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THE

AMERICAN AND ENGLISH

ENCYCLOPÆDIA OF LAW.

RECEIVERS OF RAILROADS.

By Archibald R. Watson.

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See the title RECEIVERS, vol. 23, p. 992, *and references there given.*

I. Scope of Article. — The general principles of the law of receivers have been treated under a prior title.[1] The present article will be confined to considering the application of those general principles to receivers of railroads.

II. Definition. — The term "receiver" has already been defined.[2] A receiver of a railroad is merely such a functionary appointed for the purpose of taking possession of and generally operating and managing for a time a railroad, under the orders and control of the court.[3] The term "receiver of a railroad" is applied, in *England*, to one who receives the tolls and applies them to payment of debts; he does not sell, or provide for current expenses; if he is required to pay money and carry on the business he is a manager.[4]

III. Object of Appointment. — A receivership of a railroad is created, as in all other cases, as a provisional and *pro tempore* scheme for the preservation of the estate *pendente lite*.[5] But the stated object of the appointment of railroad receivers — viz., the preservation of the property *pendente lite* — frequently involves the operation of the road by the receiver until such time as the receivership is terminated by the court.[6] While, however, receivers of railroads are frequently appointed to operate railroads and keep them going concerns until their financial embarrassments are removed or they can be conveniently and advantageously sold for the benefit of all concerned, the courts in several cases have expressly disclaimed an intention to assume the responsibility of the indefinite operation of a railroad.[7]

IV. Grounds for Appointment — 1. In General. — The grounds for the appointment of a receiver of a railroad are, in the main, the same as for that of receivers of other corporations. These have already been considered.[8]

2. Nonpayment of Judgment. — Under the *English* Railway Companies Act, a judgment creditor of a railroad is entitled, as matter of right, to the appointment of a receiver or manager.[9]

3. Insolvency. — The mere insolvency of a railroad company is not necessarily a sufficient ground for the appointment of a receiver.[10] And where

1. See the title Receivers, vol. 23, p. 992.

2. See the title Receivers, vol. 23, p. 992.

3. **A Receiver of a Railroad** is merely a person appointed to receive and preserve the property of a railroad company. Farmers' L. & T. Co. *v.* Oregon Pac. R. Co., 31 Oregon 237, 65 Am. St. Rep. 822.

4. See observations of Jessel, M. R., in *In re* Manchester, etc., R. Co., 14 Ch. D. 655.

5. Lyman *v.* Cent Vermont R. Co., 59 Vt. 167.

Propriety of Postponement of Corporate Meetings. — The court will not, upon petition of the company filed in the suit in which receivers were appointed, take jurisdiction of and decide a question as to the propriety of postponing a meeting called for the election of officers, which question has no relation to the objects for which the receivers were appointed. Taylor *v.* Philadelphia, etc., R. Co., 7 Fed. Rep. 381.

6. Davis *v.* Gray, 16 Wall. (U. S.) 203; Kennedy *v.* St. Paul, etc., R. Co., 2 Dill. (U. S.) 448; Meyer *v.* Johnston, 53 Ala. 237; Brown *v.* New York, etc., R. Co., (Supm. Ct.) 19 How. Pr. (N. Y.) 84; Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792.

7. Gardner *v.* London, etc., R. Co., L. R. 2 Ch. 212; Taylor *v.* Philadelphia, etc., R. Co., 9 Fed. Rep. 1.

8. See the title Receivers, vol. 23, p. 992.

9. *In re* Manchester, etc., R. Co., 14 Ch. D. 645.

10. **Insolvency.** — Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 27 Fed. Rep. 146; Sewell *v.* Cape May, etc., R. Co., (N. J. 1887) 30 Am. & Eng. R Cas. 155. See Smith *v.* Port Dover, etc., R. Co., 12 Ont. App. 288; Pond *v.* Fram-

a railroad is solvent, a receivership will not, in general, be ordered.[1] But insolvency in connection with other circumstances, such as mismanagement, failure to elect officers, refusal of trustees to execute deeds to secure bonds, and danger of repeal of franchises through mismanagement, constitutes a ground for a receiver.[2]

4. Fraud or Misconduct of Officers. — Where the officers of a railroad company are guilty of gross fraud and mismanagement and are diverting and misappropriating the earnings of the road, a receiver will be appointed,[3] especially if it is shown in addition that the railroad is, or is in danger of becoming, insolvent.[4] But a receiver will not be appointed where the receivership was sought to accomplish what another railroad was required by statute to do.[5]

5. Dispute Between Tenants in Common of Easement. — A dispute between two railroad companies, tenants in common of an easement consisting of a right of passing through a tunnel, whereby each company threatens to deprive the other of the use of the tunnel, will warrant the appointment of a receiver for the disputed property and rights.[6] So also, where there was a dispute and threatened conflict between two railroad companies which had agreed to use a railway station jointly.[7] But it has been held that a court of equity, in advance of a determination of the right of possession at law, will not interfere by the appointment of a receiver in a suit to quiet the title to an unused railroad track, of which both parties to the controversy claim possession, but which is in the actual physical possession of neither, even where one of the parties has attempted to take forcible possession thereof.[8]

6. Violation of Injunction. — Participation in a corporate meeting by part of the stockholders, where they had been prohibited from so doing by injunction, is not sufficient ground for the appointment of a receiver.[9]

ingham, etc., R. Co., 130 Mass. 194; Denike *v.* New York, etc., Lime, etc., Co., 80 N. Y. 599.

Rule by Statute. — By a particular statute on return to an execution of "no property found," a receiver may be appointed. Ball *v.* Maysville, etc., R. Co., 102 Ky. 486.

1. Boston, etc., R. Co. *v.* Boston, etc., R. Co., 65 N. H. 393.

2. Ralph *v.* Wisner, 100 Mich. 164.

Insolvency and Exclusion from Management. — Where, in addition to the insolvency of the railroad company, its property is in the hands of parties who deny the right of the petitioner, a stockholder, and other stockholders as well, to share in the management of the property, equity will, in order to afford relief to such stockholders, appoint a receiver to take possession of the property. Bill *v.* New Albany, etc., R. Co., 2 Biss. (U. S.) 390.

Bankruptcy and Misappropriation of Earnings. — Kelly *v.* Alabama, etc., R. Co., 58 Ala. 489. And see *Ex p.* Brown, 58 Ala. 536; Gest *v.* New Orleans, etc., R. Co., 30 La. Ann. 28.

Insolvency and Danger of Destruction of Business. — Brassey *v.* New York, etc., R. Co., 19 Fed. Rep. 663.

3. Forbes *v.* Memphis, etc., R. Co., 2 Woods (U. S.) 323.

Where Control Obtained by Conspiracy. — Where certain persons inaugurated a system of management which they had wrongfully combined to obtain, and wrongfully turned the same to the benefit of the managers and their associates, the court, upon the application of stockholders, appointed a receiver. Fisher *v.* Concord R. Co., 50 N. H. 200.

Unauthorized Lease of Road. — It has been held a proper case for the appointment of a receiver, where the board of directors of a railroad company make a lease of a railroad and the property of the corporation, without authority of law and without the sanction of stockholders in a meeting lawfully convened. Stevens *v.* Davison, 18 Gratt. (Va.) 819, 98 Am. Dec. 692.

4. **Illustration.** — Where the money paid by bondholders for the bonds of a corporation is, with the connivance of the directors, being squandered and embezzled by its officers instead of being used for the purpose to which it was pledged, and thereby the bondholders as well as the *bona fide* stockholders are in danger of losing all their money by such fraudulent conduct of the officers and agents of the corporation, and the latter has been rendered insolvent thereby, a receiver will be appointed. Forbes *v.* Memphis, etc., R. Co., 2 Woods (U. S.) 323.

5. Smith *v.* Port Dover, etc., R. Co., 12 Ont. App. 288.

6. Delaware, etc., R. Co. *v.* Erie R. Co., 21 N. J. Eq. 298, *citing* Russell *v.* East Anglian R. Co., 3 Macn. & G. 125; Fripp *v.* Chard R. Co., 11 Hare 259.

7. Midland R. Co. *v.* Ambergate, etc., R. Co., 10 Hare 359.

The General Cognizance of Equity is particularly appropriate and salutary, it has been held, in such cases, because railroad companies, although technically private corporations, are in some measure agents of the public, which might suffer great injury but for the appointment of a receiver. Delaware, etc., R. Co. *v.* Erie R. Co., 21 N. J. Eq. 298.

8. St. Louis, etc., R. Co. *v.* Dewees, 23 Fed. Rep. 519.

9. Cincinnati, etc., R. Co. *v.* Jewett, 37 Ohio St. 649.

7. In Foreclosure Proceedings — *a.* IN GENERAL. — In the foreclosure of mortgages upon railroad property, receivers are appointed upon the same general grounds as in the foreclosure of mortgages upon other classes of property. That is, inadequacy of the mortgage security and the insolvency of the mortgagor are the principal, as in general they are sufficient, grounds for the appointment of a receiver.[1]

b. NOT APPOINTED IN CASE OF DOUBT. — A receiver of mortgaged railroad property will not be appointed unless the right of foreclosure is clear and indisputable; never where a reasonable dispute exists as to whether or not the conditions of the mortgage have been broken.[2]

c. DEFAULT — APPOINTMENT OF RECEIVER NOT MATTER OF COURSE. — The appointment of a receiver for a railroad is not a matter of course in all cases upon a default and a bill to foreclose.[3]

8. Appointment by Consent. — A receiver of a railroad cannot be appointed, even with consent of parties, in an improper case.[4]

1. Foreclosure Proceedings — *England.* — Grey *v.* Manitoba, etc., R. Co., (1897) A. C. 254. And see Vann *v.* Barnett, 2 Bro. C. C. 157; Metcalfe *v.* Pulvertoft, 1 Ves. & B. 180.

United States. — Pullan *v.* Cincinnati, etc., R. Co., 4 Biss. (U. S.) 35; Central Trust Co., *v.* Chattanooga, etc. R. Co., (C. C. A.) 94 Fed. Rep. 275; Farmers' L. & T. Co. *v.* Winona, etc., R. Co., 59 Fed. Rep. 957; Dow *v.* Memphis, etc., R. Co., 20 Fed. Rep. 260; Benedict *v.* St. Joseph, etc., R. Co., 19 Fed. Rep. 173. And see Mercantile Trust Co. *v.* Missouri, etc., R. Co., 36 Fed. Rep. 221; Taylor *v.* Philadelphia, etc., R. Co., 7 Fed. Rep. 381.

Alabama. — Kelly *v.* Alabama, etc., R. Co., 58 Ala. 489.

Illinois. — Keep *v.* Michigan Lake Shore R. Co., 6 Chicago Leg. N. 101, 14 Fed. Cas. No. 7,727; Ruggles *v.* Southern Minnesota R. Co., 5 Chicago, Leg. N. 110, 20 Fed. Cas. No. 12,121. And see Haas *v.* Chicago Bldg. Soc., 89 Ill. 498.

New York. — Whitney *v.* New York, etc., R. Co., 32 Hun (N. Y.) 164. And see Bloodgood *v.* Clark, 4 Paige (N. Y.) 577.

Vermont. — Cheever *v.* Rutland, etc., R. Co., 39 Vt. 653.

Fraud or Bad Faith on Part of Mortgagor. — For such circumstances as influencing the appointment of a receiver, see Haas *v.* Chicago Bldg. Soc., 89 Ill. 498.

Interest in Arrear — Business on Decrease — — Disagreement in Management. — See Mercantile Trust Co. *v.* Missouri, etc., R. Co., 36 Fed. Rep. 221.

Default for Ten Years — Misconduct of Officers, Etc. — See Pullan *v.* Cincinnati, etc., R. Co., 4 Biss. (U. S.) 35.

Insolvency — Inadequacy of Security — Appropriation of Earnings. — See Dow *v.* Memphis, etc., R. Co., 20 Fed. Rep. 260.

On Application of Trustee in Mortgage. — See Allen *v.* Dallas, etc., R. Co., 3 Woods (U. S.) 316.

Trustees in Mortgage May Apply for Receiver in Advance of Action on Part of Bondholders. — Phinizy *v.* Augusta, etc., R. Co., 56 Fed. Rep. 273.

Right to Rents and Profits from Date of Receiver's Entry. — Where a mortgage of railroad property expressly provided that the mortgagor should receive the income until default had continued for a period of three months, at the expiration of which time the trustee named in the mortgage had the option to take possession of the road himself and operate it until sale under foreclosure, or apply for a receiver, it was held that the rents and profits of the property inured to the mortgagee, subject to such terms as the court might impose, from and at the date of entry by the receiver. Central Trust Co. *v.* Chattanooga, etc., R. Co., (C. C. A.) 94 Fed. Rep. 275.

Stipulation for Receiver. — An express stipulation in a trust deed for the appointment of a receiver on default in the bonds secured thereby, will not affect the rights of a lessee of the road, under a lease anterior to the deed of trust. Louisville, etc., R. Co. *v.* Eakins, 100 Ky. 745

Seizure of Earnings Deposited in Bank — Right of Bondholders. — So long as a railroad company is a going concern, mortgage bondholders whose bonds are made a general charge on the undertaking by statute have no right, even although interest on the bonds is in arrear, to seize the earnings of the company deposited in the bank. Their only remedy is the appointment of a receiver. Phelps *v.* St. Catharines, etc., R. Co., 19 Ont. 501.

Divisional Mortgage. — It has been held that a receiver for an entire railroad will not be appointed on the application of a holder of bonds secured by a mortgage on only one-fourth of the road, against the objection of persons having liens on the other three-fourths of the road. Merriam *v.* St. Louis, etc., R. Co., 136 Mo. 145.

2. American L. & T. Co. *v.* Toledo, etc., R. Co., 29 Fed. Rep 421.

Receiver as of Course. — It has been held in an action by a bondholder of a railroad to foreclose a railway mortgage that a receiver would be appointed although it was shown that the railroad was properly managed. Van Benthuysen *v.* Central New England, etc., R. Co., 63 Hun (N. Y.) 627, 17 N. Y. Supp. 709.

3. American L. & T. Co. *v.* Toledo, etc., R. Co., 29 Fed. Rep. 418.

4. Whelpley *v.* Erie R. Co., 6 Blatchf. (U. S.) 274.

Manager of Railroad under Consent Decree. — It has been held that a person who managed and controlled a railroad and other property under several consent decrees based on contracts and agreements between the parties,

V. Jurisdiction to Appoint — 1. In General. — It has already been seen that the appointment of a receiver is a matter of equity cognizance and jurisdiction, and that a receiver will not be appointed where there is a complete and adequate remedy at law.[1] This rule applies without exception to receivers of railroads.[2] So also, as courts of equity, in the absence of statute, have no authority to appoint receivers of corporations except to preserve the assets and wind up the business, this principle prescribes the rule for the appointment of receivers of railroads.[3]

2. Rule by Statute — *a.* In the United States. — In some states express statutory provision is made for the appointment of receivers of railroads. In others, this power is conferred in statutes relating to corporations in general.[4]

b. In England. — The Railway Companies Act, passed in 1867,[5] confers upon the High Court of Chancery the power which a former decision had denied to that court, to appoint a receiver and manager of a railroad.[6]

3. Reluctance to Appoint. — As in other cases, receivers of railroads are, as the rule is stated, appointed with great reluctance.[7] The power of such

was not in a legal sense a receiver, but only a managing agent for the parties in interest, having the character and office of an administrative trust. Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 50 Vt. 500.

1. See the title Receivers, vol. 23, p. 992.

2. Rice *v.* St. Paul, etc., R. Co., 24 Minn. 464.

3. Gardner *v.* London, etc., R. Co., L. R. 2 Ch. 201; American L. & T. Co. *v.* Toledo, etc., R. Co., 29 Fed. Rep. 421; Pond *v.* Framingham, etc., R. Co., 130 Mass. 194. And see Treadwell *v.* Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490.

General Rule Stated. — The powers of the court of chancery over insolvent railroads, and of the receiver appointed by it, are such as have been expressly conferred by statute, and those necessary to the exercise of the powers expressly conferred. Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669.

Rule in Alabama. — It has been held that in Alabama, a court of equity has authority, without the aid of statute, to take charge of, manage, and operate by its receivers, a railroad which is the subject of litigation, when such a course is indispensable to secure the rights of creditors and others to prevent a failure of justice. Meyer *v.* Johnston, 53 Ala. 237.

Receivers of Trustees. — In Rice *v.* St. Paul, etc., R. Co., 24 Minn. 464, where, by special provision of its charter, the company was empowered to confer upon its mortgagees the right of possession of its mortgaged property upon the common-law conditions, or upon any other conditions that may be agreed upon and stated in the mortgage, the ninth article of the trust deed authorized the trustees, upon the company's default, to take possession of the mortgaged property, and to have, hold, and use the same, "operating by their superintendents, managers, receivers, or servants, or other attorneys or agents," it was held that the "receivers" here mentioned were not technical receivers to be appointed by the court, but the receivers of the trustees.

4. Consult the statutes of the several states. See also Pond *v.* Framingham, etc., R. Co., 130 Mass. 194; Atty.-Gen. *v.* Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; Atty.-Gen. *v.* Niagara Bank, Hopk. (N. Y.) 354.

North Carolina Statute. — It has been held in North Carolina that the code, which specified certain cases in which a receiver may be appointed, "does not materially alter the equitable jurisdiction" of the courts of that state. Skinner *v.* Maxwell, 66 N. Car. 45; Battle *v.* Davis, 66 N. Car. 252.

Injunction Against Use of Road by Lessee. — In an action by a judgment creditor with a lien in the nature of that of a vendor, for the appointment of a receiver of a railroad under Ky. Stat., § 814, a lessee of the road whose rights are subordinate to the plaintiff's lien may be enjoined from using the road. Bal *v.* Maysville, etc., R. Co., 102 Ky. 486.

May Appoint Receiver in Suit by State for Forfeiture of Franchise. — Texas Trunk R. Co. *v.* State, 83 Tex. 1.

5. 30 & 31 Vict., c. 127, § 4.

Construction of Act. — It has been held that section 4 of the Railway Companies Act, 1867, takes away from the judgment creditor of a railway company the right of taking in execution the rolling stock and plant of that company, but gives him new rights, which are independent of the fact whether such company has or has not rolling stock or plant to be taken in execution. *In re* Manchester, etc., R. Co., 14 Ch. D. 645.

What Railroads Within Meaning of Act. — It has been held that a railway company which has never commenced to acquire the lands of its incorporation is not an "undertaking" within the meaning of section 4 of the Railway Companies Act, 1867, of which a receiver can be appointed under that section. *In re* Birmingham, etc., R. Co., 18 Ch. D. 155.

6. The case referred to is Gardner *v.* London, etc., R. Co., L. R. 2 Ch. 211.

7. Court Acts with Great Caution — *England.* — Gardner *v.* London, etc., R. Co., L. R. 2 Ch. 201.

United States. — Pullan *v.* Cincinnati, etc., R. Co., 4 Biss. (U. S.) 35; M'Lean *v.* Lafayette Bank, 3 McLean (U. S.) 503; Overton *v.* Memphis, etc., R. Co., 10 Fed. Rep. 866.

Alabama. — Kelly *v.* Alabama, etc., R. Co., 58 Ala. 489.

Georgia. — Rogers *v.* Dougherty, 20 Ga. 271.

Iowa. — Bisson *v.* Curry, 35 Iowa 72.

Maryland. — Voshell *v.* Hynson, 26 Md. 83;

appointment, it has been said, is "to be exercised sparingly and with great caution in the case of *quasi*-public corporations operating a public highway."[1] It may be laid down as a general rule that receivers of railroads are never appointed merely because it "will do no harm."[2] There should be some affirmative reason and ground for the appointment. It should be shown that harm and injury will probably result if a receiver is not appointed.[3] But while, as stated, a court of chancery is reluctant to appoint a receiver to take charge of and manage a railroad, it will do so where such course is indispensable to secure the rights of the legitimate stockholders and to prevent a failure of justice.[4]

4. Rule as to Discretion of Court. — The appointment of a receiver of a railroad is, as a rule, a matter of judicial discretion,[5] generally to be determined with reference to the special circumstances of each case as it arises.[6] But this discretion is not an arbitrary or capricious discretion; it is to be exercised in the light of and controlled by well-settled legal principles.[7]

5. Where No Assets. — A receiver for a railroad will not be appointed where there is no property for him to receive.[8]

VI. Who May Be Appointed Receiver — 1. General Rule. — In the appointment of a receiver of a railroad the court should select a disinterested and impartial person.[9] "While it may be true," it has been said, "that a

Triebert *v.* Burgess, 11 Md. 452; Blondheim *v.* Moore, 11 Md. 365.

Mississippi. — Whitehead *v.* Wooten, 43 Miss. 523.

Nevada. — Maynard *v.* Railey, 2 Nev. 313.

New York. — People *v.* Albany, etc., R Co., (Supm. Ct. Spec. T.) 7 Abb. Pr. N. S. (N. Y.) 265; Sandford *v.* Sinclair, 8 Paige (N. Y.) 373; Devoe *v.* Ithaca, etc., R. Co., 5 Paige (N. Y.) 521; Verplanck *v.* Mercantile Ins. Co., 2 Paige (N. Y.) 438.

Virginia. — Stevens *v.* Davison, 18 Gratt. (Va.) 819, 98 Am Dec. 692.

Appointment Only in Extreme Case. — As a general rule, it is only an extreme case that will move a court of equity to exercise its extraordinary power to afford relief by the appointment of a receiver of the property of a railroad corporation. Pullan *v.* Cincinnati, etc., R. Co., 4 Biss (U. S.) 35.

The "Greatest Urgency." — "The case ought to be of the greatest urgency in which a court should appoint a receiver to manage and operate a railroad." Meyer *v.* Johnston, 53 Ala. 237.

1. Sage *v.* Memphis, etc., R. Co., 125 U. S. 361.

2. Blondheim *v.* Moore, 11 Md. 365; Orphan Asylum Soc. *v.* McCartee, Hopk. (N. Y.) 429; Smith *v.* Port Dover, etc., R. Co., 12 Ont. App. 288.

Courts Will Only Interfere by Receivership When They Can Do So Usefully. — Simpson *v.* Ottawa, etc., R. Co., 1 Ch. Chamb. (Ont.) 126; Blondheim *v.* Moore, 11 Md. 365; Orphan Asylum Soc. *v.* McCartee, Hopk. (N. Y.) 429. See also Myers *v.* Estell, 48 Miss. 403; Ogdensburgh Bank *v.* Arnold, 5 Paige (N. Y.) 39; Clason *v.* Corley, 5 Sandf. (N. Y.) 447; Schreiber *v.* Carey, 48 Wis. 213.

3. See Simpson *v.* Ottawa, etc., R. Co., 1 Ch. Chamb. (Ont.) 126.

Where Receivership Only Incidentally Advantageous. — Nor will a receiver of a railroad be appointed where it appears that the only way in which the plaintiff expected the appointment of a receiver to be useful to him was that the defendants would possibly pay his claim rather than submit to interference with their arrangements. Smith *v.* Port Dover, etc., R. Co., 12 Ont. App. 288.

4. Stevens *v.* Davison, 18 Gratt. (Va.) 828, 98 Am. Dec. 692.

The Fact that Owing to Insufficient Equipment a receiver would not be able to operate the road, and that a judgment creditor thereof would therefore have difficulty in collecting his judgment through a receiver, does not deprive such creditor of the right to have a receiver appointed. Ball *v.* Maysville, etc., R Co., 102 Ky. 486.

5. Judicial Discretion. — Sage *v.* Memphis, etc., R. Co , 125 U. S. 361; Mercantile Trust Co. *v.* Missouri, etc., R. Co., 36 Fed. Rep. 221; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 27 Fed. Rep. 146; Pond *v.* Framingham, etc., R. Co., 130 Mass. 194; Denike *v.* New York, etc., Lime, etc., Co., 80 N. Y. 599; Smith *v.* Port Dover, etc., R. Co., 12 Ont. App. 288.

Rule under English Statute. — It has been held that under the English act, the appointment of a receiver or manager of a railroad is matter of right, at the instance of an unpaid judgment creditor. *In re* Manchester, etc., R. Co., 14 Ch. D. 645.

6. Sage *v.* Memphis, etc., R. Co., 125 U. S. 361.

Difficulty of General Rules.—See Mercantile Trust Co. *v.* Missouri, etc., R. Co., 36 Fed. Rep. 221.

7. Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 27 Fed. Rep. 146; Pond *v.* Framingham, etc., R. Co., 130 Mass. 194; Denike *v.* New York, etc., Lime, etc., Co., 80 N. Y. 599; Smith *v.* Port Dover, etc., R. Co., 12 Ont. App. 288.

8. No Assets. — Bigelow *v.* Union Freight R. Co., 137 Mass. 478; Smith *v.* Port Dover, etc., R. Co., 12 Ont. App. 288. And see *In re* Birmingham, etc., R. Co., 18 Ch. D. 155; Young *v.* Rollins, 85 N. Car 485.

9. Who May Be Appointed — General Rule. — Meier *v.* Kansas Pac. R. Co., 5 Dill. (U. S.) 476; Atkins *v.* Wabash, etc., R. Co , 29 Fed.

large personal interest may stimulate the activity and direct the vigilance of the receiver, it is equally true that such vigilance, whenever occasion offers, will be directed unduly to advancing that personal interest, and that activity to securing personal advantages." [1]

2. Parties to Cause. — Parties to the cause should not, in general, be appointed receivers of railroad property.[2]

3. Officers and Directors. — It has been held that an officer or director of a railroad corporation will not, in general, be appointed a receiver therefor.[3] But this rule is frequently departed from, and an officer or director of a railroad appointed receiver on account of his familiarity with the business and experience in the management unless he has been guilty of misconduct or implicated in the transactions rendering the appointment of a receiver necessary.[4]

4. Receiver Nominated by Agreement. — If the parties to the cause can agree upon a person to be appointed receiver for railroad property, the court will, in general, appoint such person.[5]

5. Lessees. — Lessees of a railroad have in some cases been appointed receivers to manage the affairs of the road *pendente lite*.[6]

6. Rule of Discretion of Court. — The selection of a receiver for a railroad is, as a rule, a matter for the discretion of the court.[7] The court will generally select for receiver of a railroad a person qualified for the performance of his duties by experience in the management of railroads.[8]

VII. Effect of Appointment — 1. In General. — The effect of the appointment of a receiver of a railroad corporation is, in brief, to give him the temporary management of the railroad under the direction of the court, instead of the officers appointed by the directors of the corporation.[9]

Rep. 163; Baker *v.* Backus, 32 Ill. 79; Young *v.* Rollins, 85 N. Car. 485.

Single Disinterested Person. — In the case of Meier *v.* Kansas Pac. R. Co. 5 Dill. (U. S.) 476, a single disinterested receiver was appointed to replace two receivers who were originally appointed as representatives of different interests, which afterwards became hostile, thus leading to dissensions and unnecessary expense in the management of the railroad property.

1. Meier *v.* Kansas Pac. R. Co., 5 Dill. (U. S.) 476.

2. **Parties.** — See Baker *v.* Backus, 32 Ill. 79; Bolles *v.* Duff, 54 Barb. (N. Y.) 215; Young *v.* Rollins, 85 N. Car. 485.

3. **Officers – Directors.** — Atkins *v.* Wabash, etc., R. Co., 29 Fed. Rep. 161; Baker *v.* Backus, 32 Ill. 79; Matter of Empire City Bank, (Supm. Ct. Gen. T.) 10 How. Pr. (N. Y.) 498; Atty.-Gen. *v.* Columbia Bank, 1 Paige (N. Y.) 511.

4. *In re* Manchester, etc., R. Co., 14 Ch. D. 645; Richards *v.* Chesapeake, etc., R. Co., 1 Hughes (U. S.) 32; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 61 Fed. Rep. 546; Clarke *v.* Central R., etc., Co., 54 Fed. Rep. 556; Cook *v.* Detroit, etc., R. Co., 45 Mich. 453.

President and Directors as Receivers. — Where, on a prayer to appoint a receiver of a railroad, the president and directors of the road were directed to take charge of the property, manage it, report its earnings and expenditures, and a referee appointed to call in creditors and report the priority of liens, it was held that the president and directors of the road were thereby constituted the receivers thereof, though not specifically so designated. *In re* Fifty-four First Mortg. Bonds, 15 S. Car. 314; *Ex p.* Brown, 15 S. Car. 518.

5. Brewer, J., in Mercantile Trust Co. *v.* Missouri, etc., R. Co., 36 Fed. Rep. 221.

6. Stevens *v.* Davison, 18 Gratt. (Va.) 819, 98 Am. Dec. 692.

7. Richards *v.* Chesapeake, etc., R. Co., 1 Hughes (U. S.) 28.

8. Farmers' L. & T. Co. *v.* Cape Fear, etc., R. Co., 62 Fed. Rep. 675.

9. **Effect of Appointment.** — Ohio, etc., R. Co. *v.* Russell, 115 Ill. 52; Louisville, etc., R. Co. *v.* Cauble, 46 Ind. 277 Rochester *v.* Bronson, (Supm. Ct. Gen. T.) 41 How. Pr. (N. Y.) 78.

Receiver's Possession Not Possession of Corporation. — Memphis, etc., R. Co. *v.* Stringfellow, 44 Ark. 322, 51 Am. Rep. 598.

Extent to Which Receiver Supersedes Corporation. — Receivers appointed in actions to foreclose a mortgage on railroad property do not represent the corporation in its individual or personal character, nor supersede it in the exercise of its corporate powers except so far as the mortgaged property is concerned. Decker *v.* Gardner, 124 N. Y. 334.

Order Restraining Directors. — It has been held that upon the appointment of a receiver of all the property and effects of a corporation, for the purpose of closing up its affairs, it is proper that the court should make it a part of the order, that the directors and officers of the corporation be restrained from collecting any debts or demands due to the company, and from paying out, assigning, or delivering any of the property, moneys, or effects of the corporation to any other person, and from encumbering the same. Morgan *v.* New York,

2. Does Not Dissolve Corporation — *a.* GENERAL RULE. — It is well settled that the appointment of a receiver for a railroad company does not dissolve the corporation.[1] The corporate existence remains intact, with its legal functions unimpaired. The only difference is that the corporation acts by agents appointed by the court, and not by the corporation.[2] Indeed, where the receiver is required or allowed to continue the operation of the road, the corporate existence must of necessity be continued, as otherwise the situation would be that of the court's conferring corporate existence and powers on an individual, the receiver.[3]

b. SUBSEQUENT EXERCISE OF CORPORATE FUNCTIONS. — As the appointment of a receiver for a railroad does not dissolve the corporation, the latter may continue to exercise such corporate rights and franchises as do not interfere with the possession and control of the receiver.[4] The corporation may do all things necessary to preserve its corporate existence,[5] and, subject to the limitation above stated, may sue and be sued.[6]

c. ELECTION OF OFFICERS. — It has been held that the appointment of a receiver of a railroad does not deprive the company of the right to elect its officers and board of directors at the time and in the manner provided by its charter.[7]

3. Liability of Corporation upon Its Contracts. — As the receiver of a railroad is merely an officer of the court for the management and preservation of the property, his appointment and acts in furtherance of the objects thereof do not absolve the company from liability for subsequent breaches of its contracts.[8]

4. Liability of Corporation for Receiver's Torts — *a.* GENERAL RULE. — It has been said that the relation of a receiver to a railway company of whose property he is put in possession by order of a court of competent jurisdiction is not in all respects clear, particularly where, by the order of his appointment, the receiver is directed to employ the property of the company in discharging to the public the duties of a common carrier.[9] The general rule is, however, that the relation of master and servant or principal and agent does not exist in such case between a railroad company and the receiver, and that when the receiver has the exclusive control of the operations of a railway placed in his hands, the company to which it belongs is not liable for injuries resulting from the negligence of the receiver and his employees.[10] And the

etc., R. Co., 10 Paige (N. Y.) 290, 40 Am. Dec. 244.

1. Does Not Operate as Dissolution. — Jones *v.* Leadville Bank, 10 Colo. 464; Ohio, etc., R. Co. *v.* Russell, 115 Ill. 52; People *v.* Barnett, 91 Ill. 422; Safford *v.* People, 85 Ill. 558; Wyatt *v.* Ohio, etc., R. Co., 10 Ill. App. 289; Louisville, etc., R. Co. *v.* Cauble, 46 Ind. 277; Taylor *v.* Columbian Ins. Co., 14 Allen (Mass.) 353; State *v.* Merchant, 37 Ohio St. 251.

2. Safford *v.* People, 85 Ill. 558.

Corporation Remains Owner of Unsold Property. — Philadelphia, etc., R. Co. *v.* Com., 104 Pa. St. 80.

3. Louisville, etc., R. Co. *v.* Cauble, 46 Ind. 277.

4. Ohio, etc., R. Co. *v.* Russell, 115 Ill. 52. And see Stevens *v.* Davison, 18 Gratt. (Va.) 819, 98 Am. Dec. 692.

5. Ohio, etc., R. Co. *v.* Russell, 115 Ill. 52; State *v.* Merchant, 37 Ohio St. 251.

6. Suits By and Against Corporation. — Jones *v.* Leadville Bank, 10 Colo. 464; Ohio, etc., R. Co. *v.* Russell, 115 Ill. 52; People *v.* Barnett, 91 Ill. 422; Taylor *v.* Columbian Ins. Co., 14 Allen (Mass.) 353; State *v.* Merchant, 37 Ohio St. 251. And see Com. *v.* Buffalo, etc., R. Co., 2 Dauphin Co. Rep. (Pa.) 216.

Rule by Statute. — There is no doubt that the legislature of a state possesses the constitutional power of enacting, as has sometimes been done, that certain actions are maintainable against a railroad, whether such road were being operated by the company, a lessee, assignee, receiver, or other person. Louisville, etc., R. Co. *v.* Cauble, 46 Ind. 277.

Liability of Corporation for Taxes. — The mere fact that the property and franchises of a corporation are in the hands of receivers, does not affect the liability of the corporation to pay state taxes accruing on "gross receipts." Philadelphia, etc., R. Co. *v.* Com., 104 Pa. St. 80.

7. State *v.* Merchant, 37 Ohio St. 251.

8. Contractual Liability. — Brown *v.* Warner, 78 Tex. 543, 22 Am. St. Rep. 67; Gulf, etc., R. Co. *v.* North America Ins. Co., (Tex. Civ. App. 1894) 28 S. W. Rep. 237; Hunt *v.* Reilly, 50 Tex. 99.

9. Ryan *v.* Hays, 62 Tex. 42.

10. Torts by Receiver—Liability of Company — *United States.* — Washington, etc., R. Co. *v.*

rule is the same although officers of the company are appointed receivers,[1] though if the officers of the company are permitted to remain in control as such, the company may be liable.[2] In order, however, for a railroad to escape liability because of a receivership, it is not always enough for the railroad corporation to show, merely, that a receiver has been appointed. It must also, it has been held, in some cases, be affirmatively shown that such functionary has taken control of the road.[3]

b. JOINT POSSESSION OF RAILROAD AND RECEIVER. — Where the possession of the company and the receiver is joint, the liability of the corporation continues. The company is not relieved from liability unless the possession of the receiver is exclusive and the servants of the road are wholly employed and controlled by him.[4]

c. INJURIES DUE TO PRIOR DEFAULT OF COMPANY. — A railroad company will be liable for damage occurring during the receivership when such damage is caused by an act or default of the company previous to the receivership.[5]

d. COLLUSIVE APPOINTMENT OF RECEIVER. — Where a receiver is appointed for a railroad through the fraud and collusion of the company, he will be treated as its agent and the company held liable accordingly.[6]

e. WHERE NET EARNINGS OF ROAD APPLIED IN BETTERMENTS. — Where, however, during the incumbency of a receiver, the net earnings of the road have been applied in betterments or permanent improvements upon the road, the railroad company, after the determination of the receivership, may be held liable for the torts of the receiver or his agents or servants, to the extent of the value of such improvements or betterments.[7]

Brown, 17 Wall. (U. S.) 445; Chamberlain *v.* New York, etc., R. Co., 71 Fed. Rep. 636; Memphis, etc., R. Co. *v.* Hoechner, (C. C. A.) 67 Fed. Rep. 456; Davis *v.* Duncan, 19 Fed. Rep. 477.

Arkansas. — Memphis, etc., R. Co. *v.* Stringfellow, 44 Ark. 322, 51 Am. Rep. 598.

Colorado. — Kansas Pac. R. Co. *v.* Searle, 11 Colo. 1.

Georgia. — Thurman *v.* Cherokee R. Co., 56 Ga. 376.

Illinois. — Ohio, etc., R. Co. *v.* Russell, 115 Ill. 52; Ohio, etc., R. Co. *v.* Anderson, 10 Ill. App. 313. But *compare* Safford *v.* People, 85 Ill. 558.

Indiana. — Godfrey *v.* Ohio, etc., R. Co., 116 Ind. 30; State *v.* Wabash R. Co., 115 Ind. 466; Bell *v.* Indianapolis, etc., R. Co., 53 Ind. 57; Louisville, etc., R. Co. *v.* Cauble, 46 Ind. 277; Ohio, etc., R. Co. *v.* Davis, 23 Ind. 553; 85 Am. Dec. 477; Ohio, etc., R. Co. *v.* Fitch, 20 Ind. 498.

Kansas. — Kansas Pac. R. Co. *v.* Wood, 24 Kan. 619.

Maine. — Leathers *v.* Shipbuilders' Bank, 40 Me. 386.

Missouri. — Turner *v.* Hannibal, etc., R. Co., 74 Mo. 602.

New York. — Metz *v.* Buffalo, etc., R. Co., 58 N. Y. 64, 17 Am. Rep. 201; Rogers *v.* Wheeler, 43 N. Y. 598.

Ohio. — Murphy *v.* Holbrook, 20 Ohio St. 137. 5 Am. Rep 633; Ellis *v.* Indianapolis, etc., R. Co., 5 Ohio Dec. (Reprint) 497, 6 Am. L. Rec. 288.

Tennessee. — Erwin *v.* Davenport, 9 Heisk. (Tenn) 44 Rogers *v.* Mobile, etc., R. Co., (Tenn.) 12 Am. & Eng. R. Cas. 442.

Texas. — Missouri, etc., R. Co. *v.* Wood, (Tex. Civ. App 1899) 52 S. W. Rep. 93; Missouri, etc., R. Co. *v.* McFadden, 89 Tex. 138; Dillingham *v.* Anello, (Tex. Civ. App. 1895) 29 S. W. Rep. 1103; Howe *v.* St. Clair, 8 Tex. Civ. App. 101; Texas, etc., R. Co. *v.* Collins, 84 Tex. 121; Texas, etc., R. Co. *v.* Huffman, 83 Tex. 286; Texas, etc., R. Co. *v.* Adams, 78 Tex. 372; Kansas, etc., R. Co. *v.* Dorough, 72 Tex. 108; Ryan *v.* Hays, 62 Tex. 42.

Railroad Company Indirectly Liable. — That the rule stated in the text is technically true cannot be controverted; but it has been noted that the fact remains that the company is indirectly, through the liability of its property or the profits or income thereof while in the hands of a receiver, made responsible for the satisfaction of claims for injuries resulting from the negligence of a receiver or his employees, and it is exceedingly difficult, it has been said, to see upon what ground this can be accomplished in ordinary receiverships if the idea is entirely excluded that the receiver is in some sense the servant of the company whose property he holds and operates and whose franchises he exercises. Stayton, J., in Ryan *v.* Hays, 62 Tex. 42.

1. *Ex p.* Brown, 15 S. Car. 518.

2. Pennsylvania R. Co. *v.* Jones, 155 U. S. 333; Jones *v.* Pennsylvania R. Co., 19 D. C. 178.

3. Allen *v.* Central R. Co., 42 Iowa 683.

4. **Joint Possession.** — Washington, etc., R. Co. *v.* Brown, 17 Wall. (U. S.) 445.

5. Union Trust Co. *v.* Cuppy, 26 Kan. 754, as where the damage was due to an inadequate culvert, previously constructed by the railroad.

6. Texas, etc., R. Co. *v.* Gay, 88 Tex. 111.

7. **Where Permanent Improvements Made.** — Texas, etc., R. Co. *v.* Bloom, 164 U. S. 636, (C. C. A.) 60 Fed. Rep. 979, *following* Texas

5. Liability for Crimes and Misdemeanors. — Where a corporation is in the hands of a receiver who has full possession of its property and entire charge of its affairs, the corporation cannot be prosecuted for crimes or misdemeanors committed by the agents or servants of the receiver.[1]

6. Liability for Receiver's Contracts. — It has been held that a railroad company does not, by the mere fact of resuming control of its property after the discharge of a receiver, render itself liable upon the receiver's contracts.[2] Thus, the employees of a railroad receiver must, it has been decided, look to the receiver and not to the railroad for compensation.[3] But where a railroad is permanently improved while in the hands of receivers by expenditures from its net earnings, the road is liable for the obligations of the receivers incurred during the receivership to the extent of such improvements.[4]

7. Statutory Duties. — It has also been held that a railway company is liable for breach of duty imposed by statute, though the injury which is made the basis of the claim occurred at a time when the railway was in the exclusive management and control of a receiver, and this even when due care on the part of the receiver would have avoided the injury.[5]

Pac. R. Co. *v.* Johnson, 76 Tex. 421, 18 Am. St. Rep. 60; Missouri, etc., R. Co. *v.* Wood, (Tex. Civ. App. 1899) 52 S. W. Rep. 93; Missouri, etc., R. Co. *v.* Chilton, 7 Tex. Civ. App. 183; Texas, etc., R. Co. *v.* Boyd, 6 Tex. Civ. App, 205; Texas, etc., R. Co. *v.* Donovan, 86 Tex. 378; Texas Pac. R. Co. *v.* White, 82 Tex. 543; Texas, etc., R. Co. *v.* Geiger, 79 Tex. 13; Texas, etc., R. Co. *v.* Bailey, 83 Tex. 19; Texas, etc., R. Co. *v.* Watts, (Tex. 1891) 18 S. W. Rep. 312; Texas, etc., R. Co. *v.* Huffman, 83 Tex. 286; Texas, etc., R. Co. *v.* Barnhart, 5 Tex. Civ. App. 601; Texas, etc., R. Co. *v.* Rosedale St. R. Co., 4 Tex. App. Civ. Cas. § 179.

Receiver's Liability Exceeding Betterments. — It has been held that pending undetermined suits for unliquidated damages cannot be computed as claims against the receiver, on the ground that the liabilities of the receiver for unadjusted claims exceed the amount expended in betterments. Texas, etc., R. Co. *v.* Bailey, 83 Tex. 19.

Receiver Discharged under Consent Decree. — Where the receiver is discharged under a consent decree and the property turned over to the company subject to the receiver's liabilities, the company may be held liable for injuries occurring during the receivership although it is not shown that the net income was applied in permanent improvements of the road. Missouri, etc., R. Co. *v.* Chilton, 7 Tex. Civ. App. 183.

Burden of Proof. — Where in an action against a railroad company for injuries to freight while the road was in the hands of a receiver, the defense is that the improvements made by the receiver were not paid for out of the net earnings, the burden is on the defendant to show the fact. Texas, etc., R. Co. *v.* Barnhart, 5 Tex. Civ. App. 601.

Liability of Property After Receiver's Sale. — Where between the date of the sale of a railroad in the hands of a receiver and its delivery to the purchaser, a claim for personal injuries accrued, it was held that the purchaser was liable therefor to the extent of the value of improvements made by the receiver out of the surplus earnings between the sale of the road and its delivery to the purchaser. Houston, etc., R. Co. *v.* Crawford, 88 Tex. 277, 53 Am. St. Rep. 752.

1. State *v.* Wabash R. Co., 115 Ind. 466. In this case the court said: "As the corporation can do no act while the receiver is in full control, it can commit no offense."

Obstructing Highway. — It has been held that a railroad company while in the hands of a receiver cannot be convicted of obstructing the highway. State *v.* Minneapolis, etc., R. Co., 88 Iowa 689.

2. Contracts of Receivers. — Metz *v.* Buffalo, etc., R. Co., 58 N. Y. 61, 17 Am. Rep. 201; Missouri, etc., R. Co. *v.* Lacy, 13 Tex. Civ. App. 391; Missouri, etc., R. Co. *v.* McFadden, 89 Tex. 138.

Contracts of Transportation. — If a ticket agent in the employ of the receiver of the railroad by mistake issues the wrong ticket to an intending traveler, the company is not, upon resuming control subsequently, liable for the mistake of the receiver's agent. Godfrey *v.* Ohio, etc., R. Co., 116 Ind. 30.

Tickets in Same Form After Receivership. — But where a railroad company permits its tickets to be issued to passengers in the same form after the receiver has taken possession as before, it is liable for an injury occasioned to a passenger, at least where there is nothing to show that the latter had a knowledge of the receiver's appointment. The contract of carriage is to be considered as having been entered into between the passenger and corporation. Washington, etc., R. Co. v. Brown, 17 Wall. (U. S.) 445.

3. Metz *v.* Buffalo, etc., R. Co., 58 N. Y. 61, 17 Am. Rep. 201.

4. Missouri, etc., R. Co. *v.* Lacy, 13 Tex. Civ. App. 391.

5. Statutory Duties. — Stayton, J., in Ryan *v.* Hays, 62 Tex. 42; and see Ohio, etc., R. Co. *v.* Russell, 115 Ill. 52; State *v.* Wabash R. Co., 115 Ind. 466; Louisville, etc., R. Co. *v.* Cauble, 46 Ind. 277; McKinney *v.* Ohio, etc., R. Co., 22 Ind. 99; Ohio, etc., R. Co. *v.* Fitch, 20 Ind. 498; Union Trust Co. *v.* Cuppy, 26 Kan. 754; Kansas Pac. R. Co. *v.* Wood, 24 Kan. 619; Philadelphia, etc., R. Co. *v.* Com., 104 Pa. St. 80.

But it has been held that a railroad company

VIII. JUDICIAL CONTROL OF RECEIVER — RECEIVER'S RELATION TO COURT — 1. In General. — The receiver of a railroad is under the control of the court which appointed him and subject to its direction and supervision.[1] And the receiver may, of course, apply to the court for advice and instructions when in doubt as to the course he should pursue.[2]

2. Interference with Receiver's Possession. — The possession of the receiver is the possession of the court,[3] and any unauthorized interference with the possession of the receiver, or his control of the road or conduct of the operations thereof, is a contempt of court and punishable as such,[4] as, for example, maliciously inciting the receiver's employees to quit his employ.[5]

3. Receiver of Railroad as Agent or Arm of Court. — The receiver of a railroad corporation is, as in the case of other receivers, a mere agent or arm of the court.[6] Hence a statute providing for the operation of an insolvent railroad by a receiver for the benefit of the public does not confer such power on the receiver as an independent person, but merely as an officer of the court.[7]

4. Difficulties Between Receiver and Employees — *a.* IN GENERAL. — It has been held competent for the court to adjust difficulties between the receiver and his employees, which, in the absence of such adjustment, would tend to injure the property.[8]

b. REGULATION OF WAGES OF EMPLOYEES. — The court has the power, if it sees fit, to make all proper regulations concerning the wages of the employees of the road in the hands of its receiver.[9]

5. Injunction. — The receiver's possession and orderly performance of his functions will, where necessary, be protected by injunction.[10] So, also, it has been held that if a receiver transcends his proper authority and functions, the court may grant an injunction restraining a continuance of the unauthorized acts.[11]

6. When Jurisdiction of Court Ends. — The jurisdiction of the court over a receiver of a railway corporation is ended when the receiver is discharged and the property returned.[12]

is not liable for a statutory penalty imposed upon carriers of animals, for a failure to care for them properly in transit, where such alleged dereliction of duty occurred while the railroad was in the hands of and exclusively operated by a receiver, Texas, etc., R. Co. *v.* Barnhart, 5 Tex. Civ. App. 601; nor, under similar circumstances, for a penalty for improper detention of freight, Missouri, etc., R. Co. *v.* Stoner, 5 Tex. Civ. App. 50.

Effect on Directors' Duty to Make Annual Report. — See Huguenot Nat. Bank *v.* Studwell, 74 N. Y. 621, where the court held that a corporation is so far dissolved by the appointment of a receiver that thereafter no duty devolves upon the trustees or directors to make the annual report required by statute.

1. Ohio, etc., R. Co. *v.* Davis, 23 Ind. 553, 85 Am. Dec. 477; Montreal Bank *v.* Chicago, etc., R. Co., 48 Iowa 518.

Questions Which Court Will Not Decide. — A court will not take jurisdiction of and decide a question as to the propriety of postponing a meeting called for the election of officers, where the question has no relation to the objects for which the receivers were appointed. Taylor *v.* Philadelphia, etc., R. Co., 7 Fed. Rep. 381.

2. Cowdrey *v.* Galveston, etc., R. Co., 1 Woods (U. S.) 334.

3. Ohio, etc., R. Co. *v.* Davis, 23 Ind. 553, 85 Am. Dec. 477. And see Louisville Trust Co. *v.* Cincinnati Inclined Plane R. Co., 78 Fed. Rep. 307.

4. **Interference with Receiver's Possession.** — Secor *v.* Toledo, etc., R. Co., 7 Biss. (U. S.) 513; King *v.* Ohio, etc., R. Co., 7 Biss. (U. S.) 539; Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. Rap. 803; U. S. *v.* Murphy, 44 Fed. Rep. 39; *In re* Higgins, 27 Fed. Rep. 443; *In re* Wabash R. Co., 24 Fed. Rep. 217; *In re* Doolittle, 23 Fed. Rep. 544.

5. Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. Rep. 803.

6. Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669. See also Lurton, J., in New York, etc., R. Co. *v.* New York, etc., R. Co., 58 Fed. Rep. 268.

7. Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669.

8. Waterhouse *v.* Comer, 55 Fed. Rep. 149.

9. **Regulation of Wages.** — Dexter *v.* Union Pac. R. Co., 75 Fed. Rep. 947; U. S. Trust Co. *v.* Omaha, etc., R. Co., 63 Fed. Rep. 737; Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. Rep. 669; Waterhouse *v.* Comer, 55 Fed. Rep. 149.

10. **Injunction.** — Fidelity Trust, etc., Co. *v.* Mobile St. R. Co., 53 Fed. Rep. 687; Metropolitan Trust Co. *v.* Columbus, etc., R. Co., 95 Fed. Rep. 18.

11. Chattanooga Terminal R. Co. *v.* Felton, 69 Fed. Rep. 273.

12. Texas Pac. R. Co. *v.* Johnson, 76 Tex. 421, 18 Am. St. Rep. 60; Texas, etc., R. Co. *v.* Bailey, 83 Tex. 19.

Sale of Road. — The sale of the road does not affect the right of the court to determine and

IX. Functions, Powers, Duties — 1. In General. — Ordinarily the duties of a receiver comprise only the operation and management of the road, the payment of current expenses, and the application of the residue of the earnings and receipts to the extinguishment of indebtedness to secure which the receiver was appointed.[1]

2. Subject to Charter Limitations. — When the court appoints a receiver for a railroad, it assumes the management of the corporation under and in accordance with the charter, only authorizing the receiver to exercise the privileges and perform the duties prescribed thereby. The court would have no right through its receiver to enlarge or restrict the powers and duties conferred by the charter.[2]

3. Discretionary Powers — *a.* In General. — A receiver appointed to operate a railroad must of necessity be vested with considerable discretion in the conduct of such operations.[3] It would be obviously impracticable for the court to direct and order each and every contract into which the receiver entered. To control, in each instance, the selection and employment of necessary subordinates; to fix the term of service and the amount of wages; to contract for and purchase materials and supplies, and to anticipate in these respects the future needs of the railroad by express orders in each case, would require the entire time of the chancellor.[4] But while, it has been held, necessarily, much is left to the judgment and discretion of the receivers, yet their power depends upon the decrees and directions of the court appointing them.[5]

b. Interference with Receiver's Discretion. — Where a matter is properly within the receiver's discretion, the exercise of this discretion will not be interfered with by the court in the absence of a manifest abuse thereof.[6]

4. Power to Manage and Operate Road — *a.* In General. — Receivers of

allow a claim for damages due to the receiver s negligence, where the sale was made subject to the right of the court to charge the purchaser with all liabilities incurred by the receiver before delivering possession of the property. Central Trust Co. *v.* Denver, etc. R. Co., (C. C. A.) 97 Fed. Rep. 239.

1. May Do All Acts Necessary for Preservation of Property. — Gibert *v.* Washington City, etc., R. Co., 33 Gratt. (Va.) 586.

Promotion of Plan for Reorganization. — A railroad receiver may promote any reorganization scheme which is for the best interests of all concerned, but cannot further a scheme which is for the benefit of one interest or set of interests at the expense of the others. Clarke *v.* Central R., etc., Co., 66 Fed. Rep. 16.

Under English Railway Companies Act. — It has been held that under the English Railway Companies Act of 1867 the powers of a receiver did not apparently extend to getting in unpaid calls. *In re* Birmingham, etc., R. Co., 18 Ch. D. 155.

2. Safford *v.* People, 85 Ill. 558; Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669.

3. Discretion of Receiver. — Cowdrey *v.* Galveston, etc., R. Co., 1 Woods (U. S.) 334; Mercantile Trust Co. *v.* Baltimore, etc., R. Co., 79 Fed. Rep. 389; Veatch *v.* American L. & T. Co., (C. C. A.) 79 Fed. Rep. 471; Clarke *v.* Central R., etc., Co., 66 Fed. Rep. 16; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 27 Fed. Rep. 146; Montreal Bank *v.* Chicago, etc., R. Co., 48 Iowa 518; Morley *v.* Saginaw Circuit Judge, 117 Mich. 246; Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669.

Rule under New Jersey Statute. — For the extent of the discretion of a receiver under the New Jersey statutes, see Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669.

Distinction between Railroad and Other Receivers. — The duties of a railroad receiver, and the discretion with which he is invested, are very different from those of a passive receiver, appointed merely to collect and hold moneys due on prior transactions or rents accruing from houses and lands. Cowdrey *v.* Galveston, etc., R. Co., 1 Woods (U. S.) 334.

Discretionary Powers Conferred by General Order. — A discretionary power, in such matters, may, it has been held, be conferred on the receiver by a general order of court. And "when a receiver has thus acquired discretionary powers to operate an insolvent railroad, his position is peculiar, and the contracts he makes for that purpose are *sui generis*." Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669.

4. Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669.

Operation under Personal Direction of Court. — Where an insolvent railroad is operated by a court of chancery under a statute conferring such power, the court may control its operation, and the chancellor personally direct or make contracts for the purpose, or there may be conferred on the receiver by the court discretionary authority to make such contracts. Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669.

5. New York, etc., R. Co. *v.* New York, etc., R. Co., 58 Fed. Rep. 268.

6. South Carolina *v.* Port Royal, etc., R. Co., 89 Fed. Rep. 565; Morley *v.* Saginaw Circuit Judge, 117 Mich. 246.

a railroad, contrary as a rule to receivers of other species of property, are appointed for the purpose of managing and operating the property committed to their charge and keeping the road a going concern.[1]

b. EMPLOYMENT AND DISMISSAL OF SERVANTS AND AGENTS. — Receivers of a railroad empowered to maintain, operate, and keep the railroad in repair, may dismiss any of the agents or servants of the corporation and employ others in their places.[2]

c. WAGES OF EMPLOYEES. — The court will ratify and approve reasonable changes by the receiver in the regulations for the conduct of employees or the compensation to be paid for services,[3] but not an unreasonable change in such respects or one made without proper notice to the employees themselves.[4]

d. ENLARGEMENT OR EXTENSION OF OPERATIONS. — The receiver is seldom authorized to enlarge the operations of the company, or to extend its lines of road, his functions being usually limited to the management of the property in its existing condition.[5]

e. COMPLETION OF UNFINISHED PORTIONS OF ROAD. — The receiver will not, as a rule, be authorized to complete the road, or unfinished portions thereof, committed to his charge,[6] nor will he be permitted to contract for the completion of another railroad which would, if finished, serve as a valuable feeder to the main line under his custody.[7] Nor can a receiver, without the sanction of the court, contract for municipal aid to complete the road.[8] But the court may authorize a receiver to complete an unfinished line of road, or even to construct a new line, when such course appears clearly to be necessary to the maintenance of the receivership road as a going concern, or the preservation of the receivership property.[9]

f. CONDEMNATION OF LANDS. — It has been held that the receiver of an insolvent railroad cannot proceed to condemn land without express authority.[10] This power, however, may be conferred by the court where the completion of an unfinished portion is essential to the preservation of the receivership property.[11]

1. Erb *v.* Morasch, 177 U. S. 584; Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669; Moran *v.* Lydecker, 27 Hun (N. Y.) 582.

Railroads as Distinguished from Other Corporations — Construction of Legislation. — Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669. And see Barton *v.* Barbour, 104 U. S. 126; Wallace *v.* Loomis, 97 U. S. 146.

Operation Not to Continue for Indefinite Period — New Jersey Statute. — Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 686.

Operation by Receiver After Sale of Road. — In Vilas *v.* Page, 106 N. Y. 439, it was held that if a mortgage upon a railroad is foreclosed and sale had under order of court, the jurisdiction of the court over the corporate property is not at an end, if the purchasers delay to complete the contract; and it is in the power of the court, even after such sale, to authorize the receiver to continue the operation of the road and to purchase rolling stock therefor, and to direct that the price thereof should form a first lien upon the mortgaged property.

2. Ellis *v.* Boston, etc., R. Co., 107 Mass. 1.

3. Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. Rep. 17.

4. Ames *v.* Union Pac. R. Co., 60 Fed. Rep. 674.

5. Montreal Bank *v.* Chicago, etc., R. Co., 48 Iowa 518; Hand *v.* Savannah, etc., R. Co., 10 S. Car. 406.

6. **Completion of Road — General Rule.** — Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286; Smith *v.* McCullough, 104 U. S. 25; Kennedy *v.* St. Paul, etc., R. Co., 5 Dill. (U. S.) 519; Morrison *v.* Forman, 177 Ill. 427; Moran *v.* Lydecker, 27 Hun (N. Y.) 582; Gibert *v.* Washington City, etc., R. Co., 33 Gratt. (Va.) 586.

7. Tripp *v.* Boardman, 49 Iowa 410.

8. Smith *v.* McCullough, 104 U. S. 25.

Authority to Borrow Money in order to complete a branch of the railroad will not justify a receiver in contracting for municipal aid to enable him to build such branch. Smith *v.* McCullough, 104 U. S. 25.

9. **Completion of Road — Construction of New Lines — When Allowed** — *United States.* — Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286; Smith *v.* McCullough, 104 U. S. 25; Shaw *v.* Little Rock, etc., R. Co., 100 U. S. 605; Jerome *v.* McCarter, 94 U. S. 734; Kennedy *v.* St. Paul, etc., R. Co., 5 Dill. (U. S.) 519, 2 Dill. (U. S.) 448; Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. Rep. 46.

Alabama. — Meyer *v.* Johnston, 53 Ala. 237.

Illinois. — Morrison *v.* Forman, 177 Ill. 427.

Iowa. — Montreal Bank *v.* Chicago, etc., R. Co., 48 Iowa 518.

New York. — Moran *v.* Lydecker, 27 Hun (N. Y.) 582.

Vermont. — Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 50 Vt. 500.

Virginia. — Gibert *v.* Washington City, etc., R. Co., 33 Gratt. (Va.) 586.

10. Minneapolis Western R. Co. *v.* Minneapolis, etc., R. Co., 61 Minn. 502.

11. Morrison *v.* Forman, 177 Ill. 427.

5. Power to Contract — *a.* IN GENERAL. — It has been held that a receiver of a railroad may be authorized by the court to make all such contracts relating to the operation of the road as the corporation itself had the power to make.[1] So also a receiver with authority to operate and manage a railroad so as to keep it up as a going concern, has implied power to make such contracts as are necessary for the maintenance of the road in a proper state of repair and efficiency.[2] A receiver appointed to manage and operate a railroad may make contracts for the carriage of goods,[3] even, it has been held, from points beyond the terminus of its road to a point on such road.[4] Likewise a contract made by a receiver of a railroad to furnish cars and an engine at a particular time and place is within his authority.[5]

b. IMPROVIDENT CONTRACTS. — Where, however, contracts made by a receiver for materials and supplies are grossly improvident and in excess of the needs of the railroad, they may be repudiated by his successor in office. But the contractor is entitled to be reimbursed for expenses or losses incurred in good faith under such circumstances.[6]

c. ADOPTION OF EXISTING CONTRACTS. — Receivers of a railroad may adopt the pre-existing contracts of the company if beneficial to the property.[7] But "they may not pay its debts, nor fulfil contracts which are burdensome or tend to diminish the value of the property in their control, unless such contracts are charged as incumbrances upon the property, or are necessary to its proper preservation and security."[8] It has been held that the receiver has the same discretion in continuing contracts already in force as in entering into new contracts or incurring other expenditures and liabilities necessary for the proper management of the road.[9]

d. DEBTS. — The receiver, with authority of court, may pledge the assets of the company to secure loans necessary to the operation of the road.[10] Without express authority of court, however, it is believed that he has no power to contract debts to be paid otherwise than out of the earnings of the road.[11]

e. CONTRACTS WITH OFFICIALS OF ROAD. — It has been held improper

1. Receiver's Power to Contract. — South Carolina, etc., R. Co. *v.* Carolina, etc., R. Co., (C. C. A.) 93 Fed. Rep. 543.

2. South Carolina *v.* Port Royal, etc., R. Co., 89 Fed. Rep. 565; Bayles *v.* Kansas Pac. R. Co., 13 Colo. 181; Ellis *v.* Boston, etc., R. Co., 107 Mass. 1; Martin *v.* New York, etc., R. Co., 36 N. J. Eq. 109.

Discretion of Receiver. — The making of contracts for materials or supplies necessary to the operation of the road is generally left to the discretion of the receiver, which will only be reviewed on a showing of bad faith or unconscionable extravagance. South Carolina *v.* Port Royal, etc., R. Co., 89 Fed. Rep. 565.

3. Bayles *v.* Kansas Pac. R. Co., 13 Colo. 181; San Antonio, etc., R. Co. *v.* Barnett, (Tex. Civ. App. 1898) 44 S. W. Rep. 20.

Power of Receiver to Terminate Transportation Arrangements. — Where the receiver makes an arrangement for the transportation of the freight and passengers of another railroad company over the line of his road, and there is no provision making the arrangement obligatory on either party for any stated period of time, the receiver may terminate such arrangement at will, without previous notice to the other company. Philadelphia Invest. Co. *v.* Ohio, etc., R. Co., 41 Fed. Rep. 378.

4. Kansas Pac. R. Co. *v.* Bayles, 19 Colo. 348.

5. San Antonio, etc., R. Co. *v.* Barnett, (Tex. Civ. App. 1898) 44 S. W. Rep. 20.

6. Vanderbilt *v.* Little, 51 N. J. Eq. 289.

7. Adoption of Contracts. — Mercantile Trust Co. *v.* Farmers' L. & T. Co., (C. C. A.) 81 Fed. Rep. 254; Central Trust Co. *v.* Ohio Cent. R. Co., 23 Fed. Rep. 306; Ellis *v.* Boston, etc., R. Co., 107 Mass. 1.

Continuation of Pooling Contract. — So a receiver of a railroad may continue a pooling contract in force at the time of his appointment, where such contract is for the benefit of the road. Central Trust Co. *v.* Ohio Cent. R. Co., 23 Fed. Rep. 306.

8. Ellis *v.* Boston, etc., R. Co., 107 Mass. 1.

9. Central Trust Co. *v.* Ohio Cent. R. Co., 23 Fed. Rep. 306.

10. Clarke *v.* Central R., etc., Co., 54 Fed. Rep. 556.

11. State *v.* Edgefield, etc., R. Co., 6 Lea (Tenn.) 353. See also Noyes *v.* Rich, 52 Me. 115.

Contracting Unnecessary Debts. — When the net earnings during a receivership are sufficient to purchase and keep in repair the necessary rolling stock, the court will not sanction the raising of money for such purposes by the creation of a car trust, merely in order to allow the earnings of the road to be applied to the payment of interest on its bonds. Taylor *v.* Philadelphia, etc., R. Co., 9 Fed. Rep. 1.

for the receiver to enter into contracts for supplies with a company composed of the officials of the railroad.[1]

f. RECEIVER DEALING WITH HIMSELF. — But it has been held, on the other hand, that a purchase of necessary articles at a fair price is not necessarily fraudulent because the receiver, in his personal capacity, is a part or even the sole owner thereof.[2]

6. Power to Employ Counsel. — The receiver has the right to employ counsel where reasonably necessary to the prosecution or defense of his rights as receiver.[3]

7. Power to Lease Other Railroads. — It has been held that a receiver has no implied power as such to lease another railroad.[4] The court may, however, authorize the lease of another road where such a course is manifestly advantageous to the parties in interest.[5]

8. Expenditures — *a.* GENERAL RULE. — It has been said that it is the duty of the receiver to perform his functions with fidelity and economy, and so to manage the affairs of the company as to make the least possible expenditure.[6]

b. OPERATING EXPENSES AND FOR PRESERVATION OF PROPERTY. — The receiver is, in general, authorized, in his own discretion, to make expenditures, not of an extravagant character, in order that the road may be kept a going concern and for the preservation of its property.[7] And even in a case where the receiver should, perhaps, have applied to the court in the first instance, but in his own discretion he has made such expenditures, the court will sanction them upon a proper investigation.[8] But as a receiver of a railroad is appointed generally merely to operate and manage the road so as to keep it up as a going concern, he has therefore, in general, no right or power to incur expenses other than such as are necessary for the maintenance of the road in a proper state of repair and efficiency, so as to enable business to be carried on and trains run in the ordinary manner.[9]

1. Clarke *v.* Central R., etc., Co., 66 Fed. Rep. 16.

2. Farmers' L. & T. Co. *v.* Central R. Co., 8 Fed. Rep. 60.

3. Montgomery *v.* Petersburg Sav., etc., Co., (C. C. A.) 70 Fed. Rep. 746. In this case the sum of two thousand five hundred dollars was held to be an adequate counsel fee for services rendered to a receiver during three years and a half, in which the receiver operated about thirteen miles of street railroad.

4. **Lease of Other Roads.** — McMinnville, etc., R. Co. *v.* Huggins, 3 Baxt. (Tenn.) 177. And see State *v.* McMinnville, etc., R. Co., 6 Lea (Tenn.) 369.

5. Mercantile Trust Co. *v.* Missouri, etc., R. Co., 41 Fed. Rep. 8; Gibert *v.* Washington City, etc., R. Co., 33 Gratt. (Va) 586.

Through Transportation of Freight. — When the business of a railroad company consisted in part at least of the through transportation of freight from a point beyond its terminus, it was held to be within the power of the court to direct the receiver to lease a railroad connecting with such point. Mercantile Trust Co. *v.* Missouri, etc., R. Co., 41 Fed. Rep. 8.

6. Farmers' L. & T. Co. *v.* Central R. Co., 2 McCrary (U. S.) 318.

7. **Operating Expenses** — *United States.* — Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434; Burnham *v.* Bowen, 111 U. S. 776; Cowdrey *v.* Galveston, etc., R. Co., 93 U. S. 352, 1 Woods (U. S.) 334; Stanton *v.* Alabama, etc., R. Co., 2 Woods (U. S.) 506; Kennedy *v.* St. Paul, etc., R. Co., 2 Dill. (U. S.) 448; Veatch *v.* American L. & T. Co., (C. C. A.) 79 Fed. Rep. 471; Phinizy *v.* Augusta, etc., R. Co., 62 Fed. Rep. 771; Central Trust Co. *v.* Marietta, etc., R. Co., 48 Fed. Rep. 32.

Alabama. — Meyer *v.* Johnston, 53 Ala. 237.

California. — McLane *v.* Placerville, etc., R. Co., 66 Cal. 606.

New Jersey. — Hoover *v.* Montclair, etc., R. Co., 29 N. J. Eq. 4.

Vermont. — Langdon *v.* Vermont, etc., R. Co., 54 Vt. 593; Poland *v.* Lamoille Valley R. Co., 52 Vt. 144.

Virginia. — Williamson *v.* Washington City, etc., R. Co., 33 Gratt. (Va.) 624.

A Claim for Oil Sold to a railroad company for use in operating the road is a current expense and payable from the income. Poland *v.* Lamoille Valley R. Co., 52 Vt. 144.

Coal. — So also a debt incurred for coal supplied for use in locomotives. Burnham *v.* Bowen, 111 U. S. 776.

Rails and Cross Ties. — So also a claim for new iron rails and cross ties required for the purpose of keeping the road in a condition safe and fit for travel. Williamson *v.* Washington City, etc., R. Co., 33 Gratt. (Va.) 624.

Payments to Connecting Lines. — Payments made by receivers while operating a railroad by connecting roads for freight received, belonging to them according to a necessary usage in the business of connecting railroads, are properly allowed to them as a credit. Meyer *v.* Johnston, 64 Ala. 603.

8. Cowdrey *v.* Galveston, etc., R. Co., 1 Woods (U. S.) 336; Phinizy *v.* Augusta, etc., R. Co., 62 Fed. Rep. 771.

9. Cowdrey *v.* Galveston, etc., R. Co., 93 U.

In Extraordinary Cases, involving a large outlay of money, the receiver should always apply to the court in advance and obtain its authority for the purchase or improvement proposed.[1]

c. REPAIRS. — The receiver may, and it is his duty to, cause to be made all such repairs as are necessary to keep the road under his control a going concern, and in proper condition for safe and effective operation.[2]

d. PAYMENT OF DEBTS OF CORPORATION. — As a general rule the receiver of a railroad may not pay the debts of the corporation in the absence of an order of court.[3] Subject to a judicial discretion to be sparingly exercised, the receiver may, however, be ordered to pay pre-existing corporate debts necessary to keep the railroad a going concern and prevent a suspension of operations.[4]

e. COMPROMISE OF CLAIMS. — Receivers of railroads are sometimes given the power to compromise, adjust, and settle claims against the corporation.[5] But this power, it is believed, is generally exercised subject to the ratification and approval of the court.

9. Sales. — The general rules regulating receivers' sales are fully treated under another title,[6] and will not be here repeated. A few instances of the special application of these rules to railroad property will be found in the notes.[7]

S. 352; Martin *v.* New York, etc., R. Co., 36 N. J. Eq. 109.

Expenditure to Defeat Construction of Rival Road. — An expenditure by a receiver of a street railroad to defeat a proposed subsidy by a city to aid in the construction of a railroad parallel with the one in his hands, was held properly disallowed, although such contemplated road, if constructed, might have diminished the earnings of the road in the hands of the receiver. Cowdrey *v.* Galveston, etc., R. Co., 93 U. S. 352.

Payment of Renewed Promissory Note. — Where there was a specific clause in the order appointing the receiver authorizing him "to pay the amounts due and maturing for materials and supplies about the operation and for the use of said road," it was held that the order could not properly be construed to include the payment of a renewed promissory note originally made by the company in payment for such purchases. Brown *v.* New York, etc., R. Co., (Supm. Ct.) 19 How. Pr. (N. Y.) 84.

1. Cowdrey *v.* Galveston, etc., R. Co., 1 Woods (U. S.) 334.

2. **Rule as to Repairs.** — Morison *v.* Morison, 7 DeG. M. & G. 214; Bright *v.* North, 2 Phil. 216; Jerome *v.* McCarter, 94 U. S. 734; Stanton *v.* Alabama, etc., R. Co., 2 Woods (U. S.) 506; Hoover *v.* Montclair, etc., R. Co., 29 N. J. Eq. 4.

3. Ellis *v.* Boston, etc., R. Co., 107 Mass. 1.

Temporary Receiver under New York Statute. — A temporary receiver of a railroad appointed under section 1788 of the New York Code of Civil Procedure, though for the purpose of preserving the property he may be required to continue to operate the road, "is not thereby invested with any power or duty to ascertain who are its creditors and to provide for their payment." Franklin Trust Co. *v.* Northern Adirondack R. Co., 11 N. Y. App. Div. 249. And see Mercantile Trust Co. *v.* Kings County El. R. Co., 40 N. Y. App. Div. 141.

4. **Pre-existing Debts.** — Louisville, etc., R. Co. *v.* Wilson, 138 U. S. 501; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434; Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286. See also Barton *v.* Barbour, 104 U. S. 126; Douglass *v.* Cline, 12 Bush (Ky.) 608; Newport, etc., Bridge Co. *v.* Douglass, 12 Bush (Ky.) 673.

Lawyers' Fees Not Included. — An order of the court appointing a receiver of a railroad, that he pay all "salaries of officers and wages of employees" which are earned within six months of the appointment of the receiver, does not cover the fees of an attorney employed by the company within the period specified, for certain special purposes. Louisville, etc., R. Co. *v.* Wilson, 138 U. S. 501.

5. See Mercantile Trust Co. *v.* Baltimore, etc., R. Co., 79 Fed. Rep. 389.

6. See the title RECEIVERS, vol. 23, p. 992.

7. **Claims Against Receiver.** — It has been held that a receiver's sale of railroad property transfers it, in the absence of statute, free from all claims against the receiver. Howe *v.* St. Clair, 8 Tex. Civ. App. 101.

Sale "with All Appurtenances." — An order of sale directing the receiver to sell the property "with all appurtenances" does not pass freight contracts with other roads, not specially mentioned in the order of sale. Cincinnati, etc., R. Co. *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. 493, 6 Ohio N. P. 427.

Consolidated Company — Sale of Property as Whole. — Where the railroad in the hands of the court is the property of a company formed by the consolidation of three other companies, all of which had, before the consolidation, issued their bonds and executed mortgages on their property to secure them, the court may direct the property of the consolidated company to be sold as a whole, and afterwards fix and adjust the amounts to be paid to the several holders of the bonds and mortgages on the respective roads. Gibert *v.* Washington City, etc., R. Co., 33 Gratt. (Va.) 586.

Confirmation of Sale Unauthorized in Certain Particular. — Where a receiver's sale of railroad property purported to convey certain contracts which the receiver had no right to sell, the inadvertent confirmation of the sale

10. Receivers of Mortgaged Property. — While receivers appointed in suits for the foreclosure of railroad mortgages have many duties and powers peculiar to themselves, they are such only as flow from the nature and character of the property committed to their charge, and in their legal character and relation to the mortgagor such receivers differ in no respect from the receivers of rents and profits of mortgaged property appointed in actions to foreclose mortgages against individuals.[1]

X. Receiver's Title, Possession, and Control of Property and Funds — **1. In General.** — The rules of law applicable to the receiver's title and possession and control of property and funds are the same in general in the case of receivers of railroads as in other receiverships, and are fully considered elsewhere.[2]

2. No Disturbance of Existing Rights. — The possession of the receiver of a railroad is only that of the court whose officer he is, and adds nothing to the previously existing title of the parties at whose instance he is appointed. The receiver holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the court proceeds to determine the rights of the parties upon the same principles that it would if no change of possession had taken place.[3]

3. Liens. — The receiver of a railroad takes the property, of course, subject to all valid subsisting liens against it.[4] It has been held that the lien of a prior mortgage containing an after-acquired property clause does not attach to rolling stock held under a lease providing that the title thereto should remain in the lessor until the rentals had paid the purchase price,[5] even where there is a statute rendering conditional sales void against third parties.[6] Such rolling stock, therefore, remains the property of the lessor and should be returned to him, unless purchased by the receiver.[7] Or, if the rolling stock is sold under foreclosure, as part of the railroad, the price thereof

by the court will not be held to validate the transaction in the particular in question. Cincinnati, etc., R. Co. *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. 493, 6 Ohio N. P. 427.

1. Decker *v.* Gardner, 124 N. Y. 334. See generally in this connection the title Receivers, vol. 23, p. 992.

In Railway Foreclosures the duties of a receiver are, while more extensive, primarily the same as those of a receiver in foreclosures of other property, viz., in aid of the mortgagee by collecting the rents and preserving the property from loss and decay. New Jersey Midland R. Co. *v.* Wortendyke, 27 N. J. Eq. 658.

2. See the title Receivers, vol. 23, p. 992.

Claims for Unpaid Subscriptions. — It has been held that the naked legal title to a claim for unpaid subscriptions does not pass to the receiver of a railroad, such right not being essential to the proper discharge of the receiver's duties. Coler *v.* Grainger County, (C. C. A.) 74 Fed. Rep. 16.

Books and Papers. — An order appointing a receiver providing that "all the books, vouchers, and papers touching the operation of the road" should be delivered to such receiver, has been held to include all books relating to the previous history of the railroad, as well as the records of its transactions, and not to be confined to books relating to the future operation of the road, or to such as the receiver might specifically demand. American Constr. Co. *v.* Jacksonville, etc., R. Co., 52 Fed. Rep. 937.

3. Waite, C. J., in Fosdick *v.* Schall, 99 U. S. 251.

4. **Liens.** — Fosdick *v.* Southwestern Car Co., 99 U. S. 256; Fosdick *v.* Schall, 99 U. S. 235.

Rights of Lessor. — Where, after the execution of a lease of the road, a receiver is appointed under a subsequent mortgage, he cannot take charge of the road as against the lessee at the suit of a bondholder secured by the mortgage. Louisville, etc., R. Co. *v.* Eakins, 100 Ky. 745.

Levy of Execution Between Appointment and Qualification. — Where, after the appointment but before the qualification of a railroad receiver by the execution of the required bond, a fi. fa. against the railroad company is placed in the sheriff's hands, the execution creditor is entitled to a fund in bank representing the earnings of the road in preference to the mortgage creditors at whose instance the receiver was appointed. Frayser *v.* Richmond, etc., R. Co., 81 Va. 388.

5. **Leased Rolling Stock.** — Fosdick *v.* Southwestern Car Co., 99 U. S. 256; Fosdick *v.* Schall, 99 U. S. 235; Huidekoper *v.* Hinckley Locomotive Works, 99 U. S. 258.

6. Fosdick *v.* Schall, 99 U. S. 235, construing *Illinois* statute; Myer *v.* Western Car Co., 102 U. S. 1, construing *Iowa* statute.

7. Myer *v.* Western Car Co., 102 U. S. 1; Fosdick *v.* Schall, 99 U. S. 235; Fosdick *v.* Southwestern Car Co., 99 U. S. 256; Huidekoper *v.* Hinckley Locomotive Works, 99 U. S. 258.

should be paid to the lessor out of the proceeds of the sale prior to the mortgage.[1]

4. Right to Earnings. — When the receivers of a railroad, appointed at the instance of stockholders and creditors, take possession of the property, they enjoy the same right to the earnings and income thereof as the company enjoyed before their appointment.[2]

5. Trust Fund Doctrine. — The property and income of a railroad company seized by a court of equity for administration by a receiver constitute a trust fund pledged first to the payment of its debts and next to distribution among its stockholders.[3]

XI. Suits By and Against Receivers — 1. In General. — Though the reverse has been contended,[4] the fact that the receiver, under orders of court, is doing the business of a common carrier, constitutes no exception to the rule requiring leave of the appointing court before suit can be brought against him.[5] But when the same person is receiver of one railroad and lessee of another, and both are operated by him together, the leased road is not receivership property. An employee of the receiver, therefore, may maintain an action at law against him without leave of court to recover for injuries resulting from the negligence of his servants in operating the leased road.[6]

2. Rule by Statute. — It has been seen that there are statutory provisions in some jurisdictions with reference to suits against receivers.[7] These statutes apply without exception to receivers of railroads, in the absence of express exclusion.[8] The Act of Congress of March 3, 1887, permitting suits against a receiver for any act of his in carrying on the business connected with the property in his charge, has been held to apply to a passenger's action for bodily injuries,[9] or for other negligence of a receiver or his servants in the operation of the road.[10]

XII. Liabilities — 1. Liability for Tort — *a.* In General. — Receivers of a railroad company, vested with its absolute control and management, are, as a rule, liable in their representative capacity for injuries resulting from operating the road, to the same extent that the company itself might have been liable.[11] So, also, most of the statutes requiring of railroads the performance of

1. Fosdick *v.* Schall, 99 U. S. 235.

2. Southern R. Co. *v.* Carnegie Steel Co., (C. C. A.) 76 Fed. Rep. 492.

Possession of Mortgagor. — But a receiver appointed in a suit to foreclose a mortgage, under which the mortgagor had the right to remain in possession until default, has no right to the earnings of the company prior to the filing of the bill, though not paid over till after the receiver was appointed. Hook *v.* Bosworth, (C. C. A.) 64 Fed. Rep. 443.

3. Trust Fund Doctrine.—Richardson *v.* Green, 133 U. S. 30; Wabash, etc., R. Co. *v.* Ham, 114 U. S. 587; Graham *v.* La Crosse, etc., R. Co., 102 U. S. 148; Ames *v.* Union Pac. R. Co., 74 Fed. Rep. 343; Butler *v.* Cockrill, (C. C. A.) 73 Fed. Rep. 945; Stuart *v.* Hayden, (C. C. A.) 72 Fed. Rep. 402; Hayden *v.* Thompson, (C. C. A.) 71 Fed. Rep. 60.

4. Suits Against Receivers. — See Barton *v.* Barbour, 104 U. S. 129.

5. Barton *v.* Barbour, 104 U. S. 126.

Suits by Railroad Receivers — Earnings. — A receiver appointed in a suit in equity to foreclose a mortgage of a railroad cannot maintain a suit to recover earnings of the road accruing before his appointment. Noyes *v.* Rich, 52 Me. 115.

It Has Been Held by Statute in Colorado that receivers of a railroad company appointed beyond the state, but operating a railroad within the state, are subject to garnishee proceedings, when such proceedings do not tend to disturb the rights of the receivers under the general orders of the court by which they were appointed. Phelan *v.* Ganebin, 5 Colo. 14; Ganebin *v.* Phelan, 5 Colo. 83.

Construction of Particular Order. — A receiver of railroad properties is not exempt from suits in courts other than that of his appointment for his torts and defaults committed and incurred in the operation of the property, by an order of the appointing court forbidding suits elsewhere by "bondholders, creditors, and other parties interested in the properties of said railroad company and the subject matter of this suit," and requiring them to present their claims in that cause. Burke *v.* Ellis, 105 Tenn. 702.

6. Kain *v.* Smith, 80 N. Y. 458; Lyman *v.* Central Vermont R. Co., 59 Vt. 167.

7. See the title Receivers, vol. 23, p. 992.

8. Dow *v.* Memphis, etc., R. Co., 20 Fed. Rep. 260; Malott *v.* Shimer, 153 Ind. 35, 74 Am. St. Rep. 278.

9. Fullerton *v.* Fordyce, 121 Mo. 1.

10. Malott *v.* Shimer, 153 Ind. 35, 74 Am. St. Rep. 278.

11. Liability for Torts — General Rule.—Central Trust Co. *v.* East Tennessee, etc., R. Co., 69 Fed. Rep. 353; Ohio, etc., R. Co. *v.* Anderson, 10 Ill. App. 313; Little *v.* Dusenberry, 46

certain duties for the safety of the public have been held to apply to railroads in the hands of receivers,[1] and likewise a statute forbidding discrimination in freight rates has been held to apply to railroad receivers.[2] But a statute merely making "any corporation operating a railway" liable for damages under certain circumstances has been held not to apply to a railroad in the hands of an individual receiver.[3] Nor is a receiver of a railroad a "proprietor, owner, charterer, or hirer" within the meaning of a statute giving a right of action for injuries resulting in death caused by the negligence of the proprietor, owner, charterer, or hirer of a railroad.[4]

b. NEGLIGENCE OF EMPLOYEES. — A receiver is not, as a rule, personally liable for the torts of his employees.[5] He is, however, personally liable when he himself commits or participates in the wrong, or where he fails to exercise reasonable care in the selection of employees.[6] And a receiver is, as a rule, liable in his official capacity for the negligence of his employees, in the same manner and to the same extent as the copartner to whose management and control the receiver has succeeded.[7]

N. J. L. 614, 50 Am. Rep. 445; Murphy *v.* Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633; Com. *v.* Runk, 26 Pa. St. 235; *Ex p.* Brown, 15 S. Car. 531; Peoples *v.* Yoakum, 7 Tex. Civ. App. 85; Newell *v.* Smith, 49 Vt. 265; Cutts *v.* Brainerd, 42 Vt. 566, 1 Am. Rep 353; Morse *v.* Brainard, 41 Vt. 550; Blumenthal *v.* Brainerd, 38 Vt. 402, 91 Am. Dec. 349. And see Rouse *v.* Redinger, 1 Kan. App. 355.

Where Persons Are, in Fact, Common Carriers over a line of railroad, it is no defense to an action at law for a breach of duty or obligation arising out of business intrusted to them on that relation that they were running and managing the railroad as receivers under the appointment of a court of chancery. Blumenthal *v.* Brainerd, 38 Vt. 408, 91 Am. Dec. 349. And see Paige *v.* Smith, 99 Mass. 395.

Statutory Receiver of Railroad Not Public Officer. — Merely because a receiver is operating a railroad under a statute providing that when a railroad shall have passed into the hands of a receiver it shall be his duty "to operate said railroad for the use of the public," does not create such receiver a public officer so as to entitle him to exemption as such. Little *v.* Dusenberry, 46 N. J. L. 614, 50 Am. Rep. 445.

Suits in Foreign State. — And where receivers are operating a railway under appointment from a court of chancery in one state, and the courts of that state hold them liable as common carriers and they are acting in that capacity, they are liable to an action in the courts of another state for a breach of duty as common carriers. Paige *v.* Smith, 99 Mass. 395.

1. Central Trust Co. *v.* Wabash, etc., R. Co., 26 Fed. Rep. 12; International, etc., R. Co. *v.* Bender, 87 Tex. 99. And see Rouse *v.* Redinger, 1 Kan. App. 355.

Judgments Against Road. — Where, after a judgment had been recovered against a railroad company requiring it to construct a crossing on the plaintiff's farm, a receiver of the company was appointed, it was held that an order was properly granted requiring the receiver to construct the crossing. Peckham *v.* Dutchess County R. Co., 81 Hun (N. Y.) 399.

2. Cutting *v.* Florida R., etc., Co., 43 Fed. Rep. 747. And see Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 31 Fed. Rep. 862. But *compare* Campbell *v.* Wiess, (Tex. Civ. App. 1894) 25 S. W. Rep. 1076; Turner *v.* Cross, 83 Tex. 218; Bonner *v.* Franklin Cooperative Assoc., 4 Tex. Civ. App. 166. And see Clark *v.* Dyer, 81 Tex. 339.

3. Schurr *v.* Omaha, etc., R. Co., 98 Iowa 418.

4. **Texas Statute.** — Allen *v.* Dillingham, (C. C. A.) 60 Fed. Rep. 176; Burke *v.* Dillingham, (C. C. A.) 60 Fed. Rep. 729; Dillingham *v.* Blake, (Tex. Civ. App. 1894) 32 S. W. Rep. 77; Dillingham *v.* Scales, (Tex. Civ. App. 1893) 24 S. W. Rep. 975; Brown *v.* Record, (Tex. Civ. App. 1893) 23 S. W. Rep. 704; Campbell *v.* Davis, (Tex. Civ. App. 1893) 22 S. W. Rep. 244; Texas, etc., R. Co. *v.* Thedens, (Tex. Civ. App. 1892) 21 S. W. Rep. 132; Texas, etc., R. Co. *v.* Bledsoe, 2 Tex. Civ. App. 88; Bonner *v.* Thomas, (Tex. Civ. App. 1892) 20 S. W. Rep. 722; Texas, etc., R. Co. *v.* Collins, 84 Tex. 122; Yoakum *v.* Selph, 83 Tex. 607; Turner *v.* Cross, 83 Tex. 218; Houston, etc., R. Co. *v.* Roberts, (Tex. 1892) 19 S. W. Rep. 512.

Fellow Servants — Statutes. — See the title FELLOW SERVANTS, vol. 12, p. 980.

5. **Torts of Employees.** — Kain *v.* Smith, 80 N. Y. 458; Cardot *v.* Barney, 63 N. Y. 281, 20 Am. Rep. 533; Camp *v.* Barney, 4 Hun (N. Y.) 373; Murphy *v.* Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633; Com. *v.* Runk, 26 Pa. St. 235; Newell *v.* Smith, 49 Vt. 255; Ruck *v.* Williams, 3 H. & N. 308.

6. Davis *v.* Duncan, 19 Fed. Rep. 477; Cardot *v.* Barney, 63 N. Y. 281, 20 Am. Rep. 533; Erwin *v.* Davenport, 9 Heisk. (Tenn.) 44.

Actual Knowledge of Defect in Machinery. — It has been held that a receiver is personally liable when he has actual knowledge of defects in machinery and equipments and an injury occurs in consequence. Erwin *v.* Davenport, 9 Heisk. (Tenn.) 44.

7. **Extent of Liability** — *United States.* — Cowdrey *v.* Galveston, etc., R. Co., 93 U. S. 352; Hornsby *v.* Eddy, 12 U. S. App. 404; Winbourn's Case, 30 Fed. Rep. 167; Pope's Case, 30 Fed. Rep. 169; Davis *v.* Duncan, 19 Fed. Rep. 477. And see Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 41 Fed. Rep. 319.

Colorado. — Kansas Pac. R. Co. *v.* Searle, 11 Colo. 1.

Torts of Prior Receiver. — It has been held that a successor receiver is liable in his official capacity for the torts of his predecessor.[1]

2. Liability on Contracts — *a.* IN GENERAL. — A railroad receiver is, as a rule, liable as such on all proper contracts made by him in his representative capacity.[2]

b. PRE-EXISTING CONTRACTS. — The receiver does not become, by mere force of appointment, liable on the existing contracts of the railroad, nor bound to carry out their provisions.[3] Nor will specific performance of a con-

Georgia. — McGhee *v.* Claridy, 96 Ga. 755, 22 S. E. Rep 375.

Illinois. — Brown *v.* Wabash R. Co., 96 Ill. 297.

Indiana. — Hunt *v.* Conner, 26 Ind. App. 41; Bell *v.* Indianapolis, etc., R. Co., 53 Ind. 57.

Iowa. — Sloan *v.* Central Iowa R. Co., 62 Iowa 728.

Kansas. — Union Trust Co. *v.* Thomason, 25 Kan. 1.

Massachusetts. — Nichols *v.* Smith, 115 Mass. 332; Paige *v.* Smith, 99 Mass. 395.

Mississippi. — Mobile, etc., R. Co. *v.* Davis, 62 Miss. 271.

New Jersey. — Bartlett *v.* Keim, 50 N. J. L. 260; Little *v.* Dusenberry, 46 N. J. L. 614, 50 Am. Rep. 445; Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669; Lehigh Coal, etc., Co. *v.* Central R. Co., 42 N. J. Eq. 591; Palys *v.* Jewett, 32 N. J. Eq. 302; Klein *v.* Jewett, 26 N. J. Eq. 474.

New York. — Kain *v.* Smith, 80 N. Y. 458; Metz *v.* Buffalo, etc., R. Co., 58 N. Y. 61, 17 Am. Rep. 201; Graham *v.* Chapman, 58 Hun (N. Y.) 602, 11 N. Y. Supp. 318.

Ohio. — Potter *v.* Bunnell, 20 Ohio St. 159; Murphy *v.* Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633.

South Carolina. — *Ex p.* Johnson, 19 S. Car. 492; *Ex p.* Brown, 15 S. Car. 518.

Tennessee. — Rogers *v.* Mobile, etc., R. Co., (Tenn.) 12 Am. & Eng. R. Cas. 442.

Texas. — Dillingham *v.* Crank, 87 Tex. 104; Texas, etc., R. Co. *v.* Geiger, 79 Tex. 13; Dillingham *v.* Russell, 73 Tex. 47, 15 Am. St. Rep. 753; Ryan *v.* Hays, 62 Tex. 42.

Vermont. — Newell *v.* Smith, 49 Vt. 255.

Virginia. — Melendy *v.* Barbour, 78 Va. 544.

Wisconsin. — Kinney *v.* Crocker, 18 Wis. 80.

Where a Defect Existed When the Receiver Took Possession and an injury afterward results therefrom, the receiver's liability is the same as if the defect arose during his management. Texas, etc., R. Co. *v.* Geiger, 79 Tex. 13; Bonner *v.* Mayfield, 82 Tex. 234.

Presumption that Receiver Was Operating Train. — McNulta *v.* Ensch, 134 Ill. 46.

Liability of Earnings of Road. — The earnings of a railroad in the hands of a receiver are chargeable with the value of goods lost in transportation and with damages done to property during his management. Cowdrey *v.* Galveston, etc., R. Co., 93 U. S. 352. And see Yoakum *v.* Dunn, 1 Tex. Civ. App. 524.

Liability Assumed by Purchaser of Road. — See Memphis, etc., R. Co. *v.* Glover, 78 Miss. 467.

Liability Assumed by Lessee Company. — See Grand Trunk R. Co. *v.* Central Vermont R. Co., 81 Fed. Rep. 60.

1. McNulta *v.* Lockridge, 32 Ill. App. 86.

2. Metz *v.* Buffalo, etc., R. Co., 58 N. Y. 61, 17 Am. Rep. 201.

Contract of Receiver as Carrier. — In Bayles *v.* Kansas Pac. R. Co., 13 Colo. 181, 40 Am. & Eng. R. Cas. 42, it was held that where it is alleged and admitted that the receiver managed and controlled the business of the company and operated the railway, a contract relative to the carriage of goods will not be held to be in violation of his authority until the authority conferred upon him by the court is shown.

Continuing Contract Terminable at Will. — Where the receiver makes a continuing transportation contract with another railroad, but there is no period of time stated for the duration of the contract, the receiver may terminate such contract at will. Philadelphia Invest. Co. *v.* Ohio, etc., R. Co., 41 Fed. Rep. 378.

3. Liability on Pre-existing Contracts — *United States.* — U. S. Trust Co. *v.* Wabash Western R. Co., 150 U. S. 287; Seney *v.* Wabash Western R. Co., 150 U. S. 310; St. Joseph, etc., R. Co. *v.* Humphreys, 145 U. S. 105; Sunflower Oil Co. *v.* Wilson, 142 U. S. 313; Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82; Keeler *v.* Atchison, etc., R. Co., (C. C. A.) 92 Fed. Rep. 545; U. S. *v.* De Coursey, 82 Fed. Rep. 302; Manhattan Trust Co. *v.* Sioux City, etc., R. Co., 81 Fed. Rep. 50; *In re* Seattle, etc., R. Co., 61 Fed. Rep. 541; Ames *v.* Union Pac. R. Co., 60 Fed. Rep. 966; New York, etc., R. Co. *v.* New York, etc., R. Co., 58 Fed. Rep. 280; Park *v.* New York, etc., R. Co., 57 Fed. Rep. 799. And see Farmers' L. & T. Co. *v.* Cape Fear, etc., R. Co., 73 Fed. Rep. 712.

Massachusetts. — Ellis *v.* Boston, etc., R. Co., 107 Mass. 1.

New Jersey. — Elmira Iron, etc., Rolling Mill Co. *v.* Erie R. Co., 26 N. J. Eq. 284.

Tennessee. — Southern Iron Car Line *v.* East Tennessee, etc., R. Co., (Tenn. Ch. 1897) 42 S. W. Rep. 529.

Texas. — Brown *v.* Warner, 78 Tex. 543.

Washington. — Casey *v.* Northern Pac. R. Co., 15 Wash. 450; Scott *v.* Rainier Power, etc., Co., 13 Wash. 108.

But Compare, for the Rule under a Particular Statute, Howe *v.* Harding, 76 Tex. 17, 18 Am. St. Rep. 17; Levy *v.* Tatum, (Tex. Civ. App. 1897) 43 S. W. Rep. 941.

Right of Bank to Hold Railroad Deposits as Collateral Security. — A bank, which by contract had the right to hold certain station receipts deposited by a railroad company as collateral for a loan, could not, it was held, under such agreement, hold as collateral station receipts deposited by the receivers of such road. Grand Trunk R. Co. *v.* Central Vermont R. Co., 81 Fed. Rep. 541.

Suit to Enforce Claim of Railroad's Assignee. — Though a railroad company was bound, under the terms of an assignment of a claim for unpaid subscriptions, to sue for the benefit of

tract of the railroad, in existence when the receiver was appointed, be decreed as against the receiver.[1] But the receiver cannot, it has been held, abrogate a lease which is valid and binding as between the company and its lessee. As between lessor and lessee the lease must stand until abrogated under some of the conditions contained therein.[2]

c. ADOPTION OF ADVANTAGEOUS CONTRACTS — (1) *In General.* — The receiver may, however, adopt and ratify such existing contracts as are for the benefit and advantage of the trust property, and become bound thereby by the terms thereof.[3] And railroad receivers, like receivers of other sorts of property, are entitled to a reasonable time to elect whether they will adopt and become bound by existing contracts or not.[4] The fact, therefore, that the receiver does not immediately disaffirm an existing contract of the company is not a constructive adoption of it.[5]

(2) *What Constitutes Adoption* — **Leases.** — The appointment of receivers for a railroad system, and their taking possession of a leased line or of leased rolling stock, does not, of itself, constitute an adoption of the lease so as to make the receivers liable for the stipulated rental therefor.[6]

Contract of Employment. — Nor does the mere retention of a former employee of the railroad in the service of a receiver bind the latter to the terms of the

the assignee in case of default therein, such obligation does not pass to a receiver thereof. Coler *v.* Grainger County, (C. C. A.) 74 Fed. Rep. 16.

Contracts of Prior Receiver. — The receiver is not bound by a contract made by his predecessors for a rebate of freight charges unless he ratifies it. Kansas Pac. R. Co. *v.* Bayles, 19 Colo. 348.

Liability for Attorneys' Fees. — Cowdrey *v.* Galveston, etc., R. Co., 93 U. S. 352.

1. Southern Express Co. *v.* Western North Carolina R. Co., 99 U. S. 199.

2. New York, etc., R. Co. *v.* New York, etc., R. Co., 58 Fed. Rep. 268.

3. Ratification. — U. S. Trust Co. *v.* Wabash Western R. Co., 150 U. S. 287; St. Joseph, etc., R. Co. *v.* Humphreys, 145 U. S. 105; Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82; South Carolina, etc., R. Co. *v.* Carolina, etc., R. Co., (C. C. A.) 93 Fed. Rep. 543; U. S. Trust Co. *v.* Mercantile Trust Co., (C. C. A.) 88 Fed. Rep. 140; Central Trust Co. *v.* Continental Trust Co., (C. C. A.) 86 Fed. Rep. 517; New York, etc., R. Co. *v.* New York, etc., R. Co., 58 Fed. Rep. 280; Mercantile Trust, etc., Co. *v.* Southern Iron Car Line Co., 113 Ala. 543; Woodruff *v.* Erie R. Co., 93 N. Y. 609; Guarantee Trust, etc., Co. *v.* Philadelphia, etc., R. Co., 31 N. Y. App. Div. 511.

Rule Stated and Limited. — A receiver of a railroad may fulfil contracts made by the company prior to his appointment, so far as they serve the purposes of his appointment, which are to preserve the property and operate the road in the interests of the public, but no further. Whightsel *v.* Felton, 95 Fed. Rep. 923.

Adoption — Preferential Claim. — By the adoption of a pre-existing contract of the company, which was merely an unsecured obligation, the receiver cannot make it a preferential claim. Whightsel *v.* Felton, 95 Fed. Rep. 923.

Claims for Losses Incurred by reason of the refusal of a receiver to fulfil contracts entered into by the railroad before his appointment stand on the same ground as other debts of the company incurred before the receiver's appointment. Central Trust Co. *v.* Ohio Cent. R. Co., 23 Fed. Rep. 306.

No Partial Adoption of Entire Contract. — Howe *v.* Harding, 76 Tex. 17, 18 Am. St. Rep. 17.

4. Reasonable Time for Election. — Sunflower Oil Co. *v.* Wilson, 142 U. S. 313; Platt *v.* Philadelphia, etc., R. Co., (C. C. A.) 84 Fed. Rep. 535; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 58 Fed. Rep. 257; Park *v.* New York, etc., R. Co., 57 Fed. Rep. 799.

5. Platt *v.* Philadelphia, etc., R. Co., (C. C. A.) 84 Fed. Rep. 535.

6. Adoption of Lease. — U. S. Trust Co. *v.* Wabash Western R. Co., 150 U. S. 287; Seney *v.* Wabash Western R. Co., 150 U. S. 310; Platt *v.* Philadelphia, etc., R. Co., (C. C. A.) 84 Fed. Rep. 535; New York, etc., R. Co. *v.* New York, etc., R. Co., 58 Fed. Rep. 268; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 58 Fed. Rep. 257; Park *v.* New York, etc., R. Co., 57 Fed. Rep. 799.

Possession and Operation of Leased Line with Recognition of Lessor's Right. — It has been held that the receiver of a railroad, by the mere taking possession of a leased line and operating it for a reasonable time, keeping separate accounts and diverting none of its earnings to the receivership property, with an express recognition of the lessor's right to resume possession on making proper application therefor, does not adopt the lease so as to render the agreed rentals a lien on the earnings of the general system superior to that of mortgagees thereof. Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82.

Operation of Leased Line for Year and a Half. — But where receivers of a railroad took possession of a leased line and operated it for a year and a half, keeping no separate accounts and treating such leased line in all respects as an integral part of the entire system, the rental for the period during which the receivers were in possession should be treated as a receivership obligation. Central R., etc., Co. *v.* Farmers' L. & T. Co., 79 Fed. Rep. 158.

contract of employment between the railroad and the employee.[1]

Considered as Assignees of Company. — Where, however, receivers authorized to take charge of all the company's property of every description, and to conduct operations, take possession of and use leased sleeping cars, with knowledge of the terms of the lease, it has been held that they become the assignees of the company and are bound to perform the covenants of the lease as to the care and return of the cars.[2]

Reasonable Value of Use of Property. — And where a railroad company is enjoying the use of property under a lease or a contract for an agreed compensation at periodic intervals, the receiver, though he may not affirm the contract, will be liable for the reasonable value of the use of the property if he continues to use it.[3]

3. Taxes. — A receiver appointed by an act of the state legislature is liable in his official capacity for taxes due the state.[4] And, where the receiver continues to operate the road by virtue of the franchises conferred upon the company by the state, there is no distinction between the receiver's liability for taxes on the franchise and those on the corporate property.[5] But taxes cannot be collected from receivers whose connection with the road has ceased, except upon proof that they have assets of the railroad in their hands, or have diverted its revenues.[6]

4. Defenses in Actions Against Receivers. — In an action against the receiver seeking to enforce a liability incurred during the operation of the road in his hands, any defense is available to him which would have been available to the company had the liability been incurred and the suit instituted before the appointment of a receiver.[7]

5. When Liability Ends. — Where the receiver has handed over the funds in his hands and has been discharged, he cannot thereafter be sued for injuries

1. Adoption of Contracts of Employment. — Spencer *v.* Brooks, 97 Ga. 681. And see Keeler *v.* Atchison, etc., R. Co., (C. C. A.) 92 Fed. Rep. 545.

Receiver's Liability to Employees for Wages Due at Time of Appointment. — See Franklin Trust Co. *v.* Northern Adirondack R. Co., 11 N. Y. App. Div. 249.

2. Easton *v.* Houston, etc., R. Co., 38 Fed. Rep. 784.

Application of Earnings of Leased Road. — It has been held that the receivers are bound to account for and apply the earnings of a leased road in accordance with the covenants of the lease so long as they operate it. Charlotte, etc., R. Co. *v.* Chester, etc., R. Co., 118 N. Car. 1078.

3. Use of Property — Liability for Removable Value. — Kneeland *v.* American L. & T. Co., 136 U. S. 89; Platt *v.* Philadelphia, etc., R. Co., (C. C. A.) 84 Fed. Rep. 535; Savannah, etc., R. Co. *v.* Jacksonville, etc., R. Co., (C. C. A.) 79 Fed. Rep. 35; Carswell *v.* Farmers' L. & T. Co., (C. C. A.) 74 Fed. Rep. 88; Lane *v.* Macon, etc., R. Co., 96 Ga. 630; Central of Georgia R. Co. *v.* Hitchcock, (C. C. A.) 91 Fed. Rep. 209.

Lease by Receivers of the Leased Property of the Road. — The receivers are not relieved from liability for rent of cars by leasing them to another company which made no payments to the original lessor therefor. Mercantile Trust, etc., Co. *v.* Southern Iron Car Line Co., 113 Ala. 543.

4. Taxes. — Com. *v.* Runk, 26 Pa. St. 235.

Mode of Collection. — It has been held that the mode of collecting taxes is not affected by the appointment of the receiver, and the property in the hands of the receiver is liable to execution in the same manner as if it were still in possession of the company. Central Trust Co. *v.* Wabash, etc., R. Co., 26 Fed. Rep. 11.

Interest on Tax Execution. — Under a statute prescribing that all executions for state or county taxes should bear interest at a stipulated rate per annum from the time fixed by law for issuing the same, a tax execution against a railroad company will be held to bear interest notwithstanding the fact that the company is in the hands of a receiver and that the tax accrued after the receiver was appointed. Sparks *v.* Lowndes County, 98 Ga. 284.

Injunction Against Collection. — But a court whose receiver is in charge of a railroad may properly allow an injunction *pendente lite* forbidding the state taxing officers to collect disputed taxes levied upon the railroad property. Clark *v.* McGhee, (C. C. A.) 87 Fed. Rep. 789. And see Georgia *v.* Atlantic, etc., R. Co., 3 Woods (U. S.) 434.

5. Central Trust Co. *v.* New York City, etc., R. Co., 110 N. Y. 250.

6. Comer *v.* Polk County, (C. C. A.) 81 Fed. Rep. 921.

7. Bartlett *v.* Keim, 50 N. J. L. 260.

Statute of Limitations. — The receiver has the right to set up, as a defense against a suit for injuries sustained from negligence in running the trains by such receiver, the statute which requires suits for negligence to be brought against railroads within two years. Bartlett *v.* Keim, 50 N. J. L. 260.

alleged to have accrued during the receivership.[1]

6. Ancillary Receivers. — Ancillary receivers of a railroad are not liable for a tort committed by the original receivers of the company in a foreign state.[2]

7. Liability of Trustees Not Technical Receivers. — A distinction has been drawn, in regard to personal liability, between technical receivers who are directed by the court to operate a railroad, and trustees or mortgagees who are permitted to operate a railroad for the benefit of creditors. Such trustees or mortgagees operating a railroad are personally liable, and are not entitled to the immunity in this respect accorded to official receivers.[3] But where a receiver is in possession of a railroad as lessee, and not as receiver, he is personally liable for the torts of his servants or employees.[4]

But by Statute in Some States, trustees operating a railroad for the benefit of creditors are relieved from personal liability for injuries arising from the negligence of employees, and the liability is restricted to the property in their charge.[5]

XIII. Compensation — 1. In General. — The compensation paid to receivers of the property of railroad corporations is not allowed precisely upon the same basis as that upon which other receivers are paid for their services. The court selects a person whom it regards as competent and trustworthy, and the amount of his compensation is graduated somewhat by the duties and somewhat by the responsibilities of the situation. Where a receiver is a manager as well as a mere receiver, his duties and responsibilities are largely increased; and the management of a business like that of a railroad is one of the most difficult and responsible duties that a receiver is charged with. It requires not only a man of experience in the business, but also one of a high order of intelligence and ability.[6]

2. Amount of Compensation. — The question of the compensation of a railroad receiver is a judicial one and within the discretion of the court, dependent upon the particular circumstances of the case.[7] But the matter is discretionary only in the sense that there are no fixed rules to determine the proper amount, and not in the sense that courts are at liberty to give anything more than a fair and reasonable compensation.[8] The object of the courts with respect to railroad receiverships is, of course, to give adequate but not excessive compensation.[9] Sometimes the salary of the president of the road is fixed upon as the proper compensation for the receiver.[10] But attention

1. Archambeau *v.* Platt, 173 Mass. 249.

So, in *Texas*, before the Act of March 19, 1889, the rule was that a judgment rendered against the receiver of a railroad company after he had been discharged and had returned the property to the company did not bind either the property or the company. Texas, etc., R. Co. *v.* Watson, (Tex. Civ. App. 1894) 24 S. W. Rep. 952.

Liability of Purchaser. — When the road has been sold under foreclosure by the federal court, the property delivered to the purchaser, and the receiver discharged, the state court has the power to adjudicate a claim which accrued against the receiver, and to enforce its judgment against the purchaser according to the state law. Houston, etc., R. Co. *v.* Crawford, 88 Tex. 277, 53 Am. St. Rep. 752.

2. Union Trust Co. *v.* Atchison, etc., R. Co., 87 Fed. Rep. 530.

3. **Trustees or Mortgagees — Liability.** — Ballou *v.* Farnum, 9 Allen (Mass.) 47; Kain *v.* Smith, 80 N. Y. 458; Rogers *v.* Wheeler, 43 N. Y. 598; Sprague *v.* Smith, 29 Vt. 421, 70 Am. Dec. 424.

4. **Lessee.** — Roxbury *v.* Central Vermont R. Co., 60 Vt. 121; Lyman *v.* Central Vermont R. Co., 59 Vt. 167.

5. For the *Connecticut* statute on this subject and a decision involving the construction thereof, see Lamphear *v.* Buckingham, 33 Conn. 237.

6. **Compensation.** — Cowdrey *v.* Galveston, etc., R. Co., 1 Woods (U. S.) 331. And see McArthur *v.* Montclair R. Co., 27 N. J. Eq. 77.

7. Central Trust Co. *v.* Wabash, etc., R. Co., 32 Fed. Rep. 187; Central Trust Co. *v.* Cincinnati, etc., R. Co., 58 Fed. Rep. 500.

For Cases in Which Various Amounts were allowed railroad receivers under the respective particular circumstances, see Montgomery *v.* Petersburg Sav., etc., Co., (C. C. A.) 70 Fed. Rep. 746; Boston Safe Deposit, etc., Co. *v.* Chamberlain, (C. C. A.) 66 Fed. Rep. 847; Easton *v.* Houston, etc., R. Co., 40 Fed. Rep. 189.

8. Central Trust Co. *v.* Wabash, etc., R. Co., 32 Fed. Rep. 187.

9. Central Trust Co. *v.* Wabash, etc., R. Co., 32 Fed. Rep. 187.

10. Mabry *v.* Brown, 12 Heisk. (Tenn.) 597.

has been called to the fact that in many instances the president's salary would be inadequate compensation for a railroad receiver, on account of the disorganized and demoralized condition of the road.[1]

3. Additional Compensation. — Where the receiver of a railroad is unexpectedly called upon to perform additional duties, extra compensation may be allowed him;[2] but not where the receiver has agreed to act for a fixed sum, though his duties may have proved more burdensome than was expected.[3]

XIV. Whom Receiver Represents. — The receiver of an insolvent railroad corporation, appointed to preserve its property and operate its road, does not stand in the shoes of the corporation. He is neither the representative of the corporation nor of its creditors or stockholders, but is the officer and representative of the court, — the hand of the court in which it holds the property while it operates the road for the benefit of those ultimately entitled to the property and the income.[4]

XV. Foreign Receivers. — The general rules applicable to this subject, including the territorial limits of the power of a receiver and the law of comity with respect thereto, have been discussed elsewhere and will not be reviewed here.[5]

XVI. Ancillary Receivers. — Where a line of railroad extends to several jurisdictions, and the court of one jurisdiction appoints receivers for the property and effects of the road in such jurisdiction, the courts of the other jurisdictions should, it has been held, appoint the same persons as receivers, for two reasons: First, the interests of the owners and creditors of the road require unity in the custody and management thereof;[6] second, courtesy and comity between courts of equal and co-ordinate powers require that a court of ancillary jurisdiction should, in such matters, conform, under ordinary circumstances, to the selection of receivers theretofore made by the court of primary jurisdiction.[7]

XVII. Conflicting Receiverships. — The general doctrines on this subject have been fully treated elsewhere.[8] With reference to railroads specifically, it has been held that after the appointment of a general receiver for the company the court will not appoint a separate receiver for one of its branches.[9]

1. Cowdrey *v.* Galveston, etc., R. Co., 1 Woods (U. S.) 331.

2. Farmers L. & T. Co. *v.* Central R. Co., 2 McCrary (U. S.) 318.

3. Farmers L. & T. Co. *v.* Central R. Co., 2 McCrary (U. S.) 318.

4. **Receiver Represents the Court.** — Union Bank *v.* Kansas City Bank, 136 U. S. 223; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434; New York Security, etc., Co. *v.* Louisville, etc., R. Co., 102 Fed. Rep. 389; Ames *v.* Union Pac. R. Co., 74 Fed. Rep. 344.

In Railway Foreclosure Suits it has been said that the appointment of a receiver is presumed to be for the benefit of the mortgagees and for the protection of their interests. New Jersey Midland R. Co. *v.* Wortendyke, 27 N. J. Eq. 658.

Agent of Corporation Appointed by Law. — "The receiver, within the sphere of his functions, represents the company; by virtue of such a relationship he exercises all its necessary franchises, and in my opinion he is its agent, appointed, not by the corporate body itself, but by the law for certain ends of its own." Beasley, C. J., in Bartlett *v.* Keim, 50 N. J. L. 260.

5. See the title Receivers, vol. 23, p. 992.

Reliance upon Recognition by Comity. — It has been held that though a part of the road over which a receiver has been appointed extends into another state, the appointing court has power to direct the acts of the road, as it may rely on the rule of comity by which the courts in the other state will recognize such directions, and aid in their enforcement. Guarantee Trust, etc., Co. *v.* Philadelphia, etc., R. Co., 69 Conn 709.

6. **Ancillary Receivers.** — Dillon *v.* Oregon, etc., R. Co., 66 Fed. Rep. 622; New York, etc., R. Co. *v.* New York, etc., R. Co., 58 Fed. Rep. 278; Port Royal, etc., R. Co. *v.* King, 93 Ga. 63.

See for a general discussion of this subject, the title Receivers, vol. 23, p. 992.

7. New York, etc., R. Co. *v.* New York, etc., R. Co., 58 Fed. Rep. 278.

Powers of Ancillary Court. — Where a receiver of a railroad appointed by the courts of one state was subsequently appointed as ancillary receiver by the courts of another, it was held that the courts of the latter jurisdiction had the power to fix a schedule of wages to be paid employees of the road, though ordinarily the court of initial proceedings should make directions in respect to the management of the property as a whole. Guarantee Trust, etc., Co. *v.* Philadelphia, etc., R. Co., 69 Conn. 709.

8. See the title Receivers, vol. 23, p. 992.

9. Clap *v.* Interstate St. R. Co., 61 Fed. Rep. 537.

But where, it has been held, allied companies have been carried into the hands of receivers along with the parent company, they should have receivers of their own appointed.[1]

XVIII. Claims — Priorities — 1. In General. — While, as a general rule, the demands against a railroad company secured by legal liens at the time of the filing of the bill for the appointment of a receiver will take precedence over claims superior in equity, but not secured by legal lien,[2] the power of a court of equity in the case of railroad receiverships to allow priority to certain classes of unsecured claims, though sometimes criticised as a transgression of the rights of lien creditors,[3] is now too thoroughly established to admit of controversy.[4] There is no longer doubt of the power of a court of equity to create claims through receivers in a suit for the foreclosure of a railroad mortgage, which take precedence of the lien of the mortgage.[5] This power, it has been held, is a part of that equitable jurisdiction whereby it is the duty of the court to protect and preserve the trust funds or property in its hands.[6] It is, undoubtedly, however, a power to be exercised with great caution, and, if possible, with the consent or acquiescence of the parties interested in the fund.[7] It is the exception and not the rule that

1. Evans *v.* Union Pac. R. Co., 58 Fed. Rep. 497.

2. **Priority of Claims — General Rule.** — Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82; Alexander *v.* Mercantile Trust, etc., Co., 100 Ga. 537. And see Jones *v.* Central Trust Co., (C. C. A.) 73 Fed. Rep. 568.

Rights of Execution Creditors. — Where, at the time a receiver is appointed at the suit of trust creditors to take possession of a railroad and carry it on, there are a number of executions against the company in the hands of the sheriff, and there are funds derived from income in the hands of or due to the company, the execution creditors are entitled to such funds in preference to the trust creditors. Gibert *v.* Washington City, etc., R. Co., 33 Gratt. (Va.) 645. And see Gilman *v.* Illinois, etc., Tel. Co., 91 U. S. 603; Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459; American Bridge Co. *v.* Heidelbach, 94 U. S. 798.

Equitable Lien on Freights. — For a case in which an equitable lien on freights was enforced against a receiver appointed in proceedings to foreclose a mortgage, see Fidelity Ins., etc., Co. *v.* Norfolk, etc., R. Co., 72 Fed. Rep. 704.

Priorities in Surplus Earnings. — The surplus earnings over and above the cost of operating railroad property in the hands of a receiver appointed on a creditor's bill, belong to the creditor for whose benefit the creditor's bill has been filed, in the same order of priority as must, upon principles of equity, be observed in the distribution of the property upon a sale thereof. Thomas *v.* Cincinnati, etc., R. Co., 91 Fed. Rep. 202.

Extension of Receivership — Creditor Claiming Priority. — Where a railroad is in the hands of receivers pending foreclosure and the settlement of claims, it is proper, on the application of an alleged creditor claiming priority as to a certain portion of the road not included in the receivership property, to extend the receivership over the portion of the road as to which there is such claim of priority. Mercantile Trust Co. *v.* Missouri, etc., R. Co., 41 Fed. Rep. 8.

3. See Kneeland *v.* American L. & T. Co., 136 U. S. 89.

4. Fosdick *v.* Schall, 99 U. S. 235; Hale *v.* Frost, 99 U. S. 389; Thomas *v.* Peoria, etc., R. Co., 36 Fed. Rep. 808. And see also other cases cited throughout this subdivision.

Rights of Assignees of Debts. — It has been held that the preferences created by an order of court as to the payment of claims by a receiver, attach to the debts themselves and continue in the hands of the assignees thereof. Northern Pac. R. Co. *v.* Lamont, (C. C. A.) 69 Fed. Rep. 23.

5. Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286; Wallace *v.* Loomis, 97 U. S. 146; Louisville Trust Co. *v.* Louisville, etc., R. Co., 174 U. S. 674, *reversing* (C. C. A.) 84 Fed. Rep. 539.

Stated Grounds of Allowance. — The courts have given certain unsecured claims a preference over the bondholders on two general grounds: first, that income which should have been appropriated to the current operating expenses has been diverted to the bondholders or to the improvement of the *corpus* of the mortgaged estate; second, that, for the purpose of continuing the operation of the railroad, the company should have credit for its operating expenses, a credit which could not be maintained were it to be subjected to the hazard of the general financial condition of the company. Guarantee Trust, etc., Co. *v.* Philadelphia, etc., R. Co., 31 N. Y. App. Div. 511.

6. Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286; Wallace *v.* Loomis, 97 U. S. 146.

7. Bradley, J., in Wallace *v.* Loomis, 97 U. S. 146.

Restricted Limits of Rule. — A court of equity should confine itself within very restricted limits in the application of the doctrine that in certain cases a court having a road or fund under its control may be justified in awarding priority over the claims of mortgage bondholders to unsecured claims originating prior to a receivership. Virginia, etc., Coal Co. *v.* Central R., etc., Co., 170 U. S. 355; Thomas

priority of liens can be displaced.[1]

2. Grounds of Priority — *a.* IN GENERAL. — Unsecured claims which are given priority over the mortgage debt or existing liens must be of a nature which are entitled, in equity, to prior payment. No court has the right, arbitrarily, to give priority to unsecured claims, or to exercise such power, in the absence of equitable grounds.[2]

b. REGULATION OF PRIORITIES AS CONDITION OF APPOINTMENT OF RECEIVER. — In some cases the power of the appointing court to regulate the priorities of claims before the receiver is maintained on the ground that the court has the right to reserve such power as a condition of its equitable interposition.[3] But it is well settled that when application is made for the appointment of a receiver of railroad property, the court has no right to make the receivership conditional upon the payment of unsecured claims which are not entitled, in equity, to priority over the liens displaced.[4]

c. PRIORITIES AS AFFECTED BY PERSON APPLYING FOR RECEIVER. — A distinction seems to have been intimated by some of the cases between the status of receivership expenses, where the appointment is made at the instance of mortgagees or bondholders, and where such appointment is at the instance of judgment creditors or of the corporation itself. These cases seem to hold that the expenses of receiverships created on the application of others than mortgagees have priority over mortgage bondholders only out of the income, but not out of the *corpus* of the mortgaged property.[5] But the weight of authority, and the preferable doctrine, is in favor of the general rule that operating expenses incurred by the receiver under order of court take precedence over pre-existing liens, mortgage or otherwise.[6]

d. DIVERSION OF INCOME — (1) *In General.* — The matter of "diversion

v. Western Car Co., 149 U. S. 95; Kneeland *v.* American L. & T. Co., 136 U. S. 89.

1. Kneeland *v.* American L. & T. Co., 136 U. S. 92; New York Security, etc., Co. *v.* Louisville, etc., R. Co., 102 Fed. Rep. 390; Central Trust Co. *v.* Wabash, etc., R. Co., 46 Fed. Rep. 26.

2. Thomas *v.* Western Car. Co., 149 U. S. 95; Kneeland *v.* American L. & T. Co., 136 U. S. 89.

3. Central Trust Co. *v.* Chattanooga, etc., R. Co., (C. C. A.) 94 Fed. Rep. 280; Farmers' L. & T. Co. *v.* Kansas City, etc., R. Co., 53 Fed. Rep. 182; Central Trust Co. *v.* Utah Cent. R. Co. 16 Utah 12. And see Fosdick *v.* Schall, 99 U. S. 235.

Implied Consent of Lienor. — When the holder of a lien upon the realty alone of a railroad asks a court to take possession by a receiver not only of the real, but also of the personal property, and for the benefit of the real, such application is a consent on the part of the holder of such real estate lien that the rental value of the personalty thus taken possession of and operated for the benefit of the railroad shall be paid in preference to his own claim. New York Security, etc., Co. *v.* Louisville, etc., R. Co., 102 Fed. Rep. 390. And see Kneeland *v* American L. & T. Co., 136 U. S. 92; Central Trust Co. *v.* Wabash, etc., R. Co., 46 Fed. Rep. 26.

4. Kneeland *v.* American L. & T. Co., 136 U. S. 89; Third St., etc., R. Co. *v.* Lewis, (C. C. A.) 79 Fed. Rep. 196.

5. See Kneeland *v.* American L. & T. Co., 136 U. S. 89; Street *v.* Maryland Cent. R. Co., 59 Fed. Rep. 25; Central Trust Co. *v.* Wabash, etc., R. Co., 46 Fed. Rep. 26.

Judgment Creditor's Receivership — Priority to Surplus. — In Sage *v.* Memphis, etc., R. Co., 125 U. S. 361, 35 Am. & Eng. R. Cas. 40, a receiver of a railroad company was appointed at the suit of a judgment creditor. In about two years the receiver was discharged and the property turned over again to the company. A balance of net earnings remained in his hands. In a contest as to the payment of this balance, between the judgment creditor at whose suit the receiver was appointed and intervening trustees under a mortgage, it was held that the judgment creditor was entitled to priority.

Appointment on Application of Trustee in Mortgage. — But the earnings of a railroad in the hands of a receiver appointed by the court pending foreclosure at the instance of the trustee in the mortgage, will be applied in payment of a deficiency judgment rendered in favor of the trustee after sale of the road in preference to general judgments against the road, though prior in time to the deficiency judgment, where the mortgage, which was prior to the general judgments, though not in express terms covering the income or earnings of the road, did provide that the trustee, on default, should take possession of the road and operate it until sale. Such a provision operates as an appropriation of the earnings of the road, between the time of default and sale, to the payment of the mortgage debt. Central Trust Co. *v.* Chattanooga, etc., R. Co., 89 Fed. Rep. 388.

6. See Kneeland *v.* Bass Foundry, etc., Works, 140 U. S. 592, in which Kneeland *v.* American L. & T. Co., 136 U. S. 89, is *distinguished.*

of income" is of considerable importance on the question of allowance of priority to unsecured debts against railroad companies, so that the term and its exact limitations deserve explanation.[1] The doctrine may be briefly summarized as follows: That a railroad should be continued in operation is not only necessary to the interests of its bondholders, but is a duty to the public.[2] Bondholders are, therefore, assumed to hold subject to an implied provision that out of the gross earnings of the railroad all necessary operating expenses must be paid before the net income arises out of which the mortgage interest is to be paid or permanent improvements made to the *corpus* of the property.[3] The company is regarded, in a certain sense, as a trustee of its receipts,[4] its duty being to apply such receipts, which constitute the "current debt fund," to the payment of current charges. If, instead of doing this, the money is used to pay interest or to make permanent improvements to the railroad, this is a misapplication of trust funds, and a court of equity in administering the property, if the road while in its receiver's hands makes any profit (*i. e.*, net income), will apply such net income, to an amount equal to the amount of the diversion, to the payment of back debts for current operating expenses, instead of to payment of interest or the improvement of the property.[5] So, also, if the court uses its receiver's net income temporarily for the permanent improvement of the railroad property instead of paying such back debts, this will be treated as in the nature of a loan, and upon the sale of the property, back debts to the amount of the receiver's income so used will be paid out of the proceeds of the sale.[6] It has also been held that, even if the receiver has not applied net income to the improvement of the property, the court will, out of the proceeds of the sale of the road, pay such back debts to the amount of the diversion existing at the time the receiver was appointed.[7] But the limitation as to time will apply, and may cut out the equitable priority of back debts, even though there has been a diversion.[8]

(2) *Waiver of Preference on Ground of Diversion.* — One who furnishes operating supplies may waive the preferential claim therefor on the ground of diversion of income, by taking notes payable at a future date. This will be

Consolidated System — Apportionment of Expenses. — New York Security, etc., Co. *v.* Louisville, etc., R. Co., 102 Fed. Rep. 382.

Employees of a Railroad Company in the hands of a receiver pending foreclosure have no claim on the mortgagees at whose instance the receiver was appointed, where the income and *corpus* of the property are insufficient to pay their wages, unless such liability on the part of plaintiffs was imposed by the court as a condition to the appointment of the receiver. Farmers' L. & T. Co. *v.* Oregon Pac. R. Co., 31 Oregon 237, 65 Am. St. Rep. 822.

1. **Diversion as Foundation of Rule of Priorities.** — With reference to the power of a court of equity to allow priority to unsecured debts, it has been said that it "rests upon the fact that in the administration of the affairs of the company the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors." *Per* Waite, C. J., in Fosdick *v.* Schall, 99 U. S. 235.

2. McCornack *v.* Salem Consol. St. R. Co., 34 Oregon 543.

3. Burnham *v.* Bowen, 111 U. S. 776; Fosdick *v.* Schall, 99 U. S. 235; Thomas *v.* Peoria, etc., R. Co., 36 Fed. Rep. 808; McCornack *v.* Salem Consol. St. R. Co., 34 Oregon 543.

4. Harlan, J., in Thomas *v.* Peoria, etc., R Co., 36 Fed. Rep. 808.

5. Fosdick *v.* Schall, 99 U. S. 235; Southern R. Co. *v.* Carnegie Steel Co., (C. C. A.) 76 Fed. Rep. 492; Finance Co. *v* Charleston, etc., R. Co., 52 Fed. Rep. 524; Thomas *v.* Peoria, etc., R. Co., 36 Fed. Rep. 808. And see Terre Haute, etc., R. Co. *v* Cox, (C. C. A.) 102 Fed. Rep. 825.

Where Diversion Cannot Be Shown. — The doctrine that the income of a railroad applied by a receiver to the payment of interest on the mortgage debt or in permanent improvements must be restored to the fund applicable to the debts of the income, cannot be applied where it is impossible to ascertain whether such expenditures have been made out of the income or out of money borrowed. Central Trust Co. *v.* East Tennessee, etc., R. Co., (C. C. A.) 80 Fed. Rep. 624.

Senior Mortgagees — Junior Mortgagees — Diversion to Pay Former. — But where there has been a diversion of the income to the payment of interest on senior mortgages, junior mortgagees cannot be called upon to make reimbursement and restoration to the fund applicable to the payment of the debts of the income. Central Trust Co. *v.* East Tennessee, etc., R. Co., (C. C. A.) 80 Fed. Rep. 624.

6. Burnham *v.* Bowen, 111 U. S. 776; Union Trust Co. *v.* Souther, 107 U. S. 591; Turner *v.* Indianapolis, etc , R. Co., 8 Biss. (U. S.) 315.

7. Burnham *v.* Bowen, 111 U. S. 776.

8. See *infra*, this subdivision, *Back Debts; Period of Time Required.*

held to be an assent to the application of earnings, during the period which the notes are to run, to purposes other than the payment of debts for supplies.[1]

3. Nature of Claims to Which Priority Is Given — *a.* IN GENERAL. — No definite limits can be traced to include the class of claims which have generally been designated and allowed as preferential.[2] Indeed, it is not always easy to determine what are preferred claims and what not, much depending upon the particular circumstances of each case.[3]

b. COSTS AND EXPENSES OF RECEIVERSHIP. — The costs and expenses of the receivership are chargeable as a lien upon the receivership property superior to all other liens.[4] The expenses of the receivership are necessarily burdens on the property taken possession of, and this irrespective of who may be the ultimate owner, or who may have the prior lien, or who may have invoked the receivership.[5]

c. EXPENDITURES NECESSARY TO PRESERVATION OF PROPERTY. — Expenditures necessary to the preservation of the receivership property may be allowed priority over existing liens, such expenditures being regarded as, in fact, incurred for the benefit of the lienholders.[6] So, also, money necessary for the proper management of a railroad, borrowed by the officers of the road while acting as receiver, under an order of court giving them power "to continue in the possession and management of the property," should be replaced out of the fund in court, realized from the income of the road while in the receiver's hands.[7]

d. REPAIRS. — The expense of necessary repairs may be charged as a first lien on railroad property in the hands of a receiver, prior to existing mortgages thereon.[8] But where what has been done is so extensive as to amount

1. Bound *v.* South Carolina R. Co., (C. C. A.) 58 Fed. Rep. 473. *Compare* Burnham *v.* Bowen, 111 U. S. 776; Southern R. Co. *v.* Carnegie Steel Co., (C. C. A.) 76 Fed. Rep. 492.

2. Central Trust Co. *v.* Chattanooga, etc., R. Co., (C. C. A.) 94 Fed. Rep. 280.

3. McCornack *v.* Salem Consol. St. R. Co., 34 Oregon 543.

4. Expenses of Receivership. — Pennsylvania Ins. Co. *v.* Jacksonville, etc., R. Co., (C. C. A.) 66 Fed. Rep. 421; Louisville, etc., R. Co. *v.* Schmidt, (Ky. 1899) 52 S. W. Rep. 835; Ellis *v.* Boston, etc., R. Co., 107 Mass. 1; Farmers' L. & T. Co. *v.* Oregon Pac. R. Co., 31 Oregon 237, 65 Am. St. Rep. 822.

5. Kneeland *v.* American L. & T. Co., 136 U. S. 92; New York Security, etc., Co. *v.* Louisville, etc., R. Co., 102 Fed. Rep. 390; Central Trust Co. *v.* Wabash, etc., R. Co., 46 Fed. Rep. 26.

Implied Consent of Mortgagee. — A mortgagee or lienholder who procures a receivership of a railroad, thereby consents to the subjection of his interest in the property, of which possession is taken at his instance, to the discharge of all liabilities and expenses incurred by the receiver under the proper orders of the court. Kneeland *v.* American L. & T. Co., 136 U. S. 92; Fosdick *v.* Schall, 99 U. S. 235; Central Trust Co. *v.* Wabash, etc., R. Co., 38 Fed. Rep. 63.

6. Preservation of Property — Expenses of. — Southern R. Co. *v.* Carnegie Steel Co., 176 U. S. 257, *affirming* (C. C. A.) 76 Fed. Rep. 492; Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286; Kneeland *v.* Bass Foundry, etc., Works, 140 U. S. 592; Wallace *v.* Loomis, 97 U. S. 146; Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 45 Fed. Rep. 664; Brown *v.* New York, etc., R. Co., (Supm. Ct.) 19 How. Pr. (N. Y.) 84.

7. *Ex p.* Carolina Nat. Bank, 18 S. Car. 289. And see Cowdrey *v.* Galveston, etc., R. Co., 1 Woods (U. S.) 337; *Ex p.* Brown, 15 S. Car. 531; *In re* Fifty-Four First Mortg. Bonds, 15 S. Car. 304.

8. Cost of Repairs. — Southern R. Co. *v.* Carnegie Steel Co., 176 U. S. 257, *affirming* (C. C. A.) 76 Fed. Rep. 492; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434; Central Trust Co. *v.* Clark, 49 U. S. App. 453; Hoover *v.* Montclair, etc., R. Co., 29 N. J. Eq. 4.

Doctrine of Implied Notice and Consent. — All persons who deal with a railroad corporation as creditors or holders of its obligations must necessarily be held to do so in the view that if it falls into insolvency and its affairs come into a court of equity for adjustment involving the transfer of its franchises and property by a sale into other hands, to have the purposes of its creation still carried out, the court, while in charge of the property, has the power, and under some circumstances it may be its duty, to make such repairs as are necessary to keep the road and its structures in a safe and proper condition to serve the public. Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434.

Taking Collateral Security. — It has been held that where a vendor of rails for use in repairing the road took considerable collateral security from the road for the debt, such circumstances may be considered as evidence that the vendor did not sell upon the faith of his equitable lien upon the earnings of the road.

to a reconstruction of the road or the construction of a new road, claims therefor will not be allowed a preference over a pre-existing mortgage.[1]

e. ROLLING STOCK AND EQUIPMENT. — Debts for necessary rolling stock and equipment while the road is in the hands of the receiver may be allowed as preferential claims.[2]

f. TAXES. — Claims for taxes on a railroad in the hands of a receiver take precedence over the claims of mortgagees.[3]

g. CLAIMS FOR DAMAGES — **Torts During Receivership.** — Damages for injuries to persons or property during the receivership, caused by the torts of the receiver's agents and employees, are classed as operating expenses and are accorded the same priority of payment as belongs to other necessary expenses of the receivership. Such claims will be paid out of the net income if that is sufficient, but in the event of a deficiency they will be paid out of the *corpus*. Such claims, therefore, have priority over mortgage debts, or other debts existing when the action was brought in which the receiver was appointed.[4]

Torts Prior to Receivership. — But damages for torts committed by the company prior to the appointment of the receiver are not classed as operating expenses, and the rule elsewhere considered, that operating expenses for a limited time preceding the appointment of the receiver shall be allowed priority,[5] does not apply to such claims.[6]

Lackawanna Iron, etc., Co. *v.* Farmers' L. & T. Co., 176 U. S. 298.

1. Lackawanna Iron, etc., Co. *v.* Farmers' L. & T. Co., 176 U. S. 298.

2. Equipment. — Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286; Stewart *v.* Wisconsin Cent. R. Co., 95 Fed. Rep. 577; McLane *v.* Placerville, etc., R. Co., 66 Cal. 606; Vilas *v.* Page, 106 N. Y. 439.

Rolling Stock — Labor and Supplies.—In Frank *v.* Denver, etc., R. Co., 23 Fed. Rep. 123, the court held that where the payment for rolling stock purchased by the receiver so absorbed the earnings of the road that the receiver was unable to execute the orders of the court relating to demands for labor and supplies, payment of the principal sums falling due under the rolling stock contracts ought to be postponed until the demands for labor and supplies had been satisfied, but that the interest thereon should be paid as it matured.

3. Claims for Taxes — *United States.* — Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434; Georgia *v.* Atlantic, etc., R. Co., 3 Woods (U. S.) 434; U. S. Trust Co. *v.* Mercantile Trust Co., (C. C. A.) 88 Fed. Rep. 140; Mercantile Trust Co. *v.* Atlantic, etc., R. Co., 80 Fed. Rep. 18; Ames *v.* Union Pac. R. Co., 74 Fed. Rep. 345; Clyde *v.* Richmond, etc., R. Co., 63 Fed. Rep. 21; Central Trust Co. *v.* Wabash, etc., R. Co., 26 Fed. Rep. 11.

Alabama. — Perry County *v.* Selma, etc., R. Co., 65 Ala. 391.

Illinois. — Union Trust Co. *v.* Weber, 96 Ill. 346.

Kansas. — St. Joseph, etc., R. Co. *v.* Smith, 19 Kan. 225.

Missouri. — Greeley *v.* Provident Sav. Bank, 98 Mo. 458.

New York. — Central Trust Co. *v.* New York City, etc., R. Co., 110 N. Y. 250.

Pennsylvania. — Philadelphia, etc., R. Co., *v.* Com., 104 Pa. St. 80; Com. *v.* Runk, 26 Pa. St. 235.

4. Damages to Persons or Property. — Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434; Barton *v.* Barbour, 104 U. S. 126; Cowdrey *v.* Galveston, etc., R. Co., 93 U. S. 352; Anderson *v.* Condict, (C. C. A.) 93 Fed. Rep. 349; Cross *v.* Evans, (C. C. A.) 86 Fed. Rep. 1; St. Louis S. W. R. Co. *v.* Holbrook, (C. C. A.) 73 Fed. Rep. 112; Green *v.* Coast Line R. Co., 97 Ga. 15, 54 Am. St. Rep. 379; Mobile, etc., R. Co. *v.* Davis, 62 Miss. 271; Klein *v.* Jewett, 26 N. J. Eq. 474; *Ex p.* Brown, 15 S. Car. 518; Ryan *v.* Hayes, 62 Tex. 42.

Contra. — In Davenport *v.* Alabama, etc., R. Co., 2 Woods (U. S.) 519, the court decided this question differently. In this case a passenger was injured through the negligence of the receiver's employees, and, the road not making running expenses, the passenger, who had recovered judgment against the receiver, petitioned the court to have his claim paid out of the proceeds of a sale of the road, on the ground that his claim was one incurred in the necessary expense of the trust. It was held that he was not entitled to payment prior to the bondholders.

The Texas Receivers' Act (Rev. Stat. Tex., art. 1466 *et seq.*) does not authorize a judgment for damages for personal injuries to be made a preferential lien to a mortgage executed before the act was passed. Foreman *v.* Central Trust Co., (C. C. A.) 71 Fed. Rep. 776.

5. See *infra*, this section, *Back Debts*.

6. Torts Prior to Receivership. — Front St. Cable R. Co. *v.* Drake, 84 Fed. Rep. 257; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., (C. C. A.) 79 Fed. Rep. 227; New York Security, etc., Co. *v.* Louisville, etc., R. Co., 79 Fed. Rep. 386; Farmers' L. & T. Co. *v.* Nestelle, (C. C. A.) 79 Fed. Rep. 748; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 74 Fed. Rep. 431; Ames *v.* Union Pac. R. Co., 74 Fed. Rep. 335; St. Louis Trust Co. *v.* Riley, (C. C. A.) 70 Fed. Rep. 32; Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 45 Fed. Rep. 664; Easton *v.* Houston, etc., R. Co., 38 Fed. Rep. 12; Hiles *v.* Case, 14 Fed. Rep. 141; *In re* Dexterville Mfg., etc., Co., 4 Fed. Rep. 873; Barnett *v.* East Tennessee, etc., R. Co. (Tenn. Ch. 1898) 48 S. W. Rep. 817.

Contra. — In Dow *v.* Memphis, etc., R. Co.,

Damages for Breach of Contract. — Nor is a claim for damages for breach of a contract to receive lumber at a certain switch, the contract having been abrogated before the appointment of a receiver, a claim of a preferential character which would entitle the claimants to an allowance against the property in the hands of a receiver, or out of the earnings of the road in preference to the mortgage bondholders.[1]

h. OPERATING EXPENSES — (1) *In General.* — Operating expenses in the conduct of the road by the receiver, such as are necessary to keep the road a going concern, constitute a first lien on the receivership property and funds, irrespective of the lien of mortgages or other incumbrances.[2] So, also, debts for operating expenses incurred within a limited time before the appointment of the receiver are regarded as preferential claims.[3] And it makes no differ-

20 Fed. Rep. 260, 17 Am. & Eng. R. Cas. 324, the United States circuit court for the eastern district of *Arkansas*, in appointing a receiver, ordered that he should pay, *inter alia*, damages for injuries to persons or property which accrued within six months past, and that such claims should be a lien paramount and superior to the liens of the mortgages. This position is severely criticised in Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 45 Fed. Rep. 664, 46 Am. & Eng. R. Cas. 296, by the United States circuit court for the eastern district of *Wisconsin*.

Rule in Georgia.—Where a judgment for damages for negligence was obtained against a railroad company before mortgages thereon were foreclosed or a receiver appointed, such damages so reduced to judgment should, it has been held, be regarded as operating expenses, charged by the judgment upon the income, as against the mortgages and all their incidents. So long as such a charge is unsatisfied the mortgagees cannot justly and equitably divert the income from its payment and take the benefit of such diversion, whether directly or indirectly. Georgia Southern, etc., R. Co. *v.* Barton, 101 Ga. 466; Green *v.* Coast Line R. Co., 97 Ga. 15, 54 Am. St. Rep. 379.

1. Central Trust Co. *v.* Wabash, etc., R. Co., 32 Fed. Rep. 187.

2. Operating Expenses — *United States.* — Virginia, etc., Coal Co., *v.* Central R., etc., Co., 170 U. S. 355; Kneeland *v.* Bass Foundry, etc., Works, 140 U. S. 592; Kneeland *v.* American L. & T. Co., 136 U. S. 92; New York Security, etc., Co. *v.* Louisville, etc., R. Co., 102 Fed. Rep. 390; Myer *v.* Western Car Co., 102 U. S. 1; Turner *v.* Indianapolis, etc., R. Co., 8 Biss. (U. S.) 315; Illinois Trust, etc., Bank *v.* Doud, (C. C. A.) 105 Fed. Rep. 123; Lee *v.* Pennsylvania Traction Co., 105 Fed. Rep. 405; Pennsylvania Ins. Co. *v.* Jacksonville, etc., R. Co., (C. C. A.) 93 Fed. Rep. 60; Ruhlender *v.* Chesapeake, etc., R. Co., (C. C. A.) 91 Fed. Rep. 5; Central Trust Co. *v.* Clark, (C. C. A.) 81 Fed. Rep. 269; Southern R. Co. *v.* Carnegie Steel Co., (C. C. A.) 76 Fed. Rep. 492; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 71 Fed. Rep. 245; Cleveland, etc., R. Co. *v.* Knickerbocker Trust Co., 64 Fed. Rep. 623; Central Trust Co. *v.* Wabash, etc., R. Co., 46 Fed. Rep. 26; Farmers' L. & T. *v.* Green Bay, etc. R. Co., 45 Fed. Rep. 664. And see Burnham *v.* Bowen, 111 U. S. 776.

New York. — Brown *v.* New York, etc., R. Co., (Supm. Ct.) 19 How. Pr. (N. Y.) 84.

South Carolina. — *Ex p.* Carolina Nat. Bank, 18 S. Car. 289.

Debt for Motive Power. — That such a claim incurred by a street railway company pending its receivership is entitled to a preference, see Manhattan Trust Co. *v.* Sioux City Cable R. Co., 76 Fed. Rep. 658.

Receiver under English Statute. — When a receiver has been appointed under the English Railway Companies Act, the moneys received by him must be applied first in providing for the "working expenses" of the railway, even if, by authority of a special act, a fixed dividend on shares and the interest on debentures, forming the capital, raised for a particular undertaking of the company, are charged on the gross receipts of that undertaking. *In re* Eastern, etc., R. Co., 45 Ch. D. 367.

3. Grand Trunk R. Co. *v.* Central Vermont R. Co., 88 Fed. Rep. 620; Central Trust Co. *v.* Clark, (C. C. A.) 81 Fed. Rep. 269. And see McCornack *v.* Salem Consol. St. R. Co., 34 Oregon 543.

See further in this connection, *infra*, this section, *Back Debts*.

Underlying Principle — Advantage of Mortgagees. — Easton *v.* Houston, etc., R. Co., 38 Fed. Rep. 12.

Misappropriation of Income. — The equity of a current supply claimant in subsequent income arising from the operation of a railroad under the direction of the court is not affected by the fact that while the company was operating the road its income had been misappropriated and diverted not only to purposes not inuring to the benefit of the mortgage bondholders, but also foreign to the beneficial maintenance, preservation, and improvement of the property. Virginia, etc., Coal Co. *v* Central R., etc., Co., 170 U. S. 355. And see Thomas *v.* Western Car Co., 149 U. S. 95; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434; Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286.

Doctrine of Estoppel. — To a certain extent and under some circumstances, the doctrine of estoppel may be applicable as justifying a preference for claims for operating expenses over a mortgage debt; that is, bondholders, upon default in the payment of interest, rarely proceed at once to foreclose their mortgages or take possession of the road, but, instead, permit the company to continue in control after such default, though its insolvency may be notorious. It is considered that under such circumstances debts for necessary operating

ence, it has been held, if the person furnishing supplies allows his claim to remain an open account, or prefers to close it with a note or acceptance giving extended credit; nor is it any waiver of the right to renew the paper at maturity.[1] But the doctrine giving priority to operating expenses incurred before the appointment of the receiver only applies where there has been a diversion of the income of a going concern from the purposes to which that income should be, in equity, primarily devoted.[2]

Useless or Defective Materials — Excessiveness of Price. — While a receiver may, as has already been stated, purchase material essential for the operation of the road, he cannot bind the trust by a purchase of material not wanted, excessive in price and defective in quality.[3]

Mere Fact that Expenditure Wise and Judicious. — The mere fact that a particular expenditure was wise and judicious, and enhanced the value of the mortgaged property, is not sufficient to warrant its allowance as a preferred claim, where not necessary to keep the road a going concern.[4]

Rule of Discretion of Court. — If, either from lapse of time or from other circumstances, the debt for equipment or labor sought to be preferred by order of the court and to be paid out of the earnings of the receivership is more properly to be classed with the general debts of the corporation than with those incurred for current expenses proximately connected with the possession and operation of the road by the receiver, it is at least a proper exercise of the discretion of the court to disallow the application.[5]

(2) *Rentals of Leased Lines — Rolling Stock.* — Where a receiver is appointed for a railroad which leases other lines, the rentals for such leased lines, if the leases are adopted by the receiver, may be regarded as an operating expense and given priority as such.[6] But an indebtedness due for a leased line accruing before the appointment of a receiver is not entitled to preference where it was not necessary to keep the road a going concern.[7] It has been held, where the receiver was appointed at the instance of persons other than the mortgagees, that the rentals of leased lines during receiverships would be prior to the claims of mortgagees only out of income, and not out of the proceeds of a sale of the *corpus*.[8]

The Amount of Such Rentals is to be determined by the actual value of the leasehold, and not necessarily according to the rate established by the contract of lease.[9]

Car Rentals. — The lessor of cars is entitled to a reasonable rent therefor while such cars are in the hands of and used by the receiver of the lessee company, and such claim is to be regarded as a part of the expenses of the receiver's administration of the company's property.[10]

expenses may fairly be held to have been contracted on the credit of the mortgagees and for their benefit. See Burnham *v.* Bowen, 111 U. S. 776; Union Trust Co. *v.* Souther, 107 U. S. 591; Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 45 Fed. Rep. 664.

Laches. — For the effect of laches on the part of a claimant for equipment upon his right to priority, see Stewart *v.* Wisconsin Cent. R. Co., 95 Fed. Rep. 577.

1. Burnham *v.* Bowen, 111 U. S. 776; Southern R Co. *v.* Carnegie Steel Co., (C. C. A.) 76 Fed. Rep. 492. But see Bound *v.* South Carolina R. Co., (C. C. A.) 58 Fed. Rep. 473.

2. Wood *v.* Guarantee Trust, etc., Co., 128 U. S. 416. See further in this connection, *infra*, this section, *Back Debts*.

3. Lehigh Coal, etc., Co. *v.* Central R. Co., 35 N. J. Eq. 426.

4. McCornack *v.* Salem Consol. St. R. Co., 34 Oregon 543.

5. Manchester Locomotive Works *v.* Truesdale, 44 Minn. 115.

6. **Leased Lines — Rentals.** — Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286; Central Trust Co. *v.* Continental Trust Co., (C. C. A.) 86 Fed. Rep. 517; Brown *v.* Toledo, etc., R. Co., 35 Fed. Rep. 444.

7. Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82, *distinguishing* Fosdick *v.* Schall, 99 U. S. 241.

8. Central Trust Co. *v.* Wabash, etc., R. Co., 46 Fed. Rep. 26; Central Trust Co. *v.* Wabash, etc., R. Co., 38 Fed. Rep. 63.

9. Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286.

10. **Car Rentals.** — Thomas *v.* Western Car Co., 149 U. S. 95; Kneeland *v.* American L. & T. Co., 136 U. S. 89; Grand Trunk R. Co. *v.* Central Vermont R. Co., 88 Fed. Rep. 636; Thomas *v.* Peoria, etc., R. Co., 36 Fed. Rep. 808; Mercantile Trust, etc., Co. *v.* Southern

(3) *Wages — Rule by Statute.* — By statute in some jurisdictions the wages of employees are made preferential claims upon the funds in the hands of the receiver.[1]

i. ADVANCES. — It has been held that one who advances a railroad company money with which to pay preferred claims does not acquire a right to the priority which would have been accorded to the claimants themselves;[2] although it is conceded that one who takes an assignment of such debt from the original creditor is entitled to priority.[3] But several cases at least seem inclined to regard a claim for advances made to discharge preferential debts as succeeding to the equities of the debts discharged, especially where such advances were made on the faith of repayment from the current income.[4]

j. LAWYERS' FEES. — As a general rule lawyers' fees for services rendered the corporation are not entitled to priority as for services necessary to keep the railroad a going concern.[5]

k. BACK DEBTS — (1) *In General.* — It is also stated as a general rule by many cases that a court of equity has the power, in appointing a receiver for a railroad, to decree a preference as to overdue debts for operating expenses incurred within a limited and reasonable time prior to the receivership.[6]

Iron Car Line Co., 113 Ala. 543; Lane *v.* Macon, etc., R. Co., 96 Ga. 630.

1. Wages. — Metropolitan Trust Co. *v.* Tonawanda Valley, etc., R. Co., 103 N. Y. 245; Raht *v.* Attrill, 42 Hun (N. Y.) 414.

Temporary Receiver. — It has been held that a statute providing that the wages due operatives and employees of corporations when a receiver is appointed should be a preferred debt against the corporation, did not apply to a mere temporary receiver, with no authority to pay debts. Franklin Trust Co. *v.* Northern Adirondack R. Co., 11 N. Y. App. Div. 249.

2. Advances to Pay Preferred Claims. — Morgans' Louisiana, etc., R., etc., Co. *v.* Texas Cent. R. Co., 137 U. S. 171. And see Illinois Trust, etc., Bank *v.* Ottumwa Electric R. Co., 89 Fed. Rep. 235; Southern Development Co. *v.* Farmers' L. & T. Co., (C. C. A.) 79 Fed. Rep. 212.

Advances to Complete Road. — One who advances money to a railroad company to pay a loan for cash borrowed to complete the road is not entitled to priority over the bondholders, unless it is shown that he acted under such inducements from the bondholders or had such dealings with them as estopped them from asserting their liens against his claim. Kelly *v.* Green Bay, etc., R. Co., 10 Biss. (U. S.) 151.

3. Assignments. — Union Trust Co. *v.* Walker, 107 U. S. 596, holding that it is a matter of no importance that the original creditor has parted with the claim. The right is one which attaches to the debt, and not to the person of the original creditor. And see McIlhenny *v.* Binz, 80 Tex. 1, 26 Am. St. Rep. 705.

4. Illinois Trust, etc., Bank *v.* Ottumwa Electric R. Co., 89 Fed. Rep. 235; Atkins *v.* Petersburg R. Co., 3 Hughes (U. S.) 307.

The Claims of Receivers Who Advanced Money to pay for operating expenses properly incurred in the operation of a mortgaged railroad for a limited time before the filing of a bill of foreclosure, are superior in equity to that of the mortgage, and should be first paid out of the income subsequently derived from the property, or, if that is insufficient, then out of the proceeds of the sale of the property in foreclosure. Ames *v.* Union Pac. R. Co., 74 Fed. Rep. 335.

But the claim of a receiver of a railroad company, which manages and controls a subordinate road, for expenditures upon the roadbed of the subordinate road, is a charge upon the entire road of such company, but subordinate to prior mortgage liens. Phinizy *v.* Augusta, etc., R. Co., 62 Fed. Rep. 771.

5. Attorneys' Fees. — Louisville, etc., R. Co. *v.* Wilson, 138 U. S. 501; Finance Co. *v.* Charleston, etc., R. Co., 52 Fed. Rep. 526 (Fosdick *v.* Schall, 99 U. S. 235, *distinguished*).

But where the order appointing the receiver authorized him to pay out of the income all wages due to employees for services rendered within a prescribed period prior to the order of appointment, it was held that a lawyer employed at a regular monthly salary came within the terms of the order. Finance Co. *v.* Charleston, etc., R. Co., 52 Fed. Rep. 526.

6. Overdue Debts for Operating Expenses — *United States.* — Southern R. Co. *v.* Carnegie Steel Co., 176 U. S. 257, *affirming* (C. C. A.) 76 Fed Rep. 492; Quincy etc., R. Co. *v.* Humphreys, 145 U. S. 82; Kneeland *v.* Bass Foundry, etc., Works, 140 U. S. 592; Wood *v.* Guarantee Trust, etc., Co., 128 U. S. 416; Union Trust Co. *v.* Morrison, 125 U. S. 591; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434; Burnham *v.* Bowen, 111 U. S. 776; Union Trust Co. *v.* Souther, 107 U. S. 591; Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286; Fosdick *v.* Schall, 99 U. S. 251; Huidekoper *v.* Hinckley Locomotive Works, 99 U. S. 258; Hale *v.* Frost, 99 U. S. 389; Illinois Trust, etc., Bank *v.* Doud, (C. C. A.) 105 Fed. Rep. 123; Lee *v.* Pennsylvania Traction Co., 105 Fed. Rep. 405; Central Trust Co. *v.* Clark, (C. C. A.) 81 Fed. Rep. 269; Central Trust Co. *v.* East Tennessee, etc., R. Co., (C. C. A.) 80 Fed. Rep. 624; Southern R. Co. *v.* Carnegie Steel Co., (C. C. A.) 76 Fed. Rep. 492; Southern R. Co. *v.* American Brake Co., (C. C. A.) 76 Fed. Rep. 502; New England R. Co. *v.* Carnegie Steel Co., (C. C. A.) 75 Fed. Rep. 54; Ames *v.* Union Pac. R. Co., 74 Fed. Rep. 335; Newgass *v.* Atlantic, etc., R. Co.,

Diversion of Income. — And the right to require the payment of debts for operating expenses incurred within a reasonable period before the appointment of a receiver does not, it has been held, depend upon whether current earnings have been used to pay the mortgage debt.[1]

But Claims for Car or Track Rentals accruing prior to a receivership are not preferential claims to be given priority over the mortgage debt.[2]

72 Fed. Rep. 712; Wood *v.* New York, etc., R. Co., 70 Fed. Rep. 741; Northern Pac. R. Co. *v.* Lamont, (C. C. A.) 69 Fed. Rep. 23; Clark *v.* Central R., etc., Co., (C. C. A.) 66 Fed. Rep. 803; Finance Co. *v.* Charleston, etc., R. Co., (C. C. A.) 62 Fed. Rep. 205; Farmers' L. & T. Co. *v.* Kansas City, etc., R. Co., 53 Fed. Rep. 182; Bound *v.* South Carolina R. Co., 47 Fed. Rep. 30; Central Trust Co. *v.* St. Louis, etc., R. Co., 41 Fed. Rep. 551; Thomas *v.* Peoria, etc., R. Co., 36 Fed. Rep. 808; Blair *v.* St. Louis, etc., R. Co., 22 Fed. Rep. 769; Dow *v.* Memphis, etc., R. Co., 20 Fed. Rep. 260; Calhoun *v.* St. Louis, etc., R. Co., 14 Fed. Rep. 9; Taylor *v.* Philadelphia, etc., R. Co., 7 Fed. Rep. 377.

Illinois. — St. Louis, etc., R. Co. *v.* O'Hara, 177 Ill. 525, *affirming* 75 Ill. App. 496.

Kentucky. — Douglass *v.* Cline, 12 Bush (Ky.) 608.

Minnesota. — Manchester Locomotive Works *v.* Truesdale, 44 Minn. 115.

New York. — Farmers L. & T. Co. *v.* Bankers, etc., Tel. Co., 148 N. Y. 315, 51 Am. St. Rep. 690.

Vermont. — Poland *v.* Lamoille Valley R. Co., 52 Vt. 144.

Virginia. — Addison *v.* Lewis, 75 Va. 701; Duncan *v.* Chesapeake, etc., R. Co., (Va. 1876) 15 Am. L. Reg. N. S. 428; Williamson *v.* Washington City, etc., R. Co., 33 Gratt. (Va.) 624.

A Claim Against a Receiver of a Railroad Company for Coal sold to it by the claimant during the three months prior to the appointment of the receiver, made upon the ground that, for the purpose of keeping the road a going concern it was necessary that the company should have credit for its operating expenses, should not be paid by the receiver where the company furnishing the coal has itself passed into the hands of a receiver, and the only creditor of the latter company is a second railroad company, which has agreed with the railroad company first referred to, to pay its bonds and coupons, and also any deficiency which may exist in its income on the payment of interest, taxes, rental, and operating expenses. Guarantee Trust, etc., Co. *v.* Philadelphia, etc., R. Co., 31 N. Y. App. Div. 511.

Temporary Receivers. — But it has been held that a mere temporary receiver of an elevated railroad under section 1788 of the *New York* Code of Civil Procedure, has no power and will not be ordered to pay a debt for supplies furnished the railroad prior to his appointment. Mercantile Trust Co. *v.* Kings County El. R. Co., 40 N. Y. App. Div. 141.

A different question would be presented, it was said in this case, if it appeared that the payment of the claim was essential to enable the receiver to continue the operation of the road, as might be the case if it were a claim for wages of persons now in the employ of the receiver, or for other necessary current expenses. And see Franklin Trust Co. *v.* Northern Adirondack R. Co., 11 N. Y. App. Div. 249.

In England it is held that when a railroad company has purchased rolling stock on the terms of paying for it by a series of instalments at fixed times, the stock not becoming the property of the company until the complete payment of all the instalments, and the vendor having the right to seize the stock on default in payment of any one instalment, the "working expenses" include overdue instalments as well as instalments as they become due. *In re* Eastern, etc., R. Co., 45 Ch. D. 367.

In Canada it has been held that a receiver of a railroad company is authorized to pay debts incurred before his appointment but not in the ordinary course payable until after his appointment, but that he is not entitled to pay any sums which at the time of his appointment were in the position of ordinary overdue debts. Gooderham *v.* Toronto, etc., R. Co., 8 Ont. App. 685.

1. Union Trust Co. *v.* Souther, 107 U. S. 591; Dow *v.* Memphis, etc., R. Co., 20 Fed. 260. *Compare* Illinois Trust, etc., Bank *v.* Doud, (C. C. A.) 105 Fed. Rep. 123; Hammerly *v.* Mercantile Trust, etc., Co., 123 Ala. 596.

Implied Assent of Plaintiff. — Where a receiver of a railroad company was appointed in a mortgage foreclosure proceeding, and the order of appointment, made on the application of the plaintiff in the action, recognizes the equity of certain claims, and authorizes the receiver to pay claims for current operating expenses incurred in the prior three months, this constitutes an assent by the plaintiff to the payment of such debts as, in equity, should be so paid. Guarantee Trust, etc., Co. *v.* Philadelphia, etc., R. Co., 31 N. Y. App. Div. 511.

2. Thomas *v.* Western Car Co., 149 U. S. 95; Kneeland *v.* American L. & T. Co., 136 U. S. 89; Grand Trunk R. Co. *v.* Central Vermont R. Co., 90 Fed. Rep. 163; Louisville, etc., R. Co. *v.* Central Trust Co., (C. C. A.) 87 Fed. Rep. 500; New York, etc., R. Co. *v.* New York, etc., R. Co., 58 Fed. Rep. 268.

Mileage Due on a Contract for the Use of Pullman Cars cannot be made a preferred claim on the appointment of a receiver for a railroad company. Pullman's Palace-Car Co. *v.* American L. & T. Co., (C. C. A.) 84 Fed. Rep. 18.

Repairs on Leased Cars. — It has been held that the lessor and owner of cars used by the receiver of a railroad company under order of court, is entitled, out of the proceeds of a sale of the railroad property, to the cost of extraordinary repairs upon the cars, above such as were rendered necessary for ordinary wear and tear, but not for mere depreciation due to a usual and proper use thereof. Lane *v.* Macon, etc., R. Co., 96 Ga. 630.

Leased Property — Conditional Sale. — Where rolling stock is leased to a railroad company with the proviso that title shall remain in the lessor until the rental has paid the purchase price, and that the lessor may resume possession upon default, the rental is not entitled to priority. Such an arrangement is really a conditional sale, not a letting, and the court will look beyond the form to the substance of the contract.[1]

Miscellaneous. — A claim for advertising matter furnished to a railroad company before the appointment of a receiver is not entitled to priority.[2] So, also, an order appointing a railroad receiver, authorizing him "to pay the amounts due and maturing for materials and supplies about the operation and for the use of said road," cannot, it has been held, properly be construed to include the payment of a renewed promissory note, originally made by the company in payment of a claim for rerolling iron for the use of the road several years previous thereto.[3]

Past Due Salary of Officer. — The arrears of the salary of the president of a railroad, due when a receiver is appointed, the income of the road during the receivership being only sufficient to pay current operating expenses, will not be paid in preference to a first mortgage debt out of the proceeds of a sale of the road.[4]

(2) *Period of Time Regarded.* — The general rule is that no precise period of time prior to the appointment of a receiver may be fixed as in all cases prescribing the limit anterior to which no claims will be allowed. Each case depends much upon the discretion of the court, to be exercised in view of the particular circumstances.[5] Perhaps the period most usually adopted is six months prior to the appointment of the receiver,[6] but varying periods have been fixed in particular cases, as shown in the notes.[7]

Renewal Notes. — Where the debt was contracted outside of the required limit of time, the fact that notes given in payment therefor were renewed

1. Conditional Sale. — Huidekoper *v.* Hinckley Locomotive Works, 99 U. S. 258; Fosdick *v.* Schall, 99 U. S. 235; Fidelity Ins., etc., Co. *v.* Shenandoah Valley R. Co., 86 Va. 1, 19 Am. St. Rep. 858.

2. Central Trust Co. *v.* East Tennessee, etc., R. Co., (C. C. A.) 80 Fed. Rep. 624.

3. Brown *v.* New York, etc., R. Co., (Supm. Ct.) 19 How. Pr. (N. Y.) 84.

4. National Bank *v.* Carolina, etc., R. Co., 63 Fed. Rep. 25.

5. Time Limit as to Indebtedness. — Southern R. Co. *v.* Carnegie Steel Co., 176 U. S. 257, *affirming* (C. C. A.) 76 Fed. Rep. 492; Paine *v.* Central Vermont R. Co., 118 U. S. 160; Morgan *v.* U. S., 113 U. S. 477; Thomas *v.* Cincinnati, etc., R. Co., 91 Fed. Rep. 195; Central Trust Co. *v.* East Tennessee, etc., R. Co., (C. C. A.) 80 Fed. Rep. 624; Northern Pac. R. Co. *v.* Lamont, (C. C. A.) 69 Fed. Rep. 23; Thomas *v.* Peoria, etc., R. Co., 36 Fed. Rep. 808, 36 Am. & Eng. R. Cas. 381; Blair *v.* St. Louis, etc., R. Co., 22 Fed. Rep. 474; Central Trust Co. *v.* Utah Cent. R. Co., 16 Utah 12.

6. Six Months' Rule. — Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434; Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286; Fosdick *v.* Schall, 99 U. S. 235; Turner *v.* Indianapolis, etc., R. Co., 8 Biss. (U. S.) 315; Lee *v.* Pennsylvania Traction Co., 105 Fed. Rep. 405; Grand Trunk R. Co. *v.* Central Vermont R. Co., 88 Fed. Rep. 620; Central Trust Co. *v.* East Tennessee, etc., R. Co., (C. C. A.) 80 Fed. Rep. 624; Clark *v.* Central R. etc., Co., (C. C. A.) 66 Fed. Rep. 803; Thomas *v.* Peoria, etc., R. Co., 36 Fed. Rep. 808; Blair *v.* St. Louis, etc., R. Co., 22 Fed. Rep. 474; Taylor *v.* Philadelphia, etc., R. Co., 7 Fed. Rep. 377.

7. While Six Months Is the Usual Time, it has been said that "perhaps in some large concerns, with extensive lines of road and a complicated business, a larger time might be necessary." Brewer J., in Blair *v.* St. Louis, etc., R. Co. 22 Fed. Rep. 474.

Ninety Days. — For a case in which a ninety-day limit was adopted, see Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 288.

Sale of Locomotive — More than Six Months. — One who sold a locomotive to a railroad company more than six months before the appointment of a receiver, and who made no application for a preference until nearly a year thereafter, is not entitled to a lien upon the earnings of the receivership, prior to that of a mortgage antedating the sale. Manchester Locomotive Works *v.* Truesdale, 44 Minn. 115.

Sixteen Months to Two Years. — Such a purchase for the purpose indicated from sixteen months to two years before the appointment of the receiver is not a purchase of supplies entitled to preference. Lackawanna Iron, etc., Co. *v.* Farmers' L. & T. Co., (C. C. A.) 79 Fed. Rep. 202.

Eighteen Months. — In Bound *v.* South Carolina R. Co., (C. C. A.) 58 Fed. Rep. 473, eighteen months was considered too long a period. See also Northern Pac. R. Co. *v.* Lamont, (C. C. A.) 69 Fed. Rep. 23.

Nine Months to Four Years. — Money loaned a railroad on its notes from nine months to four years prior to the appointment of a receiver does not constitute preferential debts.

within the limit does not entitle the renewed notes to priority.[1] But where notes were given for a debt contracted within the limit, and were renewed after the appointment of a receiver, the renewed notes are entitled to priority.[2]

(3) *Priority Out of Corpus.* — While the priority given to "back debts" is usually limited to the appropriation of the income of the receivership, in the event of a deficiency of income the *corpus* of the property will in some cases be used in the same way, and such debts be made a charge on the property, or else paid out of the proceeds of a sale thereof.[3] This may be done where there has been diversion of income,[4] but whether in the absence of diversion the *corpus* may be so used is not so well settled. In some cases the negative rule has been laid down in terms.[5] But there are also decisions qualifying the negative doctrine, and favoring the view that other considerations besides diversion of income may warrant the payment of back debts out of the *corpus* of the property or its proceeds.[6]

l. Debts for New Construction. — The general rule is that the court will not give a preference to debts for new construction over the liens of existing mortgages, because ordinarily when mortgages are executed upon completed roads it is not contemplated that its income is to be applied to the construction of the new road.[7] And the rule denying such priority is particularly strong, it has been held, where the debts did not accrue within six months prior to the appointment of the receiver.[8] But the court has the power to authorize the receiver to complete an unfinished line of road, or even to construct a new line, when such new construction appears clearly necessary, and may make the cost thereof a first lien, having priority over precedent

Morgans' Louisiana, etc., R., etc., Co. *v.* Farmers' L. & T. Co., (C. C. A.) 79 Fed. Rep. 210.

1. Brown *v.* New York, etc., R. Co., (Supm. Ct.) 19 How. Pr. (N. Y.) 84.

2. Burnham *v.* Bowen, 111 U. S. 776.

3. **Corpus of Property.** — Lee *v.* Pennsylvania Traction Co., 105 Fed. Rep. 405.

4. **Diversion of Income.** — Southern R. Co. *v.* Carnegie Steel Co., 176 U. S. 257; Kneeland *v.* Bass Foundry, etc., Works, 140 U. S. 592; Fosdick *v.* Schall, 99 U. S. 235; Lee *v.* Pennsylvania Traction Co., 105 Fed. Rep. 405; Southern R. Co. *v.* Carnegie Steel Co., (C. C. A.) 76 Fed. Rep. 492; Southern R. Co. *v.* American Brake Co., (C. C. A.) 76 Fed. Rep. 502; Southern R. Co. *v.* Tillett, (C. C. A.) 76 Fed. Rep. 507; Ames *v.* Union Pac. R. Co., 74 Fed. Rep. 335; Clark *v.* Central R., etc., Co., (C. C. A.) 66 Fed. Rep. 803; Thomas *v.* Peoria, etc., R. Co., 36 Fed. Rep. 808; Bellingham Bay Imp. Co. *v.* Fairhaven, etc., R. Co., 17 Wash. 371.

5. For statements to the effect that back debts can only be paid out of the *corpus* of the property where there has been a diversion of income, see observations of Lamar, J., in Wood *v.* Guarantee Trust, etc., Co., 128 U. S. 416; also Jenkins, J., in Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 45 Fed. Rep. 664. See also International Trust Co. *v.* Townsend Brick, etc., Co., (C. C. A.) 95 Fed. Rep. 850.

No Right to Give Priority Out of Corpus in Absence of Statute. — To this effect see Farmers', etc., Nat. Bank *v.* Waco Electric R., etc., Co., (Tex. Civ. App. 1896) 36 S. W. Rep. 131.

6. Cleveland, etc., R. Co. *v.* Knickerbocker Trust Co., 86 Fed. Rep. 73; New York Guaranty, etc., Co. *v.* Tacoma R., etc., Co., (C. C. A.) 83 Fed. Rep. 365. See also statements of Jenkins, J., in Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 45 Fed. Rep. 664, 46 Am. & Eng. R. Cas. 296, qualifying the negative rule. See further, Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286; Turner *v.* Indianapolis, etc., R. Co., 8 Biss. (U. S.) 315.

7. **Claims for New Construction.** — Wood *v.* Guarantee Trust, etc., Co., 128 U. S. 416; Hale *v.* Frost, 99 U. S. 389; Houston First Nat. Bank *v.* Ewing, (C. C. A.) 103 Fed. Rep. 168; Felton *v.* Cincinnati, (C. C. A.) 95 Fed. Rep. 336; International Trust Co. *v.* Townsend Brick, etc., Co., (C. C. A.) 95 Fed. Rep. 850; American L. & T. Co. *v.* East, etc., R. Co., 46 Fed. Rep. 101; Central Trust Co. *v.* Wabash, etc., R. Co., 46 Fed. Rep. 26; Addison *v.* Lewis, 75 Va. 701, 9 Am. & Eng. R. Cas. 702.

A Mortgage Containing an After-acquired Property Clause has priority over a claim of contractors upon the rents and profits of a portion of the road constructed by them subsequently to the mortgage. Thompson *v.* White Water Valley R. Co., 132 U. S. 68.

Mortgage of Road "Built and to Be Built." — In Dunham *v.* Cincinnati, etc., R. Co., 1 Wall. (U. S.) 254, it was held that a mortgage by a railroad company of its road "built and to be built" had priority, even as regards the unbuilt portion, over the claim of a contractor who had himself finished it under an agreement with the company that he should retain its possession and apply its earnings to the liquidation of the debts to him, and who had in accordance with such an agreement taken possession of the road and retained it.

8. American L. & T. Co. *v.* East, etc., R. Co., 46 Fed. Rep. 101; Central Trust Co. *v.* Wabash, etc., R. Co., 46 Fed. Rep. 26.

mortgages.[1] Such completion or new construction is, however, never authorized except under extraordinary circumstances, which make it practically a necessity in order to render the old portion of the line reasonably productive.[2]

m. PRIORITIES AMONG PREFERENTIAL DEBTS. — It has been held that as a general rule preferential claims should be paid ratably and without preference *inter sese*, except debts due for taxes and the expenses of the receivership which are always entitled to priority over debts accruing before the appointment of the receiver.[3]

n. PRIORITIES AMONG EXISTING LIENS. — Where the earnings of the company are not sufficient to pay all the creditors thereof after paying for operating expenses and necessary repairs, they will be applied first to the discharge of liens which if enforced would endanger the integrity of the property.[4]

o. INTEREST ON CLAIMS. — After the property of a railroad company passes into the hands of a receiver, interest is not, as a rule, it has been held, allowed on claims against it.[5]

XIX. RECEIVERS' CERTIFICATES — 1. In General. — Where a railroad has gone into the hands of a receiver, and the income of the road is insufficient for the conservation of the road *pendente lite*, the receiver will, as a rule, be authorized to borrow money upon the credit of the property, and to issue for the security of the payment thereof debentures or certificates of indebtedness. These receivers' certificates are, in general, made a first lien upon the entire property, income, and franchises of the railroad company, and accordingly take priority over liens of first mortgage bondholders and all other creditors. Owing to the fact that the income of the receivership is generally insufficient to pay these evidences of indebtedness, they are usually paid out of the proceeds of foreclosure, and take precedence over all other debts in distribution.[6]

1. Court May Authorize New Construction, Etc. — Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286; Jerome *v.* McCarter, 94 U. S. 734; Kennedy *v.* St. Paul, etc., R. Co., 5 Dill. (U. S.) 519; Meyer *v.* Johnston, 53 Ala. 237; Montreal Bank *v.* Chicago, etc., R. Co., 48 Iowa 518; Hilton Bridge Constr. Co. *v.* Foster, (Supm. Ct. Tr. T.) 26 Misc. (N. Y.) 338; McIlhenny *v.* Binz, 80 Tex. 1, 26 Am. St. Rep. 705.

2. Smith *v.* McCullough, 104 U. S. 25; Shaw *v.* Little Rock, etc., R. Co., 100 U. S. 605; Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. Rep. 46; Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 50 Vt. 500, 46 Vt. 792.

3. See Houston First Nat. Bank *v.* Ewing, (C. C. A.) 103 Fed. Rep. 168.

4. Mercantile Trust Co. *v.* Baltimore, etc., R. Co., 82 Fed. Rep. 360; Park *v.* New York, etc., R. Co., 64 Fed. Rep. 190. And see Lloyd *v.* Chesapeake, etc., R. Co., 65 Fed. Rep. 351.

5. Interest. — Thomas *v.* Western Car Co., 149 U. S. 95. But for a case in which interest was allowed on certain claims against a receiver from a date fixed, see Lane *v.* Macon, etc., R. Co., 96 Ga. 630.

6. Receivers' Certificates — *United States.* — Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434; Swann *v.* Clark, 110 U. S. 602; Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286; Smith *v.* McCullough, 104 U. S. 25; Barton *v.* Barbour, 104 U. S. 126; Shaw *v.* Little Rock, etc., R. Co., 100 U. S. 605; Wallace *v.* Loomis, 97 U. S. 146; Jerome *v.* McCarter, 94 U. S. 734; Kennedy *v.* St. Paul, etc., R. Co., 2 Dill. (U. S.) 448; Stanton *v.* Alabama, etc., R. Co., 2 Woods (U. S.) 506; Cowdrey *v.* Galveston, etc., R. Co., 1 Woods (U. S.) 331; Mercantile Trust Co. *v.* Kanawha, etc., R. Co., 50 Fed. Rep. 874; Philadelphia Invest. Co. *v.* Ohio, etc., R. Co., 36 Fed. Rep. 51; Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. Rep. 46; Union Trust Co. *v.* Chicago, etc., R. Co., 7 Fed. Rep. 513; Montreal Bank *v.* Thayer, 7 Fed. Rep. 622.

Alabama. — Browning *v.* Kelly, 124 Ala. 645; Meyer *v.* Johnston, 53 Ala. 273.

California. — Illinois Trust, etc., Bank *v.* Pacific R. Co., 115 Cal. 285.

Illinois. — Turner *v.* Peoria, etc., R. Co., 95 Ill. 134, 35 Am. Rep. 144; Newbold *v.* Peoria, etc., R. Co., 5 Ill. App. 367.

Indiana. — Fletcher *v.* Waring, 137 Ind. 159.

Iowa. — Montreal Bank *v.* Chicago, etc., R. Co., 48 Iowa 518.

New Jersey. — Hoover *v.* Montclair, etc., R. Co., 29 N. J. Eq. 4; Coe *v.* New Jersey Midland R. Co., 27 N. J. Eq. 37.

New York. — Central Trust Co. *v.* Tappan, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 918.

South Carolina. — *Ex p.* Mitchell, 12 S. Car. 83.

Tennessee. — Crosby *v.* Morristown, etc., R. Co., (Tenn. Ch. 1897) 42 S. W. Rep. 507; State *v.* Edgefield, etc., R. Co., 6 Lea (Tenn.) 353.

Vermont. — Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 50 Vt. 500.

Virginia. — Gibert *v.* Washington City, etc., R. Co., 33 Gratt. (Va.) 586.

In Whose Favor Lien Enforceable. — Orders of court authorizing the receiver to make an agreement with specified contractors for the construction, completion, and equipment of a railroad in consideration of receiver's certificates for a certain amount per mile of equipped

Ratable Redemption. — Where the proceeds of the railroad property are insufficient to redeem all the certificates by payment in full, the holders thereof are entitled to a *pro rata* distribution.[1]

2. Power to Authorize Issuance. — The power of a court of equity to authorize receivers' certificates is derived from its duty to protect and preserve the trust property in its hands, and should be exercised only in cases where the creation of such liens is absolutely necessary for the preservation of the property pending litigation, and in all cases, if possible, with the consent or acquiescence of the parties interested in the fund.[2] The power to authorize certificates is, therefore, one to be sparingly exercised, and when exercised the order of the court should be strictly construed.[3]

3. For What Purposes Authorized — *a.* IN GENERAL. — The general rule on this subject is that receivers' certificates to which pre-existing liens are subordinated should never be authorized except for debts or claims properly entitled to preference.[4]

b. OPERATING EXPENSES. — The foregoing rule includes, but is, in general, also limited by, necessary operating expenses, as purchases or repairs essential to maintain the road as a going concern,[5] or, in some instances, for the payment of taxes, labor, materials, and supplies, the liability for which accrued within a short time prior to the appointment of the receiver.[6]

and completed railroad, gives no lien on the railroad property to the creditors of such contractors for work, materials or supplies which they furnished to the contractors to enable them to perform their agreement. Denison, etc., R. Co. *v.* Ranney-Alton Mercantile Co., (C. C. A.) 104 Fed. Rep. 595.

Traffic Debentures. — For the authorization of the issuance by a receiver of traffic debentures, receivable in payment for freight, see Evansville, etc., R. Co. *v.* Frank, 3 Ind. App. 96.

1. Turner *v.* Peoria, etc., R. Co., 95 Ill. 134, 35 Am. Rep. 144.

2. Power to Authorize Issuance of Certificates. — Shaw *v.* Little Rock, etc., R. Co., 100 U. S. 605; Wallace *v.* Loomis, 97 U. S. 146; Meyer *v.* Johnston, 53 Ala. 237.

Implied Consent of Lienholders. — Burnham *v.* Bowen, 111 U. S. 776.

Consent Not Essential to Power. — Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434; Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286; Wallace *v.* Loomis, 97 U. S. 146. *Compare* Meyer *v.* Johnston, 53 Ala. 237.

Appointment on Application of Mortgagees — Condition of Exercise of Power. — Fosdick *v.* Schall, 99 U. S. 235.

3. Newbold *v.* Peoria, etc., R. Co., 5 Ill. App. 367; State *v.* Edgefield, etc., R. Co., 6 Lea (Tenn.) 353. And see Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. Rep. 46; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434.

4. See Farmers' L. & T. Co. *v.* Centralia, etc., R. Co., (C. C. A.) 96 Fed. Rep. 636, *denying rehearing* (C. C. A.) 100 Fed. Rep. 11.

5. General Rule — Limited to Operating Expenses — *United States.* — Swann *v.* Clark, 110 U. S. 602; Fosdick *v.* Schall, 99 U. S. 235; Wallace *v.* Loomis, 97 U. S. 146; Stanton *v.* Alabama, etc., R. Co., 2 Woods (U. S.) 506; Houston First Nat. Bank *v.* Ewing, (C. C. A.) 103 Fed. Rep. 168; Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. Rep. 46. See also Cowdrey *v.* Galveston, etc., R. Co., 1 Woods (U. S.) 331.

Alabama. — Meyer *v.* Johnston, 53 Ala. 237.

Illinois. — Turner *v.* Peoria, etc., R. Co., 95 Ill. 134, 35 Am. Rep. 144.

New Jersey. — Hoover *v.* Montclair, etc., R. Co., 29 N. J. Eq. 4; Coe *v.* New Jersey Midland R. Co., 27 N. J. Eq. 37.

New York. — Hilton Bridge Constr. Co. *v.* Foster, (Supm. Ct. Tr. T.) 26 Misc. (N. Y.) 338; Central Trust Co. *v.* Tappan (Supm. Ct. Gen. T.) 6 N. Y. Supp. 918. See also Vilas *v.* Page, 106 N. Y. 439; Matter of U. S. Rolling Stock Co., (Supm. Ct. Spec. T.) 55 How. Pr. (N. Y.) 286.

Pennsylvania. — Bucks County R. Co., 22 Pa. Co. Ct. 170.

South Carolina. — Hand *v.* Savannah, etc., R. Co., 10 S. Car. 406.

Vermont. — Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 50 Vt. 500.

Where Road Not Worth Repairing. — In Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. Rep. 46, the order authorizing the issue of receiver's certificates was subsequently rescinded, upon the ground that, owing to the dilapidated condition of the road and property, the court was not justified in spending any money for its repair and improvement.

Replacing Diverted Earnings. — For the issuance of receiver's certificates to replace earnings diverted from operating expenses and ordinary repairs, see Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434.

6. Taylor *v.* Philadelphia, etc., R. Co., 7 Fed. Rep. 377; Humphreys *v.* Allen, 101 Ill. 490; Rutherford *v.* Pennsylvania Midland R. Co., 178 Pa. St. 38; Langdon *v.* Vermont, etc., R. Co., 53 Vt. 228.

In the Absence of Statute, a court has no power to authorize a receiver appointed in an action to foreclose railroad property to pay or issue certificates for the payment of labor and services in operating the road prior to his appointment, and to make the certificates so issued a lien prior to the mortgage. Metropolitan Trust Co. *v.* Tonawanda Valley, etc., R. Co., 103 N. Y. 245.

c. NEW CONSTRUCTION. — Receivers' certificates will not, as a rule, be authorized for new construction or for the completion of unfinished portions of the road.[1] But under special circumstances or in particular emergencies the issuance of receivers' certificates for new construction has been sanctioned.[2]

d. PERMANENT IMPROVEMENTS. — Receivers' certificates will not be authorized to enable the receiver of a railroad to make permanent improvements, not necessary to keep the road a going concern.[3]

4. Conformity to Order of Court. — The power of the receiver of a railroad to issue receivers' certificates is limited by the order of the court, and he may not issue them in excess of the order, or for purposes other than those mentioned in the order.[4] The certificate must, therefore, be issued in strict accordance with the order, and for the express purposes mentioned.[5] Nor can the terms of the order be extended or in any way altered by implication.[6]

5. Validity of Certificates — *a.* IN GENERAL. — Where receivers' certificates are issued in violation of the order authorizing their issuance, they are, as a rule, void.[7] But it has been held that hypothecation of the certificates by the receiver, or an agreement by him to pay more for the money borrowed thereon than allowed by the order of the court, will not have the effect of rendering the certificates wholly void, but will confine the purchasers to the amount actually advanced to the receiver at the time of purchase.[8] Nor does the fact that the bill upon which the receiver was appointed was subject to demurrer, or that the court acted erroneously in the premises, invalidate certificates issued under orders of court.[9]

b. WHO MAY QUESTION. — A party not interested in the property of a railroad company in the hands of a receiver, or who has advanced no money on the receiver's certificates, cannot object to the issue of such certificates,[10]

1. New Construction. — Snow *v.* Winslow, 54 Iowa 200; Rutherford *v.* Pennsylvania Midland R. Co., 178 Pa. St. 38; Hand *v.* Savannah, etc., R. Co., 10 S. Car. 406. And see Street *v.* Maryland Cent. R. Co., 59 Fed. Rep. 25.

Mechanic's Lien Not Displaced. — Snow *v.* Winslow, 54 Iowa 200.

2. Houston First Nat. Bank *v.* Ewing, (C. C. A.) 103 Fed. Rep. 168. And see Montreal Bank *v.* Chicago, etc., R. Co., 48 Iowa 518; Gibert *v.* Washington City, etc., R. Co., 33 Gratt. (Va.) 586.

To Prevent the Lapse of a Valuable Land Grant in favor of a railroad company a receiver was appointed at the instance of bondholders of the company, whose principal security was the lands so granted, and the receiver was empowered to borrow money to complete the unfinished portions of the road, and his debentures issued for that purpose made a lien on the railroad and lands of the company. Kennedy *v.* St. Paul, etc., R. Co., 2 Dill. (U. S.) 448. And see Jerome *v.* McCarter, 94 U. S. 734.

On Request of Ninety-six Per Cent. of Bondholders. — For the authorization of receivers' certificates to complete unfinished portions of the road on request of ninety-six per cent. of the bondholders, see Rutherford *v.* Pennsylvania Midland R. Co., 178 Pa. St. 38.

3. Permanent Improvements. — Rochester Trust, etc., Co. *v.* Rochester, etc., R. Co., (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 222. And see Street *v.* Maryland Cent. R. Co., 59 Fed. Rep. 25.

4. Must Follow Order of Court. — Montreal Bank *v.* Chicago, etc., R. Co., 48 Iowa 518. And see Stanton *v.* Alabama, etc., R. Co., 2 Woods (U. S.) 506; Union Trust Co. *v.* Chicago, etc., R. Co., 7 Fed. Rep. 513.

5. Newbold *v.* Peoria, etc., R. Co., 5 Ill. App. 367.

6. State *v.* Edgefield, etc., R. Co., 6 Lea (Tenn.) 353.

Not to Be Issued in Advance. — In Montreal Bank *v.* Chicago, etc., R. Co., 48 Iowa 518, the court held that where a receiver is authorized to issue certificates for materials furnished and labor performed in extending the road, not to exceed a given amount per mile, he cannot issue them in advance of the actual performance of labor or furnishing of materials. See also Bank of Montreal *v.* Thayer, 7 Fed. Rep. 622; Newbold *v.* Peoria, etc., R. Co., 5 Ill. App. 367.

7. Certificates Held Void. — An order of court authorizing a receiver to issue certificates in payment for materials does not authorize the issuance of certificates until the materials have been actually furnished; and so certificates having been issued for materials, merely contracted to be delivered but which in fact never were, are void and of no effect. Montreal Bank *v.* Chicago, etc., R. Co., 48 Iowa 518

8. See Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434; Swann *v.* Clark, 110 U. S. 602.

9. Farmers L. & T. Co. *v.* Centralia, etc., R. Co. (C. C. A.) 96 Fed. Rep. 636.

Effect of Dismissal of Proceedings. — Denison, etc., R. Co. *v.* Ranney-Alton Mercantile Co., (Indian Ter. 1899) 53 S. W. Rep. 496.

10. Moran *v.* Lydecker, (Supm. Ct. Gen. T.) 11 Abb. N. Cas. (N. Y.) 298.

Estoppel by Consent. — One who has consented to the issuance of receiver's certificates cannot, in general, question their priority or validity. Central Trust Co. *v.* Sheffield, etc.,

as where a property owner along the route of an elevated railroad endeavored to restrain the completion of the road on the ground that the receiver's certificates were invalid.[1] Nor can the mere priority of receivers' certificates over existing mortgages be questioned by the mortgagor or his assignee, because the question of priorities among existing liens is not one in which the mortgagor or his assignee can have an interest.[2]

6. Not Negotiable Instruments. — Receivers' certificates are not negotiable instruments in the sense that the equities existing between the original parties will be sacrificed in favor of *bona fide* purchasers for value. All parties dealing in such securities are bound to take notice of the terms of the order of the court authorizing their issue and take them subject to the final action of the court and the rights of parties having prior liens upon the property who have not had their day in court.[3] An assignee of such certificates can recover only to the extent that the original payee could have recovered;[4] and certificates in the hands of innocent holders for value are invalid where the receiver has issued them in excess of his authority, or for purposes other than those specified by the order of the court.[5] Nor does indorsement by the assignor make him liable as a guarantor, or imply a warranty that the certificates are collectible and will be paid.[6]

Constructive Notice to Holder. — Since the receiver is an officer of the court, intrusted with the care of the property, any purchaser of his certificates is bound to know whether they were issued in accordance with the terms and contingencies contemplated by the order of court authorizing their issuance.[7]

7. Payment of — How Enforced. — Receivers' certificates are payable only out of the fund in the hands of the receiver, and their payment can only be enforced by application to the court authorizing their issue.[8]

8. Personal Liability of Receiver. — It has been held that if a receiver goes beyond the order of the court and issues certificates bearing false and fraudulent representations upon their face, he will be held personally liable to *bona fide* holders.[9]

9. Interest. — It has been held that a court of equity will not, as a rule, authorize a receiver to pay a rate of interest in excess of the legal rate in order the more readily to dispose of the certificates. Nor will it authorize their sale at a discount, and in addition pay the highest legal rate of interest.[10]

XX. Removal and Discharge — 1. In General. — The principles relating to the removal or discharge of receivers in general apply also to the removal or discharge of receivers of railroad corporations, the subject of which has been fully treated elsewhere.[11]

2. Grounds for Removal. — The court will not remove a railroad receiver whose management has been competent and satisfactory, at the mere request of the controlling stockholders, where the proceedings in which the receiver

Coal, etc., Co., 44 Fed. Rep. 526; Central Trust Co. *v.* Marietta, etc., R. Co., (C. C. A.) 75 Fed. Rep. 193, 209.

1. Moran *v.* Lydecker, (Supm. Ct. Gen. T.) 11 Abb. N. Cas. (N. Y.) 298.

2. Jerome *v.* McCarter, 94 U. S. 734.

3. **Negotiability.** — Stanton *v.* Alabama, etc., R. Co., 2 Woods (U. S.) 506; Union Trust Co. *v.* Chicago, etc., R. Co., 7 Fed. Rep. 513; Turner *v.* Peoria, etc., R. Co , 95 Ill. 134, 35 Am. Rep. 144; Baird *v.* Underwood, 74 Ill. 176; Newbold *v.* Peoria, etc., R. Co., 5 Ill. App. 367; Montreal Bank *v.* Chicago, etc., R. Co., 48 Iowa 518.

4. Stanton *v.* Alabama, etc., R. Co., 2 Woods (U. S.) 506; Turner *v.* Peoria, etc., R. Co., 95 Ill. 134, 35 Am. Rep. 144.

When Receiver's Certificates Are Negotiated at a Discount, which the receiver is not authorized to allow, a subsequent *bona fide* holder will be protected only to the amount actually advanced by the first purchaser. Central Nat. Bank *v.* Hazard, 30 Fed. Rep. 484.

5. Montreal Bank *v.* Chicago, etc., R. Co., 48 Iowa 518. And see Stanton *v.* Alabama, etc., R. Co., 2 Woods (U. S.) 506; Union Trust Co. *v.* Chicago, etc., R. Co., 7 Fed. Rep. 513.

6. McCurdy *v.* Bowes, 88 Ind. 583.

7. Montreal Bank *v.* Chicago, etc., R. Co., 48 Iowa 518. And see Turner *v.* Peoria, etc., R. Co., 95 Ill. 134, 35 Am. Rep. 144.

8. Turner *v.* Peoria, etc., R. Co., 95 Ill. 134, 35 Am. Rep. 144.

9. Montreal Bank *v.* Thayer, 2 McCrary (U. S.) 1.

10. Meyer *v.* Johnston, 53 Ala. 237.

11. See the title Receivers, vol. 23, p. 992.

was appointed were instituted by a minority stockholder on the ground that the bonded indebtedness and stock issues of the company were being increased without a corresponding increase of assets.[1]

3. Effect of Removal or Discharge. — After a receiver of a railroad has been discharged no action will lie against him for torts committed by his employees during the time he operated the road.[2]

1. Street *v.* Maryland Cent. R. Co., 58 Fed. Rep. 47.

2. **Effect of Removal or Discharge.** — Davis *v.* Duncan, 19 Fed. Rep. 477; Farmers' L. & T. Co. *v.* Central R. Co., 2 McCrary (U. S.) 181; Corser *v.* Russell, (Supm. Ct. Gen. T.) 20 Abb. N. Cas. (N. Y.) 316; Texas, etc., R. Co. *v.* Adams, 78 Tex. 372, 22 Am. St. Rep. 56; Ryan *v.* Hays, 62 Tex. 42.

RECEIVING STOLEN PROPERTY.

By A. S. H. Bristow.

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CROSS-REFERENCES.

For matters of PROCEDURE, see the ENCYCLOPÆDIA OF PLEADING AND PRACTICE, vol. 17, p. 887.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see in this work the title LARCENY, vol. 18, p. 456, *and references there given.*

I. DEFINITION. — A receiver of stolen property is one who receives into his possession or under his control, with felonious intent, any stolen goods or chattels, with knowledge that they have been stolen.[1]

II. NATURE AND GRADE OF OFFENSE — 1. Nature of Offense — *a.* AT COMMON LAW. — At common law the receiving of stolen goods, knowing them to be stolen, was regarded as a misdemeanor, and did not make the offender an accessory to the theft.[2]

b. UNDER STATUTE. — Subsequently, however, by statutes in *England* the receiver was made an accessory after the fact,[3] and by still later statutes receiving was elevated into a substantive offense.[4] Likewise, under statute in most jurisdictions in the *United States* the offense is a distinct and substantive crime in itself, and is not merely accessorial to the principal offense of larceny.[5] Under statutes in some jurisdictions, however, a receiver is an accessory after the fact.[6]

1. See the statutes of the various states defining the offense.

2. Nature of Offense at Common Law. — Ross *v.* State, 1 Blackf. (Ind.) 390; People *v.* Reynolds, 2 Mich. 422; State *v.* Counsil, Harp. L. (S. Car.) 53. See also *In re* Kirby, 84 Fed. Rep. 606. And see the titles ACCESSORY, vol. 1, p. 267; LARCENY, vol. 18, p. 528.

3. See the title LARCENY, vol. 18, p. 528.

4. Receiving Substantive Offense under English Statute. — 7 & 8 Geo. IV., c. 29, § 54; 9 Geo. IV., c. 55, § 47; 24 & 25 Vict., c. 96, § 1; 2 Russ. on Crimes (9th Am. ed.) 542; Rex *v.* Solomons, 1 Moody 292; Rex *v.* Wheeler, 7 C. & P. 170, 32 E. C. L. 483; Rex *v.* Hartall, 7 C. & P. 475, 32 E. C. L. 589; Rex *v.* Austin, 7 C. & P. 796, 32 E. C. L. 740; Reg. *v.* Pulham, 9 C. & P. 280, 38 E. C. L. 121; Reg. *v.* Smith, 11 Cox C. C. 511; Reg. *v.* Hodge, 12 Manitoba 319.

5. Receiving Distinct Offense in United States — *Alabama.* — Sellers *v.* State, 49 Ala. 357.

California. — People *v.* Maxwell, 24 Cal. 14; People *v.* Hawkins, 34 Cal. 181; People *v.* Stakem, 40 Cal. 599; People *v.* Fagan, 98 Cal. 230; People *v.* Ward, 105 Cal. 652.

Connecticut. — State *v.* Weston, 9 Conn. 527, 25 Am. Dec. 46; State *v.* Ward, 49 Conn. 438.

Florida. — Anderson *v.* State, 38 Fla. 3.

Georgia. — Bieber *v.* State, 45 Ga. 569.

Illinois. — Huggins *v.* People, 135 Ill. 243, 25 Am. St. Rep. 357.

Indiana. — Reilley *v.* State, 14 Ind. 217; Redman *v.* State, 1 Blackf. (Ind.) 430; Semon *v.* State, (Ind. 1902) 62 N. E. Rep. 625.

Kentucky. — Allison *v.* Com., 83 Ky. 254; Stone *v.* Com., (Ky. 1902) 67 S. W. Rep. 841.

Maryland. — Kearney *v.* State, 48 Md. 16.

Massachusetts. — Com. *v.* Barry, 116 Mass. 1.

Montana. — State *v.* Rechnitz, 20 Mont. 488; State *v.* Kinder, 22 Mont. 516.

Nebraska. — Engster *v.* State, 11 Neb. 539; Levi *v.* State, 14 Neb. 1; Ream *v.* State, 52 Neb. 727.

New Mexico. — See Leonardo *v.* Territory, 1 N. Mex. 291.

North Carolina. — Code N. Car. (1883), § 1074. See also State *v.* Stroud, 95 N. Car. 626; State *v.* Lawrence, 81 N. Car. 522. Under a prior statute a receiver was an accessory after the fact. State *v.* Goode, 1 Hawks (8 N. Car.) 463; State *v.* Groff, 1 Murph. (5 N. Car.) 270.

Oregon. — State *v.* Pomeroy, 30 Oregon 16.

South Carolina. — State *v.* Crawford, 39 S. Car. 343. See also State *v.* Sanford, 1 Nott & M. (S. Car.) 512; State *v.* Harkness, 1 Brev. (S. Car.) 276; State *v.* Teideman, 4 Strobh. L. (S. Car.) 300.

Tennessee. — Harris *v.* State, 7 Lea (Tenn.) 124; Roach *v.* State, 5 Coldw. (Tenn.) 39; Hampton *v.* State, 8 Humph. (Tenn.) 69, 47 Am. Dec. 599, *citing* Wright *v.* State, 4 Humph. (Tenn.) 194.

Texas. — Street *v.* State, 39 Tex. Crim. 134. See also Wheeler *v.* State, 34 Tex. Crim. 350.

Vermont. — State *v.* S. L., 2 Tyler (Vt.) 249.

Virginia. — Smith *v.* Com., 10 Leigh (Va.) 729; Com. *v.* Frye, 1 Va. Cas. 19.

Receiver Not Liable to Conviction as Accessory. — People *v.* Stakem, 40 Cal. 599; Street *v.* State, 39 Tex. Crim. 134. See also State *v.* Hayden, 45 Iowa 11.

6. Receiver Accessory under Some Statutes. — Edwards *v.* State, 80 Ga. 127; Licette *v.* State,

2. Grade of Offense. — In some jurisdictions the offense is a misdemeanor [1] and in others a felony under specified limitations.[2]

As Depending upon Value of Property Received. — In some jurisdictions the grade of the offense does not depend upon the value of the property received, it being a felony or a misdemeanor according to the nature of the judgment.[3] In other jurisdictions, however, punishment by imprisonment in the penitentiary is made dependent upon the receipt of property of a specified value.[4]

Effect of Restitution to Owner. — In *Michigan* it is provided by statute that upon a first conviction of the offense, when the act of stealing was a simple larceny, the receiver shall not be imprisoned in the state prison if he shall have made satisfaction to the party injured to the full value of the property stolen and not restored.[5]

III. Essential Elements — 1. Larceny — *a.* In General. — It is essential to a conviction for this offense that the property which the accused is charged with receiving should have been previously stolen.[6]

b. Embezzlement. — In some jurisdictions in which embezzlement is regarded as a species of larceny,[7] as where it is declared by statute that an

75 Ga. 253. See also the title Larceny, vol. 18, p. 529.

1. Receiving Held Misdemeanor. — Edwards *v.* State, 80 Ga. 127; State *v.* Hodges, 55 Md. 127; State *v.* Brite, 73 N. Car. 26; State *v.* Morrison, 85 N. Car. 561.

2. In England the receiving amounts to a felony where the original taking, etc., amounts to a felony. Reg. *v.* Smith, 11 Cox C. C. 511.

Receiving Property Stolen from Railroad Felony under Kansas Statute. — State *v.* Sutton, 53 Kan. 318.

3. Grade of Offense Held Not Dependent upon Value of Property Received. — People *v.* Fitzpatrick, 80 Cal. 538; People *v.* Rice, 73 Cal. 220; People *v.* Perini, 94 Cal. 573. See also State *v.* Sutton, 53 Kan. 318.

4. Grade of Offense as Depending upon Value of Property Received — *Alabama.* — Cohen *v.* State, 50 Ala. 108.

Connecticut. — State *v.* Kaplan, 72 Conn. 635.

District of Columbia. — Matter of Fry, 3 Mackey (D. C.) 135.

Illinois. — Sawyer *v.* People, 8 Ill. 53.

Indiana. — Maynard *v.* State, 14 Ind. 427.

Kentucky. — Chenault *v.* Com., 90 Ky. 160; Brown *v.* Com., 4 Ky. L. Rep. 49.

Nebraska. — Engster *v.* State, 11 Neb. 539; Levi *v.* State, 14 Neb. 1; Berneker *v.* State, 40 Neb. 810.

Ohio. — Smith *v.* State, 59 Ohio St. 350.

In South Carolina the offense is expressly declared by statute to be a misdemeanor, but the punishment is measured by the value of the property stolen. State *v.* Crawford, 39 S. Car. 343. See also State *v.* Jacob, 30 S. Car. 132, 14 Am. St. Rep. 897.

Property Received at Different Times. — It has been held that if different stolen articles are received at different times, each receiving constitutes a distinct offense, and a conviction as for a felony based upon the aggregate value of the property received cannot be sustained, though the different articles were received in pursuance of a prior conspiracy and were, subsequent to their receipt, found in the possession of the receiver at one time and place. Smith *v.* State, 59 Ohio St. 350. *Compare* Levi *v.* State, 14 Neb. 1; State *v.* Crawford, 39 S. Car. 347.

Property Distributed to Several Receivers. — In Chenault *v.* Com., 90 Ky. 160, it was held that the degree of the offense is not determined by the value of the aggregate quantity of goods originally stolen and divided into small parcels among several receivers not acting in concert with each other, but by the value of what is actually received by each receiver.

5. Pitcher *v.* People, 16 Mich. 142; People *v.* Hubbard, 86 Mich. 440; People *v.* Smith, 94 Mich. 644.

6. Proof of Larceny Essential — *United States.* — U. S. *v.* Montgomery, 3 Sawy. (U. S.) 544.

Florida. — Anderson *v.* State, 38 Fla. 3.

Georgia. — O'Connell *v.* State, 55 Ga. 296.

Illinois. — Williams *v.* People, 101 Ill. 382.

Louisiana. — State *v.* Antoine, 42 La. Ann. 945.

Maine. — State *v.* McAloon, 40 Me. 133.

Massachusetts. — Com. *v.* Hills, 10 Cush. (Mass.) 530; Com. *v.* King, 9 Cush. (Mass.) 284.

Michigan. — People *v.* Montague, 71 Mich. 318. See also People *v.* Oblaser, 104 Mich. 579.

New York. — People *v.* Seaton, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 270.

South Carolina. — See State *v.* Teideman, 4 Strobh. L. (S. Car.) 300.

Texas. — Wilson *v.* State, 12 Tex. App. 481. See also Johnson *v.* State, (Tex. Crim. 1893) 24 S. W. Rep. 94.

Virginia. — Hey *v.* Com., 32 Gratt. (Va.) 946, 34 Am. Rep. 799.

Canada. — See McIntosh *v.* Reg., 23 Can. Sup. Ct. 180.

Proof of Exact Time and Place of Theft Unnecessary. — It is unnecessary to prove the precise time when or the exact place where the larceny was committed, or to identify the thief; it is sufficient if the jury is satisfied beyond a reasonable doubt that the goods were stolen. State *v.* Murphy, 6 Ala. 845; Collins *v.* State, 33 Ala. 434, 73 Am. Dec. 426; Hester *v.* State, 103 Ala. 83.

7. Receiving Embezzled Goods. — McIntosh *v.* Reg., 23 Can. Sup. Ct. 180. See People *v.* Stein, (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 202; People *v.* Dumar, 106 N. Y. 502.

embezzler "shall be deemed to have feloniously stolen," [1] or that the offense is punishable "in the manner prescribed for feloniously stealing property of the value of that embezzled," [2] embezzlement is a stealing within the meaning of the statute against receiving. But in *Texas* it has been held that receiving embezzled property is not a violation of the laws of that state against receiving property acquired by theft,[3] and in *Massachusetts* it has been held that receiving stolen property is an offense distinct from the offense of receiving embezzled property, since the punishment of the two offenses may be different, although under the statute of that state embezzlement is regarded as a species of larceny.[4]

c. BURGLARY OR ROBBERY. — By the express terms of the statutes in some jurisdictions, the offense may be committed as to property procured by burglary or robbery, as well as by larceny.[5]

d. THEFT BY WIFE FROM HUSBAND. — Since a wife cannot be guilty of larceny from her husband, a third person with whom she is living in adultery cannot become a receiver of property stolen by her from her husband.[6]

e. THEFT BY INFANT. — Under statute in *Georgia* it has been held that a receiver of stolen goods from an infant, who on account of his age was incapable of committing larceny, cannot be convicted as an accessory, but is liable as a principal in the larceny.[7]

f. LARCENY IN FOREIGN JURISDICTION. — By express statutory provision in some of the states, the offense includes a receiving in one state of property stolen in another.[8] But in the absence of such provision, proof of a foreign larceny, it is held, will not be sufficient to establish the offense.[9] In a jurisdiction, however, where the bringing by the thief of goods stolen in another jurisdiction is regarded as a new larceny in the former, a receiver in that jurisdiction will be liable to indictment.[10]

g. STATUTORY LARCENY. — In the absence of anything in the statute to the contrary, the theft need not be a larceny at common law; it is sufficient if it is a larceny under statute.[11] But in *England*, under the express terms of the statute of 24 & 25 Vict., c. 96, § 91, the stealing must amount to "a felony either at common law or by virtue of this act." [12]

h. EFFECT OF RESUMPTION OF POSSESSION BY OWNER AFTER THEFT. — If the subject of the larceny has lost the character of stolen property at the time it is received by the prisoner, the receiving will not amount to a crime. On this principle, if after the theft the true owner resumed possession of the property and then delivered it voluntarily to the thief, a person subsequently receiving it from the thief would not be liable to indictment.[13]

2. Guilty Knowledge of Larceny. — Knowledge of the theft on the part of the receiver is an essential element of the offense,[14] and such knowledge must

1. Reg. *v.* Frampton, 8 Cox C. C. 16. The English statute against receiving (24 & 25 Vict., c. 96, § 91) expressly embraces embezzled goods.

2. People *v.* Perini, 94 Cal. 573.

3. Leal *v.* State, 12 Tex. App. 279.

4. Com. *v.* Leonard, 140 Mass. 473, 54 Am. Rep. 485.

5. **Receiving Property Obtained by Burglary or Robbery.** — State *v.* Turner, 19 Iowa 144; State *v.* Lane, 68 Iowa 384; Levi *v.* State, 14 Neb. 1; Shriedley *v.* State, 23 Ohio St. 130.

6. **Theft by Wife from Husband.** — Reg. *v.* Kenny, 2 Q. B. D. 307, 13 Cox C. C. 397.

7. **Theft by Infant.** — Edwards *v.* State, 80 Ga. 127.

8. **Statutes Extending Offense to Larceny in Foreign Jurisdiction.** — State *v.* Stimpson, 45 Me. 608; People *v.* Goldberg, 39 Mich. 545.

9. Reg. *v.* Debruiel, 11 Cox C. C. 207.

10. U. S. *v.* Mortimer, 1 Hayw. & H. (D. C.) 215; State *v.* Stimpson, 45 Me. 608; Com. *v.* Andrews, 2 Mass. 14, 3 Am. Dec. 17. See also Com. *v.* White, 123 Mass. 430, 25 Am. Rep. 116.

11. **Statutory Larceny Sufficient.** — Reg. *v.* Deane, 10 U. C. Q. B. 464.

12. Hence, in Reg. *v.* Smith, 11 Cox C. C. 511, it was held that a purchaser from a partner who stole goods belonging to the firm and rendered himself liable to be dealt with as a felon under 31 and 32 Vict., c. 116, could not be convicted as a receiver.

13. **Effect of Resumption of Possession by Owner After Theft.** — Reg. *v.* Dolan, Dears. 436; Reg. *v.* Hancock, 14 Cox C. C. 119; U. S. *v.* De Bare, 6 Biss. (U. S.) 358. See also Reg. *v.* Schmidt, 10 Cox C. C. 172; Reg. *v.* Villensky, (1892) 2 Q. B. 597.

14. **Guilty Knowledge of Larceny Essential** — *England.* — Rex *v.* Densley, 6 C. & P. 399, 25 E. C. L. 457.

exist at the moment the property is received.[1] But the knowledge need not be that actual and positive knowledge which is required from personal observation of the fact; a belief without actual knowledge is sufficient.[2]

3. Intent — *a.* IN GENERAL. — Under the statutes of most jurisdictions it is held that the receiver must not only know that the property was stolen, but he must have received it with a dishonest or fraudulent intent.[3] But in *Iowa* it is held that a felonious intent is not a necessary ingredient of the crime.[4]

b. SECURING REWARD. — The receipt of stolen goods, knowing them to be stolen, with the intent to extort or secure from the owner a reward for their restoration, has been held to be within the prohibition of the statute against receiving.[5]

c. AIDING THIEF. — A receiver will be liable to indictment although he

Alabama. — Collins *v.* State, 33 Ala. 434, 73 Am. Dec. 426; Huggins *v.* State, 41 Ala. 393.
California. — People *v.* Levison, 16 Cal. 98, 76 Am. Dec. 505; People *v.* Ward, 105 Cal. 652.
Georgia. — O'Connell *v.* State, 55 Ga. 191.
Indiana. — Gandolpho *v.* State, 33 Ind. 439; Semon *v.* State, (Ind. 1902) 62 N. E. Rep. 625.
Maryland. — See Donovan *v.* State, 64 Md. 365.
Michigan. — People *v.* Considine, 105 Mich. 149.
Missouri. — State *v.* Goldblat, 50 Mo. App. 186.
Nebraska. — George *v.* State, 57 Neb. 656.
New Jersey. — State *v.* Goldman, 65 N. J. L. 394.
New York. — People *v.* Hartwell, 166 N. Y. 361.
Texas. — Collins *v.* State, 39 Tex. Crim. 441; Estes *v.* State, 23 Tex. App. 600; Tolliver *v.* State, 25 Tex. App. 600.

Knowledge Question for Jury. — People *v.* Schooley, 149 N. Y. 99.

1. State *v.* Caveness, 78 N. Car. 484.

2. Belief Without Actual Knowledge Sufficient. — Reg. *v.* White, 1 F. & F. 665; People *v.* Clausen, 120 Cal. 381; Cobb *v.* State, 76 Ga. 664; Huggins *v.* People, 135 Ill. 243, 25 Am. St. Rep. 357; Frank *v.* State, 67 Miss. 125; State *v.* Goldblat, 50 Mo. App. 186. See also Hester *v.* State, 103 Ala. 83. *Compare* Young *v.* Com., 4 Ky. L. Rep. 55.

Accordingly it has been held that a charge to the jury instructing the jurors that they would be authorized to find guilty knowledge if the defendant received the goods under such circumstances as would satisfy a man of ordinary intelligence and caution that they were stolen is not error. Collins *v.* State, 33 Ala. 434, 73 Am. Dec. 426; Com. *v.* Finn, 108 Mass. 466. *Compare* Robinson *v.* State, 84 Ind. 452.

Suspicions Not Sufficient. — State *v.* Goldman, 65 N. J. L. 394.

Knowledge that Facts Constitute Larceny. — In Reg *v.* Adams, 1 F. & F. 86, it was held that to justify a conviction for receiving stolen property in a case of goods found, it is not sufficient to show that the prisoner had a general knowledge of the circumstances under which the goods were taken, unless the jury is also satisfied that he knew that the circumstances were such as constituted a larceny. But in Com. *v.* Leonard, 140 Mass. 473, 54 Am. Rep. 485, it was held that if the defendant knew the facts and the facts constituted larceny, it is immaterial that he thought that they constituted embezzlement. See also Licette *v.* State, 75 Ga. 253.

Evidence to Satisfy Jury Beyond Reasonable Doubt Necessary. — Stripland *v.* State, 114 Ga. 843; May *v.* People, 60 Ill. 119; Collins *v.* State, 39 Tex. Crim. 441.

3. Felonious Intent as Element of Offense — *Alabama.* — Holt *v.* State, 86 Ala. 599.
California. — People *v.* Avila, 43 Cal. 196; People *v.* Ribolsi, 89 Cal. 492; People *v.* Tilley, 135 Cal. 61.
Illinois. — Aldrich *v.* People 101 Ill. 16.
Indiana. — Gandolpho *v.* State, 33 Ind. 439; Pelts *v.* State, 3 Blackf. (Ind.) 28. *Compare* Semon *v.* State, (Ind. 1902) 62 N. E. Rep. 625.
Kentucky. — See Sanderson *v.* Com., (Ky. 1889) 12 S. W. Rep. 136.
Louisiana. — State *v.* Burdon, 38 La. Ann. 357; State *v.* Hartleb, 35 La. Ann. 1180; State *v.* Moultrie, 34 La. Ann. 490.
New York. — People *v.* McClure, 148 N. Y. 95. See People *v.* Johnson, (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 564; Miller *v.* People, 25 Hun (N. Y.) 473; Chatterton *v.* People, (Supm. Ct. Gen. T.) 15 Abb. Pr. (N. Y.) 147; People *v.* Weldon, 111 N. Y. 569; People *v.* Hartwell, 166 N. Y. 361.
North Carolina. — State *v.* Caveness, 78 N. Car. 484.
South Carolina. — See State *v.* Crawford, 39 S. Car. 343.
Tennessee. — Hurell *v.* State, 5 Humph. (Tenn.) 68; Rice *v.* State, 3 Heisk. (Tenn.) 215.
Texas. — Arcia *v.* State, 26 Tex. App. 193.
Virginia. — Hey *v.* Com., 32 Gratt. (Va.) 946, 34 Am. Rep. 799.

Intent Question for Jury. — State *v.* Shoaf, 68 N. Car. 375.

4. State *v.* Lane, 68 Iowa 384; State *v.* Smith, 88 Iowa 1. See also State *v.* Feuerhaken, 96 Iowa 299.

The Fact of Aiding in Concealing Stolen Goods, knowing them to be stolen, necessarily implies a felonious intent, if proof of such intent is necessary. State *v.* Turner, 19 Iowa 144; State *v.* Smith, 88 Iowa 1.

5. Receiving with Intent to Secure Reward. — Baker *v.* State, 58 Ark. 513; Leonardo *v.* Territory, 1 N. Mex. 291; People *v.* Wiley, 3 Hill (N. Y.) 194; State *v.* Pardee, 37 Ohio St. 63.

receives goods merely as a friendly act to the thief, without the intention of deriving any personal benefit or profit therefrom.[1]

d. SELF-PROTECTION. — It has been held that a person has no right to receive or conceal stolen goods, knowing them to be stolen, even with the intention of saving himself from loss.[2] On the other hand, it has been held that a person is not guilty of receiving stolen goods if he finds them at his house and detains them under a *bona fide* claim of right.[3]

e. DELIVERY TO OWNER. — There will, of course, be no offense if the goods are received on behalf of the owner with the honest purpose of delivering them to him without fee or reward, and the goods are in fact restored.[4]

4. Receiving — *a.* IN GENERAL. — To establish the offense it is further necessary to show the receipt of the goods, including, of course, their identity.[5] The receiving is not complete until the property has actually come into the possession or under the control of the party charged.[6]

Manual Possession Unnecessary. — It is not necessary to prove an actual manual possession of stolen goods in order to sustain an indictment for receiving them, but it is sufficient if they are shown to have been under the control of the person charged as receiver.[7]

Receiving by Agent. — If goods are received by one's agent or servant, or are deposited in some place by his direction, he knowing that they were stolen, it is a receiving.[8]

b. CONCEALMENT. — In some jurisdictions the offense has been enlarged by making persons who conceal or aid the thief in the concealment of the property stolen equally guilty with him who receives such property.[9] But it

1. Receiving Merely in Aid of Thief. — Rex *v.* Davis, 6 C. & P. 177, 25 E. C. L. 341; Rex *v.* Richardson, 6 C. & P. 335, 25 E. C. L. 427; U. S. *v.* Montgomery, 3 Sawy. (U. S.) 544; Com. *v.* Bean, 117 Mass. 141; State *v.* Rushing, 69 N. Car. 29, 12 Am. Rep. 641.

2. Receiving to Save One's Self from Loss. — Campbell *v.* People, 109 Ill. 565, 50 Am. Rep. 621.

3. Receiving under Bona Fide Claim of Right. — State *v.* Caveness, 78 N. Car. 484.

4. Receiving with Intent to Deliver to Owner. — Aldrich *v.* People, 101 Ill. 16.

5. Receipt. — See Com. *v.* Finn, 108 Mass. 468.

6. What Amounts to Receiving. — Reg. *v.* Hill, 3 N. Sess. Cas. 348, 1 Den. C. C. 453, T. & M. 150, 2 C. & K. 978, 61 E. C. L. 978, 13 Jur. 545, 18 L. J. M. C. 199; Reg. *v.* Wiley, 2 Den. C. C. 37, 4 Cox C. C. 412, T. & M. 367, 15 Jur. 134, 20 L. J. M. C. 4; Jones *v.* State, 14 Ind. 346; Com. *v.* Sheriff, 3 Brews. (Pa.) 342.

Buying Stolen Property. — People *v.* Montejo, 18 Cal. 38; Stevens *v.* Com., 6 Met. (Mass.) 241.

Passing of Consideration Unnecessary. — Hopkins *v.* People, 12 Wend. (N. Y.) 76.

Passenger Allowing Stolen Goods to Be Shipped as Part of His Baggage Held Receiving. — State *v.* Scovel, Mill (S. Car.) 274.

Unexecuted Agreement to Participate in Sale of Goods Not Receiving. — Com. *v.* Light, 195 Pa. St. 220.

Goods Found. — The finder of goods may be indicted as a receiver if, having reason to believe, and in fact believing, that they were stolen, he appropriates them to his own use, especially if he misrepresents his possession of them so as to show a guilty knowledge. Com. *v.* Moreland, 27 Pa. L. J. 217.

But in Reg. *v.* Adams, 1 F. & F. 86, it was held that to justify a conviction for receiving stolen property in the case of goods found, it is not sufficient to show that the prisoner had a general knowledge of the circumstances under which the goods were taken, unless the jury is also satisfied that he knew that the circumstances were such as constituted a larceny.

Property Taken Against Will of Thief Not Receiving. — Reg. *v.* Wade, 1. C. & K. 739, 47 E. C. L. 739.

Jury Must Be Satisfied Beyond Reasonable Doubt as to Receiving. — Com. *v.* Maguire, 108 Mass. 469.

7. Manual Possession Unnecessary. — Reg. *v.* Smith, Dears. 494, 1 Jur. N. S. 575, 24 L. J. M. C. 135, 6 Cox C. C. 554.

8. Receiving by Agent. — Reg. *v.* Miller, 6 Cox C. C. 353; State *v.* Stroud, 95 N. Car. 626. See also Reg. *v.* Woodward, 9 Cox C. C. 95.

9. Concealment of Stolen Property. — Crim. Code Ala. (1896), § 5054; Barber *v.* State, 34 Ala. 213; Turner *v.* State, 40 Ala. 21; People *v.* Reynolds, 2 Mich. 422; People *v.* Harris, 93 Mich. 617; Smith *v.* State, 59 Ohio St. 361.

A Concealment Has Been Held to Include all acts done which render the discovery or identification of the property more difficult. State *v.* Ward, 49 Conn. 429, in which it was held that the clipping of a horse for the purpose of making it more difficult to identify it was a concealment. See also People *v.* Reynolds, 2 Mich. 424.

In State *v.* St. Clair, 17 Iowa 149, it was held that being present where stolen property is concealed, knowing it to be stolen, and keeping silent and refusing to give information to officers searching for it, is, when unexplained, conduct sufficient to warrant a conviction.

Merely giving to the thief his breakfast and

has been held that concealment is not an essential element of the crime of receiving stolen goods.[1]

5. Thing Received — *a.* IN GENERAL. — As a general rule, whatever property is the subject of larceny admits of being received, within the meaning of the statute.[2]

b. ALTERATION OF CHARACTER OF STOLEN PROPERTY. — The fact that the character of the stolen property is changed before it reaches the receiver is not material if he knows that it was stolen.[3] But the receiving of property for which the stolen goods were exchanged will not amount to a receiving of stolen goods.[4]

6. Who May Be Receivers — *a.* HUSBAND AND WIFE — **As Joint Receivers.** — Husband and wife may be jointly indicted and convicted when it appears that they have jointly received stolen goods and that the wife acted of her own will and free from the control of her husband.[5] But where the wife acts in the presence of her husband she is *prima facie* presumed to have acted through his coercion, and the mere fact that she may be the more active in consummating the offense will not make her guilty, the question in such case depending upon the cause and not upon the fact of the action.[6]

Husband Receiving from Wife. — A husband may be convicted of feloniously receiving property which his wife has stolen voluntarily and without any constraint on his part, if he receives it knowing that she has stolen it.[7]

Wife Receiving from Husband. — But the wife cannot be convicted of receiving from her husband.[8]

b. JOINT RECEIVERS. — Two or more persons may be convicted of jointly receiving,[9] but in the absence of a statute providing otherwise[10] it has been held that a joint act of receiving must be proved. Proof that one did the receiving without the knowledge of the other, and afterwards made a delivery to the latter, will not be sufficient.[11] The possession may, however, be

feed for stolen horses has been held not an aiding to conceal. State *v.* Upton, 5 Iowa 465.

Mere Ineffectual Attempt at Concealment. — "If one, knowing the place of deposit of stolen goods, should prepare himself with materials to cover the same so that they might not be discovered, and should set out for the place of deposit with such materials and with a purpose of thereby covering and concealing such stolen property, but the stolen property should be discovered and recovered before such person had reached the place of deposit, the fact that he had done something designed and intended to conceal the goods would not be sufficient to constitute an offense under the law." Vanimmons *v.* State, 12 Ohio Cir. Dec. 345, 22 Ohio Cir. Ct. 451.

1. Concealment Not Essential to Receiving. — Holtz *v.* State, 30 Ohio St. 486. See Turner *v.* State, 40 Ala. 21. But see State *v.* Ward, 49 Conn. 429.

2. What Property May Be Received. — State *v.* Ward, 49 Conn. 429.

"Goods or Articles" Held to Include a Horse. — State *v.* Ward, 49 Conn. 429.

Banknotes Held Not to Be "Goods and Chattels." — U. S. *v.* Morgan, 1 Cranch (C. C.) 278; State *v.* Calvin, 22 N. J. L. 207; Boyd's Case, 3 City Hall Rec. (N. Y.) 59; Rutherford *v.* Com., 2 Va. Cas. 141. And the same was at one time held as to promissory notes. Rex *v.* Gaze, R. & R. C. C. 385. But see the amendments to the various statutes so as to include banknotes and promissory notes.

Statutory Enumeration of Subjects of Receiving Conclusive. — Barber *v.* State, 34 Ala. 213; Turner *v.* State, 40 Ala. 21. Under Crim. Code Ala. (1896), § 5054, the offense may be committed as to "any personal property whatever."

3. Alteration of Character of Stolen Property. — Rex *v.* Cowell, 2 East P. C. 617; Com. *v.* White, 123 Mass. 430, 25 Am. Rep. 116.

4. Receiving Property Exchanged for Stolen Goods. — U. S. *v.* Montgomery, 3 Sawy. (U. S.) 544.

5. Husband and Wife as Joint Receivers. — Goldstein *v.* People, 82 N. Y. 231. See also Reg. *v.* Dring, 7 Cox C. C. 382; Reg. *v.* Wardroper, 8 Cox C. C. 284. *Compare* Reg. *v.* Matthews, 4 Cox C. C 214. See further the title HUSBAND AND WIFE, vol. 15, p. 903.

6. Presumption of Coercion from Presence of Husband. — State *v.* Houston, 29 S. Car. 108.

7. Husband Receiving from Wife. — Reg. *v.* M'Athey, L. & C. 250, 9 Cox C. C. 251, 8 Jur. N. S. 1218, 32 L. J. M. C. 35, 11 W. R. 73, 7 L. T. N. S. 433. See also Reg. *v.* Woodward, L. & C. 122, 9 Cox C. C. 95, 8 Jur. N. S. 104, 31 L. J. M. C. 91, 10 W. R. 298, 5 L. T. N. S. 686.

8. Wife Receiving from Husband. — Reg. *v.* Brooks, 6 Cox C. C. 148.

9. Conviction of Joint Receivers. — Reg. *v.* Byrne, 4 Ir. C. L. 68.

10. Reg. *v.* Reardon, L. R. 1 C. C. 31, 12 Jur. N. S. 476, 35 L. J. M. C. 171, 14 W. R. 663, 14 L. T. N. S. 449, decided under 24 & 25 Vict., c. 96, § 94; Reg. *v.* Smith, L. R. 1 C. C. 266, 39 L. J. M. C. 112, 18 W. R. 932.

11. Proof of Joint Act of Receiving Necessary. — Rex *v.* Messingham, 1 Moody 257; Faunce *v.*

constructive.[1]

c. PERSON IMPLICATED IN THEFT. — One cannot be at the same time a principal in the commission of a larceny and, in the legal sense, a receiver of the stolen property.[2] This rule has also been applied to principals in the second degree.[3] On the other hand it has been held that a prosecution for receiving or concealing stolen property may be maintained against one who was present and aiding in the commission of the larceny, and who received the property from the principal.[4]

d. AGENT OF OWNER. — If the property was received with a felonious intent, it will be no defense that the receiver had been authorized or licensed by the owner to receive it.[5]

7. From Whom Property Must Be Received. — To sustain the charge of having received stolen goods, it has been held that it must appear that the goods were received either directly from the thief or indirectly through a person not acting independently of him; a receiving from a prior receiver will not be sufficient.[6]

IV. EVIDENCE — 1. Confessions. — As in the case of prosecutions for other offenses, the confession of the accused will be admissible[7] provided it is voluntarily made.[8]

Declarations of Co-conspirator. — Where the evidence shows a fraudulent conspiracy between the thief or thieves and the receiver to sell or dispose of the stolen goods, the acts or declarations of one of the conspirators in reference to the common enterprise, even in the absence of the defendant, are competent evidence against the defendant if made before the consummation of the sale of the property and the division of the proceeds.[9]

2. Testimony of Thief. — The thief is a competent witness against a receiver of stolen goods.[10]

People, 51 Ill. 311; Wheeler *v.* State, 76 Miss. 265. See also Reg. *v.* Dring, 7 Cox C. C. 382. *Compare* People *v.* Stein, (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 202.

But in Sanderson *v.* Com., (Ky. 1889) 12 S. W. Rep. 136, it was held that where one partner without his copartner's knowledge receives stolen goods knowing them to be stolen, and his copartner afterwards with knowledge of the theft appropriates them, both are guilty of receiving stolen goods.

Conviction of Separate Receipt. — Upon an indictment charging A and B with jointly receiving stolen goods, it has been held that if a separate receipt by each is proved, the one may be convicted who is proved to have been guilty of the first separate act of receiving. Reg. *v.* Dovey, 2 Den. C. C. 86, T. & M. 411, 20 L. J. M. C. 105, 15 Jur. 230, 4 Cox C. C. 428.

In the *United States* it has been held that while in the absence of proof of joint receipt there can be no conviction of the joint offense, either defendant may be acquitted or convicted as upon a separate indictment. Com. *v.* Billings, 167 Mass. 283; Chatterton *v.* People, (Supm. Ct. Gen. T.) 15 Abb. Pr. (N. Y.) 147. See also Com *v.* State, 11 Gray (Mass.) 60.

1. Reg. *v.* Rogers, L. R. 1 C. C. 136, 37 L. J. M. C. 83; Reg. *v.* Parr, 2 M. & Rob. 346.

2. Thief Cannot Be Receiver. — Owen *v.* State, 52 Ind. 379; Matter of Franklin, 77 Mich. 615; State *v.* Honig, 78 Mo. 249; People *v.* Brien, 53 Hun (N. Y.) 496, 7 N. Y. Crim. 166; Reg. *v.* Lamoureux, 10 Quebec K. B. 15.

3. Principal in Second Degree. — Reg. *v.* Perkins, 5 Cox C. C. 554; Reg. *v.* Coggins, 12 Cox C. C. 517; Reg. *v.* Hodge, 12 Manitoba 319. See also Reg. *v.* Gruncell, 9 C. & P. 365, 38 E. C. L. 157; Reg. *v.* M'Carthy, 2 C. & P. 379; Reg. *v.* Hilton, 8 Cox C. C. 87, 5 Jur. N. S. 47.

Person Aiding Escape of Criminal. — State *v.* Pomeroy, 30 Oregon 16.

Aider Not Present at Commission of Crime. — This rule has been held not to apply to an accessory before the fact who was not present at the commission of the crime, State *v.* Coppenburg, 2 Strobh. L. (S. Car.) 273; and this although under the *New York* Penal Code he became guilty of the principal offense, People *v.* Rivello, 39 N. Y. App. Div. 454.

4. Smith *v.* State, 59 Ohio St. 350; Jenkins *v.* State, 62 Wis. 49.

5. Receiving by Agent of Owner. — People *v.* Wiley, 3 Hill (N. Y.) 194; Cassels *v.* State, 4 Yerg. (Tenn.) 149; Wright *v.* State, 5 Yerg. (Tenn) 154, 26 Am. Dec. 258.

6. Necessity of Receiving from Thief. — Foster *v.* State, 106 Ind. 272. See also State *v.* Ives, 13 Ired. L. (35 N. Car.) 338; Moseley *v.* State, 36 Tex. Crim. 578. But see Levi *v.* State, 14 Neb. 1; Smith *v.* State, 59 Ohio St. 350.

Receiving from Thief's Agent Sufficient. — Com. *v.* White, 123 Mass. 430, 25 Am. Rep. 116.

7. Confessions. — People *v.* McKennan, (Supm. Ct. Gen. T.) 35 N. Y. St. Rep. 938; State *v.* Habib, 18 R. I. 558.

8. State *v.* Davis, 125 N. Car. 612. See generally the title CONFESSIONS, vol. 6, p. 535.

9. Declarations of Co-conspirator. — People *v.* Pitcher, 15 Mich. 397; McFadden *v.* State, 28 Tex. App. 241.

10. Thief Competent Witness Against Receiver. — Rex *v.* Haslam, 1 Leach C. C. 418, 2 East

Whether Thief Is Accomplice. — In some cases the thief has been held not to be an accomplice of the receiver within the meaning of statutes providing substantially that no conviction can be had in any case of felony upon the uncorroborated testimony of an accomplice.[1] But in other jurisdictions a different view has been declared.[2] In *California* it is held that whether the thief is an accomplice in the commission of the offense is a question of fact for the jury, and should be submitted thereto in order to determine whether his uncorroborated evidence will be sufficient to convict.[3]

3. Testimony of Owner. — The owner of the stolen property is a competent witness against the receiver.[4]

4. Presumption from Recent Possession. — In *New York* it is held that the presumption of guilt arising from recent possession of stolen property applies as well to a person charged with unlawful receiving as to one charged with its original taking.[5] In other jurisdictions it is held that the presumption that would usually arise in such case is that the possessor is guilty of larceny and not of a felonious reception.[6] It is settled, however, that recent possession united with other circumstances of a peculiar and suspicious character, as, for instance, failure to give a satisfactory explanation of the possession, may warrant a presumption of guilty knowledge if it may reasonably be inferred from the circumstances that the possessor did not commit the larceny himself.[7] The declaration of the possessor that he received the property from another may be taken as sufficient evidence that he received it from the thief, rather than that he himself stole it.[8]

5. Good Character of Accused. — In a prosecution for receiving stolen goods,

P. C. 782; People *v.* Levison, 16 Cal. 98, 76 Am. Dec. 505; McNiff's Case, 1 City Hall Rec. (N. Y.) 8; Wixson *v.* People, (Supm. Ct. Gen. T.) 5 Park. Crim. (N. Y.) 119; People *v.* Cook, (Supm. Ct. Gen. T.) 5 Park. Crim. (N. Y.) 351; State *v.* Coppenburg, 2 Strobh. L. (S. Car.) 273.

1. Thief Held Not to Be Accomplice. — Lowery *v.* State, 72 Ga. 649; Allen *v.* State, 74 Ga. 769; Springer *v.* State, 102 Ga. 447; State *v.* Kuhlman, 152 Mo. 100, 75 Am. St. Rep. 438. See also the title ACCOMPLICES, vol. 1, p. 393.

2. Thief Held to Be Accomplice. — State *v.* Greenburg, 59 Kan. 404; Com. *v.* Poots, 18 Phila. (Pa.) 477, 43 Leg. Int. (Pa.) 226; Johnson *v.* State, (Tex. Crim. 1901) 60 S. W. Rep. 667 See also Com. *v.* Savory, 10 Cush. (Mass.) 535.

In England it has been held, in the absence of any statutory provision against a conviction on the uncorroborated testimony of an accomplice, that a conviction cannot be had upon the uncorroborated testimony of the thief. Reg. *v.* Robinson, 4 F. & F. 43. So the mere fact that the stolen goods were found on the prisoner's premises has been held not to be sufficient to confirm the evidence of the thief. Reg. *v.* Pratt, 4 F. & F. 315.

3. People *v.* Kraker, 72 Cal. 459, 1 Am. St. Rep. 65. See also People *v.* Clausen, 120 Cal. 381.

4. Owner of Property Competent Witness. — Gassenheimer *v.* State, 52 Ala. 313. See also People *v.* Clausen, 120 Cal. 381; People *v.* Moloney, 113 Mich. 536.

Testimony of Owner as to Value Admissible. — Cohen *v.* State, 50 Ala. 108.

5. Presumption of Guilt from Recent Possession. — People *v.* Weldon, 111 N. Y. 569. See also People *v.* Ray, 36 N. Y. App. Div. 389.

Presumption Not Conclusive. — State *v.* Pomeroy, 30 Oregon 16.

6. No Presumption of Receiving Held to Arise from Mere Possession. — Sartorious *v.* State, 24 Miss. 602; State *v.* Bulla, 89 Mo. 595; Trail *v.* State, (Tex. Crim. 1900) 57 S. W. Rep. 92. See also Rex *v.* Densley, 6 C. & P. 399, 25 E. C. L. 457; Sisk *v.* State, (Tex. Crim. 1897) 42 S. W. Rep. 985.

7. Inference from Possession Combined with Other Circumstances. — Reg. *v.* Langmead, L. & C. 427, 9 Cox C. C. 464, 10 L. T. N. S. 350; Reg. *v.* McMahon, 13 Cox C. C. 275; State *v.* Mayer, 45 Iowa 698; Sartorious *v.* State, 24 Miss. 602; Goldstein *v.* People, 82 N. Y. 231. See also Reg. *v.* Matthews, 1 Den. C. C. 596; Reg *v.* Hobson, Dears. 400.

Failure to Make Reasonable Explanation as Evidence of Guilt. — Huggins *v.* People, 135 Ill. 243, 25 Am. St. Rep. 357; State *v.* Mayer, 45 Iowa 698; State *v.* Miller, 159 Mo. 113.

Where a man engaged in trade is found, under suspicious circumstances, in possession of stolen goods, and he declares that he knows or has the means of ascertaining the person from whom he received them, and who transferred possession to him in a manner out of the ordinary course of business, his failure to take any steps to detect such person would be a potent fact from which a jury could reasonably infer guilt. Adams *v.* State, 52 Ala. 379.

But the inference is otherwise where a reasonable explanation of possession is given. Estes *v.* State, 23 Tex. App. 600; Williams *v.* State, 29 Tex. App 167; Brothers *v.* State, 22 Tex. App. 447.

8. Gunther *v.* People, 139 Ill. 526. See also People *v.* McKenna, (Supm. Ct. Gen. T.) 35 N. Y. St. Rep. 938.

evidence of the good character of the accused is admissible in his behalf,[1] subject to the qualification supported by authority to some extent that the other evidence in the case must be circumstantial or the guilt of the accused be doubtful.[2]

6. Proof of Larceny — *a.* IN GENERAL. — Whatever would be evidence of the theft in a prosecution against the thief is *prima facie* evidence of the theft as against the receiver.[3]

b. RECORD OF CONVICTION AND SENTENCE. — The record of the conviction and sentence of the thief is *prima facie* evidence of his guilt on the trial of the receiver, and places upon the latter the onus of showing that the thief was not properly convicted.[4] But it has been held that the record of the conviction of a thief on his plea of guilty to an indictment against him alone is not admissible in evidence to prove the theft on the trial of the receiver of that property, upon an indictment against him alone which does not aver that the thief has been convicted.[5]

7. Receipt and Identification. — The receipt and identification of the stolen property are to be determined from all the circumstances of the case which bear on the question.[6]

8. Proof of Knowledge — *a.* IN GENERAL. — Knowledge need not be shown by direct testimony, but all the facts and circumstances from which the inference of guilty knowledge arises are admissible to show such knowledge.[7]

1. Jupitz *v.* People, 34 Ill. 516. See also U. S. *v.* Lowenstein, 21 D. C. 515. See generally the title CHARACTER (IN EVIDENCE), vol. 5, p. 866.

For a treatment of the admissibility of such evidence in rebuttal of the presumption arising from possession, see the title CHARACTER (IN EVIDENCE), vol. 5, p. 869.

Character of Defendant's Business. — On the trial of a shopkeeper for receiving stolen goods, evidence of the kind of shop which he kept and the business which he there conducted is admissible to inform the jury of his habitual occupation and the consequent opportunity to commit the offense charged against him. Com. *v.* Campbell, 103 Mass. 436.

2. See Hey *v.* Com., 32 Gratt. (Va.) 946, 34 Am. Rep. 799.

3. Evidence in Proof of Larceny. — Rex *v.* Blick, 4 C. & P. 377, 19 E. C. L. 428; Tucker *v.* State, 23 Tex. App. 512; Polin *v.* State, (Tex. Crim. 1901) 65 S. W. Rep. 183.

Testimony of Thief. — People *v.* Clausen, 120 Cal. 381; Stone *v.* Com., (Ky. 1902) 67 S. W. Rep. 841; Com. *v.* Poots, 18 Phila. (Pa.) 477, 43 Leg. Int. (Pa.) 226.

An Admission of his guilt, made by the thief while in custody, in the presence of the receiver, has been held evidence against the receiver. Reg. *v.* Cox, 1 F. & F. 90. But in Reilley *v.* State, 14 Ind. 217, the extrajudicial confession of the thief was held inadmissible in evidence.

Flight of Accomplices in Theft. — State *v.* Hanna, 35 Oregon 195.

Theft of Other Goods. — In McIntire *v.* State, 10 Ind. 26, evidence was held inadmissible to show that the alleged thief had stolen other property of the same kind from another person at a different time.

4. Record of Conviction and Sentence of Thief. — Coxwell *v.* State, 66 Ga. 310; Stripland *v.* State, 114 Ga. 843; Cooper *v.* State, 29 Tex. App. 8, 25 Am. St. Rep. 712.

Conviction on Plea of Guilty. — Rex *v.* Blick, 4 C. & P. 377, 19 E. C. L. 428; Anderson *v.* State, 63 Ga. 675.

Act Making Prior Conviction Conclusive Evidence Held Unconstitutional. — Kirby *v.* U. S., 174 U. S. 47.

5. Com. *v.* Elisha, 3 Gray (Mass.) 460.

6. Receipt and Identification of Goods. — People *v.* Kiley, 107 Mich. 345. See also Reg. *v.* Hobson, Dears. 400.

Similarity of Wrapping Paper Found in Defendant's Room. — Com. *v.* Mullen, 150 Mass. 394; Polin *v.* State, (Tex. Crim. 1901) 65 S. W. Rep. 183.

Identification by Sense of Touch. — People *v.* Connor, 68 Hun (N. Y.) 78, *affirmed* 141 N. Y. 583.

Recognition of Goods by Means of Certain Marks. — Hester *v.* State, 103 Ala. 83; People *v.* Moloney, 113 Mich. 536. See also Polin *v.* State, (Tex. Crim. 1901) 65 S. W. Rep. 183.

Unexplained Possession of Large Sum of Money. — Jenkins *v.* State, 62 Wis. 49.

Mere Similarity of Goods Insufficient. — Com. *v.* Billings, 167 Mass. 283.

Possession of Other Goods. — In People *v.* McClure, 148 N. Y. 95, it was held that evidence of the receiving of other goods than those charged to be stolen is admissible for the purpose of aiding in the identification of the goods in question, where it appears that all the goods were taken by the same person, at the same time, and from the same place, and were found in the defendant's possession in the same place, and where the evidence also warrants the inference that the defendant received all the goods from the same person at the same time. See also State *v.* Hanna, 35 Oregon 195.

7. Proof of Guilty Knowledge. — People *v.* Clausen, 120 Cal. 381; Licette *v.* State, 75 Ga. 253; Cobb *v.* State, 76 Ga. 664, 78 Ga. 801; Huggins *v.* People, 135 Ill. 243, 25 Am. St. Rep. 357; Harless *v.* U. S., 1 Indian Ter. 447; People *v.* Teal, 1 Wheel. Crim. (N. Y.) 199; People *v.* Flechter, 44 N. Y. App. Div. 199, 14

b. CONVERSATIONS, ETC., BETWEEN THIEF AND RECEIVER. — It is competent both for the prosecution [1] and for the defense [2] to show what were the actual circumstances, the arrangement or understanding, as evidenced by conversations or otherwise, under which the goods were received by the defendant, as bearing on the question of guilty knowledge, such evidence being admitted as part of the *res gestæ*.

c. POSSESSION OF OTHER STOLEN GOODS. — It is competent for the commonwealth to prove other prior acts of receiving, or that other stolen goods were found in the possession of the defendant, for the purpose of showing guilty knowledge,[3] especially if all the goods were stolen from the same person and delivered to the receiver by the same thief,[4] and this without proving guilty knowledge as to the other acts of receiving.[5] It is not essential in order to make such evidence admissible that the other goods should have been stolen from the same person or place as the goods in question, or that they should have been similar in character.[6] According to some of the cases, the receiving of stolen goods in the former instances, to be admissible in evidence, must have been from the same person from whom the goods in

N. Y. Crim. 328; People *v.* Schooley, 149 N. Y. 99, *affirmed* 89 Hun (N. Y.) 391; Murio *v.* State, 31 Tex. Crim. 210.

Stealthy or Suspicious Manner of Receiving. — People *v.* Schooley, 149 N. Y. 99. As where the goods are received at night. Friedberg *v.* People, 102 Ill. 160; Murio *v.* State, 31 Tex. Crim. 210.

Failure to Make Entry of Description of Goods in Accordance with Ordinance. — People *v.* Clausen, 120 Cal. 381. See also Com. *v.* Leonard, 140 Mass. 473, 54 Am. Rep. 485.

Desire that Thief Should Abscond. — People *v.* Pitcher, 15 Mich. 397.

Drunkenness as Showing Want of Knowledge. — Proof of drunkenness will not support an averment of a want of guilty knowledge in receiving stolen goods. Com. *v.* Finn, 108 Mass. 466. *Compare* Com. *v.* Ault, 10 Pa. Super. Ct. 651.

Evidence of Former Agency of Thief to Make Sale to Receiver admissible to show want of knowledge. Reg. *v.* Wood, 1 F. & F. 497.

Burden of Proof on Prosecution. — Reg. *v.* Harwood, 11 Cox C. C. 388; Reg. *v.* Davis, 11 Cox C. C. 578.

1. Admissibility of Conversations at Time of Receiving. — Com. *v.* Jenkins, 10 Gray (Mass.) 485. See also Copperman *v.* People, 56 N. Y. 591.

2. O'Connell *v.* State, 55 Ga. 296; Durant *v.* People, 13 Mich. 351; People *v.* Dowling, 84 N. Y. 478 [*overruling* People *v.* Rando, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 335; Willis *v.* People, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 473]; State *v.* Bethel, 97 N. Car. 459.

3. Proof of Possession of Other Stolen Goods. — Devoto *v.* Com., 3 Met. (Ky.) 418; Shriedley *v.* State, 23 Ohio St. 130; Com. *v.* Johnson, 133 Pa. St. 293; State *v.* Crawford, 39 S. Car. 343. See also Reg. *v.* Mansfield, C. & M. 140, 41 E. C. L. 81; Reg. *v.* Nicholls, 1 F. & F. 51.

By the Statute 34 & 35 Vict., c. 112, § 19, it was provided that where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of proceedings taken against him. Reg. *v.* Jones, 14 Cox C. C. 3.

Under this statute it must be proved that such "other property" was found in the possession of the prisoner at the time when he was found in possession of the property which is the subject-matter of the indictment. Reg. *v.* Drage, 14 Cox C. C. 85; Reg. *v.* Carter, 12 Q. B. D. 522.

Other Goods Must Have Been Stolen. — Gassenheimer *v.* State, 52 Ala. 313.

Necessity of Connection Between Different Receivings. — It was said in Com. *v.* Charles, 3 Leg. Gaz. (Pa.) 336, 14 Phila. (Pa.) 663, 36 Leg. Int. (Pa.) 444, that on the trial of an indictment for receiving stolen goods, other acts of receiving, not so far removed in point of time or circumstances from the specific act charged as to constitute a totally distinct transaction, may be given in evidence to establish the fact of guilty knowledge. See also Kilrow *v.* Com., 89 Pa. St. 480.

Proof of Bona Fide Receiving in Rebuttal. — Where evidence of other acts of receiving has been admitted, it is competent for the prisoner to offer in rebuttal testimony tending to show that he came by the property honestly. People *v.* Dowling, 84 N. Y. 478.

4. Rex *v.* Dunn, 1 Moody 146; Copperman *v.* People, 56 N. Y. 591; Coleman *v.* People, 58 N. Y. 555; State *v.* Habib, 18 R. I. 558; State *v.* Jacob, 30 S. Car. 131, 14 Am. St. Rep. 897.

Goods Belonging to Same Owner. — Rex *v.* Davis, 6 C. & P. 177, 25 E. C. L. 341.

Goods Received from Same Thief. — Harwell *v.* State, 22 Tex. App. 251.

5. State *v.* Jacob, 30 S. Car. 131, 14 Am. St. Rep. 897.

6. Goods Need Not Belong to Same Person. — State *v.* Ward, 49 Conn. 429; Goodman *v.* State, 141 Ind. 35; People *v.* Rando, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 335; Shriedley *v.* State, 23 Ohio St. 130; Morgan *v.* State, 31 Tex. Crim. 1.

question were received.[1] But other authorities are to the contrary.[2]

Subsequent Acts of Receiving. — Since the question to be determined is the state of mind of the receiver at the date of the receipt, dealings or transactions subsequent to the receiving in question are not admissible.[3]

d. CHARACTER OF PERSONS FREQUENTING DEFENDANT'S PREMISES. — Where the character of persons frequenting the defendant's house or premises is such as to put him on inquiry as to any property brought by any of them upon his premises, evidence of this fact may be admitted for the purpose of showing that in receiving stolen property he must have had knowledge that it was stolen.[4]

e. REPUTATION OF THIEF. — So evidence of knowledge of the accused that the person from whom the property was received was a thief,[5] or of the thief's reputation in the community,[6] is admissible on the question of knowledge.

f. FALSE DENIAL OF POSSESSION. — So the false denial by a receiver that he has the goods in question in his possession is presumptive evidence of guilty knowledge.[7] But if the denial is the result of a misunderstanding, or from fear of consequences, it will not have that effect.[8]

g. INADEQUACY OF PURCHASE PRICE. — So guilty knowledge may be inferred from the fact that the receiver purchased the goods for very much less than their value.[9]

9. Proof of Intent. — It is not essential that the prosecution should prove the felonious intent by positive testimony, as by the actual admission of such motive by the defendant; if he knew when he received the goods that they were stolen, the intent to defraud the owner can be gathered from the circumstances surrounding the case.[10]

Offering Property for Sale as Evidence of Intent. — If a person has in his possession goods which he knows are stolen, his offer of the goods for sale is proof of his guilty intent to deprive the true owner of his property.[11]

V. BAR TO PROSECUTION — 1. Former Acquittal. — If goods stolen from different persons are received from the same thief at the same time, it has been held that there is but one offense of receiving, and an acquittal of a charge of receiving as to goods stolen from one of the persons will bar a charge as to the other goods.[12]

Former Acquittal of Breaking Storehouse with Intent to Steal. — An acquittal under an

1. Receiving from Same Thief. — Reg. *v.* Oddy, 5 Cox C. C. 210; State *v.* Ward, 49 Conn. 429; Coleman *v.* People, 55 N. Y. 81; Copperman *v.* People, 56 N. Y. 591; Coleman *v.* People, 58 N. Y. 555. See also Shriedley *v.* State, 23 Ohio St. 130.

2. Goodman *v.* State, 141 Ind. 35; Morgan *v.* State, 31 Tex. Crim. 1.

3. Subsequent Receivings Inadmissible. — People *v.* Willard, 92 Cal. 482.

4. Goodman *v.* State, 141 Ind. 35. *Compare* People *v.* Pierpont, 1 Wheel. Crim. (N. Y.) 139.

5. Receiver's Knowledge of Thief's Character Admissible. — Friedberg *v.* People, 102 Ill. 160; State *v.* Goldblat, 50 Mo. App. 186.

6. Thief's Reputation in Community Admissible. — Huggins *v.* People, 135 Ill. 243, 25 Am. St. Rep. 357; Com. *v.* Gazzolo, 123 Mass. 220, 25 Am. Rep. 79.

7. False Denial of Possession. — People *v.* Levison, 16 Cal. 98, 76 Am. Dec. 505; Huggins *v.* People, 135 Ill. 243, 25 Am. St. Rep. 357; Frank *v.* State, 67 Miss. 125. See also State *v.* Miller, 159 Mo. 113.

But the mere fact that the defendant did not attempt to prevent the owner from recovering his goods is not evidence that he did not know that they were stolen People *v.* Solomon, (Cal. 1899) 58 Pac. Rep. 55, 125 Cal. xix.

8. See Sartorious *v.* State, 24 Miss. 602.

9. Inadequacy of Purchase Price. — People *v.* Levison, 16 Cal. 98, 76 Am. Dec. 505; People *v.* Hertz, 105 Cal. 660; People *v.* Clausen, 120 Cal. 381; Huggins *v.* People, 135 Ill. 243, 25 Am. St. Rep. 357; State *v.* Goldman, 65 N. J. L. 394; State *v.* Houston, 29 S. Car. 108. See also Estes *v.* State, 23 Tex. App. 600; Trail *v.* State, (Tex. Crim. 1900) 57 S. W. Rep. 92.

But where a dealer in second-hand clothing is charged as a receiver, he may show in rebuttal of such evidence a usage among such dealers to pay less than value in accordance with the requirements of their business. Andrews *v.* People, 60 Ill. 354.

10. Proof of Intent.—U. S. *v.* Lowenstein, 21 D. C. 519.

11. Offering Property for Sale as Evidence of Intent. — People *v.* Flechter, 44 N. Y. App. Div. 199.

12. Effect of Former Acquittal.—People *v.* Willard, 92 Cal. 482. But see Com. *v.* Andrews, 2 Mass. 409.

Acquittal No Bar to Civil Action. — Rohm *v.* Borland, (Pa. 1886) 7 Atl. Rep. 171.

indictment for feloniously breaking a storehouse with intent to steal and taking goods therefrom is no bar to the prosecution of an indictment for receiving stolen goods.[1]

2. Statute of Limitations. — Under a statute of limitations prescribing the time in which a prosecution for this offense may be had, it has been held that the period of limitation begins to run when the offense is complete, that is, at the time of the actual reception of the stolen goods.[2]

RECENT — RECENTLY. — The words "recent" and "recently" are relative terms.[3]

RECESSES. (See also the title CHAMBERS AND VACATION, 4 ENCYC. OF PL. AND PR. 336. And see in this work ADJOURN — ADJOURNMENT, vol. 1, p. 636; and the title STATUTES.) — See note 4.

RECIPROCAL DEMAND. — See note 5.

1. Pat *v.* State, (Ga. 1902) 42 S. E. Rep. 389; Com. *v.* Bragg, 104 Ky. 306.

2. Jones *v.* State, 14 Ind. 346.

3. **Recent — Recently.** — White *v.* State, 72 Ala. 200; Crawford *v.* Lozano, (Tex. Civ. App. 1898) 48 S. W. Rep. 538.

4. **Recesses.** — Code Civ. Pro. Cal., § 74, provides that "adjournments from day to day, or from time to time, are to be construed as *recesses* in the sessions, and shall not prevent the court from sitting at any time." In Matter of Gannon, 69 Cal. 545, it was held that "by the term *recesses* is meant the times in which the court is not actually engaged in business."

5. **Reciprocal Demand — Mutual Accounts.** (See also the title MUTUAL ACCOUNTS, vol. 21, p. 242. The term *reciprocal demand* has been held equivalent to "mutual accounts." Millet *v.* Bradbury, 109 Cal. 170; Green *v.* Disbrow, 79 N. Y. 1; Peck *v.* New York, etc., U. S. Mail Steamship Co., 5 Bosw. (N. Y.) 236.

RECITALS.

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CROSS-REFERENCES.

For a discussion of Recitals in Pleadings, see the Encyclopædia of Pleading and Practice, vol. 6, p. 270; vol. 20, p. 593.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see in this work the titles COMMUNITY PROPERTY, vol. 6, p. 328 *et seq.; CONSIDERATION*, vol. 6, p. 765 *et seq.; DOCUMENTARY EVIDENCE*, vol. 9, p. 880; *ESTOPPEL*, vol. 11, p. 385; *PURCHASERS FOR VALUE AND WITHOUT NOTICE, ante; RECORDING ACTS; RECORDS; SHERIFFS' SALES; STATUTES; TRUST DEEDS AND POWER-OF-SALE MORTGAGES.*

I. DEFINITION. — A recital in a deed is defined to be the setting-down or report of something done before,[1] or, more specifically, the narration of the previous agreements or matters of fact upon which the transaction is founded.[2] Recitals frequently appear as preliminary or introductory statements in a deed and constitute what is sometimes called the reciting part of the instrument.[3] But the term as employed in this article is not confined to this narrow use, but refers to material statements of fact made in any portion of the instrument.

II. OPERATION AS ESTOPPEL — **1. Particularity Required.** — To work an estoppel, a recital must be particular, certain, and unambiguous, and not merely general.[4] But if a distinct statement of a particular fact is made in the recital, and the contract is made with reference to that recital, it is a general rule that as between the parties to the instrument or persons claiming under them, the recital is conclusive,[5] and this rule applies to a recital of a

1. Definition. — Clark *v.* Post, 113 N. Y. 25, *quoting* Shepard's Touchstone, c. 5, Exposition of Deeds, 76, § 3.

2. See 2 Bl. Com. 298; McCullough *v.* Dashiell, 78 Va. 640.

3. Bath *v.* Mountague, Ch. Cas. (pt. iii.) 101; Jackson School Tp. *v.* Farlow, 75 Ind. 122; Clark *v.* Post, 113 N. Y. 25.

4. General Recitals Not Operative as Estoppels — *England.* — Salter *v.* Kidley, 1 Show. 59; Lainson *v.* Tremere, 1 Ad. & El. 792, 28 E. C. L. 214.

United States. — Wallace *v.* McClung, (C. C. A.) 74 Fed. Rep. 376; Independent School Dist. *v.* Stone, 106 U. S. 183.

Illinois. — Kerns *v.* Brockway, 96 Ill. App. 273.

Massachusetts. — Doane *v.* Willcutt, 16 Gray (Mass.) 368; Weed Sewing Mach. Co. *v.* Emerson, 115 Mass. 554; Jackson *v.* Allen, 120 Mass. 79; Claflin *v.* Boston, etc., R. Co., 157 Mass. 495.

Mississippi. — McComb *v.* Gilkey, 29 Miss. 146.

New York. — Edmonston *v.* Edmonston, 13 Hun (N. Y.) 133; Dempsey *v.* Tylee, 3 Duer (N. Y.) 73.

Pennsylvania. — Ingersoll *v.* Sergeant, 1 Whart. (Pa.) 337; Naglee *v.* Ingersoll, 7 Pa. St. 185; Wells *v.* Slayer, 1 Pa. L. J. Rep. 516, 3 Pa. L. J. 203.

Vermont. — Probate Ct. *v.* Matthews, 6 Vt. 269.

See also the title ESTOPPEL, vol. 11, p. 401.

5. Particular Recitals Binding — *England.* — Carpenter *v.* Buller, 8 M. & W. 209 (*disapproving* statement in Coke on Littleton 352*b*); Webb *v.* Herne Bay, L. R. 5 Q. B. 642; Shelley *v.* Wright, Willes 9; Cossens *v.* Cossens, Willes 25.

United States. — American L. Ins. Co. *v.* Bruce, 105 U. S. 328.

Alabama. — Elyton Land Co. *v.* South, etc., R. Co., 95 Ala. 631.

Georgia. — Atlas Tack Co. *v.* Exchange Bank, 111 Ga. 703.

Illinois. — Byrne *v.* Morehouse, 22 Ill. 603; George *v.* Bischoff, 68 Ill. 236; Herrick *v.* Swartwout, 72 Ill. 341; Pinckard *v.* Milmine, 76 Ill. 453; Mix *v.* People, 86 Ill. 329.

Louisiana. — Barbet *v.* Roth, 16 La. Ann. 271.

Maryland. — Kreps *v.* Kreps, 91 Md. 692.

New York. — Jackson *v.* Willson, 9 Johns. (N. Y.) 92; Sandford *v.* Roosa, 12 Johns. (N. Y.) 162; Ludlow *v.* Hudson River R. Co., 4 Hun (N. Y.) 239.

Ohio. — Douglas *v.* Scott, 5 Ohio 199.

Pennsylvania. — Green's Appeal, 97 Pa. St. 342.

Tennessee. — Rankin *v.* Warner, 2 Lea (Tenn.) 302.

And see the title ESTOPPEL, vol. 11, p. 400.

Recital as to Rate of Interest Payable on Mortgage. — Dodge *v.* Kennedy, 93 Mich. 547.

Delivery of Chattel. — If a vendor under his seal states that he has bargained, sold, and delivered property to the vendee, the vendor, in an action of trover by the vendee for the property, is estopped to deny the delivery. Nevett *v.* Berry, 5 Cranch (C. C.) 291.

Recital of Coverture. — Orthwein *v.* Thomas, 127 Ill. 554, 11 Am. St. Rep. 159; Despain *v.* Wagner, 163 Ill. 598.

Recital as to Paternity. — Thrower *v.* Wood, 53 Ga. 458.

Recital as to Persons Composing Partnership. — Willis *v.* Lockett, (Tex. Civ. App. 1894) 26 S. W. Rep. 419.

Recital of Decree Authorizing Deed of Settlement in Partition Proceedings. — Moseley *v.* Hankinson, 25 S. Car. 519.

Recital of Mortgagee's Ownership of Money Secured by Mortgage. — Stevens *v.* Shannahan, 160 Ill. 330.

Recital of Validity of Patents. — Bowman *v.* Taylor, 2 Ad. & El. 278, 29 E. C. L. 90; Hills *v.* Laming, 9 Exch. 256 (*distinguishing* Hayne *v.* Maltby, 3 T. R. 438); Cutler *v.* Bower, 11 Q. B. 973), 63 E. C. L. 973.

conclusion of law.[1]

2. Materiality. — Recitals operate as estoppels when they are of the essence of the contract. In other words, where it can be collected from the deed that the parties to it have agreed upon a certain admitted state of facts as the basis on which they contract, the statement of these facts, though but in the way of recitals, shall estop the parties to aver the contrary. But a recital for the purpose of mere description or identification or a recital of immaterial matters, generally is not binding.[2]

Dates. — Thus it has been held that the recital to the effect that a deed was executed on a certain day is not conclusive upon the parties,[3] unless it is a material part of the instrument.[4]

3. Solemnity and Validity of Reciting Instrument — *a.* UNSEALED INSTRUMENT. — A recital of a particular fact in an instrument not under seal, while of course inoperative as a technical estoppel by deed,[5] may, it has been said, be such as to be conclusive if a contract is made with reference to that recital.[6]

Effect of Statute Dispensing with Necessity of Seal. — And it has been intimated that the estoppel which at common law grew out of the recitals of a sealed instrument attaches to an unsealed conveyance of the legal estate in land, where, by statute, a seal has been made unnecessary to such conveyance.[7]

b. INSTRUMENT INVALID FOR FRAUD OR OTHER REASON. — A recital in an instrument which is inoperative and void for fraud in its execution, or for other reasons, cannot work an estoppel.[8]

c. UNDELIVERED INSTRUMENT. — So a recital contained in an undelivered instrument is not conclusively binding.[9]

4. Recital to Conceal Illegal Contract. — No estoppel can arise when the recital is made for the purpose of concealing an illegal contract, for persons cannot be allowed to escape from the law by making a false statement.[10] An admission in a contract of lease, that the lessee was a free woman of color, has been held not to estop the sureties from proving that the lessee was a slave, where it appeared that it was against the policy of the law that a slave should be a lessee.[11]

1. Hills *v.* Laming, 9 Exch. 256; Bigelow on Estoppel 363.

2. Materiality of Recitals —*England.* — Young *v.* Raincock, 7 C. B. 336, 62 E. C. L. 336.

California. — Osborne *v.* Endicott, 6 Cal. 149, 65 Am. Dec. 498; Barr *v.* Schroeder, 32 Cal. 609; Ingersoll *v.* Truebody, 40 Cal. 603.

Louisiana. — Toledano's Succession, 42 La. Ann. 914.

Minnesota. — Ambs *v.* Chicago, etc., R. Co., 44 Minn. 266.

New Hampshire. — Porter *v.* Nelson, 4 N. H. 130.

New York. — Reed *v.* McCourt, 41 N. Y. 435; Clark *v.* Post, 113 N. Y. 17; Champlain, etc., R. Co. *v.* Valentine, 19 Barb. (N. Y.) 484.

North Carolina. — Brinegar *v.* Chaffin, 3 Dev. L. (14 N. Car.) 108, 22 Am. Dec. 711; Den *v.* Dew, 3 Murph. (7 N. Car.) 260; Hays *v.* Askew, 5 Jones L. (50 N. Car.) 63; Fort *v.* Allen, 110 N. Car. 183.

Ohio. — Glover *v.* Ruffin, 6 Ohio 255.

Pennsylvania. — Fairchild *v.* Dunbar Furnace Co., 128 Pa. St. 486.

See also Bower *v.* McCormick, 23 Gratt. (Va.) 328.

Recital of Unnecessary Legal Requirement as Necessary. — Walker *v.* Sioux City, etc., Town Lot Co., 65 Iowa 563.

3. Immaterial Recital of Date. — Pascault *v.* Cochran, 34 Fed. Rep. 358; Commings *v.* Wellman, 14 N. H. 287. See Kelly *v.* State, 25 Ohio St. 567. *Compare* Russell *v.* Peyton, 4 Ill. App. 473.

4. Dyer *v.* Rich, 1 Met. (Mass.) 180. See also Wilson *v.* Winter, 6 Fed. Rep. 16.

5. See Davis *v.* Tyler, 18 Johns. (N. Y.) 490.

6. Recital in Unsealed Instrument. — Carpenter *v.* Buller, 8 M. & W. 209. See also Snowden *v.* Grice, 62 Ga. 615; Ferguson *v.* Millikin, 42 Mich. 441.

As to the operation and effect of recitals in bills of lading, see the title BILLS OF LADING, vol. 4, p. 522 *et seq.*

As to recitals in bills and notes, see the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 117.

7. Jones *v.* Morris, 61 Ala. 518.

8. Deed Defectively Witnessed. — Wallace *v.* Miner, 6 Ohio 366, *affirmed* 7 Ohio 249.

Instrument Procured by Fraud. — Burroughs *v.* Pacific Guano Co., 81 Ala. 255; Hickman *v.* Stewart, 69 Tex. 255.

Deed of Patented Lands Void for Want of Approval of Secretary of Interior. — O'Brien *v.* Bugbee, 46 Kan. 1.

9. Recital in Undelivered Instrument. — Bulley *v.* Bulley, L. R. 9 Ch. 739; Robinson *v.* Cushman, 2 Den. (N. Y.) 149. See also Parker *v.* Parker, 17 Mass. 370; Porter *v.* Green, (Ky. 1888) 9 S. W. Rep. 401.

10. Recital to Conceal Illegal Contract. — Horton *v.* Westminster Imp. Com'rs, 7 Exch. 780.

11. Levy *v.* Wise, 15 La. Ann. 38.

5. Recitals Founded on Mistake. — A recital which is not only untrue, but is founded on a mistake of fact, will not be allowed to operate by way of estoppel to exclude the truth when satisfactorily shown to a court of equity.[1]

6. Effect in Collateral Action. — A recital is an estoppel only in an action on the deed or in an action brought to enforce rights arising under it. A recital in an action not founded on the instrument, but wholly collateral to it, may be *prima facie* evidence, but it is not conclusive.[2]

7. Extent of Estoppel. — A recital will not operate as an estoppel to deny a fact not necessarily inconsistent with the recital.[3] A recital may consequently be an estoppel for some purposes and not for others.[4] Thus it has been held that the recital in a deed of a former deed between the same parties admits and proves as between the parties so much as to the former deed as is recited, but no more.[5] So recitals and admissions in an agreement concerning real estate have been held not to estop the party making them to deny the truth except for the accomplishment of the purpose for which they were made, unless they become a part of, or work upon, the title.[6]

8. Entire Instrument to Be Considered. — In determining the effect of recitals, the entire instrument must be considered, and a recital will not work an estoppel if it is shown to be untrue by taking into consideration other parts of the instrument.[7] Thus, where a recital is only a part of the description of the estate upon which the deed was intended to operate, and the estate is otherwise fully and accurately described in the deed, the recital will not operate as an estoppel.[8] So where in a deed some of the recitals operate in the grantor's favor and others operate against him, the instrument must be read *in toto*.[9] But it has been held that where a stranger to a deed relies upon admissions of the grantor recited therein, such recitals are only evidence, and no estoppel in his favor, and hence he is not precluded from denying other recitals in the instrument that operate against him.[10]

Effect of Preliminary Recitals in Connection with Operative Parts of Deed. — The preliminary recitals in an instrument may be looked to in order to determine the meaning of the operative parts of the instrument.[11] But where there is a discrepancy between the recitals in the preamble and the operative parts, the latter if clear and unambiguous must prevail.[12]

9. Estoppel in Pais. — The recital in a deed may operate as an estoppel *in pais*,[13] provided the party claiming the benefit of the estoppel was misled by

1. Recital Founded on Mistake. — Brooke *v.* Haymes, L. R. 6 Eq. 25; Blaney *v.* Rogers, 174 Mass. 277; Stoughton *v.* Lynch, 2 Johns. Ch. (N. Y.) 209; Long *v.* Cruger, 9 Tex. Civ. App. 208; Bower *v.* McCormick, 23 Gratt. (Va.) 310; Ballantine's Appeal, 67 Pa. St. 178.

Recital in Bond. — Conant *v.* Newton, 126 Mass. 105.

2. Recital Not Conclusive in Collateral Action. — Carpenter *v.* Buller, 8 M. & W. 209; *Exp.* Morgan, 2 Ch. D. 72; Bank of America *v.* Banks, 101 U. S. 240; King *v.* Mead, 60 Kan. 539; Claflin *v.* Boston, etc., R. Co., 157 Mass. 489; Merrifield *v.* Parritt, 11 Cush. (Mass.) 590; Reed *v.* McCourt, 41 N. Y. 435; Champlain, etc., R. Co. *v.* Valentine, 19 Barb. (N. Y.) 488; Bingham *v.* Walla Walla, 3 Wash. Ter. 68. See also South Eastern R. Co. *v.* Warton, 6 H. & N. 520.

3. Extent of Estoppel. — Kepp *v.* Wiggett, 10 C. B. 35, 70 E. C. L. 35; Shepherd *v.* May, 115 U. S. 505; Zimmler *v.* San Luis Water Co., 57 Cal. 221; Parke, etc., Co. *v.* White River Lumber Co., 110 Cal. 658; Blair *v.* Carr, 162 Ill. 362; Terhune *v.* Matson, 40 Ill. App. 296; Mehaffy *v.* Dobbs, 9 Watts (Pa.) 363; McKonkey's Appeal, 13 Pa. St. 253; Noble *v.* Cope, 50 Pa. St. 17.

4. See McCullough *v.* Dashiell, 78 Va. 640.

5. Gillett *v.* Abbott, 7 Ad. & El. 783, 34 E. C. L. 221.

6. Gerrish *v.* Union Wharf, 26 Me. 384, 46 Am. Dec. 568.

7. Entire Instrument to Be Considered. — Doe *v.* Brooks, 3 Ad. & El. 513, 30 E. C. L. 139; Tait *v.* Frow, 8 Ala. 544; Simmons *v.* Hendrickson, 3 Harr. (Del.) 103; Den *v.* Camp, 19 N. J. L. 148; Frick *v.* Fiscus, 164 Pa. St. 623. See also Bower *v.* McCormick, 23 Gratt. (Va.) 310. And see the title ESTOPPEL, vol. 11, p. 401.

8. Doane *v.* Willcutt, 16 Gray (Mass.) 368.

9. Barbour *v.* Watts, 2 A. K. Marsh. (Ky.) 290.

10. Stoever *v.* Whitman, 6 Binn. (Pa.) 416.

11. Doe *v.* Brooks, 3 Ad. & El. 515, 30 E. C. L. 140. See also the title INTERPRETATION AND CONSTRUCTION, vol. 17, p. 6.

12. Bailey *v.* Lloyd, 5 Russ. 330; Young *v.* Smith, 35 Beav. 87; Miller *v.* Tunica County, 67 Miss. 651.

13. Waters's Appeal, 35 Pa. St. 523, 78 Am.

the recital, and the other ordinary elements for an equitable estoppel exist.[1]

10. Persons Affected — *a.* PARTIES AND PRIVIES. — The general rule is that a recital in a deed of a material fact is binding and conclusive upon the parties and those claiming under them as privies in blood, in estate, or in law.[2]

b. STRANGERS. — But it does not bind mere strangers or those who claim by title paramount to the reciting deed.[3]

Dec. 354; Olney *v.* Fenner, 2 R. I. 211, 57 Am. Dec. 711.

1. Sunderlin *v.* Struthers, 47 Pa. St. 411; Allen *v.* Allen, 45 Pa. St. 468.

2. Recitals Binding upon Parties and Privies — *England.* — Trevivan *v.* Lawrance, 1 Salk. 276. *Compare* Doe *v.* Shelton, 3 Ad. & El. 265, 30 E. C. L. 90.

United States. — U. S. Bank *v.* Benning, 4 Cranch (C. C.) 81, 2 Fed. Cas. No. 908; Carver *v.* Jackson, 4 Pet. (U. S.) 1.

California. — Redman *v.* Bellamy, 4 Cal. 247; Simson *v.* Eckstein, 22 Cal. 580.

Delaware. — Inskeep *v.* Shields, 4 Harr. (Del.) 345.

Illinois. — Byrne *v.* Morehouse, 22 Ill. 603; Pinckard *v.* Milmine, 76 Ill. 453; Rigg *v.* Cook, 9 Ill. 336, 46 Am. Dec. 462.

Kansas. — Libby *v.* Ralston, 2 Kan. App. 125.

Mississippi. — Robbins *v.* McMillan, 26 Miss. 434.

Missouri. — Broadwell *v.* Merritt, 87 Mo. 95; St. Louis *v.* Wiggins Ferry Co., 15 Mo. App. 227, *affirmed* 88 Mo. 615.

New York. — Demeyer *v.* Legg, 18 Barb. (N. Y.) 14; Jackson *v.* Parkhurst, 9 Wend. (N. Y.) 209; Torrey *v.* Orleans Bank, 9 Paige (N. Y.) 649.

Ohio. — Douglass *v.* Scott, 5 Ohio 194, *affirmed* 7 Ohio 227; McChesney *v.* Wainwright, 5 Ohio 452.

Pennsylvania. — See Stewart *v.* Butler, 2 S. & R. (Pa.) 381; Naglee *v.* Ingersoll, 7 Pa. St. 185; Waters's Appeal, 35 Pa. St. 523, 78 Am. Dec. 354. *Compare* Mehaffy *v.* Dobbs, 9 Watts (Pa.) 363; McKonkey's Appeal, 13 Pa. St. 253; Bicking's Appeal, 2 Brews. (Pa.) 202; Good *v.* Good, 9 Watts (Pa.) 567.

South Carolina. — Moseley *v.* Hankinson, 25 S. Car. 519.

Texas. — Kimbro *v.* Hamilton, 28 Tex. 560; Fisk *v.* Flores, 43 Tex. 340; Gonzales *v.* Batts, 20 Tex. Civ. App. 421; Doty *v.* Barnard, 92 Tex. 104.

Washington. — Peabody *v.* Nicklin, 8 Wash. 660.

3. Recitals Not Binding on Strangers — *England.* — Doe *v.* Errington, 8 Scott 210.

United States. — Carver *v.* Jackson, 4 Pet. (U. S.) 83; Crane *v.* Morris, 6 Pet. (U. S.) 611.

California. — Franklin *v.* Dorland, 28 Cal. 175, 87 Am. Dec. 111.

Georgia. — Lamar *v.* Turner, 48 Ga. 329.

Illinois. — Graves *v.* Colwell, 90 Ill. 612; Cobb *v.* Oldfield, 151 Ill. 540, 42 Am. St. Rep. 263.

Iowa. — Baldwin *v.* Thompson, 15 Iowa 504; Miller *v.* Miller, 63 Iowa 387.

Mississippi. — Stevenson *v.* McReary, 12 Smed. & M. (Miss.) 9, 51 Am. Dec. 102.

Missouri. — Alexander *v.* Campbell, 74 Mo. 142.

North Carolina. — Crump *v.* Thompson, 9 Ired. L. (31 N. Car.) 491

Pennsylvania. — Muhlenberg *v.* Druckenmiller, 103 Pa. St. 631; Kearney *v.* Fagen, 2 Del. Co. Rep. (Pa.) 462; Tate *v.* Clement, 176 Pa. St. 550.

South Carolina. — Polson *v.* Ingram, 22 S. Car. 541.

Texas. — Hart *v.* Meredith, (Tex. Civ. App. 1901) 65 S. W. Rep. 507.

See also Borst *v.* Corey, 16 Barb. (N. Y.) 136, *affirmed* 15 N. Y. 505.

Recital of Bond. — Stumpf *v.* Osterhage, 94 Ill. 115.

Recital as to Authority of Person Making Deed. — Mordecai *v.* Beal, 8 Port. (Ala.) 529.

Recital as to Quantity of Estate Conveyed. — Gaunt *v.* Wainman, 3 Bing. N. Cas. 69, 32 E. C. L. 42.

Recital as to Consideration. — Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417; Lloyd *v.* Lynch, 28 Pa. St. 419, 70 Am. Dec. 137; King *v.* Mead, 60 Kan. 539.

Recital of Fact that Grantor Is a Corporation. — Sonoma County Water Co. *v.* Lynch, 50 Cal. 503.

Recital of Prior Deed to Same Grantee. — Smith *v.* Shackleford, 9 Dana (Ky.) 452.

Recital of Release by Third Person. — Smith *v.* Webster, 2 Watts (Pa.) 478.

Recital of Will. — Miller *v.* Miller, 63 Iowa 387.

Recital of Heirship. — Costello *v.* Burke, 63 Iowa 361; Soukup *v.* Union Invest. Co., 84 Iowa 448, 35 Am. St. Rep. 317; Jones *v.* Sherman, 56 Miss. 559; Watson *v.* Gregg, 10 Watts (Pa.) 289; Mariposa Land, etc., Co. *v.* Silliman, (Tex. Civ. App. 1895) 32 S. W. Rep. 843. See also Potter *v.* Washburn, 13 Vt. 558, 37 Am. Dec. 615.

Prior Creditors Not Estopped. — De Targes *v.* Ryland, 87 Va. 404, 24 Am. St. Rep. 659; Battersbee *v.* Tarrington, 1 Swanst. 106, as, for instance, a judgment creditor, Buchanan *v.* Kimes, 2 Baxt. (Tenn.) 275; or a mortgagee, Tolman *v.* Smith, 85 Cal. 280.

Tenant in Common of Grantor. — Thomason *v.* Dayton, 40 Ohio St. 63.

Reciting Deed Introduced by Stranger to Show Fraud. — The giving in evidence of a lease which contained a recital of a prior lease executed by a lunatic has been held not to preclude a defense of want of capacity on the part of the lunatic in the execution of the lease, where the reciting lease was exhibited for the purpose of showing fraud, not as a link in the chain of the title. Rogers *v.* Walker, 6 Pa. St. 371, 47 Am. Dec. 470.

Deed Introduced to Show Adverse Claim by Other Party. — Nor will a party to a cause be estopped to deny the recitals in a deed to which he is a stranger and which he introduces in evidence for the purpose of showing an adverse claim made by the other party, not for the purpose of showing title in himself. Douglass *v.* Huhn, 24 Kan. 766.

Admissibility as Secondary Evidence. — But there are cases in which such a recital may be used as evidence even against strangers. If, for instance, there is the recital of a lease in a deed of release, and in a suit against a stranger the title under the release comes in question, there the recital of the lease in such release is not *per se* evidence of the existence of the lease. But, if the existence and loss of the lease be established by other evidence, there the recital is admissible as secondary proof, in the absence of more perfect evidence, to establish the contents of the lease.[1]

Recitals in Ancient Deeds. — And if the transaction is an ancient one, and the possession has been long held under such release, and is not otherwise to be accounted for, there the recital will of itself, under such circumstances, materially fortify the presumption from lapse of time and length of possession of the original existence of the lease.[2]

Operation of Recital in Favor of Stranger. — Nor can a stranger take advantage of the recitals contained in a deed for the purpose of showing an estoppel.[3] But while the admissions recited in a deed may not operate as an estoppel in favor of third persons, yet they may, like other admissions, be of some weight in their favor, and constitute some evidence against the parties.[4]

Estoppel in Pais. — And they may operate as an estoppel *in pais*, if a stranger, relying upon their truth, has thereby been induced to act to his prejudice.[5]

c. MARRIED WOMEN. — Since, in the absence of statute, a married woman is not competent to enter into binding contracts, she cannot be estopped by the recitals in a deed.[6] But it has been held that a *feme covert* will not be permitted to take the benefit under a conveyance and repudiate the recited terms upon which it was made.[7]

d. INFANTS — CONTRACTS OF APPRENTICESHIP. — While the recital of an apprentice's age in an indenture of apprenticeship will be conclusive against the master, it will not so operate against the apprentice, since every indenture of an infant is voidable at his election upon his coming of age.[8]

e. GOVERNMENT GRANTS. — A treatment of the operation and effect of recitals in government grants will be found discussed elsewhere in this work.[9]

f. MUNICIPAL BONDS AND SECURITIES. — A treatment of the effect of recitals in municipal bonds and securities will be found elsewhere in this work.[10]

g. MUTUALITY OF ESTOPPEL. — Mutuality is in general a necessary ingredient of an estoppel by recitals.[11] Where a recital in an instrument is intended to be a statement which all the parties have mutually agreed to admit as true, it is an estoppel upon all, whether they are parties by execut-

1. Ford *v.* Grey, 1 Salk. 285; Carver *v.* Jackson, 4 Pet. (U. S.) 81.

2. See Carver *v.* Jackson, 4 Pet. (U. S.) 81. And see the title ANCIENT DOCUMENTS, vol. 2, p. 331.

3. **No Estoppel in Favor of Stranger** — *United States.* — Deery *v.* Cray, 5 Wall. (U. S.) 795.
Maine. — Hovey *v.* Woodward, 33 Me. 470.
Maryland. — Nutwell *v.* Tongue, 22 Md. 419.
Massachusetts. — Holt *v.* Sargent, 15 Gray (Mass.) 97.
New Hampshire. — Great Falls Co. *v.* Worster, 15 N. H. 412.
Pennsylvania. - Sunderlin *v.* Struthers, 47 Pa. St. 411.
Texas. — Mayfield *v.* Robinson, 22 Tex. Civ. App. 385; Meriwether *v.* Ashbeck, (Tex. Civ. App. 1894) 25 S. W. Rep. 1100; Illg *v.* Garcia, 92 Tex. 251.
Compare Monmouth Second Nat. Bank *v.* Gilbert, 174 Ill. 485, 66 Am. St. Rep. 306.

4. Franklin *v.* Dorland, 28 Cal. 175, 87 Am. Dec. 111; Pennsylvania, etc., Canal, etc., Co. *v.* Billings, 94 Pa. St. 40; Stewart *v.* Butler, 2 S. & R. (Pa.) 381. See also Den *v.* Brewer, 1 N. J. L. 200.

5. Waters's Appeal, 35 Pa. St. 523, 78 Am. Dec. 354.

6. **Married Women.** — Bank of America *v.* Banks, 101 U. S. 240; Harden *v.* Darwin, 77 Ala. 472; Hempstead *v.* Easton, 33 Mo. 142; Dempsey *v.* Tylee, 3 Duer (N. Y.) 73.
Recital in Partition Deed Between Spouses Held Not Conclusive. — Harden *v.* Darwin, 77 Ala. 472.

7. Fort *v.* Allen, 110 N. Car. 183.

8. See the title APPRENTICES, vol. 2, p. 500. And see Houston *v.* Turk, 7 Yerg. (Tenn.) 13.

9. See the title PUBLIC LANDS, *ante*.

10. See the title MUNICIPAL SECURITIES, vol. 21, p. 67 *et seq.*

11. **Estoppel Must Be Mutual.**—Hempstead *v.* Easton, 33 Mo. 142; Dempsey *v.* Tylee, 3 Duer (N. Y.) 73; Chandler *v.* Bunn, Hill & D. Supp. (N. Y.) 167; Earle *v.* Earle, 20 N. J. L. 347.

ing it or only by accepting it.[1] But when it is intended to be the statement of one party only, the estoppel, though all have executed the instrument, is confined to that party.[2]

Recital of Fact Known to One Party Only. — Thus it has been held that the principle cannot be extended to a recital coming from one party and which can necessarily be known only to him.[3]

Deed of Married Women. — On this principle, too, it has been held that where the grantor, being a married woman, is not estopped, no estoppel will arise against her grantee.[4]

The Grantor in a Deed Poll, and those claiming under him by matters subsequent, are bound by recitals in the deed.[5] But a recital in a deed poll, not being the words of the grantee, is not generally evidence to affect him by way of estoppel.[6] An estoppel, however, may arise from recitals in a deed poll which are clearly intended for the grantee.[7]

11. Particular Recitals — *a.* RECITALS AS TO TITLE — (1) *Grantor's Title* — **Operation Against Grantor.** — A grantor cannot, as against his grantee, set up a title in a third person contrary to a recital in his own deed.[8]

Operation Against Grantee. — The grantee also may be estopped by a recital of the grantor's title,[9] provided he claims under the deed and not by title paramount.[10] And, indeed, it has been stated that a recital declaring the reversion to be in the grantor will estop the grantee from setting up a paramount title.[11]

(2) *Reference to Prior Instrument* — (a) **In General.** — A deed which refers to a will or conveyance as the source of title will estop one claiming thereunder from denying the genuineness and validity of the will or conveyance.[12] And it has been laid down as a general rule that a recital of one deed in another binds the parties and those who claim under them by matters subsequent. Such evidence is not offered as secondary but as primary proof; not as presumptive evidence but as evidence operating by way of estoppel, which cannot be averred against and forms a muniment of the title.[13] Thus a recital of a

1. Douglass *v.* Scott, 5 Ohio 195, *affirmed* 7 Ohio 227. See Stroughill *v.* Buck, 14 Q. B. 781, 68 E. C. L. 781; Crosby *v.* Chase, 17 Me. 369.

2. **Recitals Binding on One Party Only.** — Stroughill *v.* Buck, 14 Q. B. 781, 68 E. C. L. 781; Bower *v.* McCormick, 23 Gratt. (Va.) 328. See also Chandler *v.* Bunn, Hill & D. Supp. (N. Y.) 167.

3. Miller *v.* Bagwell, 3 McCord L. (S. Car.) 429. See also Hayne *v.* Maltby, 3 T. R. 438; Simson *v.* Eckstein, 22 Cal. 581; Dickson *v.* Anderson, 9 Mo. 156.

4. Hempstead *v.* Easton, 33 Mo. 142. See also Dempsey *v.* Tylee, 3 Duer (N. Y.) 73.

5. **Recital in Deed Poll.** — See Blake *v.* Tucker, 12 Vt. 39.

6. Tull *v.* Owen, 4 Jur. 503; Poyntell *v.* Spencer, 6 Pa. St. 254. See also Doe *v.* Shelton, 3 Ad. & El. 265, 30 E. C. L. 90.

7. Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35. And see Robertson *v.* Pickrell, 109 U. S. 608. See also the title ESTOPPEL, vol. 11, p. 399.

8. **Grantor Estopped to Deny Recital of His Title.** — Usina *v.* Wilder, 58 Ga. 178; Green *v.* Clark, 13 Vt. 158. See also Ruffin *v.* Johnson, 5 Heisk. (Tenn.) 604.

For a discussion of the effect of recitals in a deed on the title of the grantor acquired subsequently to the conveyance, see the title ESTOPPEL, vol. 11, p. 410 *et seq.* And see Trope *v.* Kerns, (Cal. 1888) 20 Pac. Rep. 82; Mitchell *v.* Kinnard, (Ky. 1895) 29 S. W. Rep. 309; Brazee *v.* Schofield, 2 Wash. Ter. 209.

Grantor's Recital of Ownership in Grantee. — In Lajoye *v.* Primm, 3 Mo. 529, it was held that the grantor in a deed may be bound by a recital therein attributing ownership to the grantee in premises adjoining the land conveyed.

9. **Conclusiveness Against Grantee.** — Kellogg *v.* McMillan, 9 La. Ann. 225; Clamorgan *v.* Greene, 32 Mo. 285.

As to the estoppel arising from the acceptance of conveyances, see the title ESTOPPEL, vol. 11, p. 440.

10. **No Estoppel to Set Up Title Paramount.** — Jaeckel *v.* Easton, 11 Mo. 118, 47 Am. Dec. 142; Poyntell *v.* Spencer, 6 Pa. St. 254.

11. See Robertson *v.* Pickrell, 109 U. S. 608.

12. **Reference to Prior Deed or Will as Source of Title.** — Jackson *v.* Thompson, 6 Cow. (N. Y.) 178; Douglass *v.* Scott, 5 Ohio 199, *affirmed* 7 Ohio 227. See also Jackson *v.* Ireland, 3 Wend. (N. Y.) 99; Green *v.* Clark, 13 Vt. 158.

13. **Recital of One Deed in Another.**—Carver *v.* Jackson, 4 Pet. (U. S.) 1; Crane *v.* Morris, 6 Pet. (U. S.) 611; M'Cleskey *v.* Leadbetter, 1 Ga. 551; Todd *v.* Eighmie, 4 N. Y. App. Div. 9; Hardy *v.* De Leon, 5 Tex. 211.

Where a Voidable Deed Is Referred to and described in a subsequent deed by the grantor in a manner such as to evince an acquiescence in it, this amounts to a valid and irrevocable confirmation. Breckenridge *v.* Ormsby, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71.

lease in a deed of release conclusively binds the parties to the reciting deed and those claiming under them by matters subsequent.[1]

(b) **Prior Instrument in Favor of Stranger — Recital as Notice.** — As a general rule a grantee or mortgagee will be estopped, by a recital of a prior instrument in favor of a third person in the instrument under which he claims, to deny as against the third person notice of such prior instrument.[2]

Conclusiveness as to Existence and Validity of Instrument. — A recital as to the existence of a prior deed of conveyance to a third person has been held to be binding only to the extent of the obligation of the deed, and if the deed is shown to be invalid, the recital will be of no effect as an estoppel.[3]

Recital Making Deed Subject to Prior Mortgage. — Many of the authorities lay down the rule that a grantee is estopped to deny the validity of any mortgage to which his deed recites that the conveyance to him is subject.[4] But according to other authorities, it is held that where the incumbrance is not made a part of the consideration and not deducted from it, and where it is not assumed by the grantee, the recital in a deed that the conveyance is subject to an incumbrance does not estop the grantee from showing that what purports to be an incumbrance is not one in fact, because of its invalidity or because it has been satisfied.[5]

(3) *Recital in Will.* — It has been held that an heir is estopped by a recital in his ancestor's will to the effect that the ancestor had made certain conveyances in his lifetime.[6]

b. AUTHORITY OR CAPACITY TO CONTRACT — **Capacity to Contract.** — The doctrine of estoppel by reason of recitals in sealed instruments is applicable

1. Recital of Lease in Deed of Release. — Carver *v.* Jackson, 4 Pet. (U. S.) 1; Crane *v.* Morris, 6 Pet. (U. S.) 611.

2. See the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, *ante*.

3. Blake *v.* Tucker, 12 Vt. 39.

4. Conclusiveness as to Validity of Mortgage. — American Water Works Co. *v.* Farmers' L. & T. Co., 36 U. S. App. 563; Taylor *v.* Riggs, 8 Kan. App. 323; Tuite *v.* Stevens, 98 Mass. 305; Howard *v.* Chase, 104 Mass. 249; Johnson *v.* Thompson, 129 Mass. 398; Riley *v.* Rice, 40 Ohio St. 441; Freeman *v.* Auld, 44 N. Y. 50; Pittman *v.* Hall, (Brooklyn City Ct. Gen. T.) 5 N. Y. St. Rep. 853, *affirmed* without opinion in 112 N. Y. 659; Mott *v.* Maris, (Tex. Civ. App. 1894) 29 S. W. Rep. 825; Walsh *v.* Ford, (Tex. Civ. App. 1901) 66 S. W. Rep. 854. See also Hopkins *v.* Wolley, 81 N. Y. 77; Stein *v.* Indianapolis, 18 Ind. 237, 81 Am. Dec. 353. *Compare* Russell *v.* Kinney, 1 Sandf. Ch. (N. Y.) 34; Hartley *v.* Tatham, (N. Y. Super. Ct. Gen. T.) 24 How. Pr. (N. Y.) 505, 2 Abb. App. Dec. (N. Y.) 333.

But in Purdy *v.* Coar, 109 N. Y. 448, it was held that a recital in a deed that it was "subject nevertheless to all liens of mortgages" did not estop the grantee to deny the existence and validity of any pretended mortgage that should be set up.

Recital Made to Protect Grantor from Liability on His Covenants. — In Weed Sewing Mach. Co. *v.* Emerson, 115 Mass. 554, it was held that a description of the premises in a subsequent deed thereof by a mortgagor as subject to the mortgage and the exception of the mortgage out of his covenants in that deed, being for the purpose of protecting him from liability upon his covenants, could have no effect upon the grantee by way of estoppel.

Estoppel to Set Up Title in Stranger. — A purchaser of the equity of redemption from the mortgagor, and subject to the mortgage, has been held estopped to set up an adverse title in a stranger for the purpose of preventing a sale of the whole mortgaged premises for the satisfaction of the mortgage. Eagle Fire Co. *v.* Lent, 6 Paige (N. Y.) 637.

As to the effect, by way of estoppel, of a recital in a deed assuming a prior mortgage, see the title MORTGAGES, vol. 20, p. 1001 *et seq*. And see Cram *v.* Ingalls, 18 N. H. 613; Moulton *v.* Haskell, 50 Minn. 367; Lynch *v.* Moser, 72 Conn. 714.

5. Brooks *v.* Owen, 112 Mo. 251. See also Briggs *v.* Seymour, 17 Wis. 255; Farmers' L. & T. Co. *v.* Commercial Bank, 15 Wis. 424. *Compare* Hasenritter *v.* Kirchhoffer, 79 Mo. 239.

Defectively Executed Mortgage. — Thompson *v.* Morgan, 6 Minn. 292. See also Ross *v.* Worthington, 11 Minn. 438, 88 Am. Dec. 95; Calkins *v.* Copley, 29 Minn. 471.

Mortgage Not Signed by Mortgagor. — Goodman *v.* Randall, 44 Conn. 321.

There Is No Estoppel to Show a Mortgage to Be Fraudulent if the amount of the mortgage indebtedness is not included in and does not form a part of the consideration of the conveyance. Robinson Bank *v.* Miller, 153 Ill. 244, 46 Am. St. Rep. 883.

Where Incumbrance Is Part of Consideration — Estoppel to Set Up Usury. — Stiger *v.* Bent, 111 Ill. 328; Pinnell *v.* Boyd, 33 N. J. Eq. 190; Dolman *v.* Cook, 14 N. J. Eq. 56; Conover *v.* Hobert, 24 N. J. Eq. 120; Trusdell *v.* Dowden, 47 N. J. Eq. 396. See also Van Winkle *v.* Earl, 26 N. J. Eq. 242; Essley *v.* Sloan, 16 Ill. App. 63; Flanders *v.* Doyle, 16 Ill. App. 508.

6. Conclusiveness of Recital in Will. — Adams *v.* Lansing, 17 Cal. 629; Denn *v.* Cornell, 3 Johns. Cas. (N. Y.) 174.

only where the existence of the deed as the act of the party is admitted; a recital of legal capacity to contract will not operate as an estoppel.[1]

Authority of Agent. — Nor will the grantor in a deed executed by a person professing to act as an attorney in fact be estopped from denying the authority of the attorney as recited in the deed.[2] But a recital in a deed that the agent making the conveyance had authority from his principal to sell or convey the subject-matter of the conveyance will operate as an estoppel against the agent to deny such authority when he attempts to set up an adverse title subsequently acquired from his principal.[3]

c. PAYMENT OF CONSIDERATION. — The recital in a deed of the payment of a consideration cannot be contradicted so as to defeat the operation of the conveyance according to the purpose therein designated, unless it be on the ground of fraud or illegality.[4] So the obligor in a bond which expressly acknowledges a consideration is estopped to deny the consideration for the purpose of avoiding the bond in the absence of any fraud or mistake.[5] But the recital of the receipt of the consideration in a deed of conveyance is not contractual in its character, so as to preclude recovery of the purchase money due.[6]

1. Recital as to Capacity to Contract Not Binding. — Northern Bank *v.* Porter Tp., 110 U. S. 608; Hudson *v.* Winslow Tp., 35 N. J. L. 437; Singer Mfg. Co. *v.* Elizabeth, 42 N. J. L. 249.

2. Recital as to Authority of Agent Not Binding. — Earle *v.* Earle, 20 N. J. L. 348.

Where a husband executes a chattel mortgage on property belonging to his wife, and held by him as trustee, it has been held that he will not be estopped, by a recital therein that the property was his own, from showing his want of authority to mortgage property in controversy in an action against him for the recovery of the property. McIntosh *v.* Parker, 82 Ala. 238.

3. Stow *v.* Wyse, 7 Conn. 214, 18 Am. Dec. 99.

Estoppel Against Personal Representative to Deny His Authority. — Larco *v.* Cassaneuava, 30 Cal. 560; Corzine *v.* Williams, 85 Tex. 499.

4. Recital of Payment of Consideration — *United States.* — Powell *v.* Monson, etc., Mfg. Co., 3 Mason (U. S.) 347, 19 Fed. Cas. No. 11,356; McCalla *v.* Bane, 45 Fed. Rep. 828.

Alabama. — Dugger *v.* Tayloe, 46 Ala. 320.

California. — Coles *v.* Soulsby, 21 Cal. 47; Hendrick *v.* Crowley, 31 Cal. 471; Rhine *v.* Ellen, 36 Cal. 369.

Florida. — Campbell *v.* Carruth, 32 Fla. 264.

Illinois. — See Brokaw *v.* Field, 33 Ill. App. 138.

Iowa. — Rynear *v.* Neilin, 3 Greene (Iowa) 310.

Maine. — Hammond *v.* Woodman, 41 Me. 177, 66 Am. Dec. 219; Morrill *v.* Robinson, 71 Me. 24.

Minnesota. — McKusick *v.* Washington County, 16 Minn. 151.

New Hampshire. — Buffum *v.* Green, 5 N. H. 71, 20 Am. Dec. 562; Horn *v.* Thompson, 31 N. H. 562; Farrington *v.* Barr, 36 N. H. 86.

New York. — Grout *v.* Townsend, 2 Hill (N. Y.) 554; U. S. Bank *v.* Housman, 6 Paige (N. Y.) 526.

Pennsylvania. — Pennsylvania Salt Mfg. Co. *v.* Neel, 54 Pa. St. 9.

See also Wilt *v.* Franklin, 1 Binn. (Pa.) 502, 2 Am. Dec. 474; Mowry *v.* Davenport, 6 Lea (Tenn.) 80. *Compare* Medley *v.* Mask, 4 Ired. Eq. (39 N. Car.) 339.

Specific Performance. — The same rule has been applied in a suit in equity for the specific performance of a contract to convey. Goodlett *v.* Hansell, 66 Ala. 151.

Conclusiveness in Favor of Subsequent Bona Fide Purchaser. — Quirk *v.* Thomas, 6 Mich. 76; Bunton *v.* Palm, (Tex. 1888) 9 S. W. Rep. 182. See also Duval *v.* Bibb, 4 Hen. & M. (Va.) 113, 4 Am. Dec. 506.

Recital Not Conclusive as Against Showing of Fraud. — Whitaker *v.* Garnett, 3 Bush (Ky.) 402. See also the title CONSIDERATION, vol. 6, p. 777.

Effect of Acknowledgment of Payment in Insurance Policy for Purpose of Sustaining Validity of Policy. — See the title INSURANCE, vol. 16, p. 960 *et seq.*

Recital of Consideration in Favor of Bona Fide Purchaser. — See the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, *ante.*

Admissibility of Extraneous Evidence. — For a general discussion of the admissibility of extraneous evidence to explain or contradict the recitals of the consideration in contracts and deeds, see the title CONSIDERATION, vol. 6, p. 765 *et seq.*

5. Recital of Consideration in Bond. — Guard *v.* Bradley, 7 Ind. 600; Thompson *v.* Buckhannon, 2 J. J. Marsh. (Ky.) 416.

6. Not Conclusive in Action for Consideration — *United States.* — Mills *v.* Dow, 133 U. S. 423; Taggard *v.* Stanbery, 2 McLean (U. S.) 543.

Alabama. — Steed *v.* Hinson, 76 Ala. 298; Mobile Sav. Bank *v.* McDonnell, 89 Ala. 434, 18 Am. St. Rep. 137.

California. — Rhine *v.* Ellen, 36 Cal. 362.

Connecticut. — Meeker *v.* Meeker, 16 Conn. 383.

District of Columbia. — Somerville *v.* Lee, 1 Hayw. & H. (D. C.) 30.

Georgia. — Harwell *v.* Fitts, 20 Ga. 723.

Illinois. — Koch *v.* Roth, 150 Ill. 212.

Indiana. — French *v.* Arnett, 15 Ind. App. 674. *Compare* Henry *v.* Henry, 11 Ind. 236, 71 Am. Dec. 354.

Iowa. — Trayer *v.* Reeder, 45 Iowa 272.

Kentucky. — Gordon *v.* Gordon, 1 Met. (Ky.) 285.

Maine. — Barter *v.* Greenleaf, 65 Me. 405; Schillinger *v.* McCann, 6 Me. 364; Goodspeed

d. RECITAL OF SEAL. — Where an instrument is delivered to an obligee or grantee without seals, a recital therein that it is sealed does not, in the absence of statute, make it a specialty or estop the obligor or grantor from denying that he is liable as on a sealed instrument.[1] But in an action on a penal bond, in which it was recited that the bond was executed under seal, it was held that the obligor was estopped from denying that the instrument was so executed, when it appeared by his own evidence that he knew the difference in the legal effect between sealed and unsealed instruments, and that he read, subscribed, and placed the bond in the custody of the person interested in having it accepted, and when it further appeared that such person sealed and delivered the bond to the obligee, who received and acted on it in good faith.[2]

e. EXISTENCE, QUANTITY, AND DESCRIPTION OF SUBJECT-MATTER OF DEED. — So the parties may be concluded by a recital in the deed as to the existence,[3] the quantity,[4] or the description [5] of the subject-matter conveyed.

v. Fuller, 46 Me. 141, 71 Am. Dec. 572. *Compare* Emery *v.* Chase, 5 Me. 232; Steele *v.* Adams, 1 Me. 1.

Missouri. — Bridges *v.* Russell, 30 Mo. App. 258.

New Jersey. — Bolles *v.* Beach, 22 N. J. L. 680, 53 Am. Dec. 263. See also Stearns *v.* Stearns, 23 N. J. Eq. 167.

North Carolina. — Long *v.* Freeman, 114 N. Car. 567; Smith *v.* Arthur, 110 N. Car. 400. See also Farmer *v.* Barnes, 3 Jones Eq. (56 N. Car.) 109.

Ohio. — Ranney *v.* Hardy, 43 Ohio St. 157.

Pennsylvania. — Jordan *v.* Cooper, 3 S. & R. (Pa.) 564; Allison *v.* Kurtz, 2 Watts (Pa.) 185; Byers *v.* Mullen, 9 Watts (Pa.) 266; Depew *v.* Clark, 1 Phila. (Pa.) 432, 10 Leg. Int. (Pa.) 82; Eshelman's Estate, 143 Pa. St. 24, 28 W. N. C. (Pa.) 293; Tonkin *v.* Baum, 114 Pa. St. 414.

South Carolina. — Daniels *v.* Moses, 12 S. Car 130.

Virginia. — Wilson *v.* Shelton, 9 Leigh (Va.) 342.

Wisconsin. — Crowe *v.* Colbeth, 63 Wis. 643.

And see the titles CONSIDERATION, vol. 6, pp. 760, 778; PAROL EVIDENCE, vol. 21, p. 1088 *et seq.*

Suit to Enforce Vendor's Lien — Acknowledgment of Payment Not Conclusive. — Koch *v.* Roth, 150 Ill. 212, Parker *v.* Fay, 43 Miss. 260, 5 Am. Rep. 484; Major *v.* Bukley, 51 Mo. 227.

Bill of Sale. — Recitals of payment in a bill of sale are rebuttable by parol. Cravens *v.* Dewey, 13 Cal. 40. See also McLouth *v.* Dibble, 31 Mich. 68.

Action on Covenants. — As to the effect of a recital of the consideration in an action on the covenants contained in a deed, see the titles CONSIDERATION, vol. 6, p. 768; COVENANTS, vol. 8, p. 196. And see Mowrey *v.* Vandling, 9 Mich. 39.

Prima Facie Evidence in Action for Damages on Covenant to Convey. — Watson *v.* Blaine, 12 S. & R. (Pa.) 131, 14 Am. Dec. 669.

Recital of Indebtedness in Mortgage. — As to the effect of a recital of an indebtedness or a consideration in a mortgage for the purpose of fixing the personal liability of the mortgagor see the title MORTGAGES, vol. 20, p. 985.

1. Effect of Recital of Seal — *England.* — Moore *v.* Jones, 2 Ld. Raym. 1536.

Florida. — Williams *v.* State, 25 Fla. 740.

Illinois. — Chilton *v.* People, 66 Ill. 501.

Indiana. — Deming *v.* Bullitt, 1 Blackf. (Ind.) 241.

Maine. — Boothbay *v.* Giles, 68 Me. 160.

Maryland. — State *v.* Humbird, 54 Md. 330; Stabler *v.* Cowman, 7 Gill & J. (Md.) 284.

Mississippi. — McPherson *v.* Reese, 58 Miss. 749. But in McCarley *v.* Tippah County, 58 Miss. 483, 38 Am. Rep. 338, it was held that a party complainant would not in a court of equity be permitted to obtain affirmative relief based upon his omission to affix a seal or scroll to an instrument delivered by him as a sealed instrument and containing the words "witness my hand and seal."

Pennsylvania. — Maule *v.* Weaver, 7 Pa. St. 329; Taylor *v.* Glaser, 2 S. & R. (Pa.) 502.

Wisconsin. — Davis *v.* Judd, 6 Wis. 85.

See also Warren *v.* Lynch, 5 Johns. (N. Y.) 239.

2. Metropolitan L. Ins. Co. *v.* Bender, 124 N. Y. 47. *Compare* Barnet *v.* Abbott, 53 Vt. 120.

3. Subject-matter of Conveyance. — Where a mortgagor described in his mortgage a certain stock of goods and located them in a certain house in a city named, he is estopped from denying the truth of these statements in his mortgage, and from setting up, as a defense to the foreclosure thereof, that there was no such stock of goods as that described when the mortgage was executed. Marable *v.* Mayer, 78 Ga. 60.

4. Quantity of Land Conveyed. — Doe *v.* Howell, 1 Houst. (Del.) 178. And see the title MORE OR LESS, vol. 20, p. 875.

For a discussion of the relief in equity against a recital of this kind made under a mutual mistake of fact, see the title MISTAKE, vol. 20, p. 826.

5. Description of Land. — Thompson *v.* Smith, 96 Mich. 258.

Estoppel to Claim that Wrong Tract of Land Was Described by Mistake. — Where a tract of land is granted in clear and unmistakable terms, the grantor and those claiming under him are estopped to say in a court of law that the land thus described in the deed was inserted by mistake and that another piece of land was intended. Brown *v.* Allen, 43 Me. 590. To the same effect see Delogny *v.* David, 12 La. Ann. 30.

For a discussion of the relief in equity under such circumstances, see the title MISTAKE, vol. 20, p. 826 *et seq.*

f. EXCEPTIONS OR RESERVATIONS. — The grantee in a deed will be concluded by recitals therein limiting the quantity or extent of the interest conveyed and making reservations in favor of the grantor or third person.[1] But the grantee will not be estopped by such reservation or exception from setting up title to the reserved interest afterwards acquired, and through a source hostile to the title of the grantor.[2] And the recitals of a deed, excepting out of the conveyance lands embraced therein, must, to work an estoppel, be as definite and descriptive as are required by law in a deed of conveyance, either by their presence in the deed relied on as an estoppel, or by reference to another in which they are sufficiently set out.[3]

g. EXISTENCE OF STREET OR WAY. — If land is conveyed as bounded upon a way or street, this is not merely a description but an implied covenant that there is such a way, and the grantor and those claiming under him are estopped to deny such way as existing or to obstruct the grantee in the use and enjoyment thereof, provided the grantor owns the street or way or has the right to have it kept open and to grant the right of way.[4]

h. RECITAL OF PRIOR AGREEMENT. — A recital in a deed that a certain agreement had been previously made between the parties is equivalent to making the agreement anew and will estop the parties from saying that there was no agreement.[5] Accordingly where, in a bond executed to secure the faithful performance by the principal of certain duties imposed upon him by an indenture to which he was a party, the terms of the indenture are recited, this recital is conclusive upon the signers of the bond.[6]

Realty Described as Personalty. — A chattel mortgage which describes the property mortgaged as personalty will estop the mortgagor to set up the claim that it is real property. Ballou *v.* Jones, 37 Ill. 95.

Recital that Premises Are the Homestead of Grantor. — Williams *v.* Swetland, 10 Iowa 51.

1. Exceptions or Reservations. — Doe *v.* Wright, 2 Houst. (Del.) 49; Badger *v.* Batavia Paper Mfg. Co., 70 Ill. 302; Goddard *v.* Dakin, 10 Met. (Mass.) 94; Rosseel *v.* Wickham, 36 Barb. (N. Y.) 386; Olwine *v.* Holman, 23 Pa. St. 279; Ehret *v.* Gunn, 166 Pa. St. 384.

Reservation of Rent. — Sheppard *v.* Hunt, 4 N. J. Eq. 277.

Reservation of Dower. — Doe *v.* Wright, 2 Houst. (Del.) 49; Knight *v.* Mains, 12 Me. 41. See also Stevenson *v.* McReary, 12 Smed. & M. (Miss.) 9, 51 Am. Dec. 102.

Where Exception Void for Uncertainty Inoperative as Estoppel. — Mooney *v.* Cooledge, 30 Ark. 640.

2. Champlain, etc., R. Co. *v.* Valentine, 19 Barb. (N. Y.) 484; Fisher *v.* Cid Copper Min. Co., 94 N. Car. 397; Moore *v.* Lord, 50 Miss. 229.

3. McDonald *v.* Lusk, 9 Lea (Tenn.) 654. See also Knowlton *v.* New York, etc., R. Co., 72 Conn. 188.

4. Recital of Existence of Street or Way. — Rogers *v.* Bollinger, 59 Ark. 12; Zearing *v.* Raber, 74 Ill. 409; Crowell *v.* Beverly, 134 Mass. 98; Fahey *v.* Marsh, 40 Mich. 236; Karrer *v.* Berry, 44 Mich. 391; Moses *v.* St. Louis Sectional Dock Co., 84 Mo. 242; Matter of St. Nicholas Terrace, 143 N. Y. 621; Lowe *v.* Redgate, 42 Ohio St. 329; Kneisel *v.* Krug, 8 Ohio Dec. (Reprint) 581, 9 Cinc. L. Bul. 38. See also Satchell *v.* Doram, 4 Ohio St. 542; Bell *v.* Todd, 51 Mich. 21. *Compare* Bushman *v.* Gibson, 15 Neb. 676. And see the title ESTOPPEL, vol. 11, p. 402.

Recitals Operating as Estoppel to Deny Dedication. — For a discussion of the operation of recitals as estoppels to deny a dedication to the public, see the title DEDICATION, vol. 9, p. 55. And see the following cases: Gridley *v.* Hopkins, 84 Ill. 528; Dexter *v.* Tree, 117 Ill. 532; Getchell *v.* Benedict, 57 Iowa 121; Tobey *v.* Taunton, 119 Mass. 404; Pillsbury *v.* Alexander, 40 Neb. 242; Peters *v.* Carleton, 48 Hun (N. Y.) 620, 1 N. Y. Supp. 531; Philadelphia *v.* Ash, 15 Phila. (Pa.) 45, 38 Leg. Int. (Pa.) 292; Providence Steam-Engine Co. *v.* Providence, etc., Steamship Co., 12 R. I. 348, 34 Am. Rep. 652; Daniels *v.* Almy, 18 R. I. 244; Moore *v.* Walla Walla, 2 Wash. Ter. 184; Kenyon *v.* Knipe, 2 Wash. 394; Kenyon *v.* Squire, 2 Wash. 404; Dearborn *v.* Moran, 2 Wash. 405; State *v.* Forrest, 12 Wash. 483.

5. Recital of Prior Agreement. — Jewell *v.* ———, 1 Rolle 408; Ball *v.* Hancock, 82 Ky. 107; State Bank *v.* Vance, 4 Litt. (Ky.) 172. See also Douglass *v.* Scott, 5 Ohio 199; Augusta Bank *v.* Hamblet, 35 Me. 491.

If a party authorizes a justice to enter his name as stayor to certain judgments, by an informal instrument of writing which does not bind him, but at the same time accepts a mortgage from the judgment debtor to indemnify him as such stayor, he is estopped by the recitals of the deed to deny his liability. Morgan *v.* Cooper, 1 Head (Tenn.) 430.

6. Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98.

Recital in Contractor's Bond. — Where a bond given by a contractor recites that he has contracted with the obligee for the construction of a building, and one of the conditions of the bond is that he "shall duly perform and keep his agreements as in said contract set forth," a surety on the bond will be estopped to deny the recital. Hayden *v.* Cook, 34 Neb. 670.

The sureties upon a bond given by a con-

i. RECITALS IN BONDS — (1) *In General.* — The obligor or surety on a bond is estopped to deny any fact recited therein, when by such denial he seeks to avoid liability thereon.[1]

Existence of Obligor. — For instance, a party who has executed a bond as surety for a bank, and thus admitted its existence and covenanted for its faithful performance of the contract, is estopped from denying its existence when sued upon the bond.[2]

Existence and Character of Obligee. — So the obligors in a bond are estopped to deny the corporate existence of the body to whom it was given.[3]

Bond Made to Obligee as Administrator or Executor. — In the same way a bond executed to a person "as executor" or "as administrator" is an admission of his representative character and is binding upon the obligor and his sureties.[4]

(2) *Injunction Bond.* — The parties to an injunction bond are estopped from denying that there was such an injunction awarded or judgment or decree rendered as their bond recites.[5]

(3) *Appeal Bond.* — In an action on an appeal bond, the obligors and sureties are estopped from setting up defenses that contradict the recitals therein.[6]

(4) *Official Bond.* — The obligors and sureties in an official bond are

tractor for the erection of a school building, under a statute requiring such bond, for the protection of those furnishing labor and materials to a contractor employed in making public improvements, are estopped to deny the authority of the school district to make the contract, when the bond executed by such sureties recites as a fact that the principal in the bond had duly entered into a contract with the school district for the erection of said school building. Price *v.* Scott, 13 Wash. 574.

1. Recitals in Bonds Generally. — Willoughby *v.* Brook, Cro. Eliz. 756; Brown, etc., Co. *v.* Ligon, 92 Fed. Rep. 857; Pickering *v.* Day, 2 Del. Ch. 333; Chicago Pressed Steel Co. *v.* Clark, 87 Ill. App. 658; Miller *v.* Elliott, 1 Ind. 484; State *v.* McDonald, (Idaho 1895) 40 Pac. Rep. 312; Peddicord *v.* Hill, 4 T. B. Mon. (Ky.) 370; Wheeler *v.* Meyer, 95 Mich. 36; Hayden *v.* Cook, 34 Neb. 670. See further the title SURETYSHIP.

Penal Bond by Insolvent Debtor. — Edwards *v.* State, 22 Ark. 303.

Traverse Bond. — Wayman *v.* Taylor, 1 Dana (Ky.) 527.

The Sureties on a Liquor Bond are estopped to deny the recital therein that the principal, at the time of its execution, was professing to carry on the business of selling liquor. Brockway *v.* Petted, 79 Mich. 620.

Undertaking to Support Wife. — The surety on an undertaking given under the statute, to support the principal's wife, cannot deny that the woman is a wife. Charities, etc., Com'rs *v.* O'Rourk, 34 Hun (N. Y.) 349.

Obligation to Indemnify Surety. — Where, in an obligation to indemnify the obligee for entering into security for costs for the obligor, the latter acknowledges that the former has become such surety, he is estopped to deny the fact, or to show that it occurred after instead of before the obligation was executed. Cordle *v.* Burch, 10 Gratt. (Va) 480.

Bond Reciting Security by First Mortgage. — In Green's Appeal, 97 Pa. St. 342, it was held that when a person sells a bond, setting out on its face that it is secured by a first mortgage, or induces another to guarantee it as such, he will, in the absence of any further qualification, be estopped from subsequently setting up a lien as against the guarantor and holder of the bond.

2. People *v.* McCumber, 27 Barb. (N. Y.) 637.

3. Father Mathew Young Men's Total Abstinence, etc., Soc. *v.* Fitzwilliam, 12 Mo. App. 445, *affirmed* in 84 Mo. 406.

4. Jones *v.* Snedecor, 3 Mo. 390; Hoke *v.* Hoke, 3 W. Va. 561.

5. See the title INJUNCTIONS, vol. 16, p. 452.

But in *Alabama*, where the injunction bond is always executed before the writ is issued, it has been held that a recital that the person seeking the injunction had "prayed for and obtained an injunction" does not estop him from showing that the injunction was not in fact obtained. Adams *v.* Olive, 57 Ala. 249.

6. Recitals in Appeal Bonds. — Thalheimer *v.* Crow, 13 Colo. 397; Arnott *v.* Friel, 50 Ill. 174; Healy *v.* Newton, 96 Mich. 228; Dunterman *v.* Storey, 40 Neb. 447; Levi *v.* Dorn, (Supm. Ct. Gen. T.) 28 How. Pr. (N. Y.) 217.

Recital of Existence of Judgment or Decree. — Kellar *v.* Beeler, 4 J. J. Marsh. (Ky.) 655; Herrick *v.* Swartwout, 72 Ill. 340; Mix *v.* People, 85 Ill. 329; Parrott *v.* Kane, 14 Mont. 23.

Parties to Judgment. — Arnott *v.* Friel, 50 Ill. 174; Keen *v.* Whittington, 40 Md. 489.

Fact that Decree Was in Rem. — George *v.* Bischoff, 68 Ill. 236.

Fact of Taking Appeal. — Meserve *v.* Clark, 115 Ill. 580; Reeves *v.* Andrews, 7 Ind. 207.

Allowance of Supersedeas. — Baltimore, etc., R. Co. *v.* Vanderwarker, 19 W. Va. 265.

The Surety in a Supersedeas Bond is estopped to deny the truth of the recitals therein that his principal had filed a transcript and petition in error. Dunterman *v.* Storey, 40 Neb. 447.

Recital of Existence of Court. — But an obligor in an appeal bond conditioned to prosecute an appeal to the "county court for Anne Arundel county" has been held not to be estopped by the recital to deny that there was such a court in existence as that recited. Tucker *v.* State, 11 Md. 322.

estopped to deny the recitals therein of the appointment of the principal to office, or to otherwise impeach his official character. This rule applies not only to bonds of public officers,[1] but also to bonds of private officers and agents.[2]

(5) *Forthcoming and Delivery Bond* — **Recitals as to Ownership of Property.** — A recital in a forthcoming or delivery bond that property levied on or attached is the property of the defendant is conclusive upon the parties.[3] And a similar effect has been given to a recital that the property was attached as the property of the defendant.[4]

Levy. — So the recital of an attachment, execution, or a levy will estop the parties from denying it.[5]

Value of Property. — So a recital in a forthcoming bond of the value of goods attached will be conclusive against the parties in an action on a covenant in the bond, that in case the attachment was not dissolved, the defendant and his sureties would, in default of the return of the goods, pay the full value thereof.[6]

(6) *Replevin Bond.* — So the recitals in a replevin bond may operate by way of an estoppel.[7]

1. Sheriff's Bond. — Norris *v.* State, 22 Ark. 524; Allbee *v.* People, 22 Ill. 533; Brown *v.* Grover, 6 Bush (Ky.) 1; Montieth *v.* Com., 15 Gratt. (Va.) 172; Sprague *v.* Brown, 40 Wis. 612.

Deputy Sheriff. — Cox *v.* Thomas, 9 Gratt. (Va.) 312; Cecil *v.* Early, 10 Gratt. (Va.) 198.

Constable's Bond. — Hardwick *v.* Cox, 21 N. J. L. 247.

But a recital to the effect that the principal is a constable will not estop a surety from denying that fact, where the bond also recites that the appointment was made by an officer having no lawful authority. Tinsley *v.* Kirby, 17 S. Car. 1.

Tax Collector's Bond. — Ford *v.* Clough, 8 Me. 334, 23 Am. Dec. 513; Billingsley *v.* State, 14 Md. 369; State *v.* Horner, 34 Md. 569; Seiple *v.* Elizabeth, 27 N. J. L. 407; Hoboken *v.* Harrison, 30 N. J. L. 73; Fake *v.* Whipple, 39 Barb. (N. Y.) 339; Borden *v.* Houston, 2 Tex. 594; Burnett *v.* Henderson, 21 Tex. 588.

Agent for Indian Tribe. — Bruce *v.* U. S., 17 How. (U. S.) 437.

Justice of Peace. — Williamson *v.* Woolf, 37 Ala. 298.

County Treasurer. — Custer County *v.* Elbien, 7 S. Dak. 482.

So as to the bond of a depositary of county funds. Meeker County *v.* Butler, 25 Minn. 363.

Jailer. — Crump *v.* Bennett, 2 Litt. (Ky.) 209.

2. Washington County Ins. Co. *v.* Colton, 26 Conn. 42.

Bond of Bank Cashier. — Lionberger *v.* Krieger, 88 Mo. 160, *affirming* judgment (1883) 13 Mo. App. 313; Hall *v.* Brackett, 62 N. H. 509, 13 Am. St. Rep. 588; State Bank *v.* Chetwood, 8 N. J. L. 1.

Guardian's Bond. — Norton *v.* Miller, 25 Ark. 108; State *v.* Mills, 82 Ind. 126; Shroyer *v.* Richmond, 16 Ohio St. 455; Williamson *v.* Woodman, 73 Me. 163; Hauenstein *v.* Gillespie, 73 Miss. 742, 55 Am. St. Rep. 569 [*overruling* Thomas *v.* Burrus, 23 Miss 550, 57 Am. Dec. 154]; Parker *v.* Campbell, 21 Tex. 763; Findley *v.* Findley, 42 W. Va. 372. And see the title GUARDIAN AND WARD, vol. 15, p. 122.

Administration Bond. — Outlaw *v.* Yell, 8 Ark. 349; Moore *v.* Earl, 91 Cal. 632. See also the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 880.

3. Recital of Ownership in Forthcoming and Delivery Bond. — Pierce *v.* Whiting, 63 Cal. 538; Birdsall *v.* Wheeler, 58 Conn. 429; Dickson *v.* Anderson, 9 Mo. 156. See also the title FORTHCOMING AND DELIVERY BONDS, vol. 13, p. 1141.

4. Johnston *v.* Oliver, 51 Ohio St. 6. See also Case *v.* Steele, 34 Kan. 90. *Compare* Bradley Hubbard Mfg. Co. *v.* Bean, 20 Mo. App. 111.

As to the effect of the bond in the absence of a recital of ownership, see the title FORTHCOMING AND DELIVERY BONDS, vol. 13, p. 1141.

5. Recital of Levy, etc. — McMillan *v.* Dana, 18 Cal. 339; Briggs *v.* McDonald, 166 Mass. 37; Greengard *v.* Fretz, 64 Minn. 10; Coleman *v.* Bean, (C. Pl. Gen. T.) 14 Abb. Pr. (N. Y.) 38; Higgins *v.* Healy, 47 N. Y. Super. Ct. 207; Pearre *v.* Folb, 123 N. Car. 239; Easton *v.* Driscoll, 18 R. I. 318. See also the title FORTHCOMING AND DELIVERY BONDS, vol. 13, p. 1140.

Validity of Attachment as Dependent upon Sufficiency of Return. — And the same has been held of a recital bearing upon the validity of the attachment as dependent upon the sufficiency of the return. Briggs *v.* McDonald, 166 Mass. 37. But for the general rule see the title FORTHCOMING AND DELIVERY BONDS, vol. 13, p. 1140.

6. Klippel *v.* Oppenstein, 8 Colo. App. 187.

7. Recitals in Replevin Bond. — Decker *v.* Judson, 16 N. Y. 439. See also Harrison *v.* Wilkin, 69 N. Y. 412.

Recital as to Making of Affidavit. — Wisconsin M. & F. Ins. Co. Bank *v.* Hobbs, (Supm. Ct. Gen. T.) 22 How. Pr. (N. Y.) 494.

Quantity of Property Taken by Sheriff. — On the other hand, it has been held that where the plaintiff in the replevin suit, in order to get his requisition, gave a bond, a recital therein describing all the property claimed did not estop him in an action on the bond from showing as a fact that only a part of the property described therein had been subsequently taken by the sheriff. Miller *v.* Moses, 56 Me. 128.

(7) *Bail and Recognizance.* — So the parties to a bail bond or recognizance are estopped by the recitals therein,[1] unless it was obtained by duress.[2]

(8) *Prison-bound Bond.* — So the obligor and sureties will be bound by a recital in a prison-bound bond.[3]

(9) *Guardian's Bond.* — The principal and sureties of a guardian's bond are estopped by its recitals.[4]

III. Operation as Covenants. — Although a recital in a deed of conveyance may be operative as an estoppel, it does not necessarily follow that it will amount to a covenant either express or implied,[5] and it can have this effect only where it sufficiently appears from the whole instrument to have been the intention of the parties that it should so operate.[6]

RECITE. — See note 7.

RECKLESS — RECKLESSLY — RECKLESSNESS. — Recklessness is an indifference whether wrong is done or not — an indifference to the rights of others.[8]

Recital of Possession in Delivery Bond Given by Defendant in Replevin. — Joseph Schnaider Brewing Co. *v.* Niederweiser, 28 Mo. App. 233; Miller *v.* Bryden, 34 Mo. App. 602; Martin *v.* Gilbert, 119 N. Y. 298; Blake *v.* McNamara, (N. Y. City Ct. Gen. T.) 9 Misc. (N. Y.) 213. *Compare* Wallis *v.* Long, 16 Ala. 738.

Recital of Value of Property. — Vulcan Iron-Works *v.* Cyclone Steam Snow-Plow Co., 48 Fed. Rep. 652; Wiseman *v.* Lynn, 39 Ind. 250; Weyerhaeuser *v.* Foster, 60 Minn. 223. *Compare* Thomas *v.* Spofford, 46 Me. 408.

1. Recital in Bail Bond or Recognizance. — Whitted *v.* Governor, 6 Port. (Ala.) 335. And see the title Bail and Recognizance (in Criminal Cases), vol. 3, p. 707.

Validity of Indictment. — Kepley *v.* People, 123 Ill. 367.

Fact that Obligor Was Person Indicted. — U. S. *v.* McNeily, 72 Fed. Rep. 972, 41 U. S. App. 1.

2. Cordis *v.* Sager, 14 Me. 475.

3. Recital in Prison-bound Bond. — Rudd *v.* Hanna, 4 T. B. Mon. (Ky.) 528. See also Tait *v.* Frow, 8 Ala. 543.

Recital of Judgment. — Allen *v.* Magruder, 3 Cranch (C. C.) 6. *Compare* Stillman *v.* Barney, 4 Vt. 187.

Amount of Execution for Which Prisoner Is in Custody. — Where a bond, taken by a sheriff for his security on granting the liberties of the jail to a prisoner in execution, stated the amount of the execution for which the prisoner was in custody, it was conclusive as to the fact, so that the sheriff, in an action afterwards against him for an escape, could not allege that it was not the true sum, or that he had no notice of the true sum before the escape. Tallmadge *v.* Richmond, 9 Johns. (N. Y.) 85.

4. May *v.* May, 19 Fla. 373.

As to recitals of the guardian's appointment, see *supra*, this section, *Official Bonds*.

5. Recitals as Covenants. — Ferguson *v.* Dent, 8 Mo. 673; Clark *v.* Post, 113 N. Y. 17. And see the title Covenants, vol. 8, p. 61.

6. Whitehill *v.* Gotwalt, 3 P. & W. (Pa.) 327.

Recitals Held Operative as Covenants. — Farrall *v.* Hilditch, 5 C. B. N. S. 840, 94 E. C. L. 840; De Forest *v.* Byrne, 1 Hilt. (N. Y.) 43; Horry *v.* Frost, 10 Rich. Eq. (S. Car.) 109; Peck *v.* Hensley, 20 Tex. 673. See also Severn *v.* Clerk, Leon. (pt. i.) 122; Barfoot *v.* Freswell, 3 Keb. 465; Johnson *v.* Procter, Yelv. 175; Adams *v.* Gibney, 6 Bing. 656, 19 E. C. L. 194; Browning *v.* Wright, 2 B. & P. 25. *Compare* Delmer *v.* M'Cabe, 14 Ir. C. L. 377.

7. Recite. — A *Kansas* statute required that a sheriff's deed should "*recite* the execution," the names of the parties, etc. In Ogden *v.* Walters, 12 Kan. 290, it was held that the word *recite* as used in this connection "does not mean to copy or to repeat verbatim, but only to state the substance of the execution, etc."

Reciting Statute Distinguished from Pleading or Counting upon Statute. — "There is a material distinction, not always observed by writers on pleading — and the nonobservance of which has sometimes occasioned confusion — between pleading, counting upon, and *reciting* a statute. Pleading a statute is merely stating the facts which bring a case within it, without making mention or taking any notice of the statute itself. Counting upon a statute consists in making express reference to it, as by the words 'against the form of the statute,' or 'by force of the statute,' 'in such case made and provided.' *Reciting* a statute is quoting or stating its contents. A statute may therefore be pleaded without either *reciting* or counting upon it, and may be counted upon without being *recited*." Gould on Pleading (Hamilton's ed.), c. 3, note 51, *quoted* in Hart *v.* Baltimore, etc., R. Co., 6 W. Va. 348. See generally the title Statutes.

8. Kansas Pac. R. Co. *v.* Whipple, 39 Kan. 542.

"The word *reckless* means 'heedless, careless, rash, indifferent to consequences.'" Harrison *v.* State, 37 Ala. 156.

Recklessly. — In Times Pub. Co. *v.* Carlisle, (C. C. A.) 94 Fed. Rep. 773, it was said: "*Recklessly* signifies with a wanton disregard of all consequences, and hence of the violation of all rights, and its use presented to the jury the proper rule for their guidance upon the question under consideration."

Negligence. (See also the titles Contributory Negligence, vol. 7, p. 368; Negligence, vol. 21, p. 455.) — In Louisville, etc., R. Co. *v.* Anchors, 114 Ala. 492, 62 Am. St. Rep. 117, it was held that the word *reckless*, when applied to negligence, had no legal significance *per se* which imported other than simple negligence or a want of due care; but that the use of the word *reckless* in connection with aver-

RECKON. — See note 1.

RECLAMATION. — Reclamation is defined as recovery; demand; challenge of something to be restored; claim made.[2]

RECLUSION. — See note 3.

RECOGNITION. — See RATIFICATION, *ante*.

RECOGNIZANCE. — See the title BAIL AND RECOGNIZANCE, vol. 3, p. 686.

RECOGNIZE. — To recognize means to acknowledge or solemnly avow.[4] It also means to know; to recall to mind; to recollect or recover the knowledge of a thing or person; to acknowledge;[5] to admit; to acknowledge something existing before.[6]

RECOMMEND. (See also the titles LIBEL AND SLANDER, vol. 18, p. 1033; PRECATORY TRUSTS, vol. 22, p. 1162.) — To recommend is to commend to the favorable notice of another; to commit to another's care, confidence, or accept-

ments of facts to which it referred and which it explained might imply more than mere heedlessness or negligence.

In Stringer *v.* Alabama Mineral R. Co., 99 Ala. 410, it was said: "The words 'gross,' ***reckless***, when applied to 'negligence,' *per se* have no legal significance which imports other than simple negligence or a want of due care." See also Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412; Louisville, etc., R. Co. *v.* Barker, 96 Ala. 435; Louisville, etc., R. Co. *v.* Anchors, 114 Ala. 492, 62 Am. St. Rep. 117.

Recklessly Means No More than Negligently. — Highland Ave., etc., R. Co. *v.* Sampson, 112 Ala. 425.

Recklessness Used as Synonym for Carelessness or Negligence. — Eddy *v.* Powell, 4 U. S. App. 263.

Reckless and Wilful Distinguished. — In Harrison *v.* State, 37 Ala. 154, a distinction is drawn between the words "wilful" and ***reckless***, as employed in reference to criminal acts. The court said: "The word 'wilful,' when employed in penal enactments, has not always the same meaning. In this statute it is used as the synonym of 'intentional' or 'designed;' 'pursuant to intention or design;' 'without lawful excuse.' * * * The word ***reckless*** means 'heedless, careless, rash; indifferent to consequences.' Now, one may be heedless, rash, or indifferent to results, without contemplating or intending these consequences. As a general rule, there is a wide difference between intentional acts and those results which are the consequence of carelessness." See also Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412; Johnson *v.* State, 92 Ala. 82; Louisville, etc., R. Co. *v.* Anchors, 114 Ala. 492; Alabama G. S. R. Co. *v.* Hall, 105 Ala. 599; Kansas Pac. R. Co. *v.* Whipple, 39 Kan. 531.

Same — Intention. — In Richmond, etc., R. Co. *v.* Farmer, 97 Ala. 146, it was said: "The word ***reckless***, used in each of these charges, is not necessarily the equivalent of wantonness or intention. It may mean and is often used with no other significance than mere carelessness, heedlessness, unmindfulness." See also Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412.

1. Reckon. — In Phipps *v.* State, 34 Tex. Crim. 608, it was held that a witness could not be impeached with hearsay testimony of what he ***reckoned*** about a fact. The court said: "It was not the statement of any fact by the witness, but what he ***reckoned*** about it, that is, his opinion; and it was not competent to impeach him upon this hearsay testimony." See generally the title WITNESSES.

2. Reclamation. — Southwestern R. Co. *v.* Atlantic, etc., R. Co., 53 Ga. 406, *quoting* Webst. Dict.

A statute provided that swamp lands should be exempt from taxation until ***reclamation***. The act further provided the mode and extent of ***reclamation*** contemplated. It was held that the term ***reclamation*** must be construed to have reference to that general system and standard of ***reclamation***, and that whenever any levees and drains provided for by the act were completed, the lands intended to be protected or drained thereby were, within the meaning of the statute, ***reclaimed***. State *v.* Crittenden County Ct., 19 Ark. 366.

3. Reclusion. — ***Reclusion*** in *Louisiana* law means incarceration under a sentence; to undergo an infamous punishment, carrying civil degradation, in a house of forced labor. Phelps *v.* Reinach, 38 La. Ann. 547. See also Jurgeus *v.* Ittmann, 47 La. Ann. 367.

4. Recognize. — Arthur *v.* Monck, 21 U. C. C. P. 81.

Recognize and Acknowledge. — A vendor gave to his vendee a deed for certain crown lands and agreed that if the crown-land department did not ***recognize*** his assignment he would return the purchase money to his vendee. It was held that the money was to be refunded in the event of the crown-land department not acknowledging that the defendant's vendee had, by virtue of the assignment, acquired a beneficial interest in the land, entitling him to the benefit of the contract between the crown and the original locatee. Arthur *v.* Monck, 21 U. C. C. P. 76.

5. Recognize. — Arthur *v.* Monck, 21 U. C. C. P. 81.

Recognize in Sense of Acknowledge. — Hallett *v.* Doe, 7 Ala. 898.

6. Recognize. — Leak *v.* Bear, 80 N. Car. 273. That case arose upon the construction of a note payable as soon as the legislature should pass an act ***recognizing*** certain classes of bonds. The court said: "The note in legal effect imports a promise to pay on the state's passing an act admitting or acknowledging the particular class of bonds referred to as genuine and binding, and as contradistinguished from other classes not obligatory."

ance, with favoring representations; to put in a favorable light before any one; to bestow commendation on.[1]

RECONCILE. — See note 2.

RECONSIDERATION. (See also the title STATUTES.) — Reconsideration is defined to be taking up for renewed consideration that which has been passed or acted upon previously;[3] thinking again upon a matter with care.[4]

RECONSTRUCT — RECONSTRUCTION. — To reconstruct means to construct again; to rebuild.[5]

RECONVENTION. (See generally the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM.) — Reconvention is a plea of the civil law, in the nature of a plea of set-off or counterclaim. It is more extensive in its application than set-off, it not being requisite that the claim opposed in reconvention should be liquidated; but the matter embraced in the plea must be connected with and incidental to the main action.[6]

RECONVERSION. — See the titles CONVERSION AND RECONVERSION, vol. 7, p. 463; PARTNERSHIP, vol. 22, p. 2.

RECONVEY. — See REDEEM — REDEMPTION, *post.*

RECORD. — See the title RECORDS, *post.*

RECORDARI. — See the title RECORDARI, 17 ENCYC. OF PL. AND PR. 899.

1. Recommend. — People *v.* Woodruff, 166 N. Y. 460, *quoting* Webst. Dict.

A testatrix willed her property to her sister to be hers independent of any husband, and earnestly *recommended* her to take such measures as she might think best for making it sure that whatever she might inherit should go to the children. It was held that the children, on their mother's death, were entitled to the property as joint tenants absolutely. Cholmondeley *v.* Cholmondeley, 14 Sim. 590. See also Horwood *v.* West, 1 Sim. & St. 387.

Recommend in Sense of Command or Direction — Imperative. — See Tibbits *v.* Tibbits, Jac. 317, 19 Ves. Jr. 656; Malim *v.* Keighley, 2 Ves. Jr. 333; Paul *v.* Compton, 8 Ves. Jr. 380; Mercer County *v.* Pittsburgh, etc., R. Co., 27 Pa. St. 401; Webster *v.* Morris, 66 Wis. 397.

Recommend Not Mandatory. — See Johnston *v.* Rowlands, 2 De G. & Sm. 356; Meggison *v.* Moore, 2 Ves. Jr. 633; Randal *v.* Hearle, 1 Anstr. 124; Hart *v.* Tribe, 18 Beav. 215; Sale *v.* Moore, 1 Sim. 534; Taylor *v.* Brown, 88 Me. 56.

2. Reconcile and Harmonize. — In Holdridge *v.* Lee, 3 S. Dak. 137, it was said: "Appellant insists that the court might properly instruct a jury to *reconcile* conflicting evidence, if possible, but not to 'harmonize' it. It is quite probable that etymologically the two words are not synonymous, but as commonly used, they are so nearly equivalent that we are entirely satisfied that the jury would have understood the rule of their duty as to conflicting evidence precisely the same whether they were told to harmonize or to *reconcile* such evidence."

3. People *v.* Delaware County, 48 N. Y. App. Div. 432, *quoting* Webst. Dict.; Cent. Dict.

Reconsider. — All deliberative bodies have a right to *reconsider* their proceedings as often as they think proper, and it is the final result only which is to be regarded as the thing done. State *v.* Foster, 7 N. J. L. 101.

Reference. — In People *v.* Delaware County, 48 N. Y. App. Div. 428, it was held that the action of the board of supervisors in referring bills which had been audited and allowed to a committee for a renewed consideration, and to obtain further evidence in relation thereto, upon the ground that numerous items in such bills were improper and illegal, was in substance a *reconsideration* of the audit.

4. Reconsideration. — Lake, etc., Water Co. *v.* Ocean City, etc., Water Co., 62 N. J. L. 160, where it was held that the word *reconsideration*, occurring in a statute respecting the repassage of a vetoed ordinance, was to receive its ordinary meaning and not the artificial one it has acquired in parliamentary uses.

5. Reconstruct. — Farraher *v.* Keokuk, 111 Iowa 310; Levi *v.* Coyne, (Ky. 1900) 57 S. W. Rep. 791; Board of Education *v.* Townsend, 63 Ohio St. 514; Norristown *v.* Norristown Pass. R. Co., 148 Pa. St. 87.

"*Reconstruction* is 'the act of constructing again.'" Goodyear Shoe Machinery Co. *v.* Jackson, (C. C. A.) 112 Fed. Rep. 150.

Reconstruction of Street. — An ordinance provided that a railroad should *reconstruct* the street between its tracks, upon which its tracks were laid, with the same kind of material used in the remaining portion of the said street. It was held that the company was obliged, after laying its track, to *reconstruct* the streets once, but was not obliged after that to put down a new and improved pavement on demand of the city authorities. Norristown *v.* Norristown Pass. R. Co., 148 Pa. St. 87. See also the titles STREET RAILWAYS; STREETS AND SIDEWALKS.

Reconstruction and Repairs Distinguished. — See REPAIRS.

6. Reconvention. — Pacific Express Co. *v.* Malin, 132 U. S. 531; Lanusse *v.* Pimpienella, 4 Mart. N. S. (La.) 439; Agaisse *v.* Guedron, 2 Mart. N. S. (La.) 83; Mitchell *v.* Silver Lake Lodge, 29 Oregon 294; Egery *v.* Power, 5 Tex. 502; Walcott *v.* Hendrick, 6 Tex. 406.

RECORDED. (See also the titles RECORDING ACTS, *post*, p. 73; RECORDS, *post*.) — See note 1.

RECORDER. — See the titles COURTS, vol. 8, p. 21; MUNICIPAL COURTS, vol. 21, p. 1; RECORDING ACTS, *post*, p. 73.

RECORDER OF DEEDS. (See also the titles ACKNOWLEDGMENTS, vol. 1, p. 483; PUBLIC OFFICERS, vol. 23, p. 314; RECORDING ACTS, *post*, p. 73.) — A recorder of deeds is a ministerial officer, authorized by law to keep the register in which deeds are recorded. It has been said that his duties are owed chiefly to those particular individuals who have occasion to employ him and to whom he usually looks for his compensation.[2]

1. Recorded. — In International L. Ins. Co. *v.* Scales, 27 Wis. 640, it was held that a deed which had been left with the register for record, and which had the date of its reception indorsed thereon, but which had neither been spread upon the record nor entered in the general index, was not *recorded* within the meaning of a redemption statute. See also Oconto Co. *v.* Jerrard, 46 Wis. 317.

Allowed and Recorded. — In Hamilton *v.* Farrar, 131 Mass. 572, it was held that if exceptions are taken by the respondent to the rulings of the Superior Court at the trial of a complaint under the Mill Act, Gen. Stat. Mass., c. 149 (Rev. Laws Mass. 1902, c. 196), which are overruled by the Supreme Court after the verdict of a sheriff's jury assessing the complainant's damages in accordance with that act has been returned into and accepted by the Superior Court, the verdict is not allowed and *recorded*, within the meaning of Gen. Stat. Mass., c. 149, § 21 (Rev. Laws Mass., c. 196, § 11), until after the overruling of the exceptions.

Recorded Title. — In Dallemand *v.* Mannon, 4 Colo. App. 262, it was held that a record of a receiver's certificate would be the *recorded* title upon the margin of which the word "homestead" might be written, so as to give to the owner the benefit of the Homestead Act.

"Recorded" Held to Be Clerical Error for "Received." — See Dryden *v.* Stephens, 19 W. Va. 18.

2. Recorder of Deeds. — Luther *v.* Banks, 111 Ga. 374, *quoting* Mechem on Public Officers, § 733.

Compensation. — Leavenworth County *v.* Keller, 6 Kan. 510; Beekman *v.* Eaton County, 85 Mich. 584; Pierie *v.* Philadelphia, 139 Pa. St. 577; Gackenbach *v.* Lehigh County, 166 Pa. St. 448; Lee *v.* Dameron, 1 Lea (Tenn.) 131.

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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: ABSTRACT OF TITLE, vol. 1, p. 210; *ACKNOWLEDGMENTS*, vol. 1, p. 484; *ANNUITIES*, vol. 2, p. 386; *ATTACHMENT*, vol. 3, p. 183; *BILLS OF SALE*, vol. 4, p. 555; *CHATTEL MORTGAGES*, vol. 5, p. 947; *CONDITIONAL SALES*, vol. 6, p. 437; *DEBENTURES*, vol. 8, p. 961; *DEEDS*, vol. 9, p. 89; *EQUITABLE MORTGAGES*, vol. 11, p. 123; *EXECUTION AND PROOF OF DOCUMENTS*, vol. 11, p. 583; *EXECUTIONS*, vol. 11, p. 604; *FRAUDULENT SALES AND CONVEYANCES*, vol. 14, p. 210; *GARNISHMENT*, vol. 14, p. 731; *LEASES*, vol. 18, p. 593; *MARRIAGE SETTLEMENTS*, vol. 19, p. 1224; *MORTGAGES*, vol. 20, p. 897; *NOTICE*, vol. 21, p. 580; *NOTICE OF PENDENCY AND LIS PENDENS*, vol. 21, p. 594; *PURCHASERS FOR VALUE AND WITHOUT NOTICE*, vol. 23, p. 475.

I. Origin and History — 1. In England. — At Common Law, originally the only notoriety needed in transactions passing the title to land was livery of seizin for freehold estates and entry for estates for years. The practice of recording titles had no existence.[1]

Statutory Origin. — But later, with the demands of a higher civilization —

1. **Recording Unknown at Common Law** — *United States.* — Clarke *v.* White, 12 Pet. (U. S.) 178.
Alabama. — Sheridan *v.* Schimpf, 120 Ala. 475.
California. — Warnock *v.* Harlow, 96 Cal. 298, 31 Am. St. Rep. 209.
Indiana. — Shirk *v.* Thomas, 121 Ind. 147, 16 Am. St. Rep. 381.
Missouri. — Aubuchon *v.* Bender, 44 Mo. 564; Kelley *v.* Vandiver, 75 Mo. App. 435.
New Jersey. — Den *v.* Richman, 13 N. J. L. 43.
New York. — Fort *v.* Burch, 6 Barb. (N. Y.) 60.

especially after the enactment of the Statute of Uses,[1] whereby estates in lands, even estates of inheritance, might be created and transferred by deed merely, without actual livery of seizin — the necessity for something to take the place of livery of seizin induced the enactment of the Statute of Enrolments, providing for the enrolment of bargains and sales.[2] But this statute was soon nullified by the ingenious adaptation of the lease and release to the purpose of conveying the title to land.[3] Since that time there have been various recording acts passed,[4] but they have usually been of a limited and local nature, and the practice of recording instruments has never attained the importance in England that it has in the United States.[5]

2. In the United States. — By a gradual and continuous growth from a very early period, antedating even the statute of 7 Anne,[6] these acts have attained great importance in the United States. By this public exhibition of titles, transfers of land are greatly facilitated, especially where, as is often the case in this country, the abodes of the parties thereto are widely separated. And, because of the greater security against previous alienations which these acts furnish purchasers of land, its transfer is much encouraged. These considerations of convenience and safety have so operated that, in the United States, the system of registration flourishes in its fullest vigor. It may, indeed, be said that "our whole system of land titles and conveyances has now for many years rested upon the plan and policy of registration."[7] And the principles of the law of registration have not been confined to land titles; statutes have been enacted extending their scope and operation so as to embrace nearly every species of property.[8]

II. CONSTRUCTION — 1. Strict or Liberal. — Although the provisions of the recording acts have by some courts been declared to be in derogation of the common law, or existing rights, therefore requiring a strict construction,[9] the more common view is that these statutes are remedial and should be liberally construed to attain the object intended.[10]

1. Statute of Uses. — 27 Henry VII., c. 10.

2. Statute of Enrolments. — 27 Henry VIII., c. 16.

Enrolment Essential Part of Instrument. — This statute differed formerly from the usual recording acts now adopted, in that enrolment was made a part of the execution of the conveyance by bargain and sale. See Mart. on Conv., § 269; Le Neve *v.* Le Neve, Ambl. 436, 1 Ves. 64, 3 Atk. 646, 2 Hare & W. Lead. Cas. 29; Pyle *v.* Maulding, 7 J. J. Marsh. (Ky.) 204. As to when recording is essential to the validity of the instrument, see *infra*, XI. 2. *a. Failure to Record as Affecting Validity of Instrument — Through Fault of Grantee — In General.*

Never Adopted in United States. — This statute seems never to have been part of the law of the United States. Chandler *v.* Chandler, 55 Cal. 267; Givan *v.* Doe, 7 Blackf. (Ind.) 210; Welsh *v.* Foster, 12 Mass. 96; Report of Judges, 3 Binn. (Pa.) 595.

3. Act Nullified by Lease and Release. — Jackson *v.* Wood, 12 Johns. (N. Y.) 74.

4. English Registry Acts. — Among the English statutes requiring registration may be noted: The Middlesex Registry Act, 7 Anne, c. 20; see *In re* Calcott, (1898) 2 Ch. 460. The various Yorkshire Acts, 5 Anne, c. 18; 6 Anne, c. 35; 8 Geo. II , c. 6. The Yorkshire Registries Act of 1884; see Buttison *v.* Hobson, (1896) 2 Ch. 403; Rodger *v.* Harrison, (1893) 1 Q. B. 161. The Deeds of Arrangement Act of 1887; see Hadley *v.* Beedom, (1895) 1 Q. B. 646. The Bills of Sale Act of 1878; see Johns *v.* Ware, (1899) 1 Ch. 359; *In re* Roundwood Colliery Co., (1897) 1 Ch. 373; *In re* Isaacson, (1895) 1 Q. B. 333; Small *v.* National Provincial Bank, (1894) 1 Ch. 686; Ellis *v.* Wright, 76 L. T. N. S. 522. The statute of 15 Car. II., c. 17, providing that no lease, etc., should be of force but from the registration thereof, may also be mentioned.

5. See 2 Bl. Com. 343; 4 Kent's Com. 459.

6. See Webb Rec. Tit., § 3.

In Chase *v.* Caryl, 57 N. J. L. 560, Lippincott, J., said: "The system grew up with this country and the records made in pursuance of it were necessary and familiar public records in every state of the Union."

7. Webb Rec. Tit., § 4; 2 Min. Inst. 849; Womble *v.* Battle, 3 Ired. Eq. (38 N. Car.) 186. See also Wood *v.* Lake, 62 Ala. 489; Sheridan *v.* Schimpf, 120 Ala. 475.

Livery of Seizin has been dispensed with in America either by express law or usage. See the title DEEDS, vol. 9, p. 100. Registration is equivalent to, and supersedes, the necessity of livery of seizin. Bryan *v.* Bradley, 16 Conn. 474; Wyman *v.* Brown, 50 Me. 160; Williamson *v.* Carlton, 51 Me. 452; Matthews *v.* Ward, 10 Gill & J. (Md.) 443; Key *v.* Davis, 1 Md. 39; Evans *v.* Horan, 52 Md. 611; Higbee *v.* Rice, 5 Mass. 344, 4 Am. Dec. 63; Caldwell *v.* Fulton, 31 Pa. St. 475, 72 Am. Dec. 760.

8. See the statutes of the various states, and *infra*, III. *Instruments Entitled to Record.*

9. Strict Construction. — See Webb *v.* Doe, 33 Ga. 565; Hoyt *v.* Hoyt, 8 Bosw. (N. Y.) 524.

10. Liberal Construction — *United States.* — Kelly *v.* Calhoun, 95 U. S. 710; National Bank

2. Retroactive Effect. — Ordinarily statutes requiring registration are not given a retroactive effect, so as to apply to instruments executed before their enactment;[1] but, if the true construction of such legislative act demands that it be given a retroactive effect, the statute is not open to the objection that it impairs any constitutional right, providing a reasonable time be allowed after the passage thereof to comply with its provisions.[2]

III. Instruments Entitled to Record — 1. In General. — The practice of recording instruments being of purely statutory origin,[3] it naturally follows that no instrument need be recorded in the absence of a statute requiring it,[4] and, as will be seen hereafter, the recording of an instrument not required or entitled to be recorded has no effect whatever.[5] The statutes in the different states provide for the registration of a great variety of instruments, such as assignments for the benefit of creditors,[6] mining

v. Conway, 1 Hughes (U. S.) 37, 14 Nat. Bankr. Reg. 175.

Alabama. — M'Gregor *v.* Hall, 3 Stew. & P. (Ala.) 397.

District of Columbia. — Sis *v.* Boarman, 11 App. Cas. (D. C.) 116.

Florida. — Hudnall *v.* Paine, 39 Fla. 67 (in effect *overruling* Roof *v.* Chattanooga Wood Split Pulley Co., 36 Fla. 284).

Maryland. — General Ins. Co. *v.* U. S. Insurance Co., 10 Md. 517, 69 Am. Dec. 174; Nelson *v.* Hagerstown Bank, 27 Md. 73; Hoffman *v.* Gosnell, 75 Md. 577.

Massachusetts. — Toupin *v.* Peabody, 162 Mass. 473.

Mississippi. — Tarpley *v.* Hamer, 9 Smed. & M. (Miss.) 310.

New York. — Parkist *v.* Alexander, 1 Johns. Ch. (N. Y.) 394; Jackson *v.* Town, 4 Cow. (N. Y.) 599, 15 Am. Dec. 405; Fort *v.* Burch, 6 Barb. (N. Y.) 60; Peck *v.* Mallams, 10 N. Y. 542.

Oregon. — Moore *v.* Thomas, 1 Oregon 201.

Pennsylvania. — Kenyon *v.* Stewart, 44 Pa. St. 179.

Wisconsin. — Fallass *v.* Pierce, 30 Wis. 480.

1. Not Intended to Operate Retrospectively — *Georgia.* — Bowen *v.* Frick, 75 Ga. 786. And see Bond *v.* Brewer, 96 Ga. 443.

Illinois. — Guard *v.* Rowan, 3 Ill. 499.

Iowa. — Knoulton *v.* Redenbaugh, 40 Iowa 114; Moseley *v.* Shattuck, 43 Iowa 540.

Kansas. — Standard Implement Co. *v.* Parlin, etc., Co., 51 Kan. 544.

Minnesota. — Dunwell *v.* Bidwell, 8 Minn. 34; Foster *v.* Berkey, 8 Minn. 351.

Mississippi. — Bramlett *v.* Wetlin, 71 Miss. 902; Drane *v.* Newsom, 73 Miss. 422.

Missouri. — Kingsland Ferguson Mfg. Co. *v.* Culp, 85 Mo. 548.

Nebraska. — Blunk *v.* Kelley, 9 Neb. 442.

New York. — Beal *v.* Miller, 3 Thomp. & C. (N. Y.) 570; Payne *v.* Batterson, 22 N. Y. Wkly. Dig. 109.

North Carolina. — Harrell *v.* Godwin, 102 N. Car. 330; Perry *v.* Young, 105 N. Car. 463.

Ohio. — Case Mfg. Co. *v.* Garven, 45 Ohio St. 289.

Texas. — Campbell Printing Press, etc., Co. *v.* Powell, 78 Tex. 53.

2. Retrospective Statute Not Unconstitutional — *United States.* — Jackson *v.* Lamphire, 3 Pet. (U. S.) 290; Curtis *v.* Whitney, 13 Wall. (U. S.) 68; Vance *v.* Vance, 108 U. S. 514.

California. — Call *v.* Hastings, 3 Cal. 179; Stafford *v.* Lick, 7 Cal. 479.

Georgia. — Tucker *v.* Harris, 13 Ga. 1, 58 Am. Dec. 488; Boston *v.* Cummins, 16 Ga. 102, 60 Am. Dec. 717.

Indiana. — Connecticut Mut. L. Ins. Co. *v.* Talbot, 113 Ind. 373, 3 Am. St. Rep. 655; Citizens' State Bank *v.* Julian, 153 Ind. 655.

Iowa. — Hopping *v.* Burnam, 2 Greene (Iowa) 39.

Kansas. — Myers *v.* Wheelock, 60 Kan. 747.

New York. — See Fitzpatrick *v.* Boylan, 57 N. Y. 443.

Tennessee. — Snider *v.* Brown, (Tenn. Ch. 1898) 48 S. W. Rep. 377.

3. See *supra*, I. *Origin and History.*

4. Recording Unnecessary in Absence of Statute — *England.* — *In re* Calcott, (1898) 2 Ch. 460.

Canada. — Macdonald *v.* Ferdais, 22 Can. Sup. Ct. 260; Clinch *v.* Pernette, 24 Can. Sup. Ct. 385.

Alabama. — Falkner *v.* Jones, 12 Ala. 165; Fash *v.* Ravesies, 32 Ala. 451.

Illinois. — Schmidt *v.* Shaver, 196 Ill. 108.

Maine. — Noyes *v.* Sturdivant, 18 Me. 104; Littlefield *v.* Getchell, 32 Me. 390.

Maryland. — Snowden *v.* Pitcher, 45 Md. 260.

New York. — Ludlow *v.* Van Ness, 8 Bosw. (N. Y.) 178.

North Carolina. — Lenoir *v.* Valley River Min. Co., 113 N. Car. 513.

Virginia. — Trout *v.* Warwick, 77 Va. 731; Braxton *v.* Bell, 92 Va. 229.

Washington. — Tibbals *v.* Iffland, 10 Wash. 451; Fischer *v.* Woodruff, 25 Wash. 67.

Wisconsin. — Stubbings *v.* Curtis, 109 Wis. 307.

As to the effect of failure to record, see *infra*, XI.

A Release of Covenants in a deed need not be recorded under the *Maine* statutes. Littlefield *v.* Getchell, 32 Me. 390.

An Assignment of a Judgment is not entitled to be recorded in *Illinois*. Schmidt *v.* Shaver, 196 Ill. 108.

Resolutions Adopted by Private Corporations are not such instruments as are entitled under the *Illinois* statutes to be recorded in the office of the recorder of deeds. Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 25 Am. St. Rep. 401, *affirming* 34 Ill. App. 500.

5. See *infra*, XII. *Effect of Record.*

6. Assignments for Benefit of Creditors. — See the title Assignments for the Benefit of Creditors, vol. 3, p. 66. See also the following cases: Earle *v.* McCartney, 109 Fed. Rep. 13; Mc-

claims,[1] bonds[2] and debentures,[3] marriage settlements,[4] mechanics' liens,[5] building contracts,[6] depositions,[7] certificates of limited partnership,[8] and notices of the dissolution of such partnerships.[9]

Lis Pendens. — The common-law doctrine of *lis pendens*, at least so far as it imputes notice of tne pendency of suits, has been modified by statutes requiring a memorandum, called a notice of *lis pendens*, containing certain matters specified in the statutes, to be filed in order to be notice of the suit to a stranger.[10]

Judgments. — In many of the states statutes exist requiring judgments to be recorded or docketed before they can operate as liens.[11]

Executions and Attachments. — Under the statutes of some states an execution must be recorded in order to constitute a valid lien as against subsequent purchasers and incumbrancers;[12] and the same requirement exists in relation to attachments in some jurisdictions.[13]

2. Instruments Relating to Real Property — *a.* IN GENERAL. — At the outset, the recording system was of very limited application, but by a process of gradual extension it has become continually broader in scope, until at the present time it is the well defined policy in most jurisdictions that the title to all interests in land shall be apparent on the records, so that they may be easily and accurately traced;[14] and practically all instruments conveying, or in any way affecting, the title to real estate are required, either specifically or by implication, to appear of record.[15] Thus, such statutes have been held to

Cartney *v.* Earle, (C. C. A.) 115 Fed. Rep. 462; Reeves *v.* Estes, 124 Ala. 303; Strong *v.* Lynn, 38 Minn. 315; Maul *v.* Drexel, 55 Neb. 446; Eggleston *v.* Harrison, 61 Ohio St. 397; Colvin *v.* White, 200 Pa. St. 277.

1. Mining Claims. — See the title MINES AND MINING CLAIMS, vol. 20, pp. 716–721.

2. Bonds. — See the title BONDS, vol. 4, p. 669.

3. Debentures. — See the title DEBENTURES, vol. 8, pp. 966, 975.

4. Marriage Settlements. — See the title MARRIAGE SETTLEMENTS, vol. 19, pp. 1237, 1254.

5. Mechanics' Liens. — See the title MECHANICS' LIENS, vol. 20, pp. 384–442.

6. Building Contracts. — Laidlaw *v.* Marye, 133 Cal. 170. See the title WORKING CONTRACTS.

7. Depositions. — See the title DEPOSITIONS, vol. 9, p. 312.

8. Certificate of Limited Partnership. — See the title LIMITED PARTNERSHIP, vol. 19, p. 349.

9. Notice of Dissolution of Limited Partnership. — See the title LIMITED PARTNERSHIP, vol. 19, p. 388.

10. Lis Pendens. — See the title NOTICE OF PENDENCY AND LIS PENDENS, vol. 21, pp. 616, 624.

11. See the title JUDGMENTS AND DECREES, vol. 17, pp. 772–777.

12. Executions Required to Be Recorded. — Steam Stone-Cutter Co. *v.* Sears, 23 Fed. Rep. 313; Rathbone *v.* Riley, 3 Day (Conn.) 503; Schroeder *v.* Tomlinson, 70 Conn. 348; Moody *v.* Millen, 103 Ga. 452; Maddux *v.* Watkins, 88 Ind. 74; Benjamin *v.* Davis, 73 Iowa 715; Ponder *v.* Boaz, (Ky. 1902) 67 S. W. Rep. 833; Day *v.* Thompson, 11 Neb. 123. See the title EXECUTIONS, vol. 11, p. 671.

13. Attachments Required to Be Recorded. — Satterfield *v.* Malone, 35 Fed. Rep. 445; Tama City First Nat. Bank *v.* Hayzlett, 40 Iowa 659; Bailey *v.* McGregor, 46 Iowa 667; Columbia Bank *v.* Jacobs, 10 Mich. 349, 81 Am. Dec. 792; Davis Sewing Mach. Co. *v.* Whitney, 61 Mich. 518; Day *v.* Thompson, 11 Neb. 123; Hodgman *v.* Barker, 60 Hun (N. Y.) 156, *affirmed* 128 N. Y. 601; Van Camp *v.* Searle, 79 Hun (N. Y.) 134, 149 N. Y. 600; Schacklett's Appeal, 14 Pa. St. 326; McLaughlin *v.* Phillips, 10 Pa. Co. Ct. 382; Schall *v.* Rutledge, 1 York Leg. Rec. (Pa.) 33.

14. Policy of Recording Acts.—Bush *v.* Golden, 17 Conn. 594; Whiting *v.* Gaylord, 66 Conn. 337, 50 Am. St. Rep. 87; Shaw *v.* Wilshire, 65 Me. 485; Henderson *v.* Pilgrim, 22 Tex. 464.

15. The Word "Deed" as used in the *Nebraska* recording act embraces every instrument in writing by which any real estate or interest therein is created, aliened, mortgaged, or assigned, or by which title to real estate may be affected in law or equity, except last wills and leases for one year or less. Neb. Comp. St. c. 73, § 46. Ames *v.* Miller, (Neb. 1902) 91 N. W. Rep. 250.

What a Written Contract Relating to Land. — A written acknowledgment by the grantee of a land certificate already located, that he had previously sold and conveyed it, is, in legal effect, a written contract in relation to land, and may be recorded within the provision of the statute (Texas Pasc. Dig. 4989) permitting written contracts in relation to land to be recorded in the county in which the land was situated. Peterson *v.* Lowry, 48 Tex. 408.

Rules agreed upon by two congregations, Lutheran and Reformed, reciting that they had taken up land and built a church, and regulating their respective titles to rights in the same, and also the modes of conducting worship, of electing trustees and ministers, and rights in the burial ground, are within the recording act of *Pennsylvania* of 1775. Shortz *v.* Unangst, 3 W. & S. (Pa.) 45.

Agreement to Set Off Land Pending Partition. — Pending a partition by commissioners appointed by deed, some of the parties agreed that a certain portion should be set off to G, a purchaser since the deed, and it was so set

embrace deeds of gift,[1] mortgages of school certificates,[2] the grant of an easement, such as a permanent right of way,[3] a ratification in writing by an adult of a conveyance of realty made by him while an infant,[4] a certificate of sale issued to the purchaser at an execution or foreclosure sale,[5] an instrument acknowledging the nonpayment of purchase money and giving the vendor the right of possession until payment,[6] an instrument by a first mortgagee waiving his priority in favor of a subsequent incumbrancer,[7] an instrument by a partner releasing his interest in partnership realty.[8] But the courts will not extend the acts by construction to instruments not fairly within their meaning.[9]

off. It was held that the agreement with G was at least such an executory agreement in respect to land as could be recorded under the statute, and, therefore, that the record thereof was notice to purchasers from the parties thereto. Tewksbury *v.* Provizzo, 12 Cal. 20.

Admission of Interest in Land. — A writing which recites that "there is due B from me an interest in" certain lands has been held entitled to record under the *Texas* statutes. Chamberlin *v.* Boon, 74 Tex. 659.

Purchase-money Notes, given by the purchaser of certain land who received a conveyance absolute upon its face, which notes recited that they were given for the land, and on their face expressly retained a lien on the land described therein for their payment, were held to be within the recording act. Saunders *v.* Hartwell, 61 Tex. 679.

Married Woman's Deed Void as Conveyance. — Under a statute providing for the recording of "deeds, mortgages, powers of attorney, and other instruments of writing relating to, or affecting the title to real estate," where a deed of trust executed by a married woman was void as a conveyance, inasmuch as her husband did not join in the execution thereof, it was held under the statute that this was an instrument in writing relating to real estate, and when recorded gave constructive notice. Morrison *v.* Brown, 83 Ill. 562.

A Deed Conveying Growing Trees and authorizing the grantee to sever them from the soil within a given time, the trees to stand meanwhile and derive their nourishment from the ground on which they were standing, was held to be entitled to record under Sandb. & H. Dig. Ark., §§ 721, 727. Kendall *v.* J. I. Porter Lumber Co., 69 Ark. 442.

Incumbrances on Land must be recorded to be binding on a subsequent purchaser for value and without notice. Thus where A constructed a sewer under an agreement with B, an adjoining owner, that if the latter ever made use of the sewer he should pay part of the cost of construction, it was held that a purchaser from B, who had no notice of such unrecorded agreement, took free of it. Kilgour *v.* Groeschen, 2 Ohio Dec. 545.

Lands Held under Spanish Grant. — Under the treaty of Dec. 30, 1853, with Mexico, title to lands held under Spanish grants in the territory then transferred to the United States was to be respected only where such grant had been recorded in the archives of Mexico. U. S. *v.* Pendell, 185 U. S. 189.

1. Deeds of Gift. — Myers *v.* Peek, 2 Ala. 648; Foster *v.* Mitchell, 15 Ala. 571.

2. Mortgages of School Certificates. — Dodge *v.* Silverthorn, 12 Wis. 644.

3. Grant of Right of Way. — Prescott *v.* Beyer, 34 Minn. 493; Worley *v.* State, 7 Lea (Tenn.) 382; Parker *v.* Meredith, (Tenn. Ch. 1900) 59 S. W. Rep. 167. See also Bush *v.* Golden, 17 Conn. 594. And see the title EASEMENTS, vol. 10, p. 410.

But the Failure to Record a Sealed Instrument Releasing an Easement is of no importance, even as against subsequent purchasers, where the execution of such instrument is followed by acts denoting an unequivocal intention to abandon the easement, as the instrument is of importance only as showing, with the other facts, an intention to abandon the easement. Ray Neg. of Imp. Duties, p. 573, n. 1; Snell *v.* Levitt, 110 N. Y. 595.

4. Ratification of Infant's Deed. — Black *v.* Hills, 36 Ill. 376, 87 Am. Dec. 224; Holbrook *v.* Dickenson, 56 Ill. 500. See also Weaver *v.* Carpenter, 42 Iowa 343; Mustard *v.* Wohlford, 15 Gratt. (Va.) 329, 76 Am. Dec. 209.

5. Certificate of Sale. — Webber *v.* Kastner, (Ariz. 1898) 53 Pac. Rep. 207; Raymond *v.* Pauli, 21 Wis. 531. See also Gardner *v.* Eberhart, 82 Ill. 316; Evans *v.* Ashley, 8 Mo. 177.

6. Admission of Nonpayment of Purchase Money. — Melross *v.* Scott, 18 Ind. 250.

7. Waiver of Priority by First Mortgagee. — Clason *v.* Shepherd, 6 Wis. 369.

8. Release by Partner of Claims to Firm Realty. — Pegram *v* Owens, 64 Tex. 475.

9. United States Tax Assessments need not be recorded under a state recording act in order to be valid against the persons protected by such act. U. S. *v.* Snyder, 149 U. S. 210.

An Order of Adjudication in Bankruptcy was held not to be a conveyance requiring registration under the Middlesex Registry Act (7 Anne, c. 20, § 1). *In re* Calcott, (1898) 2 Ch. 460.

An Assignment of a Land Certificate was held not to be within the *Alabama* registry laws. Falkner *v.* Jones, 12 Ala. 165.

An Agreement, Not Under Seal, by Which a Railroad Company Pledges Its Real and Personal Property to secure agents employed by it to purchase iron, is not within the Act of 1828 (Clay's Dig. 255, § 5) requiring registration of all conveyances in trust to secure debts. Fash *v.* Ravesies, 32 Ala. 451.

Bond for Support of Mortgagee. — The *Maine* Statute of 1821, c. 36, § 3, requiring a "bond, deed, or other instrument of defeasance," to be recorded in order to be effectual, contemplates one which acts directly upon the title, requiring upon certain terms a conveyance of it. Therefore, a bond for the support of the mortgagee, to secure which the mortgage is given, is not within the statute. Noyes *v.* Sturdivant, 18 Me. 104.

Deeds of Corporations are Included by a statute requiring the registration of deeds and applying in terms to natural persons only.[1]

Maps and Plats of Land are, in certain cases, required to be recorded by the statutes of some states.[2]

Wills. — Sometimes wills devising realty are required to be recorded like deeds or other conveyances *inter vivos*.[3] But in many jurisdictions there is no such requirement.[4]

b. CONVEYANCES OF EQUITABLE TITLE. — In earlier times it seems to have been the tendency of the courts to regard the recording acts as applicable to conveyances of the legal title only.[5] But by the combined force of statute and decision this doctrine has been materially altered, so that at the present time such acts are generally applicable as well to conveyances of equitable interests.[6] As a result, a recorded equitable claim will prevail even against

A Covenant to Hold Land for the Benefit of an Alien, and to convey as he shall direct, is not a conveyance within the recording acts. Ludlow *v.* Van Ness, 8 Bosw. (N. Y.) 178.

A Mere Agreement for a Division of the Proceeds from a sale of land thereafter to be made, and for authority to take entire control and management of such sale, was held not to be within the *North Carolina* Act 1885, c. 147. Lenoir *v.* Valley River Min. Co., 113 N. Car. 513.

A Deed Delivered as an Escrow in the proceedings of a court of equity, administering trust funds, is not within the intendment of the statute requiring the registry of titles. Trout *v.* Warwick, 77 Va. 731.

A Parol Partition is not affected by the *Texas* registry laws. Aycock *v.* Kimbrough, 71 Tex. 330, 10 Am. St. Rep. 745.

1. Corporate Deeds Included. — Sheehan *v.* Davis, 17 Ohio St. 571.

2. Maps and Plats of Land. — See Bauman *v.* Ross, 167 U. S. 548; Satchell *v.* Doran, 4 Ohio St. 542; Kensington *v.* Wood, 10 Pa. St. 93, 49 Am. Dec. 582. See also the title DEDICATION, vol. 9, p. 35.

3. Wills Required to Be Recorded. — Stim. Am. Stat. L., § 1624. And see Chadwick *v.* Turner, L. R. 1 Ch. 310; Harrison *v.* Weatherby, 180 Ill. 418; Keith *v.* Keith, 97 Mo. 223; Graves *v.* Ewart, 99 Mo. 13; Gaven *v.* Allen, 100 Mo. 293; Rodney *v.* Landau, 104 Mo. 251; Wolf *v.* Brown, 142 Mo. 612; Matter of Nash, (Surrogate Ct.) 37 Misc. (N. Y.) 706; Lovejoy *v.* Raymond, 58 Vt. 509. For a full discussion, see the title WILLS.

4. Need Not Be Recorded. — Stim. Am. St. L., § 1624. See Currell *v.* Villars, 72 Fed. Rep. 330.

5. Conveyances of Equitable Interests Not Included — *England.* — Morecock *v.* Dickins, Ambl. 678.

Indiana. — Combs *v.* Nelson, 91 Ind. 123.

Kentucky. — Morton *v.* Robards, 4 Dana (Ky.) 258; Corn *v.* Sims, 3 Met. (Ky.) 391; Halstead *v.* State Bank, 4 J. J. Marsh. (Ky.) 554; Swigert *v.* State Bank, 17 B. Mon. (Ky.) 268.

Mississippi. — Walker *v.* Gilbert, Freem. (Miss.) 85; Kelly *v.* Mills, 41 Miss. 267.

New York. — Grimstone *v.* Carter, 3 Paige (N. Y.) 421, 24 Am. Dec. 230; Ellison *v.* Pecare, 29 Barb. (N. Y.) 333; Laverty *v.* Moore, 32 Barb. (N. Y.) 347, 33 N. Y. 658.

Pennsylvania. — Jaques *v.* Weeks, 7 Watts (Pa.) 261.

Tennessee. — Trotter *v.* Nelson, 1 Swan (Tenn.) 7.

Virginia. — Doswell *v.* Buchanan, 3 Leigh (Va.) 365, 23 Am. Dec. 280; Withers *v.* Carter, 4 Gratt. (Va.) 407, 50 Am. Dec. 78; Briscoe *v.* Ashby, 24 Gratt. (Va.) 454.

6. Within Scope of Recording Acts — *United States.* — Memphis Land, etc., Co. *v.* Ford, (C. C. A.) 58 Fed. Rep. 452.

California. — Fish *v.* Benson, 71 Cal. 428.

Maine. — Bailey *v.* Myrick, 50 Me. 171; Putnam *v.* White, 76 Me. 551.

Maryland. — U. S. Insurance Co. *v.* Shriver, 3 Md. Ch. 381; Alderson *v.* Ames, 6 Md. 52; General Ins. Co. *v.* U. S. Insurance Co., 10 Md. 517, 69 Am. Dec. 174.

Michigan. — Edwards *v.* McKernan, 55 Mich. 520.

Minnesota. — Wilder *v.* Brooks, 10 Minn. 50, 88 Am. Dec. 49.

New York. — Parkist *v.* Alexander, 1 Johns. Ch. (N. Y.) 394; Johnson *v.* Stagg, 2 Johns. (N. Y.) 510; Hunt *v.* Johnson, 19 N. Y. 279; Tarbell *v.* West, 86 N. Y. 280.

Tennessee. — Smith *v.* Neilson, 13 Lea (Tenn.) 461.

Texas. — Herrington *v.* Williams, 31 Tex. 448; Moran *v.* Wheeler, (Tex. Civ. App. 1894) 26 S. W. Rep. 297, *affirmed* 87 Tex. 179; Perkiewiez *v.* Oklahoma First Nat. Bank, (Tex. Civ. App. 1895) 33 S. W. Rep. 674; Hale *v.* Hollon, 14 Tex. Civ. App. 96, *affirmed* 90 Tex. 427, 59 Am. St. Rep. 819.

Purchase of Unmined Coal from Equitable Owner. — Articles of agreement whereby one purchases unmined coal from an equitable owner is a conveyance of realty within the recording act. Lulay *v.* Barnes, 172 Pa. St. 331.

Agreement for Lien on Land. — An agreement in writing that a creditor shall have a lien on certain land must be recorded. Cantrell *v.* Ford, (Tenn. Ch. 1898) 46 S. W. Rep. 581.

Texas — Equitable Liens Not Evidenced by Writing, as for example a vendor's lien, or a resulting trust, are held not to be embraced within the recording acts, so as to require recording as against creditors. Purchasers for value and with notice, however, stand on a different footing and are protected in equity against such unrecorded equities. Blankenship *v.* Douglas, 26 Tex. 225, 82 Am. Dec. 608; Orme *v.* Roberts, 33 Tex. 768; Senter *v.* Lambeth, 59 Tex. 259; Parker *v.* Coop, 60 Tex. 111; McKamey *v.* Thorp, 61 Tex. 648; Ross *v.* Kornrumpf, 64 Tex. 390; Russell *v.* Nall, 2

the legal title of a subsequent purchaser from the same grantor.[1]

Executory Contracts. — Executory contracts for the sale or purchase of land are not deemed to be within the operation of the recording acts, unless made so by express provision or by the use of terms necessarily including such instruments.[2]

Equitable Mortgages. — Under the statutes existing at the present time, equitable mortgages are among the instruments requiring registration.[3]

Title Bonds. — Ordinarily bonds for title are deemed to be within the recording acts.[4] But under some statutes it is held that such instruments need not be recorded.[5]

c. MORTGAGES — (1) *In General.* — A mortgage of land is a "conveyance" within the meaning of the recording acts,[6] and such instruments are everywhere required to be recorded.[7]

A Mortgage Given to the State has been held to be within the terms of a recording act, making no exception in favor of the state.[8]

Tex. Civ. App. 60; Hawkins *v.* Willard, (Tex. Civ. App. 1896) 38 S. W. Rep. 365.

1. Recorded Equitable Title Superior. — U. S. Insurance Co. *v.* Shriver, 3 Md. Ch. 381; Edwards *v.* McKernan, 55 Mich. 520; Johnson *v.* Prairie, 91 N. Car. 159; Herrington *v.* Williams, 31 Tex. 448.

2. Executory Contracts. — Mesick *v.* Sunderland, 6 Cal. 297; Miller *v.* Alexander, 8 Tex. 45. See Stim. Am. Stat. L., §§ 1551, 1624.

In some states such instruments are deemed to fall within the purview of the statutes though not specifically enumerated. O'Neal *v.* Seixas, 85 Ala. 80; Allen *v.* Woodruff, 96 Ill. 11; Case *v.* Bumstead, 24 Ind. 429; Thorsen *v.* Perkins, 39 Minn. 420; Beman *v.* Douglas, 1 N. Y. App. Div. 169.

In Texas a statute providing for the registration of "all instruments relating to any lands" is held to include executory contracts. Ranney *v.* Hogan, 1 Tex. Unrep. Cas. 253; Miller *v.* Alexander, 8 Tex. 45; Linn *v.* Le Compte, 47 Tex. 440; Lewis *v.* Johnson, 68 Tex. 448.

3. Equitable Mortgages Within Recording Acts. — *England.* — Battison *v.* Hobson, (1896) 2 Ch. 403.

Alabama. — Pierce *v.* Jackson, 56 Ala. 599; O'Neal *v.* Seixas, 85 Ala. 80, *overruling* dictum in Bailey *v.* Timberlake, 74 Ala. 221.

Maine — Putnam *v.* White, 76 Me. 551.

Maryland. — Alderson *v.* Ames, 6 Md. 52; General Ins. Co. *v.* U. S. Insurance Co., 10 Md. 517, 69 Am. Dec. 174.

Michigan. — Edwards *v.* McKernan, 55 Mich. 520.

Missouri. — Clamorgan *v.* Lane, 9 Mo. 446; Carter *v.* Holman, 60 Mo. 498.

New York. — Crane *v.* Turner, 7 Hun (N. Y.) 357; Tefft *v.* Munson, 63 Barb. (N. Y.) 31, 57 N. Y. 97; Tarbell *v.* West, 86 N. Y. 280.

North Carolina. — Todd *v.* Outlaw, 79 N. Car. 236.

Pennsylvania. — Russell's Appeal, 15 Pa. St. 319.

Tennessee. — Butler *v.* Maury, 10 Humph. (Tenn.) 420.

Wisconsin. — Jarvis *v.* Dutcher, 16 Wis. 307.

4. Title Bonds Within Recording Acts. — McFarran *v.* Knox, 5 Colo. 217; D'Wolf *v.* Pratt, 42 Ill. 198; Eaton *v.* Schneider, 185 Ill. 508; Macrae *v.* Goodbar, 80 Miss. 315; Hunt *v.* Johnson, 19 N. Y. 279; Morgan *v.* Snell, 3 Baxt. (Tenn.) 382; Scarborough *v.* Arrant, 25 Tex. 129; Catlin *v.* Bennatt, 47 Tex. 165; Schuster *v.* La Londe, 57 Tex. 28; Wright *v.* Lassiter, 71 Tex. 644.

Assignments of Title Bonds are also usually required to be recorded. McFarran *v.* Knox, 5 Colo. 217; Bailey *v.* Myrick, 50 Me. 171; Damron *v.* Smith, 37 W. Va. 580. But see Macrae *v.* Goodbar, 80 Miss. 315.

5. Title Bonds Not Required to Be Recorded. — Cochran *v.* Adler, 121 Ala. 442; Beverly *v.* Burke, 9 Ga. 440, 54 Am. Dec. 351; Corn *v.* Sims, 3 Met. (Ky.) 401; Morton *v.* Robards, 4 Dana (Ky.) 260; Nelson *v.* Boyce, 7 J. J. Marsh. (Ky.) 401, 23 Am. Dec. 411.

6. Mortgage a "Conveyance." — Odd Fellows' Sav. Bank *v.* Banton, 46 Cal. 604; Hassey *v.* Wilke, 55 Cal. 528; Tolman *v.* Smith, 74 Cal. 345; Stewart *v.* Powers, 98 Cal. 518; Hull *v.* Diehl, 21 Mont. 71; Ward *v.* Isbill, 73 Hun (N. Y.) 550; Larned *v.* Donovan, 84 Hun (N. Y.) 533; Fries *v.* Null, 154 Pa. St. 573; Rowell *v.* Williams, 54 Wis. 636. See also CONVEY — CONVEYANCE, vol. 7, p. 488.

7. Mortgages Must Be Recorded. — See the article MORTGAGES, vol. 20, pp. 907–908, and the following cases: Delogny *v.* Her Creditors, 48 La. Ann. 488; Sprigg *v.* Lyles, 2 Gill & J. (Md.) 446; Pannell *v.* Farmers' Bank, 7 Har. & J. (Md.) 202; Pfeaff *v.* Jones, 50 Md. 263.

As to the necessity of recording leasehold mortgages, see *infra*, III. 2. *e.*

As to the necessity of recording equitable mortgages, see *supra*, III. 2. *c.*

As to the necessity of recording railroad mortgages, see the title RAILROAD SECURITIES, vol. 23, p. 800.

Mortgage of Land Lying Out of State. — The *New York* recording act does not apply to a mortgage of land located in another state. Owen *v.* Evans, 134 N. Y. 514.

Considerations Determining Priority. — Aside from the general principles of registration, priority may be determined by contract or understanding of the parties, and a variety of equitable considerations. Howard *v.* Chase, 104 Mass. 249; Pomeroy *v.* Latting, 15 Gray (Mass.) 435; Van Aken *v.* Gleason, 34 Mich. 477; Rhoades *v.* Canfield, 8 Paige (N. Y.) 545; Jones *v.* Phelps, 2 Barb. Ch. (N. Y.) 440; Hendrickson's Appeal, 24 Pa. St. 363; Clason *v.* Shepherd, 6 Wis. 369.

8. Mortgage Given to the State. — Clement *v.* Bartlett, 33 N. J. Eq. 43.

(2) *Defeasance.* — In a number of jurisdictions it is provided by statute that where a deed absolute on its face is intended merely as a security in the nature of a mortgage, the instrument of defeasance must be recorded in order to preserve the rights of the grantor.[1] This requirement is, of course, intended for the protection of purchasers from the grantee, and the record of the absolute deed is sufficient to protect the grantee's interest against subsequent purchasers from the grantor.[2]

(3) *Assignment of Mortgage.* — Assignments of mortgages are not within the operation of the recording acts unless they are expressly made so, or the language of the statute is sufficiently comprehensive fairly to include them.[3] At the present time, however, the statutes existing in most jurisdictions include such assignments.[4]

1. Defeasance Must Be Recorded — *Kentucky.* — Lobban *v.* Garnett, 9 Dana (Ky.) 390.

Maine. — Smith *v.* Monmouth Mut. F. Ins. Co., 50 Me. 96.

Maryland. — Waters *v.* Riggin, 19 Md. 536; Harrison *v.* Morton, 87 Md. 671; Hoffman *v.* Gosnell, 75 Md. 577; Ing *v.* Brown, 3 Md. Ch. 521.

Massachusetts. — Newhall *v.* Pierce, 5 Pick. (Mass.) 450; Newhall *v.* Burt, 7 Pick. (Mass.) 157; Kelleran *v.* Brown, 4 Mass. 443; Harrison *v.* Phillips Academy, 12 Mass. 455; Moors *v.* Albro, 129 Mass. 9.

Michigan. — Russell *v.* Waite, Walk. (Mich.) 31; Columbia Bank *v.* Jacobs, 10 Mich. 349, 81 Am. Dec. 792.

Minnesota. — Cogan *v.* Cook, 22 Minn. 137.

Nebraska. — Livesey *v.* Brown, 35 Neb. 111.

New Jersey. — Clark *v.* Condit, 18 N. J. Eq. 358; Essex County Nat. Bank *v.* Harrison, 57 N. J. Eq. 91.

Pennsylvania. — McKibbin *v.* Peters, 185 Pa. St. 518; Rathfon *v.* Specht, 18 Pa. Co. Ct. 19.

South Dakota. — Murphy *v.* Plankinton Bank, 13 S. Dak. 501.

2. Record of Deed Notice of Grantee's Rights. — In Livesey *v.* Brown, 35 Neb. 111, the court held that the record of the absolute deed is constructive notice of the grantee's rights, for "being notice to the world of a greater interest than he has in the property, it certainly ought to be regarded as notice of his true interest therein." See also Ing *v.* Brown, 3 Md. Ch. 521; Grellet *v.* Heilshorn, 4 Nev. 526; Security Trust Co. *v.* Loewenberg, 38 Oregon 159.

Failure to Record the Defeasance does not render it absolutely void: as between the parties the transaction is to be regarded as a mortgage. Harrison *v.* Morton, 87 Md. 671. And see Barkwell *v.* Swan, 69 Miss. 907.

3. Mortgage Assignments Not Within Acts — *United States.* — Oregon, etc., Trust Invest. Co. *v.* Shaw, 5 Sawy. (U. S.) 336.

Indiana. — Hasselman *v.* McKernan, 50 Ind. 441; Dixon *v.* Hunter, 57 Ind. 278; Reeves *v.* Hayes, 95 Ind. 521.

Montana. — Hull *v.* Diehl, 21 Mont. 71.

New York. — James *v.* Morey, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475.

Oregon. — Watson *v.* Dundee Mortg., etc., Co., 12 Oregon 474.

South Carolina. — Williams *v.* Paysinger, 15 S. Car. 171; Singleton *v.* Singleton, 60 S. Car. 216.

Virginia. — Gordon *v.* Rixey, 76 Va. 694.

Washington. — Howard *v.* Shaw, 10 Wash. 151; Fischer *v.* Woodruff, 25 Wash. 67.

Not a "Grant of Real Estate." — An assignment of a mortgage is not within a statute requiring grants of real estate to be recorded. Adler *v.* Sargent, 109 Cal. 42.

4. *Indiana.* — Citizens' State Bank *v.* Julian, 153 Ind. 655.

Kansas. — Myers *v.* Wheelock, 60 Kan. 747; Neosho Valley Invest. Co. *v.* Sharpless, 63 Kan. 885, 65 Pac. Rep. 667.

Nebraska. — Bullock *v.* Pock, 57 Neb. 781; Eggert *v.* Beyer, 43 Neb. 711; Rumery *v.* Loy, 61 Neb. 755; Ames *v.* Miller, (Neb. 1902) 91 N. W. Rep. 250.

New Jersey. — Mott *v.* Newark German Hospital, 55 N. J. Eq. 722.

Ohio. — Strait *v.* Ady, 6 Ohio Dec. 263. See also Lea *v.* Welsh, 1 Ohio Dec. 23.

South Dakota. — Merrill *v.* Luce, 6 S. Dak. 354, 55 Am. St. Rep. 844; Merrill *v.* Hurley, 6 S. Dak. 592; Pickford *v.* Peebles, 7 S. Dak. 166.

Utah. — Donaldson *v.* Grant, 15 Utah 231.

Wyoming. — Frank *v.* Snow, 6 Wyo. 42 (*rehearing denied* 6 Wyo. 55).

In California, by Civ. Code Cal., § 2934, the record of an assignment of a mortgage operates as constructive notice to "all persons subsequently deriving title from the assignor." The record of such assignment is part of the record title of which a purchaser of the equity of redemption must take notice. Woodward *v.* Brown, 119 Cal. 283, 63 Am. St. Rep. 108. See also Rodgers *v.* Peckham, 120 Cal. 238.

But it is held that the assignee need not record his assignment to protect himself against a subsequent assignee. Adler *v.* Sargent, 109 Cal. 42.

In Pennsylvania it was formerly held that a mortgage assignment was not within the purview of the statute. Craft *v.* Webster, 4 Rawle (Pa.) 254; Mott *v.* Clark, 9 Pa. St. 399, 49 Am. Dec. 566; Goff *v.* Denny, 2 Phila. (Pa.) 275, 14 Leg. Int. (Pa.) 32.

But by virtue of subsequent acts such assignments are now entitled to record there. Philips *v.* Lewistown Bank, 18 Pa. St. 394; Pepper's Appeal, 77 Pa. St. 373; Neide *v.* Pennypacker, 9 Phila. (Pa.) 86, 30 Leg. Int. (Pa.) 4.

When Assignment Deemed a "Conveyance." — Where the term "conveyance" is defined as embracing "instruments by which the title to land may be affected in law or in equity"

Effect of Failure to Record. — Where assignments of mortgages are required to be recorded, failure to record will render the assignment invalid as against persons dealing in good faith with the mortgagee.[1] Thus, where the assignment is unrecorded and the mortgage is subsequently discharged of record by one having apparent authority to do so, such assignment is void as against a subsequent *bona fide* purchaser or incumbrancer relying on the record.[2] And so, where the record discloses an apparent merger of the mortgage, a purchaser for value and without notice, relying on the record, takes free of the unrecorded assignment.[3] But where the mortgage itself appears of record unsatisfied, it is sufficient to protect the rights of the assignee against a purchaser from the mortgagor, although the assignment be not recorded.[4]

(Stim. Am. St. L., § 1551), it has been held that assignments of mortgages of interests in real estate come within the term "conveyance" as used in the recording acts.

Massachusetts. — Swasey *v.* Emerson, 168 Mass. 118, 60 Am. St. Rep. 368.

New York. — Kellogg *v.* Smith, 26 N. Y. 18; Greene *v.* Warnick, 64 N. Y. 220; Van Keuren *v.* Corkins, 66 N. Y. 77; Westbrook *v.* Gleason, 79 N. Y. 23; Decker *v.* Boice, 83 N. Y. 215; Bacon *v.* Van Schoonhoven, 87 N. Y. 446; Belden *v.* Meeker, 2 Lans. (N. Y.) 470; Fort *v.* Burch, 5 Den. (N. Y.) 187; Vanderkemp *v.* Shelton, 11 Paige (N. Y.) 28; Purdy *v.* Huntington, 46 Barb. (N. Y.) 389, 42 N. Y. 334, 1 Am. Rep. 532; Larned *v.* Donovan, 84 Hun (N. Y.) 533; St. John *v.* Spalding, 1 Thomp. & C. (N. Y.) 483; Savings Bank *v.* Frank, 45 N. Y. Super. Ct. 411. See also Gillig *v.* Maass, 28 N. Y. 212; Roberts *v.* Jackson, 1 Wend. (N. Y.) 485.

South Dakota. — Merrill *v.* Luce, 6 S. Dak. 354, 55 Am. St. Rep. 844.

Wisconsin. — Butler *v.* Mazeppa Bank, 94 Wis. 351.

See also McCabe *v.* Grey, 20 Cal. 509.

But *compare* Hoyt *v.* Hoyt, 8 Bosw. (N. Y.) 511.

"Instrument Affecting Real Estate." — In *Iowa*, under a statute requiring recordation of "instruments affecting real estate," it is held that assignments of mortgages must be recorded, though not specifically mentioned. Indiana State Bank *v.* Anderson, 14 Iowa 544, 83 Am. Dec. 390; McClure *v.* Burris, 16 Iowa 591; Bowling *v.* Cook, 39 Iowa 200; Reel *v.* Wilson, 64 Iowa 13; Parmenter *v.* Oakley, 69 Iowa 388; Livermore *v.* Maxwell, 87 Iowa 705; Quincy *v.* Ginsbach, 92 Iowa 144; Nashua Trust Co. *v.* W. S. Edwards Mfg. Co., 99 Iowa 109; 61 Am. St. Rep. 226; Jenks *v.* Shaw, 99 Iowa 604, 61 Am. St. Rep. 256. See also Van Gorder *v.* Hanna, 72 Iowa 572.

1. Void as to Persons Dealing with Mortgagee — *Illinois.* — McCormick *v.* Bauer, 122 Ill. 573.

Indiana. — Connecticut Mut. L. Ins. Co. *v.* Talbot, 113 Ind. 373, 3 Am. St. Rep. 655.

Iowa. — Indiana State Bank *v.* Anderson, 14 Iowa 544, 83 Am. Dec. 390; Bowling *v.* Cook, 39 Iowa 200; Daws *v.* Craig, 62 Iowa 515.

New York. — James *v.* Johnson, 6 Johns. Ch. (N. Y.) 417; Bacon *v.* Van Schoonhoven, 87 N. Y. 446.

Ohio. — Swartz *v.* Leist, 13 Ohio St. 419.

South Dakota. — Merrill *v.* Luce, 6 S. Dak. 354, 55 Am. St. Rep. 844.

Utah. — Donaldson *v.* Grant, 15 Utah 231.

2. Release of Record — *Indiana.* — Connecticut Mut. L. Ins. Co. *v.* Talbot, 113 Ind. 373, 3 Am. St. Rep. 655.

Iowa. — Indiana State Bank *v.* Anderson, 14 Iowa 544, 83 Am. Dec. 390; Bowling *v.* Cook, 39 Iowa 200; Daws *v.* Craig, 62 Iowa 515.

Massachusetts. — Swasey *v.* Emerson, 168 Mass. 118, 60 Am. St. Rep. 368.

Nebraska. — Whipple *v.* Fowler, 41 Neb. 675; Porter *v.* Ourada, 51 Neb. 510; Bullock *v.* Pock, 57 Neb. 781.

New York. — Bacon *v.* Van Schoonhoven, 87 N. Y. 446; Ely *v.* Scofield, 35 Barb. (N. Y.) 330.

Ohio. — Swartz *v.* Leist, 13 Ohio St. 419; Lea *v.* Welsh, 1 Ohio Dec. 23; Strait *v.* Ady, 6 Ohio Dec. 263.

South Dakota. — Citizens' Bank *v.* Shaw, 14 S. Dak. 197; Pickford *v.* Peebles, 7 S. Dak. 166.

Vermont. — Ladd *v.* Campbell, 56 Vt. 529.

Wisconsin. — Girardin *v.* Lampe, 58 Wis. 267.

Wyoming. — Frank *v.* Snow, 6 Wyo. 42, *rehearing denied* 6 Wyo. 55.

For a full discussion of the question, see the title MORTGAGES, vol. 20, p. 1073.

Where the Assignment Is Not Required to Be Recorded the rule is otherwise, and the assignee's rights are superior to those of an innocent third party dealing with the mortgagee. Singleton *v.* Singleton, 60 S. Car. 216; Howard *v.* Shaw, 10 Wash. 151. See also Hasselman *v.* McKernan, 50 Ind. 441; Dixon *v.* Hunter, 57 Ind. 278.

3. Apparent Merger. — Ames *v.* Miller, (Neb. 1902) 91 N. W. Rep. 250; Merrill *v.* Hurley, 6 S. Dak. 592. See also Purdy *v.* Huntington, 42 N. Y. 334, 1 Am. Rep. 532; James *v.* Morey, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475.

What Not a Merger. — Where the mortgagee in a duly recorded mortgage assigned the mortgage and note secured thereby, which assignment was not recorded, and thereafter such mortgagee took a conveyance of the legal title, it was held that there was in such case no merger and a subsequent purchaser of the legal title from the mortgagee took subject to the assignment, since the unsatisfied mortgage of record was notice to him. Peterborough Sav. Bank *v.* Pierce, 54 Neb. 712.

4. Record of Mortgage Notice to Purchaser — *United States.* — Oregon, etc., Trust Invest. Co. *v.* Shaw, 5 Sawy. (U. S.) 336.

California. — Enos *v.* Cook, 65 Cal. 175.

Indiana. — Zehner *v.* Johnston, 22 Ind. App. 452.

Michigan. — Wilson *v.* Campbell, 110 Mich. 580.

Effect of Recording Assignment. — The record of a mortgage assignment operates as notice to all persons dealing with his assignor and protects him against a subsequent assignment.[1] But unless the mortgage itself is recorded the registration of the assignment will not furnish notice to subsequent purchasers and incumbrancers of the land from the mortgagor.[2] In some states it is provided by statute that the recording of a mortgage assignment shall not be deemed constructive notice to the mortgagor, his heirs, or personal representatives, so as to invalidate payments by them to the mortgagee.[3] But even where such statutes exist, if the mortgage is given to secure a negotiable instrument, the mortgagor cannot make a valid payment to any one but the holder of such instrument, and payment to the mortgagee after assignment of the instrument secured and the mortgage will not be valid against the assignee.[4] And the statute applies only to the persons specified; a purchaser of the mortgaged land who makes payments to the mortgagee is charged with constructive notice of the recorded assignment.[5]

(4) *Release.* — A release of a mortgage, being an "instrument by which an estate or interest in land may be affected in law or equity," under those statutes so defining the term "conveyance of real estate" which is required to be recorded, must be recorded in order to protect the releasee against a subsequent purchaser.[6] But in most jurisdictions provision is now made by statute for the discharge of mortgages by entry of satisfaction on the record, and a penalty is commonly provided for failure to make such entry.[7]

d. TRUST DEEDS. — Trust deeds are ordinarily held to be within the purview of the recording acts, even where not specifically mentioned, being deemed to be within the provisions relating to mortgages, and also those provisions which extend to powers of sale contained in mortgages.[8] But

Nebraska. — Bridges *v.* Bidwell, 20 Neb. 185; Peterborough Sav. Bank *v.* Pierce, 54 Neb 712; Eggert *v.* Beyer, 43 Neb. 711.

New York. — Campbell *v.* Vedder, 3 Keyes (N. Y.) 174; Gillig *v.* Maass, 28 N. Y. 191; Purdy *v.* Huntington, 42 N. Y. 334, 1 Am. Rep. 532; Sprague *v.* Rockwell, 51 Vt. 401; King *v.* McVicker, 3 Sandf. Ch. (N. Y.) 192; Curtis *v.* Moore, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 341.

1. Protects Assignee Against Subsequent Assignment — Mott *v.* Newark German Hospital, 55 N. J. Eq. 722; Greene *v.* Warnick, 64 N. Y. 220; Yates County Nat. Bank *v.* Baldwin, 43 Hun (N. Y.) 136; Pepper's Appeal, 77 Pa. St. 373; Neide *v.* Pennypacker, 9 Phila. (Pa.) 86, 30 Leg. Int. (Pa.) 4.

Protects Against Unauthorized Discharge. — Belden *v.* Meeker, 47 N. Y. 308; Vanderkemp *v.* Shelton, 11 Paige (N. Y.) 29; Viele *v.* Judson, 82 N. Y. 32; Heilbrun *v.* Hammond, 13 Hun (N. Y.) 480.

2. When Mortgage Not Recorded. — Yerger *v.* Barz, 56 Iowa 77. See generally *infra*, XII.

Purchaser with Actual Notice of Mortgage. — A purchaser of the mortgaged premises who has actual notice of the mortgage is affected with notice of the assignment by the record thereof. Larned *v.* Donovan, 84 Hun (N. Y.) 533.

3. Right of Mortgagor to Pay Mortgagee. — Rodgers *v.* Peckham, 120 Cal. 238; Eggert *v.* Beyer, 43 Neb. 711; Johnson *v.* Carpenter, 7 Minn. 176; Blumenthal *v.* Jassoy, 29 Minn. 179; Reed *v.* Marble, 10 Paige (N. Y.) 409; Van Keuren *v.* Corkins, 6 Thomp. & C. (N. Y.) 355. See also Hubbard *v.* Turner, 2 McLean (U. S.) 533.

As to right of mortgagor to pay mortgagee after assignment of the mortgage, see the title MORTGAGES, vol. 20, p. 1059.

4. Mortgage Securing Negotiable Instrument. — Rodgers *v.* Peckham, 120 Cal. 238; Eggert *v.* Beyer, 43 Neb. 711. And see the title MORTGAGES, vol. 20, p. 1060.

A Purchaser from the Mortgagee of land conveyed to the latter by the mortgagor in payment of the secured note is affected with notice of the recorded assignment. Rodgers *v.* Peckham, 120 Cal. 238.

5. Applies Only to Persons Specified. — Eggert *v.* Beyers, 43 Neb. 711.

6. Release Must Be Recorded. — Palmer *v.* Bates 22 Minn. 532; Merchant *v.* Woods, 27 Minn. 396; Bacon *v.* Van Schoonhoven, 87 N. Y. 446; St. John *v.* Spalding, 1 Thomp. & C. (N. Y.) 483; Mutual L. Ins. Co. *v.* Wilcox, (Supm. Ct. Spec. T.) 55 How. Pr. (N. Y.) 43.

7. See the title MORTGAGES, vol. 20, p. 1074.

8. Trust Deeds Within Recording Acts. — Wood *v.* Lake, 62 Ala. 489; Hannah *v.* Carrington, 18 Ark. 85; Farrar *v.* Payne, 73 Ill. 82; Schultze *v.* Houfes, 96 Ill. 335; Lyons *v.* Field, 17 B. Mon. (Ky.) 543; Munson *v.* Ensor, 94 Mo. 504; Ladd *v.* Anderson, 133 Mo. 625; Bostic *v.* Young, 116 N. Car. 766; Woodruff *v.* Robb, 19 Ohio 212; Crosby *v.* Huston, 1 Tex. 203. See also Magee *v.* Carpenter, 4 Ala. 469.

Invalidity as to Creditors. — Under statutes avoiding unrecorded deeds of trust as to subsequent judgment creditors, a trust deed will be void as to such creditors, notwithstanding the trust had been executed by a sale and conveyance of the property; for in this respect the statutes of registration make no distinction

some statutes have been held not to include deeds of trust.[1]

The Record Is Constructive Notice not only of the existence of the deed of trust, but also of the fact that it was given to secure a negotiable instrument;[2] of the extent of the trustee's powers;[3] and of the fact that a sale has been made under the power, even though the deed given to the purchaser at the sale was unrecorded.[4]

e. LEASES. — In some instances it has been held that leases of land were not within the scope of statutes not expressly including them.[5] But the more general doctrine is that leases for a term exceeding that which may be granted by parol[6] are within the mischief sought to be remedied by the recording acts and are "conveyances" within the meaning of such acts, although not specifically designated therein.[7] Now, leases are usually included by the express terms of the statutes.[8]

Assignments of Leaseholds must be recorded under some statutes.[9]

Mortgages of Leaseholds are also usually deemed to be within the recording acts.[10]

between executed and unexecuted trusts, but are designed to give notice of the state of the title as affected by successive alienations, as well as by incumbrances. Campbell *v.* Nonpareil Fire-Brick, etc., Co., 75 Va. 291.

An Unrecorded Assignment of a Trust Deed is void as against one purchasing from the grantor in reliance on a release of record by the duly authorized agent of the beneficiary. Pickford *v.* Peebles, 7 S. Dak. 166.

1. Statute Not Applicable to Trust Deed. — Stanhope *v.* Dodge, 52 Md. 483.

In Louisiana it has been held that the record of a trust deed in the book of mortgages was ineffectual as constructive notice to a subsequent mortgagee. Thibodaux *v.* Anderson, 34 La. Ann. 797.

A Deed of Trust Assigning a Legacy does not come within the operation of the registration laws. Wallston *v.* Braswell, 1 Jones Eq. (54 N. Car.) 137.

2. Notice that Deed Secures Negotiable Instrument. — Weldon *v.* Tollman, (C. C. A.) 67 Fed. Rep. 986.

3. Notice of Trustee's Powers. — Weldon *v.* Tollman, (C. C. A.) 67 Fed. Rep. 986.

4. Notice of Sale under Power. — Snapp *v.* Peirce, 24 Ill. 156; Farrar *v.* Payne, 73 Ill. 82; Heaton *v.* Prather, 84 Ill. 330; Mansfield *v.* Excelsior Refining Co., 135 U. S. 326.

5. Recording Not Required. — Wall *v.* Hinson, 1 Ired. L. (23 N. Car.) 276; Burnett *v.* Thompson. 13 Ired. L. (35 N. Car.) 379.

6. A Lease for One Year is not a "conveyance" requiring registration under the *Wisconsin* statute. Topping *v.* Parish, 96 Wis. 378.

As to what leases may be granted by parol, see the title STATUTE OF FRAUDS.

In Massachusetts a lease for more than seven years must be recorded. Where a lease was for five years with privilege of renewal for five years, it was held that as to the second term of five years recording was necessary. As to the original term the court did not express an opinion. Toupin *v.* Peabody, 162 Mass. 473. See also Chapman *v.* Gray, 15 Mass. 439.

7. Lease Must Be Recorded — *California.* — Jones *v.* Marks, 47 Cal. 242; Commercial Bank *v.* Pritchard, 126 Cal. 600; Garber *v.* Gianella, 98 Cal. 527.

Louisiana. — Talley *v.* Alexander, 10 La. Ann. 627; Summers *v.* Clark, 30 La. Ann. 436; Anderson *v.* Comeau, 33 La. Ann. 1119; Cochrane *v.* Gibert, 41 La. Ann. 735; Flower *v.* Pearce, 45 La. Ann. 853.

Massachusetts. — Chapman *v.* Gray, 15 Mass. 439; Toupin *v.* Peabody, 162 Mass. 473.

New Jersey. — Spielmann *v.* Kliest, 36 N. J. Eq. 199. But see Hutchinson *v.* Bramhall, 42 N. J. Eq. 372.

Pennsylvania. — Lucas *v.* Sunbury, etc., R. Co., 32 Pa. St. 458.

A Lease of Growing Timber for a term of years is an "unconditional conveyance" of real property within the meaning of the *Alabama* Code, § 1810, requiring registration. Milliken *v.* Faulk, 111 Ala. 658.

Ohio — Oil Lease. — Under Ohio Rev. St., § 4112*a*, a license or lease to operate upon land for petroleum or natural gas must be recorded. Northwestern Ohio Natural Gas Co. *v.* Tiffin, 59 Ohio St. 420.

But indorsements on such a recorded lease extending the time and changing the amount to be paid for delay in drilling need not be recorded. Northwestern Ohio Natural Gas Co. *v.* Browning, 8 Ohio Cir. Dec. 188.

8. See Stim. Am. Stat. L., § 1624.

Acts Regulating the Recording of Chattel Mortgages do not as a rule apply to chattels real. See *infra*, III. 3. *c.*

9. Assignment of Lease. — Mayhew *v.* Hardesty, 8 Md. 479; Crouse *v.* Michell, (Mich. 1902) 90 N. W. Rep. 32. See the article LEASES, vol. 18, p. 679.

In Washington the assignment need not be recorded. Tibbals *v.* Iffland, 10 Wash. 451.

10. Mortgage of Leasehold. — Berry *v.* Mutual Ins. Co., 2 Johns. Ch. (N. Y.) 603; Johnson *v.* Stagg, 2 Johns. (N. Y.) 510; Paine *v.* Mason, 7 Ohio St. 198; Speer's Assignment, 10 Pa. Super. Ct. 518. *Compare* Williams *v.* Downing, 18 Pa. St. 60.

In Decker *v.* Clarke, 26 N. J. Eq. 163, the statute was held to be applicable to a leasehold mortgage.

But in Hutchinson *v.* Bramhall, 42 N. J. Eq. 372, the court held that a lease must be regarded as a chattel and therefore did not fall within the operation of statutes relating to the title to realty.

Lease and Mortgage Required to Be Recorded Together. — Under a statute requiring a mort-

f. POWERS OF ATTORNEY. — Whether or not a power of attorney to execute a conveyance is an instrument required to be recorded depends in large measure on the language of the statute. The modern statutes commonly include such instruments.[1] But it seems that powers of attorney need not be recorded in the absence of provisions specifically enumerating them and making them subject to the operation of the recording acts.[2] Where there is a statute requiring the power to be recorded along with the deed executed under it, the record of the deed without the power has no legal effect.[3]

A Revocation of a Power of Attorney is sometimes required to be recorded.[4]

g. UNITED STATES PATENTS. — Patents of land from the United States do not come within the purview of the recording laws of the different states, where the terms employed do not specially include them.[5]

Land Office Record as Notice. — The original record in the General Land Office from which patents are issued has been held to give notice to the world of their existence.[6]

3. Instruments Relating to Personal Property — *a.* IN GENERAL. — Generally the provisions for recording conveyances of land will not be construed as applicable to personalty or choses in action,[7] and, in the absence of a statutory requirement, transfers of personalty need not be recorded.[8] But the

gage of a leasehold estate to be recorded it was held that all such mortgages must be recorded together with the lease; that is, the two deeds showing the actual extent and nature of the mortgagee's interest must be placed of record. Sturtevant's Appeal, 34 Pa. St. 149.

A Mortgage of an Oil Lease is a conveyance of an interest in land within the meaning of the *Ohio* recording acts, and must be recorded in the same manner as a mortgage of real estate. Acklin *v.* Waltermier, 10 Ohio Cir. Dec. 629, 19 Ohio Cir. Ct. 372.

1. Powers of Attorney Included by Statutes. — Stim. Am. Stat. L., §§ 1624 (10), 1670, 1673. See Gratz *v.* Land, etc., Co., (C. C. A.) 82 Fed. Rep. 381; Hager *v.* Spect. 52 Cal. 579; Herndon *v.* Bascom, 8 Dana (Ky.) 113; Hughes *v.* Wilkinson, 37 Miss. 482; and cases cited in the title POWER OF ATTORNEY, vol. 22, p. 1085, note 3.

"Contract Relating to Land." — A power of attorney falls within Miss. Act 1822, requiring registration of contracts relating to land. Hughes *v.* Wilkinson, 37 Miss. 482.

2. When Recording Not Required. — Valentine *v.* Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715. See also Tyrrell *v.* O'Connor, 56 N. J. Eq. 448, holding that the power was valid though not recorded.

In Anderson *v.* Dugas, 29 Ga. 440, it was said that a power of attorney to execute a deed was a muniment of title, and might be, though it need not be, recorded with the deed. But, as we shall see later, the record of an instrument not entitled to record has no effect. See *infra*, XII.

3. Necessary to Record Power with Deed. — Carnall *v.* Duval, 22 Ark. 136; Graves *v.* Ward, 2 Duv. (Ky.) 301; Taylor *v.* M'Donald, 2 Bibb (Ky.) 420; Lowry *v.* Harris, 12 Minn. 255. See also Tyrrell *v.* O'Connor, 56 N. J. Eq. 448.

But if a recorded deed recites the power of attorney under which it was executed, such recital constitutes notice of the power to a subsequent purchaser. Jackson *v.* Neely, 10 Johns. (N. Y.) 374.

Simultaneous Recording is not required in such case: the power may be recorded before the deed. Rosenthal *v.* Ruffin, 60 Md. 324.

4. Recording Revocation. — Arnold *v.* Stevenson, 2 Nev. 234. But where there is no such requirement, recording the revocation will have no legal effect. Williams *v.* Birbeck, Hoffm. (N. Y.) 359; James *v.* Morey, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475. And see *infra*, XII.

5. United States Patents Not Within Recording Acts. — Rhinehart *v.* Schuyler, 7 Ill. 473; Curtis *v.* Hunting, 6 Iowa 536; David *v.* Rickabaugh, 32 Iowa 540; Moran *v.* Palmer, 13 Mich. 367; Sands *v.* Davis, 40 Mich. 14; Evitts *v.* Roth, 61 Tex. 81; Sayward *v.* Thompson, 11 Wash. 706. But see Coles *v.* Berryhill, 37 Minn. 56.

A Deed Executed under a United States Treaty with the Indians, requiring the President's approval to render it valid, is analogous to a patent for government lands, and does not fall within the scope of the *Illinois* recording act. Therefore where the President has approved two such deeds to land lying in that state, the subsequent grantee cannot gain priority by first recording his deed in Illinois. Lomax *v.* Pickering, 165 Ill. 431.

6. Land Office Record as Notice. — Lomax *v.* Pickering, 165 Ill. 431; Evitts *v.* Roth, 61 Tex. 81; Stevens *v.* Geiser, 71 Tex. 140.

But see Coles *v.* Berryhill, 37 Minn. 56, wherein it was held that where a statute declared an unrecorded conveyance void as against a judgment, only when the judgment is "against the person in whose name the title to such land appears of record prior to the recording of such conveyance," the recording of a patent in the General Land Office of the United States was not a recording within the meaning of this statute.

7. Personalty Not Within Real Property Acts. — Stim. Am. Stat. L., § 4035. See Tift *v.* Dunn, 80 Ga. 14; Thomas *v.* Grand Gulf Bank, 9 Smed. & M. (Miss.) 201; Merrill *v.* Dawson, Hempst. (U. S.) 563.

8. Bills of Sale Not Required to Be Recorded. — Janelle *v.* Denoncour, 68 N. H. 1; Curtin *v.* Isaacsen, 36 W. Va. 391.

recording acts have now been very generally extended to include absolute conveyances of personalty,[1] as well as conditional sales,[2] and chattel mortgages.[3]

The Purpose of these Acts, as in the case of those applying to conveyances of real property,[4] being to prevent the use of apparent ownership in fraud of persons relying thereon, a transfer of personalty, without an actual change of possession, is declared to be void as against the parties within the contemplation of the statute, unless the instrument be recorded.[5]

The Effect of recording a transfer of personalty is to remove the presumption of fraud arising from the retention of possession.[6]

Actual Transfer of Possession is regarded as notice of the transaction and dispenses with the necessity for registration,[7] unless the statute declares an unrecorded instrument to be void regardless of the question of notice.[8]

b. CONDITIONAL SALES. — Conditional sales are not usually required to be recorded unless they fall expressly or by necessary implication within the recording acts.[9] But in practically all jurisdictions at the present time the

As to recording bill of sale as chattel mortgage when intended as such, see *infra*, III. 3, *c*.

A Written Contract of Pledge need not be recorded in the absence of an express provision to that effect. See the title PLEDGE AND COLLATERAL SECURITY, vol. 22, p. 853.

1. Stim. Am. Stat. L., § 4580.

Bills of Sale are usually required to be recorded where there is no change of possession. See the title BILLS OF SALE, vol. 4, p. 569.

A Deed of Trust or of Gift of personalty must be recorded. Chemical Co. *v.* Johnson, 98 N. Car. 123.

Assignments of Future Earnings are in some states required to be recorded in order to be valid against trustee process. See the title GARNISHMENT, vol. 14, p. 865.

Virginia — Contracts Made in Consideration of Marriage are the only contracts in regard to goods and chattels entitled to registration under the Virginia statutes. Braxton *v.* Bell, 92 Va. 229.

2. See *infra*, III. 3. *b*.

3. See *infra*, III. 3. *c*.

4. The Same Principles Are Applicable to acts requiring the registration of transfers of personalty as to those relating to realty. See Griffith *v.* Douglass, 73 Me. 532, 40 Am. Rep. 395; Wade on Notice, §§ 67, 68.

5. Must Be Recorded Where No Change of Possession. — Stewart *v.* Platt, 101 U. S. 731; Farmington Bank *v.* Ellis, 30 Minn. 270; Hughes *v.* Menefee, 29 Mo. App. 192; Camp *v.* Camp, 2 Hill (N. Y.) 628; Yenni *v.* McNamee, 45 N. Y. 614; Porter *v.* Parmley, 52 N. Y. 185; Steele *v.* Benham, 84 N. Y. 634; Smith *v.* Clarendon, 53 Hun (N. Y.) 636, 6 N. Y. Supp. 809; Corbett *v.* Cushing, 15 Daly (N. Y.) 170; Siedenbach *v.* Riley, 111 N. Y. 560; Thorne *v.* Wilmington First Nat. Bank, 37 Ohio St. 254.

6. Recording Equivalent to Change of Possession. — See the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, pp. 361, 371. See also Howell *v.* Carden, 99 Ala. 100; Cooper *v.* Berney Nat. Bank, 99 Ala. 119; Jordan *v.* Lendrum, 55 Iowa 478.

7. Change of Possession Equivalent to Recording. — Wilson *v.* Pearson, 20 Ill. 81; Owens *v.* Gascho, 154 Ind. 225; Dayton *v.* People's Sav. Bank, 23 Kan. 421; Waters *v.* Dashiell, 1 Md. 455; Trimble *v.* Keer-Rountree Mercantile Co., 56 Mo. App. 683; Corning *v.* Records, 69 N. H. 390, 76 Am. St. Rep. 178; Parks *v.* Willard, 1 Tex. 350; Vincent *v.* Snoqualmie Mill Co., 7 Wash. 566. And see cases cited in the titles BILLS OF SALE, vol. 4, p. 571, note 1; CHATTEL MORTGAGES, vol. 5, p. 1008.

After a Creditor's Claim Has Arisen, a taking possession by the mortgagee will not render an unrecorded chattel mortgage valid as against him. Stephens *v.* Meriden Britannia Co., 13 N. Y. App. Div. 268.

8. As Against a Creditor, an unrecorded chattel mortgage is, in most jurisdictions, void, even though he have actual notice thereof; and since change of possession is regarded as equivalent to recording only because it constitutes notice, therefore it would seem to follow logically that in such states change of possession cannot obviate the necessity for recording as against creditors. Sykes *v.* Hannawalt, 5 N. Dak. 335. As to the question of notice, see *infra*, XI.

9. Conditional Sales Not Within Recording Acts. — Bradshaw *v.* Thomas, 7 Yerg. (Tenn.) 497; Buson *v.* Dougherty, 11 Humph. (Tenn.) 50; McCombs *v.* Guild, 9 Lea (Tenn.) 81; Warner *v.* Roth, 2 Wyo. 63.

Chattel Mortgage Acts requiring registration have sometimes, especially in doubtful cases, been held to cover conditional sales. But the contrary view is usually maintained. See the title CONDITIONAL SALES, vol. 6, p. 495. And see Maxwell *v.* Tufts, 8 N. Mex. 396, holding that a statute requiring the recordation of chattel mortgages did not apply to a conditional sale.

In Florida the court, in handling this question, has not spoken in a very decided tone, but it appears to be the doctrine in that state at present that conditional sales must be recorded under Fla. Rev. St., § 1994, although not strictly within the terms of that act. Hudnall *v.* Paine, 39 Fla. 67. But *compare* Roof *v.* Chattanooga Wood Split Pulley Co., 36 Fla. 284; Campbell Printing Press, etc., Co. *v.* Walker, 22 Fla. 412.

In Georgia, by Act Sept. 27, 1881, the statutes regulating the registration of chattel mortgages were made applicable to conditional sales. Bond *v.* Brewer, 96 Ga. 443.

statutes have been extended so as to embrace conditional sales.[1] Such acts, however, do not apply to mere loans of personalty,[2] or pledges,[3] or consignments of goods for sale where the consignee has no interest in the property.[4]

c. CHATTEL MORTGAGES. — In practically all of the states there are statutes providing that, in the absence of an actual transfer of possession, a chattel mortgage must be recorded in the prescribed manner[5] in order to be valid against subsequent purchasers and incumbrancers for value and without notice and creditors of the mortgagor.[6]

1. Conditional Sales Must Be Recorded. — See the title CONDITIONAL SALES, vol. 6, p. 494, and the following cases:

Alabama.— Brandon Printing Co. *v.* Bostick, 126 Ala. 247.

Connecticut. — *In re* Wilcox, etc., Co., 70 Conn. 220; National Cash Register Co. *v.* Woodbury, 70 Conn. 321; Camp *v.* Charles Thacher Co., (Conn. 1902) 52 Atl. Rep. 953.

Georgia. — Penland *v.* Cathey, 110 Ga. 431; Hill *v.* Ludden, etc., Southern Music House, 113 Ga. 320.

Iowa. — National Cash Register Co. *v.* Maloney, 95 Iowa 573.

Kentucky. — Barney, etc., Mfg. Co. *v.* Hart, (Ky. 1886) 1 S. W. Rep. 414, 8 Ky. L. Rep. 223.

Maine. — Richardson Mfg. Co. *v.* Brooks, 95 Me. 146.

Minnesota. — Clark *v.* B. B. Richards Lumber Co., 68 Minn. 282.

Missouri. — Oyler *v.* Renfro, 86 Mo. App. 321.

Nebraska. — Shaughnessey *v.* Lininger, etc., Co., 34 Neb. 747; New Home Sewing Mach. Co. *v.* Beals, 44 Neb. 816.

New Hampshire. — Sinclair *v.* Wheeler, 69 N. H. 538.

New Jersey. — Behn *v.* National Bank, 65 N. J. L. 591.

Washington. — Eisenberg *v.* Nichols, 22 Wash. 70.

2. Loan of Personalty. — Oyler *v.* Renfro, 86 Mo. App. 321. See the title LOANS, vol. 19, p. 462.

By Statute in Some States, however, the loan must be recorded, else the transaction will be regarded as fraudulent, after the borrower has been in possession a certain length of time. See the title LOANS, vol. 19, p. 471.

3. Pledges. — See the title PLEDGE AND COLLATERAL SECURITY, vol. 22, p. 853.

4. Consignment for Sale Not Conditional Sale. — See the title CONDITIONAL SALES, vol. 6, p. 450; Thomas *v.* Parsons, 87 Me. 203; Richardson Mfg. Co. *v.* Brooks, 95 Me. 146; Shaughnessey *v.* Lininger, etc., Co., 34 Neb. 747. And see Smith *v.* Clews, 105 N. Y. 283, 59 Am. Rep. 502.

5. As to Sufficiency of Record, see *infra*, VIII.

Recording as a Land Mortgage is not sufficient. Bishop *v.* McKillican, 124 Cal. 321, 71 Am. St. Rep. 68; Ramsdell *v.* Citizens' Electric Light, etc., Co., 103 Mich. 89.

New York — Electric Light, etc., Companies. — In New York, under Laws 1891, c. 171, a mortgage by an electric light, telegraph, or telephone company is required to be recorded in a specified manner and need not also be recorded in the manner provided for chattel mortgages, although such mortgage covers personal property. New York Security, etc., Co. *v.* Saratoga Gas, etc., Co., 88 Hun (N. Y.) 569.

A Receipt from the Mortgagee of chattels given to the mortgagor forms no part of the mortgage and need not be recorded with it, unless the statute expressly so provides. National Bank of Commerce *v.* Morris, 114 Mo. 255, 35 Am. St. Rep. 754.

6. Chattel Mortgages Must Be Recorded — *England.* — Small *v.* National Provincial Bank, (1894) 1 Ch. 686; Johns *v.* Ware, (1899) 1 Ch. 359.

Canada. — Clarkson *v.* McMaster, 25 Can. Sup. Ct. 96; Warner *v.* Don, 26 Can. Sup. Ct. 388, 28 Nova Scotia 202; Roff *v.* Krecker, 8 Manitoba 230.

Alabama. — M'Gregor *v.* Hall, 3 Stew. & P. (Ala.) 397; Chadwick *v.* Russell, 117 Ala. 290.

Arkansas. — Main *v.* Alexander, 9 Ark. 112, 47 Am. Dec. 732.

California. — Cardenas *v.* Miller, 108 Cal. 250, 49 Am. St. Rep. 84; Fassett *v.* Wise, 115 Cal. 316; Bishop *v.* McKillican, 124 Cal. 321, 71 Am. St. Rep. 68; Ruggles *v.* Cannedy, 127 Cal. 293, 306.

Connecticut. — *In re* Wilcox, etc., Co , 70 Conn. 220.

Colorado. — Mumford *v.* Harris, 8 Colo. App. 51.

Florida. — Weed *v.* Standley, 12 Fla. 166; Reese *v.* Taylor, 25 Fla. 283.

Illinois. — Forest *v.* Tinkham, 29 Ill. 141; Porter *v.* Dement, 35 Ill. 478; Frank *v.* Miner, 50 Ill. 444; Blatchford *v.* Boyden, 122 Ill. 668; Long *v.* Cockern, 128 Ill. 29; Martin *v.* Duncan, 156 Ill. 274; Snydacker *v.* Blatchley, 177 Ill. 506; Seim *v.* Hale, 67 Ill. App. 364; Packard *v.* Chicago Title, etc., Co., 67 Ill. App. 598; Roberts *v.* Kingsbury, 71 Ill. App. 451; Martin *v.* Sexton, 72 Ill. App. 395.

Indiana. — Kennedy *v.* Shaw, 38 Ind. 474; Granger *v.* Adams, 90 Ind. 87; Fordice *v.* Gibson, 129 Ind. 7; St. Joseph Hydraulic Co. *v.* Wilson, 133 Ind. 465; Stengel *v.* Boyce, 143 Ind. 642; Franklin Nat. Bank *v.* Whitehead, 149 Ind. 560, 63 Am. St. Rep. 302; Scarry *v.* Bennett, 2 Ind. App. 167.

Kansas. — Ramsey *v.* Glenn, 33 Kan. 271; Jewell *v.* Simpson, 38 Kan. 362; Swiggett *v.* Dodson, 38 Kan. 702; American Lead Pencil Co. *v.* Champion, 57 Kan. 352; Frankhouser *v.* Warrall, 51 Kan. 404; Standard Implement Co. *v.* Parlin, etc., Co., 51 Kan. 566.

Maine. — Field *v.* Gellerson, 80 Me. 270; York *v.* Murphy, 91 Me. 320.

Massachusetts. — Bingham *v.* Jordan, 1 Allen (Mass.) 373, 79 Am. Dec. 748; Travis *v.* Bishop, 13 Met. (Mass.) 304; Williams *v.* Nichols, 121 Mass. 435; Smith *v.* Howard, 173 Mass 88.

Michigan. — Brown *v.* Brabb, 67 Mich. 17,

To What Mortgages Statutes Apply. — Such acts are held to apply not only to instruments which are strictly such in form, but also to other instruments intended to operate as such.[1] However, they usually relate only to such

11 Am. St. Rep. 549, Kalamazoo First Nat. Bank *v.* Guntermann, 94 Mich. 125; Hudson *v.* McKale, 107 Mich. 22, 61 Am. St. Rep. 310; Vining *v.* Miliar, 116 Mich. 144; Farr *v.* Kilgour, 117 Mich. 227; Ramsdell *v.* Citizen's Electric Light, etc., Co., 103 Mich. 89; Cutler *v.* Huston, 158 U. S. 423 (construing *Michigan* statute).

Minnesota. — Clark *v.* B. B. Richards Lumber Co., 68 Minn. 282; McNeal *v.* Rider, 79 Minn. 153.

Missouri. — Martin-Perrin Mercantile Co. *v.* Perkins, 63 Mo. App. 310; Morris *v.* McMahan, 75 Mo. App. 494.

Montana.—Cope *v.* Minnesota Type Foundry Co., 20 Mont. 67; John Caplice Co. *v.* Beauchamp, 22 Mont. 258.

Nebraska. — State Bank *v.* O. S. Kelley Co , 47 Neb. 678; Fuller *v.* Brownell, 48 Neb. 145; Spaulding *v.* Johnson, 48 Neb. 830; Farmers, etc., Bank *v.* Anthony, 39 Neb. 343.

Nevada. — Simpson *v.* Harris, 21 Nev. 353.

New Jersey. — Brown *v.* Harris, 67 N. J. L. 207; Roe *v.* Meding, 53 N. J. Eq. 350; Hebberd *v.* Southwestern Land, etc., Co., 55 N. J. Eq. 18; Bleakley *v.* Nelson, 56 N. J. Eq. 674.

New York. — Karst *v.* Gane, 136 N. Y. 316, 61 Hun (N. Y.) 533; Stephens *v.* Perrine, 143 N. Y. 476; Hardin *v.* Dolge, 46 N. Y. App. Div. 416; Field *v.* Ingreham, (County Ct.) 15 Misc. (N. Y.) 529; Bueb *v.* Geraty, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 134; Kings County Bank *v.* Courtney, 69 Hun (N. Y.) 152; Stephens *v.* Meriden Britannia Co., 13 N. Y. App. Div. 268.

North Dakota. — Union Nat. Bank *v.* Oium, 3 N. Dak. 193.

Oklahoma. — El Reno First Nat. Bank *v.* Sayler, 4 Okla. 408; Campbell *v.* Richardson, 6 Okla. 375.

Rhode Island. — Ryder *v.* Ryder, 19 R. I. 188.

South Carolina. — Quattlebaum *v.* Taylor, 45 S. Car. 512; Avery *v.* Wilson, 47 S. Car. 78.

Tennessee. — Woodward *v.* Crump, 95 Tenn. 369.

Texas. — Brothers *v.* Mundell, 60 Tex. 240; Smelser *v.* Baker, 6 Tex. Civ. App. 751; Williams *v.* Farmers Nat. Bank, 22 Tex. Civ. App. 581; Lewis *v.* Bell, (Tex. Civ. App. 1897) 40 S. W. Rep. 747; Guaranty Trust Co. *v.* Galveston City R. Co., (C. C. A.) 107 Fed. Rep. 311 (construing *Texas* statute).

Vermont. — Longey *v.* Leach, 57 Vt. 377; Blair *v.* Ritchie, 72 Vt. 311.

Washington. — Willamette Casket Co. *v.* Cross Undertaking Co., 12 Wash. 190; American L. & T. Co. *v.* Olympia Light, etc., Co., 72 Fed. Rep 620 (construing *Washington* statute).

West Virginia. — Poling *v.* Flanagan, 41 W. Va. 191; Curtin *v.* Isaacsen, 36 W. Va. 391.

Wisconsin. — Parroski *v.* Goldberg, 80 Wis. 339; Ryan Drug Co. *v.* Hvambsahl, 89 Wis. 61; Wagg-Anderson Woolen Co. *v.* Dunn, 92 Wis. 409; Rommerdahl *v.* Jackson, 102 Wis. 444.

Louisiana — Recording Not Required. — In Louisiana there is no statute requiring the registration of " privileges " on movable property, and therefore they are valid as to all persons though not recorded. Flower *v.* Skipwith, 45 La. Ann. 895; Hewitt *v.* Williams, 47 La. Ann. 742.

Mortgages of Vessels. — State statutes requiring registration of chattel mortgages are not applicable to mortgages on vessels properly recorded in accordance with the United States statutes. The Vigilancia, 68 Fed. Rep. 781, (C. C. A.) 73 Fed. Rep. 452; Haug *v.* Detroit Third Nat. Bank, 77 Mich. 474. See the title SHIPS AND SHIPPING.

1. As to What Constitutes a Chattel Mortgage, see the title CHATTEL MORTGAGES, vol. 5 p. 945.

Bill of Sale Intended as Mortgage. — A bill of sale absolute on its face but in fact intended to secure a debt is a chattel mortgage and must be recorded, even though there be no statute requiring bills of sale to be recorded. See cases cited in the title BILLS OF SALE, vol. 4, p. 570, note 1. And see Siedenbach *v.* Riley, 111 N. Y. 560.

But recording a bill of sale as such, it being such in form but in fact a chattel mortgage, does not answer the requirement of the *Massachusetts* statute as to recording chattel mortgages. Hill *v.* Marston, 178 Mass. 285.

Lease Providing for Lien on Lessee's Property. — A lease providing that the lessor shall have a lien on all of the lessee's property as security for rent is in effect a chattel mortgage and must be recorded as such. Packard *v.* Chicago Title, etc., Co., 67 Ill. App. 598; Merrill *v.* Ressler, 37 Minn. 82, 5 Am. St. Rep. 822. See also Seim *v.* Hale, 67 Ill. App. 364.

An Agreement to Give a Chattel Mortgage stands on no higher ground than a chattel mortgage, and must be recorded to be valid against a subsequent purchaser without notice. Smith *v.* Howard, 173 Mass. 88.

An Oral Mortgage of Chattels cannot be recorded under Mass. Gen. St., c. 151, § 1. Williams *v.* Nichols, 121 Mass. 435.

A Crop Mortgage must be recorded to be valid against a creditor of the mortgagor levying on the crop. Woodward *v.* Crump, 95 Tenn. 369. See also the title CROPS, vol. 8, p. 314.

A Mortgage of Fixtures which retain the character of personalty is properly recorded as a chattel mortgage. St. Joseph Hydraulic Co. *v.* Wilson, 133 Ind. 465. And see Sword *v.* Low, 122 Ill. 487; Sowden *v.* Craig, 26 Iowa 156, 96 Am. Dec. 125.

But a mortgage of an interest in land and the fixtures annexed to such land need not be recorded as a chattel mortgage, and if so recorded the record will not be notice to a subsequent purchaser. Bringhoiff *v.* Munzenmaier, 20 Iowa 513; Potts *v.* New Jersey Arms, etc., Co., 17 N. J. Eq. 395; Warner *v.* Don, 26 Can. Sup. Ct. 388, 28 Nova Scotia 202.

As to Mortgages of Railroad Rolling Stock, see the title RAILROAD SECURITIES, vol. 23, p. 801.

A Written Pledge of Personalty is not within the statutes requiring registration of chattel mortgages. See the title PLEDGE AND COLLATERAL SECURITY, vol. 22, p. 853.

goods and chattels as are of a visible, tangible, and movable nature, capable of delivery.[1] Thus they do not, as a rule, embrace chattels real, such as leases for years or assignments thereof by way of mortgage,[2] or defeasible or conditional assignments of choses in action,[3] or the capital stock of corporations.[4]

d. CHOSES IN ACTION. — The recording acts relating to personal property are generally inapplicable to choses in action.[5]

IV. PLACE OF RECORDATION — 1. Instruments Affecting Real Property — *a.* IN GENERAL. — The statutes in the various jurisdictions customarily require that a deed or other instrument affecting land shall be recorded in the county wherein the land conveyed or affected is situated;[6] and in order for the record to be effective as a protection against subsequent conveyances or incumbrances, it is essential that such record be made at the place designated by law.[7]

Where One County Is Attached to Another for Certain Purposes which do not include the registration of land titles, the record in the latter county of an instrument relating to land lying in the former is not sufficient.[8]

1. Apply Only to Visible, Tangible Goods. — Bacon *v.* Bonham, 27 N. J. Eq. 212; Williamson *v.* New Jersey Southern R. Co., 26 N. J. Eq. 398; Harrison *v.* Burlingame, 48 Hun (N. Y.) 212; Tilden *v.* Tilden, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 672; National Hudson River Bank *v.* Chaskin, 28 N. Y. App. Div. 315; Booth *v.* Kehoe, 71 N. Y. 341; State Trust Co. *v.* Casino Co., 19 N. Y. App. Div. 344; Haskins *v.* Kelly, 1 Robt. (N. Y.) 160; Kilbourne *v.* Fay, 29 Ohio St. 264, 23 Am. Rep. 741; Kirkland *v.* Brune, 31 Gratt. (Va.) 126; Valley Bank *v.* Gettinger, 3 W. Va. 317; Tingle *v.* Fisher, 20 W. Va. 497; Rommerdahl *v.* Jackson, 102 Wis. 444. See also Marsh *v.* Woodbury, 1 Met. (Mass.) 436; Gregg *v.* Sloan, 76 Va. 500. *Contra*, Sykes *v.* Hannawalt, 5 N. Dak. 335. See the title GOODS, vol. 14, p. 1079.

New York — A Liquor Tax Certificate is not a chattel within the recording act, and a transfer of such certificate as security is not invalid as against creditors although not recorded. Niles *v.* Mathusa, 162 N. Y. 546, *affirming* 20 N. Y. App. Div. 483.

2. Do Not Embrace Chattels Real. — Potts *v.* New Jersey Arms, etc., Co., 17 N. J. Eq. 395; Decker *v.* Clarke, 26 N. J. Eq. 163; Deane *v.* Hutchinson, 40 N. J. Eq. 83; Hutchinson *v.* Bramhall, 42 N. J. Eq. 372; Booth *v.* Kehoe, 71 N. Y. 341; Breese *v.* Bange, 2 E. D. Smith (N. Y.) 474.

3. Conditional Assignment of Chose in Action. — Winsor *v.* McLellan, 2 Story (U. S.) 492; Monroe *v.* Hamilton, 60 Ala. 226; Newby *v.* Hill 2 Met. (Ky.) 530; U. S. Bank *v.* Huth, 4 B. Mon. (Ky.) 448; Putnam *v.* White, 76 Me. 551; Marsh *v.* Woodbury, 1 Met. (Mass.) 436; Bacon *v.* Bonham, 27 N. J. Eq. 209. See Vanmeter *v.* McFaddin, 8 B. Mon. (Ky.) 435.

4. Corporate Stock. — Rowland *v.* Plummer, 50 Ala. 182; Williamson *v.* New Jersey Southern R. Co., 26 N. J. Eq. 398.

5. Choses in Action Not Subject to Recording Acts. — Spalding *v.* Paine, 81 Ky. 416; National Hudson River Bank *v.* Chaskin, 28 N. Y. App. Div. 311; Allen *v.* Bain, 2 Head (Tenn.) 100; Kelly *v.* Thompson, 2 Heisk. (Tenn.) 278; Chicago Sugar-Refining Co. *v.* Jackson Brewing Co., (Tenn. Ch. 1898) 48 S. W. Rep. 275; Kirkland *v.* Brune, 31 Gratt. (Va.) 126; Gordon *v.* Rixey, 76 Va. 694; Daily *v.* Warren, 80 Va. 512; Tingle *v.* Fisher, 20 W. Va. 497. *Contra*, Sykes *v.* Hannawalt, 5 N. Dak. 335.

6. See the local statutes.

7. Must Record at Place Designated — *United States.* — Lewis *v.* Baird, 3 McLean (U. S.) 56.

Arkansas. — Beaver *v.* Frick Co., 53 Ark. 18.

Illinois. — St. John *v.* Conger, 40 Ill. 535.

Kentucky. — Taylor *v.* M'Donald, 2 Bibb (Ky.) 420.

Louisiana. — Harang *v.* Plattsmier, 21 La. Ann. 426; Myer *v.* Simpson, 21 La. Ann. 591; Lyons *v.* Cenas, 22 La. Ann. 113.

Maryland. — Stiefel *v.* Barton, 73 Md. 408.

New Mexico. — Moore *v.* Davey, 1 N. Mex. 303.

North Carolina. — King *v.* Portis, 77 N. Car. 25.

Texas. — Secrest *v.* Jones, 21 Tex. 121; Hawley *v.* Bullock, 29 Tex. 216.

Vermont. — Brown *v.* Edson, 23 Vt. 435.

Wisconsin. — Stewart *v.* McSweeney, 14 Wis. 468.

See also Hunt *v.* Swayze, 55 N. J. L. 33; Kerns *v.* Swope, 2 Watts (Pa.) 75; Harrison *v.* Strother, 1 Bay (S. Car.) 332.

An Assignment for the Benefit of Creditors which includes lands must be recorded in the county where such lands lie. Reeves *v.* Estes, 124 Ala. 303; Eggleston *v.* Harrison, 61 Ohio St. 397. And see Maul *v.* Drexel, 55 Neb. 446. See also the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 3, p. 67.

A Mistake as to the True Location of Land will not excuse a failure to record in the proper county. Adams *v.* Hayden, 60 Tex. 223.

8. One County Attached to Another for Certain Purposes. — Harris *v.* Monroe Cattle Co., 84 Tex. 674; Broussard *v.* Dull, 3 Tex. Civ. App. 59; Tomlinson *v.* League, (Tex. Civ. App. 1894) 25 S. W. Rep. 313.

In Iowa, by Act of 1853, A county, which was an unorganized county, was attached to B county for all purposes. Later, by Act of 1855, A county was attached to W county for election, revenue and judicial purposes. It was held that this specification of purposes in the latter act showed an intent to leave A county attached to B county for all other pur-

b. WHERE LANDS SITUATED IN DIFFERENT COUNTIES — **Separate Tracts.** — An instrument conveying or affecting separate and distinct tracts of land lying in different counties must be recorded in each of such counties; recording in but one of them will be constructive notice only as to the tract lying in that county.[1]

Single Tract Lying in Several Counties. — Under some statutes an instrument conveying or affecting a single tract of land which extends into several counties must be recorded in each, else the grantee thereunder will not be protected as to that part of the land lying in the county or counties where the instrument is not recorded.[2] But where the statute requires the instrument to be recorded in the county where the land or part thereof lies, registration in one county is sufficient.[3]

c. EFFECT OF CHANGE IN COUNTY LINES — **After Recording.** — If an instrument has been recorded in the proper county, but by a subsequent change of the county boundaries the land falls within the boundaries of another county, such change will not affect the validity of the recordation, and necessitate a re-record of the instrument in the new county.[4]

Between Execution and Recording. — Where, however, the change in the county boundaries is made after the execution of an instrument, but before its record, it must be recorded in that county in which the land lies at the time of its recordation.[5]

2. Instruments Affecting Personal Property — *a.* IN GENERAL. — The statutes of the different states show a considerable lack of uniformity in the provisions which establish the place for recording title to personal property. It is obvious that whatever idea of place may be attached for any purpose to

poses; and therefore a transfer of land lying therein was properly recorded in B county and not in W county. Meagher *v.* Deury, (Iowa 1892) 53 N. W. Rep. 313.

1. Separate Tracts Lying in Different Counties. — Reeves *v.* Estes, 124 Ala. 303; Hancock *v.* Tram Lumber Co., 65 Tex. 232; Perrin *v.* Reed, 35 Vt. 2.

Where Distinct but Adjacent Tracts of land lying in different counties are conveyed by one deed, the recording of the deed in only one of the counties is not effectual in regard to the land lying in the other county. Thus, where a navigable stream which formed the dividing line between two counties separated the land of a proprietor so as to throw part thereof in one county and part in another, it was held that such parts must be treated as separate tracts and a transfer thereof must be recorded in both counties. Horsley *v.* Garth, 2 Gratt. (Va.) 471, 44 Am. Dec. 393.

2. Single Tract — Must Be Recorded in Each County. — Ludlow *v.* Clinton Line R. Co., 1 Flipp. (U. S.) 25; Harper *v.* Tapley, 35 Miss. 506; Oberholtzer's Appeal, 124 Pa. St. 583. See also Van Meter *v.* Knight, 32 Minn. 205.

3. Record in One County Sufficient. — Conn *v.* Manifee, 2 A. K. Marsh. (Ky.) 396, 12 Am. Dec. 417; Shively *v.* Gilpin, 23 Ky. L. Rep. 2090, 66 S. W. Rep. 763; Perry *v.* Clift, (Tenn. Ch. 1899) 54 S. W. Rep. 121; Hancock *v.* Tram Lumber Co., 65 Tex. 232; Brown *v.* Lazarus, 5 Tex. Civ. App. 81; Mattfeld *v.* Huntington, 17 Tex. Civ. App. 716. And see Simm *v.* Read, Cooke (Tenn.) 346.

4. Change After Recording — *United States.* — Stebbins *v.* Duncan, 108 U. S. 32.

Louisiana. — Hayden *v.* Nutt, 4 La. Ann. 65; Ellison *v.* Iler, 22 La. Ann. 470; Parish Board *v.* Edrington, 40 La. Ann. 633; Chambers *v.* Haney, 45 La. Ann. 447.

Minnesota. — Koerper *v.* St. Paul, etc., R. Co., 40 Minn. 132; Thomas *v.* Hanson, 59 Minn. 274.

Ohio. — Davidson *v.* Root, 11 Ohio 99, 37 Am. Dec. 411.

South Carolina. — Hill *v.* Wilson, 4 Rich. L. (S. Car.) 521, 55 Am. Dec. 696.

Texas. — McKissick *v.* Colquhoun, 18 Tex. 148; Howard *v.* Colquhoun, 28 Tex. 134; Melton *v.* Turner, 38 Tex. 81; Jones *v.* Powers, 65 Tex. 207. See also Lumpkin *v.* Muncey, 66 Tex. 311.

Where County Lines Not Correctly Established. — Registration made in a county in which land is shown to be by legal establishment of the county lines will be held valid registry, even if the County Commissioners' Court has power to, and subsequently actually does, cause other lines to be established, which exclude from the county in which registration has been made, land conveyed by a deed formerly registered. Jones *v.* Powers, 65 Tex. 207.

Presumption as to Correctness of Record. — In the absence of evidence to the contrary the court will presume that the land lay in the county in which the instrument is recorded at the time the record was made. Trimble *v.* Edwards, 84 Tex. 497; Hill *v.* Grant, (Tex. Civ. App. 1898) 44 S. W. Rep. 1016.

5. Change Before Recording. — Astor *v.* Wells, 4 Wheat. (U. S.) 466; Green *v.* Green, 103 Cal. 108; Garrison *v.* Haydon, 1 J. J. Marsh. (Ky.) 222, 19 Am. Dec. 70; Geer *v.* Missouri Lumber, etc., Co., 134 Mo. 85, 56 Am. St. Rep. 489; Alt *v.* Fullerton, 151 Mo. 598; Stewart *v.* McSweeney, 14 Wis. 468. See also Bell *v.* Fry, 5 Dana (Ky.) 344.

most chattels is purely conventional, the things having in themselves no natural locality. Consequently the question depends almost entirely upon the arbitrary provisions of the statutes.[1] The statutes must be strictly followed with respect to the place of record; a record in the wrong county cannot charge with notice.[2]

Grantor's Residence. — A statute requiring registration in the county of the mortgagor's residence must be followed irrespective of the *situs* of the property,[3] or the place where he conducts his business,[4] and the record must be made in the county which is his permanent place of residence[5] at the time of the execution of the instrument.[6] An instrument executed by several persons residing in different counties or towns must be recorded in each place in which such persons reside;[7] and if some of them are nonresidents and some residents, then in the counties where the residents reside.[8]

Situs of Property. — Where the instrument is required to be recorded in the county in which the property is located, this refers to its *situs* at the time the instrument is executed.[9] No reason is perceived why the rules, long established in *England*, in connection with the probate of wills and grant of administration, which assigns a locality to every subject of personal property, may not be invoked to determine the place of record under the provisions of the recording acts which require registration in the place wherein the chattels may be.[10]

1. See the various statutes.

For a citation of the statutes in the various states regarding the place at which chattel mortgages must be recorded, see the title CHATTEL MORTGAGES, vol. 5, p. 1010.

2. Record at Wrong Place of No Effect. — Griffin *v.* Karter, 116 Ala. 160; Brittenham *v.* Robinson, 18 Ind. App. 502; Bither *v.* Buswell, 51 Me. 601; York *v.* Murphy, 91 Me. 320; Stiefel *v.* Barton, 73 Md. 408; London *v.* Youmans, 31 S. Car. 147, 17 Am. St. Rep. 17; Davis *v.* Loftin, 6 Tex. 489; Brown *v.* Hudson, 14 Tex. Civ. App. 605; Parroski *v.* Goldberg 80 Wis. 339.

3. Situs of Property Immaterial. — Vaughn *v.* Bell, 9 B. Mon. (Ky.) 447; Singleton *v.* Young, 3 Dana (Ky.) 559; Reynolds *v.* Case, 60 Mich. 76; Ray County Sav. Bank *v.* Holman, 63 Mo. App. 492; Powers *v.* Freeman, 2 Lans. (N. Y.) 127.

4. Place of Business Immaterial. — Weaver *v.* Chunn, 99 N. Car. 431.

5. Permanent Place of Residence. — Boyd *v.* Beck, 29 Ala. 703; Vaughn *v.* Bell, 9 B. Mon. (Ky.) 447; Briggs *v.* Leitelt, 41 Mich. 79.

A Corporation Mortgage of Chattels is properly recorded under these statutes at the place where the corporation has its principal business office. Wright *v.* Bundy, 11 Ind. 398; Nelson *v.* Neil, 15 Hun (N. Y.) 383.

But a Foreign Corporation has no residence except in the place of its creation, and the record of a chattel mortgage by such corporation in a county of another state wherein it has a place of business is not effectual under a statute requiring registration "in the county in which the mortgagor resides." Watson *v.* Thompson Lumber Co., 49 Ark. 83; Cook *v.* Hager, 3 Colo. 386.

A Partnership Mortgage is usually required to be recorded in each county or town in which any of the individual resident partners reside. See the title CHATTEL MORTGAGES, vol. 5, p. 1010. And see also Bueb *v.* Geraty, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 134; Devine *v.* Taylor, 1 Ohio Dec. 153; Smith *v.* Burnett, 2 Ohio Cir. Dec. 344.

6. At Time of Execution. — Reynolds *v.* Case, 60 Mich. 76; Bleakley *v.* Nelson, 56 N. J. Eq. 674; Powers *v.* Freeman, 2 Lans. (N. Y.) 127; Hicks *v.* Williams, 17 Barb. (N. Y.) 523.

But in Avery *v.* Wilson, 47 S. Car. 78, where the mortgagor, after the execution and before the recording of a chattel mortgage, removed to another county, the latter county was held to be the proper place of record.

And where a mortgage was executed by a person living in one county upon a crop to be planted on land bought by him in another, to which he contemplated removing and to which he afterwards did remove, it was held to be properly registered in such latter county. Harris *v.* Jones, 83 N. Car. 317.

7. Several Mortgagors Residing in Different Counties. — Granger *v.* Adams, 90 Ind. 87; Rich *v.* Roberts, 48 Me. 548; Morrill *v.* Sanford, 49 Me. 566; Rich *v.* Roberts, 50 Me. 395; Aultman *v.* Guy, 41 Ohio St. 598.

8. Where Resident Grantors Live.—De Courcey *v.* Collins, 21 N. J. Eq. 357; Smith *v.* Burnett, 2 Ohio Cir. Dec. 344. However, special provision is usually made for the case of nonresidents

9. Location at Time Instrument Executed. — Mumford *v.* Harris, 8 Colo. App. 51; Marquette First Nat. Bank *v.* Weed, 89 Mich. 359. See also Stirk *v.* Hamilton, 83 Me. 524.

Mortgagor's Residence Deemed Situs of Property. — Under Ky. St., § 495, requiring all mortgages to be recorded in the county "in which the property conveyed or the greater part thereof shall be," it was held that a chattel mortgage on a horse must be recorded in the county of the mortgagor's residence. Coppage *v.* Johnson, (Ky. 1900) 55 S. W. Rep 424.

Where Part of the Property Is in Another County a copy of the original mortgage must be recorded there under S. Dak. Comp. Laws, § 4382. Rosenbaum *v.* Foss, 4 S. Dak. 184.

10. 2 Min. Inst., § 853.

Grantor's Residence and Situs of Property. — Where the statutes require a chattel mortgage to be in all cases filed at the place where the property is situated and also where the mortgagor resides, registration in one only of those places is not sufficient.[1] But under some statutes it is deemed sufficient to record the mortgage at either place.[2]

b. REMOVAL OF PROPERTY FROM PLACE OF RECORD — **To Another County.** — It is sometimes provided that when the mortgagor removes, or the property is removed, to another county, the mortgage must, within a certain time, be filed in the county to which the removal is made.[3] But this is necessary only under express provisions to this effect. Statutes requiring recordation ordinarily refer only to the time of the execution of the instrument, and if a record has been duly made, a subsequent removal of the property or change of habitancy will not necessitate another record in such new *situs* or abode.[4]

To Another State. — It is the general rule that where a chattel mortgage is properly recorded in the state where the parties reside and the property is situated, if such property be afterwards removed to another state, the protection of the record continues without any further recording in the latter state unless its statutes contain express provisions to the contrary.[5] But the contrary view is maintained in some jurisdictions.[6]

1. Both Grantor's Residence and Situs of Property. — Fassett *v.* Wise, 115 Cal. 316; Lundberg *v.* Northwestern Elevator Co., 42 Minn. 37; Nickerson *v.* Wells-Stone Mercantile Co., 71 Minn. 230.

2. Either Grantor's Residence or Situs of Property. — Springfield Third Nat. Bank *v.* Bond, 64 Kan. 346; Oxsheer *v.* Watt, 91 Tex. 402, *affirming* (Tex. Civ. App. 1897) 42 S. W. Rep. 121; Griffith *v.* Morrison, 58 Tex. 46; Oxsheer *v.* Tandy, 11 Tex. Civ. App. 142.

3. Must Record in County to Which Property Removed. — Wilkinson *v.* King, 81 Ala. 156; Malone *v.* Bedsole, 93 Ala. 41; Fassett *v.* Wise, 115 Cal. 316; Ladd *v.* Alcorn, 71 Miss. 395; Turner *v.* Caldwell, 15 Wash. 274; Hundley *v.* Calloway, 45 W. Va. 516.

In Texas it is provided that where mortgaged chattels are removed to another county the mortgage must be recorded within four months. Reed *v.* Spikes, 4 Tex. App. Civ. Cas., § 169; Vickers *v.* Carnahan, 4 Tex. Civ. App. 305; Greene *v.* Bentley, (C. C. A.) 114 Fed. Rep. 112.

But since it is sufficient there to record the instrument in *either* the county where the property is located or that of the mortgagor's residence, if recorded where the mortgagor resides, it need not be again recorded in the county to which the property is removed. Griffith *v.* Morrison, 58 Tex. 46.

Necessity to Record as of Time of Execution. — Where at the time a mortgage was executed the property was in one county but was intended to be removed immediately to another county, it was held sufficient to record in the latter county alone, and this although the record was made before the property actually arrived there. Ames Iron Works *v.* Chinn, 15 Tex. Civ. App. 88.

But see Pollak *v.* Davidson, 87 Ala. 551, where a subsequent recording in the county to which the property was removed was held ineffectual, the instrument not having been properly recorded at the time of its execution.

That the Mortgagee Did Not Consent to the removal, or know it, is not material. Turner *v.* Caldwell, 15 Wash. 274.

A Purchaser Acquiring Title in the County of Record is charged with constructive notice although the property be delivered to him in a second county and held in a third. Ladd *v.* Alcorn, 71 Miss. 395.

4. New Record Not Necessary in Absence of Statute — *Alabama.* — Beall *v.* Williamson, 14 Ala. 55; Twelves *v.* Nevill, 39 Ala. 175.

Arkansas. — Yarbrough *v.* Arnold, 20 Ark. 592.

Connecticut. — Pease *v.* Odenkirchen, 42 Conn. 415.

Iowa. — Smith *v.* McLean, 24 Iowa 322.

Kansas. — Ord Nat. Bank *v.* Massey, 48 Kan. 762.

Maine. — Barrows *v.* Turner, 50 Me. 127.

Massachusetts. — Brigham *v.* Weaver, 6 Cush. (Mass.) 298.

Mississippi. — Elson *v.* Barrier, 56 Miss. 394.

Missouri. — Bevans *v.* Bolton, 31 Mo. 437; Feurt *v.* Rowell, 62 Mo. 524.

Nebraska. — Cool *v.* Roche, 20 Neb. 550; Grand Island Banking Co. *v.* Frey, 25 Neb. 66, 13 Am. St. Rep. 478.

New Hampshire. — Offutt *v.* Flagg, 10 N. H. 46; Hoit *v.* Remick, 11 N. H. 285.

New York. — Hicks *v.* Williams, 17 Barb. (N. Y.) 523; Nichols *v.* Mase, 25 Hun (N. Y.) 640.

North Carolina. — Harris *v.* Alden, 104 N. Car. 86; Barrington *v.* Skinner, 117 N. Car. 47.

Texas. — Parks *v.* Willard, 1 Tex. 350.

5. Mortgage Recorded in Another State. — Ames Iron Works *v.* Warren, 76 Ind 513, 40 Am. Rep. 258; Handley *v.* Harris, 48 Kan. 606, 30 Am. St. Rep. 322; National Bank of Commerce *v.* Morris, 114 Mo. 255, 35 Am. St. Rep. 754; Wilson *v.* Rustad, 7 N. Dak. 330, 66 Am. St. Rep. 649; Greenville Nat. Bank *v.* Evans-Snyder-Buel Co., 9 Okla. 353. And see the title CHATTEL MORTGAGES, vol. 5, p. 1011.

6. Contrary Doctrine. — Johnson *v.* Hughes, 89 Ala. 588; Montgomery *v.* Wight, 8 Mich. 143; Boydson *v.* Goodrich, 49 Mich. 65; Corbett *v.* Littlefield, 84 Mich. 30, 22 Am. St. Rep. 681; Farnsworth *v.* Shepard, 6 Vt. 521; Woodward *v.* Gates, 9 Vt. 361; Gates *v.* Gaines, 10 Vt. 349; Lynde *v.* Melvin, 11 Vt. 686, 34 Am.

c. CONFLICT OF LAWS. — The statutes of one state requiring mortgages or other instruments dealing with personal property to be recorded in the town or county where the mortgagors reside, do not apply to mortgages made in another state where the parties and the property are at the time. The *lex loci contractus* governs.[1] But, although the requirement that an instrument conveying or affecting movable chattels shall be recorded in the place where the property is situate may not be in strict harmony with the common-law doctrine that the disposition of movables is to be governed by the law of the domicil of the owner, it is certainly competent for a state to adapt a modification of this kind to the disposition of any property within its territorial limits.[2]

V. TIME OF RECORDATION — 1. In General. — Ordinarily an instrument may be recorded at any time after its execution, and the record will be effective as against all claims attaching subsequently to such registration,[3] unless there has been unreasonable delay or other circumstances constituting laches.[4]

After Death of Grantor. — And, since the recording of an instrument is no part of its execution, the period of recordation is not restricted by the terms or policy of the statutes to the lifetime of the grantor in a deed or mortgage, but recordation may take place after his death.[5]

2. As Affecting Priorities — *a.* WHERE STATUTE SPECIFIES NO TIME. — In some jurisdictions, where the acts requiring recordation specify no time within

Dec. 717; Kendall *v.* Samson, 12 Vt. 515; Rockwood *v.* Collamer, 14 Vt. 141; Skiff *v.* Solace, 23 Vt. 279. And see Barney, etc., Mfg. Co. *v.* Hart, (Ky. 1886) 1 S. W. Rep. 414, 8 Ky. L. Rep. 223.

1. Lex Loci Contractus Governs. — Pyeatt *v.* Powell, (C. C. A.) 51 Fed. Rep. 551; Langworthy *v.* Little, 12 Cush. (Mass.) 109; Davis *v.* Osgood, 69 N. H. 427; Woolley *v.* Geneva Wagon Co., 59 N. J. L. 278; Richardson *v.* Sheiby, 3 Okla. 68. And see Mershon *v.* Moors, 76 Wis. 502. And see the title CHATTEL MORTGAGES, vol. 5, p. 1011.

2. Where Property in the State. — Cooper *v.* Berney Nat. Bank, 99 Ala. 119; Golden *v.* Cockril, 1 Kan. 259, 81 Am. Dec. 510; Denny *v.* Faulkner, 22 Kan. 89; Barney, etc., Mfg. Co. *v.* Hart, (Ky. 1886) 1 S. W. Rep. 414, 8 Ky. L. Rep. 223; Montgomery *v.* Wight, 8 Mich. 143; Boydson *v.* Goodrich, 49 Mich. 65; Lathe *v.* Schoff, 60 N. H. 34; Crosby *v.* Huston, 1 Tex. 203.

For a full discussion of conflict of laws as relating to transfers of personalty, see the title PRIVATE INTERNATIONAL LAW, vol. 22, p. 1338 *et seq.*

Mortgage by Corporation. — A chattel mortgage by a *New Jersey* corporation on property situated in Indian Territory must be recorded in New Jersey to be valid against creditors of the corporation. Hebberd *v.* Southwestern Land, etc., Co., 55 N. J. Eq. 18.

3. May Record at Any Time — *Florida.* — Stewart *v.* Mathews, 19 Fla. 752; Reese *v.* Taylor, 25 Fla. 283; Hope *v.* Johnston, 28 Fla. 55.

Kentucky. — Finley *v.* Spratt, 14 Bush (Ky.) 225.

Louisiana. — Citizens' Bank *v.* Ferry, 32 La. Ann. 310.

New Jersey. — Roe *v.* Meding, 53 N. J. Eq. 350.

South Carolina. — Steele *v.* Mansell, 6 Rich. L. (S. Car.) 437; Leger *v.* Doyle, 11 Rich. L. (S. Car.) 109, 70 Am. Dec. 240.

Tennessee. — Herman *v.* Clark, (Tenn. Ch. 1896) 39 S. W. Rep. 873.

In North Carolina, since the Acts of 1885, c. 147, there is no limit to the time in which a deed may be recorded. Previous to that time the record, to be effective, was required to be made within two years after the execution of the instrument, but the legislature was accustomed at each session to pass an act extending such time limit. Sellers *v.* Sellers, 98 N. Car. 13; Spivey *v.* Rose, 120 N. Car. 163; Bond *v.* Wilson, 129 N. Car. 325; Hallyburton *v.* Slagle, 130 N. Car. 482.

"Forthwith" — "Immediately." — The rule stated in the text holds good even where the statute calls for recording "forthwith" or "immediately." Gibson *v.* Warden, 14 Wall. (U. S.) 244; McVay *v.* English, 30 Kan. 368; Roe *v.* Meding, 53 N. J. Eq. 350; Wilson *v.* Leslie, 20 Ohio 161; Vickers *v.* Carnahan, 4 Tex. Civ. App. 305; Maverick *v.* Bohemian Club, (Tex. Civ. App. 1896) 36 S. W. Rep. 147; Moore *v.* Masterson, 19 Tex. Civ. App. 308.

Withholding from Record as Evidence of Fraud. — Withholding from record is not alone a sufficient ground for setting aside a conveyance as fraudulent, but it may be a significant circumstance when taken in connection with other evidence tending to show a fraudulent intent. See *infra*, X.

4. Laches. — Longworth *v.* Close, 1 McLean (U. S.) 282; Reese *v.* Taylor, 25 Fla. 283; Kappes *v.* Rutherford Park Assoc., 60 N. J. Eq. 129. See also Paul *v.* Kerswell, 60 N. J. L. 273.

5. After Death of Grantor. — 1 Jones on Mortg., § 545; 2 Min. Inst., § 857; Terry *v.* Briggs, 12 Met. (Mass.) 17.

As Against the Grantor's General Creditors, having no specific lien on the property, a deed or mortgage, though recorded after the grantor's death, is not for that reason inoperative. Haskell *v.* Bissell, 11 Conn. 174; Gill *v.* Pinney, 12 Ohio St. 38; McCandlish *v.* Keen, 13 Gratt. (Va.) 615.

which the record is to be made, it has been held necessary to record an instrument before a subsequent conveyance is made, else the rights of the subsequent purchaser will prevail.[1]

Allowance of Reasonable Time. — But, on the other hand, it has been held, and with better reason, that where the instrument is recorded within a reasonable time the record will relate back to the time of its execution and entitle it to priority over an intermediate conveyance.[2] What constitutes a reasonable time is a question depending in large measure upon the circumstances of the particular case.[3]

Where Priority of Record Governs. — But the statutes enacted in many states which provide that the instrument under which the subsequent purchaser or incumbrancer claims must be first duly recorded in order to give him priority, have served to lessen the importance of this question by turning the decisions which would otherwise come thereunder on another and simpler consideration, namely, the question of priority of record.[4]

b. WHERE TIME LIMIT PRESCRIBED BY STATUTE — (1) *In General.* — Frequently a definite period is prescribed by statute within which an instrument shall be recorded.[5] And where this is the case, if the instrument be recorded at any time before the expiration of the period specified, the record will relate back to the date of its execution and give it priority over a subsequent instrument, although the latter may have been recorded first.[6]

(2) *Effect of Not Recording Within Time Limited* — (a) **In General.** — Where

1. Stafford *v.* Lick, 7 Cal. 479; Self *v.* Sanford, 4 Ill. App. 328; Sigourney *v.* Larned, 10 Pick. (Mass.) 72; Hunt *v.* Swayze, 55 N. J. L. 33 And see Drew *v.* Streeter, 137 Mass. 460.

2. Reasonable Time Allowed. — Moor *v.* Watson, 1 Root (Conn.) 388; Beers *v.* Hawley, 2 Conn. 467; Bissell *v.* Nooney, 33 Conn. 411; Goodsell *v.* Sullivan, 40 Conn. 83; Hartford Bldg., etc., Assoc. *v.* Goldreyer, 71 Conn. 95; Bryson *v.* Penix, 18 Mo. 13; Way *v.* Braley, 44 Mo. App. 457.

Where Registration "Forthwith" Is Required by statute, it has been held that if reasonable diligence be used the record will relate back to the time of execution as against intermediate liens or conveyances. Baker *v.* Smelser, 88 Tex. 26; Jacks *v.* Dillon, 6 Tex. Civ. App. 192; Cameron Ice Co. *v.* Wallace, 21 Tex. Civ. App. 141. But see Cass *v.* Rothman, 42 Ohio St. 382.

3. Reasonable Time a Question of Fact. — Hartford Bldg., etc., Assoc. *v.* Goldreyer, 71 Conn. 95.

What Constitutes a Reasonable Time. — See Goodsell *v.* Sullivan, 40 Conn. 83; Hartford Bldg., etc., Assoc. *v.* Goldreyer, 71 Conn. 95; Way *v.* Braley, 44 Mo. App. 457; Baker *v.* Smelser, 88 Tex. 26.

What Not a Reasonable Time. — See Pond *v.* Skidmore, 40 Conn. 213; Camp *v.* Charles Thacher Co., (Conn. 1902) 52 Atl. Rep. 953; Givanovitch *v.* Hebrew Congregation, 36 La. Ann. 272; Cutler *v.* Steele, 85 Mich. 627; Wilson *v.* Milligan, 75 Mo. 41; Karst *v.* Gane, 136 N. Y. 316.

Diligence Must Be Shown. — One claiming under an instrument which was not recorded until after an attaching creditor had secured a lien must show that the instrument was in fact executed before the attachment was levied, and that it was recorded within a reasonable time. Bissell *v.* Nooney, 33 Conn. 411. And see Karst *v.* Gane, 136 N. Y. 316.

4. Question Governed by Priority of Record. — See Den *v.* Richman, 13 N. J. L. 43; Fleschner *v.* Sumpter, 12 Oregon 161.

As to the necessity for priority of record, see *infra*, XI.

5. Statutory Period for Recording. — See the local statutes, and the following cases: Truman *v.* Weed, (C. C. A.) 67 Fed. Rep. 645; McGhee *v.* Importers, etc., Nat. Bank, 93 Ala. 192; Bond *v.* Brewer, 96 Ga. 443; Meikel *v.* Borders, 129 Ind. 529; Michener *v.* Bengel, 135 Ind. 188; Stengel *v.* Boyce, 143 Ind. 642; State *v.* Griffin, 16 Ind. App. 555; Davey *v.* Ruffall, 162 Pa. St. 443.

As to the period within which a chattel mortgage is required to be recorded, see the title CHATTEL MORTGAGES, vol. 5, p. 1009.

As to proof of the time of recording, see *infra*, VI. 1.

Time Computed from Delivery. — The time within which an instrument must be recorded begins to run from its delivery, notwithstanding it may have been signed and acknowledged several weeks before delivery. Hornbrook *v.* Hetzel, 27 Ind. App. 79.

6. Record Relates Back to Execution — *United States.* — Clarke *v.* White, 12 Pet. (U. S.) 178.

Alabama. — Betz *v.* Mullin, 62 Ala. 365; Winston *v.* Hodges, 102 Ala. 304.

Georgia. — Nichols *v.* Hampton, 46 Ga. 253; Cabot *v.* Armstrong, 100 Ga. 438; White *v.* Interstate Bldg., etc., Assoc., 106 Ga. 146; Harvey *v.* Sanders, 107 Ga. 740.

Indiana. — Melross *v.* Scott, 18 Ind. 250; Eaton *v.* McKahan, 91 Ind. 109; McCarthy *v.* Seisler, 130 Ind. 63.

Kentucky. — Dale *v.* Arnold, 2 Bibb (Ky.) 605; M'Connell *v.* Brown, Litt. Sel. Cas. (Ky.) 462; Breckenridges *v.* Todd, 3 T. B. Mon. (Ky.) 54, 16 Am. Dec. 83.

Mississippi. — Claiborne *v.* Holmes, 51 Miss. 146.

North Carolina. — Hill *v.* Jackson, 9 Ired. L.

an instrument is not recorded within the time limited, the record will not have such retrospective effect, and a subsequent conveyance taken, or lien secured without notice of such prior unrecorded instrument, is entitled to precedence, which cannot be divested by subsequently recording the older instrument;[1] and this would seem to be true even though the junior instrument were executed within the time allowed for recording the prior one.[2]

Where the Junior Instrument Is Recorded Within the Time Limited, the record will relate back to the time of its execution and entitle it to priority, notwithstanding the senior instrument may have been recorded first in point of time, but after the expiration of the prescribed period.[3]

Where Neither Instrument Recorded in Time. — Under some statutes the junior instrument must be first recorded to gain priority,[4] and where this is the case, if neither instrument be recorded within the prescribed period, the one first recorded takes precedence.[5] In the absence of such a requirement, the omission to record the subsequent instrument within its statutory time cannot logically affect its relation to the prior one.[6] Yet it has been held in some states that where neither instrument was recorded in time the older must prevail, even though the younger were first recorded.[7]

(b) **Record Effective from Time of Recording.** — An omission to record an instrument within the time designated by statute will not ordinarily render it void.[8]

(31 N. Car.) 333; Phifer *v.* Barnhart, 88 N. Car. 333.

Ohio. — Stansell *v.* Roberts, 13 Ohio 148, 42 Am. Dec. 193.

Pennsylvania. — Parke *v.* Neeley, 90 Pa. St. 52; Bismarck Bldg., etc., Assoc. *v.* Bolster, 92 Pa. St. 123; Fries *v.* Null, 154 Pa. St. 573; Hamory *v.* Sargent, 25 Pa. Co. Ct. 198.

South Carolina. — Steele *v.* Mansell, 6 Rich. L. (S. Car.) 453; King *v.* Fraser, 23 S. Car. 543; Martin *v.* Sale, Bailey Eq. (S. Car.) 6.

Actual Notice Does Not Relate Back. — Where the junior claim has attached within the time limited for recording the prior conveyance, it will not take precedence if the senior conveyance be in fact recorded before the expiration of such period. But actual notice given the junior claimant within such period, but after the attaching of his claim, will not relate back and he is entitled to priority notwithstanding such notice, if the prior conveyance remains unrecorded at the expiration of the time limited. Winston *v.* Hodges, 102 Ala. 304.

Deed Intended as Mortgage. — An instrument which was an absolute deed upon its face, but in fact a mortgage, was held properly recorded at any time before the expiration of the six months allowed for the recording of deeds. Kemper *v.* Campbell, 44 Ohio St. 210.

Chattel Mortgage. — In *Massachusetts* it has been held that the rule stated in the text does not apply to chattel mortgages, although the provision as to time is the same. Drew *v.* Streeter, 137 Mass. 460.

1. Subsequent Instrument Entitled to Priority — *United States.* — U. S. *v.* Devereux, (C. C. A.) 90 Fed. Rep. 182.

Alabama. — Mallory *v.* Stodder, 6 Ala. 801; Wallis *v.* Rhea, 12 Ala. 646; Pollard *v.* Cocke, 19 Ala. 188.

Georgia. — Maddox *v.* Wilson, 91 Ga. 39; Cabot *v.* Armstrong, 100 Ga. 438; White *v.* Interstate Bldg., etc., Assoc., 106 Ga. 146; Harvey *v.* Sanders, 107 Ga. 740.

Indiana. — Jenckes *v.* Jenckes, 145 Ind. 624; Schmidt *v.* Zahrndt, 148 Ind. 447.

Maine. — Littlefield *v.* Prince, 96 Me. 499.

Maryland. — Jones *v.* Jones, 2 Har. & J. (Md.) 281; Carroll *v.* Norwood, 5 Har. & J. (Md.) 155; Harding *v.* Allen, 70 Md. 395; Brooks *v.* Dent, 1 Md. Ch. 523.

New Jersey. — Sanborn *v.* Adair, 29 N. J. Eq. 338.

Ohio. — Northrup *v.* Brehmer, 8 Ohio 392.

South Carolina. — Turpin *v.* Sudduth, 53 S. Car. 295; Summers *v.* Brice, 36 S. Car. 204.

2. Where Executed Within Time for Recording Prior Instrument. — Carson *v.* Eickhoff, 148 Ind. 596. See also Schaeffer *v.* Fithian, 17 Ind. 463. *Contra*, Martin *v.* Williams, 27 Ga. 406, wherein it was held that the subsequent grantee had no equity because he purchased during the time allowed for recording the prior deed.

3. Where Junior Instrument Recorded Within Time Limited. — Wise *v.* Mitchell, 100 Ga. 614; White *v.* Interstate Bldg., etc., Assoc., 106 Ga. 146.

But in *Pennsylvania* it has been held that, although the subsequent conveyance was recorded within the prescribed period, yet the older would prevail if actually recorded first though not within the time limited. Fries *v.* Null, 154 Pa. St. 573.

4. See *infra*, XI.

5. First Recorded Has Priority. — Fleschner *v.* Sumpter, 12 Oregon 161; Souder *v.* Morrow, 33 Pa. St. 83; Fries *v.* Null, 154 Pa. St. 573; Collins *v.* Aaron, 162 Pa. St. 539, 10 Lanc. L. Rev. 213.

6. See *infra*, XI.

7. Older Instrument Prevails. — Martin *v.* Williams, 27 Ga. 406; Roe *v.* Maund, 48 Ga. 461; Turner *v.* Roe, 49 Ga. 165; Myers *v.* Picquet, 61 Ga. 260; Taylor *v.* M'Donald, 2 Bibb (Ky.) 420.

8. Instrument Not Void. — Meier *v.* Flinsbach, 95 Ky. 146; Kelley *v.* Yandell, (Ky. 1896) 36 S. W. Rep. 1127, 18 Ky. L. Rep. 462. And see *infra*, XI. 2. *a.*

An Assignment for Benefit of Creditors is absolutely void under the *Nebraska* statutes unless

Recordation at any time thereafter becomes operative from the time it is effected and will protect the grantee in such instrument against conveyances and incumbrances made subsequently thereto.[1] The only difference, therefore, between recording within the time specified and afterwards is that in the first case the record is notice from the time of execution; in the latter, from the time of record.[2]

VI. When Record Takes Effect — 1. In General — From Time of Filing.— It is the usual course in recording to deposit the instrument with the recording officer, who makes an entry of the fact and time of filing[3] and places it among the accessible files of newly deposited unrecorded instruments. At an opportune time — in some states within a time specified by statute[4] — the recorder enrols it upon the record books. This transcript then becomes the true and only record, since the owner of the instrument usually removes it from the record office after the enrolment has been made.[5] It will be observed that between the date of filing and that of the transcribing, the instrument itself remains in the recorder's office subject to public inspection. It is, therefore, with good reason that the completed record is declared, in most states by statute,[6] to relate back to the moment of filing the instrument, and give constructive notice from that time.[7] But under some statutes the record does

properly recorded within twenty-four hours after its execution. Miller *v.* Waite, 60 Neb. 431, *reversing* on rehearing 59 Neb. 319, and *overruling* Lancaster County Bank *v.* Horn, 34 Neb. 742. See the title Assignments for Benefit of Creditors, vol. 3, p. 68, note 1.

1. *United States.* — De Lane *v.* Moore, 14 How. (U. S.) 253; U. S. *v.* Devereux, (C. C. A.) 90 Fed. Rep. 182; *In re* Schmitt, 109 Fed. Rep. 267; *In re* Shirley, (C. C. A.) 112 Fed. Rep. 301.

Alabama. — Mallory *v.* Stodder, 6 Ala. 801.

Georgia. — Hand *v.* McKinney, 25 Ga. 648; Lee *v.* Doe, 27 Ga. 637, 73 Am. Dec. 746; Anderson *v.* Dugas, 29 Ga. 440; Allen *v.* Holding, 29 Ga. 485; Williams *v.* Logan, 32 Ga. 165; Williams *v.* Adams, 43 Ga. 407; Adair *v.* Davis, 71 Ga. 769; Hockenhull *v.* Oliver, 80 Ga. 89, 12 Am. St. Rep. 235; Cabot *v.* Armstrong, 100 Ga. 438; White *v.* Interstate Bldg., etc., Assoc., 106 Ga. 146.

Indiana. — Meni *v.* Rathbone, 21 Ind. 454; Runyan *v.* McClellan, 24 Ind. 165; Trisler *v.* Trisler, 38 Ind. 282; Gilchrist *v.* Gough, 63 Ind. 576, 30 Am. Rep. 250; Carson *v.* Eickhoff, 148 Ind. 596.

Kansas. — McVay *v.* English, 30 Kan. 368. See also Cameron *v.* Marvin, 26 Kan. 612.

Kentucky. — Meier *v.* Flinsbach, 95 Ky. 146.

Mississippi. — McRaven *v.* McGuire, 9 Smed. & M. (Miss.) 34.

New Jersey. — Plume *v.* Bone, 13 N. J. L. 63.

Ohio. — Irvin *v.* Smith, 17 Ohio 226.

Oregon. — Fleschner *v.* Sumpter, 12 Oregon 161.

South Carolina. — Steele *v.* Mansel, 6 Rich. L. (S. Car.) 454; Leger *v.* Doyle, 11 Rich. L. (S. Car.) 109, 70 Am. Dec. 240; Belk *v.* Massey, 11 Rich. L. (S. Car.) 614; King *v.* Fraser, 23 S. Car. 543; South Carolina L. & T. Co. *v.* McPherson, 26 S. Car. 431; Mowry *v.* Crocker, 33 S. Car. 436; Summers *v.* Brice, 36 S. Car. 204.

Texas. — Vickers *v.* Carnahan, 4 Tex. Civ. App. 305; Maverick *v.* Bohemian Club, (Tex. Civ. App. 1896) 36 S. W. Rep. 147; Moore *v.* Masterson, 19 Tex. Civ. App. 308.

Under the Maryland Statutes any instrument except a mortgage, although not recorded within the prescribed period of six months, may be recorded thereafter and becomes effective from the time of such recording. Pfeaff *v.* Jones, 50 Md. 263; Stanhope *v.* Dodge, 52 Md. 483; Rosenthal *v.* Maryland Brick Co., 61 Md. 594.

But a Mortgage Must Be Recorded Within Six Months after its execution, else it cannot be recorded at all without an order or decree of a court of chancery. Pannell *v.* Farmers' Bank, 7 Har. & J. (Md.) 202; Sprigg *v.* Lyles, 2 Gill & J. (Md.) 446; Roberts *v.* Salisbury, 3 Gill & J. (Md.) 425; Sixth Ward Bldg. Assoc. No. 5 *v.* Willson, 41 Md. 506; Pfeaff *v.* Jones, 50 Md. 263; Stanhope *v.* Dodge, 52 Md. 483, Nally *v.* Long, 56 Md. 567.

But when recorded in pursuance of such an order or decree, it becomes effective from that time. Sprigg *v.* Lyles, 2 Gill & J. (Md.) 446. And see Carroll *v.* Norwood, 1 Har. & J. (Md.) 167.

2. See Anderson *v.* Dugas, 29 Ga. 440.

3. See the local statutes.

4. See Stim. Am. Stat. L., § 1619.

It Will Be Presumed, in the absence of evidence to the contrary, that the recording was done on the day the instrument was left for record. Whitacre *v.* Martin, 51 Minn. 421.

5. **Instrument Removed After Enrolment.** — Donald *v.* Beals, 57 Cal. 399; Hatch *v.* Haskins, 17 Me. 391. See also Terrell *v.* Andrew County, 44 Mo. 312.

6. Stim. Am. Stat. L., § 1617.

7. **Effective from Time of Filing** — *Alabama.* — M'Gregor *v.* Hall, 3 Stew. & P. (Ala.) 397; Dubose *v.* Young, 10 Ala. 365; Turner *v.* McFee, 61 Ala. 468; Heflin *v.* Slay, 78 Ala. 180; Leslie *v.* Hinson, 83 Ala. 266; Seibold *v.* Rogers, 110 Ala. 438; Eufaula Nat. Bank *v.* Pruett, 128 Ala. 470.

California. — Quackenbush *v.* Reed, 102 Cal. 493; Watkins *v.* Wilhoit, 104 Cal. 395; Edwards *v.* Grand, 121 Cal. 254; Cady *v.* Purser, 131 Cal. 552.

District of Columbia. — Sis *v.* Boarman, 11 App. Cas. (D. C.) 116.

not become effective until certain prescribed index entries have been made.[1]

The Officer's Indorsement on the instrument as to its filing for record is not an essential part of the registration.[2] Where such indorsement is made it constitutes *prima facie* evidence of the fact and date of filing,[3] but it is not conclusive and may be controverted by parol evidence.[4]

2. What Constitutes a Filing for Record. — To constitute a filing for record

Illinois. — Cook *v.* Hall, 6 Ill. 575; Merrick *v.* Wallace, 19 Ill. 486; Nattinger *v.* Ware, 41 Ill. 245; Tucker *v.* Shaw, 158 Ill. 326; Jummel *v.* Mann, 80 Ill. App. 288; Madlener *v.* Ruesch, 91 Ill. App. 391.

Kentucky. — Webb *v.* Austin, (Ky. 1900) 58 S. W. Rep. 808, 22 Ky. L. Rep. 764.

Nebraska. — Deming *v.* Miles, 35 Neb. 739, 37 Am. St. Rep. 464.

New Jersey. — Mott *v.* Newark German Hospital, 55 N. J. Eq. 722.

North Carolina. — Davis *v.* Whitaker, 114 N. Car. 279, 41 Am. St. Rep. 793. But see Bostic *v.* Young, 116 N. Car. 766, holding that a deed of trust takes effect against judgment creditors only from the time it is actually recorded.

Ohio. — Kalb *v.* Wise, 5 Ohio Dec. 533, 5 Ohio N. P. 5.

Pennsylvania. — Shebel *v.* Bryden, 114 Pa. St. 147; Farabee *v.* McKerrihan, 172 Pa. St. 234, 51 Am. St. Rep. 734.

South Dakota. — Parrish *v.* Mahany, 10 S. Dak. 276, 66 Am. St. Rep. 715.

Tennessee. — Wilson *v.* Eifler, 11 Heisk. (Tenn.) 179; Hughes *v.* Powers, 99 Tenn. 480; Turberville *v.* Fowler, 101 Tenn. 88. See also Southern Bldg., etc., Assoc. *v.* Rodgers, 104 Tenn. 437.

Texas. — Willis *v.* Thompson, 85 Tex. 301; Cleveland *v.* Empire Mills, 6 Tex. Civ. App. 479; Parker *v.* Panhandle Nat. Bank, 11 Tex. Civ. App. 707; Ames Iron Works *v.* Chinn, 15 Tex. Civ. App. 88; Hudson *v.* Randolph, (C. C. A.) 66 Fed. Rep. 216, *following* Texas practice.

Vermont. — Jarvis *v.* Aikens, 25 Vt. 635; Fairbanks *v.* Davis, 50 Vt. 251; Blair *v.* Ritchie, 72 Vt. 311.

Virginia. — Mercantile Co-operative Bank *v.* Brown, 96 Va. 614; Virginia Bldg., etc., Co. *v.* Glenn, 99 Va. 460.

See also the title CHATTEL MORTGAGES, vol. 5, p. 1013.

1. Not Effective until Indexed. — Ritchie *v.* Griffiths, 1 Wash. 429, 22 Am. St. Rep. 155.

As to the necessity for indexing generally, see *infra*, VIII. 4.

In *Wisconsin* the record of a deed takes effect only when the required index entries are made. International L. Ins. Co. *v.* Scales, 27 Wis. 640.

And when properly indexed the record is deemed to relate back to the time of reception for record. Pringle *v.* Dunn, 37 Wis. 449, 19 Am. Rep. 772.

But in the Case of Chattel Mortgages the record becomes effective from the time of filing for record. Smith *v.* Waggoner, 50 Wis. 155; Marlet *v.* Hinman, 77 Wis. 136, 20 Am. St. Rep. 102; Bailey *v.* Costello, 94 Wis. 87.

It Will Be Presumed, in the absence of evidence to the contrary, that an instrument was actually recorded on the day it was received for record. St. Croix Land, etc., Co. *v.* Ritchie, 73 Wis. 409.

2. Indorsement Not Essential. — Eufaula Nat. Bank *v.* Pruett, 128 Ala. 470; Gorham *v.* Summers, 25 Minn. 81; Thorn *v.* Mayer, (Buffalo Super. Ct. Gen. T.) 12 Misc. (N. Y.) 487; Metts *v.* Bright, 4 Dev. & B. L. (20 N. Car.) 173, 32 Am. Dec. 683; Cunninggim *v.* Peterson, 109 N. Car. 33; Boyce *v.* Stanton, 15 Lea (Tenn.) 346; Houghton *v.* Burnham, 22 Wis. 301; Bailey *v.* Costello, 94 Wis. 87.

Directory Statute. — The *Illinois* Act Jan. 8, 1829, requiring the recorder to keep a book and enter therein the time of filing, etc., was directory only, and his failure to keep such a book did not affect the validity of the record. The time of filing could be shown by parol. Cook *v.* Hall, 6 Ill. 575.

The Use of Ditto Marks in noting the filing of instruments for record is deprecated; but where used the court will read them as a repetition of the words immediately above them. Hughes *v.* Powers, 99 Tenn. 480.

3. Indorsement Prima Facie Evidence. — Merrick *v.* Wallace, 19 Ill. 486; Webb *v.* Austin, (Ky. 1900) 58 S. W. Rep. 808, 22 Ky. L. Rep. 764; Head *v.* Goodwin, 37 Me. 181; Thomas *v.* Hanson, 59 Minn. 274; Jackson *v.* Phillips, 9 Cow. (N. Y.) 94.

Simultaneous Filing. — Where two instruments are claimed to have been filed simultaneously the indorsements by the recorder of the numbers and the time of filing are to be regarded as indicating the priority. Modlener *v.* Ruesch, 91 Ill. App. 391.

The Official Character of the Officer need not be proved. Thomas *v.* Hanson, 59 Minn. 274.

Sufficient Certificate. — A certificate of the recording officer that "the foregoing writing" was duly admitted to record on a specified day is sufficient proof of that fact, and the date of the deed need not be given. Fouse *v.* Gilfillan, 45 W. Va. 213.

A Copy of a chattel mortgage with the fact of filing indorsed thereon is not evidence of the time of filing. Drexel *v.* Murphy, 59 Neb. 210.

Fractions of a Day will be noticed by the law in order to ascertain priority of record. See the title DAY, vol. 8, p. 743.

4. Not Conclusive. — Worcester Nat. Bank *v.* Cheeney, 87 Ill. 602; Budd *v.* Brooke, 3 Gill (Md.) 198, 43 Am. Dec. 321; Town *v.* Griffith, 17 N. H. 165; Cunninggim *v.* Peterson, 109 N. Car. 33; Kalb *v.* Wise, 5 Ohio Dec. 533, 5 Ohio N. P. 5; Bartlett *v.* Boyd, 34 Vt. 256; Blair *v.* Ritchie, 72 Vt. 311; Horsley *v.* Garth, 2 Gratt. (Va.) 471, 44 Am. Dec. 393. But *compare* Webb *v.* Austin, (Ky. 1900) 58 S. W. Rep. 808, 22 Ky. L. Rep. 764.

It Is for the Jury to Determine the actual time of filing where the officer's indorsement is controverted by other evidence. Budd *v.* Brooke, 3 Gill (Md.) 198, 43 Am. Dec. 321.

the instrument must be delivered to the recording officer or his deputy [1] at the recording office: delivery elsewhere will not render the record operative from that time,[2] even though the officer indorse it as filed at the time of such delivery.[3] But a delivery at the proper place is good although made after the usual office hours.[4]

Intent to Record. — The filing must be done with an intention that the instrument shall be recorded. Thus, if an instrument be filed with the officer with instructions not to record it until further notice, it will not be considered recorded until directions to record it are given,[5] even though the clerk may have noted thereon the time of receiving it.[6] And if the officer record it without such directions the record is not notice,[7] but it may, if afterwards ratified, become effective from the time of such ratification.[8]

Effect of Withdrawing Instrument. — If, after an instrument has been filed for record, it be withdrawn from the office by the grantee or by his authority[9] before it has been copied on the record books, the operation of the record is suspended until its return,[10] and the purpose of such withdrawal is immaterial.[11]

1. Must Be to Officer or Deputy. — Wilson *v.* Eifler, 11 Heisk. (Tenn.) 179.

Vermont — Assistant Clerk. — In Vermont an assistant clerk can exercise the duties of the clerk only where the latter is absent or disabled, and therefore he is not authorized to receive an instrument for record when the clerk is present. Blair *v.* Ritchie, 72 Vt. 311.

Where No One Is Present in the Office, it is not sufficient to leave the instrument there with the recording fee; and if it be not in fact recorded until several days later, the record will take effect only from the time of such actual recording. Crouse *v.* Johnson, 65 Hun (N. Y.) 337.

Person Performing Recorder's Duties. — It is a sufficient filing of a record that the instrument is left with a person who is actually discharging the duties of the office, whether he is a regularly appointed deputy or not. Cook *v.* Hall, 6 Ill. 575; Fairbanks *v.* Davis, 50 Vt. 251.

A Person in Charge During a Vacancy in the office may properly receive an instrument for record. Bishop *v.* Cook, 13 Barb. (N. Y.) 326; Deane *v.* Hutchinson, 40 N. J. Eq. 83; Stewart *v.* Beale, 68 N. Y. 629, 7 Hun (N. Y.) 405; Maley *v.* Tipton, 2 Head (Tenn.) 403.

2. Delivery Must Be at Recording Office. — Edwards *v.* Grand, 121 Cal. 254; Withrow *v.* Citizens Bank, 55 Kan. 378; Kalb *v.* Wise, 5 Ohio Dec. 533, 5 Ohio N. P. 5, Matter of Jones, 2 Ohio Dec. 409, 7 Ohio N. P. 225.

In Withrow *v.* Citizens Bank, 55 Kan. 378, a chattel mortgage was mailed by the mortgagor to the recording officer, and on a Sunday the mortgagee called at the officer's house, accepted the mortgage and returned it to the officer with the proper fee, requesting him to record it. On Monday morning at seven o'clock the officer filed the mortgage in his office. It was held that the record took effect from that time and not from the time the instrument was delivered to him by the mortgagee with a request to record.

In Horsley *v.* Garth, 2 Gratt. (Va.) 471, 44 Am. Dec. 393, it was held that going to the clerk's office just before midnight, and, he not being there, taking it to his house just before sunrise the next morning and personally delivering it to him, stating the other attempt, does not make it good as a recorded deed from such previous day.

3. Not Made Effective by Officer's Indorsement. — Edwards *v.* Grand, 121 Cal. 254.

4. Delivery After Office Hours Good. — Edwards *v.* Grand, 121 Cal. 254.

5. Must Be Intent to Record. — Bowen *v.* Fassett, 37 Ark. 507; Dedman *v.* Earle, 52 Ark. 164; Town *v.* Griffith, 17 N. H. 165; Turberville *v.* Fowler, 101 Tenn. 88; Blair *v.* Ritchie, 72 Vt. 311; Hunt *v.* Allen, 73 Vt. 322.

6. Indorsement by Officer as to Time of Receipt. — Town *v.* Griffith, 17 N. H. 165.

7. Record Ineffective. — Haworth *v.* Taylor, 108 Ill. 275; Brigham *v* Brown, 44 Mich. 59; Blair *v.* Ritchie, 72 Vt. 311.

But *compare* Mercantile Co-operative Bank *v.* Brown, 96 Va. 614, where a deed was regularly filed for record but, under subsequent instructions from the grantee, the clerk did not actually record the deed until later. It was held that the record was effective from the time of filing as against an intermediate conveyance.

8. Effective from Time of Ratification. — Blair *v.* Ritchie, 72 Vt. 311.

9. An Unauthorized Withdrawal of the instrument by a third person without the knowledge of the grantee will not affect the operation of the record. Parrish *v.* Mahany, 10 S. Dak. 276, 66 Am. St. Rep. 715; Parker *v.* Panhandle Nat. Bank, 11 Tex. Civ. App. 707.

Loss of Instrument Through Officer's Fault. — Where a chattel mortgage, properly filed for record, thereafter disappeared from the files through the negligence or misconduct of the officer, it was held that the record was not invalidated thereby. Marlet *v.* Hinman, 77 Wis. 136, 20 Am. St. Rep. 102.

10. Withdrawal Suspends Operation of Record. — Lawton *v.* Gordon, 37 Cal. 202; Kiser *v.* Heuston, 38 Ill. 252; Yerger *v.* Barz, 56 Iowa 77; Webb *v.* Austin, (Ky. 1900) 58 S. W. Rep. 808, 22 Ky. L. Rep. 764; Jones *v.* Parker, 73 Me. 248; Clamorgan *v.* Lane, 9 Mo. 446; Ward *v.* Watson, 24 Neb. 592; Hickman *v.* Perrin, 6 Coldw. (Tenn.) 135; Johnson *v.* Burden, 40 Vt. 567, 94 Am. Dec. 436.

11. Purpose Not Material. — Worcester Nat. Bank *v.* Cheeney, 87 Ill. 602. But *compare* Wilson *v.* Leslie, 20 Ohio 161.

But the record again becomes effective from the time the instrument is returned.[1]

VII. Prerequisites to Recordation — 1. Validity of Instrument — *a.* In General. — In order that the effects of registration may attach to an instrument, it must be a valid instrument;[2] the record of a void instrument is of no effect.[3]

b. Signing and Sealing. — Where signing and sealing are necessary to the validity of a deed, mortgage, or other instrument, such instrument is not entitled to record unless it be properly signed[4] and sealed.[5]

c. Delivery. — Where delivery of a deed or other instrument is necessary to its validity, it is a prerequisite to valid registration.[6] And, as there can be no delivery without an acceptance, a record of an instrument made without the knowledge or consent of the purchaser is of no effect until it has been accepted.[7] But a subsequent acceptance by the purchaser renders the record effective from that time.[8]

Recording as Evidence of Delivery. — The fact that an instrument appears of record raises a presumption that it has been delivered,[9] but this presumption

1. Effective from Time of Return. — Woodruff *v.* Phillips, 10 Mich. 500.

2. Must Be Valid Instrument. — Loomis *v.* Brush, 36 Mich. 40; Southern Bldg., etc., Assoc. *v.* Rodgers, 104 Tenn. 437; Wright *v.* Lancaster, 48 Tex. 250; Stiles *v.* Japhet, 84 Tex. 91; Terry *v.* Cutler, 14 Tex. Civ. App. 520; Isham *v.* Bennington Iron Co., 19 Vt. 230; Hunt *v.* Allen, 73 Vt. 322; Wood *v.* Meyer, 36 Wis. 308. And see Colvin *v.* Warford, 20 Md. 357.

As to the necessity for the record to show a valid instrument, see *infra*, VIII. 5. *a.*

Forged Deed. — The recording statutes, requiring all instruments affecting the title to land to be recorded, have no application to forged deeds and other instruments, as they cannot affect the title to land, and are therefore not entitled to record. And innocent purchasers, without notice of the forgery, claiming under a forged deed which has been placed upon the records, will not have a good title as against the true owner. Pry *v.* Pry, 109 Ill. 466.

Revenue Stamps. — The United States War Revenue Law of 1898, making the affixing of revenue stamps a condition precedent to the recording of any instrument, applied only to records kept pursuant to federal statutes, and the omission of such stamps did not affect the validity of an instrument entitled to record under the *New York* laws. People *v.* Fromme, 35 N. Y. App. Div. 459.

3. See *infra*, XII.

4. Must Be Signed. — Shepherd *v.* Burkhalter, 13 Ga. 443, 58 Am. Dec. 523.

5. Must Be Sealed. — Racouillat *v.* Sansevain, 32 Cal. 376; Racouillat *v.* Rene, 32 Cal. 450; Switzer *v.* Knapps, 10 Iowa 72, 74 Am. Dec. 375; Arthur *v.* Screven, 39 S. Car. 77. See Van Riswick *v.* Goodhue, 50 Md. 57.

As to necessity for record to show seal, see *infra*, VIII. 5. *b.*

6. Delivery Essential. — Edwards *v.* Thom, 25 Fla. 222; Fitzgerald *v.* Goff, 99 Ind. 28. See Wade on Notice, § 141.

7. Record Before Acceptance of No Validity — *United States.* — Parmelee *v.* Simpson, 5 Wall. (U. S.) 81.

Illinois. — Herbert *v.* Herbert, 1 Ill. 354, 12 Am. Dec. 192; Union Mut. L. Ins. Co. *v.* Campbell, 95 Ill. 267, 35 Am. Rep. 166; Weber *v.* Christen, 121 Ill. 91, 2 Am. St. Rep. 68.

Indiana. — Woodbury *v.* Fisher, 20 Ind. 387, 83 Am. Dec. 325.

Maine. — Oxnard *v.* Blake, 45 Me. 602.

Massachusetts. — Samson *v.* Thornton, 3 Met. (Mass.) 275, 37 Am. Dec. 135; Parker *v.* Hill, 8 Met. (Mass.) 447.

New York. — Jackson *v.* Phipps, 12 Johns. (N. Y.) 418; Foster *v.* Beardsley Scythe Co., 47 Barb. (N. Y.) 505.

Rhode Island. — Cook *v.* Cook, (R. I. 1898) 43 Atl. Rep. 537.

Wisconsin. — Welch *v.* Sackett, 12 Wis. 243; Miller *v.* Blinebury, 21 Wis. 676; McCutchin *v.* Platt, 22 Wis. 561.

But *compare* Carnall *v.* Duval, 22 Ark. 136.

8. Subsequent Acceptance Validates Record. — Gould *v.* Day, 94 U. S. 405; Oxnard *v.* Blake, 45 Me. 602; Hedge *v.* Drew, 12 Pick. (Mass.) 141, 22 Am. Dec. 416; Parker *v* Hill, 8 Met. (Mass.) 447; Mutual Ben. L. Ins. Co. *v.* Rowand, 26 N. J. Eq. 389; Farmers', etc., Bank *v.* Drury, etc., Bank, 38 Vt. 426.

9. Recording Presumptive Evidence of Delivery — *Georgia.* — Stallings *v.* Newton, 110 Ga. 875.

Illinois. — Brady *v.* Huber, 197 Ill. 291.

Kansas. — Neel *v.* Neel, (Kan. 1902) 69 Pac. Rep 162.

Maryland. — Craufurd *v.* State, 6 Har. & J. (Md.) 231; Hutchins *v.* Dixon, 11 Md. 29.

Michigan. — Patrick *v.* Howard, 47 Mich. 40; Stevens *v.* Castel, 63 Mich. 111; Fenton *v.* Miller, 94 Mich. 204.

Minnesota. — Conlan *v.* Grace, 36 Minn. 276.

Mississippi. — Claiborne *v.* Holmes, 51 Miss. 153.

Missouri. — Tobin *v.* Bass, 85 Mo. 654, 55 Am. Rep. 392; Standiford *v.* Standiford, 97 Mo. 231.

Nebraska. — Bowman *v.* Griffith, 35 Neb. 361.

New York. — Jackson *v.* Perkins, 2 Wend. (N. Y.) 308; Gilbert *v.* North American F. Ins. Co., 23 Wend. (N. Y.) 43, 35 Am. Dec. 543; Raynor *v.* Syracuse University, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 83; National Bank *v.* Bonnell, 46 N. Y. App. Div. 302.

Ohio. — Wright *v.* Werden, 8 Ohio Dec. 1, 7 Ohio N. P. 122.

is *prima facie* only and may be rebutted by showing that there was no intention to deliver or no acceptance of delivery.[1]

d. ACKNOWLEDGMENT OR PROOF OF EXECUTION. — Under the statutes in most states a valid acknowledgment or proof of execution is made a prerequisite to the registration of an instrument, and the recording of an unacknowledged or defectively acknowledged instrument has no effect whatever.[2]

For further citations, see the title DEEDS, vol. 9, p. 159.

Where the Grantor Was Also the Recorder it was held that a registration by him of his own deed was *prima facie* evidence of a delivery. Fenton *v.* Miller, 94 Mich. 204.

There Is No Presumption that the date of filing for record was the time of delivery. Bull *v.* Griswold, 19 Ill. 631; Savery *v.* Browning, 18 Iowa 246.

1. Presumption of Delivery Rebuttable — *United States.* — Parmelee *v.* Simpson, 5 Wall. (U. S.) 81.

Georgia. — Wellborn *v.* Weaver, 17 Ga. 267, 63 Am. Dec. 235.

Illinois. — Herbert *v.* Herbert, 1 Ill. 354, 12 Am. Dec. 192; Weber *v.* Christen, 121 Ill. 91, 2 Am. St. Rep. 68.

Indiana. — Woodbury *v.* Fisher, 20 Ind. 387, 83 Am. Dec. 325.

Iowa. — Day *v.* Griffith, 15 Iowa 104; National State Bank *v.* Morse, 73 Iowa 174, 5 Am. St. Rep. 670.

Kentucky. — Bell *v.* Farmer's Bank, 11 Bush (Ky.) 34.

Maine. — Patterson *v.* Snell, 67 Me. 559.

Massachusetts. — Hawkes *v.* Pike, 105 Mass. 560, 7 Am. Rep. 554.

Tennessee. — Thomason *v.* Hays, (Tenn. Ch. 1901) 62 S. W. Rep. 336.

Texas. — Koppelmann *v.* Koppelmann, 94 Tex. 40.

For further citations, see the title DEEDS, vol. 9, p. 160.

Where Without the Grantee's Knowledge or Consent the grantor recorded a deed it was held not to constitute delivery. Guggenheimer *v.* Lockridge, 39 W. Va. 457.

2. Acknowledgment or Proof of Execution Essential — *England.* — Latouche *v.* Dunsany, 1 Sch. & Lef. 137.

United States. — Hitz *v.* Jenks, 123 U. S. 298; Prentice *v.* Duluth Storage, etc., Co., (C. C. A.) 58 Fed. Rep. 437.

Arizona. — Reid *v.* Kleyensteuber, (Ariz. 1900) 60 Pac. Rep. 879.

Arkansas. — Main *v.* Alexander, 9 Ark. 112, 47 Am. Dec. 732; Martin *v.* O'Bannon, 35 Ark. 62; Conner *v.* Abbott, 35 Ark. 365; Griesler *v.* McKennon, 44 Ark. 517; Leonhard *v.* Flood, 68 Ark. 162.

California. — Hastings *v.* Vaughn, 5 Cal. 315; Mesick *v.* Sunderland, 6 Cal. 297; Landers *v.* Bolton, 26 Cal. 393; McMinn *v.* O'Connor, 27 Cal. 238.

District of Columbia. — Chafee *v.* Blatchford, 6 Mackey (D. C.) 459.

Florida. — Sanders *v.* Pepoon, 4 Fla. 465; Edwards *v.* Thom, 25 Fla. 222; Townsend *v.* Edwards, 25 Fla. 582; Kendrick *v.* Latham, 25 Fla. 819; Hope *v.* Johnston, 28 Fla. 55; Keech *v.* Enriquez, 28 Fla. 597; Cleland *v.* Long, 34 Fla. 353; Parker *v.* Cleveland, 37 Fla. 39; McKeown *v.* Collins, 38 Fla. 276.

Georgia. — Rushin *v.* Shields, 11 Ga. 636, 56 Am. Dec. 436; Shepherd *v.* Burkhalter, 13 Ga. 443, 58 Am. Dec. 523; Gardner *v.* Granniss, 57 Ga. 557; Mac Kenzie *v.* Jackson, 82 Ga. 80; McCandless *v.* Yorkshire Guarantee, etc., Corp., 101 Ga. 180.

Illinois. — Choteau *v.* Jones, 11 Ill. 300, 50 Am. Dec. 460; Porter *v.* Dement, 35 Ill. 478; Frank *v.* Miner, 50 Ill. 444; Long *v.* Cockern, 128 Ill. 29.

Indiana. — Jordan *v.* Corey, 2 Ind. 385, 52 Am. Dec. 516; Deming *v.* State, 23 Ind. 416; Allen *v.* Vincennes, 25 Ind. 531; Westerman *v.* Foster, 57 Ind. 408; Starnes *v.* Allen, 151 Ind. 108; Kothe *v.* Krag-Reynolds Co., 20 Ind. App. 293.

Iowa. — Gould *v.* Woodward, 4 Greene (Iowa) 82; Brewer *v.* Crow, 4 Greene (Iowa) 520; Jones *v.* Berkshire, 15 Iowa 248, 83 Am. Dec. 412; Carleton *v.* Byington, 18 Iowa 482; Smith *v.* Clark, 100 Iowa 605; Sherod *v.* Ewell, 104 Iowa 253; Waterhouse *v.* Black, 87 Iowa 317.

Kansas. — Fisher *v.* Cowles, 41 Kan. 418; Guild *v.* Ohio Lodge No. 132, 6 Kan. App. 67.

Kentucky. — Miller *v.* Henshaw, 4 Dana (Ky.) 325; Edwards *v.* Brinker, 9 Dana (Ky.) 69; Blight *v.* Banks, 6 T. B. Mon. (Ky.) 192, 17 Am. Dec. 136; Herd *v.* Cist, (Ky. 1889) 12 S. W. Rep. 466.

Maine. — Jones *v.* Roberts, 65 Me. 273.

Maryland. — Budd *v.* Brooke, 3 Gill (Md.) 198, 43 Am. Dec. 321; Berry *v.* Matthews, 13 Md. 537; Brydon *v.* Campbell, 40 Md. 331; Dyson *v.* Simmons, 48 Md. 207; Johns *v.* Reardon, 3 Md. Ch. 57.

Michigan. — Dewey *v.* Campau, 4 Mich. 565; Brown *v* McCormick, 28 Mich. 215; Dohm *v.* Haskin, 88 Mich. 144; Chicago Lumbering Co. *v.* Powell, 120 Mich. 51.

Minnesota. — Minor *v.* Willoughby, 3 Minn. 225; Parret *v.* Shaubhut, 5 Minn. 323, 80 Am. Dec. 424; Baze *v.* Arper, 6 Minn. 220; Cogan *v.* Cook, 22 Minn. 137; Benson Bank *v.* Hove, 45 Minn. 40.

Mississippi. — Loughridge *v.* Bowland, 52 Miss. 546.

Missouri. — Allen *v.* Moss, 27 Mo. 354; Lemay *v.* Poupenez, 35 Mo. 71; Hainey *v.* Alberry, 73 Mo. 427; Brim *v.* Fleming, 135 Mo. 597; German American Bank *v.* Carondelet Real Estate Co., 150 Mo. 570.

New Hampshire. — Hill *v.* Gilman, 39 N. H. 88; Stevens *v.* Morse, 47 N. H. 532; Lovell *v.* Osgood, 60 N. H. 71.

New York. — Williams *v.* Birbeck, Hoffm. (N. Y.) 369; Card *v.* Bird, 10 Paige (N. Y.) 435; Wolcott *v.* Sullivan, 1 Edw. (N. Y.) 408; Peck *v.* Mallams, 10 N. Y. 509; Washburn *v.* Burnham, 63 N. Y. 132; Stoddard *v.* Rotton, 5 Bosw. (N. Y.) 383; Wetmore *v.* Roberts, (Supm. Ct.) 10 How. Pr. (N. Y.) 54; Smith *v.* Tim, (C. Pl. Gen. T.) 14 Abb. N. Cas. (N. Y.) 447; Armstrong *v.* Combs, 15 N. Y. App. Div. 246.

North Carolina. — Suddereth *v.* Smyth, 13

But some statutes allow recording without previous acknowledgment.[1]

Certificate of Authenticity. — Where the statute requires a further certificate as to the official character and authority of the officer taking the acknowledgment,[2] such additional certificate is a prerequisite to valid registration.[3]

Attestation. — Where the statute requires attestation of the instrument by witnesses in addition to the formal acknowledgment before an officer, the record of an instrument not properly attested will not operate as constructive notice.[4]

Ired. L. (35 N. Car.) 452; Todd *v.* Outlaw, 79 N. Car. 235; Quinnerly *v.* Quinnerly, 114 N. Car. 145; Bernhardt *v.* Brown, 122 N. Car. 587, 65 Am. St. Rep. 725; Blanton *v.* Bostic, 126 N. Car. 418; Hatcher *v.* Hatcher, 127 N. Car. 200.

Ohio. — White *v.* Denman, 1 Ohio St. 110; Amick *v.* Woodworth, 58 Ohio St. 86; Straman *v.* Rechtine, 58 Ohio St. 443; Brannon *v.* Brannon, 2 Disney (Ohio) 224.

Pennsylvania. — Zeigler *v.* Shomo, 78 Pa. St. 357; Lancaster *v.* Flowers, 9 Pa. Dist. 241; Gans *v.* Drum, 24 Pa. Co. Ct. 481.

South Carolina. — Villard *v.* Robert, 1 Strobh. Eq. (S. Car.) 393; Wood *v.* Reeves, 23 S. Car. 382; Armstrong *v.* Austin, 45 S. Car. 69.

Tennessee. — Harrison *v.* Wade, 3 Coldw. Tenn.) 505; McGuire *v.* Gallagher, 95 Tenn. 349; Citizens' Bank *v.* McCarty, 99 Tenn. 469; Alabama Marble, etc., Co. *v.* Chattanooga Marble, etc., Co., (Tenn. Ch. 1896) 37 S. W. Rep. 1004.

Texas. — Craddock *v.* Merrill, 2 Tex. 494; Berry *v.* Donley, 26 Tex. 737; Peters *v.* Clements, 46 Tex. 115; McDaniel *v.* Needham, 61 Tex. 269; Carleton *v.* Lombardi, 81 Tex. 355; Stiles *v.* Japhet, 84 Tex. 91; Heintz *v.* Thayer, 92 Tex. 658, *rehearing denied* 92 Tex. 667; Masterson *v.* Todd, 6 Tex. Civ. App. 131.

Vermont. — Hoisington *v.* Hoisington, 2 Aik. (Vt.) 235; Stevens *v.* Brown, 3 Vt. 420, 23 Am. Dec. 215; Sawyer *v.* Adams, 8 Vt. 172, 30 Am. Dec. 459; Pope *v.* Henry, 24 Vt. 560.

Virginia. — Moore *v.* Auditor, 3 Hen. & M. (Va.) 232; Raines *v.* Walker, 77 Va. 92; Nicholson *v.* Gloucester Charity School, 93 Va. 101; Iron Belt Bldg., etc., Assoc. *v.* Groves, 96 Va. 138.

West Virginia. — Fleming *v.* Ervin, 6 W. Va. 215; Tavenner *v.* Barrett, 21 W. Va. 656; Parkersburg Nat. Bank *v.* Neal, 28 W. Va. 744; Abney *v.* Ohio Lumber, etc., Co., 45 W. Va. 446.

Wisconsin. — Harrass *v.* Edwards, 94 Wis. 459.

For further citations, see the title ACKNOWLEDGMENTS, vol. 1, pp. 485, 490.

As to the effect in general of recording an instrument not entitled to record, see *infra*, XII.

Proof of Execution by the attesting witnesses is by statute in some states made equivalent to acknowledgment. Whittle *v.* Vanderbilt Min., etc., Co., 83 Fed. Rep. 48. And see the title ACKNOWLEDGMENTS, vol. 1, pp. 485, 569.

But in the absence of statutory authority it would seem that proof of execution could not be substituted for acknowledgment so as to entitle an instrument to record. McIntyre *v.* Kamm, 12 Oregon 253. But see Carrier *v.* Hampton, 11 Ired. L. (33 N. Car.) 307.

What Law Governs. — The sufficiency of the acknowledgment must be determined by the law of the place where the instrument is to be recorded. Jones *v.* Berkshire, 15 Iowa 248, 83 Am. Dec. 412; Galpin *v.* Abbott, 6 Mich. 17; Irwin *v.* Welch, 10 Neb. 479; Woolfolk *v.* Graniteville Mfg. Co., 22 S. Car. 332; State *v.* Cowhick, 9 Wyo. 93.

1. Acknowledgment Not Essential. — See the title ACKNOWLEDGMENTS, vol. 1, p. 492. And see Tranum *v.* Wilkinson, 81 Ala. 408; Schwartz *v.* Baird, 100 Ala. 154; McCormick *v.* Evans, 33 Ill. 327; Nottinger *v.* Ware, 41 Ill. 245; Morrison *v.* Brown, 83 Ill. 562; Joliet First Nat. Bank *v.* Adam, 34 Ill. App. 159; Ryan *v.* Carr, 46 Mo. 483; Singer Mfg. Co. *v.* Shull, 74 Mo. App. 486.

A State Grant may be recorded without further proof than the certificate of the secretary of state attested by the great seal of the state. Barcello *v.* Hapgood, 118 N. Car. 712.

2. See the title ACKNOWLEDGMENTS, vol. 1, p. 535.

3. Certificate of Authenticity Essential — *United States.* — Morton *v.* Smith, 2 Dill. (U. S.) 216; Strong *v.* Smith, 3 McLean (U. S.) 362; Milligan *v.* Mayne, 2 Cranch (C. C.) 210; Prentice *v.* Duluth Storage, etc., Co., (C. C. A.) 58 Fed. Rep. 437.

Indiana. — Reasoner *v.* Edmundson, 5 Ind. 393.

Iowa. — Jones *v.* Berkshire, 15 Iowa 248, 83 Am. Dec. 412.

Maryland. — Dyson *v.* Simmons, 48 Md. 207; Sitler *v.* McComas, 66 Md. 135.

Nebraska. — Irwin *v.* Welch, 10 Neb. 479; O'Brien *v.* Gaslin, 20 Neb. 347.

Ohio. — De Segond *v.* Culver, 10 Ohio 188.

Oregon. — Musgrove *v.* Bonser, 5 Oregon 313, 20 Am. Rep. 737; Fleschner *v.* Sumpter, 12 Oregon 161.

Texas. — Texas Land Co. *v.* Williams, 51 Tex. 51.

Wisconsin. — Ely *v.* Wilcox, 20 Wis. 523, 91 Am. Dec. 436.

4. Attestation Required—*Connecticut.*— Carter *v.* Champion, 8 Conn. 549, 21 Am. Dec. 695.

Georgia. — Gardner *v.* Moore, 51 Ga. 268.

Maryland. — Frostburg Mut. Bldg. Assoc. *v.* Brace, 51 Md. 508.

Michigan. — Galpin *v.* Abbott, 6 Mich. 17.

Minnesota. — Parret *v.* Shaubhut, 5 Minn. 323, 80 Am. Dec. 424; Thompson *v.* Morgan, 6 Minn. 292; Ross *v.* Worthington, 11 Minn. 438, 88 Am. Dec. 95.

New Hampshire. — Hastings *v.* Cutler, 24 N. H. 481.

Ohio. — White *v.* Denman, 16 Ohio 59, 1 Ohio St. 110.

South Carolina. — Harper *v.* Barsh, 10 Rich. Eq. (S. Car.) 149.

Wisconsin. — Pringle *v.* Dunn, 37 Wis. 449, 19 Am. Rep. 772.

Defect Not Apparent on Face. — Where the defect in the acknowledgment is not apparent on the face of the instrument, as, for example, a disqualifying interest in the officer who took the acknowledgment, it is very generally held that the record will operate as constructive notice notwithstanding such defect.[1] But it has been held that, where the statute requires the attestation of witnesses, in addition to acknowledgment, the record of an instrument not properly attested will not impart constructive notice even though the defect be not apparent on the face of the instrument.[2]

e. DESCRIPTION OF PROPERTY CONVEYED OR AFFECTED. — The record operates as constructive notice only so far as the property conveyed or affected is intelligibly described; and where the description is not sufficient to identify the property with reasonable certainty or to suggest an inquiry which would lead to information as to the true state of the title, the record will not operate as notice to subsequent purchasers and incumbrancers.[3] But where the

1. Latent Defect Does Not Invalidate Record — *United States.* — National Bank *v.* Conway, 1 Hughes (U. S.) 37.

Illinois. — Ogden Bldg., etc., Assoc. *v.* Mensch, 196 Ill. 554.

Minnesota. — Benson Bank *v.* Hove, 45 Minn. 40.

Missouri. — Stevens *v.* Hampton, 46 Mo. 404.

New Jersey. — Morrow *v.* Cole, 58 N. J. Eq. 203.

New York. — Heilbrun *v.* Hammond, 13 Hun (N. Y.) 474.

North Carolina. — Blanton *v.* Bostic, 126 N. Car. 418.

Pennsylvania. — Angier *v.* Schieffelin, 72 Pa. St. 106, 13 Am. Rep. 659.

Texas. — Peterson *v.* Lowry, 48 Tex. 408; Titus *v.* Johnson, 50 Tex. 224; Southwestern Mfg. Co. *v.* Hughes, 24 Tex. Civ. App. 637.

Virginia. — Corey *v.* Moore, 86 Va. 721.

2. Record Vitiated by Latent Defect. — Carter *v.* Champion, 8 Conn. 549, 21 Am. Dec. 695, wherein one of the witnesses was disqualified because she was the wife of the grantor.

3. Property Must Be Identified — *United States.* — White *v.* McGarry, 2 Flipp. (U. S.) 572; Bright *v.* Buckman, 39 Fed. Rep. 243.

Arkansas. — Adams *v.* Edgerton, 48 Ark. 419.

California. — Chamberlain *v.* Bell, 7 Cal. 292, 68 Am. Dec. 260.

Colorado. — Tabor *v* Sampson, 7 Colo. 426.

Connecticut. — Herman *v.* Deming, 44 Conn. 124.

Illinois. — Rodgers *v.* Kavanaugh, 24 Ill. 583; Wait *v.* Smith, 92 Ill. 385. See also Charter *v.* Graham, 56 Ill. 19.

Indiana. — Murphy *v.* Hendricks, 57 Ind. 593; Rinehardt *v.* Reifers, (Ind. 1902) 64 N. E. Rep. 459.

Iowa. — Scoles *v.* Wilsey, 11 Iowa 261; Halloway *v.* Platner, 20 Iowa 121, 89 Am. Dec. 517; Nelson *v.* Wade, 21 Iowa 49; Disque *v.* Wright, 49 Iowa 538; Davis *v.* Lutkiewiez, 72 Iowa 254; State Bank *v.* Felt, 99 Iowa 532, 61 Am. St. Rep. 253; Iowa Lumber Co. *v.* Cassidy, 107 Iowa 564.

Kansas. — American Invest. Co. *v.* Coulter, 8 Kan. App. 841.

Louisiana. — Green *v.* Witherspoon, 37 La. Ann. 751.

Maryland. — Brydon *v.* Campbell, 40 Md. 331.

Michigan. — Barrows *v.* Baughman, 9 Mich. 213; Van Slyck *v.* Skinner, 41 Mich. 186.

Minnesota. — Simmons *v.* Fuller, 17 Minn. 485; Bailey *v.* Galpin, 40 Minn. 319; Ada Bank *v.* Gullikson, 64 Minn. 91. See also Van Meter *v.* Knight, 32 Minn. 205.

Missouri. — Gatewood *v.* House, 65 Mo. 663; Cass County *v.* Oldham, 75 Mo. 50; Ozark Land, etc., Co. *v.* Franks, 156 Mo. 673.

Montana. — Baker *v.* Bartlett, 18 Mont. 446, 56 Am. St. Rep. 594.

Nebraska. — Bowman *v.* Griffith, 35 Neb. 361.

New Jersey. — Rutgers *v.* Kingsland, 7 N. J. Eq. 178.

Pennsylvania. — Banks *v.* Ammon, 27 Pa. St. 172; Sturtevant's Appeal, 34 Pa. St. 149.

Tennessee. — Lally *v.* Holland, 1 Swan (Tenn.) 396; Southern Bldg., etc., Assoc. *v.* Rodgers, 104 Tenn. 437.

Texas. — Wynne *v.* Admire, (Tex. Civ. App. 1896) 37 S. W. Rep. 33.

Vermont. — Sanger *v.* Craigue, 10 Vt. 555.

Virginia. — Mundy *v.* Vawter, 3 Gratt. (Va.) 518.

West Virginia. — Warren *v.* Syme, 7 W. Va. 474.

Where Land Is Omitted in the description in a mortgage, although intended to be included, the record is not constructive notice so far as the omitted land is concerned. Rutgers *v.* Kingsland, 7 N. J. Eq. 178.

"Fourteenth" Instead of "Four Tenths." — Where the record of a deed showed a conveyance of a "fourteenth" of certain land instead of "four tenths," it was held to be constructive notice only to the extent of a "fourteenth." Brydon *v.* Campbell, 40 Md. 331.

Wrong Block Number. — Where a mortgage described the mortgaged premises as lot 16 in block 67 the record was not constructive notice of a mortgage on lot 16 in block 57. Baker *v.* Bartlett, 18 Mont. 446, 56 Am. St. Rep. 594.

Schedules or Inventories of Personal Property. — It follows, from the necessity of a recorded description which sufficiently identifies the property conveyed or affected, that, when it is necessary to the identification of the property affected by a chattel mortgage that a schedule or inventory of the chattels, which is referred to in the mortgage, be examined, the schedule must be recorded. Barkman *v.* Simmons, 23 Ark. 1; Sawyer *v.* Pennell, 19 Me. 167; Chapin *v.* Cram, 40 Me. 561; M'Kinnon *v.* M'Lean, 2

description, though imperfect or erroneous, is yet such that it will reasonably put one on an inquiry that would lead to a correct knowledge of the identity of the property intended to be conveyed, the record will charge notice.[1] And a defective description may sometimes be aided by reference to another recorded instrument.[2]

f. NATURE AND AMOUNT OF DEBT SECURED. — In some jurisdictions it is the policy of the recording acts that, where the instrument creates a lien upon property, the real nature of the transaction, so far as it can be disclosed, and the amount of the debt secured, must be shown [3]

2. Prepayment of Recording Fee. — Under statutes providing that no deed shall be admitted to record until the tax thereon be paid, and the recording officer is not bound to receive a deed for record until such tax has been paid;[4] yet if he permits a deed to be deposited for record in his office without prepayment he is bound to record it,[5] and the record will be valid.[6] The statute is merely directory, and if the officer accepts the instrument for record he himself assumes the taxes,[7] but may look for reimbursement to the person

Dev. & B. L. (19 N. Car.) 79. But if the schedule is not necessary to the identification of the property, it need not be recorded. Lund *v.* Fletcher, 39 Ark. 325, 43 Am. Rep. 270.

1. Sufficient if Searcher Put on Inquiry — *United States.* — Partridge *v.* Smith, 2 Biss. (U. S.) 183; Vercruysse *v.* Williams, (C. C. A.) 112 Fed. Rep. 206.

Colorado. — Foster *v.* Cramer, 19 Colo. 405.

Connecticut. — Lewis *v.* Hinman, 56 Conn. 55.

Illinois. — Merrick *v.* Wallace, 19 Ill. 486; Erickson *v.* Rafferty, 79 Ill. 209; Myers *v.* Perry, 72 Ill. App. 450.

Iowa. — Dargin *v.* Beeker, 10 Iowa 571; Jones *v.* Bamford, 21 Iowa 217.

Louisiana. — Thornhill *v.* Burthe, 29 La. Ann. 639; Roberts *v.* Bauer, 35 La. Ann. 453.

Michigan. — Anderson *v.* Baughman, 7 Mich. 69, 74 Am. Dec. 699; Michigan Mut. L. Ins. Co. *v.* Conant, 40 Mich. 530; Schweiss *v.* Woodruff, 73 Mich. 479.

Missouri. — Wolfe *v.* Dyer, 95 Mo. 545; Coney *v.* Laird, 153 Mo. 408.

Nebraska. — Buck *v.* Davenport Sav. Bank, 29 Neb. 407, 26 Am. St. Rep. 392; Chicago Lumber Co. *v.* Hunter, 58 Neb. 328.

Ohio. — Tousley *v.* Tousley, 5 Ohio St. 78.

Texas. — Carter *v.* Hawkins, 62 Tex 393; Polk *v.* Chaison, 72 Tex. 500; Regan *v.* Milby, 21 Tex. Civ. App. 21; Swearingen *v.* Reed, 2 Tex. Civ. App. 364; Rankin *v.* McCarthy, (Tex. Civ. App. 1896) 37 S. W. Rep. 979.

Virginia. — Florance *v.* Morien, 98 Va. 26.

Washington. — Sengfelder *v.* Hill, 21 Wash. 371.

Duty to Inquire. — Where an intending purchaser searching the title finds the record of a deed, good on its face, made by a common grantor, he cannot with impunity ignore it simply because he fails to find of record any property to which the given description is applicable, but must inquire outside the record whether or not there was, at the time the deed was made, property answering the description therein and whether the deed conflicts with the title to the property he intends purchasing. If he fails to do so and such deed afterwards proves to affect the property he has purchased, he must be held to have had notice thereof. Sengfelder *v.* Hill, 21 Wash. 371.

2. Aider by Other Recorded Instrument. — Wallace *v.* Furber, 62 Ind. 103; Newman *v.* Tymeson, 13 Wis. 172, 80 Am. Dec. 735. And see Bent *v.* Coleman, 89 Ill. 364.

3. Nature and Amount of Debt Secured. — See the titles MORTGAGES, vol. 20, p. 927; FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 521. See also Crawford *v.* Chicago, etc., R. Co., 112 Ill. 314; Gilchrist *v.* Gough, 63 Ind. 576, 30 Am. Rep. 250; Dargin *v.* Beeker, 10 Iowa 571; Fetes *v.* O'Laughlin, 62 Iowa 532; Hill *v.* McNichol, 76 Me. 314; Terrell *v.* Andrew County, 44 Mo. 309; Frost *v.* Beekman, 1 Johns. Ch. (N. Y.) 288; Beekman *v.* Frost, 18 Johns. (N. Y.) 544, 9 Am. Dec. 246.

4. Need Not Record Till Fees Paid. — Cunninggim *v.* Peterson, 109 N. Car. 33.

A Subsequent Vendee may pay the recording fee and have the deed recorded where the officer has refused to record for failure to pay such fee, and the record will take effect from the time of such payment Knight *v.* Whitman, 6 Bush (Ky.) 51, 99 Am. Dec. 652.

When Record Takes Effect. — Where a deed was presented for record but the officer refused to record it before payment of his fees, and after the instrument had lain in the office several months the fees were paid and he then indorsed it as filed of the day when first presented, stating the facts in such indorsement, it was held that the record took effect only after the payment of the fees. Cunninggim *v.* Peterson, 109 N. Car. 33.

5. Officer Must Record. — Bussing *v.* Crain, 8 B. Mon. (Ky.) 593; People *v.* Bristol, 35 Mich. 28; Ridley *v.* McGehee, 2 Dev. L. (13 N. Car.) 40; Parrish *v.* Mahany, 10 S. Dak. 276, 66 Am. St. Rep. 715.

6. Record Valid. — Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637; Parrish *v.* Mahany, 10 S. Dak. 276; Lucas *v.* Clafflin, 76 Va. 269.

But see Phillips *v.* Clark, 4 Met. (Ky.) 348, 83 Am. Dec. 471, where, under a statute providing that no deed should be held to be legally lodged for record until the tax was paid thereon, it was held that, even though a deed were left for record with the clerk, subsequent purchasers could not be charged with constructive notice thereof if the tax were unpaid.

7. Officer Assumes Taxes. — Lucas *v.* Clafflin, 76 Va. 269.

depositing it for record.[1]

3. Prepayment of Taxes on Land. — It has been held that a statute forbidding the registration of any deed of land unless accompanied by a certificate from the county treasurer that all taxes on such land have been fully paid is unconstitutional, as depriving a person of property without due process of law.[2]

VIII. MAKING THE RECORD — 1. Compliance with Statute. — The manner in which the record is to be made is prescribed by the statutes, and unless these statutes are complied with in every substantial particular by the person seeking the protection of the record the instrument will not be regarded as properly recorded.[3] But it must be borne in mind that in many jurisdictions an instrument is deemed to be recorded from the time it is filed for record, and a failure of the officer to spread it properly on the record book, while rendering him liable to a person injured thereby, will not affect the operation of the record as constructive notice.[4]

2. Requisite Steps to Obtain Registration — *a.* IN GENERAL. — The original instrument[5] must be filed in the proper office[6] and recorded by the authorized officer[7] in the appropriate book of record,[8] according to the order in which it is filed for record.[9]

Where the Officer Owed Money to the Grantee and assumed to pay the recording fee, on which promise the grantee relied, it was held to be sufficient. Buckner *v.* Davis, 19 Ky. L. Rep. 1349, 43 S. W. Rep. 445.

1. May Look to Person Depositing for Record. — Bussing *v.* Crain, 8 B. Mon. (Ky.) 593.

The Mortgagor Is Not Liable for the payment of the recording fee in the absence of an agreement to that effect with the mortgagee, since the registration of the mortgage is solely for the benefit of the latter. Simon *v.* Sewell, 64 Ala. 241.

2. Statute Unconstitutional. — State *v.* Moore, 7 Wash. 173.

3. Statutes Must Be Complied With — *California.* — Bishop *v.* McKillican, 124 Cal. 321, 71 Am. St. Rep. 68.

Massachusetts. — Hill *v.* Marston, 178 Mass. 285.

Michigan. — Galpin *v.* Abbott, 6 Mich. 17; Booth *v.* Oliver, 67 Mich. 664; Williams *v.* Hyde, 98 Mich. 152; Ramsdell *v.* Citizens' Electric Light, etc., Co., 103 Mich. 89; Crouse *v.* Michell. (Mich. 1902) 90 N. W. Rep. 32.

Mississippi. — Tillman *v.* Cowand, 12 Smed. & M. (Miss.) 262.

Missouri. — Caldwell *v.* Head, 17 Mo. 561.

New York. — Dey *v.* Dunham, 2 Johns. Ch. (N. Y.) 182; New York Security, etc., Co. *v.* Saratoga Gas, etc., Co., 88 Hun (N. Y.) 569.

Pennsylvania. — Jaques *v.* Weeks, 7 Watts (Pa.) 261; Manufacturers', etc., Bank *v.* Pennsylvania Bank, 7 W. & S. (Pa.) 335, 42 Am. Dec. 240; Peebles *v.* Reading, 8 S. & R. (Pa.) 496; Hendrickson's Appeal, 24 Pa. St. 363; Zeigler *v.* Shomo, 78 Pa. St. 357.

South Carolina. — Woolfolk *v.* Graniteville Mfg. Co., 22 S. Car. 332.

Virginia. — Johnston *v.* Slater, 11 Gratt. (Va.) 321.

West Virginia. — Cox *v.* Wayt, 26 W. Va. 807.

Wisconsin. — Pringle *v.* Dunn, 37 Wis. 449, 19 Am Rep. 772.

It Is a Question for the Court to decide whether or not an instrument has been duly recorded. Bailey *v.* Godfrey, 54 Ill. 507, 5 Am. Rep. 157.

4. See *infra*, XI. 1.

5. Recording a Copy Is Not Sufficient — *United States.* — Lewis *v.* Baird, 3 McLean (U. S.) 56; Central Trust Co. *v.* Georgia Pac. R. Co., 83 Fed. Rep. 386.

Illinois. — Porter *v.* Dement, 35 Ill. 478; St. John *v.* Conger, 40 Ill. 535; Lane *v.* Lesser, 135 Ill. 567; Mack *v.* McIntosh, 181 Ill. 633.

Kentucky. — Blight *v.* Banks, 6 T. B. Mon. (Ky.) 192, 17 Am. Dec. 136.

Minnesota. — Lund *v.* Rice, 9 Minn. 230.

New York. — See Marsden *v.* Cornell, 62 N. Y. 215.

Pennsylvania. — Watson *v.* Hue, 9 Pa. Dist. 519.

Vermont. — Stevens *v.* Brown, 3 Vt. 420, 23 Am. Dec. 215.

Virginia. — Pollard *v.* Lively, 2 Gratt. (Va.) 216.

But if the Officer Compares the Original with a Copy and thereafter makes the record from such copy, it is sufficient, the original having been actually filed with him for record. Central Trust Co. *v.* Georgia Pac. R. Co., 83 Fed. Rep. 386.

Duplicate Certificate of Sale Under Execution. — Ariz. Act March 20, 1889, § 19, subd. 3, provides that a duplicate of the officer's certificate of a sale of land under execution shall be filed in the county recorder's office. There is no provision requiring the original certificate to be recorded, and therefore the filing of the duplicate in the proper office is sufficient. Webber *v.* Kastner, (Ariz. 1898) 53 Pac. Rep. 207.

6. See *infra*, VIII. 2. *b*.

7. See *infra*, VIII. 2. *c*.

8. See *infra*, VIII. 2. *d*.

9. According to Order in Which Filed. — New York L. Ins. Co. *v.* White, 17 N. Y. 469; Sawyer *v.* Adams, 8 Vt. 172, 30 Am. Dec. 459.

As to when the record takes effect, see *supra*, VI.

It Will Be Presumed that instruments were handed to the recorder in the order in which they were filed or recorded. Brookfield *v.* Goodrich, 32 Ill. 363. But *compare* Hatch *v.* Haskins, 17 Me. 391.

Postdated Mortgage. — Where a mortgage was recorded in the order in which it was handed to the officer, it was held to be imma-

b. THE RECORD OFFICE. — The statutes designate the office in which the record is to be made.[1] Subsequent purchasers cannot be expected to examine the records of any but the designated office, and therefore, if an instrument is recorded in an office not by the statutes appointed for such purpose, the record cannot be treated as conveying constructive notice.[2]

c. THE RECORDING OFFICER. — It would seem scarcely necessary to state that, in order to render the recording effectual, it should be the act of an officer duly authorized and empowered to act in the premises.[3] But the duties of a recording officer are ministerial; therefore he cannot be disqualified from recording an instrument because he is a party to it.[4] And for the same reason he may appoint a deputy to act in his stead.[5]

d. THE RECORD BOOK. — The recording must be done in a book used for that purpose,[6] but where no particular book is designated by law, recording in any book kept by the officer for such purpose is sufficient.[7]

Separate Books for Different Classes of Instruments. — In many states separate books of record are required to be kept for certain classes of instruments,[8] and

terial that it was dated a year ahead. Jacobs *v.* Denison, 141 Mass. 117. But see Lane *v.* Duchac, 73 Wis. 646.

Subsequent Agreement with Reference Back. — An agreement subsequent to a recorded mortgage, and relating to and dependent on such prior mortgage, may be recorded in its proper order with insertion of a reference to the record of the mortgage. Choteau *v.* Thompson, 2 Ohio St. 114.

But a record of this kind without such identifying reference was held ineffectual. Bassett *v.* Hathaway, 9 Mich. 28.

1. See the local statutes.

2. Record in Wrong Office Not Notice. — McCan *v.* Bradley, 38 La. Ann. 482; Booth *v.* Oliver, 67 Mich. 664; Williams *v.* Hyde, 98 Mich. 152; Simon *v.* Kaliske, 1 Sweeny (N. Y.) 304, 37 How. Pr. (N. Y.) 261, 6 Abb. Pr. N. S. (N. Y.) 224; Martin *v.* Rothschild, 42 Hun (N. Y.) 410; Wagner *v.* Hodge, 34 Hun (N. Y.) 524; Davis *v.* Selden, 29 Pa. St. 316.

Land Mortgage Including Chattel Mortgage. — Where a mortgage of land, properly recorded as such in the office of the county register, includes a chattel mortgage, the record is not constructive notice as to the latter, chattel mortgages being required to be recorded in the office of the township clerk. Ramsdell *v.* Citizens' Electric Light, etc., Co., 103 Mich. 89.

3. Must Be Duly Authorized. — Pearson *v.* Powell, 100 N. Car. 86. And see Wade on Notice, § 144.

See generally the titles DE FACTO OFFICERS, vol. 8, p. 781; PUBLIC OFFICERS, vol. 23, p. 314.

Record Made in Confederate State. — The registry of a deed by a clerk who continued to exercise his official duties in the state of *Virginia* after the passage of the ordinance of secession while the country was under control of the military power, was held valid. Henning *v.* Fisher, 6 W. Va. 238.

But see Simpson *v.* Loving, 3 Bush (Ky.) 458, 96 Am. Dec. 252, wherein it was held that the official acts of a person appointed as clerk of a county by the "provisional government of *Kentucky*" in 1862, were not valid for any purpose, and therefore a deed acknowledged before, and recorded by such person, did not operate as constructive notice, nor could a certified copy of it be regarded as evidence.

4. Instrument to Which Officer a Party. — Tessier *v.* Hall, 7 Mart. (La.) 411; Brockenborough *v.* Melton, 55 Tex. 493.

5. May Appoint Deputy. — Dodge *v.* Potter, 18 Barb. (N. Y.) 193.

As to who may receive an instrument for record, see *supra*, VI. 2.

A Record in the Handwriting of the Grantor is not invalid on that account. The presumption is that the officer authorized him to make such record. Merrill *v.* Dawson, Hempst. (U. S.) 563.

6. Book Kept for Purposes of Taxation. — A book in the county clerk's office, showing the names of purchasers of government land in the county, being kept only for purposes of taxation, is not constructive notice to subsequent purchasers. Betser *v.* Rankin, 77 Ill. 289; Lewis *v.* Barnhardt, 43 Fed. Rep. 854.

Disused Record Book. — Where the officer, with fraudulent intent, copies an instrument in an old and disused record book, it will not be regarded as a valid record. Sawyer *v.* Adams, 8 Vt. 172, 30 Am. Dec. 459. See also New York L. Ins. Co. *v.* White, 17 N. Y. 469.

7. Where No Book Designated by Law. — Farabee *v.* McKerrihan, 172 Pa. St. 234, 51 Am. St. Rep. 734.

Recording Deed in Book Labeled "Mortgages." — At a time when the law did not require that deeds and mortgages should be recorded in separate books, an absolute deed was recorded in a book labeled "mortgages." It was held that the record was valid and sufficient notice, it not being shown that the absolute deeds were recorded in a separate book. Switzer *v.* Knapps, 10 Iowa 72, 74 Am. Dec. 375.

Copies Kept in Bundles. — Duplicate copies of deeds properly filed and kept in the proper office, although not bound in the form of a book, yet each class being kept in separate bundles, was, under the circumstances, held sufficient. Mumford *v.* Wardwell, 6 Wall. (U. S.) 423.

8. See the local statutes.

Texas — Instruments Creating Liens. — Under Texas Rev. Stat., § 4304, requiring deeds of trust, mortgages, judgments, or other instruments in writing intended to create a lien, to be recorded in a book or books separate from those in which deeds or other conveyances are

where this is the case, an instrument must be recorded in the book designated for the recording of the class to which it belongs.[1]

Instrument in Form a Deed but in Fact a Mortgage. — Where an instrument has the form of one class but in fact belongs to another class of instruments, it is entitled to be recorded according to its real rather than its apparent character,[2] and in some jurisdictions the courts have gone so far as to hold that it must be so recorded. Thus it has been held that an absolute deed intended as a mortgage must be recorded in the book for mortgages in order for the record to be sufficient.[3] But according to the weight of authority, where a deed absolute upon its face is in fact a mortgage, the defeasance being in parol or

recorded, it is not contemplated that each class of instruments creating such lien shall be recorded in a distinct book. The recordation, therefore, of a mechanic's lien in a book in which mortgages are recorded is regular. Quinn *v.* Logan, 67 Tex. 600

Substantial Compliance with Statute. — In *Missouri* the statute provides that chattel mortgages be recorded in a separate series of books distinct from the series in which land conveyances are recorded. In a case where only one series of books was kept for all purposes, but conveyances of personalty were recorded in a volume used exclusively for that purpose, as was shown on the back of such volume, it was held to be a substantial compliance with the statute, and a chattel mortgage recorded therein was sufficiently recorded. Hume Bank *v.* Hartsock, 56 Mo. App. 291.

Book Not Required by Statute. — In Mee *v.* Benedict, 98 Mich. 260, 39 Am. St. Rep. 543, the *Michigan* Supreme Court held that the practice of recording officers in that state of keeping a separate book for exceptional instruments, such as land contracts, sales of standing timber, etc., was proper and commendable though not sanctioned by statute, and that a deed of standing timber recorded in such book operated as constructive notice.

1. Must Be Recorded in Proper Book. — Cady *v.* Purser, 131 Cal. 552; Pitcher *v.* Barrows, 17 Pick. (Mass.) 361, 28 Am. Dec. 306; Gordon *v.* Constantine Hydraulic Co., 117 Mich. 620; Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311; Parsons *v.* Lent, 34 N. J. Eq. 67; Howells *v.* Hettrick, 13 N. Y. App. Div. 366; Abraham *v.* Mayer, (N. Y. City Ct. Gen. T.) 7 Misc. (N. Y.) 250; Edwards *v.* Meader, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 285; Drake *v.* Reggel, 10 Utah 376.

Mortgage Including Realty and Personalty. — Where separate books are designated for mortgages of land and chattel mortgages, a mortgage including both realty and personalty should be recorded in both books. Deane *v.* Hutchinson, 40 N. J. Eq. 83; Stewart *v.* Beale, 7 Hun (N. Y.) 405, 68 N. Y. 629; Hunt *v.* Allen, 73 Vt. 322. See also Ramsdell *v.* Citizens' Electric Light, etc., Co., 103 Mich. 89; Merrill *v.* Ressler, 37 Minn. 82, 5 Am. St. Rep. 822.

As to the necessity for recording as a chattel mortgage a mortgage on fixtures, see *supra*, III. 3. *c*.

In *South Carolina*, previous to 1882, there was no statute requiring land mortgages and chattel mortgages to be recorded in different books. Therefore a mortgage covering both realty and personalty was properly recorded in the book used for recording liens and mortgages. Armstrong *v.* Austin, 45 S. Car. 69.

Rule Varied by Usage of Officer. — A mortgage of both real estate and personal property, recorded in the book for real estate only, according to the custom of the recording officer, was held properly recorded. Anthony *v.* Butler, 13 Pet. (U. S.) 423.

Statute Deemed Directory. — In *Louisiana* the statute requiring entry in separate books has been held merely directory to the recorder. Gillespie *v.* Cammack, 3 La. Ann. 248; Robertson *v.* Brown, 5 La. Ann. 154; Smith *v.* Smith, 13 Ohio St. 532.

2. According to Real Rather than Apparent Character. — Shaw *v.* Wilshire, 65 Me. 485; Nicklin *v.* Betts Spring Co., 11 Oregon 406, 50 Am. Rep. 477.

3. Must Be Recorded as a Mortgage — *Connecticut.* — North *v.* Belden, 13 Conn. 376, 35 Am. Dec. 83; Hart *v.* Chalker, 14 Conn. 77; Stearns *v.* Porter, 46 Conn. 313; Ives *v.* Stone, 51 Conn. 446.

Louisiana. — Cordeviolle *v.* Dawson, 26 La. Ann. 534.

New York. — Warner *v.* Winslow, 1 Sandf. Ch. (N. Y.) 430; White *v.* Moore, 1 Paige (N. Y.) 551; Grimstone *v.* Carter, 3 Paige (N. Y.) 421, 24 Am. Dec. 230; James *v.* Morey, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; Jackson *v.* Van Valkenburgh, 8 Cow. (N. Y.) 260; Brown *v.* Dean, 3 Wend. (N. Y.) 208; Dey *v.* Dunham, 2 Johns. Ch. (N. Y.) 182; Gillig *v.* Maass, 28 N. Y. 191; Purdy *v.* Huntington, 42 N. Y. 343, 1 Am. Rep. 532.

North Carolina. — Gregory *v.* Perkins, 4 Dev. L. (15 N. Car.) 50. See also Halcombe *v.* Ray, 1 Ired. L. (23 N. Car.) 340; Dukes *v.* Jones, 6 Jones L. (51 N. Car.) 14; Gulley *v.* Macy, 84 N. Car. 434.

Pennsylvania. — Manufacturers', etc., Bank *v.* Pennsylvania Bank, 7 W. & S. (Pa.) 335, 42 Am. Dec. 240; Friedley *v.* Hamilton, 17 S. & R. (Pa.) 70, 17 Am. Dec. 638; Jaques *v.* Weeks, 7 Watts (Pa.) 261; McLanahan *v.* Reeside, 9 Watts (Pa.) 508, 36 Am. Dec. 136; Hendrickson's Appeal, 24 Pa. St. 363; Luch's Appeal, 44 Pa. St. 519; Edwards *v.* Trumbull, 50 Pa. St. 509; Calder *v.* Chapman, 52 Pa. St. 359, 91 Am. Dec. 163.

In *Michigan*, prior to the Revised Statutes of 1846, by the express provisions of the Laws of 1833, p. 284, § 3, such instruments could be properly recorded only in the book for mortgages. Thompson *v.* Mack, Harr. (Mich.) 150.

in a separate instrument not recorded, the recording of such instrument in the book for deeds is sufficient.[1]

Effect of Failure to Record in Proper Book. — The authorities are not agreed as to the effect of failure on the officer's part to record in the proper book, some holding that where an instrument has been properly filed for record it imparts constructive notice even though the officer does not record it at all, while others hold that there can be no constructive notice unless the instrument is properly recorded.[2]

3. **Transcribing.**— In transcribing the instrument on the record book, care should be taken to make an exact copy thereof, even to the perpetuation of its errors and omissions.[3] Although the transcribing is generally done in writing with ink, the record will not be vitiated by the fact that it is partly printed and only the blanks are filled with writing in ink.[4] But because of the small durability of pencil writing, a record written in pencil is not sufficient.[5]

4. **Indexing** — **Necessity.** — In the absence of any statutory provision making the index an essential part of the record, an error in indexing or a failure to index, while rendering the recording officer liable to a person injured thereby,[6] will not prevent the record from operating as constructive notice.[7]

1. *Georgia.* — Gibson *v.* Hough, 60 Ga. 588.
Illinois. — De Wolf *v.* Strader, 26 Ill. 231.
Iowa. — Clemons *v.* Elder, 9 Iowa 273.
Kansas. — Young *v.* Thompson, 2 Kan. 83.
Maryland. — Ing *v.* Brown, 3 Md. Ch. 521.
Massachusetts. — Harrison *v.* Phillips' Academy, 12 Mass. 456.
Minnesota. — Benton *v.* Nicoll, 24 Minn. 221; Marston *v.* Williams, 45 Minn. 116, 22 Am. St. Rep. 719.
Mississippi. — Mobile Bank *v.* Tishomingo Sav. Inst., 62 Miss. 250.
Nevada. — Grellet *v.* Heilshorn, 4 Nev. 526.
Ohio. — Kemper *v.* Campbell, 44 Ohio St. 210.
Oregon. — Haseltine *v.* Espey, 13 Oregon 301.
Tennessee. — Ruggles *v.* Williams, 1 Head (Tenn.) 141.
Vermont. — Gibson *v.* Seymour, 4 Vt. 518; Seymour *v.* Darrow, 31 Vt. 122.
Wisconsin. — Knowlton *v.* Walker, 13 Wis. 264.

It Has Been Said in Support of These Decisions that a deed absolute upon its face is in law a deed, whatever it may be in equity, and that its terms control as to the place where the recorder shall assign it for record, and as to the effect of the record. Benton *v.* Nicoll, 24 Minn. 221; Haseltine *v.* Espey, 13 Oregon 301.

2. See *infra*, XI. 1.

3. **Must Record Without Change.** — Carleton *v.* Lombardi, 81 Tex. 355, wherein the officer changed an initial of a party's name as it appeared in the certificate of acknowledgment to make it correspond with the signature to the instrument. The court held that the change was unauthorized and did not make the record valid.

What Constitutes "Due Recording." — In Fogg *v.* Holcomb, 64 Iowa 621, the court said that to constitute "due recording" it was probably not essential that the record be a literal copy of the instrument in every respect, but that it must certainly embody every material part and follow so closely the language of the instrument that the subject-matter thereof can be identified with certainty by the record. See also Dunning *v.* Coleman, 27 La. Ann. 48, as to the meaning of "duly recorded."

Pasting a Map Between the Leaves of the record book has been held not to be a valid recording. Caldwell *v.* Center, 30 Cal. 539, 89 Am. Dec. 131.

Chattel Mortgage — What Sufficient Recording. — Under some statutes it is not necessary to record a chattel mortgage at length; filing and indexing is sufficient. State *v.* Smith, 40 Ark. 431; Price *v.* Skillern, 60 Ark. 112; Loeb *v.* Milner, 21 Neb. 392; Brothers *v.* Mundell, 60 Tex. 240.

4. **Partly Printed Record Good.** — Maxwell *v.* Hartmann, 50 Wis. 660.

5. **Record in Pencil Not Sufficient.** — Caldwell *v.* Center, 30 Cal. 539, 89 Am. Dec. 131.

6. **Officer Liable to Person Injured.** — See Hampton Lumber Co. *v.* Ward, 95 Fed. Rep. 3; Norton *v.* Kumpe, 121 Ala. 448; Bishop *v.* Schneider, 46 Mo. 472, 2 Am. Rep. 533; Green *v.* Garrington, 16 Ohio St. 548, 91 Am. Dec. 103; Polk County *v.* Babcock, 5 Oregon 472; Armstrong *v.* Austin, 45 S. Car. 69; Maxwell *v.* Stuart, 99 Tenn. 409; Curtis *v.* Lyman, 24 Vt. 338, 58 Am. Dec. 174; Johnson *v.* Brice, 102 Wis. 575.

What Not a Defense. — The doctrine that the record takes effect as constructive notice from the time of filing for record is only for the protection of those claiming under the conveyance and cannot be invoked by the recording officer to protect himself against liability for the nonperformance of his duty to index. Norton *v.* Kumpe, 121 Ala. 448.

7. **Indexing Not Material** — *United States.* — The W. B. Cole, 49 Fed Rep. 587, (C. C A.) 59 Fed. Rep. 182; Hampton Lumber Co. *v.* Ward, 95 Fed. Rep. 3.
Alabama. — Turner *v.* McFee, 61 Ala. 468.
Georgia. — Chatham *v.* Bradford, 50 Ga. 327, 15 Am. Rep. 693.
Indiana. — Nichol *v.* Henry, 89 Ind. 54.
Iowa. — Hilpire *v.* Claude, 109 Iowa 159, 77 Am. St. Rep. 524.
Louisiana. — Swan *v.* Vogel, 31 La. Ann. 38.
Missouri. — Bishop *v.* Schneider, 46 Mo. 472, 2 Am. Rep. 533.
Nebraska. — Jordan *v.* Hamilton County Bank, 11 Neb. 499. *Compare* Hoyt *v.* Schuyler. 19 Neb. 652.

Indexing Essential. — But under some statutes indexing is made an essential part of the record, and where this is the case a record is ineffectual to impart constructive notice until the proper index entries have been made.[1]

Sufficiency. — The sufficiency of the index, of course, depends on the language of the statutes. If the statute simply provides that a suitable index shall be made, it is sufficient if the index, as made, suitably answers the requirements of such an index; that is, informs the person examining the title to certain property where the record of such title can be found.[2] But the statutes, which impose the duty upon the recorder of keeping a general index, sometimes provide for an index so full in its details as to give, in addition to names and dates, a substantial description of the nature of the instrument and of the property conveyed by it.[3]

A Mere Clerical Error in the index, which will not mislead a person making an ordinary diligent, skilful, and careful examination of the records, will not invalidate the constructive notice of the record.[4]

An Omission to Make Proper Entries in the index may be corrected by the officer at any time, and the record will be good from the time of such correction without the necessity of again recording the instrument.[5] And it seems that an omission of the statutory requirements may sometimes be cured by the transcript on the record book,[6] especially if there is a reference to the record book pointing out that the omission is there supplied.[7]

New Hampshire. — Chase *v.* Bennett, 58 N. H. 428.

New Jersey. — Semon *v.* Terhune, 40 N. J. Eq. 364.

New York. — Mutual L. Ins. Co. *v.* Dake, 87 N. Y. 257, (Supm. Ct. Spec. T.) 1 Abb. N. Cas. (N. Y.) 381.

North Carolina. — Davis *v.* Whitaker, 114 N. Car. 279, 41 Am. St. Rep. 793.

Ohio. — Green *v.* Garsington, 16 Ohio St. 548, 91 Am. Dec. 103.

Oregon. — Polk County *v.* Babcock, 5 Oregon 472; Nicklin *v.* Betts Spring Co., 11 Oregon 406, 50 Am. Rep. 477.

Pennsylvania. — Schell *v.* Stein, 76 Pa. St. 398, 18 Am. Rep. 416; Stockwell *v.* McHenry, 107 Pa. St. 237, 52 Am. Rep. 475; Farabee *v.* McKerrihan, 172 Pa. St. 234, 51 Am. St. Rep. 734; Wyoming Nat. Bank's Appeal, 11 W. N. C. (Pa.) 567.

South Carolina. — Armstrong *v.* Austin, 45 S. Car. 69.

Vermont. — Curtis *v.* Lyman, 24 Vt. 338, 58 Am. Dec. 174; Barrett *v.* Prentiss, 57 Vt. 297.

Virginia. — Virginia Bldg., etc., Co. *v.* Glenn, 99 Va. 460.

Entry Book. — The provision of the statute requiring an entry book to be kept has been given the same construction, and declared not to make the entry book an essential part of the record. Nichol *v.* Henry, 89 Ind. 54. See Gilchrist *v.* Gough, 63 Ind 576, 30 Am. Rep. 250. But *compare* Sinclair *v.* Slawson, 44 Mich. 123, 38 Am. Rep. 235.

1. Indexing Essential. — Bardon *v.* Land, etc., Imp. Co., 157 U. S. 327 [construing *Wisconsin* statute]; Barney *v.* McCarty, 15 Iowa 510, 83 Am. Dec. 427; Gwynn *v.* Turner, 18 Iowa 1; Howe *v.* Thayer, 49 Iowa 154; Peters *v.* Ham, 62 Iowa 656; Ritchie *v.* Griffiths, 1 Wash. 429, 22 Am. St. Rep. 155; Malbon *v.* Graw, 15 Wash. 301; Congregational Church Bldg. Soc. *v.* Scandinavian Free Church, 24 Wash. 433; International L. Ins. Co. *v.* Scales, 27 Wis. 640; Pringle *v.* Dunn, 37 Wis. 449, 19 Am. Rep. 772; Lombard *v.* Culbertson, 59 Wis. 433; Hall *v.* Baker, 74 Wis. 118; Hiles *v.* Atlee, 80 Wis. 219, 27 Am. St. Rep. 32. See also Lane *v.* Duchac, 73 Wis. 646.

Index as Constructive Notice. — Under a statute clothing the index with the character of notice to subsequent purchasers, it was held that the index would charge a purchaser with constructive notice regardless of the fact that there was a substantial error in the entry on the record book itself. Shove *v.* Larsen, 22 Wis. 142; Pringle *v.* Dunn, 37 Wis. 449, 19 Am. Rep. 772.

2. Sufficiency of Index. — Smith *v.* Royalton, 53 Vt. 604.

When an Index to Each Volume is required to be made, it may be kept separate or bound in with the record book of which it is an index. Benton *v.* Nicoll, 24 Minn. 221.

3. As to Sufficiency of Index, see Malbon *v.* Grow, 15 Wash. 301; Oconto Co. *v.* Jerrard, 46 Wis. 317.

Names of Grantors. — In *Wisconsin* the names of grantors are required to be indexed in alphabetical order. Hiles *v.* Atlee, 80 Wis. 219, 27 Am. St. Rep. 32.

But in the case of tax deeds it is enough to enter the name of the county only as grantor and not the state. Hall *v.* Baker, 74 Wis. 118.

4. Clerical Errors. — Bardon *v.* Land, etc., Imp. Co., 157 U. S. 327; Jones *v.* Berkshire, 15 Iowa 248, 83 Am. Dec. 412; Barney *v.* Little, 15 Iowa 527. See also Hodgson *v.* Lovell, 25 Iowa 97, 95 Am. Dec. 775; Paige *v.* Lindsey, 69 Iowa 593.

5. Officer May Correct Omissions. — Bardon *v.* Land, etc., Imp. Co., 157 U. S. 327; Hotson *v.* Wetherby, 88 Wis. 324.

6. Index Aided by Record. — Bostwick *v.* Powers, 12 Iowa 456; Pringle *v.* Dunn, 37 Wis. 449, 19 Am. Rep. 772; Lane *v.* Duchac, 73 Wis. 646.

7. Description of Land — "See Record." — An index entry "See Record" made in the column for description of the land is sufficient

5. Contents and Sufficiency — *a.* VALID INSTRUMENT. — The record must set forth a valid instrument showing the prerequisites to valid registration.[1]

b. SEAL. — Where the instrument recorded is one required to be under seal, the fact of sealing should in some way be indicated on the record.[2] But any inscription or device intended to represent the seal is sufficient,[3] and a failure of the recording officer to indicate it in any way will not be fatal to the efficiency of the record where the instrument in fact bore a seal and that fact appears from the recitals of the instrument.[4]

Where Seal Not Essential to Validity. — But a seal need not appear except when it is necessary to the validity of the conveyance. Thus, where equitable interests are recognized as the proper subjects of registration, and a record has been made of an unsealed instrument which, although void as a conveyance of the legal title, conveys the equitable title, the record will be sustained.[5]

c. IDENTITY OF PARTIES. — The record must correctly show the identity of the parties to the instrument,[6] but slight errors in this regard will not vitiate the record where there is nothing to show that any one could have been misled thereby.[7]

d. CLERICAL ERRORS. — Mere clerical errors or omissions which are not

if the record contains a proper description. Calvin *v.* Bowman, 10 Iowa 529; White *v.* Hampton, 13 Iowa 259; Breed *v.* Conley, 14 Iowa 269, 81 Am. Dec. 485; Peirce *v.* Weare, 41 Iowa 378; St. Croix Land, etc., Co. *v.* Ritchie, 73 Wis. 409; Hall *v.* Baker, 74 Wis. 118; Hotson *v.* Wetherby, 88 Wis. 324.

Index Purporting to Describe Land. — But, where the index upon its face purports to set out the description of the land, yet, in fact, omits some material part thereof, it may be misleading, and cannot be supplied by the record to which a searcher for incumbrances would seemingly have no occasion to look. Scoles *v.* Wilsey, 11 Iowa 261; Noyes *v.* Horr, 13 Iowa 570; Stewart *v.* Huff, 19 Iowa 557.

1. Must Set Forth Valid Instrument. — Wood *v.* Meyer, 36 Wis. 308; Lander *v.* Bromley, 79 Wis. 372. And see *supra*, VII. 1.

The Certificate of Acknowledgment is usually required to be copied in the record. Dean *v.* Gibson, (Tex. Civ. App. 1898) 48 S. W. Rep. 57.

But this has been held not to be necessary in the absence of a statute requiring it. Perry *v.* Bragg, 111 N. Car. 159. See also Chandler *v.* Bailey, 89 Mo. 641; Gardner *v.* Port Blakely Mill Co., 8 Wash. 1.

2. Seal Should Appear of Record. — Racouillat *v.* Sansevain, 32 Cal. 376; Racouillat *v.* Rene, 32 Cal. 450; Cox *v.* Stern, 170 Ill. 442, 62 Am. St. Rep. 385; Switzer *v.* Knapps, 10 Iowa 72, 74 Am. Dec. 375; Hiles *v.* Atlee, 90 Wis. 72. And see Van Riswick *v.* Goodhue, 50 Md. 57. *Compare* Hadden *v.* Larned, 87 Ga. 634.

The Lack of a Seal on the instrument cannot be stated by the officer by entering the words "not sealed" in the record where the seal should appear. He has no authority to enter independent statements of fact. Farmers, etc., Bank *v.* Bronson, 14 Mich. 363. And see Jones *v.* Martin, 16 Cal. 165.

3. Any Indication of Seal Sufficient. — Dale *v.* Wright, 57 Mo. 110; Carpenter *v.* Frazier, 102 Tenn. 462; Huey *v.* Van Wie, 23 Wis. 613; Putney *v.* Cutler, 54 Wis. 66. And see Switzer *v.* Knapp, 10 Iowa 72, 74 Am. Dec. 375.

4. Shown by Recitals of Instrument. — Ellison *v.* Branstrator, 153 Ind. 146; Beardsley *v.* Day, 52 Minn. 451; Heath *v.* Big Falls Cotton Mills, 115 N. Car. 202.

Seal to Certificate of Acknowledgment. — It has been held that the recorder need not copy the seal of the officer who took the acknowledgment. It is sufficient if the recorded certificate contains a recital that he affixed his seal of office. This authorizes the presumption that the seal was affixed. Jones *v.* Martin, 16 Cal. 165; Sneed *v.* Ward, 5 Dana (Ky.) 187; Griffin *v.* Sheffield, 38 Miss. 359, 77 Am. Dec. 646; Geary *v.* Kansas City, 61 Mo. 378; Addis *v.* Graham, 88 Mo. 197; Thorn *v.* Mayer, (Buffalo Super. Ct. Gen. T.) 12 Misc. (N. Y.) 487; Ballard *v.* Perry, 28 Tex. 347. See also Emmal *v.* Webb, 36 Cal. 197; Hadden *v.* Larned, 87 Ga. 634; Perry *v.* Bragg, 111 N. Car. 159.

5. Where Seal Not Essential to Validity. — McClurg *v.* Phillips, 57 Mo. 214; Harrington *v.* Fortner, 58 Mo. 468; Brydon *v.* Campbell, 40 Md. 331; Todd *v.* Eighmie, 4 N. Y. App. Div. 9; Wade on Notice, § 140; Webb on Rec. Tit., § 146.

6. Must Give Names of Parties. — Disque *v.* Wright, 49 Iowa 539; Jennings *v.* Wood, 20 Ohio 261; Sturtevant's Appeal, 34 Pa. St. 149. And see Sorenson *v.* Davis, 83 Iowa 405.

Person Known by Two Names. — When a person is equally well known by two different names, the recording of a deed made by him in which either name is used will sufficiently notice the conveyance to subsequent purchasers. Gillespie *v.* Rogers, 146 Mass. 610; Jenny *v.* Zehnder, 101 Pa. St. 296. *Compare* Grundies *v.* Reid, 107 Ill. 304.

Mortgage to Partnership. — Under the *Maryland* Code, art. 24, § 9, providing that to entitle a deed to registration it must contain the names of a grantor and grantee, and art. 18, §§ 54, 55, requiring clerk to enter the Christian names and surnames of the parties after he records the deed, it was held that a mortgage executed to the "firm of Wehr, Hobelman & Gottlieb" was entitled to registration. Bernstein *v.* Hobelman, 70 Md. 29.

7. Slight Variances Not Material. — Pinney *v.* Russell, 52 Minn. 443; Royster *v.* Lane, 118 N. Car. 156; Jenny *v.* Zehnder, 101 Pa. St. 296. And see the title NAME, vol. 21, pp. 308, 318.

material to the sense and not reasonably calculated to mislead a subsequent purchaser will not vitiate the record.[1] And the index or entry book may sometimes be looked to for the purpose of supplying omissions in the record.[2]

6. Curing Errors in the Record — *a.* By Correction. — If the recording officer makes an error or omits something in transcribing the instrument upon the record book, he may so correct the record as to make it a true representation of the instrument.[3] And so if the certificate of the official character of the officer taking the acknowledgment, which is a prerequisite to recordation in some states, is not recorded with the instrument, the omission may be afterwards supplied.[4] The corrected record takes effect only from the time of such correction and cannot affect rights which have vested previous thereto.[5]

b. By Curative Statutes. — Statutes have been enacted in some of the states for the purpose of validating records of conveyances which are defective because of some omission in the prescribed formalities, as want of the certificate of acknowledgment, of the notarial or official seal to the certificate of acknowledgment, of the requisite number of witnesses, or of the certificate of official character of the acknowledging officer.[6] Notwithstanding the apparent retrospective operation of statutes of this kind, they have almost uniformly been held constitutional and valid.[7] But such acts cannot impair rights of

"*Johnson*" *instead of* "*Johnston.*" — Miltonvale State Bank *v.* Kuhnle, 50 Kan. 420, 34 Am. St. Rep. 129.

"*Shelleng*" *instead of* "*Schilling.*" — Muehlberger *v.* Schilling, (Supm. Ct. Spec. T.) 19 N. Y. St. Rep. 1.

"*Henry N. Ward*" *instead of* "*Henry M. Ward.*" — Fincher *v.* Hanegan, 59 Ark. 151.

Name Shown by Entry Book. — Where the name of the mortgagee was by mistake omitted in transcribing the instrument, but appeared in the entry book, the record was held to impart constructive notice. Sinclair *v.* Slawson, 44 Mich. 123, 38 Am. Rep. 235.

1. Clerical Errors — *England.* — Wyatt *v.* Barwell, 19 Ves. Jr. 435.

District of Columbia. — Sis *v.* Boarman, 11 App. Cas. (D. C.) 116.

Florida. — Jackson *v.* Haisley, 35 Fla. 587.

Nebraska. — Gillespie *v.* Brown, 16 Neb. 457. See also Lincoln Bldg., etc., Assoc. *v.* Hass, 16 Neb. 581.

New York. — Muehlberger *v.* Schilling, (Supm. Ct. Spec. T.) 19 N. Y. St. Rep. 1.

North Carolina. — Hughes *v.* Debnam, 8 Jones L. (53 N. Car.) 127; Royster *v.* Lane, 118 N. Car. 156.

Ohio. — Tousley *v.* Tousley, 5 Ohio St. 78.

South Dakota. — Citizens' Bank *v.* Shaw, 14 S. Dak. 197.

Texas. — Hart *v.* Patterson, 17 Tex. Civ. App. 591. See also Woodson *v.* Allen, 54 Tex. 551.

Wisconsin. — St. Croix Land, etc., Co. *v.* Ritchie, 73 Wis. 409.

2. Aider of Record by Index or Entry Book. — Sinclair *v.* Slawson, 44 Mich. 123, 38 Am. Rep. 235, Pringle *v.* Dunn, 37 Wis. 449, 19 Am. Rep. 772. See also American Emigrant Co. *v.* Call, 22 Fed. Rep. 765. But see Gilchrist *v.* Gough, 63 Ind. 576, 30 Am. Rep. 250.

3. Correction by Officer. — Sellers *v.* Sellers, 98 N. Car. 13, wherein it was intimated that the correction could be made by interlineation. But see Foster *v.* Dugan, 8 Ohio 87, 31 Am. Dec. 432.

Recopying Whole Record. — Since the amended record can take effect only from the time the correction is made, it would seem that there can be no objection to recopying the whole record with the corrections in the proper order, with a marginal note on the first record indicating where the reformed record may be found. See King *v.* Bales, 44 Ind. 219.

Power of Court to Order Correction. — In an action to reform a deed on the ground of mistake, the court ordered that certain words should be erased from the instrument and that the record of such deed should be in like manner corrected. It was held that the court possessed no power to order the recorder of the county to change his record when he had correctly copied the deed; a new deed should be decreed and recorded. Toops *v.* Snyder, 47 Ind. 91.

4. May Supply Certificate of Authenticity. — Reasoner *v.* Edmundson, 5 Ind. 393; Ely *v.* Wilcox, 20 Wis. 523, 91 Am. Dec. 436.

5. Effective from Time of Correction. — Reed *v.* Klevensteuber, (Ariz. 1900) 60 Pac. Rep. 879; Chamberlain *v.* Bell, 7 Cal. 292, 68 Am. Dec. 260; Davis *v.* Lutkiewiez, 72 Iowa 254; Baldwin *v.* Marshall, 2 Humph. (Tenn.) 116; Harrison *v.* Wade, 3 Coldw. (Tenn.) 505; Citizens' Bank *v.* McCarty, 99 Tenn. 469; Southern Bldg., etc., Assoc. *v.* Rodgers, 104 Tenn. 437; McLouth *v.* Hurt, 51 Tex. 115.

6. Curative Acts. — See the statutes, and the title Acknowledgments, vol. 1, pp. 564–568. See also Greenwood *v.* Jenswold, 69 Iowa 53; Lariverre *v.* Rains, 112 Mich. 276; Geer *v.* Missouri Lumber, etc., Co., 134 Mo. 85, 56 Am. St. Rep. 489; German American Bank *v.* Carondelet Real Estate Co., 150 Mo. 570; McCelvey *v.* Cryer, 8 Tex. Civ. App. 437.

7. Constitutionality of Acts. — See the title Acknowledgments, vol. 1, p. 567. See also Gillespie *v.* Reed, 3 McLean (U. S.) 377; Wallace *v.* Moody, 26 Cal. 387; Reed *v.* Kemp, 16 Ill. 445; Logan *v.* Williams, 76 Ill. 175; Buckley *v.* Early, 72 Iowa 289; Brown *v.* Simpson, 4 Kan. 76; German-American Bank *v.* White, 38 Minn. 471; Allen *v.* Moss, 27 Mo. 354; Stevens *v.* Hampton, 46 Mo. 404; Bishop

third persons which have vested in the meantime.[1]

IX. Renewal of Record — 1. Chattel Mortgages. — In many states there are statutes requiring the record of a chattel mortgage to be renewed within a designated period after the original filing.[2] But a failure to refile does not affect the validity of the instrument as between the parties,[3] and refiling is not necessary where before the expiration of the designated period the mortgagee takes possession of the mortgaged property,[4] or the mortgagor makes a general assignment for the benefit of creditors.[5] On renewal after the expiration of the time limited the record again becomes effective from that time.[6]

Effect of Failure on Persons with Notice. — A failure to renew the record will not ordinarily render the instrument invalid as against creditors, purchasers or incumbrancers with notice of its existence.[7] And so a subsequent purchaser or incumbrancer who takes before the expiration of the original period is charged with notice from the record, and therefore cannot take advantage of a failure to refile.[8] But this is not true as to creditors of the mortgagor under some statutes, and the mortgage becomes void as to them even though their claims arose before the expiration of the original record or they have actual notice of the mortgage.[9]

v. Schneider, 46 Mo. 472, 2 Am. Rep. 533; Barnet *v.* Barnet, 15 S. & R. (Pa.) 72, 16 Am. Dec. 516; Maley *v.* Tipton, 2 Head (Tenn.) 403.

1. Cannot Impair Vested Rights. — Carpenter *v.* Dexter, 8 Wall. (U. S.) 513; Logan *v.* Williams, 76 Ill. 175; Gatewood *v.* Hart, 58 Mo. 261; Barrett *v.* Barrett, 120 N. Car. 127. See also the title Acknowledgments, vol. 1, p. 568.

What Rights Not Vested. — In McFaddin *v.* Evans-Snider-Buel Co., 185 U. S. 505, it was held that rights acquired under a default judgment in an attachment suit were not vested and that a subsequent act validating a prior mortgage on the property attached was not unconstitutional as depriving the attachment creditor of property without due process of law.

The Record Becomes Effective as against every one from the time the curing act becomes operative. Carson *v.* Thompson, 10 Wash. 295.

2. Chattel Mortgage Must Be Refiled. — See the title Chattel Mortgages, vol. 5, p. 1012. See also Burchinell *v.* Gorshine, 11 Colo. App. 22; Gilbert *v.* Sprague, 88 Ill. App. 508; Griffen *v.* Henry, 99 Ill. App. 284; Allcock *v.* Loy, 100 Ill. App. 573; Moore *v.* Shaw, 1 Kan. App. 103; Chafey *v.* Mathews, 104 Mich. 103; Whiteley *v.* Weber, 1 Ohio Cir. Dec. 517; O. S. Kelly Co. *v.* Lobenthal, 8 Ohio Cir. Dec. 300; Graham *v.* Blinn, 3 Wyo. 746.

Time of Refiling. — In some states the refiling must be done within thirty days of the expiration of the specified period, and an earlier refiling is not effective. Industrial Loan Assoc. *v.* Saul, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 188; *In re* Landman, 5 Ohio Dec. 398, 7 Ohio N. P. 570.

A Mortgage of a Leasehold Interest is not a chattel mortgage within the meaning of such a statute, and the record thereof need not be renewed. State Trust Co. *v.* Casino Co., 19 N. Y. App. Div. 344, 18 Misc. (N. Y.) 327.

Requirement Abolished in New Jersey. — By N. J. Act 1885, the requirement for refiling chattel mortgages was abolished. Roe *v.* Meding, 53 N. J. Eq. 350.

3. Validity as Between Parties Not Affected. — Deering *v.* Hanson, 7 N. Dak. 288.

4. Where Mortgagee Takes Possession. — Union Nat. Bank *v.* Oium, 3 N. Dak. 193.

Where the Property Is Taken and Converted within the period protected by the original record, refiling is not necessary to preserve the mortgagee's rights. Case *v.* Jewett, 13 Wis. 498, 80 Am. Dec. 752. See also Newman *v.* Tymeson, 12 Wis. 448.

5. Assignment for Benefit of Creditors. — Matter of Brocamp, 1 Ohio Cir. Dec. 537.

6. Record Effective from Time of Renewal. — Wade *v.* Strachan, 71 Mich. 459, in effect *overruling* Briggs *v.* Mette, 42 Mich. 12.

7. Valid Against Persons with Notice. — Riederer *v.* Pfaff, 61 Fed. Rep. 872; Huber Mfg. Co. *v.* Sweny, 57 Ohio St. 169, 5 Ohio Cir. Dec. 331, 11 Ohio Cir. Ct. 193.

8. Purchasers with Notice from the Record. — Howard *v.* Hutchinson First Nat. Bank, 44 Kan. 549; Farmers', etc., Bank *v.* Glen Elder Bank, 46 Kan. 376; Wade *v.* Strachan, 71 Mich. 459; Arlington Mill, etc., Co. *v.* Yates, 57 Neb. 286; Beskin *v.* Feigenspan, 32 N. Y. App. Div. 29; McCrea *v.* Hopper, 35 N. Y. App. Div. 572, *affirmed* 165 N. Y. 633; Wolff *v.* Rausch, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 108; Lowe *v.* Wing, 56 Wis. 31; Rockwell *v.* Humphrey, 57 Wis. 410; Ullman *v.* Duncan, 78 Wis. 213; Nix *v.* Wiswell, 84 Wis. 334.

Mississippi — Extension of Lien. — Miss. Code 1892, § 2462, provides that if a lien appear by the record thereof to be barred by the statute of limitations it shall become invalid as to creditors and subsequent purchasers for value and without notice unless within six months after the remedy is so barred the fact of its renewal or extension be made to appear of record. Under this it is held that one whose claim arises before the record shows a bar cannot take advantage of a failure to record the renewal. Klaus *v.* Moore, 77 Miss. 701.

9. Notice Does Not Affect Creditors. — Swiggett *v.* Dodson, 38 Kan. 702; State Trust Co. *v.*

2. Louisiana — Mortgages on Land. — In Louisiana a mortgage on land must be reinscribed within ten years from the date of the original inscription, else the effect of the record is lost, and a subsequent reinscription is effective only from the time thereof. Nothing will dispense with the necessity for such reinscription: without it the mortgage becomes invalid, even as against persons having actual notice thereof.[1]

X. Withholding from Record as Evidence of Fraud. — It is well settled that withholding an instrument from record is not of itself, and in the absence of any evidence of fraudulent intent, a sufficient reason for setting aside the conveyance as fraudulent.[2]

When Deemed Fraudulent. — Where, however, the instrument is withheld from record by agreement, or for the purpose of creating a fictitious credit, the transaction is deemed to be fraudulent as against persons who, relying on the apparent ownership of the property, give credit subsequently to the execution of such instrument and before its registration.[3] And in such cases it is not

Casino Co., 5 N. Y. App. Div. 381; Rock Springs First Nat. Bank *v.* Ludvigsen, 8 Wyo. 230.

As to the effect of notice to creditors, see *supra*.

1. In Louisiana. — Bondurant *v.* Watson, 103 U. S. 281; Pickett *v.* Foster, 149 U. S. 505; Shepherd *v.* Orleans Cotton Press Co., 2 La. Ann. 100; Hyde *v.* Bennett, 2 La. Ann. 799; Adle *v.* Anty, 5 La. Ann. 631; Hyatt *v.* Gallier, 6 La. Ann. 321; Young *v.* City Bank, 9 La. Ann. 193; Consolidated Assoc. *v.* Wilson, 10 La. Ann. 591; Flower's Succession, 12 La. Ann. 216; Kohn *v.* McHatton, 20 La. Ann. 223; Britton *v.* Norment, 20 La. Ann. 508; Britton *v.* Janney, 21 La. Ann. 204; Johnson *v.* Lowry, 22 La. Ann. 205; Blair *v.* Taylor, 25 La. Ann. 144; Adams *v.* Daunis, 29 La. Ann. 315; Watson *v.* Bondurant, 30 La. Ann. 1; Norres *v.* Hays, 44 La. Ann. 907; Delogny *v.* Her Creditors, 48 La. Ann. 488.

2. Withholding from Record Not Fraudulent — *United States.* — Williams *v.* Simons, (C. C. A.) 70 Fed. Rep. 40; Stapylton *v.* Stockton, (C. C. A.) 91 Fed. Rep. 326.

Florida. — American Freehold Land, etc., Co. *v.* Maxwell, 39 Fla. 489.

Illinois. — Sternbach *v.* Leopold, 50 Ill. App. 476.

Indiana. — National State Bank *v.* Sandford Fork. etc., Co., 157 Ind. 10.

Kansas. — American Lead Pencil Co. *v.* Champion, 57 Kan. 352.

Michigan. — Cutler *v.* Steele, 93 Mich. 204; Michigan Trust Co. *v.* Adams, 109 Mich. 181; Campbell *v.* Remaly, 112 Mich. 214, 67 Am. St. Rep. 393.

Minnesota. — Clark *v.* B. B. Richards Lumber Co., 68 Minn. 282.

Missouri. — Hord *v.* Harlan, 143 Mo. 469; Boone County Nat. Bank *v.* Newkirk, 144 Mo. 472; Barton *v.* Sitlington, 128 Mo. 164; Wall *v.* Beedy, 161 Mo. 625; Meyer Bros. Drug Co. *v.* Self, 77 Mo. App. 284; Miller-Arthur Drug Co. *v.* Curtis, (Mo. App. 1902) 67 S. W. Rep. 712.

Nebraska. — Patrick *v.* Paulson, 34 Neb. 416.

New Jersey. — Claflin *v.* Freudenthal, 58 N. J. Eq. 298.

New York. — Hardin *v.* Dolge, 46 N. Y App. Div. 416; Niagara County Nat. Bank *v.* Lord, 33 Hun (N. Y.) 557; Philadelphia, etc., Coal, etc., Co. *v.* Devoy, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 640.

Oregon. — Fisher *v.* Kelly, 30 Oregon 1.

Rhode Island. — Johnson's Petition, 20 R. I. 108.

South Carolina. — McElwee *v.* Kennedy, 56 S. Car. 154.

South Dakota. — Park *v.* Armstrong, 9 S. Dak. 269; Black Hills Mercantile Co. *v.* Gardiner, 5 S. Dak. 246, 256.

Texas. — Banner *v.* Robinson, (Tex. Civ. App. 1896) 34 S. W. Rep. 355.

Wisconsin. — McFarlane *v.* Louden, 99 Wis. 620, 67 Am. St. Rep. 883.

For further citations, see the title Fraudulent Sales and Conveyances, vol. 14, p. 525.

3. Conveyance Fraudulent as to Intermediate Creditors — *United States.* — Wachusett Nat. Bank *v.* Sioux City Stove Works, 63 Fed. Rep. 366; Truman *v.* Weed, (C. C. A.) 67 Fed. Rep. 645; Thompson Nat. Bank *v.* Corwine, 89 Fed. Rep. 774; Brown *v.* Easton, 112 Fed. Rep. 592. See also Ross *v.* Prentiss, 4 McLean (U. S.) 106.

Arkansas. — Bunch *v.* Schaer, 66 Ark. 98.

California. — Ruggles *v.* Cannedy, 127 Cal. 293, *affirmed* 127 Cal. 306.

Connecticut. — Curtis *v.* Lewis, (Conn. 1902) 50 Atl. Rep. 878.

Florida. — American Freehold Land, etc., Co. *v.* Maxwell, 39 Fla. 489; Logan *v* Slade, 28 Fla. 699.

Georgia. — Sibley *v.* Haslam, 75 Ga. 490.

Illinois. — English *v.* Lindley, 194 Ill. 181.

Kentucky. — Louisville Banking Co. *v.* Etheridge Mfg. Co., 19 Ky. L. Rep. 908, 43 S. W. Rep. 169.

Michigan. — Merrill *v.* Denton, 73 Mich. 628; Cutler *v.* Steele, 85 Mich. 627; Kennedy *v.* Dawson, 96 Mich. 79; Preston Nat. Bank *v.* Pierson, 112 Mich. 435; Belcher *v.* Curtis, 119 Mich. 1, 75 Am. St. Rep. 376.

Minnesota. — Clark *v.* B. B. Richards Lumber Co., 68 Minn. 282.

Missouri. — Glasgow Milling Co. *v.* Burnes, 144 Mo. 192; State *v.* O'Neill, 151 Mo. 67; Williams *v.* Kirk, 68 Mo. App. 457; Keet-Rountree Dry Goods Co. *v.* Brown, 73 Mo. App. 245; Donk Bros. Coal, etc., Co. *v.* Stevens, 74 Mo. App. 39.

Nebraska. — Ackerman *v.* Ackerman, 50 Neb. 54.

essential that the creditor secure a lien before the instrument is actually recorded, since his claim of relief is based on the fraud and not on the protection of the recording acts.[1]

XI. Failure to Record as Affecting Validity of Instrument —1. Through Fault of Recording Officer. — Regarding the effect of a failure to record which arises from the neglect or misprision of the recording officer, the cases are in irreconcilable conflict. By a provision of the statutes, which is common to nearly all of the states, the record is deemed to take effect at the time the instrument is filed for record.[2]

Majority Rule. — Where this is the law, the rule is favored by what seems to be the weight of authority that, when the grantee has duly deposited for record a valid instrument at the proper time, in the proper office and with the proper officer, he has performed his whole duty, and subsequent purchasers will be charged with constructive notice, notwithstanding the officer does not properly spread the instrument on the record book or fails to record it at all.[3]

New York. — Ledoux *v.* Bank of America, 24 N. Y. App. Div. 123.

Oregon. — Fisher *v.* Kelly, 30 Oregon 1.

Tennessee. — Boze *v.* Nichols, (Tenn. Ch. 1898) 51 S. W. Rep. 122.

Washington. — Hall *v.* Matthews, 8 Wash. 407.

Wisconsin. — Standard Paper Co. *v.* Guenther, 67 Wis. 101; Sanger *v.* Guenther, 73 Wis. 354.

For further citations, see the title Fraudulent Sales and Conveyances, vol. 14, p. 526.

Pre-existing Creditors are not entitled to claim that such transfer is void as to them unless, since the execution of the instrument and without knowledge of its existence, they have granted extensions or otherwise parted with legal rights on the faith of the apparent ownership in their debtor. Garner *v.* Fry, 104 Iowa 515; Groetzinger *v.* Wyman, 105 Iowa 574.

Creditors Whose Claims Arise After Registration of the instrument cannot take advantage of a delay in registering it. Meyer Bros. Drug Co. *v.* Self, 77 Mo. App. 284; Forrester *v.* Kearney Nat. Bank, 49 Neb. 655.

Creditors Having Actual Notice of the unrecorded conveyance at the time they gave the credit cannot claim that it is fraudulent as to them. Haas *v.* Sternbach, 156 Ill. 44; Smalley *v.* Fullerton, 88 Iowa 730.

As to the effect of notice generally, see *infra*, XI. 2. *d.*

1. Creditor Need Not Secure Lien. — Wachusett Nat. Bank *v.* Sioux City Stove Works, 63 Fed. Rep. 366; Truman *v.* Weed, (C. C. A.) 67 Fed. Rep. 645; Ruggles *v.* Cannedy, 127 Cal. 293, *affirmed* 127 Cal. 306; Roe *v.* Meding, 53 N. J. Eq. 350. *Compare* Brown *v.* Easton, 112 Fed. Rep. 592.

As to what creditors are protected by the recording acts, see *infra*, XI. 2. *c.* (6).

2. See *supra*, VI. *When Record Takes Effect.*

3. Operation as Notice Not Prevented by Officer's Neglect — *United States.* — Polk *v.* Cosgrove, 4 Biss. (U. S.) 437; Riggs *v.* Boylan, 4 Biss. (U. S.) 445; Steam Stone-Cutter Co. *v.* Sears, 23 Fed. Rep. 313; Hudson *v.* Randolph, (C. C. A.) 66 Fed. Rep. 216.

Alabama. — M'Gregor *v.* Hall, 3 Stew. & P. (Ala.) 397; Mims *v.* Mims, 35 Ala. 23; Fouche *v.* Swain, 80 Ala. 153; Seibold *v.* Rogers, 110 Ala. 438.

Arkansas. — Oats *v.* Walls, 28 Ark. 244; Case *v.* Hargadine, 43 Ark. 144.

Connecticut. — Hartmyer *v.* Gates, 1 Root (Conn.) 61; Lewis *v.* Hinman, 56 Conn. 55.

Illinois. — Cook *v.* Hall, 6 Ill. 575; Merrick *v.* Wallace, 19 Ill. 486; Nottinger *v.* Ware, 41 Ill. 245; Kiser *v.* Heuston, 38 Ill. 252; Wolf *v.* Hunter, 10 Ill. App. 32.

Indiana. — Chandler *v.* Scott, 127 Ind. 226. But see Gilchrist *v.* Gough, 63 Ind. 576, 30 Am. Rep. 250, *overruling* Kessler *v.* State, 24 Ind. 313; State *v.* Davis, 96 Ind. 539; Smith *v.* Lowry, 113 Ind. 37.

Kansas. — Poplin *v.* Mundell, 27 Kan. 138; Lee *v.* Bermingham, 30 Kan. 312; Zear *v.* Boston Safe Deposit, etc., Co., 2 Kan. App. 505; T. B. Townsend Brick, etc., Co. *v.* Allen, 9 Kan. App. 230.

Kentucky. — State Bank *v.* Haggin, 1 A. K. Marsh. (Ky.) 306; Buckner *v.* Davis, 43 S. W. Rep. 445, 19 Ky. L. Rep. 1349.

Louisiana. — Payne *v.* Pavey, 29 La. Ann. 116; Lewis *v.* Klotz, 39 La. Ann. 259.

Massachusetts. — Ames *v.* Phelps, 18 Pick. (Mass.) 314; Jordan *v.* Farnsworth, 15 Gray (Mass.) 517; Sykes *v.* Keating, 118 Mass. 517; Getchell *v.* Moran, 124 Mass. 404; Gillespie *v.* Rogers, 146 Mass. 610; Hayden *v.* Peirce, 165 Mass. 359. *Compare* Pitcher *v.* Barrows, 17 Pick. (Mass.) 361, 28 Am. Dec. 306.

Mississippi. — Mangold *v.* Barlow, 61 Miss. 593, 48 Am. Rep. 84.

Nebraska. — Perkins *v.* Strong, 22 Neb. 725; Deming *v.* Miles, 35 Neb. 739, 37 Am. St. Rep. 464.

Pennsylvania. — Schell *v.* Stein, 76 Pa. St. 398, 18 Am. Rep. 416; Woods's Appeal, 82 Pa. St. 116; Glading *v.* Frick, 88 Pa. St. 460, *overruling* Luch's Appeal, 44 Pa. St. 519; Clader *v.* Thomas, 89 Pa. St. 343; Farabee *v.* McKerrihan, 172 Pa. St. 234, 51 Am. St. Rep. 734; Wyoming Nat. Bank's Appeal, 11 W. N. C. (Pa.) 567.

Rhode Island. — Nichols *v.* Reynolds, 1 R. I. 30, 36 Am. Dec. 238.

South Carolina. — Armstrong *v.* Austin, 45 S. Car. 69.

Tennessee. — Flowers *v.* Wilkes, 1 Swan (Tenn.) 408; Swepson *v.* Exchange, etc., Bank, 9 Lea (Tenn.) 713; Hughes *v.* Powers, 99 Tenn. 480.

Texas. — Throckmorton *v.* Price, 28 Tex.

Contrary Doctrine. — Yet, while this rule is supported by the larger number of decisions as well as the weight of reason, there is a not unimportant line of cases holding that the registration of an instrument is the duty of the grantee therein, that the recording officer is his agent, and that the grantee, and not a subsequent purchaser who has acted in ignorance of the omission or mistake, must suffer the loss resulting from a failure to record, although it be due entirely to the officer's neglect.[1]

Where Indexing Is Essential to valid registration,[2] there can be no constructive notice until the instrument has been recorded and indexed.[3]

The Officer Is, of Course, Liable on his bond in any event to the party injured by his failure to perform properly his official duties.[4]

2. Through Fault of Grantee — *a.* IN GENERAL. — As has been stated before, the practice of recording transfers was unknown to the common law.[5]

Where No Statute Requiring Recordation. — Therefore, since the whole matter rests on a statutory basis, it follows of course that failure to record an instrument which is not required to be recorded by the terms or intendment of any statute has no effect on the rights of the parties as they exist at common law independently of the recording acts.[6]

605, 91 Am. Dec. 334; Crews *v.* Taylor, 56 Tex. 461; Freiberg *v.* Magale, 70 Tex. 116; Willis *v.* Thompson, 85 Tex. 301; Cleveland *v.* Empire Mills, 6 Tex. Civ. App. 479; Knowles *v.* Ott, (Tex. Civ. App. 1895) 34 S. W. Rep. 295; Parker *v.* Panhandle Nat. Bank, 11 Tex. Civ. App. 707; Ames Iron Works *v.* Chinn, 15 Tex. Civ. App. 88.

Virginia. — Beverley *v.* Ellis, 1 Rand. (Va.) 102; Mercantile Co-operative Bank *v.* Brown, 96 Va. 614.

See also the title CHATTEL MORTGAGES, vol. 5, p. 1008; 1 Dev. on Deeds, §§ 681, 686; Wade on Notice, § 162; Webb on Rec. Tit., § 16. And see the dissenting opinions in Jennings *v.* Wood, 20 Ohio 261; Sawyer *v.* Adams, 8 Vt. 172, 30 Am. Dec. 459.

As to the Effect of Failure to Index the Record, see *supra*, VIII. 4. *Indexing.*

1. Officer's Neglect Prevents Operation as Notice — *California.* — Cady *v.* Purser, 131 Cal. 552. See also Chamberlain *v.* Bell, 7 Cal. 292, 68 Am. Dec. 260; Donald *v.* Beals, 57 Cal. 399; Meherin *v.* Oaks, 67 Cal. 57; Quackenbush *v.* Reed, 102 Cal. 493; Watkins *v.* Wilhoit, 104 Cal. 395.

Georgia. — Shepherd *v.* Burkhalter, 13 Ga. 443, 58 Am. Dec. 523; Benson *v.* Green, 80 Ga. 230.

Iowa. — Miller *v.* Bradford, 12 Iowa 14; Noyes *v.* Horr, 13 Iowa 570; Barney *v.* McCarty, 15 Iowa 510, 83 Am. Dec. 427; Whalley *v.* Small, 25 Iowa 184.

Maryland. — Brydon *v.* Campbell, 40 Md 331.

Michigan. — Gordon *v.* Constantine Hydraulic Co., 117 Mich. 620. See also Barnard *v.* Campau, 29 Mich. 162. But see People *v.* Bristol, 35 Mich. 28.

Minnesota. — Parret *v.* Shaubhut, 5 Minn. 323, 80 Am. Dec. 424.

Missouri. — Terrell *v.* Andrew County, 44 Mo. 309.

New York. — Frost *v.* Beekman, 1 Johns. Ch. (N. Y.) 288; Beekman *v.* Frost, 18 Johns. (N. Y.) 544, 9 Am. Dec. 246; Peck *v.* Mallams, 10 N. Y. 509; New-York L. Ins. Co. *v.* White, 17 N. Y. 469; Gillig *v.* Maass, 28 N. Y. 191; Howells *v.* Hettrick, 13 N. Y. App. Div. 366. But see Mutual L. Ins. Co. *v.* Dake, 87 N. Y. 257; Simonson *v.* Falihee, 25 Hun (N. Y.) 570; Bedford *v.* Tupper, 30 Hun (N. Y.) 174; Dikeman *v.* Puckhafer, 1 Daly (N. Y.) 489; Dodge *v.* Potter, 18 Barb. (N. Y.) 193.

Ohio. — Jennings *v.* Wood, 20 Ohio 261; Green *v.* Garrington, 16 Ohio St. 549, 91 Am. Dec. 103.

Utah. — Drake *v.* Reggel, 10 Utah 376.

Vermont. — Sawyer *v.* Adams, 8 Vt. 172, 30 Am. Dec. 459. See also Potter *v.* Dooley, 55 Vt. 512.

And see the cases cited *supra*, VIII. 2. *d. The Record Book.*

The Destruction of the Record will not cut off the constructive notice that flows therefrom. See *infra*, XIII. *Destruction of Record.* And it is difficult to perceive why a different rule should prevail in a case where, through the officer's neglect and without any fault of the grantee, the record has been made inaccessible to a searcher. See 1 Dev. on Deeds, § 686.

2. See *supra*, VIII. 4. *Indexing.*

3. Indexing Essential to Give Constructive Notice. — Ritchie *v.* Griffiths, 1 Wash. 429, 22 Am. St. Rep. 155.

In Wisconsin a conveyance of land must be duly recorded and indexed, else it will not impart constructive notice. International L. Ins. Co. *v.* Scales, 27 Wis. 640; Pringle *v.* Dunn, 37 Wis. 449, 19 Am. Rep. 772; Lander *v.* Bromley, 79 Wis. 372. But in regard to chattel mortgages the rule is otherwise. Smith *v.* Waggoner, 50 Wis. 155; Marlet *v.* Hinman, 77 Wis. 136, 20 Am. St. Rep. 102.

4. As to the Officer's Liability for a failure to record properly, see State *v.* Davis, 96 Ind. 539; Armstrong *v.* Austin, 45 S. Car. 69; Maxwell *v.* Stuart, 99 Tenn. 409; Johnson *v.* Brice, 102 Wis. 575. See also cases cited *supra*, VIII. 4. *Indexing.* And see generally the title PUBLIC OFFICERS, vol. 23, p. 377 *et seq.*

5. See *supra*, I. 1. *In England.*

6. Where No Statute Requiring Registration — *United States.* — Pyeatt *v.* Powell, (C. C. A.) 51 Fed. Rep. 551.

Alabama. — Falkner *v.* Jones, 12 Ala. 165.

California. — Adler *v.* Sargent, 109 Cal. 42.

Connecticut. — Barnum *v.* Landon, 25 Conn. 137.

Usually Not Essential to Passing of Title. — The object of the recording acts being to protect certain specified classes of persons against fraud, failure to record will not, in the absence of an express provision to that effect, render the instrument wholly void and inoperative to convey the legal title;[1] the unrecorded instrument is valid against everyone except the classes of persons included within the terms of the statute.[2] But the recording of an instrument

Georgia. — Lee *v.* O'Quin, 103 Ga. 355.

Indiana. — Hasselman *v.* McKernan, 50 Ind. 441; Dixon *v.* Hunter, 57 Ind. 278; Citizens' State Bank *v.* Julian, 153 Ind. 655.

Louisiana. — Flower *v.* Skipwith, 45 La. Ann. 895; Hewitt *v.* Williams, 47 La. Ann. 742.

Maryland. — Snowden *v.* Pitcher, 45 Md. 260.

Mississippi. — Martin *v.* Nash, 31 Miss. 324; Lissa *v.* Pasey, 64 Miss. 352; Macrae *v.* Goodbar, 80 Miss. 315.

Missouri. — Oyler *v.* Renfro, 86 Mo. App. 321.

Nebraska. — Shaughnessey *v.* Lininger, etc., Co., 34 Neb. 747.

New Mexico. — Maxwell *v.* Tufts, 8 N. Mex. 396. See also Redewill *v.* Gillen, 4 N. Mex. 78.

New York. — Niles *v.* Mathusa, 162 N. Y. 546, *affirming* 20 N. Y. App. Div. 483; National Hudson River Bank *v.* Chaskin, 28 N. Y. App. Div. 311; Hawkins *v.* Beakes, 80 Hun (N. Y.) 292; Tilden *v.* Tilden, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 672.

South Carolina. — Singleton *v.* Singleton, 60 S. Car. 216.

Texas. — Blankenship *v.* Douglas, 26 Tex. 225, 82 Am. Dec. 608.

Washington. — Howard *v.* Shaw, 10 Wash. 151; Fischer *v.* Woodruff, 25 Wash. 67.

West Virginia. — Curtin *v.* Isaacsen, 36 W. Va. 391.

Wisconsin. — Bent *v.* Hoxie, 90 Wis. 625; Rommerdahl *v.* Jackson, 102 Wis. 444; Mississippi River Logging Co. *v.* Miller, 109 Wis. 77.

Canada. — Clinch *v.* Pernette, 24 Can. Sup. Ct. 385.

See also the title MARRIAGE SETTLEMENTS, vol. 19, p. 1238.

As to what instruments are required to be recorded, see *supra*, III. *Instruments Entitled to Record.*

The Tax System of the United States is not subject to the recording laws of the states, and a failure of the United States to record the lien or assessment of taxes does not make it invalid. U. S. *v.* Snyder, 149 U. S. 210.

A Deed Executed under a United States Treaty with the Indians is not within the scope of the *Illinois* recording act. Lomax *v.* Pickering, 165 Ill. 431.

Directory Provision — No Penalty Provided. — A statute which requires registration but provides no penalty for a failure to record will be regarded as directory only. Wolf *v.* Brown, 142 Mo. 612.

1. Not Essential to Pass Legal Title — *Florida.* — Ballard *v.* Lippman, 32 Fla. 481.

Illinois. — Haas *v.* Sternbach, 156 Ill. 44.

Indiana. — Shirk *v.* Thomas, 121 Ind. 147, 16 Am. St. Rep. 381.

Kentucky. — Meier *v.* Flinsbach, 95 Ky. 146; Kelley *v.* Yandell, 18 Ky. L. Rep. 462, 36 S. W. Rep. 1127.

Mississippi. — Chaffe *v.* Halpin, 62 Miss. 1.

Missouri. — Aubuchon *v.* Bender, 44 Mo. 560.

New York. — Jackson *v.* Burgott, 10 Johns. (N. Y.) 457, 6 Am. Dec. 349.

Ohio. — Home Bldg., etc., Assoc. *v.* Clark, 43 Ohio St. 427.

Oregon. — Moore *v.* Thomas, 1 Oregon 201.

Tennessee. — Cox *v.* Keathley, 99 Tenn. 522.

Texas. — Portis *v.* Hill, 30 Tex. 529, 98 Am. Dec. 481.

Virginia. — Wade *v.* Greenwood, 2 Rob. (Va.) 474, 40 Am. Dec. 759.

West Virginia. — Morgan *v.* Snodgrass, 49 W. Va. 387.

Wisconsin. — Hotson *v.* Wetherby, 88 Wis. 324.

As to validity as between the original parties, see *infra*, XI. 2. *b. As Against Grantor and His Legal Representatives.*

Failure to Record a Statutory Bond does not invalidate it. See the title BONDS, vol. 4, p. 669.

Kansas — Assignment of Mortgage. — Kan. Laws 1897, c. 160, provide that if the assignee of a mortgage fail to record his assignment it shall not be received as evidence in any court in the state. Under this act failure to record does not annul the mortgage or destroy the mortgage lien. It merely prevents the use of the assignment in evidence, and if the assignee can establish his title by other competent proof he is still entitled to foreclose the mortgage. Myers *v.* Wheelock, 60 Kan. 747; Burt *v.* Moore, 62 Kan. 536; Neosho Valley Invest. Co. *v.* Sharpless, 63 Kan. 885, 65 Pac. Rep. 667.

North Carolina — Unrecorded Deed in Evidence. — In North Carolina, while it seems that a deed cannot be given in evidence to support a title until registered, yet, when registered, it relates back to the time of its execution and the title becomes complete. Morris *v.* Ford, 2 Dev. Eq. (17 N. Car.) 412; Walker *v.* Coltraine, 6 Ired. Eq. (41 N. Car.) 79; Phifer *v.* Barnhart, 88 N. Car. 333; Ray *v.* Wilcoxon, 107 N. Car. 514. See Rogers *v.* Cawood, 1 Swan (Tenn.) 142, 55 Am. Dec. 729; Taylor *v.* M'Donald, 2 Bibb (Ky.) 420.

2. Only Persons Within Statute Protected — *United States.* — Pyeatt *v.* Powell, (C. C. A.) 51 Fed. Rep. 551.

Alabama. — Wood *v.* Lake, 62 Ala. 489.

Arkansas. — Hampton *v.* State, 67 Ark. 266.

California. — Warnock *v.* Harlow, 96 Cal. 298, 31 Am. St. Rep. 209.

Georgia. — White *v.* Interstate Bldg., etc., Assoc., 106 Ga. 146.

Illinois. — Haas *v.* Sternbach, 156 Ill. 44.

Indiana. — Shirk *v.* Thomas, 121 Ind. 147, 16 Am. St. Rep. 381.

Iowa. — Hays *v.* Thode, 18 Iowa 51; Chapman *v.* Coats, 26 Iowa 288; Rankin *v.* Miller, 43 Iowa 11; Fletcher *v.* Kelly, 88 Iowa 475; Nashua Trust Co. *v.* W. S. Edwards Mfg. Co.,

may, of course, be made a part of its execution by the express provisions of the statutes, and where this is the fact no title will pass until the instrument is recorded.[1]

Invalid as to Persons Within Recording Acts. — As to those classes of persons embraced within the terms of the recording acts, a prior unrecorded conveyance is void,[2] and this legal consequence of a failure to record will not be

99 Iowa 109, 61 Am. St. Rep. 226; Guernsey *v.* Black Diamond Coal, etc., Co., 99 Iowa 471.

Kentucky. — Taylor *v.* M'Donald, 2 Bibb (Ky.) 420; Meier *v.* Flinsbach, 95 Ky. 146; Kelley *v.* Yandell, 18 Ky. L. Rep. 462, 36 S. W. Rep. 1127.

Maryland. — Hoopes *v.* Knell, 31 Md. 550.

Michigan. — Wooden *v.* Wooden, 72 Mich. 347.

Minnesota. — Nickerson *v.* Wells-Stone Mercantile Co., 71 Minn. 230.

Nebraska. — Campbell Printing Press, etc., Co. *v.* Dyer, 46 Neb. 830; Fuller *v.* Brownell, 48 Neb. 145; Blair State Bank *v.* Stewart, 57 Neb. 58; Rumery *v.* Loy, 61 Neb. 755.

New Jersey. — Woolley *v.* Geneva Wagon Co., 59 N. J. L. 278; Campion *v.* Kille, 14 N. J. Eq. 229; Cressee *v.* Security Land Imp. Co., (N. J. 1896) 35 Atl. Rep. 451.

New York. — Braekeleer *v.* Schwabeland, 86 Hun (N. Y.) 143; Kauffman *v.* Klang, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 379; Tilden *v.* Tilden, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 672.

Pennsylvania. — Miller *v.* Enck, 13 Lanc. L. Rev. 190.

South Dakota. — Rosenbaum *v.* Foss, 7 S. Dak. 83, *reversing* on rehearing 4 S. Dak. 184.

Tennessee. — Bryant *v.* Charleston Bank, 107 Tenn. 560.

West Virginia. — Guggenheimer *v.* Lockridge, 39 W. Va. 457.

Wisconsin. — Mathwig *v.* Mann, 96 Wis. 213, 65 Am. St. Rep. 47; Topping *v.* Parish, 96 Wis. 378; Stanhilber *v.* Graves, 97 Wis. 515.

Canada. — McGregor *v.* Kerr, 29 Nova Scotia 45; Clinch *v.* Pernette, 24 Can. Sup. Ct. 385.

In Wood *v.* Lake, 62 Ala. 492, Stone, J., said: "The purpose of these enactments was the prevention of frauds. They impose a very light burden on the beneficiaries under such instruments while they render a valuable service to the public at large in furnishing the means of ascertaining what property is and what is not encumbered by such conveyances. They are void, that is, inoperative, unless recorded as the statute prescribes. They are not technically void instruments, for they are binding on the parties and on all persons having notice of their existence. They are only inoperative against the classes of persons the statute was designed to protect."

Court Cannot Extend Scope of Statute. — In Smith *v.* Williams, 44 Mich. 240, a tax purchaser took his decree by default, quieting his title as against the claims of a certain person who had, in fact, previously conveyed the land. His grantee, however, had not recorded the deed and was not made a party. It was held that the court could not extend the scope of the recording act, and that the failure to record the deed did not make the decree binding upon the grantee who was a stranger to the proceeding.

1. Recording May Be Made Essential. — Palmer *v.* White, 70 Cal. 220.

Under the English Statutes of Enrollment of 27 Hen. VIII., c. 16, § 1, it was provided as follows: "That no manors, lands, etc., shall pass, alter, or change from one to another, whereby any estate of inheritance or freehold shall be made to take effect, etc., except the same bargain and sale be made by writing, indented, sealed, and enrolled, etc., within six months next after the date of the same writings indented, etc." Under this statute, it has been resolved that no estate passes until the deed be enrolled. 2 Inst. 671; Cro. Jac. 408; Cro. Car. 110, 216, 569.

Deed by Married Woman. — In a few states statutes exist, or have existed, which make recordation necessary to the validity of a conveyance of land by a married woman. 2 Min. Inst. 847; Scarborough *v.* Watkins, 9 B. Mon. (Ky.) 540, 50 Am. Dec. 529; Hillegas *v.* Hartley, 1 Hill Eq. (S. Car.) 106; Rorer *v.* Roanoke Nat. Bank, 83 Va. 589; Building, etc., Co. *v.* Fray, 96 Va. 559; Sewall *v.* Haymaker, 127 U. S. 719. But *compare* Christy *v.* Burch, 25 Fla. 942, 978.

Tax Deed. — In the case of proceedings in the sale of lands for taxes, the statutes sometimes make recording necessary to the validity of the conveyance. There must be a strict compliance with such statutes in order to pass the title. Clark *v.* Tucker, 6 Vt. 181; Giddings *v.* Smith, 15 Vt. 344; Morton *v.* Edwin, 19 Vt. 81.

Assignments for Benefit of Creditors are in some jurisdictions wholly void unless recorded as prescribed. Miller *v.* Waite, 60 Neb. 431, *reversing* on rehearing 59 Neb. 319, and *overruling* Lancaster County Bank *v.* Horn, 34 Neb. 742.

But usually such is not the case. Paulson *v.* Clough, 40 Minn. 494; Thompson *v.* Ellenz, 58 Minn. 301. And see generally the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 3, pp. 66–68.

In Florida a Chattel Mortgage is not effectual or valid for any purpose until recorded or until possession is given to the mortgagee. Weed *v.* Standley, 12 Fla. 166; Reese *v.* Taylor, 25 Fla. 283; Hope *v.* Johnston, 28 Fla. 55.

An Execution on Land Must, in Connecticut, be recorded before it can operate as a conveyance of the title even as against the judgment debtor. Coe *v.* Stow, 8 Conn. 536; Schroeder *v.* Tomlinson, 70 Conn. 348.

2. As to What Persons Are Embraced within the provisions of the recording acts, see the following sections.

As to the Effect of a Failure to Record a Mortgage Assignment, see *supra*, III. 2. *c.* (3).

Such Invalidity Arises solely from the force of the recording acts. The grantor having already conveyed away his interest has, in fact, nothing left to convey, and the theory on

affected by the fact that such failure was due to unavoidable circumstances beyond the grantee's control.[1]

b. As Against Grantor and His Legal Representatives. — In the absence of any provision making registration an essential part of the execution of an instrument, such instrument is valid and binding as against the grantor, his heirs and his personal representatives.[2] And even where the

which the subsequent purchaser is protected is not that any estate has actually passed to him under his conveyance, but simply that the statute declares he shall be protected. Burns *v.* Berry, 42 Mich. 176; Edwards *v.* McKernan, 55 Mich. 520. See also Earle *v.* Fiske, 103 Mass. 491.

1. Unavoidable Circumstances No Excuse. — Eppes *v.* Randolph, 2 Call (Va.) 125; Harvey *v.* Alexander, 1 Rand. (Va.) 219, 10 Am. Dec. 519; Withers *v.* Carter, 4 Gratt. (Va.) 407, 50 Am. Dec. 78.

2. Valid Between Parties — *England.* — Robinson *v.* M'Donnell, 2 B. & Ald. 134, 5 M. & S. 228; Boughton *v.* Boughton, 1 Atk. 625. See also *In re* Marine Mansions Co., L. R. 4 Eq. 601.

United States. — Sicard *v.* Davis, 6 Pet. (U. S.) 124; Moore *v.* Simonds, 100 U. S. 145; Bacon *v.* Northwestern Mut. L. Ins. Co., 131 U. S. 258; Pyeatt *v.* Powell, (C. C. A.) 51 Fed. Rep. 551; U. S. *v.* Devereux, (C. C. A.) 90 Fed. Rep. 182; Stapylton *v.* Stockton, (C. C. A.) 91 Fed. Rep. 326.

Alabama. — Andrews *v.* Burns, 11 Ala. 691; McCaskle *v.* Amarine, 12 Ala. 17; Center *v.* Planters', etc., Bank, 22 Ala. 743; Wood *v.* Lake, 62 Ala. 489.

Arkansas. — Main *v.* Alexander, 9 Ark. 112, 47 Am. Dec. 732; Russell *v.* Cady, 15 Ark. 540; Hannah *v.* Carrington, 18 Ark. 105; Jacoway *v.* Gault, 20 Ark. 190, 73 Am. Dec. 494; Jackson *v.* Allen, 30 Ark. 110; Hampton *v.* State, 67 Ark. 266.

California. — Hunter *v.* Watson, 12 Cal. 363, 73 Am. Dec. 543; Warnock *v.* Harlow, 96 Cal. 298, 31 Am. St. Rep. 209; Beattie *v.* Crewdson, 124 Cal. 577; Ruggles *v.* Cannedy, 127 Cal. 290, *affirmed* 127 Cal. 306

Colorado. — Machette *v.* Wanless, 2 Colo. 169.

Connecticut. — Smith *v.* Starkweather, 5 Day (Conn.) 207; French *v.* Gray, 2 Conn. 92; Hill *v.* Meeker, 24 Conn. 211; Barnum *v.* Landon, 25 Conn. 137; Newtown Sav. Bank *v.* Lawrence, 71 Conn. 358.

District of Columbia. — Fitzgerald *v.* Wynne, 1 App. Cas. (D. C.) 107.

Florida. — Christy *v.* Burch, 25 Fla. 942, 978; Ballard *v.* Lippman, 32 Fla. 481.

Georgia. — Janes *v.* Penny, 76 Ga. 796; White *v.* Interstate Bldg., etc., Assoc., 106 Ga. 146.

Idaho. — Wells *v.* Alturas Commercial Co., (Idaho 1899) 56 Pac. Rep. 165.

Illinois. — Ross *v.* Hole, 27 Ill. 104; Forest *v.* Tinkham, 29 Ill. 141; Porter *v.* Dement, 35 Ill. 478; Frank *v.* Miner, 50 Ill. 444; Snydacker *v.* Blatchley, 177 Ill. 506; Seim *v.* Hale, 67 Ill. App. 364.

Indiana. — Henthorn *v.* Doe, 1 Blackf. (Ind.) 157; Evans *v.* Pence, 78 Ind. 439.

Iowa. — Bell *v.* Evans, 10 Iowa 353; Stephens *v.* Williams, 46 Iowa 540; Davis *v.* Lutkiewiez, 72 Iowa 254.

Kansas. — Neosho Valley Invest. Co. *v.* Sharpless, 63 Kan. 885, 65 Pac. Rep. 667.

Kentucky. — M'Clain *v.* Gregg, 2 A. K. Marsh. (Ky.) 454; Phillips *v.* Green, 3 A. K. Marsh. (Ky.) 7, 13 Am. Dec. 124; Fitzhugh *v.* Croghan, 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 139; Boling *v.* Ewing, 9 Dana (Ky.) 76; Ralls *v.* Graham, 4 T. B. Mon. (Ky.) 120; Hancock *v.* Beverly, 6 B. Mon. (Ky.) 531; Taylor *v.* M'Donald, 2 Bibb (Ky.) 420; Knight *v.* Whitman, 6 Bush (Ky.) 51, 99 Am. Dec. 652, Dozier *v.* Barnett, 13 Bush (Ky.) 457; Newsom *v.* Kurtz, 86 Ky. 277; Clift *v.* Williams, 105 Ky. 559.

Louisiana. — Liddell *v.* Rucker, 13 La. Ann. 569; Tilden *v.* Morrison, 33 La. Ann. 1067; McCall *v.* Irion, 41 La. Ann. 1126; Flower *v.* Pearce, 45 La. Ann. 853; Williams *v.* Landry, 47 La. Ann. 5; Ft. Wayne First Nat. Bank *v.* Ft. Wayne Artificial Ice Co., 105 La. 133.

Maine. — Beeman *v.* Lawton, 37 Me. 543.

Maryland. — Salmon *v.* Clagett, 3 Bland (Md.) 125; Cooke *v.* Kell, 13 Md. 469; Owens *v.* Miller, 29 Md. 144; Carson *v.* Phelps, 40 Md. 73; Dyson *v.* Simmons, 48 Md. 207; Stanhope *v.* Dodge, 52 Md. 483; Nally *v.* Long, 56 Md. 567; Harrison *v.* Morton, 87 Md. 671; G. Ober, etc., Co. *v.* Keating, 77 Md. 100.

Massachusetts. — Vose *v.* Morton, 4 Cush. (Mass.) 27, 50 Am. Dec. 750.

Michigan. — Sloan *v.* Holcomb, 29 Mich. 153; Burns *v.* Berry, 42 Mich. 176; Brown *v.* Brabb, 67 Mich. 17, 11 Am. St. Rep. 549; Van Husan *v.* Heames, 96 Mich. 504. See also Dwight *v.* Scranton, etc., Lumber Co., 69 Mich. 127.

Minnesota. — Greenleaf *v.* Edes, 2 Minn. 264; Paulson *v.* Clough, 40 Minn. 494; Thompson *v.* Ellenz, 58 Minn. 301.

Mississippi. — Chaffe *v.* Halpin, 62 Miss. 1.

Missouri. — Caldwell *v.* Head, 17 Mo. 561; McCamant *v.* Patterson, 39 Mo. 100; Maupin *v.* Emmons, 47 Mo. 304; Morrison *v.* Juden, 145 Mo. 282; Thomas Mfg. Co. *v.* Huff, 62 Mo. App. 124; Singer Mfg. Co. *v.* Shull, 74 Mo. App. 486.

Montana. — Marcum *v.* Coleman, 8 Mont. 196; Middle Creek Ditch Co. *v.* Henry, 15 Mont. 558.

Nebraska. — Harrison *v.* McWhirter, 12 Neb. 152; Campbell Printing Press, etc., Co. *v.* Dyer, 46 Neb. 830; Fuller *v.* Brownell, 48 Neb. 145; Blair State Bank *v.* Stewart, 57 Neb. 58; Rumery *v.* Loy, 61 Neb. 755; Keeling *v.* Hoyt, 31 Neb. 453; Connell *v.* Galligher, 39 Neb. 793.

Nevada. — Simpson *v.* Harris, 21 Nev. 353.

New Hampshire. — Whittemore *v.* Bean, 6 N. H. 47; Brown *v.* Manter, 22 N. H. 468; Corning *v.* Records, 69 N. H. 390, 76 Am. St. Rep. 178; Sinclair *v.* Wheeler, 69 N. H. 538.

New Jersey. — Milton *v.* Boyd, 49 N. J. Eq. 142.

New Mexico. — Moore *v.* Davey, 1 N. Mex. 303.

statute provides that the instrument shall take effect only from the time it is filed for record without making any exception as to the parties thereto, the courts will generally give effect to the obvious intention of the legislature and construe such act as having exclusive reference to the effect of the instrument as to those not parties to it.[1]

c. As Against Third Persons Without Notice — (1) *Purchasers* — (a) **Generally.** — The statutes requiring registration universally declare that a failure to record shall render the instrument invalid as against purchasers.[2]

New York. — Wilson *v.* Troup, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458; Jackson *v.* Burgott, 10 Johns. (N. Y.) 457, 6 Am. Dec. 349; Jackson *v.* West, 10 Johns. (N. Y.) 466; Wood *v.* Chapin, 13 N. Y. 509, 67 Am. Dec. 62; Moseley *v.* Moseley, 15 N. Y. 334; Forrester *v.* Parker, 14 Daly (N. Y.) 208; Pancoast *v.* American Heating, etc., Co., (Supm. Ct. Spec. T.) 66 How. Pr. (N. Y.) 49; Shuler *v.* Boutwell, 18 Hun (N. Y.) 171; Braekeleer *v.* Schwabeland, 86 Hun (N. Y.) 143; Todd *v.* Eighmie, 4 N. Y. App. Div. 9; Hardin *v.* Dolge, 46 N. Y. App. Div. 416; Balz *v.* Shaw, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 181.

North Carolina. — Leggett *v.* Bullock, Busb. L. (44 N. Car.) 283; Walker *v.* Coltraine, 6 Ired. Eq. (41 N. Car.) 79; Barrett *v.* Barrett, 120 N. Car. 127; Hinkle *v.* Greene, 125 N. Car. 489.

North Dakota. — Union Nat. Bank *v.* Oium, 3 N. Dak. 193, 44 Am. St. Rep. 533.

Ohio. — Irvin *v.* Smith, 17 Ohio 226; Fosdick *v.* Barr, 3 Ohio St. 471; Sidle *v.* Maxwell, 4 Ohio St. 236; Home Bldg., etc., Assoc. *v.* Clark, 43 Ohio St. 427; Straman *v.* Rechtine, 58 Ohio St. 443; Bradley *v.* Fike, 5 Ohio Cir. Dec. 50, 12 Ohio Cir. Ct. 193; Acklin *v.* Waltermier, 10 Ohio Cir. Dec. 629, 19 Ohio Cir. Ct. 372.

Oregon. — Moore *v.* Thomas, 1 Oregon 201.

Pennsylvania. — Levinz *v.* Will, 1 Dall. (Pa.) 430.

South Carolina. — Belk *v.* Massey, 11 Rich. L. (S. Car.) 614; Ashe *v.* Livingston, 2 Bay (S. Car.) 80; Penman *v.* Hart, 2 Bay (S. Car.) 251; Martin *v.* Quattlebam, 3 McCord L. (S. Car.) 205; Levi *v.* Gardner, 53 S. Car. 24.

Tennessee. — Simmons *v.* McKissick, 6 Humph. (Tenn.) 259; Rogers *v.* Cawood, 1 Swan (Tenn.) 142, 55 Am. Dec. 729; Wilkins *v.* May, 3 Head (Tenn.) 173; McGuire *v.* Gallagher, 95 Tenn. 349; Cox *v.* Keathley, 99 Tenn. 522; Literer *v.* Huddleston, (Tenn. Ch. 1898) 52 S. W. Rep. 1003.

Texas. — Cavanaugh *v.* Peterson, 47 Tex. 197; Parlin, etc., Co. *v.* Harrell, 8 Tex. Civ. App. 368; Moore *v.* Masterson, 19 Tex. Civ. App. 308.

Virginia. — Wade *v.* Greenwood, 2 Rob. (Va.) 474, 40 Am. Dec. 759; Guerrant *v.* Anderson, 4 Rand. (Va.) 208; Raines *v.* Walker, 77 Va. 92; Thomas *v.* Stuart, 91 Va. 694. *Compare* Building, etc., Co. *v.* Fray, 96 Va. 559.

Washington. — Darland *v.* Levins, 1 Wash. 582; Hinchman *v.* Point Defiance R. Co., 14 Wash. 349.

West Virginia. — Guggenheimer *v.* Lockridge, 39 W. Va. 457; Morgan *v.* Snodgrass, 49 W. Va. 387.

Wisconsin. — Hotson *v.* Wetherby, 88 Wis. 324; Ryan Drug Co. *v.* Hvambsahl, 89 Wis. 61.

Wyoming. — Schlessinger *v.* Cook, 9 Wyo. 256.

See also the titles Chattel Mortgages, vol. 5, p. 1009; Conditional Sales, vol. 6, p. 498; Covenants, vol. 8, pp. 119, 171; Marriage Settlements, vol. 19, p. 1238; Mortgages, vol. 20, p. 908; Railroad Securities, vol. 23, p. 801; Ships and Shipping.

Valid Against Grantor's Heirs. — McGee *v.* Allison, 94 Iowa 527; Todd *v.* Eighmie, 4 N. Y. App. Div. 9; Literer *v.* Huddleston, (Tenn. Ch. 1898) 52 S. W. Rep. 1003.

Valid Against Grantor's Administrator. — Andrews *v.* Burns, 11 Ala. 691; Kirkpatrick *v.* Caldwell, 32 Ind. 299.

Sale under Execution. — Where land conveyed by an unrecorded deed is sold on execution against the grantee, the purchaser at such sale gets a good title against the grantor. Connell *v.* Galligher, 39 Neb. 793.

1. Statute Not Excepting Original Parties. — Sidle *v.* Maxwell, 4 Ohio St. 236; Home Bldg., etc., Assoc. *v.* Clark, 43 Ohio St. 427. See also Hodson *v.* Sharpe, 10 East 350.

In some cases decided under such statute the courts have broadly announced that the instrument has no effect either in law or equity previous to its delivery for record. Sturgess *v.* Cleveland Bank, 3 McLean (U. S.) 140; Stansell *v.* Roberts, 13 Ohio 148, 42 Am. Dec. 193; Mayham *v.* Coombs, 14 Ohio 428; Holliday *v.* Franklin Bank, 16 Ohio 533; Bloom *v.* Noggle, 4 Ohio St. 45; Bercaw *v.* Cockerill, 20 Ohio St. 163.

But all the decisions in which such language is used determine simply the effect of the instrument on the adverse rights of third persons, and in reality delivery for record is not a part of the execution of the instrument. See opinion of Bartley, J., in Sidle *v.* Maxwell, 4 Ohio St. 236.

The Rule under the Arkansas Statutes that a mortgage is not a lien on the mortgaged property until recorded refers only to its effect as to third persons: as between the parties it constitutes a valid lien although not recorded. Hampton *v.* State, 67 Ark. 266.

2. Void as to Bona Fide Purchasers. — See the statutes, and the following cases:

United States. — Gratz *v.* Land, etc., Imp. Co., (C. C. A.) 82 Fed. Rep. 381; Mears *v.* Lockhart, (C. C. A.) 115 Fed. Rep. 865.

Alabama. — McCarthy *v.* Nicrosi, 72 Ala. 332, 47 Am. Rep. 418; Fitzgerald *v.* Williamson, 85 Ala. 585; Griffin *v.* Hall, 129 Ala. 289.

Arizona. — Webber *v.* Kastner, (Ariz. 1898) 53 Pac. Rep. 207.

California. — Garber *v.* Gianella, 98 Cal. 527.

Florida. — Rivers *v.* Rivers, 38 Fla. 65.

Georgia. — Wise *v.* Mitchell, 100 Ga. 614; Coleman *v.* Maclean, 101 Ga. 303; Harvey *v.* Sanders, 107 Ga. 740; Lindley *v.* Frey, 115 Ga. 662.

(b) **What Purchasers Embraced — Only Those Taking for Value.** — The word purchaser, as used in the recording acts, is not employed in its broadest sense, including every person who acquires land otherwise than by descent; but in its more restricted vernacular sense, whereby it is signified that the acquisition was upon a valuable consideration.[1]

What Purchasers for Value Included. — The purchasers for value to whom the recording acts are intended to apply are those who, subsequently to the execution of the unrecorded conveyance,[2] in good faith[3] purchase the same

Illinois. — Stevens *v.* Shannahan, 160 Ill. 330; Roberts *v.* Kingsbury, 71 Ill. App. 451; Martin *v.* Sexton, 72 Ill. App. 395.

Indiana. — Meikel *v.* Borders, 129 Ind. 529; Michener *v.* Bengel, 135 Ind. 188.

Kansas. — American Lead Pencil Co. *v.* Champion, 57 Kan. 352; Frankhouser *v.* Worrall, 51 Kan. 404.

Louisiana. — Thompson *v.* Whitbeck, 47 La. Ann. 49.

Maine. — Littlefield *v.* Prince, 96 Me. 499.

Maryland. — Sprigg *v.* Lyles, 2 Gill & J. (Md.) 446; Roberts *v.* Salisbury, 3 Gill & J. (Md.) 425.

Massachusetts. — Toupin *v.* Peabody, 162 Mass. 473; Smith *v.* Howard, 173 Mass. 88.

Minnesota. — Cogan *v.* Cook, 22 Minn. 137; McNeal *v.* Rider, 79 Minn. 153.

Missouri. — Morrison *v.* Juden, 145 Mo. 282; Singer Mfg. Co. *v.* Shull, 74 Mo. App. 486; Ozark Land, etc., Co. *v.* Robertson, 89 Mo. App. 480.

Nebraska. — Ames *v.* Miller, (Neb. 1902) 91 N. W. Rep. 250.

New Jersey. — Cressee *v.* Security Land Imp. Co., (N. J. 1896) 35 Atl. Rep. 451.

North Carolina. — Phillips *v.* Hodges, 109 N. Car. 248.

Ohio. — Sternberger *v.* Ragland, 57 Ohio St. 148; Eggleston *v.* Harrison, 61 Ohio St. 397; Kilgour *v.* Groeschen, 2 Ohio Dec. 545.

Pennsylvania. — Hetherington *v.* Clark, 30 Pa. St. 393; Riddle *v.* Armstrong, 179 Pa. St. 263.

Texas. — Wright *v.* Lassiter, 71 Tex. 644; Key *v.* La Pice, 88 Tex. 209; White *v.* Frank, 91 Tex. 66; Stanley *v.* Hamilton, (Tex. Civ. App. 1895) 33 S. W. Rep. 601; La Pice *v.* Caddenhead, 21 Tex. Civ. App. 363.

Washington. — Hinchman *v.* Point Defiance R. Co., 14 Wash. 349.

Canada. — Toronto *v.* Jarvis, 25 Can. Sup. Ct. 237, 21 Ont. App 395.

1. Means Purchaser for Value. — Middle Creek Ditch Co. *v.* Henry, 15 Mont. 558; Spielmann *v.* Kliest, 36 N. J. Eq. 199; Morris *v.* Daniels, 35 Ohio St. 406; Varwig *v.* Cleveland, etc., R. Co., 54 Ohio St. 455. For a full discussion of the necessity for and sufficiency of the consideration advanced by the subsequent purchaser, see *infra*, XI. 2. *e. Necessity for Valuable Consideration.*

The question as to what constitutes one a purchaser for value and without notice will be considered here only in an incidental way, having been very fully discussed in another place in this work. See the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 472.

The Term "Purchaser" Does Not Embrace a mere trespasser or a person obtaining possession of property by some wrongful act, Coucy *v.* Cummings, 12 La. Ann. 748; Moses *v.* Walker, 2 Hilt. (N. Y.) 536; or a pledgee, Kauffman *v.* Klang, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 379; or a lessee of land for less than one year, Topping *v.* Parish, 96 Wis. 378; or one seeking to fix and enforce a lien on land, Baker *v.* Bartlett, 18 Mont. 448, 56 Am. St. Rep. 594; or a suitor filing a *lis pendens*. Warnock *v.* Harlow, 96 Cal. 298, 31 Am. St. Rep. 209.

An Appropriator of the Use of Water subsequently to the conveyance of the use of the same water by the owner thereof is not a "purchaser" and the conveyance is binding on him though unrecorded. Middle Creek Ditch Co. *v.* Henry, 15 Mont. 558.

A Tenant in Common Taking by Partition is a purchaser of the interests of his cotenants in the lands set apart to him. Campau *v.* Barnard, 25 Mich. 381; Tharp *v.* Allen, 46 Mich. 389.

Member of Partnership. — Where property is put into the capital stock of a partnership by one partner, the other partner will stand in the attitude of a purchaser to the extent of his rights as a partner. Ringo *v.* Wing, 49 Ark. 457.

A mortgage executed by a member of a firm to his copartner to secure advances made by the latter over and above his due proportion, gives a priority of lien over a prior unrecorded mortgage executed to a person not a member of the firm. Brazleton *v.* Brazleton, 16 Iowa 417.

Purchaser of Chose in Action. — A title by purchase from a mortgagor of a chose in action or fund, that represents mortgaged personal property, takes precedence of the titles under the mortgage to property which is represented by such fund, where the mortgage had never been recorded. Garland *v.* Plummer, 72 Me. 397.

2. Limited to Subsequent Purchasers. — Coffin *v.* Ray, 1 Met. (Mass.) 212; Deeley *v.* Dwight, 16 Daly (N. Y.) 300; Grandin *v.* Anderson, 15 Ohio St. 286. See also Daly *v.* New York, etc., R. Co., 55 N. J. Eq. 595.

The Statutes of Many States make use of the terms "subsequent purchasers" and "subsequent creditors." Stim. Am. Stat. L., § 1611; Webb on Rec. Tit., § 194.

3. Must Be in Good Faith. — Many of the statutes limit their protection to purchasers in good faith. But, even though the statutes do not in terms demand good faith in the purchaser, they will be construed to intend to protect only *bona fide* purchasers. Corey *v.* Alderman, 46 Mich. 540; Van Rensselaer *v.* Clark, 17 Wend. (N. Y.) 25, 31 Am. Dec. 280; Hooker *v.* Pierce, 2 Hill (N. Y.) 650; Brown *v.* Johnston, (C. Pl. Spec. T.) 7 Abb. N. Cas.

property [1] from the same grantor,[2] and would suffer loss if the unrecorded conveyance were allowed to prevail against them.[3]

Not Limited to Immediate Purchasers from Grantor. — But the protection of the acts is not limited to immediate purchasers from the grantor, but extends as well to mediate purchasers deriving their title from him through mesne conveyances.[4]

A Purchaser from the Heir of a grantor in a prior unrecorded conveyance is as much entitled to protection as if he had purchased directly from such grantor.[5] A contrary doctrine was upheld in a few early cases,[6] but these decisions were based on a clear misconception of the purposes of the recording acts.[7]

A Purchaser from the Administrator of the grantor in a prior unrecorded deed takes a good title where his purchase is for value and without notice.[8]

(2) *Grantee in Quitclaim Deed.* — It is the general rule that one taking

(N. Y.) 188; Mitchell *v.* Aten, 37 Kan. 33, 1 Am. St. Rep. 231.

As to the effect of actual notice, see *infra*, XI. 2. *d. As Against Third Persons with Notice.*

For a full discussion of bona fide purchasers, see the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 472.

1. Limited to Purchasers of Same Property. — Bazemore *v.* Davis, 55 Ga. 504; Harman *v.* Oberdorfer, 33 Gratt. (Va.) 497.

Persons Claiming under the Unrecorded Instrument and not adversely to it are, of course, not within the protection of the recording acts. Williams *v.* Landry, 47 La. Ann. 5; McLaughlin *v.* Ihmsen, 85 Pa. St. 364; Nice's Appeal, 54 Pa. St. 200; House *v.* Brailsford, 1 Nott & M. (S. Car.) 31; Moore *v.* Scott, (Tex. Civ. App. 1896) 38 S. W. Rep. 394; Town *v.* Gensch, 101 Wis. 445.

2. Limited to Purchasers from Same Grantor. — Long *v.* Dollarhide, 24 Cal. 218; Smith *v.* Williams, 44 Mich. 240; Sessions *v.* Doe, 7 Smed. & M. (Miss.) 130.

One Claiming Through an Independent Chain of Title and not through the grantor in the unrecorded deed is not entitled to protection. Rankin *v.* Miller, 43 Iowa 11.

A Purchaser from a Stranger to the Title is not within the recording acts. Texas Lumber Mfg. Co. *v.* Branch, (C. C. A.) 60 Fed. Rep. 201.

A Purchaser of a Forged Conveyance is not entitled to protection. Lee *v.* Kellogg, 108 Mich. 535.

3. Liability to Loss. — Poett *v.* Stearns, 31 Cal. 78.

4. Acts Apply to Remote Purchasers. — Memphis Land, etc., Co. *v.* Ford, (C. C. A.) 58 Fed. Rep. 452; Hawley *v.* Bennett, 5 Paige (N. Y.) 111; Ledyard *v.* Butler, 9 Paige (N. Y.) 132, 37 Am. Dec. 381; Hooker *v.* Pierce, 2 Hill (N. Y.) 650; Dillingham *v.* Bolt, 37 N. Y. 198; Fallass *v.* Pierce, 30 Wis. 443. See also National Cash-Register Co. *v.* Maloney, 95 Iowa 573.

A Purchaser under a Recorded Power of Attorney to convey land is entitled to protection against a prior unrecorded deed to the same land executed by the grantor in person. Gratz *v.* Land, etc., Imp. Co., (C. C. A.) 82 Fed. Rep. 381.

5. Purchaser from Heir Protected — *England.* — Chadwick *v.* Turner, L. R. 1 Ch. 310.

United States. — Memphis Land, etc., Co. *v.* Ford, (C. C. A.) 58 Fed. Rep. 452.

Illinois. — Kennedy *v.* Northup, 15 Ill. 148; Rupert *v.* Mark, 15 Ill. 540.

Massachusetts. — Earle *v.* Fiske, 103 Mass. 491.

Michigan. — Burns *v.* Berry, 42 Mich. 176.

Minnesota. — Lyon *v.* Gleason, 40 Minn. 434; Welch *v.* Ketchum, 48 Minn. 241.

Missouri. — Youngblood *v.* Vastine, 46 Mo. 239, 2 Am. Rep. 509, *overruling* Caldwell *v.* Head, 17 Mo. 561, and McCamant *v.* Patterson, 39 Mo. 110.

New Hampshire. — Whittemore *v.* Bean, 6 N. H. 47.

Pennsylvania. — Powers *v.* McFerran, 2 S. & R. (Pa.) 44.

Rhode Island. — Harris *v.* Arnold, 1 R. I. 125.

Tennessee. — M'Culloch *v.* Eudaly, 3 Yerg. (Tenn.) 346.

Texas. — Taylor *v.* Harrison, 47 Tex. 454, 26 Am. Rep. 304; Holmes *v.* Johns, 56 Tex. 41. See also Zimpelman *v.* Robb, 53 Tex. 274.

Claim Against Contingent Interest. — A claim against a person who may, at some future day, become the owner by descent of certain premises, will, of course, not be protected against an unrecorded conveyance or incumbrance of such premises. Westervelt *v.* Voorhis, 42 N. J. Eq. 179; Voorhis *v.* Westervelt, 43 N. J. Eq. 642, 3 Am. St. Rep. 315.

6. Purchaser from Heir Not Protected. — Hill *v.* Meeker, 24 Conn. 211.

Under a Georgia Recording Act providing only for the case of a contest between two or more deeds executed by "the same person or persons," it was held that a purchaser from the heir of the grantor in a prior unrecorded deed was not entitled to protection. Webb *v.* Doe, 33 Ga. 565.

In Kentucky, prior to the Act of February 10, 1858, it was held that a purchaser from the heir was not entitled to protection. Ralls *v.* Graham, 4 T. B. Mon. (Ky.) 120; Hancock *v.* Beverly, 6 B. Mon. (Ky.) 531; Harlan *v.* Seaton, 18 B. Mon. (Ky.) 312. But by that act protection was expressly extended to such purchasers. Dozier *v.* Barnett, 13 Bush (Ky.) 457.

7. See Memphis Land, etc., Co. *v.* Ford, (C. C. A.) 58 Fed. Rep. 455, where the court exposes the fallacy of the majority doctrine in Hill *v.* Meeker, 24 Conn. 211, and says that the dissenting opinion of Waite, C. J., in that case has since met with general approval.

8. Purchaser from Administrator Protected. — Emerson *v.* Ross, 17 Fla. 122; Stewart *v.* Mathews, 19 Fla. 752; Tucker *v.* Harris, 13 Ga. 1, 58 Am. Dec. 488.

under a quitclaim deed is not a purchaser for value and without notice,[1] and under the recording acts of some states the same rule obtains.[2] But in a number of jurisdictions the recording acts are held to apply as well to quitclaims as to warranty deeds.[3] And whatever the rule, one taking by warranty deed from the grantee in a quitclaim deed is to be regarded as a *bona fide* purchaser.[4]

(3) *Mortgagee.* — A subsequent mortgagee is regarded as a "purchaser" to the extent of his interest in the mortgaged premises, and is therefore entitled to protection under an act declaring prior unrecorded conveyances void as against subsequent purchasers.[5] The statutes usually embrace subsequent

1. See the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, pp. 510–513.

2. **Not Bona Fide Purchaser under Recording Acts** — *United States.* — Dodge *v.* Briggs, 27 Fed. Rep. 160. See also Oliver *v.* Piatt, 3 How. (U. S.) 333; May *v.* Le Claire, 11 Wall. (U. S.) 217; Villa *v.* Rodriguez, 12 Wall. (U. S.) 323.

Alabama. — Walker *v.* Miller, 11 Ala. 1067; Smith *v.* Branch Bank, 21 Ala. 125; Derrick *v.* Brown, 66 Ala. 162.

Florida. — Snow *v.* Lake, 20 Fla. 656, 51 Am. Rep. 625.

Iowa. — Steele *v.* Sioux Valley Bank, 79 Iowa 339, 18 Am. St. Rep. 370.

Maine. — Bragg *v.* Paulk, 42 Me. 502; Coe *v.* Persons Unknown, 43 Me. 432; Walker *v.* Lincoln, 45 Me. 67; Nash *v.* Bean, 74 Me. 340; Reed *v.* Knights, 87 Me. 181.

Michigan. — Peters *v.* Cartier, 80 Mich. 129; Beakley *v.* Robert, 120 Mich. 209; Messenger *v.* Peter, (Mich. 1901) 88 N. W. Rep. 209. See also De Veaux *v.* Fosbender, 57 Mich. 579. But see White *v.* McGarry, 47 Fed. Rep. 420 (construing the *Michigan* statute).

Montana. — McAdow *v.* Black, 6 Mont. 601.

Oregon. — Richards *v.* Snyder, 11 Oregon 511; Baker *v.* Woodward, 12 Oregon 3; American Mortg. Co. *v.* Hutchinson, 19 Oregon 334.

South Dakota. — Rosenbaum *v.* Foss, 7 S. Dak. 83.

Texas. — Rodgers *v.* Burchard, 34 Tex. 441, 7 Am. Rep. 283; Harrison *v.* Boring, 44 Tex. 255; Richardson *v.* Levi, 67 Tex. 359; Lampkin *v.* Adams, 74 Tex. 96; Jamison *v.* Scottish-American Mortg. Co., 19 Tex. Civ. App. 232; Hill *v.* Grant, (Tex. Civ. App. 1898) 44 S. W. Rep. 1016.

Virginia. — Virginia, etc., Coal, etc., Co. *v.* Fields, 94 Va. 102.

Limitation of Doctrine. — The doctrine that one who claims under a quitclaim deed will not be protected against a prior unrecorded deed must be limited to the strict sense of that technical species of conveyance. If from the terms of the deed, the adequacy of the price paid, or other circumstances, it appears that the grantor intended to convey, and the grantee expected to be invested with, a fee simple title or other particular estate, the purchaser will be entitled to protection. Webb Rec. Tit., §§ 27, 183; Van Rensselaer *v.* Kearney, 11 How. (U. S.) 298; Flagg *v.* Mann, 2 Sumn. (U. S.) 487; Sweet *v.* Green, 1 Paige (N. Y.) 473, 19 Am. Dec. 442; Harrison *v.* Boring, 44 Tex. 255; Taylor *v.* Harrison, 47 Tex. 454, 26 Am. Rep. 304.

3. **Deemed Bona Fide Purchaser** — *United States.* — White *v.* McGarry, 2 Flipp. (U. S.) 572; Prentice *v.* Duluth Storage, etc., Co., (C. C. A.) 58 Fed. Rep. 437.

California. — Graff *v.* Middleton, 43 Cal. 341; Frey *v.* Clifford, 44 Cal. 335; Nidever *v.* Ayers, 83 Cal. 39. *Compare* Allison *v.* Thomas, 72 Cal. 562, 1 Am. St. Rep. 89.

Connecticut. — Robinson *v.* Clapp, 65 Conn. 365; Schroeder *v.* Tomlinson, 70 Conn. 348.

Illinois. — Brown *v.* Banner Coal, etc., Co., 97 Ill. 214, 37 Am. Rep. 105. *Compare* Hamilton *v.* Doolittle, 37 Ill. 473.

Indiana. — Smith *v.* McClain, 146 Ind. 77.

Massachusetts. — Stark *v.* Boynton, 167 Mass. 443.

Minnesota. — Strong *v.* Lynn, 38 Minn. 315.

Mississippi. — Chapman *v.* Sims, 53 Miss. 163.

Missouri. — Fox *v.* Hall, 74 Mo. 315, 41 Am. Rep. 316; Willingham *v.* Hardin, 75 Mo. 429; Boogher *v.* Neece, 75 Mo. 383; Campbell *v.* Laclede Gas Light Co., 84 Mo. 352; Munson *v.* Ensor, 94 Mo. 504; Ebersole *v.* Rankin, 102 Mo. 488; Hope *v.* Blair, 105 Mo. 90, 24 Am. St. Rep. 366; Elliott *v.* Buffington, 149 Mo. 663. See also Eoff *v.* Irvine, 108 Mo. 378, 32 Am. St. Rep. 609.

Nebraska. — Snowden *v.* Tyler, 21 Neb. 199; Schott *v.* Dosh, 49 Neb. 187, 59 Am. St. Rep. 531. But see Hastings *v.* Nissen, 31 Fed. Rep. 597 (construing the *Nebraska* statute).

New York. — Wilhelm *v.* Wilken, 149 N. Y. 447, 52 Am. St. Rep. 743, 75 Hun (N. Y.) 552.

In Minnesota, by the Act of 1875, a quitclaim deed was put on the same footing as deeds of bargain and sale. Strong *v.* Lynn, 38 Minn. 315; Dunn *v.* Barnum, (C. C. A.) 51 Fed. Rep. 355; Prentice *v.* Duluth Storage, etc., Co., (C. C. A.) 58 Fed. Rep. 437.

But before that act the rule was otherwise. Martin *v.* Brown, 4 Minn. 282; Marshall *v.* Roberts, 18 Minn. 405, 10 Am. Rep. 201.

Purchaser at Sheriff's Sale. — Although a purchaser at a sheriff's sale receives only a quitclaim deed, the general rule is that he is protected by the recording acts. Roberts *v.* Bourne, 23 Me. 165, 39 Am. Dec. 614. See also Morris *v.* Daniels, 35 Ohio St. 406. And see *infra*, XI. 2. *c.* (7) *Purchaser at Execution Sale.*

4. **Warranty Deed by Grantee in Quitclaim.** — Rinehardt *v.* Reifers, (Ind. 1902) 64 N. E. Rep. 459; Otis *v.* Kennedy, 107 Mich. 312. And see the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 512, note 5.

5. **Mortgagee a "Purchaser."** — Willoughby *v.* Willoughby, 1 T. R. 763; Broward *v.* Hoeg, 15 Fla. 370; Warner *v.* Watson, 35 Fla. 403; Baker *v.* Bartlett, 18 Mont. 446, 56 Am. St. Rep. 594; Dorr *v.* Meyer, 51 Neb. 94; Larned

mortgagees within their express terms, but, whether so included or not, such persons are universally held entitled to protection.[1]

(4) *Assignee of Mortgage.* — An assignee of a mortgage for value and without notice is deemed to be a purchaser within the protection of the recording acts.[2]

(5) *Trustee in Deed of Trust.* — A trustee in a deed of trust — other than one for the benefit of creditors generally[3] — is held to be a *bona fide* purchaser entitled to protection under the recording acts.[4]

(6) *Creditors* — (a) **Where Act Applies to Purchasers Only.** — The term purchaser presupposes the acquisition of some direct interest by the act of the party in contradistinction to acquisition by operation of law.[5] A creditor even after

v. Donovan, 84 Hun (N. Y.) 533. See also the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 476.

But see Campbell Printing Press, etc., Co. *v.* Dyer, 46 Neb. 830, where it was held that a mortgagee of a conditional vendee of chattels was not a purchaser from such vendee so as to be protected by the recording act.

That the Legal Title Does Not Pass to the mortgagee will not affect the rule. Porter *v.* Greene, 4 Iowa 571.

1. Subsequent Mortgagees Protected — *United States.* — Bailey *v.* Crim, 9 Biss. (U. S.) 95.

Alabama. — Cook *v.* Parham, 63 Ala. 456; Whelan *v.* McCreary, 64 Ala. 319; Steiner *v.* Clisby, 95 Ala. 91, *rehearing* denied 95 Ala. 95.

Arkansas. — Fargason *v.* Edrington, 49 Ark. 207.

California. — Salter *v.* Baker, 54 Cal. 140.

Florida. — McKeown *v.* Collins, 38 Fla. 276.

Indiana. — Carson *v.* Eickhoff, 148 Ind. 596.

Iowa. — Porter *v.* Greene, 4 Iowa 571; Seevers *v.* Delashmutt, 11 Iowa 174, 77 Am. Dec. 139; Welton *v.* Tizzard, 15 Iowa 495; Hewitt *v.* Rankin, 41 Iowa 35; Patton *v.* Eberhart, 52 Iowa 67; Kessey *v.* McHenry, 54 Iowa 189.

Kansas. — Jordan *v.* McNeil, 25 Kan. 459.

Kentucky. — Halbert *v.* McCulloch, 3 Met. (Ky.) 456, 79 Am. Dec. 556.

Louisiana. — Stockton *v.* Craddick, 4 La. Ann. 282; Thompson *v.* Whitbeck, 47 La. Ann. 49.

Maine. — Pierce *v.* Faunce, 47 Me. 507.

Maryland. — Swartz *v.* Chickering, 58 Md. 290; G. Ober, etc., Co. *v.* Keating, 77 Md. 100; Ohio L. Ins., etc., Co. *v.* Ross, 2 Md. Ch 25.

Michigan. — Burns *v.* Berry, 42 Mich. 176.

Mississippi. — Pomet *v.* Scranton, Walk. (Miss.) 406.

Missouri. — Keith, etc., Coal Co. *v.* Bingham, 97 Mo. 196; Morris *v.* McMahan, 75 Mo. App. 494.

Nebraska. — State Bank *v.* O. S. Kelley Co., 47 Neb. 678, *rehearing* denied 49 Neb. 242; Burrows *v.* Hovland, 40 Neb. 464.

Nevada. — Brophy Min. Co. *v.* Brophy, etc., Gold, etc., Min. Co., 15 Nev. 101.

New Jersey. — Lavalette *v.* Thompson, 13 N. J. Eq. 274; Behn *v.* National Bank, 65 N. J. L. 591.

New York. — James *v.* Morey, 2 Cow. (N. Y.) 247, 14 Am. Dec. 475.

North Carolina. — Brem *v.* Lockhart, 93 N. Car. 191.

Ohio. — Amick *v.* Woodworth, 58 Ohio St. 86.

Pennsylvania. — Martin *v.* Jackson, 27 Pa. St. 504, 67 Am. Dec. 489; Hulett *v.* Mutual L. Ins. Co., 114 Pa. St. 142.

South Carolina. — Haynsworth *v.* Bischoff, 6 S. Car. 159.

Tennessee. — Moore *v.* Walker, 3 Lea (Tenn.) 656; Bass *v.* Wheless, 2 Tenn. Ch. 531.

Texas. — Huffman *v.* Blume, 64 Tex. 334; Steffian *v.* Milmo Nat. Bank, 69 Tex. 513.

Utah. — Singer Mfg. Co. *v.* Chalmers, 2 Utah 542.

West Virginia. — Weinberg *v.* Rempe, 15 W. Va. 829.

A Power in a Mortgage to Sell the Land and pay the debt is part of the security and an interest in the land; and, as such, is protected by the statute against a prior unregistered deed. Bell *v.* Twilight, 22 N. H. 500.

Legal Title Not Divested. — A subsequent mortgage taken without notice of a prior unrecorded deed will not divest the grantee's legal title. He holds subject to the mortgage. Hays *v.* Tilson, 18 Tex. Civ. App. 610.

2. Assignee of Mortgage Protected. — Hayden *v.* Drury, 3 Fed. Rep. 782; Stark *v.* Boynton, 167 Mass. 443; Burns *v.* Berry, 42 Mich. 176; Hull *v.* Diehl, 21 Mont. 71; Westlerook *v.* Gleason, 79 N. Y. 23; Decker *v.* Boice, 83 N. Y. 215; Smyth *v.* Knickerbocker L. Ins. Co., 84 N. Y. 589; Larned *v.* Donovan, 84 Hun (N. Y.) 533; Mott *v.* Clark, 9 Pa. St. 399, 49 Am. Dec. 566; Butler *v.* Mazeppa Bank, 94 Wis. 351. See also the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 476.

Notice to Assignor Charged to Assignee. — In *New York* it is held that an innocent assignee of a mortgage must be charged with the notice his assignor had of a prior unrecorded mortgage on the same property. Greene *v.* Warnick, 64 N. Y. 220; Decker *v.* Boice, 83 N. Y. 215, *overruling* Jackson *v.* Van Valkenburgh, 8 Cow. (N. Y.) 260; David Stevenson Brewing Co. *v.* Iba. (N. Y. Super. Ct. Gen. T.) 12 Misc. (N. Y.) 329. See also Rapps *v.* Gottlieb, 142 N. Y. 164. See the title MORTGAGES, vol. 20, p. 1042.

3. See *infra*, XI. 2. *c.* (9) *Assignee or Trustee for Grantor's Creditors.*

4. Trustee in Trust Deed Protected. — Kesner *v.* Trigg, 98 U. S. 50; Sheffey *v.* Lewisburg Bank, 33 Fed. Rep. 315; Gerson *v.* Pool, 31 Ark. 85; Fargason *v.* Edrington, 49 Ark. 207; Belding Sav. Bank *v.* Moore, 118 Mich. 150; Schumpert *v.* Dillard, 55 Miss. 348; Ladd *v.* Anderson, 133 Mo. 625; Wickham *v.* Martin, 13 Gratt. (Va.) 427. See also the title TRUST DEEDS AND POWER OF SALE MORTGAGES.

5. See the title PURCHASE — PURCHASER, vol. 23, p. 461.

he has secured a lien by attachment, judgment, or execution, is regarded as acquiring such rights only as the debtor had,[1] and therefore, where a recording act in its terms applies only to subsequent purchasers and mortgagees, failure to record will not invalidate an instrument as against either general or lien creditors.[2]

1. Creditor Acquires Only What Interest Debtor Had. — Brown *v.* Pierce, 7 Wall. (U. S.) 205; Baker *v.* Morton, 12 Wall. (U. S.) 150; Ukiah Bank *v.* Petaluma Sav. Bank, 100 Cal. 590; Swarts *v.* Stees, 2 Kan. 236, 85 Am. Dec. 588; Holden *v.* Garrett, 23 Kan. 98; English *v.* Law, 27 Kan. 242; Bush *v.* Bush, 33 Kan. 556; Banning *v.* Edes, 6 Minn. 402; Rodgers *v.* Bonner, 45 N. Y. 379; Blankenship *v.* Douglas, 26 Tex. 228, 82 Am. Dec. 608.

As to the scope of the word "creditor," see the title CREDITOR, vol. 8, p. 238.

Creditor Advances No New Consideration. — See Norton *v.* Williams, 9 Iowa 528; Holden *v.* Garrett, 23 Kan. 98; Baze *v.* Arper, 6 Minn. 220; Thomas *v.* Kelsey, 30 Barb. (N. Y.) 268; Farley *v.* McAlister, 39 Tex. 602.

2. Unrecorded Conveyance Good Against Creditors — *England.* — Burn *v.* Burn, 3 Ves. Jr. 582; Finch *v.* Winchelsea, 1 P. Wms. 277; Brace *v.* Marlborough, 2 P. Wms. 491.

Canada. — Jellett *v.* Wilkie, 26 Can. Sup. Ct. 282.

Alabama.—Avent *v.* Read, 2 Stew. (Ala.) 488.

Arkansas. — Apperson *v.* Burgett, 33 Ark. 328.

California. — Pixley *v.* Huggins, 15 Cal. 127; Plant *v.* Smythe, 45 Cal. 161; Wilcoxson *v.* Miller, 49 Cal. 193; Le Clert *v.* Oullahan, 52 Cal. 252; Hoag *v.* Howard, 55 Cal. 564; Morrow *v.* Graves, 77 Cal. 218; Ukiah Bank *v.* Petaluma Sav. Bank, 100 Cal. 590.

Georgia. — Donovan *v.* Simmons, 96 Ga. 340.

Indiana. — Scott *v.* McMurran, 7 Blackf. (Ind.) 284; Orth *v.* Jennings, 8 Blackf. (Ind.) 420; Runyan *v.* McClellan, 24 Ind. 165; Shirk *v.* Thomas, 121 Ind. 147, 16 Am. St. Rep. 381.

Iowa. — Norton *v.* Williams, 9 Iowa 528; Bell *v.* Evans, 10 Iowa 353; Seevers *v.* Delashmutt, 11 Iowa 174, 77 Am. Dec. 139; Welton *v.* Tizzard, 15 Iowa 495; Hays *v.* Thode, 18 Iowa 51; Savery *v.* Browning, 18 Iowa 246; Churchill *v.* Morse, 23 Iowa 229, 92 Am. Dec. 422; Chapman *v.* Coats, 26 Iowa 288; Tama City First Nat. Bank *v.* Hayzlett, 40 Iowa 659; Goodenough *v.* McCoid, 44 Iowa 659; Phelps *v.* Fockler, 61 Iowa 340; Sigworth *v.* Meriam, 66 Iowa 477; Moorman *v.* Gibbs, 75 Iowa 537; Guernsey *v.* Black Diamond Coal, etc., Co., 99 Iowa 471.

Kansas. — Swarts *v.* Stees, 2 Kan. 236, 85 Am. Dec. 588; Harrison *v.* Andrews, 18 Kan. 535; Holden *v.* Garrett, 23 Kan. 98; Northwestern Forwarding Co. *v.* Mahaffey, 36 Kan. 152; Burke *v.* Johnson, 37 Kan. 337, 1 Am. St. Rep. 252; Bowling *v.* Garrett, 49 Kan. 504, 33 Am. St. Rep. 377; Smith *v.* Savage, 3 Kan. App. 556.

Kentucky. — Righter *v.* Forrester, 1 Bush (Ky.) 278; Morton *v.* Robards, 4 Dana (Ky.) 258.

Michigan. — Columbia Bank *v.* Jacobs, 10 Mich. 349, 81 Am. Dec. 792; Otis *v.* Sprague, 118 Mich. 61.

Minnesota. — Greenleaf *v.* Edes, 2 Minn. 264; Dunwell *v.* Bidwell, 8 Minn. 34.

Mississippi. — Money *v.* Dorsey, 7 Smed. & M. (Miss.) 15; Kelly *v.* Mills, 41 Miss. 267; Walton *v.* Hargroves, 42 Miss. 18, 97 Am. Dec. 429.

Missouri. — Davis *v.* Owenby, 14 Mo. 170, 55 Am. Dec. 105; Valentine *v.* Havener, 20 Mo. 133; Stillwell *v.* McDonald, 39 Mo. 282; Potter *v.* McDowell, 43 Mo. 93; Reed *v.* Ownby, 44 Mo. 204; Sappington *v.* Oeschli, 49 Mo. 244; Black *v.* Long, 60 Mo. 181.

Nebraska. — Galway *v.* Malchow, 7 Neb. 285; Harral *v.* Gray, 10 Neb. 186.

New Jersey. — Woolley *v.* Geneva Wagon Co., 59 N. J. L. 278; Herbert *v.* Mechanics Bldg., etc., Assoc., 17 N. J. Eq. 497, 90 Am. Dec. 601; Cressee *v.* Security Land Imp. Co., (N. J. 1896) 35 Atl. Rep. 415.

New York. — Schmidt *v.* Hoyt, 1 Edw. (N. Y.) 652; Thomas *v.* Kelsey, 30 Barb. (N. Y.) 268; Jackson *v.* Dubois, 4 Johns. (N. Y.) 216; Schroeder *v.* Gurney, 73 N. Y. 430; Hardin *v.* Dolge, 46 N. Y. App. Div. 416.

North Carolina. — Cowen *v.* Withrow, 112 N. Car. 736.

Pennsylvania. — Heister *v.* Fortner, 2 Binn. (Pa.) 40, 4 Am. Dec. 417; Rodgers *v.* Gibson, 4 Yeates (Pa.) 111; Cover *v.* Black, 1 Pa. St. 493; Watson *v.* Willard, 9 Pa. St. 95.

South Carolina. — Coleman *v.* Hamburg Bank, 2 Strobh. Eq. (S. Car.) 285, 49 Am. Dec. 671. See also Carraway *v.* Carraway, 27 S. Car. 576.

South Dakota. — Kohn *v.* Lapham, 13 S. Dak. 78; Murphy *v.* Plankinton Bank, 13 S. Dak. 501.

Vermont. — Hackett *v.* Callender, 32 Vt. 97.

Washington. — Dawson *v.* McCarty, 21 Wash. 314, 75 Am. St. Rep. 841.

Wisconsin. — Stanhilber *v.* Graves, 97 Wis. 515.

In Ohio the rule stated in the text has been recognized in some decisions. Muskingum Bank *v.* Carpenter, 7 Ohio 21 (pt. i.), 28 Am. Dec. 616; Tousley *v.* Tousley, 5 Ohio St. 78; Lake *v.* Doud, 10 Ohio 415.

But in other cases the illogical rule has been established that the lien of a judgment is a conveyance and therefore entitled to preference over a prior unrecorded conveyance. Mayham *v.* Coombs, 14 Ohio 428; Jackson *v.* Luce, 14 Ohio 514; Holliday *v.* Franklin Bank, 16 Ohio 533; White *v.* Denman, 1 Ohio St. 110; Fosdick *v.* Barr, 3 Ohio St. 471.

Texas — Resulting Trust. — In Texas it is held that a resulting trust is not within the recording acts, and while a subsequent purchaser for value and without notice is protected in equity against such trust, yet creditors, whose only protection lies in the express terms of the recording acts, cannot claim priority over an unrecorded resulting trust, although they had no actual notice thereof. Parker *v* Coop, 60 Tex. 111; McKamey *v.* Thorp, 61 Tex. 648; Ross *v.* Kornrumpf, 64 Tex. 390.

Meaning of "Lien" in Recording Acts. — Under Ga. Registry Act of 1889, declaring unrecorded

(b) **Where Creditors Included in Terms of Act** — *aa.* In General. — By the express provisions of many of the recording acts their protection is extended to creditors of the grantor, mortgagor, or other apparent owner.[1]

conveyances void as to third persons who have acquired a transfer or lien binding the same property, it is held that the word "lien" means one arising out of contract and not by operation of law. Donovan *v.* Simmons, 96 Ga. 340.

And so, under a *California* statute declaring unrecorded grants of real estate void as against "a purchaser or incumbrancer, who in good faith, and for a valuable consideration, acquires a title or lien by an instrument that is first recorded," it was held that a writ of attachment was not an instrument within these terms; and, therefore, a deed, executed prior to the levy of attachment upon the property conveyed, though not recorded until after the levy, would prevail over the attachment. Hoag *v.* Howard, 55 Cal. 564; Morrow *v.* Graves, 77 Cal. 218.

1. Creditors Embraced by Recording Acts. — See the statutes and the following cases:

United States. — Cutler *v.* Huston, 158 U. S. 423; Truman *v.* Weed, (C. C. A.) 67 Fed. Rep. 645; American L. & T. Co. *v.* Olympia Light, etc., Co., 72 Fed. Rep. 620; Southern Bank, etc., Co. *v.* Folsom, (C. C. A.) 75 Fed. Rep. 929; U. S. *v.* Devereux, (C. C. A.) 90 Fed. Rep. 182; *In re* Shirley, (C. C. A.) 112 Fed. Rep. 301.

Alabama. — Wood *v.* Lake, 62 Ala. 489; Watt *v.* Parsons, 73 Ala. 202; Chadwick *v.* Carson, 78 Ala. 116; Fitzgerald *v.* Williamson, 85 Ala. 585; Robertson *v.* Durden, 89 Ala. 500; Griffin *v.* Hall, 111 Ala. 601; Hall *v.* Griffin, 119 Ala. 214; Griffin *v.* Hall, 129 Ala. 289.

Arizona. — Reid *v.* Kleyensteuber, (Ariz. 1900) 60 Pac. Rep. 879.

Arkansas. — Main *v.* Alexander, 9 Ark. 112, 47 Am. Dec. 732; Cross *v.* Fombey, 54 Ark. 179.

California. — Cardenas *v.* Miller, 108 Cal. 250, 49 Am. St. Rep. 84; Ruggles *v.* Cannedy, 127 Cal. 290, *affirmed* 127 Cal. 306.

Colorado. — Jerome *v.* Carbonate Nat. Bank, 22 Colo. 37; Gates Iron Works *v.* Cohen, 7 Colo. App. 341; Wahrenberger *v.* Waid, 8 Colo. App. 200.

Connecticut. — Welch *v.* Gould, 2 Root (Conn.) 287; Carter *v* Champion, 8 Conn. 549, 21 Am. Dec. 695; Bissell *v.* Nooney, 33 Conn. 411; Theall *v.* Disbrow, 39 Conn. 318; Pond *v.* Skidmore, 40 Conn. 213; National Cash Register Co. *v.* Woodbury, 70 Conn. 321; Newtown Sav. Bank *v.* Lawrence, 71 Conn. 358.

District of Columbia. — Hume *v.* Riggs, 12 App. Cas. (D. C.) 368.

Florida. — Carr *v.* Thomas, 18 Fla. 736; Eldridge *v.* Post, 20 Fla. 579; Doyle *v.* Wade, 23 Fla. 90, 11 Am. St. Rep. 334; Lusk *v.* Reel, 36 Fla. 418, 51 Am. St. Rep. 32.

Georgia. — Richards *v.* Myers, 63 Ga. 762; Janes *v.* Penny, 76 Ga. 796; Maddox *v.* Wilson, 91 Ga. 39; Cabot *v.* Armstrong, 100 Ga. 438.

Illinois. — Manly *v.* Pettee, 38 Ill. 128; Massey *v.* Westcott, 40 Ill. 160; Martin *v.* Duncan, 156 Ill. 274; Smith *v.* Willard, 174 Ill. 538, 66 Am. St. Rep. 313.

Indian Territory. — McFadden *v.* Blocker, 2 Indian Ter. 260.

Kansas. — Ramsey *v.* Glenn, 33 Kan. 271; Jewell *v.* Simpson, 38 Kan. 362; Standard Implement Co. *v.* Parlin, etc., Co., 51 Kan. 566.

Kentucky. — Wicks *v.* McConnell, 102 Ky. 434, 20 Ky. L. Rep. 84; Low *v.* Blinco, 10 Bush (Ky.) 331.

Louisiana. — Doughty *v.* Sheriff, 25 La. Ann. 290; Summers *v.* Clark, 30 La. Ann. 436; Ft. Wayne First Nat. Bank *v.* Ft. Wayne Artificial Ice Co. 105 La. 133.

Maryland. — Pannell *v.* Farmers Bank, 7 Har. & J. (Md.) 202; Sixth Ward Bldg. Assoc. *v.* Willson, 41 Md. 506; Dyson *v.* Simmons, 48 Md. 207; Stanhope *v.* Dodge, 52 Md. 483; Nally *v.* Long, 56 Md. 567.

Massachusetts. — Pomroy *v.* Stevens, 11 Met. (Mass.) 244; Parker *v.* Osgood, 3 Allen (Mass.) 487; Dooley *v.* Wolcott, 4 Allen (Mass.) 406; Sibley *v.* Leffingwell, 8 Allen (Mass.) 584; Lamb *v.* Pierce, 113 Mass. 72.

Michigan. — Dempsey *v.* Pforzheimer, 86 Mich. 652; Kalamazoo First Nat. Bank *v.* Guntermann, 94 Mich. 125; Vining *v.* Millar, 116 Mich. 144; Farr *v.* Kilgour, 117 Mich. 227.

Minnesota. — Coles *v.* Berryhill, 37 Minn. 56; Wilkins *v.* Bevier, 43 Minn. 213, 19 Am. St. Rep. 238; Berryhill *v.* Smith, 59 Minn. 285; Hall *v.* Sauntry, 72 Minn. 420, 71 Am. St. Rep. 497; Clark *v.* Greene, 73 Minn. 467; School Dist. No. 10 *v.* Peterson, 74 Minn. 122, 73 Am. St. Rep. 337.

Missouri. — Martin-Perrin Mercantile Co. *v.* Perkins, 63 Mo. App. 310; Oyler *v.* Renfro, 86 Mo. App. 321.

Montana. — Cope *v.* Minnesota Type Foundry Co., 20 Mont. 67.

Nebraska. — Spaulding *v.* Johnson, 48 Neb. 830; Farmers, etc., Bank *v.* Anthony, 39 Neb. 343; New Home Sewing Mach. Co. *v.* Beals, 44 Neb. 816.

Nevada. — Simpson *v.* Harris, 21 Nev. 353.

New Jersey. — Hunt *v.* Swayze, 55 N. J. L. 33; Sipley *v.* Wass, 49 N. J. Eq. 463; Brown *v.* Harris, 67 N. J. L. 207; Roe *v.* Meding, 53 N. J. Eq. 350; Hebberd *v.* Southwestern Land, etc., Co., 55 N. J. Eq. 18; H. C. Tack Co. *v.* Ayers, 56 N. J. Eq. 56; Bleakley *v.* Nelson, 56 N. J. Eq. 674.

New York. — Karst *v.* Gane, 136 N. Y. 316, 61 Hun (N. Y.) 533; Stephens *v.* Perrine, 143 N. Y. 476; Hardin *v.* Dolge, 46 N. Y. App. Div. 416; Braekeleer *v.* Schwabeland, 86 Hun (N. Y.) 143; Field *v.* Ingreham, (County Ct.) 15 Misc. (N. Y.) 529; McDonald *v.* City Trust Safe Deposit, etc., Co., (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 644; Stephens *v.* Meriden Britannia Co., 13 N. Y. App. Div. 268.

North Carolina. — Tarboro *v.* Micks, 118 N. Car. 162; Bostic *v.* Young, 116 N. Car. 766.

North Dakota. — Sykes *v.* Hannawalt, 5 N. Dak. 335; Union Nat. Bank *v.* Oium, 3 N. Dak. 193, 44 Am. St. Rep. 533.

Ohio. — Straman *v.* Rechtine, 58 Ohio St. 443; Wright *v.* Franklin Bank, 59 Ohio St. 80.

bb. Distinction Between Simple and Lien Creditors — **Where Confined to Lien Creditors.** — Usually such provisions, whether limited in their terms to lien creditors or simply specifying creditors generally, are held to apply to such creditors only as have effected a lien on the conveying debtor's property by attachment, judgment or otherwise before the recordation of the prior conveyance.[1] The

Oklahoma. — Lewis *v.* Atherton, 5 Okla. 90; Campbell *v.* Richardson, 6 Okla. 375.

Oregon. — Security Trust Co. *v.* Loewenberg, 38 Oregon 159.

South Dakota. — Noyes *v.* Brace, 8 S. Dak. 190; W. W. Kimball Co. *v.* Kirby, 4 S. Dak. 152.

Tennessee. — Buchanan *v.* Kimes, 2 Baxt. (Tenn.) 275; Cowan *v.* Gill, 11 Lea (Tenn.) 674; Woodward *v.* Crump, 95 Tenn. 369; Citizens' Bank *v.* McCarty, 99 Tenn. 469; Southern Bldg., etc., Assoc. *v.* Rodgers, 104 Tenn. 437; Alabama Marble, etc., Co. *v.* Chattanooga Marble, etc., Co., (Tenn. Ch. 1896) 37 S. W. Rep. 1004; Malone *v.* Brown, (Tenn. Ch. 1897) 46 S. W. Rep. 1004; Aymett *v.* Citizens' Nat. Bank, (Tenn. Ch. 1901) 64 S. W. Rep. 302.

Texas. — Borden *v.* McRae, 46 Tex. 396; Grimes *v.* Hobson, 46 Tex. 416; Linn *v.* La Compte, 47 Tex. 440; Brothers *v.* Mundell, 60 Tex. 240; McKamey *v.* Thorp, 61 Tex. 648; Key *v.* Brown, 67 Tex. 300; Thomson *v.* Shackelford, 6 Tex. Civ. App. 121; Smelser *v.* Baker, 6 Tex. Civ. App. 751; Robertson *v.* McClay, 19 Tex. Civ. App. 513; Caldwell *v.* Bryan, 20 Tex. Civ. App. 168; Williams *v.* Farmers' Nat. Bank, 22 Tex. Civ. App. 581.

Virginia. — New South Bldg., etc., Assoc. *v.* Reed, 96 Va. 345, 70 Am. St. Rep. 858; Price *v.* Wall, 97 Va. 334; Robinson *v.* Commercial, etc., Bank, (Va. 1893) 17 S. E. Rep. 739; Heermans *v.* Montague, (Va. 1890) 20 S. E. Rep. 899.

Washington. — Radebaugh *v.* Tacoma, etc., R. Co., 8 Wash. 570; Hinchman *v.* Point Defiance R. Co., 14 Wash. 349; Willamette Casket Co. *v.* Cross Undertaking Co., 12 Wash. 190.

West Virginia. — Damron *v.* Smith, 37 W. Va. 580; Abney *v.* Ohio Lumber, etc., Co., 45 W. Va. 446; Curtin *v.* Isaacsen, 36 W. Va. 391.

Wisconsin. — Ryan Drug Co. *v.* Hvambsahl, 89 Wis. 61.

Canada. — Miller *v.* Duggan, 21 Can. Sup. Ct. 33; Clarkson *v.* McMaster, 25 Can. Sup. Ct. 96.

See also the titles Attachment, vol. 3, p. 230; Executions, vol. 11, p. 689; Garnishment, vol. 14, p. 794.

Creditors of the Grantor or other apparent owner are the only ones within the meaning of the statutes. Pierce *v.* Turner, 5 Cranch (U. S.) 154; Magniac *v.* Thompson, 7 Pet. (U. S.) 348; Whittington *v.* Doe, 9 Ga. 23; Dwight *v.* Scranton, etc., Lumber Co., 67 Mich. 507; Chaffe *v.* Halpin, 62 Miss. 1; Morgan *v.* Elam, 4 Yerg. (Tenn.) 375; Baldwin *v.* Baldwin, 2 Humph. (Tenn.) 476; Bryant *v.* Charleston Bank, 107 Tenn. 560. And see Curtin *v.* Isaacsen, 36 W. Va. 391.

Creditors of Grantor's Heir Not Protected. — Literer *v.* Huddleston, (Tenn. Ch. 1898) 52 S. W. Rep. 1003.

Pennsylvania — Statute Inoperative. — In Davey *v.* Ruffell, 162 Pa. St. 443, it was held that Pa. Act of May 19, 1893, was inoperative so far as it attempted to include "creditors of the grantor or bargainor" in the operation of the act, since priority of record was necessary to give the preference to a subsequent transfer and there was no way by which creditors could place themselves on the record in advance of the prior deed or mortgage.

1. Lien Creditors Only Within Statute — *United States.* — Simon *v.* Openheimer, 20 Fed. Rep. 553; *In re* Schmitt, 109 Fed. Rep. 267; *In re* Shirley, (C. C. A.) 112 Fed. Rep. 301; Brown *v.* Easton, 112 Fed. Rep. 592.

Alabama. — Ohio L. Ins., etc., Co. *v.* Ledyard, 8 Ala. 866; Daniel *v.* Sorrells, 9 Ala. 436; Andrews *v.* Burns, 11 Ala. 691; Center *v.* Planters, etc., Bank, 22 Ala. 743; Fash *v.* Ravesies, 32 Ala. 454; Hardaway *v.* Semmes, 38 Ala. 657; Preston *v.* McMillan, 58 Ala. 84; Wood *v.* Lake, 62 Ala. 489; Dickerson *v.* Carroll, 76 Ala. 377; Chadwick *v.* Carson, 78 Ala. 116; Carter *v.* Challen, 83 Ala. 138; McGhee *v.* Importers', etc., Nat. Bank, 93 Ala. 192.

Florida. — Rogers *v.* Munnerlyn, 36 Fla. 591.

Georgia. — Bailey *v.* Bailey, 93 Ga. 768; Thompson-Hiles Co. *v.* Dodds, 95 Ga. 754; Harvey *v.* Sanders, 107 Ga. 740.

Illinois. — Martin *v.* Dryden, 6 Ill. 187; McFadden *v.* Worthington, 45 Ill. 362; Columbus Buggy Co. *v.* Graves, 108 Ill. 459; Noe *v.* Montray, 170 Ill. 169; Smith *v.* Willard, 174 Ill. 538, 66 Am. St. Rep. 313; Bergman *v.* Bogda, 46 Ill. App. 351.

Kansas. — Cameron *v.* Marvin, 26 Kan. 612.

Kentucky. — Underwood *v.* Ogden, 6 B. Mon. (Ky.) 606; Forepaugh *v.* Appold, 17 B. Mon. (Ky.) 625.

Michigan. — Cutler *v.* Steele, 93 Mich. 204; Campbell *v.* Remaly, 112 Mich. 214, 67 Am. St. Rep. 393. See also Haug *v.* Detroit Third Nat. Bank, 95 Mich. 249.

Minnesota. — Hall *v.* Sauntry, 72 Minn. 420, 71 Am. St. Rep. 497; Clark *v.* Greene, 73 Minn. 467.

Mississippi. — Dixon *v.* Doe, 1 Smed. & M. (Miss.) 70; Money *v.* Dorsey, 7 Smed. & M. (Miss.) 15; Pickett *v.* Banks, 11 Smed. & M. (Miss.) 445; Wiggle *v.* Thomason, 11 Smed. & M. (Miss.) 452; Nugent *v.* Priebatsch, 61 Miss. 402.

Nebraska. — Ransom *v.* Schmela, 13 Neb. 77.

Ohio. — Straman *v.* Rechtine, 58 Ohio St. 443.

Pennsylvania. — Mellon's Appeal, 32 Pa. St. 121; City Bank *v.* Easton Boot, etc., Co., 6 Northam. Co. Rep. (Pa.) 21.

South Carolina. — King *v.* Fraser, 23 S. Car. 543.

Tennessee. — Chester *v.* Greer, 5 Humph. (Tenn.) 26; Cowan *v.* Gill, 11 Lea (Tenn.) 674.

Texas. — Ayres *v.* Duprey, 27 Tex. 593, 86 Am. Dec. 657; Grace *v.* Wade, 45 Tex. 522; McKeen *v.* Sultenfuss, 61 Tex. 325; Overstreet *v.* Manning, 67 Tex. 657; Russell *v.* Nall, 2 Tex. Civ. App. 60; Moore *v.* Masterson, 19 Tex. Civ. App. 308; Robertson *v.* Mc-

question as to when a creditor may be deemed to have secured a lien within the meaning of such acts is largely dependent upon the statutory provisions in the various states.[1] Elsewhere in this work will be found full discussions of the commencement of attachment, judgment and execution liens.[2]

Statutes Embracing General Creditors. — But some statutes have been held to apply to creditors at large as well as to lien creditors.[3]

Clay, 19 Tex. Civ. App. 513; Parlin, etc., Co. *v.* Harrell, 8 Tex. Civ. App. 368.

West Virginia. — Houston *v.* McCluney, 8 W. Va. 153.

Alabama — Subsequent Judgment Creditors. — To be entitled to protection the judgment creditor must have become such after the execution of the unrecorded conveyance. Chadwick *v.* Carson, 78 Ala. 116.

Minnesota — Only Where Lien Against Record Owner. — Under Minn. Gen. St. 1894, § 4180, an unrecorded conveyance is void as to attaching or judgment creditors only where the attachment or judgment is against the person who appears of record as owner of the property conveyed. Coles *v.* Berryhill, 37 Minn. 56; Berryhill *v.* Smith, 59 Minn. 285; Lyman *v.* Gaar, 75 Minn. 207, 74 Am. St. Rep. 452.

Colorado — Attaching Creditor an Incumbrancer. — Mills' Anno. Stat. Colo., § 446, protects incumbrancers "by mortgage, judgment or otherwise." It is held that an attaching creditor is an incumbrancer in the same sense as a judgment creditor and is therefore entitled to protection under such statute. Jerome *v.* Carbonate Nat. Bank, 22 Colo. 37; Gates Iron Works *v.* Cohen, 7 Colo. App. 341; Wahrenberger *v.* Waid, 8 Colo. App. 200.

New Jersey — Attaching Creditor Not Included. — In New Jersey, under a statute declaring an unrecorded mortgage void as against "judgment creditors," it was held that an attaching creditor was not protected. Campion *v.* Kille, 14 N. J. Eq. 229.

Maryland — General Creditors Sharing Pari Passu. — In Maryland, creditors whose claims arose between the execution and recording of a prior conveyance, if only general creditors, are entitled to share *pari passu* with the parties secured by the prior deed: if lien creditors, they are entitled to priority. Stanhope *v.* Dodge, 52 Md. 483.

Where Unrecorded Mortgage Foreclosed. — A judgment lien will prevail over a prior unrecorded mortgage, although it has been foreclosed and execution levied before the judgment was obtained. Richards *v.* Myers, 63 Ga. 762.

A Fraudulent Judgment obtained in pursuance of a scheme to cheat the creditors of the judgment debtor and secure the latter a benefit will not be given precedence over a prior unrecorded chattel mortgage. Braekeleer *v.* Schwabeland, 86 Hun (N. Y.) 143.

1. In Kentucky it seems that a creditor's right to priority is complete only where the property is sold to satisfy his lien before he receives notice of the prior unrecorded conveyance. Such conveyance is good against him until he acquires a legal right to the property. Forepaugh *v.* Appold, 17 B. Mon. (Ky.) 625; Baldwin *v.* Crow, 86 Ky. 679; Com. *v.* Robinson, 96 Ky. 553; Spratt *v.* Allen, 20 Ky. L. Rep. 1824, 50 S. W. Rep. 234.

By Filing a Creditors' Bill unsecured creditors do not "acquire a lien" so as to obtain priority over a previous mortgage which is recorded after the filing of the bill but before recovery thereon. Thompson-Hiles Co. *v.* Dodds, 95 Ga. 754.

Where Priority of Record Necessary. — In Nebraska an attaching or judgment creditor can acquire priority over a previous unrecorded conveyance only where the evidence of title based on such attachment or judgment is recorded before the prior conveyance. Galway *v.* Malchow, 7 Neb. 285; Mansfield *v.* Gregory, 8 Neb. 432; Harral *v.* Gray, 10 Neb. 186; Sheasley *v.* Keens, 48 Neb. 57. As to the necessity for priority of record, in general, see *infra*, XI. 2. *f. Necessity for Priority of Record.*

2. See the titles ATTACHMENT, vol. 3, p. 220; EXECUTIONS, vol. 11, p. 669; JUDGMENTS AND DECREES, vol. 17, p. 790.

The Lien of the Judgment Attaches to All Interests which appear from the records to be in the judgment debtor, not merely to those which the debtor still actually has. Lash *v.* Hardick, 5 Dill. (U. S.) 505; Stevenson *v.* Texas, etc., R. Co., 105 U. S. 703, 12 Am. & Eng. R. Cas. 393; Simon *v.* Openheimer, 20 Fed. Rep. 553; Massey *v.* Westcott, 40 Ill. 160; Welles *v.* Baldwin, 28 Minn. 408; Catlin *v.* Bennatt, 47 Tex. 165.

3. Statutes Embracing Creditors at Large. — Truman *v.* Weed, (C. C. A.) 67 Fed. Rep. 645; Roe *v.* Meding, 53 N. J. Eq. 350; Union Nat. Bank *v.* Oium, 3 N. Dak. 193, 44 Am. St. Rep. 533; Willamette Casket Co. *v.* Cross Undertaking Co., 12 Wash. 190; Clarkson *v.* McMaster, 25 Can. Sup. Ct. 96.

In New York a Chattel Mortgage not filed as required by the act is void as to a simple contract creditor of the mortgagor and cannot be validated as against him by recording or by delivery of possession to the mortgagee before he has secured a lien. Karst *v.* Gane, 136 N. Y. 316; Stephens *v.* Perrine, 143 N. Y. 476; Stephens *v.* Meriden Britannia Co., 13 N. Y. App. Div. 268.

But the creditor cannot attack the mortgage until he has secured a lien. Thompson *v.* Van Vechten, 27 N. Y. 568; Jones *v.* Graham, 77 N. Y. 628; Button *v.* Rathbone, 126 N. Y. 191, 43 Hun (N. Y.) 147; Kitchen *v.* Lowery, 127 N. Y. 53; Stewart *v.* Beale, 7 Hun (N. Y.) 405, 68 N. Y. 629; Kennedy *v.* National Union Bank, 23 Hun (N. Y.) 494; Niagara County Nat. Bank *v.* Lord, 33 Hun (N. Y.) 557; Martin *v.* Rothschild, 42 Hun (N. Y.) 410; Ebbing *v.* Husson, 54 N. Y. Super. Ct. 377; Fennikoh *v.* Gunn, 59 N. Y. App. Div. 132; Volckers *v.* Sturke, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 457.

Securing Lien by Chattel Mortgage. — In *Michigan* a creditor whose claim arises after the execution of a chattel mortgage and before it is recorded is entitled to secure a superior lien

cc. Distinction Between Antecedent and Subsequent Creditors. — In some jurisdictions the protection of the recording acts is given to such creditors only as have extended credit since the execution of the unrecorded instrument, it being presumed that antecedent creditors have not relied on the apparent ownership of the grantor.[1] But in other jurisdictions the acts are held to be applicable to antecedent as well as subsequent creditors.[2]

(7) *Purchaser at Execution Sale* — (a) **Where Creditor Entitled to Protection.** — In a case where a judgment creditor has secured a right to priority over a prior unrecorded conveyance it follows of course that a purchaser at the execution sale takes free of such conveyance, even though such purchaser himself have notice thereof.[3]

Where the Creditor Is Himself the Purchaser at the execution sale the same rule applies, since he has already secured a prior right by obtaining his judgment.[4]

(b) **Where Creditor Not Protected — Deemed a Bona Fide Purchaser.** — Even where the protection of the recording acts is not extended to lien creditors, it is settled by the weight of authority that a purchaser at an execution sale, founded on the judgment of such creditor, is within the meaning of the term pur-

after such mortgage has been recorded; and he may do this as well by taking a second chattel mortgage as by obtaining a judgment. Dempsey *v.* Pforzheimer, 86 Mich. 652; Vining *v.* Millar, 116 Mich. 144.

1. Protection Confined to Subsequent Creditors. — Hume *v.* Riggs, 12 App. Cas. (D. C.) 368; Zaring *v.* Cox, 78 Ky. 527; Wicks *v.* McConnell, 102 Ky. 434, 20 Ky. L. Rep. 84; Clift *v.* Williams, 105 Ky. 559, 20 Ky. L. Rep. 1261; Pannell *v.* Farmers Bank, 7 Har. & J. (Md.) 202; Sixth Ward Bldg. Assoc. *v.* Willson, 41 Md. 506; Dyson *v.* Simmons, 48 Md. 207; Stanhope *v.* Dodge, 52 Md. 483; Nally *v.* Long, 56 Md. 567; Brown *v.* Brabb, 67 Mich. 17, 11 Am. St. Rep. 549; Kalamazoo First Nat. Bank *v.* Guntermann, 94 Mich. 125; Union Nat. Bank *v.* Oium, 3 N. Dak. 193, 44 Am. St. Rep. 533. See also Maddox *v.* Wilson, 91 Ga. 39; Noyes *v.* Brace, 8 S. Dak. 190; Ryan Drug Co. *v.* Hvambsahl, 89 Wis. 61.

An Assignee of a Note Is a Creditor entitled to protection, where he took the note without notice after the execution of a prior mortgage and before its registration, although the note itself was made previously to the execution of the mortgage. Cutler *v.* Huston, 158 U. S. 423.

2. Acts Applicable to Antecedent Creditors. — Southern Bank, etc., Co. *v.* Folsom, (C. C. A.) 75 Fed. Rep. 929; McFadden *v.* Blocker, 2 Indian Ter. 260; Oyler *v.* Renfro, 86 Mo. App. 321; Karst *v.* Gane, 136 N. Y. 316, 61 Hun (N. Y.) 533; Stephens *v.* Perrine, 143 N. Y. 476; Field *v.* Ingreham, (County Ct.) 15 Misc. (N. Y.) 529; Campbell *v.* Richardson, 6 Okla. 375; Price *v.* Wall, 97 Va. 334.

3. Where Creditor Protected, Purchaser Protected — *United States.* — Stevenson *v.* Texas, etc., R. Co., 105 U. S. 703, 12 Am. & Eng. R. Cas. 393; Taylor *v.* Doe, 13 How. (U. S.) 287; McNitt *v.* Turner, 16 Wall. (U. S.) 352; Newman *v.* Davis, 24 Fed. Rep. 609.

Alabama. — Ohio L. Ins., etc., Co. *v.* Ledyard, 8 Ala. 866; Fash *v.* Ravesies, 32 Ala. 451; Robertson *v.* Durden, 89 Ala. 500; Motley *v.* Jones, 98 Ala. 443; Winston *v.* Hodges, 102 Ala. 304.

Florida. — Doyle *v.* Wade, 23 Fla. 90, 11 Am. St. Rep. 334.

Georgia. — Shepherd *v.* Burkhalter, 13 Ga. 443, 58 Am. Dec. 523; Smith *v.* Jordan, 25 Ga. 687; Humphrey *v.* Copeland, 54 Ga. 543.

Illinois. — Guiteau *v.* Wisely, 47 Ill. 433.

Kentucky. — See Low *v.* Blinco, 10 Bush (Ky.) 331.

Mississippi. — Nugent *v.* Priebatsch, 61 Miss. 402.

New Jersey. — Condit *v.* Wilson, 36 N. J. Eq. 370.

New York. — Wood *v.* Chapin, 13 N. Y. 509, 67 Am. Dec. 62.

Pennsylvania. — Uhler *v.* Hutchinson, 23 Pa. St. 110.

South Carolina. — Herring *v.* Cannon, 21 S. Car. 212, 53 Am. Rep. 661.

Tennessee. — Butler *v.* Maury, 10 Humph. (Tenn.) 420.

Texas. — Ayres *v.* Duprey, 27 Tex. 593, 86 Am. Dec. 657; Grace *v.* Wade, 45 Tex. 522; Borden *v.* McRae, 46 Tex. 396; Grimes *v.* Hobson, 46 Tex. 416; Linn *v.* Le Compte, 47 Tex. 440; Wallace *v.* Campbell, 54 Tex. 87; McKamey *v.* Thorp, 61 Tex. 648; Holmes *v.* Buckner, 67 Tex. 107; Blum *v.* Schwartz, (Tex. 1892) 20 S. W. Rep. 54; Russell *v.* Nall, 2 Tex. Civ. App. 60; Barnett *v.* Squyres, (Tex. Civ. App. 1899) 52 S. W. Rep. 612.

As to the effect of notice to a purchaser from one without notice, see *infra*, XI. 2. *d.* (1) (*a*) *In General.*

Recording the Deed After Judgment Entered and before sale under execution will not affect the rights of a purchaser at the sale. Robertson *v.* Durden, 89 Ala. 500.

Notice to the Creditor before he secures his priority will prevent a purchaser at the execution sale from taking title free of the prior unrecorded conveyance. In such case he takes only the interest of the execution defendant. Massey *v.* Hubbard, 18 Fla. 688.

4. Creditor Purchasing at Execution Sale. — Lusk *v.* Reel, 36 Fla. 418, 51 Am. St. Rep. 32; Wiggins *v.* Sprague, 15 Tex. Civ. App. 590.

In Kentucky, where the creditor is himself the purchaser, notice to him at any time before the sale affects his conscience and makes the unrecorded deed valid as against him. Low *v.* Blinco, 10 Bush (Ky.) 331.

chasers, as it is employed in the recording acts, and will receive their protection from the date of his purchase, provided he have no notice of the prior unrecorded conveyance.[1] And some courts have gone so far as to hold that the creditor himself when purchasing at the execution sale is entitled to protection as a *bona fide* purchaser,[2] but this rule is not very well supported by reason and is denied by other courts.[3]

Contrary Doctrine. — In some jurisdictions it is held that a purchaser at an execution sale takes only the interest of the execution debtor and is not entitled to protection where the execution creditor is not.[4]

(8) *Purchaser at Bankrupt Sale.* — It would seem that the general rule protecting an execution purchaser would apply to a purchaser at a bankrupt sale, and it has been held that a person purchasing at such sale will be protected against a prior unrecorded conveyance made by the bankrupt.[5] But it is the general rule that the assignee in bankruptcy succeeds to such rights only as the debtor himself can assert,[6] and some courts, by applying the rule

1. Purchaser Protected though Creditor Not — *Alabama.* — Barker *v.* Bell, 37 Ala. 354. See also Tennessee Coal, etc., R. Co. *v.* Gardner, 131 Ala. 599.

California. — Smith *v.* Randall, 6 Cal. 47, 65 Am. Dec. 475; Hunter *v.* Watson, 12 Cal. 363, 73 Am. Dec. 543; Pixley *v.* Huggins, 15 Cal. 128.

Colorado. — McMurtrie *v.* Riddell, 9 Colo. 497.

Georgia. — Ellis *v.* Smith, 10 Ga. 253; McCandless *v.* Inland Acid Co., 108 Ga. 619.

Indiana. — Doe *v.* Hall, 2 Ind. 556, 54 Am. Dec. 460; Sills *v.* Lawson, 133 Ind. 137.

Kansas. — Lee *v.* Bermingham, 30 Kan. 312.

Kentucky. — Logan *v.* Catron, 43 S. W. Rep. 213, 19 Ky. L. Rep. 1200.

Michigan. — Atwood *v.* Bearss, 45 Mich. 469.

Missouri. — Draper *v.* Bryson, 26 Mo. 108, 69 Am. Dec. 483.

New Jersey. — Den *v.* Richman, 13 N. J. L. 43.

New York. — Jackson *v.* Town, 4 Cow. (N. Y.) 599, 15 Am. Dec. 405; Jackson *v.* Chamberlain, 8 Wend. (N. Y.) 625; Beman *v.* Douglas, 1 N. Y. App. Div. 169; Harris *v.* Gunn, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 796.

North Carolina. — Allen *v.* Bolen, 114 N. Car. 560. And see Hooker *v.* Nichols, 116 N. Car. 157.

Ohio. — Scribner *v.* Lockwood, 9 Ohio 184; Sternberger *v.* Ragland, 57 Ohio St. 148.

Pennsylvania. — Hibbard *v.* Bovier, 1 Grant Cas. (Pa.) 266; Heister *v.* Fortner, 2 Binn. (Pa.) 40, 4 Am. Dec. 417; Kauffelt *v.* Bower, 7 S. & R. (Pa.) 64, 10 Am. Dec. 428; Morrison *v.* Funk, 23 Pa. St. 421; Wilson *v.* Shoenberger, 34 Pa. St. 121.

South Carolina. — Leger *v.* Doyle, 11 Rich. L. (S. Car.) 109, 70 Am. Dec. 240; McKnight *v.* Gordon, 13 Rich. Eq. (S. Car.) 222, 94 Am. Dec. 164; Miles *v.* King, 5 S. Car. 146; Herring *v.* Cannon, 21 S. Car. 212, 53 Am. Rep. 661.

Wisconsin. — Ehle *v.* Brown, 31 Wis. 405; Girardin *v.* Lampe, 58 Wis. 267.

Canada. — Jellett *v.* Wilkie, 26 Can. Sup. Ct. 282.

As to purchasers without notice from purchasers with notice, see *infra*, XI. 2. *d.* (1) (*a*).

Notice to Such Purchaser before he has obtained title to the property will affect him where it would affect any other purchaser. See *infra*, XI. 2. *d.* (1) (*a*) *In General.*

2. Creditor Purchasing at Sale Protected — *California.* — Hunter *v.* Watson, 12 Cal. 363, 73 Am. Dec. 543; Foorman *v.* Wallace, 75 Cal. 552.

Iowa. — Halloway *v.* Platner, 20 Iowa 121, 89 Am. Dec. 517; Gower *v.* Doheney, 33 Iowa 36; Butterfield *v.* Walsh, 36 Iowa 534; Cooley *v.* Wilson, 42 Iowa 425. See also opinion of Dillon, J., in Vannice *v.* Bergen, 16 Iowa 555, 85 Am. Dec. 531, and Evans *v.* McGlasson, 18 Iowa 150.

Michigan. — Columbia Bank *v.* Jacobs, 10 Mich. 349, 81 Am. Dec. 792.

Missouri. — Waldo *v.* Russell, 5 Mo. 387.

New York. — Wood *v.* Chapin, 13 N. Y. 509, 67 Am. Dec. 62; Barto *v.* Tompkins County Nat. Bank, 15 Hun (N. Y.) 11.

Ohio. — Sternberger *v.* Ragland, 57 Ohio St. 148.

3. Protection Denied to Creditor. — McClenaghan *v.* McClenaghan, 1 Strobh. Eq. (S. Car.) 295, 47 Am. Dec. 534; Murphy *v.* Plankinton Bank, 13 S. Dak. 501; Ayres *v.* Duprey, 27 Tex. 593, 86 Am. Dec. 657.

In Indiana the rule that a judgment creditor purchasing at his own sale was a *bona fide* purchaser was established by a divided court in Rooker *v.* Rooker, 75 Ind. 571, and was followed in Vitito *v.* Hamilton, 86 Ind. 137. But these cases were overruled and the contrary doctrine established in Shirk *v.* Thomas, 121 Ind. 147, 16 Am. St. Rep. 381.

4. Purchaser Not Protected. — Bateman *v.* Backus, 4 Dak. 433; Kelly *v.* Mills, 41 Miss. 267; Nugent *v.* Priebatsch, 61 Miss. 402; Bramlett *v.* Wetlin, 71 Miss. 902; Roblin *v.* Palmer, 9 S. Dak. 36; Kohn *v.* Lapham, 13 S. Dak. 78, Murphy *v.* Plankinton Bank, 13 S. Dak. 501.

5. Unrecorded Deed Void as to Purchaser. — Holbrook *v.* Dickenson, 56 Ill. 497; Webber *v.* Clark, 136 Ill. 256. See also Burt *v.* Batavia Paper Mfg. Co., 86 Ill. 66.

Where Creditors Are Protected by the recording acts, the assignee or trustee is also entitled to protection. See *infra*, XI. 2. *c.* (9).

Assignee or Trustee for Grantor's Creditors. — And in such case he can of course pass a good title to a purchaser. Strong *v.* Lynn, 38 Minn. 315.

6. See the title INSOLVENCY AND BANKRUPTCY, vol. 16, p. 740.

of *caveat emptor* to bankrupt sales, have decided that the purchaser takes the property subject to all the claims that might have been enforced against the bankrupt.[1]

(9) *Assignee or Trustee for Grantor's Creditors.* — It is the general rule that an assignee or trustee for the benefit of creditors or in bankruptcy or insolvency takes only such rights as the debtor had,[2] and cannot be regarded as a purchaser for value and without notice.[3] Therefore it is held that an unrecorded instrument which is valid against the grantor therein is also good against his assignee or trustee.[4] Where, however, the protection of the recording acts is not confined to purchasers but extends to creditors as well, a prior unrecorded conveyance is usually held to be void as against the assignee or trustee, so far at least as concerns those creditors who are themselves entitled to protection.[5]

(10) *Receiver.* — Usually, where the statutes declare unrecorded conveyances void as to creditors, a receiver will also be protected,[6] but the contrary view has been taken by some courts.[7]

(11) *Person Claiming Mechanic's Lien.* — One claiming a mechanic's lien is not a purchaser entitled to protection against a prior unrecorded conveyance under a statute applicable only to purchasers for value and without notice.[8]

1. Purchaser Not Protected. — *In re* Ohio Co-operative Shear Co., 2 Am. Bankr. Rep. 775; McKiernan *v.* Fletcher, 2 La. Ann. 438; Baker *v.* Vining, 30 Me. 121, 50 Am. Dec. 617; Anderson *v.* Miller, 7 Smed. & M. (Miss.) 589; Renick *v.* Dawson, 55 Tex. 102; Fletcher *v.* Ellison, 1 Tex. Unrep. Cas. 661. See the title INSOLVENCY AND BANKRUPTCY, vol. 16, p. 731.

2. See the titles ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 3, pp. 46, 99 *et seq.*; INSOLVENCY AND BANKRUPTCY, vol. 16, p. 740.

3. See the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 492.

4. Assignee Not Protected — *United States.* — Stewart *v.* Platt, 101 U. S. 731; Simon *v.* Openheimer, 20 Fed. Rep. 553; Fletcher *v.* Morey, 2 Story (U. S.) 555; National Bank *v.* Conway, 14 Nat. Bankr. Reg. 513; 1 Hughes (U. S.) 37; *Ex p.* Dalby, 1 Lowell (U. S.) 431; Matter of Collins, 12 Blatchf. (U. S.) 548, 12 Nat. Bankr. Reg. 379; Mitchell *v.* Winslow, 2 Story (U. S.) 630; Johnson *v.* Patterson, 2 Woods (U. S.) 443; *In re* Bruce, 16 Nat. Bankr. Reg. 318; Coggeshall *v.* Potter, Holmes (U. S.) 75; *In re* Ohio Co-operative Shear Co., 2 Am. Bankr. Rep. 775.

District of Columbia. — Eastern Trust, etc., Co. *v.* Willis, (D. C. 1895) 23 Wash. L. Rep. 417.

Iowa. — Warner *v.* Jameson, 52 Iowa 70.

Kentucky. — Cincinnati Leaf Tobacco Warehouse *v.* Combs, 22 Ky. L. Rep. 523, 58 S. W. Rep. 420.

Maine. — Rowell *v.* Lewis, 95 Me. 83.

Maryland. — Tyler *v.* Abergh, 65 Md. 18.

New Hampshire. — Adams *v.* Lee, 64 N. H. 421; Sinclair *v.* Wheeler, 69 N. H. 538.

Pennsylvania. — Mellon's Appeal, 32 Pa. St. 121; McGarry *v.* McGarry, 9 Pa. Super. Ct. 71.

Mortgage Taken Subject to Another. — Where a mortgagee took his mortgage with the express understanding that it should be subject to another mortgage to be executed at the same time, it was held that his assignee in insolvency also took subject to such other mortgage, although it was not recorded. Wallace *v.* McKenzie, 104 Cal. 130.

5. Where Creditor Protected, Assignee Protected — *United States.* — *In re* Leigh, 2 Am. Bankr. Rep. 606.

Colorado. — Clark *v.* Baker, (Colo. 1901) 69 Pac. Rep. 506.

Connecticut. — National Cash Register Co. *v.* Woodbury, 70 Conn. 321; Newtown Sav. Bank *v.* Lawrence, 71 Conn. 358.

Massachusetts. — Bingham *v.* Jordan, 1 Allen (Mass.) 373, 79 Am. Dec. 748; Dole *v.* Bodman, 3 Met. (Mass.) 139. See also Harriman *v.* Woburn Electric Light Co., 163 Mass. 85; Pratt *v.* Mackey, 172 Mass. 384.

Michigan. — Kennedy *v.* Dawson, 96 Mich. 79.

Minnesota. — Kellogg *v.* Kelley, 69 Minn. 124.

New York. — Sheldon *v.* Wickham, 27 N. Y. App. Div. 628.

Ohio. — Wright *v.* Franklin Bank, 59 Ohio St. 80.

Oklahoma. — El Reno First Nat. Bank *v.* Sayler, 4 Okla. 408, *affirmed* on rehearing (Okla. 1897) 50 Pac. Rep. 77.

Texas. — Parlin, etc., Co. *v.* Harrell. 8 Tex. Civ. App. 368.

Vermont. — Blair *v.* Ritchie, 72 Vt. 311. *Compare* McLoud *v.* Wakefield, 70 Vt. 558.

Contra. — Peet *v.* Spencer, 90 Mo. 384; Tufts *v.* Thompson, 22 Mo. App. 564; Thomas Mfg. Co. *v.* Huff, 62 Mo. App. 124; Stainback *v.* Junk Bros. Lumber, etc., Co., 98 Tenn. 306.

Where the Creditors Do Not Belong to the Class of Creditors Protected by the Act, the assignee for the benefit of creditors will not be protected. Brown *v.* Brabb, 67 Mich. 17, 11 Am. St. Rep. 549.

6. Receiver Protected. — Bayne *v.* Brewer Pottery Co., 90 Fed. Rep. 754; *In re* Wilcox, etc., Co., 70 Conn. 220; Radebaugh *v.* Tacoma, etc., R. Co., 8 Wash. 570; Willamette Casket Co. *v.* Cross Undertaking Co., 12 Wash. 190.

7. Receiver Not Protected. — Walsh *v.* St. Paul School Furniture Co., 60 Minn. 397; Kane *v.* Lodor, 56 N. J. Eq. 268.

8. One Claiming Mechanic's Lien Not a Purchaser. — Fletcher *v.* Kelly, 88 Iowa 475; Nashua Trust Co. *v.* W. S. Edwards Mfg. Co., 99

But under the statutes in most states such person may secure priority by taking the required steps.[1]

(12) *Wife Claiming Homestead.* — In *California* an unrecorded mortgage by the husband is void as against a subsequent declaration of homestead by the wife duly filed for record.[2]

d. As Against Third Persons with Notice — (1) *When Notice Equivalent to Recording* — (a) **In General.** — In the absence of anything in the wording of the statute to indicate a contrary legislative intent, a purchaser, or other person placed by the statute on the same footing as purchasers, who takes with notice of a prior unrecorded conveyance will not be entitled to the protection of the recording acts.[3] The purpose of such acts is to prevent

Iowa 109, 61 Am. St. Rep. 226; Mathwig *v.* Mann, 96 Wis. 213, 65 Am. St. Rep. 47.

1. May Obtain Priority. — Jenckes *v.* Jenckes, 145 Ind. 624; Mouat *v.* Fisher, 104 Mich. 262. See the title Mechanics' Liens, vol. 20, p. 372 *et seq.*

2. Wife Claiming Homestead Protected. — Ontario State Bank *v.* Gerry, 91 Cal. 94. See also Adams *v.* Baker, 24 Nev. 162, 77 Am. St. Rep. 799.

3. Persons With Notice Not Protected — *England.* — Doe *v.* Allsop, 5 B. & Ald. 142; 7 E. C. L. 46; Pomfret *v.* Windsor, 2 Ves. 472; Jolland *v.* Stainbridge, 3 Ves. Jr. 478; Davis *v.* Strathmore, 16 Ves. Jr. 419; Wyatt *v.* Barwell, 19 Ves. Jr. 439; Jennings *v.* Moore, 2 Verm. 609; 2 Bro. P. C. (Toml. ed.) 278; Benham *v.* Keane, 3 De G. F. & J. 318; Hine *v.* Dodd, 2 Atk. 275; Mill *v.* Hill, 3 H. L. Cas. 828, 22 Eng. L. & Eq. 20; Ford *v.* White, 16 Beav. 120; Le Neve *v.* Le Neve, Ambl. 436, 1 Ves. 64, 2 White & T. Lead. Cas. 26; Chadwick *v.* Turner, L. R. 1 Ch. 310; Rolland *v.* Hart, L. R. 6 Ch. 678; Greaves *v.* Tofield, 14 Ch. D. 563; Sydney, etc., Mut. Bldg., etc., Invest. Assoc. *v.* Lyons, (1894) A. C. 260.

Canada. — Clinch *v.* Pernette, 24 Can. Sup. Ct. 385.

United States. — Dresser *v.* Missouri, etc., R. Constr. Co., 93 U. S. 92; Stroud *v.* Lockart, 4 Dall. (Pa.) 153; The John T. Moore, 3 Woods (U. S.) 61; Hardy *v.* Harbin, 4 Sawy. (U. S.) 536; Norton *v.* Meader, 4 Sawy. (U. S.) 603; Villa *v.* Rodriguez, 12 Wall. (U. S.) 323; Cordova *v.* Hood, 17 Wall. (U. S.) 1; Boone *v.* Chiles, 10 Pet. (U. S.) 177; Brush *v.* Ware, 15 Pet. (U. S.) 93; Moore *v.* Simonds, 100 U. S. 145; Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417; The W. B. Cole, 49 Fed. Rep. 587, (C. C. A.) 59 Fed. Rep. 182.

Alabama. — Ohio L. Ins., etc., Co. *v.* Ledyard, 8 Ala. 866; Wallis *v.* Rhea, 10 Ala. 451; Nelson *v.* Dunn, 15 Ala. 501; Dearing *v.* Watkins, 16 Ala. 20; Johnson *v.* Thweatt, 18 Ala. 741; Smith *v.* Branch Bank, 21 Ala. 125; Poole *v.* Atty.-Gen., 22 Ala. 190; De Vendal *v.* Malone, 25 Ala. 272; Boyd *v.* Beck, 29 Ala. 703; Wyatt *v.* Stewart, 34 Ala. 716; Wells *v.* Morrow, 38 Ala. 125; Newsome *v.* Collins, 43 Ala. 656; Burch *v.* Carter, 44 Ala. 115; Ponder *v.* Scott, 44 Ala. 241; Campbell *v.* Roach, 45 Ala. 667; Dudley *v.* Witter, 46 Ala. 664; Corbitt *v.* Clenny, 52 Ala. 480; Lambert *v.* Newman, 56 Ala. 623; Chapman *v.* Holding, 60 Ala. 522; Bernstein *v.* Humes, 60 Ala. 582, 31 Am. Rep. 52; Lindsey *v.* Veasy, 62 Ala. 421, Wimbish *v.* Montgomery Mut. Bldg., etc., Assoc., 69 Ala. 575; Fitzgerald *v.* Williamson, 85 Ala. 585; Webb *v.* Elyton Land Co., 105 Ala. 471; Griffin *v.* Hall, 115 Ala. 647.

Arkansas. — Stidham *v.* Matthews, 29 Ark. 650; Holman *v.* Patterson, 29 Ark. 357; Haskell *v.* State, 31 Ark. 91; Brown *v.* Hanauer, 48 Ark. 277; Fargason *v.* Edrington, 49 Ark. 207; Ghio *v.* Byrne, 59 Ark. 280.

California. — Woodworth *v.* Guzman, 1 Cal. 203; Stafford *v.* Lick, 7 Cal. 479; Hunter *v.* Watson, 12 Cal. 363, 73 Am. Dec. 543; Galland *v.* Jackman, 26 Cal. 79, 85 Am. Dec. 172; Fair *v.* Stevenot, 29 Cal. 486; Smith *v.* Yule, 31 Cal. 180, 89 Am. Dec. 167; Lawton *v.* Gordon, 37 Cal. 202; O'Rourke *v.* O'Connor, 39 Cal. 442; Moss *v.* Atkinson, 44 Cal. 3; Thompson *v.* Pioche, 44 Cal. 508; Jones *v.* Marks, 47 Cal. 242; Donald *v.* Beals, 57 Cal. 399; Hilton *v.* Young, 73 Cal. 196; Wallace *v.* McKenzie, 104 Cal. 130; County Bank *v.* Fox, 119 Cal. 61; Beattie *v.* Crewdson, 124 Cal. 577.

Colorado. — Campbell *v.* Denver First Nat. Bank, 22 Colo. 177; Appelman *v.* Gara, 22 Colo. 397.

Connecticut. — Beers *v.* Hawley, 2 Conn. 467; Sigourney *v.* Munn, 7 Conn. 324; Sumner *v.* Rhodes, 14 Conn. 135; Wheaton *v.* Dyer, 15 Conn. 307; Bush *v.* Golden, 17 Conn. 594; Blatchley *v.* Osborn, 33 Conn. 226; Hamilton *v.* Nutt, 34 Conn. 501; New Milford First Nat. Bank *v.* New Milford, 36 Conn. 94; Clark *v.* Fuller, 39 Conn. 238; Herman *v.* Deming, 44 Conn. 124; Salisbury Sav. Soc. *v.* Cutting, 50 Conn. 113.

District of Columbia. — Hume *v.* Riggs, 12 App. Cas. (D. C.) 368.

Florida. — Massey *v.* Hubbard, 18 Fla. 688; Lake *v.* Hancock, 38 Fla. 53, 56 Am. St. Rep. 159. See also Lusk *v.* Reel, 36 Fla. 418, 51 Am. St. Rep. 32.

Georgia. — Downs *v.* Yonge, 17 Ga. 295; Wyatt *v.* Elam, 19 Ga. 335; Burkhalter *v.* Roe, 25 Ga. 55; Poulet *v.* Johnson, 25 Ga. 403; Lee *v.* Doe, 27 Ga. 637, 73 Am. Dec. 746; Allen *v.* Holding, 29 Ga. 485; Helms *v.* May, 29 Ga. 121; Allen *v.* Holden, 32 Ga. 418; Williams *v.* Adams, 43 Ga. 407; Brown *v.* Wells, 44 Ga. 573; Seabrook *v.* Brady, 47 Ga. 650; Virgin *v.* Wingfield, 54 Ga. 451; Bryant *v.* Booze, 55 Ga. 438; Finch *v.* Beal, 68 Ga. 594; Blalock *v.* Newhill, 78 Ga. 245; Atlanta Land, etc., Co. *v.* Haile, 106 Ga. 498; Hill *v.* Ludden, etc., Southern Music House, 113 Ga. 320.

Idaho. — Wells *v.* Alturas Commercial Co., (Idaho 1899) 56 Pac. Rep. 165.

Illinois. — Doe *v.* Reed, 5 Ill. 117, 38 Am. Dec. 124; Rupert *v.* Mark, 15 Ill. 542; Morrison *v.* Kelly, 22 Ill. 610, 74 Am. Dec. 169; Ogden *v.* Haven, 24 Ill. 57; Dickenson *v.* Breeden,

fraud upon persons subsequently contemplating the acquisition of an interest in the property conveyed or affected by placing the means of obtaining infor-

30 Ill. 279; Truesdale *v.* Ford, 37 Ill. 210; Cabeen *v.* Breckenridge, 48 Ill. 91; Chicago, etc., R. Co. *v.* Kennedy, 70 Ill. 350; Baldwin *v.* Sager, 70 Ill. 503; Shepardson *v.* Stevens, 71 Ill. 646; Chicago *v.* Witt, 75 Ill. 211; Erickson *v.* Rafferty, 79 Ill. 209; Frye *v.* Partridge, 82 Ill. 267; Hewitt *v.* Clark, 91 Ill. 605; Redden *v.* Miller, 95 Ill. 336; Columbus Buggy Co. *v.* Graves, 108 Ill. 459; West Chicago St. R. Co. *v.* Morrison, etc., Co., 160 Ill. 288; Interstate Bldg., etc., Assoc. *v.* Ayers, 177 Ill. 9; Clark *v.* Plumstead, 11 Ill. App. 57; Sternbach *v.* Leopold, 50 Ill. App. 476.

Indiana. — Ricks *v.* Doe, 2 Blackf. (Ind.) 346; Sparks *v.* State Bank, 7 Blackf. (Ind.) 469; Brose *v.* Doe, 2 Ind. 666; Wiseman *v.* Hutchinson, 20 Ind. 40; Crassen *v.* Swoveland, 22 Ind. 427; Croskey *v.* Chapman, 26 Ind. 333; Wilson *v.* Hunter, 30 Ind. 466; Kirkpatrick *v.* Caldwell, 32 Ind 299; Paul *v.* Connersville, etc., R. Co., 51 Ind. 530; Maxwell *v.* Brooks, 54 Ind. 98; Petry *v.* Ambrosher, 100 Ind. 510; Clift *v.* Nay, 105 Ind. 355; Hunsinger *v.* Hofer, 110 Ind. 390, Strohm *v.* Good, 113 Ind. 93.

Iowa. — Warburton *v.* Lauman, 2 Greene (Iowa) 420; Miller *v.* Chittenden, 2 Iowa 315; Blain *v.* Stewart, 2 Iowa 378; Bell *v.* Thomas, 2 Iowa 384; Dussaume *v.* Burnett, 5 Iowa 95; Wilson *v.* Holcomb, 13 Iowa 110; Jones *v.* Berkshire, 15 Iowa 248, 83 Am. Dec. 412; Coe *v.* Winters, 15 Iowa 481; Wilson *v.* Miller, 16 Iowa 111; Jones *v.* Bamford, 21 Iowa 217; Hoy *v.* Allen, 27 Iowa 208; Kittredge *v.* Chapman, 36 Iowa 348; Watson *v.* Phelps, 40 Iowa 482; Smith *v.* Dunton, 42 Iowa 48; Blanchard *v.* Ware, 43 Iowa 530; Dillon *v.* Shugar, 73 Iowa 434.

Kansas. — Kirkwood *v.* Koester, 11 Kan. 471; Setter *v.* Alvey, 15 Kan. 157; Jones *v.* Lapham, 15 Kan. 540; Howard *v.* Hutchinson First Nat. Bank, 44 Kan. 549; Gagnon *v.* Brown, 47 Kan. 83; Neerman *v.* Caldwell, 50 Kan. 61; Larned First Nat. Bank *v.* Tufts, 53 Kan. 710; American Lead Pencil Co. *v.* Champion, 57 Kan. 352.

Kentucky. — Johnston *v.* Gwathmey, 4 Litt. (Ky.) 317, 14 Am. Dec. 135; Hardin *v.* Harrington, 11 Bush (Ky.) 367; Mueller *v.* Engeln, 12 Bush (Ky.) 441; Honore *v.* Bakewell, 6 B. Mon. (Ky.) 67, 43 Am. Dec. 147; Thornton *v.* Knox, 6 B. Mon. (Ky.) 74; Underwood *v.* Ogden, 6 B. Mon. (Ky.) 606; Hopkins *v.* Garrard, 7 B. Mon. (Ky.) 312; Vanmeter *v.* McFaddin, 8 B. Mon. (Ky.) 442; Forepaugh *v.* Appold, 17 B. Mon. (Ky.) 631; Baldwin *v.* Crow, 86 Ky. 679; Shively *v.* Gilpin, 23 Ky. L. Rep. 2090, 66 S. W. Rep. 763.

Louisiana. — Bell *v.* Haw, 8 Mart. N. S. (La.) 243; Moore *v.* Jourdan, 14 La. Ann. 417; Swan *v.* Moore, 14 La. Ann. 845; Smith *v.* Lambeth, 15 La. Ann. 566; Willett *v.* Andrews, 106 La. 319.

Maine. — Porter *v.* Cole, 4 Me. 20; Webster *v.* Maddox, 6 Me. 256; Kent *v* Plummer, 7 Me. 464; Butler *v.* Stevens, 26 Me. 484; Copeland *v.* Copeland, 28 Me. 525; Spofford *v.* Weston, 29 Me. 140; Hanly *v.* Morse, 32 Me. 287; Hull *v.* Noble, 40 Me. 480; Merrill *v.* Ireland, 40 Me. 569; Porter *v.* Sevey, 43 Me. 519; Goodwin *v.* Cloudman, 43 Me. 577; Rich *v.* Roberts, 48 Me. 548; Beal *v.* Gordon, 55 Me. 482.

Maryland. — Ohio L. Ins., etc., Co. *v.* Ross, 2 Md. Ch. 25; Gill *v.* McAttee, 2 Md. Ch. 255; U. S. Insurance Co. *v.* Shriver, 3 Md. Ch. 381; Moncrieff *v.* Goldsborough, 4 Har. & M. (Md.) 281, 1 Am. Dec. 407; Baynard *v.* Norris, 5 Gill (Md.) 483, 46 Am. Dec. 647; Hardy *v.* Summers, 10 Gill & J. (Md.) 316, 32 Am. Dec. 167; Price *v.* McDonald, 1 Md. 403, 54 Am. Dec. 657; Winchester *v.* Baltimore, etc., R. Co., 4 Md. 231; Johns *v.* Scott, 5 Md. 81; General Ins. Co. *v.* U. S. Insurance Co., 10 Md. 517, 69 Am. Dec. 174; Bryan *v.* Harvey, 18 Md. 113; Willard *v.* Ramsburg, 22 Md. 206; Owens *v.* Miller, 29 Md. 144; Johnston *v.* Canby, 29 Md. 211; Matter of Leiman, 32 Md. 225, 3 Am. Rep. 132; Green *v.* Early, 39 Md. 223; Stanhope *v.* Dodge, 52 Md. 483; Reiff *v.* Eshleman, 52 Md. 582; Froshburg Perpetual Bldg. Assoc. *v.* Hamill, 55 Md. 313; Nally *v.* Long, 56 Md. 567.

Massachusetts. — M'Mechan *v.* Griffing, 3 Pick. (Mass.) 149, 15 Am. Dec. 198; Curtis *v.* Mundy, 3 Met. (Mass.) 405; Buttrick *v.* Holden, 13 Met. (Mass.) 355; Lawrence *v.* Stratton, 6 Cush. (Mass.) 163; Hennessey *v.* Andrews, 6 Cush (Mass.) 170; Parker *v.* Osgood, 3 Allen (Mass.) 487; Dooley *v.* Wolcott, 4 Allen (Mass.) 406; George *v.* Kent, 7 Allen (Mass.) 16; Sibley *v.* Leffingwell, 8 Allen (Mass.) 584; Mara *v.* Pierce, 9 Gray (Mass.) 306; Pingree *v.* Coffin, 12 Gray (Mass.) 288; Norcross *v.* Widgery, 2 Mass. 506; Farnsworth *v.* Childs, 4 Mass. 637, 3 Am. Dec. 249; White *v.* Foster, 102 Mass. 375; Connihan *v.* Thompson, 111 Mass. 270; Lamb *v.* Pierce, 113 Mass. 72.

Michigan. — Wetherell *v.* Spencer, 3 Mich. 123; Doyle *v.* Stevens, 4 Mich. 87; Fitzhugh *v.* Barnard, 12 Mich. 105; Blanchard *v.* Tyler, 12 Mich. 339, 86 Am. Dec. 57; Case *v.* Erwin, 18 Mich. 434; Palmer *v.* Williams, 24 Mich. 328; Baker *v.* Mather, 25 Mich. 51; Hosley *v.* Holmes, 27 Mich. 416; Barnard *v.* Campau, 29 Mich. 162; Shotwell *v.* Harrison, 30 Mich. 179; Munroe *v.* Eastman, 31 Mich. 283; Reynolds *v.* Ruckman, 35 Mich. 80; Hommel *v.* Devinney, 39 Mich. 522; Stetson *v.* Cook, 39 Mich. 750; Waldo *v.* Richmond, 40 Mich. 380; Atwood *v.* Bearss, 47 Mich. 72; Flory *v.* Comstock, 61 Mich. 522; Read *v.* Horner, 90 Mich. 152; Littauer *v.* Houck, 92 Mich. 162, 31 Am. St. Rep. 572; Cook *v.* French, 96 Mich. 525; Dennis *v.* Dennis, 119 Mich. 380; Chicago Lumbering Co. *v.* Powell, 120 Mich. 51.

Minnesota. — Daughaday *v.* Paine, 6 Minn. 443; Ross *v.* Worthington, 11 Minn. 438, 88 Am. Dec. 95; Coy *v.* Coy, 15 Minn. 119; Roberts *v.* Grace, 16 Minn. 126; Lamberton *v.* Merchants' Nat. Bank, 24 Minn. 281; Paulson *v* Clough, 40 Minn. 494; Northwestern Land Co. *v.* Dewey, 58 Minn. 359; St. Paul Title Ins., etc., Co. *v.* Berkey, 52 Minn. 497; Thompson *v.* Ellenz, 58 Minn. 301.

Mississippi. — Dixon *v.* Doe, 1 Smed. & M. (Miss.) 70; McRaven *v.* McGuire, 9 Smed. & M. (Miss.) 34; McLeod *v.* Jackson First Nat. Bank, 42 Miss. 99; Parker *v.* Foy, 43 Miss. 260, 5 Am. Rep. 484; Avent *v.* McCorkle, 45

mation of prior alienations within their reach. And if a prospective purchaser has actual notice of a prior conveyance of the property, the necessity for

Miss. 221; Harrington *v.* Allen, 48 Miss. 493; Bass *v.* Estill, 50 Miss. 300; Buck *v.* Paine, 50 Miss. 648; Claiborne *v.* Holmes, 51 Miss. 146; Loughridge *v.* Bowland, 52 Miss. 553; Deason *v.* Taylor, 53 Miss. 697; Allen *v.* Poole, 54 Miss. 323; Wasson *v.* Connor, 54 Miss. 351; Henderson *v.* Cameron, 73 Miss. 843; Stovall *v.* Judah, 74 Miss. 747.

Missouri. — Masterson *v.* West End Narrow Gauge R. Co., 5 Mo. App. 64; Draper *v.* Bryson, 17 Mo. 71, 57 Am. Dec. 257; Speck *v.* Riggin, 40 Mo. 405; Maupin *v.* Emmons, 47 Mo. 304; Digman *v.* McCollum, 47 Mo. 375; Rhodes *v.* Outcalt, 48 Mo. 367; Major *v.* Buckley, 51 Mo. 231; Fellows *v.* Wise, 55 Mo. 413; Eck *v.* Hatcher, 58 Mo. 235; Muldrow *v.* Robison, 58 Mo. 331; Ridgeway *v.* Holliday, 59 Mo. 444; Roberts *v.* Moseley, 64 Mo. 507; Young *v.* Kellar, 94 Mo. 581, 4 Am. St. Rep. 406; Morrison *v.* Juden, 145 Mo. 282, Fleckenstein *v.* Baxter, 114 Mo. 493; Trimble *v.* Keer-Rountree Mercantile Co., 56 Mo. App. 683.

Nebraska. — Campbell Printing Press, etc., Co. *v.* Dyer, 46 Neb. 830; Enyart *v.* Moran, (Neb. 1902) 89 N. W. Rep. 1045.

Nevada. — Gibson *v.* Milne, 1 Nev. 526; Grellet *v.* Heilshorn, 4 Nev. 526; Gilson *v.* Boston, 11 Nev. 413.

New Hampshire. — Colby *v.* Kenniston, 4 N. H. 262; Rogers *v.* Jones, 8 N. H. 264; Brown *v.* Manter, 22 N. H. 468; Bell *v.* Twilight, 22 N. H. 500; Warren *v.* Swett, 31 N. H. 332; Patten *v.* Moore, 32 N. H. 382, Tucker *v.* Tilton, 55 N. H. 223; Hoit *v.* Russell, 56 N. H. 559; Janvrin *v.* Janvrin, 60 N. H. 169; Corning *v.* Records, 69 N. H. 390, 76 Am. St. Rep. 178.

New Jersey. — Garwood *v.* Garwood, 9 N. J. L. 193; Van Keuren *v.* Central R. Co., 38 N. J. L. 165; Hulsizer *v.* Opdyke, (N. J. 1888) 13 Atl. Rep. 669; Holmes *v.* Stout, 10 N. J. Eq. 419; Smallwood *v.* Lewin, 15 N. J. Eq. 60; Smith *v.* Vreeland, 16 N. J. Eq. 199; Van Doren *v.* Robinson, 16 N. J. Eq. 256; Hoy *v.* Bramhall, 19 N. J. Eq. 563, 97 Am. Dec. 687; Raritan Water Power Co. *v.* Veghte, 21 N. J. Eq. 463; Gale *v.* Morris, 30 N. J. Eq. 285; Morris *v.* White, 36 N. J. Eq. 324; Brinton *v.* Scull, 55 N. J. Eq. 747; Merchants' Bldg., etc., Assoc. *v.* Barber, (N. J. 1894) 30 Atl. Rep. 865.

New York. — De Ruyter *v.* St. Peter's Church, 2 Barb. Ch. (N. Y.) 556; Ten Eick *v.* Simpson, 1 Sandf. Ch. (N. Y.) 244; Griffith *v.* Griffith, Hoffm. (N. Y.) 153; Dey *v.* Dunham, 2 Johns. Ch. (N. Y.) 182; Gouverneur *v.* Lynch 2 Paige (N. Y.) 300; Grimstone *v.* Carter, 3 Paige (N. Y.) 421, 24 Am. Dec. 230; Jackson *v.* Van Valkenburgh, 8 Cow. (N. Y.) 260; Jackson *v.* Tuttle, 9 Cow. (N. Y.) 233; Jackson *v.* Page, 4 Wend. (N. Y.) 585; Tuttle *v.* Jackson, 6 Wend. (N. Y.) 213, 21 Am. Dec. 306; Parks *v.* Jackson, 11 Wend. (N. Y.) 442, 25 Am. Dec. 656; Van Rensselaer *v.* Clark, 17 Wend. (N. Y.) 25, 31 Am. Dec. 280; Jackson *v.* Leek, 19 Wend. (N. Y.) 339; Jackson *v.* Given, 8 Johns. (N. Y.) 137, 5 Am. Dec. 328; Jackson *v.* Sharp, 9 Johns. (N. Y.) 163, 6 Am. Dec. 267; Jackson *v.* Burgott, 10 Johns. (N. Y.) 457, 6 Am. Dec. 349; Jackson *v.* West, 10 Johns. (N. Y.) 466; Jackson *v.* Elston, 12 Johns. (N. Y.) 452; Dunham *v.* Dey, 15 Johns. (N. Y.) 555, 8 Am. Dec. 282; Howard Ins. Co. *v.* Halsey, 8 N. Y. 271, 59 Am. Dec. 478; Hill *v.* Beebe, 13 N. Y. 556; Williamson *v.* Brown, 15 N. Y. 354; Gibert *v.* Peteler, 38 N. Y. 165, 97 Am. Dec. 785; Acer *v.* Westcott, 46 N. Y. 384, 7 Am. Rep. 355; Weaver *v.* Barden, 49 N Y. 286; Brown *v.* Volkening, 64 N. Y. 76; Page *v.* Waring, 76 N. Y. 463; Ellis *v.* Horrman, 90 N. Y. 466; Mack *v.* Phelan, 92 N. Y. 20; Ward *v.* Metropolitan El. R. Co., 152 N. Y. 39; Curtis *v.* Moore, 152 N. Y. 159, 57 Am. St. Rep. 506; Howells *v.* Hettrick, 13 N. Y. App. Div. 366; People *v.* Woodruff, 75 N. Y. App. Div. 90; Schutt *v.* Large, 6 Barb. (N. Y.) 373; Butler *v.* Viele, 44 Barb. (N. Y.) 166; Penfield *v.* Dunbar, 64 Barb. (N. Y.) 239; Rochester Sav. Bank *v.* Averell, 26 Hun (N. Y.) 643; Potter *v.* Traders' Nat. Bank, 70 Hun (N. Y.) 53; Rogers *v.* Dwight, 71 Hun (N. Y.) 547; Eastern Brewing Co. *v.* Feist, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 681.

North Carolina. — Pike *v.* Armstead, 1 Dev. Eq. (16 N. Car.) 110; Fleming *v.* Burgin, 2 Ired. Eq. (37 N. Car.) 584; Bailey *v.* Wilson, 1 Dev. & B. Eq. (21 N. Car.) 182; Hodges *v.* Spicer, 79 N. Car. 223.

North Dakota. — Doran *v.* Dazey, 5 N. Dak. 167, 57 Am. St. Rep. 550.

Ohio. — Cunningham *v.* Buckingham, 1 Ohio 264; Irvin *v.* Smith, 17 Ohio 226; Brown *v.* Kirkman, 1 Ohio St. 116; McKenzie *v.* Perrill, 15 Ohio St. 162; Morris *v.* Daniels, 35 Ohio St. 406; Varwig *v.* Cleveland, etc., R. Co., 54 Ohio St. 455.

Oregon. — Stannis *v.* Nicholson, 2 Oregon 333; Carter *v.* Portland, 4 Oregon 350; Musgrove *v.* Bonser, 5 Oregon 314, 20 Am. Rep. 737; Manaudas *v.* Mann, 14 Oregon 450; Cooper *v.* Thomason, 30 Oregon 161.

Pennsylvania. — Hibbard *v.* Bovier, 1 Grant Cas. (Pa.) 266; Jaques *v.* Weeks, 7 Watts (Pa.) 261; Manufacturers', etc., Bank *v.* State Bank, 7 W. & S. (Pa.) 335, 42 Am. Dec. 240; Krider *v.* Lafferty, 1 Whart. (Pa.) 303; Correy *v.* Caxton, 4 Binn. (Pa.) 140; Randall *v.* Silverthorn, 4 Pa. St. 173; Stumm *v.* McCulloch, 5 Pa. St. 473; Britton's Appeal, 6 Pa. St. 172; Murphy *v.* Nathans, 46 Pa. St. 512; Smith's Appeal, 47 Pa. St. 128; Speer *v.* Evans, 47 Pa. St. 141; Nice's Appeal, 54 Pa. St. 200; Maul *v.* Rider, 59 Pa. St. 167; Butcher *v.* Yocum, 61 Pa. St. 168, 100 Am. Dec. 625; Parke *v.* Neeley, 90 Pa. St. 52; Lahr's Appeal, 90 Pa. St. 507; Follweiler *v.* Lutz, 102 Pa. St. 585; Rixstine's Estate, 3 Pa. Dist. 227; Pierie *v.* Metz, 9 Pa. Dist. 341; Weidner *v.* Dauth, 21 Pa. Co. Ct. 440.

Rhode Island. — Harris *v.* Arnold, 1 R. I. 125; Tillinghast *v.* Champlin, 4 R. I. 215, 67 Am. Dec. 510; McCardell *v.* Williams, 19 R. I. 701.

South Carolina. — City Council *v.* Page, Spears Eq. (S. Car.) 162; Martin *v.* Sale, Bailey Eq. (S. Car.) 1; Foroke *v.* Woodward, Spears Eq. (S. Car.) 233; Warnock *v.* Wightman, 1 Brev. (S. Car.) 331; M'Fall *v.* Sherrard, Harp. L. (S. Car.) 295; Knotts *v.* Geiger, 4 Rich. L. (S. Car.) 32; Tart *v.* Crawford, 1 McCord L. (S. Car.) 265; Cabiness *v.* Mahon, 2 McCord

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recording is, as to him, removed; for it cannot be said that a prior conveyance of which he has knowledge can be employed in fraud of him.[1]

Creditors. — Where the protection of the recording acts is extended to lien creditors without notice, a creditor who is chargeable with notice before his lien attaches is not entitled to priority over a previous unrecorded conveyance,[2]

L. (S. Car.) 273; Wallace *v.* Craps, 3 Strobh. L. (S. Car.) 266; Ingrem *v.* Phillips, 3 Strobh. L. (S. Car.) 565; Summers *v.* Brice, 36 S. Car. 204.

Tennessee. — Murrell *v.* Watson, 1 Tenn. Ch. 342; Lillard *v.* Rucker, 9 Yerg. (Tenn.) 64; Tharpe *v.* Dunlap, 4 Heisk. (Tenn.) 686; Brevard *v.* Neely, 2 Sneed (Tenn.) 164; Gaskill *v.* Badge, 3 Lea (Tenn.) 144; Kirkpatrick *v.* Ward, 5 Lea (Tenn.) 434; Otis *v.* Payne, 86 Tenn. 663.

Texas. — Beaty *v.* Whitaker, 23 Tex. 526; Ayres *v.* Duprey, 27 Tex. 594, 86 Am. Dec. 657; Portis *v.* Hill, 30 Tex. 529, 98 Am. Dec. 481; Orme *v.* Roberts, 33 Tex. 768; Rodgers *v.* Burchard, 34 Tex. 441, 7 Am. Rep. 283; Allen *v.* Root, 39 Tex. 589; Littleton *v.* Giddings, 47 Tex. 109; Willis *v.* Gay, 48 Tex. 463, 26 Am. Rep. 328; Bonner *v.* Stephens, 60 Tex. 616; Freiberg *v.* Magale, 70 Tex. 116; Snyder *v.* Austin First Nat. Bank, (Tex. Civ. App. 1895) 32 S. W. Rep. 162; Hitchler *v.* Scanlan, 15 Tex. Civ. App. 40; Holt *v.* Hunt, 18 Tex. Civ. App. 363; Barnett *v.* Squyres, (Tex. Civ. App. 1899) 52 S. W. Rep. 612.

Vermont. — Stewart *v.* Thompson, 3 Vt. 255; Brackett *v.* Wait, 6 Vt. 411; Corliss *v.* Corliss, 8 Vt. 373; Blaisdell *v.* Stevens, 16 Vt. 179; Stafford *v.* Ballou, 17 Vt. 329; Smith *v.* Hall, 28 Vt. 364; Morrill *v.* Morrill, 53 Vt. 74, 38 Am. Rep. 659; Hill *v.* Murray, 56 Vt. 177.

Virginia. — Doswell *v.* Buchanan, 3 Leigh (Va.) 365, 23 Am. Dec. 280; McClure *v.* Thistle, 2 Gratt. (Va.) 182; Mundy *v.* Vawter, 3 Gratt. (Va.) 518; Long *v.* Weller, 29 Gratt. (Va.) 347; Wood *v.* Krebbs, 30 Gratt. (Va.) 708; Vest *v.* Michie, 31 Gratt. (Va.) 149, 31 Am. Rep. 722; Newman *v.* Chapman, 2 Rand. (Va.) 98, 14 Am. Dec. 766; Smith *v.* Profitt, 82 Va. 832; National Mut. Bldg., etc., Assoc. *v.* Blair, 98 Va. 490.

Washington. — Vincent *v.* Snoqualmie Mill Co., 7 Wash. 566; Mendenhall *v.* Kratz, 14 Wash. 453; Roy *v.* Scott, 11 Wash. 399.

West Virginia. — Cosgray *v.* Core, 2 W. Va. 353; Cox *v.* Cox, 5 W. Va. 335; Cain *v.* Cox, 23 W. Va. 594.

Wisconsin. — Parker *v.* Kane, 4 Wis. 1, 65 Am. Dec. 283; Ely *v.* Wilcox, 20 Wis. 523, 91 Am. Dec. 436; Hoppin *v.* Doty, 25 Wis. 591; Fallass *v.* Pierce, 30 Wis. 469; Hoxie *v.* Price, 31 Wis. 82; Gilbert *v.* Jess, 31 Wis. 110; Pringle *v.* Dunn, 37 Wis. 449, 19 Am. Rep. 772; Brinkman *v.* Jones, 44 Wis. 498; Helms *v.* Chadbourne, 45 Wis. 73; Bergeron *v.* Richardott, 55 Wis. 129; Butler *v.* Mazeppa Bank, 94 Wis. 351.

See also the titles ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 3, p. 67; ATTACHMENT, vol. 3, p. 230; CHATTEL MORTGAGES, vol. 5, p. 1008; CONDITIONAL SALES, vol. 6, p. 498; MARRIAGE SETTLEMENTS, vol. 19, p. 1238; MORTGAGES, vol. 20, p. 908; RAILROAD SECURITIES, vol. 23, p. 801, note 4.

1. Actual Knowledge Negatives Good Faith. — In the leading case of Le Neve *v.* Le Neve, Ambl. 436, 3 Atk. 646, 1 Ves. 64, 2 White & T. Lead. Cas. 26, it was held that the taking of a legal estate after notice of a prior right constituted a person a *mala fide* purchaser.

And, generally, under a statute providing that the subsequent purchaser "must be a *bona fide* purchaser," it will not be considered that one having notice of a previous transfer is a purchaser in good faith. Hunter *v.* Watson, 12 Cal. 363, 73 Am. Dec. 543; Smith *v.* Dunton, 42 Iowa 48; Blanchard *v.* Tyler, 12 Mich. 339, 86 Am. Dec. 57; Maybee *v.* Moore, 90 Mo. 340; Jackson *v.* Burgott, 10 Johns. (N. Y.) 457, 6 Am. Dec. 349; Wood *v.* Chapin, 13 N. Y. 509, 67 Am. Dec. 62; Dunham *v.* Dey, 15 Johns. (N. Y.) 555, 8 Am. Dec. 282; Paine *v.* Mason, 7 Ohio St. 199; Otis *v.* Payne, 86 Tenn. 663; Bonner *v.* Stephens, 60 Tex. 616.

This Theory of Fraud Being Attributable to a purchaser with notice has resulted in some cases in limiting the application of the doctrine of actual notice to a state of facts where notice is so direct and full as to render a subsequent purchase an act of positive fraud. Jolland *v.* Stainbridge, 3 Ves. Jr. 478; Hine *v.* Dodd, 2 Atk. 275; Davis *v.* Strathmore, 16 Ves. Jr. 419; Wyatt *v.* Barwell, 19 Ves. Jr. 439; Ford *v.* White, 16 Beav. 123; Chadwick *v.* Turner, L. R. 1 Ch. 310; New Brunswick R. Co. *v.* Kelly, 26 Can. Sup. Ct. 341; Gill *v.* McAtlee, 2 Md. Ch. 255.

2. Lien Creditor with Notice Not Protected — *United States.* — Hitz *v.* National Metropolitan Bank, 111 U. S. 722; Weld *v.* Madden, 2 Cliff. (U. S.) 584.

Alabama. — Wyatt *v.* Stewart, 34 Ala. 716.

California. — Thomas *v.* Vanlieu, 28 Cal. 616; O'Rourke *v.* O'Connor, 39 Cal. 442.

Colorado. — Campbell *v.* Denver First Nat. Bank, 22 Colo. 177.

Connecticut. — Goddard *v.* Prentice, 17 Conn. 546; Mead *v.* New York, etc., R. Co., 45 Conn. 199.

District of Columbia. — Hume *v.* Riggs, 12 App. Cas. (D. C.) 368.

Florida. — Massey *v.* Hubbard, 18 Fla. 688.

Illinois. — Cox *v.* Milner, 23 Ill. 476; Williams *v.* Tatnall, 29 Ill. 553; Milmine *v.* Burnham, 76 Ill. 362; Columbus Buggy Co. *v.* Graves, 108 Ill. 459; Citizens' Nat. Bank *v.* Dayton, 116 Ill. 257; Sternbach *v.* Leopold, 50 Ill. App. 476.

Iowa. — Hoy *v.* Allen, 27 Iowa 208; Kessey *v.* McHenry, 54 Iowa 187; Bacon *v.* Thompson, 60 Iowa 286.

Kansas. — Larned First Nat. Bank *v.* Tufts, 53 Kan. 710.

Kentucky. — Baldwin *v.* Crow, 86 Ky. 679.

Maryland. — Pfeaff *v.* Jones, 50 Md. 263; Stanhope *v.* Dodge, 52 Md. 483; Nally *v.* Long, 56 Md. 567.

Massachusetts. — Priest *v.* Rice, 1 Pick. (Mass.) 164, 11 Am. Dec. 156; Lawrence *v.* Stratton, 6 Cush. (Mass.) 163.

Minnesota. — St. Paul Title Ins., etc., Co. *v.* Berkey, 52 Minn. 497.

and whatever would be sufficient to charge a purchaser with notice is sufficient to charge a lien creditor.[1]

Purchaser at Execution Sale. — And so a purchaser at an execution sale, where the execution creditor is not himself entitled to protection, will not occupy a more favorable position, if notice of the prior unrecorded conveyance be given him before his purchase is complete.[2]

Purchaser with Notice from Bona Fide Purchaser. — The equity rule that a *bona fide* purchaser can pass a good title to one chargeable with notice applies under the recording acts.[3] But this rule will not operate in favor of the original purchaser *mala fide*, where he reacquires the title after it has passed through the hands of purchasers not affected with notice.[4]

Bona Fide Purchaser from Purchaser with Notice.—The converse proposition, that a purchaser for value and without notice gets a good title notwithstanding his

Mississippi. — Pickett *v.* Banks, 11 Smed. & M. (Miss.) 446; Loughridge *v.* Bowland, 52 Miss. 546.

New Jersey. — Garwood *v.* Garwood, 9 N. J. L. 193; Morris *v.* White, 36 N. J. Eq. 324; H. C. Tack Co. *v.* Ayers, 56 N. J. Eq. 56; Merchants' Bldg., etc., Assoc. *v.* Barber, (N. J. 1894) 30 Atl. Rep. 865.

Texas. — Ayres *v.* Duprey, 27 Tex. 593, 86 Am. Dec. 657; McKamey *v.* Thorp, 61 Tex. 648; Freiberg *v.* Magale, 70 Tex. 116; Holt *v.* Hunt, 18 Tex. Civ. App. 363; Barnett *v.* Squyres, (Tex. Civ. App. 1899) 52 S. W. Rep. 612.

Vermont. — Hart *v.* Farmers', etc., Bank, 33 Vt. 252.

In Pennsylvania, it has been held that actual knowledge in the creditor before the debts were contracted will avoid the judgment lien as against a prior unrecorded mortgage. Britton's Appeal, 45 Pa. St. 172. But see Hulings *v.* Guthrie, 4 Pa. St. 123; Uhler *v.* Hutchinson, 23 Pa. St. 110.

Notice After the Lien Has Attached cannot affect the creditor's priority. Hall *v.* Griffin, 119 Ala. 214; Carter *v.* Champion, 8 Conn. 549, 21 Am. Dec. 695; Smith *v.* Willard, 174 Ill. 538, 66 Am. St. Rep. 313.

Notice to One of Several Judgment Creditors, each of whom claims under a several judgment, will not bind the others who secured their liens without notice, although the sale under all the executions be made at the same time. Columbus Buggy Co. *v.* Graves, 108 Ill. 459.

1. What Sufficient to Charge Creditor with Notice. — H. C. Tack Co. *v.* Ayers, 56 N. J. Eq. 56.

2. Purchaser with Notice at Execution Sale. — Avent *v.* Read, 2 Stew. (Ala.) 488; Byers *v.* Engles, 16 Ark. 543; Shirk *v.* Thomas, 121 Ind. 147, 16 Am. St. Rep. 381; Chapman *v.* Coats, 26 Iowa 288; Cowen *v.* Withrow, 112 N. Car. 736; Moyer *v.* Schick, 3 Pa. St. 242; Senter *v.* Lambeth, 59 Tex. 259; Parker *v.* Coop, 60 Tex. 111; McKamey *v.* Thorp, 61 Tex. 648; Ross *v.* Kornrumpf, 64 Tex. 390.

In Nebraska, if the prior deed be recorded at any time before the purchaser at the execution sale records the sheriff's deed, it is good as against such sheriff's deed. Galway *v.* Malchow, 7 Neb. 285; Mansfield *v.* Gregory, 8 Neb. 432; Harral *v.* Gray, 10 Neb. 186; Sheasley *v.* Keens, 48 Neb. 57; Hargreaves *v.* Menken, 45 Neb. 668.

Where the Creditor Himself Purchases at the execution sale, notice to him at any time before his purchase is complete affects his conscience under the *Kentucky* statute, and makes the prior unrecorded conveyance good as against him. Low *v.* Blinco, 10 Bush (Ky.) 331.

3. Purchaser with Notice from Bona Fide Purchaser — *England.* — Brandlyn *v.* Ord, 1 Atk. 571; Ferrars *v.* Cherry, 2 Vern. 383.

United States. — Fletcher *v.* Peck, 6 Cranch (U. S.) 87; Vattier *v.* Hinde, 7 Pet. (U. S.) 252; Boone *v.* Chiles, 10 Pet. (U. S.) 177.

Alabama. — Cahalan *v.* Monroe, 56 Ala. 303; Sheridan *v.* Schimpf, 120 Ala. 475.

Illinois. — English *v.* Lindley, 194 Ill. 181; Shinn *v.* Shinn, 15 Ill. App. 141.

Kentucky. — Blight *v.* Banks, 6 T. B. Mon. (Ky.) 192, 17 Am. Dec. 136; Halstead *v.* State Bank, 4 J. J. Marsh. (Ky.) 554; Low *v.* Blinco, 10 Bush (Ky.) 331.

Massachusetts. — Boynton *v.* Rees, 8 Pick. (Mass.) 329, 19 Am. Dec. 326; Dana *v.* Newhall, 13 Mass. 498; Trull *v.* Bigelow, 16 Mass. 406, 8 Am. Dec. 144.

New Jersey. — Holmes *v.* Stout, 4 N. J. Eq. 492; Rutgers *v.* Kingsland, 7 N. J. Eq. 178.

New York. — Varick *v.* Briggs, 6 Paige (N. Y.) 323; Webster *v.* Van Steenbergh, 46 Barb. (N. Y.) 211; Ward *v.* Isbill, 73 Hun (N. Y.) 550; Abraham *v.* Mayer, (N. Y. City Ct. Gen. T.) 7 Misc. (N. Y.) 250.

Pennsylvania. — Bracken *v.* Miller, 4 W. & S. (Pa.) 102.

Texas. — Moore *v.* Curry, 36 Tex. 668; Holmes *v.* Buckner, 67 Tex. 107.

Vermont. — Barber *v.* Richardson, 57 Vt. 408.

Virginia. — Lacy *v.* Wilson, 4 Munf. (Va.) 313.

Wisconsin. — Pringle *v.* Dunn, 37 Wis. 449, 19 Am. Rep. 772.

For further citations and a full discussion of the question, see the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 477.

Thus a Purchaser at an Execution Sale gets a good title as against a prior unrecorded conveyance where the execution creditor is himself entitled to precedence, notwithstanding such purchaser have notice of the conveyance before purchasing. See *supra*, XI. 2. *c.* (7) (*a*) *Where Creditor Entitled to Protection.*

4. Repurchase by Former Mala Fide Holder. — Kennedy *v.* Daly, 1 Sch. & Lef. 355; Schutt *v.* Large, 6 Barb. (N. Y.) 373. And see cases cited in the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 478.

grantor be infected with notice, is also recognized in applying the recording acts.[1]

(b) **What Notice Sufficient.**—Under some recording acts using the term "actual notice" it has been held that the notice which will supply the lack of registration must be something more than the notice implied in law from circumstances; there must be actual knowledge of such instrument or knowledge of facts and circumstances that would put an ordinarily prudent man on inquiry.[2] Ordinarily, however, and especially where the statute does not employ the word "actual," the equitable doctrine as to notice is applied by the courts to cases arising under the recording acts.[3] This doctrine has been so fully treated elsewhere in this work as to render further discussion unnecessary at this point.[4]

Notice Before Completion of Purchase. — As a general rule notice to a subsequent purchaser before his purchase is complete will deprive him of the protection of the recording acts.[5]

Notice to Whom. — Actual notice to the agent of the subsequent grantee, within the scope of the agency, binds the grantee;[6] and where the grantee himself has notice his heirs are bound by it.[7] In *Connecticut* it is held that notice to the trustee in insolvency of the grantor is not binding on creditors

1. Bona Fide Purchaser from Purchaser with Notice — *United States.* — Wood *v.* Mann, 1 Sumn. (U. S.) 506.

Alabama. — Mallory *v.* Stodder, 6 Ala. 801; Le Grand *v.* Eufaula Nat. Bank, 81 Ala. 123, 60 Am. Rep. 140.

Arkansas. — Fargason *v.* Edrington, 49 Ark. 207.

Georgia. — Lee *v.* Doe, 27 Ga. 637, 73 Am. Dec. 746.

Illinois. — Choteau *v.* Jones, 11 Ill. 300, 50 Am. Dec. 460; Jennings *v.* Gage, 13 Ill. 610, 56 Am. Dec. 476; Fawcett *v.* Osborn, 32 Ill. 411, 83 Am. Dec. 278; Paris *v.* Lewis, 85 Ill. 597.

Iowa. — Cook *v.* Stone, 63 Iowa 352; National Cash-Register Co. *v.* Maloney, 95 Iowa 573.

Maine. — Knox *v.* Silloway, 10 Me. 201.

Maryland. — Hagthorp *v.* Hook, 1 Gill & J. (Md.) 270.

Massachusetts. — Somes *v.* Brewer, 2 Pick. (Mass.) 184, 13 Am. Dec. 406; Glidden *v.* Hunt, 24 Pick. (Mass.) 221; Connecticut *v.* Bradish, 14 Mass. 296; Trull *v.* Bigelow, 16 Mass. 406, 8 Am. Dec. 144; Moody *v.* Blake, 117 Mass. 23, 19 Am. Rep. 394; Morse *v.* Curtis, 140 Mass. 112, 54 Am. Rep. 456.

Missouri. — Lindell Real Estate Co. *v.* Lindell, 133 Mo. 386.

Montana. — John Caplice Co. *v.* Beauchamp, 22 Mont. 258.

New Jersey. — Rutgers *v.* Kingsland, 7 N. J. Eq. 178; Behn *v.* National Bank, 65 N. J. L. 591.

New York. — Galatian *v.* Erwin, Hopk. (N. Y.) 48; Fort *v.* Burch, 5 Den. (N. Y.) 187; Saltus *v.* Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; Hawley *v.* Cramer, 4 Cow. (N. Y.) 717; Jackson *v.* Van Valkenburgh, 8 Cow. (N. Y.) 260; Mowrey *v.* Walsh, 8 Cow. (N. Y.) 243; Varick *v.* Briggs, 6 Paige (N. Y.) 323; Simon *v.* Kaliske, (Supm. Ct. Gen. T.) 37 How. Pr. (N. Y.) 249; Westbrook *v.* Gleason, 79 N. Y. 23; Decker *v.* Boice, 83 N. Y. 215; Slattery *v.* Schwannecke, 118 N. Y. 543.

Ohio. — Doherty *v.* Stimmel, 40 Ohio St. 294.

South Carolina. — London *v.* Youmans, 31 S. Car. 147, 17 Am. St. Rep. 17.

Vermont. — Day *v.* Clark, 25 Vt. 397.

Virginia. — Claiborne *v.* Holland, 88 Va. 1046.

Washington. — Sayward *v.* Thompson, 11 Wash. 706.

Wisconsin. — Ely *v.* Wilcox, 20 Wis. 523, 91 Am. Dec. 436; Fallass *v.* Pierce, 30 Wis. 443; Pringle *v.* Dunn, 37 Wis. 449, 19 Am. Rep. 772.

For further citations, see the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 478.

Thus a Purchaser at an Execution Sale, with no notice of a prior unrecorded conveyance, is usually held to take free of such conveyance although the execution creditor is not himself entitled to protection. See *supra*, XI. 2. *c.* (7) (*b*) *Where Creditor Not Protected.*

2. "Actual Notice" Required. — Spofford *v.* Weston, 29 Me. 140; Pomroy *v.* Stevens, 11 Met. (Mass.) 244; Parker *v.* Osgood, 3 Allen (Mass.) 487; Dooley *v.* Wolcott, 4 Allen (Mass.) 406; Sibley *v.* Leffingwell, 8 Allen (Mass.) 584; Keith *v.* Wheeler, 159 Mass. 161; Masterson *v.* West End Narrow Gauge R. Co., 5 Mo. App. 64, *affirmed* 72 Mo. 342; Casey *v.* Steinmeyer, 7 Mo. App. 556; Abbe *v.* Justus, 60 Mo. App. 300.

As to what constitutes "actual notice" in general, see the title ACTUAL — ACTUALLY, vol. 1, p. 604.

3. See Protection Bldg., etc., Assoc. *v.* Knowles, 54 N. J. Eq. 519.

4. As to What Constitutes Notice, see the titles NOTICE, vol. 21, p. 580; PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 472.

5. For a full discussion of this subject, see the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 517 *et seq.*

6. Notice to Agent Binding on Subsequent Grantee. — Cowan *v.* Withrow, 111 N. Car. 306, *rehearing denied* 112 N. Car. 736. See generally the title AGENCY, vol. 1, p. 1144 *et seq.*

7. Notice to Grantee Binds His Heirs. — Dennis *v.* Dennis, 119 Mich. 380.

who have no notice themselves.[1] In *New York* an innocent assignee of a mortgage is bound by his assignor's knowledge of a prior unrecorded mortgage on the same property.[2]

(c) **Burden of Proof.** — By the weight of both reason and authority, it is incumbent upon one claiming under an unrecorded conveyance to prove that the junior claimant took with notice of the prior conveyance.[3] But in some jurisdictions the burden of proof is upon the party claiming to have obtained title for value and without notice of the prior unrecorded conveyance.[4]

(2) *When Notice Not Equivalent to Recording.* — The rule that actual notice is equivalent to recording applies only where there is nothing in the statute to indicate a contrary intention. Where recording is necessary to the validity of the instrument, actual notice will not ordinarily supply the lack thereof.[5]

Conveyances of Land. — In a number of jurisdictions all unrecorded conveyances of land are void as against creditors of the grantor, notwithstanding they have actual notice.[6] And under some statutes actual notice will not dispense with the necessity of recording even as against subsequent purchasers.[7]

1. Notice to Trustee Not Binding on Creditors. — National Cash Register Co. *v.* Woodbury, 70 Conn. 321; Newtown Sav. Bank *v.* Lawrence, 71 Conn. 358.

2. Notice to Assignor of Mortgage Binds Assignee. — Greene *v.* Warnick, 64 N. Y. 220; Decker *v.* Boice, 83 N. Y. 215, *overruling* Jackson *v.* Van Valkenburgh, 8 Cow. (N. Y.) 260; David Stevenson Brewing Co. *v.* Iba, (N. Y. Super. Ct. Gen. T.) 12 Misc. (N. Y.) 329. See also Rapps *v.* Gottlieb, 142 N. Y. 164. See the title MORTGAGES, vol. 20, p. 1042.

3. Burden on Prior Claimant — *United States.* — Gratz *v.* Land, etc., Imp. Co., (C. C. A.) 82 Fed. Rep. 381.

Iowa. — Walter *v.* Brown, 115 Iowa 360.

Michigan. — Hooper *v.* De Vries, 115 Mich. 231.

Montana. — Hull *v.* Diehl, 21 Mont. 71.

New Jersey. — Paul *v.* Kerswell, 60 N. J. L. 273; Protection Bldg., etc., Assoc. *v.* Knowles, 54 N. J. Eq. 519.

New York. — Beman *v.* Douglas, 1 N. Y. App. Div. 169.

Ohio. — Varwig *v.* Cleveland, etc., R. Co., 54 Ohio St. 455.

Oregon. — Advance Thresher Co. *v.* Esteb, 41 Oregon 469.

See generally the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 522.

4. Burden on Junior Claimant. — McNeil *v.* Finnegan, 33 Minn. 375; Newton *v.* Newton, 46 Minn. 33; Wright *v.* Larson, 51 Minn. 321, 38 Am. St. Rep. 504; Mead *v.* Randall, 68 Minn. 233; Nickerson *v.* Wells-Stone Mercantile Co., 71 Minn. 230; St. Paul Title Ins., etc., Co. *v.* Berkey, 52 Minn. 497; Bowman *v.* Griffith, 35 Neb. 361. And see the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 522.

In Texas it is held that the burden is on a junior purchaser to show that he purchased for value and without notice; but in the case of a lien creditor the burden is on the prior purchaser to show that the creditor had notice before his lien attached. Turner *v.* Cochran, 94 Tex. 480. *Compare* Barnett *v.* Squyres, 93 Tex. 193, 77 Am. St. Rep. 854.

Want of Notice May Be Inferred from proof that the junior claimant took for value and in due course of business. Newton *v.* Newton, 46 Minn. 33; Wright *v.* Larson, 51 Minn. 321, 38 Am. St. Rep. 504.

Prima Facie It Is Sufficient Proof of lack of notice to show that the prior instrument was not recorded. Lake *v.* Hancock, 38 Fla. 53, 56 Am. St. Rep. 159.

5. Where Recording Necessary to Validity. — Webb Rec. Tit., § 189; Chenyworth *v.* Daily, 7 Ind. 284; Lockwood *v.* Slevin, 26 Ind. 124; Ross *v.* Menefee, 125 Ind. 432; Travis *v.* Bishop, 13 Met. (Mass.) 304.

6. Conveyances of Land Void as to Creditors with Notice — *Oklahoma.* — Lewis *v.* Atherton, 5 Okla. 90.

Tennessee. — Washington *v.* Trousdale, Mart. & Y. (Tenn.) 385; Kinsey *v.* McDearmon, 5 Coldw. (Tenn.) 392; Johnson *v.* Morgan, 2 Humph. (Tenn.) 115; Stanley *v.* Nelson, 4 Humph. (Tenn.) 484; Turbeville *v.* Gibson, 5 Heisk. (Tenn.) 565; Wilson *v.* Eifler, 11 Heisk. (Tenn.) 179; Coward *v.* Culver, 12 Heisk. (Tenn.) 540; Buchanan *v.* Kimies, 2 Baxt. (Tenn.) 275; Lyle *v.* Longley, 6 Baxt. (Tenn.) 286; Lookout Bank *v.* Noe, 86 Tenn. 21; Alabama Marble, etc., Co. *v.* Chattanooga Marble, etc., Co., (Tenn. Ch. 1896) 37 S. W. Rep. 1004; Malone *v.* Brown, (Tenn. Ch. 1897) 46 S. W. Rep. 1004; Southern Bank, etc., Co. *v.* Folsom, (C. C. A.) 75 Fed. Rep. 929 (construing the *Tennessee* statute).

Virginia. — Guerrant *v.* Anderson, 4 Rand. (Va.) 208; Price *v.* Wall, 97 Va. 334; Heermans *v.* Montague, (Va. 1890) 20 S. E. Rep. 899.

West Virginia. — Abney *v.* Ohio Lumber, etc., Co., 45 W. Va. 446.

7. In North Carolina no notice to a subsequent purchaser or mortgagee, however full or formal, will supply the want of registration in a prior conveyance. Quinnerly *v.* Quinnerly, 114 N. Car. 145; Maddox *v.* Arp, 114 N. Car. 585; Barber *v.* Wadsworth, 115 N. Car. 29; Hooker *v.* Nichols, 116 N. Car. 157; Barrett *v.* Barrett, 120 N. Car. 127; Patterson *v.* Mills, 121 N. Car. 258. See also Robinson *v.* Willoughby, 70 N. Car. 358; Traders' Nat. Bank *v.* Lawrence Mfg. Co., 96 N. Car. 298.

Ohio — Oil Lease. — Under Ohio Rev. St., § 4112*a*, an unrecorded lease or license to

Mortgages. — Some statutes provide that a mortgage shall take effect, or be a lien on the mortgaged property, from the time of its registration, and where such provisions exist it has been held that an unrecorded mortgage is void as to both purchasers and creditors, even though they have actual notice of its existence.[1]

Chattel Mortgages. — Under the statutes in many states a chattel mortgage is void as against creditors of the mortgagor, regardless of whether or not they have actual notice thereof;[2] and in some jurisdictions this rule extends not only to creditors but to subsequent purchasers and incumbrancers as well.[3]

e. NECESSITY FOR VALUABLE CONSIDERATION — (1) *In General.*— The recording acts were intended for the protection of those who should part with something of value, or suffer some loss, by reason of having acted upon the faith of a conveyance and in ignorance of some prior transaction which, in the absence of the operation of these provisions, would defeat the intended acquisition of some new interest. It is necessary that the subsequent purchaser, in order to be entitled to the protection of the recording acts, obtain his conveyance for a valuable consideration.[4]

operate on land for oil or natural gas is void as to third persons with notice, where the person claiming under such lease or license is not in actual possession. Northwestern Ohio Natural Gas Co. *v.* Tiffin, 59 Ohio St. 420.

1. Unrecorded Mortgage Void as to Third Persons with Notice. — Main *v.* Alexander, 9 Ark. 112, 47 Am. Dec. 732; Hannah *v.* Carrington, 18 Ark. 105; Jacoway *v.* Gault, 20 Ark. 190, 73 Am. Dec. 494; Neal *v.* Speigle, 33 Ark. 63; Fry *v.* Martin, 33 Ark. 203; Dodd *v.* Parker, 40 Ark. 536; Wright *v.* Graham, 42 Ark. 140; Ft. Smith Milling Co. *v.* Mikles, 61 Ark. 123; Harang *v.* Plattsmier, 21 La. Ann. 426; Boyer *v.* Joffrion, 40 La. Ann. 657; Stansell *v.* Roberts, 13 Ohio 148, 42 Am. Dec. 193; Mayham *v.* Coombs, 14 Ohio 428; Home Bldg., etc., Assoc. *v.* Clark, 43 Ohio St. 427.

Rule Not Extended by Construction. — The rule that an unrecorded mortgage is void as to third persons with notice will not be extended. So, where a recorded mortgage misdescribed the property, it was held that one purchasing with notice of the actual state of the title was not entitled to priority, and a subsequent reformation of the mortgage rendered it good as against him. Ft. Smith Milling Co. *v.* Mikles, 61 Ark. 123.

2. Creditors with Notice Protected — *California.* — Cardenas *v.* Miller, 108 Cal. 250, 49 Am. St. Rep. 84.

Indian Territory. — McFadden *v.* Blocker, 2 Indian Ter. 260.

Missouri. — Martin-Perrin Mercantile Co. *v.* Perkins, 63 Mo. App. 310.

Nebraska. — Farmers', etc., Bank *v.* Anthony, 39 Neb. 343; Spaulding *v.* Johnson, 48 Neb. 830.

Nevada. — Simpson *v.* Harris, 21 Nev. 353.

New Jersey. — Brown *v.* Harris, 67 N. J. L. 207; Sayre *v.* Hewes, 32 N. J. Eq. 652.

New York. — McDonald *v.* City Trust Safe Deposit, etc., Co., (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 644.

North Dakota. — Sykes *v.* Hannawalt, 5 N. Dak. 335.

Oklahoma. — Greenville Nat. Bank *v.* Evans-Snyder-Buel Co., 9 Okla. 353.

South Dakota. — W. W. Kimball Co. *v.* Kirby, 4 S. Dak. 152.

Texas. — Brothers *v.* Mundell, 60 Tex. 240; Freiberg *v.* Magale, 70 Tex. 116.

Washington. — Hinchman *v.* Point Defiance R. Co., 14 Wash. 349; Turner *v.* Caldwell, 15 Wash. 274; American L. & T. Co. *v.* Olympia Light, etc., Co., 72 Fed. Rep. 620 (construing the *Washington* statute).

Wisconsin. — Ryan Drug Co. *v.* Hvambsahl, 89 Wis. 61.

In Missouri a Conditional Sale is void as to creditors with notice if not recorded. But actual notice binds a subsequent purchaser. Oyler *v.* Renfro, 86 Mo. App. 321.

3. Void as to Purchasers with Notice — *Illinois.* — Porter *v.* Dement, 35 Ill. 478; Frank *v.* Miner, 50 Ill. 444; Blatchford *v.* Boyden, 122 Ill. 657; Long *v.* Cockern, 128 Ill. 29; Roberts *v.* Kingsbury, 71 Ill. App. 451.

Indiana. — Kennedy *v.* Shaw, 38 Ind. 474; Franklin Nat. Bank *v.* Whitehead, 149 Ind. 560, 63 Am. St. Rep. 302; Scarry *v.* Bennett, 2 Ind. App. 167.

Massachusetts. — Travis *v.* Bishop, 13 Met. (Mass.) 304.

Missouri. — State *v.* Sitlington, 51 Mo. App. 252; Ray County Sav. Bank *v.* Holman, 63 Mo. App. 492.

Texas. — Lewis *v.* Bell, (Tex. Civ. App. 1897) 40 S. W. Rep. 747.

Vermont. — Longey *v.* Leach, 57 Vt. 377.

Wisconsin. — Parroski *v.* Goldberg, 80 Wis. 339.

Canada. — Roff *v.* Krecker, 8 Manitoba 230.

4. Must Pay Valuable Consideration — *United States.* — Wormley *v.* Wormley, 8 Wheat. (U. S.) 449.

Arkansas. — Gerson *v.* Pool, 31 Ark. 85.

California. — Frey *v.* Clifford, 44 Cal. 335.

Kansas. — Coon *v.* Browning, 10 Kan. 85.

Michigan. — Palmer *v.* Williams, 24 Mich. 328; Smith *v.* Williams, 44 Mich. 240.

Missouri. — Aubuchon *v.* Bender, 44 Mo. 560.

Nebraska. — Snowden *v.* Tyler, 21 Neb. 199; Fisk *v.* Osgood, 58 Neb. 486; Patrick *v.* Paulson, 34 Neb. 416.

New Jersey. — Haughwout *v.* Murphy, 21 N. J. Eq. 118.

New York. — Dickerson *v.* Tillinghast, 4 Paige (N. Y.) 215, 25 Am. Dec. 528; Wood *v.*

Consequently, a Mere Volunteer who takes by gift, devise, inheritance, etc., is excluded from the benefits of these statutes.[1] And this has been held to be true even where the prior conveyance was also voluntary in nature.[2]

(2) *What a Sufficient Consideration* — (a) **In General.**—The question as to what is a sufficient consideration to entitle one to be treated as a purchaser for value has been fully treated elsewhere in this work.[3]

(b) **Antecedent Indebtedness — Not Deemed Sufficient Consideration.** — A conveyance or mortgage of property in satisfaction of an antecedent indebtedness, although good as between the parties,[4] will not, according to the weight of authority, entitle the grantee to be considered a purchaser for value.[5] It is said that

Chapin, 13 N. Y. 509, 67 Am. Dec. 62; Ten Eyck *v.* Witbeck, 135 N. Y. 40, 31 Am. St. Rep. 809.

North Carolina. — Worthy *v.* Caddell, 76 N. Car. 82.

Ohio. — Morris *v.* Daniels, 35 Ohio St. 406.

Pennsylvania. — Ritzman *v.* Spencer, 5 Pa. Dist. 224.

South Carolina. — Zorn *v.* Savannah, etc., R. Co., 5 S. Car. 90

Texas. — Spurlock *v.* Sullivan, 36 Tex. 511; Evans *v.* Templeton, 69 Tex. 375, 5 Am. St. Rep. 71.

And see cases cited *supra*, XI. 2. *c.* (1) (*b*) *What Purchasers Embraced.* See also the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23. p. 487.

One Paying a Merely Nominal Consideration under circumstances indicating a gift or advancement is not entitled to protection against a prior unrecorded deed. Ten Eyck *v.* Witbeck, 135 N. Y. 40, 31 Am. St. Rep. 809.

1. Voluntary Conveyance Not Within Acts — *California.* — Snodgrass *v.* Ricketts, 13 Cal. 359; Morse *v.* Wright, 60 Cal. 260.

Georgia. — Toole *v.* Toole, 107 Ga. 472; Byrd *v.* Aspinwall, 108 Ga. 1.

Illinois. — Bowen *v.* Prout, 52 Ill. 354; Roseman *v.* Miller, 84 Ill. 297.

Mississippi. — Upshaw *v.* Hargrove, 6 Smed. & M. (Miss.) 286; Boon *v.* Barnes, 23 Miss. 136.

Missouri. — Bishop *v.* Schneider, 46 Mo. 472, 2 Am. Rep. 533.

New Hampshire. — Patten *v.* Moore, 32 N. H. 382.

New York. — Frost *v.* Beekman, 1 Johns. Ch. (N. Y.) 288.

South Carolina. — Swan *v.* Ligan, 1 McCord Eq. (S. Car.) 227.

Texas. — Pearce *v.* Jackson, 61 Tex. 642.

2. Prior Voluntary Conveyance Prevails though Unrecorded. — Toole *v.* Toole, 107 Ga. 472; Way *v.* Lyon, 3 Blackf. (Ind.) 76.

3. See the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 487.

4. Sufficient Consideration Between Parties. — Steiner *v.* McCall, 61 Ala. 413; Turner *v.* McFee, 61 Ala. 468.

5. Antecedent Indebtedness Not Good Consideration — *United States.* — Bybee *v.* Hawkett, 12 Fed. Rep. 649; Morse *v.* Cohannet Bank, 3 Story (U. S.) 364; People's Sav. Bank *v.* Bates, 120 U. S. 556.

Alabama. — Gafford *v.* Stearns, 51 Ala. 434; Short *v.* Battle, 52 Ala. 456; Coleman *v.* Smith, 55 Ala. 368; Alexander *v.* Caldwell, 55 Ala. 517; Bartlett *v.* Varner, 56 Ala. 580; Wilson *v.* Knight, 59 Ala. 172; Thurman *v.* Stoddard, 63 Ala. 336; Cook *v.* Parham, 63 Ala. 456; Sweeney *v.* Bixler, 69 Ala. 539; Banks *v.* Long, 79 Ala. 319.

Arkansas. — Johnson *v.* Graves, 27 Ark. 557.

California. — Withers *v.* Little, 56 Cal. 370.

Georgia. — Chance *v.* McWhorter, 26 Ga. 315.

Illinois. — Metropolitan Bank *v.* Godfrey, 23 Ill. 579.

Iowa. — Norton *v.* Williams, 9 Iowa 528; Clark *v.* Barnes, 72 Iowa 563.

Kansas. — Holden *v.* Garrett, 23 Kan. 98

Kentucky. — Halstead *v.* State Bank, 4 J. J. Marsh. (Ky.) 554.

Maryland. — Repp *v.* Repp, 12 Gill & J. (Md.) 341.

Massachusetts. — Clark *v.* Flint, 22 Pick. (Mass.) 243; Buffington *v.* Gerrish, 15 Mass. 156, 8 Am. Dec. 97; Jewett *v.* Tucker, 139 Mass. 566.

Minnesota. — Baze *v.* Arper, 6 Minn. 220.

Mississippi. — Perkins *v.* Swank, 43 Miss. 360; Hinds *v.* Pugh, 48 Miss. 268; Schumpert *v.* Dillard, 55 Miss. 348.

Montana. — McAdow *v.* Black, 6 Mont. 601.

New Jersey. — Mingus *v.* Condit, 23 N. J. Eq. 313; Pancoast *v.* Duval, 26 N. J. Eq. 445; Protection Bldg., etc., Assoc. *v.* Knowles, 54 N. J. Eq. 519; Milton *v.* Boyd, 49 N. J. Eq. 142.

New York. — Stalker *v.* M'Donald, 6 Hill (N. Y.) 93, 40 Am. Dec. 389; Coddington *v.* Bay, 20 Johns. (N. Y.) 637, 11 Am. Dec. 342; Cary *v.* White, 7 Lans. (N. Y.) 1, 52 N. Y. 138; Dickerson *v.* Tillinghast, 4 Paige (N. Y.) 215, 25 Am. Dec. 528; Manhattan Co. *v.* Evertson, 6 Paige (N. Y.) 457; Padgett *v.* Lawrence, 10 Paige (N. Y.) 170, 40 Am. Dec. 232; Westervelt *v.* Haff, 2 Sandf. Ch. (N. Y.) 98; Van Heusen *v.* Radcliff, 17 N. Y. 580, 72 Am. Dec. 480; Lawrence *v.* Clark, 36 N. Y. 128; De Lancey *v.* Stearns, 66 N. Y. 157; Union Dime Sav. Inst. *v.* Duryea, 67 N. Y. 84; Jones *v.* Graham, 77 N. Y. 628; Pickett *v.* Barron, 29 Barb. (N. Y.) 505; Thomas *v.* Kelsey, 30 Barb. (N. Y.) 268; Tiffany *v.* Warren, 37 Barb. (N. Y.) 571; Webster *v.* Van Steenbergh, 46 Barb. (N. Y.) 211; Doig *v.* Haverly, 92 Hun (N. Y.) 176; Duffus *v.* Howard Furnace Co., (County Ct.) 15 Misc. (N. Y.) 169; Bueb *v.* Geraty, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 134.

North Carolina. — Harris *v.* Horner, 1 Dev. & B. Eq. (21 N. Car.) 455, 30 Am. Dec. 182.

Pennsylvania. — Ashton's Appeal, 73 Pa. St. 153.

South Carolina. — Summers *v.* Brice, 36 S. Car. 204.

Texas. — Orme *v.* Roberts, 33 Tex. 768; Spurlock *v.* Sullivan, 36 Tex. 511; Farley *v.* McAlister, 39 Tex. 602; McKamey *v.* Thorp,

the purchaser in this case is placed in no worse condition by his purchase than he was in before.[1] Where this doctrine prevails, if a mortgage is given to secure an antecedent debt, the mortgagee, to be within the protection of the recording acts, must have given an extension of time, surrendered some security, or otherwise relinquished some safeguard to his position as a debtor.[2]

The Contrary Rule, that a pre-existing indebtedness is a sufficient consideration to entitle the subsequent conveyance to priority, is supported by very respectable authorities.[3]

(3) *Burden of Proof.* — The burden is usually upon the party claiming against a prior unrecorded conveyance to show that he took for value.[4]

f. NECESSITY FOR PRIORITY OF RECORD. — Recordation is required for the protection of subsequent purchasers only. To require a subsequent conveyance of title to be recorded in order that a prior purchaser of the same property may be able to obtain information of its existence would not be in furtherance of the general design of these statutes, which was to protect purchasers from being undone by prior secret conveyances by making the means of obtaining information thereof available to that end. And so it is not necessary to his full protection, in the absence of statutory provisions so requiring, that the subsequent purchaser record the instrument under which he claims before the recordation of the conveyance of the prior purchaser.[5] But although such requirement may not be in full accord with the general design

61 Tex. 648; Overstreet *v.* Manning, 67 Tex. 657; Lewis *v.* Bell, (Tex. Civ. App. 1897) 40 S. W. Rep. 747.

And see the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 490.

1. Purchaser Not Put in Worse Position. — McKamey *v.* Thorp, 61 Tex. 648; Wright *v.* Douglass, 10 Barb. (N. Y.) 107; Dickerson *v.* Tillinghast, 4 Paige (N. Y.) 215, 25 Am. Dec. 528.

2. See the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 491. See also Doig *v.* Haverly, 92 Hun (N. Y.) 176; Duffus *v.* Howard Furnace Co., (County Ct.) 15 Misc. (N. Y.) 169.

Extension of the Time for the Payment of the Debt will be deemed sufficient to entitle the creditor to the protection given to a purchaser for value. Thames *v.* Rembert, 63 Ala. 561; Downing *v.* Blair, 75 Ala. 216; Sargent *v.* Sturm, 23 Cal. 359, 83 Am. Dec. 118; Gilchrist *v.* Gough, 63 Ind. 576, 30 Am. Rep. 250, 19 Alb. L. J. 276; Busenbarke *v.* Ramey, 53 Ind. 499; Port *v.* Embree, 54 Iowa 14; Schumpert *v.* Dillard, 55 Miss. 348; Coddington *v.* Bay, 20 Johns. (N. Y.) 637, 11 Am. Dec. 342; Farmers', etc., Nat. Bank *v.* Wallace, 45 Ohio St. 153; Ingram *v.* Morgan, 4 Humph. (Tenn.) 66, 40 Am. Dec. 626; Griswold *v.* Davis, 31 Vt. 390.

Surrender or Cancellation of a Security held by a creditor will be sufficient to constitute him a purchaser for value. Goodman *v.* Simonds, 20 How. (U. S.) 343; Youngs *v.* Lee, 12 N. Y. 551; Padgett *v.* Lawrence, 10 Paige (N. Y.) 170, 40 Am. Dec. 232; Spurlock *v.* Sullivan, 36 Tex. 511. See also the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 491.

Assumption of Responsibility by Mortgagee. — It has been held that when the mortgagee in a mortgage, taken for a pre-existing debt not extended, enters into possession and assumes control of the business connected with the mortgaged property, the responsibility thus assumed becomes a valid present consideration for the mortgage. Clark *v.* Barnes, 72 Iowa 563.

3. Antecedent Debt Sufficient Consideration — *England.* — Mitford *v.* Mitford, 9 Ves. Jr. 100.

United States. — Bayley *v.* Greenleaf, 7 Wheat. (U. S.) 46; Partridge *v.* Smith, 2 Biss. (U. S.) 183.

California. — Hunter *v.* Watson, 12 Cal. 373, 73 Am. Dec. 543; Frey *v.* Clifford, 44 Cal. 335; Gassen *v.* Hendricks, 74 Cal. 444.

Colorado. — City Nat. Bank *v.* Goodrich, 3 Colo. 139.

Indiana. — Work *v.* Brayton, 5 Ind. 396; Babcock *v.* Jordan, 24 Ind. 14; Wert *v.* Naylor, 93 Ind. 431.

Kansas. — Ruth *v.* Ford, 9 Kan. 17.

Maryland. — Busey *v.* Reese, 38 Md. 264.

Mississippi. — Soule *v.* Shotwell, 52 Miss. 236.

Nebraska. — State Bank *v.* O. S. Kelley Co., 47 Neb 678; Dorr *v.* Meyer, 51 Neb. 94.

Virginia. — Evans *v.* Greenhow, 15 Gratt. (Va.) 153; Exchange Bank *v.* Knox, 19 Gratt. (Va.) 739; Cammack *v.* Soran, 30 Gratt. (Va.) 292.

See also the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 491.

4. Burden of Proof on Junior Claimant. — Lake *v.* Hancock, 38 Fla. 53, 56 Am. St. Rep. 159; McNeil *v.* Finnegan, 33 Minn. 375; Nickerson *v.* Wells-Stone Mercantile Co., 71 Minn. 230; St. Paul Title Ins., etc., Co. *v.* Berkey, 52 Minn. 497; Turner *v.* Cochran, 94 Tex. 480; Robertson *v.* McClay, 19 Tex. Civ. App. 513. But see Gratz *v.* Land, etc., Imp. Co., (C. C. A.) 82 Fed. Rep. 381. And see generally the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 522.

An Expression of Valuable Consideration in the deed is *prima facie* proof thereof. Ward *v.* Isbill, 73 Hun (N. Y.) 550.

5. Necessary Only When Required by Statute — *United States.* — Steele *v.* Spencer, 1 Pet. (U. S.) 552; Miller *v.* Merine, 43 Fed. Rep. 261.

Alabama. — Coster *v.* Georgia Bank, 24 Ala.

of the recording provisions, from a desire to secure a prompt record of conveyances, and to afford a means for the ready determination of certain questions of priority which would otherwise arise,[1] it is provided by statute in most jurisdictions that the junior purchaser must first record his instrument in order to secure protection against the prior unrecorded conveyance.[2]

XII. Effect of Record — 1. In Evidence. — The admissibility in evidence of records and record copies has been discussed elsewhere in this work.[3]

2. As Constructive Notice — *a.* Instruments Not Entitled to Record. — Constructive notice from the record being dependent upon purely statutory provisions, it naturally follows that such effect will not be given to any and

37; Steiner *v.* Clisby, 95 Ala. 93, *rehearing denied* 95 Ala. 95.

Georgia. — McGuire *v.* Barker, 61 Ga. 339.

Indiana. — Schaeffer *v.* Fithian, 17 Ind. 463.

New Jersey. — Paul *v.* Kerswell, 60 N. J. L. 273; De Courcey *v.* Collins, 21 N. J. Eq. 357; Sanborn *v.* Adair, 29 N. J. Eq. 338. *Compare* Taylor *v.* Thomas, 5 N. J. Eq. 331.

New York. — Hawley *v.* Bennett, 5 Paige (N. Y.) 104; Jackson *v.* Campbell, 19 Johns. (N. Y.) 281.

Ohio. — Northrup *v.* Brehmer, 8 Ohio 392.

South Carolina. — Turpin *v.* Sudduth, 53 S. Car. 295.

Tennessee. — Byrd *v.* Wilcox, 8 Baxt. (Tenn.) 68.

Texas. — Ranney *v.* Hogan, 1 Tex. Unrep. Cas. 253.

See also Galway *v.* Malchow, 7 Neb. 285; Fallass *v.* Pierce, 30 Wis. 443.

Ohio — Contract for Sale of Mortgaged Premises. — Where T, a purchaser of land at a sale in partition, executed a mortgage to secure the purchase money, and after the execution of such mortgage, but before the same was filed for record, entered into a contract in writing for the sale of the land to W, who, at the time of entering into such contract, had no notice of the mortgage, and before anything had been done between T and W towards the execution of the contract of sale, the mortgage was duly filed for record, it was held that, prior to anything being done towards the execution of the contract of sale, the equities of the mortgagees in the unrecorded mortgage were at least equal to those of W, and that from the moment the mortgage was filed for record it became a legal lien, and constructive notice of the incumbrance it created as against W. Kyle *v.* Thompson, 11 Ohio St. 616.

1. See *supra*, V. *Time of Recordation.*

2. Priority of Record Required — *United States.* — Sturgess *v.* Cleveland Bank, 3 McLean (U. S.) 140.

Illinois. — Brookfield *v.* Goodrich, 32 Ill. 363; Delano *v.* Bennett, 90 Ill. 533; Simmons *v.* Stum, 101 Ill. 454; West Chicago St. R. Co. *v.* Morrison, etc., Co., 160 Ill. 288; Stevens *v.* Shannahan, 160 Ill. 330.

Indiana. — Brose *v.* Doe, 2 Ind. 666.

Iowa. — Hopping *v.* Burnam, 2 Greene (Iowa) 39.

Maryland. — Ohio L. Ins., etc., Co. *v.* Ross, 2 Md. Ch. 25; Clabaugh *v.* Byerly, 7 Gill (Md.) 354, 48 Am. Dec. 575; General Ins. Co. *v.* U. S. Insurance Co., 10 Md. 517, 69 Am. Dec. 174; Swartz *v.* Chickering, 58 Md. 290.

Michigan. — Talcott *v.* Crippen, 52 Mich. 633; Crouse *v.* Michell, (Mich. 1902) 90 N. W. Rep. 32.

Mississippi. — Goar *v.* McCanless, 60 Miss. 244.

Nebraska. — Hubbart *v.* Walker, 19 Neb. 94; Blair State Bank *v.* Stewart, 57 Neb. 58; Rumery *v.* Loy, 61 Neb. 755; Burrows *v.* Hovland, 40 Neb. 464; Ames *v.* Miller, (Neb. 1902) 91 N. W. Rep. 250.

New York. — Jackson *v.* Campbell, 19 Johns. N. Y.) 281; Fort *v.* Burch, 5 Den. (N. Y.) 187; Page *v.* Waring, 76 N. Y. 463; Wilhelm *v.* Wilken, 149 N. Y. 447, 52 Am. St. Rep. 743; Armstrong *v.* Combs, 15 N. Y. App. Div. 246; Tilden *v.* Tilden, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 672; Raynor *v.* Syracuse University, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 83.

Oregon. — Moore *v.* Thomas, 1 Oregon 201; Fleschner *v.* Sumpter, 12 Oregon 161.

Pennsylvania. — Lightner *v.* Mooney, 10 Watts (Pa.) 407; Ebner *v.* Goundie, 5 W. & S. (Pa.) 49; Goundie *v.* Northampton Water Co., 7 Pa. St. 233; Hetherington *v.* Clark, 30 Pa. St. 393; Pennsylvania Salt Mfg. Co. *v.* Neel, 54 Pa. St. 9; Fries *v.* Null, 154 Pa. St. 573; Davey *v.* Ruffell, 162 Pa. St. 443; Collins *v.* Aaron, 162 Pa. St. 539; Riddle *v.* Armstrong, 179 Pa. St. 263.

South Carolina. — Boyce *v.* Boyce, 6 Rich. Eq. (S. Car.) 302.

Tennessee. - Rogers *v.* Wheaton, 88 Tenn. 665; Whiteside *v.* Watkins, (Tenn. Ch. 1900) 58 S. W. Rep. 1107.

Wisconsin. — Fallass *v.* Pierce, 30 Wis. 443; Butler *v.* Mazeppa Bank, 94 Wis. 351.

Sheriff's Deed. — In *Nebraska* it is held that one purchasing at an execution sale must record his deed from the sheriff before the prior instrument is recorded. Galway *v.* Malchow, 7 Neb. 285; Mansfield *v.* Gregory, 8 Neb. 432; Harral *v.* Gray, 10 Neb. 186; Sheasley *v.* Keens, 48 Neb. 57; Hargreaves *v.* Menken, 45 Neb. 668.

Where Two Deeds Were Executed on the Same Day for the same piece of land it was held that the one first recorded was entitled to priority. Penrose *v.* Doherty, 70 Ark. 256.

Where Several Deeds Are Filed Simultaneously for record the priority must be determined by the circumstances surrounding the transactions. Schaeppi *v.* Glade, 95 Ill. App. 505; Utley *v.* Dunkelberger, 86 Iowa 469.

The indorsement of the recording officer is evidence as to which instrument is entitled to priority. Fischer *v.* Tuohy, 186 Ill. 143, *affirming* 87 Ill. App. 574; Madlener *v.* Ruesch, 91 Ill. App. 391. And see *supra*, VI. *When Record Takes Effect.*

3. See the title Records, *post.*

every recorded instrument, but only to such as fall within the statute. Therefore, if an instrument be not of a kind authorized by law to be recorded,[1] or if, though within the contemplation of the statute, it be not entitled to record because of its defective execution or a failure to comply with some of the prerequisites to recordation,[2] the record thereof will be a mere nullity and will not operate to give constructive notice.[3] And so, where a recorded instrument contains a provision not entitled to record, the constructive notice following from such record will be confined to such portions

1. As to What Instruments Are Authorized to Be Recorded, see *supra*, III. *Instruments Entitled to Record.*

2. As to Compliance with Statutory Requirements, see *supra*, VII. *Prerequisites to Recordation.*

3. Unauthorized Record Imparts No Constructive Notice — *United States.* — McNeil *v.* Magee, 5 Mason (U. S.) 265; Lewis *v.* Baird, 3 McLean (U. S.) 56; Lewis *v.* Barnhart, 145 U. S. 56; Burck *v.* Taylor, 152 U. S. 634; Lynch *v.* Murphy, 161 U. S. 247; Baylor *v.* Scottish-American Mortg. Co., (C. C. A.) 66 Fed. Rep. 631; Central Trust Co. *v.* Georgia Pac. R. Co., 83 Fed. Rep. 386.

Alabama. — Baker *v.* Washington, 5 Stew. & P. (Ala.) 142; Dufphey *v.* Frenaye, 5 Stew. & P (Ala.) 215; Tatum *v.* Young, 1 Port. (Ala.) 298; Monroe *v.* Hamilton, 60 Ala. 227; Sheridan *v.* Schimpf, 120 Ala. 475.

Arizona. — Martin *v.* Wells, (Ariz. 1892) 28 Pac. Rep. 958.

Arkansas. — Main *v.* Alexander, 9 Ark. 112, 47 Am. Dec. 732.

California. — Mesick *v.* Sunderland, 6 Cal. 297; Hager *v.* Spect, 52 Cal. 579.

Colorado. — Colorado State Bank *v.* Davidson, 7 Colo. App. 91; Kenney *v.* Jefferson County Bank, 12 Colo. App. 24.

Connecticut. — Carter *v.* Champion, 8 Conn. 549, 21 Am. Dec. 695; Sumner *v.* Rhodes, 14 Conn. 135.

District of Columbia. — Clark *v.* Harmer, (D. C. 1895) 23 Wash. L. Rep. 120.

Florida. — Sanders *v.* Pepoon, 4 Fla. 465.

Georgia. — Beverly *v.* Burke, 9 Ga. 440, 54 Am. Dec. 351; Cunningham *v.* Cureton, 96 Ga. 489; Hayden *v.* Mitchell, 103 Ga. 431; Stallings *v.* Newton, 110 Ga. 875.

Illinois. — Choteau *v.* Jones, 11 Ill. 300, 50 Am. Dec. 460; Porter *v.* Dement, 35 Ill. 478; St. John *v.* Conger, 40 Ill. 535; Harrison *v.* Weatherby, 180 Ill. 418; Mack *v.* McIntosh, 181 Ill. 633; Eaton *v.* Schneider, 185 Ill. 508; Schmidt *v.* Shaver, 196 Ill. 108.

Indiana. — Brown *v.* Budd, 2 Ind. 442; Reed *v.* Coale, 4 Ind. 283; Woodbury *v.* Fisher, 20 Ind. 387, 83 Am. Dec. 325; Reeves *v.* Hayes, 95 Ind. 521; Walter *v.* Hartwig, 106 Ind. 123.

Indian Territory. — McFadden *v.* Blocker, 2 Indian Ter. 260.

Kansas. — Allen *v.* Brown, 6 Kan. App. 704.

Kentucky. — Com. *v.* Rodes, 6 B Mon. (Ky.) 171; Spalding *v.* Paine, 81 Ky. 416.

Maryland. — Johns *v.* Reardon, 3 Md. Ch. 57; Carroll *v.* Norwood, 1 Har. & J. (Md.) 167; Cheney *v.* Watkins, 1 Har. & J. (Md.) 527, 2 Am. Dec. 530; Hurn *v.* Soper, 6 Har. & J. (Md.) 276; Burgess *v.* Lloyd, 7 Md. 178; Pfeaff *v.* Jones, 50 Md. 263.

Michigan. — Wing *v.* McDowell, Walk. (Mich.) 182; Dutton *v.* Ives, 5 Mich. 515; Galpin *v.* Abbott, 6 Mich. 17; Hall *v.* Redson, 10 Mich. 21; Farmers', etc., Bank *v.* Bronson, 14 Mich. 361; Buell *v.* Irwin, 24 Mich. 145; Woods *v.* Love, 27 Mich. 308.

Minnesota. — Parret *v.* Shaubhut, 5 Minn. 323, 80 Am. Dec. 424; Lowry *v.* Harris, 12 Minn. 255.

New Hampshire. — Janelle *v.* Denoncour, 68 N. H. 1.

New York. — Williams *v.* Birbeck, Hoffm. (N. Y.) 359; Ludlow *v.* Van Ness, 8 Bosw. (N. Y.) 178; James *v.* Morey, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; Troup *v.* Haight, Hopk. (N. Y.) 239. See also Davidson *v.* Fox, 65 N. Y. App. Div. 262.

Ohio. — Blake *v.* Graham, 6 Ohio St. 580, 67 Am. Dec. 360.

Oklahoma. — Richardson *v.* Shelby, 3 Okla. 68; Greenville Nat. Bank *v.* Evans-Snyder-Buel Co., 9 Okla. 353.

Pennsylvania. — Watson *v.* Hue, 9 Pa. Dist. 519.

South Carolina. — Villard *v.* Robert, 1 Strobh. Eq. (S. Car.) 393; Bossard *v.* White, 9 Rich. Eq. (S. Car.) 483; Lynch *v.* Hancock, 14 S. Car. 66; Williams *v.* Paysinger, 15 S. Car. 171; Arthur *v.* Screven, 39 S. Car. 77.

Tennessee. — Southern Bldg., etc., Assoc. *v.* Rodgers, 104 Tenn. 437; Chicago Sugar-Refining Co. *v.* Jackson Brewing Co., (Tenn. Ch. 1898) 48 S. W. Rep. 275.

Texas. — Burnham *v.* Chandler, 15 Tex. 441; Holmes *v.* Johns, 56 Tex. 41; Stiles *v.* Japhet, 84 Tex. 91; Terry *v.* Cutler, 14 Tex. Civ. App. 520.

Vermont. — Stevens *v.* Brown, 3 Vt. 420, 23 Am. Dec. 215; Isham *v.* Bennington Iron Co., 19 Vt. 230; Pope *v.* Henry, 24 Vt. 560; Hunt *v.* Allen, 73 Vt. 322.

Virginia. — Braxton *v.* Bell, 92 Va. 229.

Wisconsin. — Ely *v.* Wilcox, 20 Wis. 523, 91 Am. Dec. 436; Shove *v.* Larsen, 22 Wis. 142; Fallass *v.* Pierce, 30 Wis. 443; Gilbert *v.* Jess, 31 Wis. 110; Stubbings *v.* Curtis, 109 Wis. 307.

See also the cases cited *supra*, VII. 1. *d. Acknowledgment or Proof of Execution.* See also the titles ACKNOWLEDGMENTS, vol. 1, p. 490; BILLS OF SALE, vol. 4, p. 571; CONDITIONAL SALES, vol. 6, p. 498; MARRIAGE SETTLEMENTS, vol. 19, p. 1238.

As to the admissibility in evidence of such record, see the title RECORDS, *post.*

New York — Cancellation of Record. — A contract for the alteration of a building whereby the contractor agrees to take in payment a second mortgage on the premises is not an instrument entitled to registration, and if recorded the owner is entitled to have such record canceled under N. Y. Real Property Act, § 276. Davidson *v.* Fox, 65 N. Y. App. Div. 262.

as are within the meaning of the recording acts.[1] But such recording tends to disprove any fraudulent intent to keep the conveyance secret;[2] and, of course, such record may be instrumental in giving actual notice of the rights claimed under the instrument where the knowledge of its existence is brought home to the party claiming against such instrument.[3]

b. INSTRUMENTS ENTITLED TO RECORD — (1) *In General.*—It is frequently stated by the courts that the record of an instrument operates as constructive notice.[4] In connection with its proper limitations this expression is a convenient statement of the effect of registration, and, in general, it may be said that the record of any instrument entitled to be recorded will give constructive notice to the persons bound to search for it.[5]

1. Instrument Containing Unrecordable Provision. — The recording of a mortgage conveying to one partner the entire interest of the other partner in the firm property as security for a debt is not constructive notice of a provision therein imposing a restraint or limitation on the power of the mortgagor as a partner, there being no statute authorizing the registration of articles of partnership or of limitations placed by agreement on the power and authority of a partner. Monroe *v.* Hamilton, 60 Ala. 227.

2. Tends to Rebut Idea of Concealment. — Bassard *v.* White, 9 Rich. Eq. (S. Car.) 483. As to when a failure to record will constitute evidence of fraudulent intent, see *supra*, X. *Withholding from Record as Evidence of Fraud.*

3. Record May Give Actual Notice. — Rooker *v.* Hoofstetter, 26 Can. Sup. Ct. 41; Woods *v.* Garnett, 72 Miss. 78; Musgrove *v.* Bonser, 5 Oregon 313, 20 Am. Rep. 737; Stiles *v.* Japhet, 84 Tex. 91.

4. Record Operates as Constructive Notice — *United States.* — McCormack *v.* James, 36 Fed. Rep. 14; Bogan *v.* Edinburgh American Land Mortg. Co., (C. C. A.) 63 Fed. Rep. 192; The Vigilancia, 68 Fed. Rep. 781, (C. C. A.) 73 Fed. Rep. 452.

Arkansas. — Kendall *v.* J. I. Porter Lumber Co., 69 Ark. 442.

California. — Berson *v.* Nunan, 63 Cal. 550.

Connecticut. — Osborn *v.* Carr, 12 Conn. 195; Sumner *v.* Rhodes, 14 Conn. 135.

Indiana. — Begein *v.* Brehm, 123 Ind. 160.

Iowa. — Tod *v.* Benedict, 15 Iowa 591; Thomas *v.* Kennedy, 24 Iowa 397, 95 Am. Dec. 740; Greenwood *v.* Jenswold, 69 Iowa 53.

Maine. — Cushing *v.* Ayer, 25 Me. 383; Humphreys *v.* Newman, 51 Me. 40.

Massachusetts. — McMechan *v.* Griffing, 3 Pick. (Mass.) 149, 15 Am. Dec. 198; Shaw *v.* Poor, 6 Pick. (Mass.) 86, 17 Am. Dec. 347.

Michigan. — Quirk *v.* Thomas, 6 Mich. 76, Hedstrom *v.* Kingsbury, 40 Mich. 636; Edwards *v.* McKernan, 55 Mich. 520; Reynolds *v.* Case, 60 Mich. 76; Mee *v.* Benedict, 98 Mich. 260, 39 Am. St. Rep. 543.

Mississippi. — Harper *v.* Bibb, 34 Miss. 472, 69 Am. Dec. 397; Learned *v.* Corley, 43 Miss. 707.

Missouri. — Miller *v.* Whitson, 40 Mo. 97; Digman *v.* McCollum, 47 Mo. 372.

Nebraska. — Harral *v.* Gray, 10 Neb. 186.

New Hampshire. — Tripe *v.* Marcy, 39 N. H. 439.

New Jersey. — Hay *v.* Bramhall, 19 N. J. Eq. 563, 97 Am. Dec. 687; Locker *v.* Riley, 30 N. J. Eq. 104; Wallace *v.* Silsby, 42 N. J. L. 1.

New York. — Schutt *v.* Large, 6 Barb (N. Y.) 373; James *v.* Morey, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; Parkist *v.* Alexander, 1 Johns. Ch. (N. Y.) 397; Johnson *v.* Stagg, 2 Johns. (N. Y.) 510; Berry *v.* Mutual Ins. Co., 2 Johns. Ch. (N. Y.) 693; Brinckerhoff *v.* Lansing, 4 Johns. Ch. (N. Y.) 70, 8 Am. Dec. 538; Wendell *v.* Wadsworth, 20 Johns. (N. Y.) 663; King *v.* Kaiser, (C. Pl. Gen. T.) 3 Misc. (N. Y.) 523.

Ohio. — Irvin *v.* Smith, 17 Ohio 226; Grandin *v.* Anderson, 15 Ohio St. 286.

Pennsylvania. — Knouff *v.* Thompson, 16 Pa. St. 357.

South Carolina. — Martin *v.* Sale, Bailey Eq. (S. Car.) 1; Godbold *v.* Lambert, 8 Rich. Eq. (S. Car.) 155, 70 Am. Dec. 192; Belk *v.* Massey, 11 Rich. L. (S. Car.) 614; Annely *v.* De Saussure, 12 S. Car. 488.

Tennessee. — Latta *v.* Fowlkes, 94 Tenn. 219.

Wisconsin. — Clason *v.* Shepherd, 6 Wis. 369.

And see the cases cited throughout the following subdivisions of this section.

United States Patents for government land, when recorded in the General Land Office, give notice of their existence to all concerned. See *supra*, III. 2. *g. United States Patents.*

5. The Record of a Deed by a Feme Sole to a trustee, shortly before her marriage, conveying to him her property for her sole and separate use during life, is constructive notice to the intended husband. Cole *v.* O'Neill, 3 Md. Ch. 174, 4 Md. 107.

The Record of a Bond for Title is notice of the obligee's rights to subsequent purchasers and incumbrancers of the land. Snapp *v.* Peirce, 24 Ill. 156; Eaton *v.* Schneider, 185 Ill. 508. But see O'Neil *v.* Wabash Ave. Baptist Church Soc., 4 Biss (U. S.) 482.

The Record of an Executory Contract to Convey Land is constructive notice to subsequent purchasers and creditors. See Thorn *v.* Phares, 35 W. Va. 771.

The Record of a Sheriff's Certificate of Sale, where such certificate is entitled to record, puts a subsequent purchaser on notice. McMurtrie *v.* Riddell, 9 Colo. 497; Hazard *v.* Cole, 1 Idaho 276.

The Record of a Deed of Trust for the Benefit of Creditors is, in the absence of fraud, sufficient notice to the creditors. Farquharson *v.* Eichelberger, 15 Md. 63.

Record of Agreement as to Priority. — When a waiver of priority by one mortgagee in favor of a later mortgagee is recorded it will bind a subsequent assignee of the first mortgage. Clason *v.* Shepherd, 6 Wis. 369.

The Record of a Will devising land is notice

Only Where Provided by Statute.—But the matter of constructive notice from the record is entirely a creation of statute,[1] and no record will operate to give constructive notice unless such effect has been given to it by some statutory provision.[2]

Conclusive Presumption of Notice.—Where such effect is given it by the terms or intent of the statute, the law raises a conclusive and incontrovertible presumption of notice to all persons bound to take notice, and the fact that such persons had no actual knowledge of the record or relied upon the misrepresentations of others will in no way affect such presumption.[3] Thus a purchaser is charged with notice not only of the state of the record title of his own grantor, but also of that of each preceding grantor in his entire chain of title.[4] And if any of such grantors have made a conveyance which is prior to the one through which the purchaser traces his title, he will, if such conveyance has been recorded, be chargeable with notice of each conveyance derived therefrom even to the last conveyance in the unbroken record series.[5]

The Record of a Party Wall Agreement is notice to subsequent purchasers of the land affected thereby.[6]

The Record of a Mortgage operates as notice to persons subsequently acquiring title from the mortgagor,[7] and, so long as such mortgage stands undischarged,

to a subsequent purchaser of such land. Millsaps *v.* Shotwell, 76 Miss. 923.

The Record of an Agreement to Pay an Annuity constituting a lien upon the grantor's "estate" gives constructive notice to a subsequent mortgagee of particular lands belonging to the grantor. Higgins *v.* Higgins, 121 Cal. 487, 66 Am. St. Rep. 57.

The Record of a Judgment is in most jurisdictions constructive notice of the lien. Mercantile Trust Co. *v.* St. Louis, etc., R. Co., 69 Fed. Rep. 193.

The Record of a Levy of Execution on Land is sometimes made constructive notice to subsequent purchasers and creditors. Wheeling, etc., Coal Co. *v.* Smithfield First Nat. Bank, 55 Ohio St. 233.

Revocation of Power of Attorney. — It has been held, on the ground that the record is constructive notice, that the deposit of an instrument revoking a power of attorney in the office where the power had been recorded, constituted a complete revocation, without giving other notice to either the agent or the third persons with whom he dealt before the power was extinguished. Arnold *v.* Stevenson, 2 Nev. 234.

1. See Grellet *v.* Heilshorn, 4 Nev. 526. And see *supra*, I. *Origin and History.*

2. Gives No Notice Unless So Provided by Statute. — Quackenbush *v.* Reed, 102 Cal. 493; Bourland *v.* Peoria County, 16 Ill. 538; Betser *v.* Rankin, 77 Ill. 289; Kelley *v.* Vandiver, 75 Mo. App. 435; Davidson *v.* Crooks, 45 N. Y. App. Div. 616; Lewis *v.* Johnson, 68 Tex. 448.

3. Conclusive Presumption of Notice. — Ensign *v.* Batterson, 68 Conn. 298; Miller *v.* Hicken, 92 Cal. 229; Barney *v.* Little, 15 Iowa 527; Smith *v.* Boyd, 162 Mo. 146; Frank *v.* Tuozzo, 26 N. Y. App. Div. 447.

That an Attorney, Employed to Make the Search, did not find the record, or failed to disclose it, is no excuse. Ensign *v.* Batterson, 68 Conn. 298.

The Ignorance or Illiteracy of a person charged with notice from the record will not excuse him. Frank *v.* Tuozzo, 26 N. Y. App. Div. 447.

No Compensation for Improvements. — Where a purchaser places improvements on lands and his title is afterwards defeated by a prior recorded conveyance, he cannot, in some jurisdictions, recover compensation for such improvements. Beach *v.* Osborne, (Conn. 1902) 50 Atl. Rep. 1019; Anderson *v.* Reid, 14 App. Cas. (D. C.) 54. But see the title IMPROVEMENTS, vol. 16, pp. 88, 89.

4. All Conveyances in Line of Title. — Von Campe *v.* Chicago, 40 Ill. App. 542; Bergman *v.* Bogda, 46 Ill. App. 351; Martin *v.* Nash, 31 Miss. 324; Hubbard *v.* Knight, 52 Neb. 400; Acer *v.* Westcott, 1 Lans. (N. Y.) 193; Equitable L. Assur. Soc. *v.* Brennan, 74 Hun (N. Y.) 576; McAteer *v.* McMullen, 2 Pa. St. 32; Pillow *v.* Southwest Virginia Imp. Co., 92 Va. 144, 53 Am. St. Rep. 804.

5. Charged with Notice of Derivative Conveyances. — Spielmann *v.* Kliest, 36 N. J. Eq. 199; Briggs *v.* Palmer, 20 Barb. (N. Y.) 392.

Effect of Failure to Record Intermediate Conveyance. — Where the prior deed from the common grantor was duly recorded, the fact that one of the intermediate conveyances in the chain of title of the party claiming under such deed was not recorded will not affect the constructive notice imparted by the record of the deed from the common grantor to an adverse claimant deriving title through a subsequent conveyance from such grantor. Rork *v.* Shields, 16 Tex. Civ. App. 640.

6. Party Wall Agreement. — Fergus Falls First Nat. Bank *v.* Security Bank, 61 Minn. 25; Garmire *v.* Willy, 36 Neb. 340; Parsons *v.* Baltimore Bldg., etc., Assoc., 44 W. Va. 335, 67 Am. St. Rep. 769.

7. Record of Mortgage. — Commercial Bank *v.* Pritchard, 126 Cal. 600; Thompson *v.* Flathers, 45 La. Ann. 120.

As to the effect of the recording acts on the doctrine of tacking mortgages, see the title MORTGAGES, vol. 20, pp. 1053–54.

The Purchaser of the Mortgaged Land acquires the legal title in any case, but if the mortgage be recorded he takes subject to it. Davis *v.* Lanier, 94 Tex. 455.

the record protects not only the rights of the mortgagee, but those of an assignee of the mortgage as well.[1]

The Record of a Mortgage Assignment gives constructive notice to persons dealing subsequently with the assignor.[2]

The Record of a Chattel Mortgage is notice to all persons subsequently acquiring an interest in the mortgaged chattels,[3] including a sheriff who levies on such chattels as the property of the mortgagor.[4]

The Record of a Conditional Sale renders the reservation of title valid against subsequent purchasers, pledgees, and mortgagees.[5]

(2) *Voluntary Conveyance.* — Usually the record of a voluntary conveyance will be as effective for the purpose of giving constructive notice to subsequent parties as though it were for a valuable consideration.[6] But in some jurisdictions it has been held that the record will operate as constructive notice only

1. Protects Rights of Assignee of Mortgage. — Curtis *v.* Moore, 152 N. Y. 159, 57 Am. St. Rep. 506. See also *supra*, III. 2. *c.* (3) *Assignment of Mortgage.*

Subsequent Discharge No Protection. — Where a purchaser of land, against which an unsatisfied mortgage stands of record, contents himself with the assurance of the mortgagor that it has been paid without making further inquiry, he cannot afterwards secure protection against a prior unrecorded assignment of the mortgage by procuring a discharge from the mortgagee and recording it. Babcock *v.* Young, 117 Mich. 155.

2. Assignment of Mortgage. — Murphy *v.* Barnard, 162 Mass. 72, 44 Am. St. Rep. 340; Eggert *v.* Beyer, 43 Neb. 711; Mott *v.* Newark German Hospital, 55 N. J. Eq. 722; Smyth *v.* Knickerbocker L. Ins. Co., 84 N. Y. 589; Brewster *v.* Carnes, 103 N. Y. 556.

But such record is not notice to the mortgagor so as to invalidate payments made by him to the mortgagee. See *supra*, III. 2. *c.* (3) *Assignment of Mortgage; infra*, XII. 2. *b.* (3) (*b*) *Limitation to Subsequent Purchasers.*

A Subsequent Unauthorized Discharge of the mortgage cannot affect the rights of an assignee who has his assignment duly recorded. Viele *v.* Judson, 82 N. Y. 32, *reversing* 15 Hun (N. Y.) 328; Larned *v.* Donovan, 155 N. Y. 341.

3. Chattel Mortgage. — Northwestern Nat. Bank *v.* Freeman, 171 U. S. 620; Consolidated Barb-Wire Co. *v.* Purcell, 48 Kan. 267; Clarke *v.* National Citizens' Bank, 74 Minn. 58; Corning *v.* Rinehart Medicine Co., 46 Mo. App. 16; Fletcher *v.* Bonnet, 51 N. J. Eq. 615; Quattlebaum *v.* Taylor, 45 S. Car. 512; Oxsheer *v.* Watt, (Tex. Civ. App. 1897) 42 S. W. Rep. 121, *affirmed* 91 Tex. 402.

The Record of a Mortgage on a Growing Crop is constructive notice to one purchasing the threshed grain in open market from the mortgagor. Wright *v.* E. M. Dickey Co., 83 Iowa 332. And the same has been held in the case of a purchaser for future delivery of a quantity of corn to be taken from the stalk in a designated field, such corn being covered by the crop mortgage. Chicago Lumber Co. *v.* Hunter, 58 Neb. 328.

For a full discussion, see the title CROPS, vol. 8, p. 314.

4. Operates as Notice to Sheriff. — McDaniel *v.* State, 118 Ind. 239; Collins *v.* State, 3 Ind. App. 542, 50 Am. St. Rep. 298; State *v.* Bergner, 20 Ind. App. 390, 67 Am. St. Rep. 261.

5. Conditional Sale. — Nichols *v.* Potts, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 273.

6. Record of Voluntary Conveyance Gives Notice — *Alabama.* — Frisbie *v.* McCarty, 1 Stew. & P. (Ala.) 56; Griffin *v.* Doe, 12 Ala. 783; Reed *v.* Smith, 14 Ala. 380; Gilliland *v.* Fenn, 90 Ala. 230.

Indiana. — McNeely *v.* Rucker, 6 Blackf. (Ind.) 391; Aiken *v.* Bruen, 21 Ind. 137.

Iowa. — Gardner *v.* Cole, 21 Iowa 216.

Maryland. — Baltimore *v.* Williams, 6 Md. 235; Warren *v.* Richardson, 6 Md. 272, note; Williams *v.* Banks, 11 Md. 198; Cooke *v.* Kell, 13 Md. 469; Kane *v.* Roberts, 40 Md. 593.

Massachusetts. — Beal *v.* Warren, 2 Gray (Mass.) 447.

Missouri. — Bonney *v.* Taylor, 90 Mo. 63. But *compare* Lander *v.* Ziehr, 150 Mo. 403, 73 Am. St. Rep. 456.

Nebraska. — State Bank *v.* Frey, (Neb. 1902) 91 N. W. Rep. 239.

Ohio. — Vanzant *v.* Davies, 6 Ohio St. 52.

Pennsylvania. — Lancaster *v.* Dolan, 1 Rawle (Pa.) 231, 18 Am. Dec. 625.

Tennessee. — Cains *v.* Jones, 5 Yerg. (Tenn.) 249; Laird *v.* Scott, 5 Heisk. (Tenn.) 314; Harton *v.* Lyons, 97 Tenn. 180.

Texas. — Robinson *v.* Martel, 11 Tex. 149; Monday *v.* Vance, (Tex. Civ. App. 1899) 51 S. W. Rep. 346.

The Fact that a Deed, Given Without Consideration, is Fraudulent as against the grantor's creditors will not prevent its record from operating as notice of its existence to subsequent purchasers. Stevens *v.* Morse, 47 N. H. 532. But see Jones *v.* Jenkins, 83 Ky. 391.

Creditors Put On Inquiry as to Consideration. — Recording of a voluntary conveyance with no concealment of the circumstances operates as constructive notice, and creditors of the grantor are thereby put on inquiry as to the consideration. State Bank *v.* Frey, (Neb. 1902) 91 N. W. Rep. 239.

But it has been held that the recording of such conveyance will not start the statute of limitations running against an action to set it aside as fraudulent. Rose *v.* Dunklee, 12 Colo. App. 403.

And the fraudulent character of an instrument intended to defraud creditors is not removed by recording. Moore *v.* Blondheim, 19 Md. 172; Lander *v.* Ziehr, 150 Mo. 403, 73 Am. St. Rep. 456.

where the conveyance is for a valuable consideration, and a voluntary conveyance is not good against a subsequent purchaser unless he have actual notice.[1]

(3) *Notice to Whom* — (a) **In General.** — The recording acts impose on grantees the duty of recording their conveyances for the purpose of placing the power of obtaining knowledge thereof within the reach of all. When, therefore, the instrument is recorded, that has been done and the requirement of the statute has been satisfied.[2] Because of this the courts have sometimes stated in a loose and general way that the record of a conveyance is notice to all the world.[3] But to expose the inaccuracy of that statement it need only be called to mind that, at common law, no duty was owing by a grantee to give any kind of notice of his conveyance, and that recording is purely an additional statutory requirement in conveyancing.[4] From this it naturally follows that the record imparts constructive notice to such persons only as would have been entitled to protection against the conveyance in case it had not been recorded, or, in other words, to such persons as are under a legal obligation to search for it.[5]

(b) **Limitation to Subsequent Purchasers.** — The operation of the record as notice is prospective and not retrospective. It is only a subsequent conveyance which defeats a prior unrecorded conveyance, and, therefore, only persons who acquired their rights subsequently to the registration can be said to be charged with notice of a recorded conveyance.[6] However, the term "subse-

1. No Constructive Notice Where Deed Voluntary. — Fleming *v.* Townsend, 6 Ga. 103, 50 Am. Dec. 318; Fowler *v.* Waldrip, 10 Ga. 350; Finch *v.* Woods, 113 Ga. 996; Enders *v.* Williams, 1 Met. (Ky.) 352; Winter *v.* Mannen, 81 Ky. 123; Jones *v.* Jenkins, 83 Ky. 391; Brown *v.* Connell, 85 Ky. 403; Sewell *v.* Nelson, (Ky. 1902) 67 S. W. Rep. 985. See also the opinion of Chancellor Kent, in Sterry *v.* Arden, 1 Johns. Ch. (N. Y.) 261.

2. See Shaw *v.* Poor, 6 Pick. (Mass.) 86, 17 Am. Dec. 347.

3. Said to Give Notice to All the World. — Hine *v.* Dodd, 2 Atk. 275; Chadwick *v.* Russell, 117 Ala. 290; Simpson *v.* Montgomery, 25 Ark. 365, 99 Am. Dec. 228; Booth *v.* Barnum, 9 Conn. 286, 23 Am. Dec. 339; Hamilton *v.* Nutt, 34 Conn. 501; Eaton *v.* Schneider, 185 Ill. 508; Williams *v.* Banks, 11 Md. 198; Cooke *v.* Kell, 13 Md. 469; West Plains Bank *v.* Edwards, 84 Mo. App. 462; Evans *v.* Jones, 1 Yeates (Pa.) 172; Maul *v.* Rider, 59 Pa. St. 167.

4. See *supra*, I. *Origin and History.*

5. Only to Persons Bound to Search for It. — Dennis *v.* Burritt, 6 Cal. 670; Gillett *v.* Gaffney, 3 Colo. 366; Bates *v.* Norcross, 14 Pick. (Mass.) 224; Edwards *v.* McKernan, 55 Mich. 520; Bailey *v.* Galpin, 40 Minn. 319; Stuyvesant *v.* Hall, 2 Barb. Ch. (N. Y.) 151; Maul *v.* Rider, 59 Pa. St. 167; Davis *v.* Monroe, 187 Pa. St. 212, 67 Am. St. Rep. 581; Parker *v.* Meredith, (Tenn. Ch. 1900) 59 S. W. Rep. 167; White *v.* McGregor, 92 Tex. 556, 71 Am. St. Rep. 875, Leach *v.* Beattie, 33 Vt. 195; Lynchburg Perpetual Bldg., etc., Co. *v.* Fellers, 96 Va. 337, 70 Am. St. Rep. 851.

Reason for Rule. — It has been said that it is solely because a subsequent conveyance defeats a prior unrecorded title that the record of a prior title is held to be constructive notice to subsequent purchasers. See Taylor *v.* Maris, 5 Rawle (Pa.) 51; Moore *v.* Thomas, 1 Oregon 201.

A Fire Insurance Company Is Not Charged with Notice from the record of a mortgage on the insured property so as to waive a condition in the policy against incumbrancing. The company owes no duty to search the records. Milwaukee Mechanics' Ins. Co. *v.* Niewedde, 12 Ind. App. 145; Shaffer *v.* Milwaukee Mechanics' Ins. Co., 17 Ind. App. 204; Phœnix Ins. Co. *v.* Overman, 21 Ind. App. 516; Wicke *v.* Iowa State Ins. Co., 90 Iowa 4.

The Record of a Lease Is Not Notice to One Claiming a Mechanic's Lien Against the Lessor for repairs made by him pursuant to an agreement with such lessor, of a provision in the lease that the lessor shall not be liable for repairs or improvements. Mosher *v.* Lewis, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 373.

6. Notice to Subsequent Purchasers Only — *California.* — McCabe *v.* Grey, 20 Cal. 509.

District of Columbia. — Clark *v.* Harmer, (D. C. 1895) 23 Wash. L. Rep. 120.

Illinois. — Matteson *v.* Thomas, 41 Ill. 110; Hosmer *v.* Campbell, 98 Ill. 572; Miller *v.* Larned, 103 Ill. 562.

Indiana. — Schmidt *v.* Zahrndt, 148 Ind. 447.

Maine. — Spofford *v.* Weston, 29 Me. 140.

Massachusetts. — Bates *v.* Norcross, 14 Pick. (Mass.) 224; George *v.* Wood, 9 Allen (Mass.) 80, 85 Am. Dec. 741; C. B. Cottrell, etc., Co. *v.* Carter, 173 Mass. 155.

Michigan. — Corey *v.* Smalley, 106 Mich. 262.

Montana. — Chowen *v.* Phelps, 26 Mont. 524.

Nebraska. — Ocobock *v.* Baker, 52 Neb. 447, 66 Am. St. Rep. 519.

Nevada. — Adams *v.* Baker, 24 Nev. 162, 77 Am. St. Rep. 799.

New York. — Mayer *v.* Hinman, 13 N. Y. 191; Ackerman *v.* Hunsicker, 85 N. Y. 49, 39 Am. Rep. 621; Sherman *v.* Foster, 158 N. Y. 587; Truscott *v.* King, 6 Barb. (N. Y.) 349; Kendall *v.* Niebuhr, 45 N. Y. Super. Ct. 551.

Pennsylvania. — Taylor *v.* Maris, 5 Rawle (Pa.) 51; Davis *v.* Monroe, 187 Pa. St. 212, 67 Am. St. Rep. 581.

South Carolina. — Lake *v.* Shumate, 20 S.

quent purchaser" does not mean one who purchased after the recording of the instrument in point of time, but one the origin of whose title is subsequent to the time when such record became effective.[1]

A Prior Mortgagee is not affected with constructive notice from the record of a subsequent deed or mortgage of the same land: to charge him he must be given actual notice.[2] In the absence of actual notice he may, without receiving anything on the mortgage debt, release to the mortgagor a portion of the property mortgaged without impairing the security of the whole mortgage debt upon the remainder;[3] and so it has been held that optional advances

Car. 23; Wadsworthville Poor School *v.* Jennings, 40 S. Car. 168, 42 Am. St. Rep. 854.

Texas. — Oppenheimer *v.* Robinson, 87 Tex. 174.

Vermont. — Holley *v.* Hawley, 39 Vt. 525, 94 Am. Dec. 352.

Virginia. — Lynchburg Perpetual Bldg., etc., Co. *v.* Fellers, 96 Va. 337, 70 Am. St. Rep. 851; Bridgewater Roller Mills Co. *v.* Strough, 98 Va. 721.

Wisconsin. — Deuster *v.* McCamus, 14 Wis. 307.

But *compare* Southern Bldg., etc., Assoc. *v.* Page, 46 W. Va. 302.

For further citations to this point, see the title MARSHALING ASSETS, vol. 19, p. 1267, note 5.

Persons Holding under a Prior Contract are not affected with constructive notice from the record of a deed so that payments made by them on the contract are invalidated. Cook *v.* Dillon, 9 Iowa 407, 74 Am. Dec. 354; Baldwin *v.* Thompson, 15 Iowa 504.

Stolen Deed — Record Not Notice to Grantor. — Where an undelivered deed is taken from the grantor's possession and recorded, without his knowledge or consent, the record does not constitute constructive notice to him of the rights of the grantee in such deed. Van Auken *v.* Mizner, (Neb. 1902) 90 N. W. Rep. 637.

Alteration by Stranger. — Where a deed conveying land was altered by a stranger and recorded in its altered form, the record was not notice to the parties to such deed. Grimes *v.* Whitesides, 65 Md. App. 1.

1. Who a Subsequent Purchaser. — White *v.* McGregor, 92 Tex. 556, 71 Am. St. Rep. 875.

Where the Record Relates Back to the time of the execution of the instrument (see *supra*, V. 2. *b.* (1), it operates as constructive notice to one taking a mortgage on the same property between the time of execution and the time of recording the prior instrument. Heflin *v.* Slay, 78 Ala. 180; Leslie *v.* Hinson, 83 Ala. 266.

A Conveyance of an Expectancy in Lands of a living ancestor, duly recorded, operates as notice to a prior judgment creditor of the grantor, since the creditor's lien cannot attach until the death of the ancestor. Hale *v.* Hollon, 14 Tex. Civ. App. 96, *affirmed* 90 Tex. 427, 59 Am. St. Rep. 819.

2. Prior Mortgagee Has No Constructive Notice — *United States.* — Shirras *v.* Caig, 7 Cranch (U. S.) 34; Matter of Haake, 2 Sawy. (U. S.) 241, 7 Nat. Bankr. Reg. 61.

Alabama. — Pitts *v.* American Freehold Land Mortg. Co , 123 Ala. 469.

Arkansas. — Birnie *v.* Main, 29 Ark. 591.

California. — Peters *v.* Jamestown Bridge Co., 5 Cal. 335; Woodward *v.* Brown, 119 Cal. 283, 63 Am. St. Rep. 108.

Connecticut. — Rowan *v.* Sharps' Rifle Mfg. Co., 29 Conn. 282, Boswell *v.* Goodwin, 31 Conn. 74, 81 Am. Dec. 169.

Illinois. — Frye *v.* State Bank, 11 Ill. 381; Matteson *v.* Thomas, 41 Ill. 110; Iglehart *v.* Crane, 42 Ill. 268; Doolittle *v.* Cook, 75 Ill. 354; Heaton *v.* Prather, 84 Ill. 330; Meacham *v.* Steele, 93 Ill. 135; Small *v.* Stagg, 95 Ill. 39; Hosmer *v.* Campbell, 98 Ill. 572; Boone *v.* Clark, 129 Ill. 466; Wanghop *v.* Bartlett, 165 Ill. 124.

Indiana. — Brinkmeyer *v.* Browneller, 55 Ind. 487; Schmidt *v.* Zahrndt, 148 Ind. 447.

Iowa. — Cook *v.* Dillon, 9 Iowa 407, 74 Am. Dec. 354; Baldwin *v.* Thompson, 15 Iowa 504. And see Powers *v.* Lafler, 73 Iowa 283.

Kansas. — Burnham *v.* Citizens' Bank, 55 Kan. 545.

Kentucky. — Nelson *v.* Boyce, 7 J. J. Marsh. (Ky.) 401, 23 Am. Dec. 411.

Maryland. — Wilson *v.* Russell, 13 Md. 494, 71 Am. Dec. 645; Annan *v.* Hays, 85 Md. 505.

Michigan. — Dewey *v.* Ingersoll, 42 Mich. 17.

Minnesota. — Anderson *v.* Liston, 69 Minn. 82.

New Hampshire. — Brown *v.* Simons, 44 N. H. 475.

New Jersey. — Blair *v.* Ward, 10 N. J. Eq. 119; Vanorden *v.* Johnson, 14 N. J. Eq. 376, 82 Am. Dec. 254; Ward *v.* Cooke, 17 N. J. Eq. 93; Hoy *v.* Bramhall, 19 N. J. Eq. 563, 97 Am. Dec. 687; Ward *v.* Hague, 25 N. J. Eq. 397; Cogswell *v.* Stout, 32 N. J. Eq. 240.

New York. — Howard Ins. Co. *v.* Halsey, 8 N. Y. 271, 59 Am. Dec. 478; Robinson *v.* Williams, 22 N. Y. 380; Young *v.* Guy, 87 N. Y. 457; Sherman *v.* Foster, 158 N. Y. 587, *affirming* 91 Hun (N. Y.) 637; Stuyvesant *v.* Hone, 1 Sandf. Ch. (N. Y.) 419; King *v.* McVicker, 3 Sandf. Ch. (N. Y.) 192; Howard Ins. Co. *v.* Halsey, 4 Sandf. (N. Y.) 565; New York L. Ins., etc., Co. *v.* Smith, 2 Barb. Ch. (N. Y.) 82; Guion *v.* Knapp, 6 Paige (N. Y.) 35, 29 Am. Dec. 741; Wetmore *v.* Roberts, (Supm. Ct.) 10 How. Pr. (N. Y.) 54; Truscott *v.* King, 6 Barb. (N. Y.) 346.

North Dakota. — Union Nat. Bank *v.* Moline, etc., Co., 7 N. Dak. 201.

Ohio. — Ranney *v.* Hardy, 43 Ohio St. 157.

Pennsylvania. — Manufacturers', etc., Bank *v.* State Bank, 7 W. & S. (Pa.) 335, 42 Am. Dec. 240; Frick's Appeal, 101 Pa. St. 485.

Vermont. — McDaniels *v.* Colvin, 16 Vt. 300, 42 Am. Dec. 512; Johnson *v.* Valido Marble Co., 64 Vt. 337.

Virginia. — Bridgewater Roller Mills Co. *v.* Strough, 98 Va. 721.

Wisconsin. — Deuster *v.* McCamus, 14 Wis. 307.

3. May Release Part of Mortgaged Property. — Dennis *v.* Burritt, 6 Cal. 670; Lewis *v.* Hinman, 56 Conn. 55; George *v.* Wood, 9 Allen

made under his mortgage after the recording of a subsequent conveyance will be protected where he had no actual notice of the latter conveyance at the time of making such advances,[1] though in some cases it has been held that optional advances take effect only from the time they are actually made, and, therefore, a conveyance recorded before the making of such advances operates as constructive notice to the mortgagee.[2]

Record of Mortgage Assignment Not Notice to Mortgagor.—The recording of an assignment of a mortgage will not usually give constructive notice thereof to the mortgagor so as to invalidate subsequent payments on the mortgage debt made by him to the mortgagee. Actual notice of such assignment is necessary to bind the mortgagor,[3] except where the mortgage secures a negotiable note.[4]

(c) **Limitation to Persons Claiming Through Same Grantor.**—*aa.* RECORD OF CONVEYANCE NOT IN LINE OF TITLE.—A record gives constructive notice only to persons in the same line of title, or, in other words, only to persons who must trace their title back through the same grantor.[5]

(Mass.) 80, 85 Am. Dec. 741; Cooper *v.* Bigly, 13 Mich. 463; Dewey *v.* Ingersoll, 42 Mich. 17; Vanorden *v.* Johnson, 14 N. J. Eq. 376, 82 Am. Dec. 254; Ward *v.* Hague, 25 N. J. Eq. 397; Howard Ins. Co. *v.* Halsey, 8 N. Y. 271, 59 Am. Dec. 478; Sherman *v.* Foster, 158 N. Y. 587, *affirming* 91 Hun (N. Y.) 637; Sarles *v.* McGee, 1 N. Dak. 365, 26 Am. St. Rep. 633; Deuster *v.* McCamus, 14 Wis. 307; Straight *v.* Harris, 14 Wis. 509.

1. Optional Advances Made Without Notice Protected. — Shirras *v.* Caig, 7 Cranch (U. S.) 34; Tapia *v.* Demartini, 77 Cal. 383, 11 Am. St. Rep. 288; Nelson *v.* Boyce, 7 J. J. Marsh. (Ky.) 401, 23 Am. Dec. 411; Anderson *v.* Liston, 69 Minn. 82; Ward *v.* Cooke, 17 N. J. Eq. 93; Sayre *v.* Hewes, 32 N. J. Eq. 652; Ackerman *v.* Hunsicker, 85 N. Y. 43, 39 Am. Rep. 627; Truscott *v.* King, 6 Barb. (N. Y.) 346; Lake *v.* Shumate, 20 S. Car. 23; McDaniels *v.* Colvin, 16 Vt. 300, 42 Am. Dec. 512. See also Matter of Haake, 2 Sawy. (U. S.) 231; Lanahan *v.* Lawton, 50 N. J. Eq. 276, 796; Robinson *v.* Williams, 22 N. Y. 380; Alexandria Sav. Inst. *v.* Thomas, 29 Gratt. (Va.) 489; McCarty *v.* Chalfant, 14 W. Va. 548; Wisconsin Planing Mill Co. *v.* Schuda, 72 Wis. 277.

Actual Notice to the mortgagor before he has made the optional advances will bind him. Boswell *v.* Goodwin, 31 Conn. 74, 81 Am. Dec. 169; Frye *v.* State Bank, 11 Ill. 367; Brinkmeyer *v.* Browneller, 55 Ind. 487; Griffin *v.* New Jersey Oil Co., 11 N. J. Eq. 49; Ward *v.* Cooke, 17 N. J. Eq. 93; Sayre *v.* Hewes, 32 N. J. Eq. 652. See also Alexandria Sav. Inst. *v.* Thomas, 29 Gratt. (Va.) 489.

Where the Advances Are Obligatory under the recorded mortgage, the record thereof is notice to a subsequent purchaser and the mortgagor will be protected in making such advances regardless of actual notice. Lovelace *v.* Webb, 62 Ala. 271; Tapia *v.* Demartini, 77 Cal. 383, 11 Am. St. Rep. 288; Oroville Bank *v.* Lawrence, (Cal. 1894) 37 Pac. Rep. 936; Crane *v.* Deming, 7 Conn. 387; Boswell *v.* Goodwin, 31 Conn. 74, 81 Am. Dec. 169; Brinkmeyer *v.* Helbling, 57 Ind. 435; Wilson *v.* Russell, 13 Md. 494, 71 Am. Dec. 645; Witczinski *v.* Everman, 51 Miss. 841; Freiberg *v.* Magale, 70 Tex. 116. See also Griffin *v.* Burtnett, 4 Edw. (N. Y.) 673; Alexandria Sav. Inst. *v.* Thomas, 29 Gratt. (Va.) 489.

2. Record Constructive Notice to Mortgagee. — Ladue *v.* Detroit, etc., R. Co., 13 Mich. 380, 87 Am. Dec. 759; Ketcham *v.* Wood, 22 Hun (N. Y.) 64; Spader *v.* Lawler, 17 Ohio 371; Ter-Hoven *v.* Kerns, 2 Pa. St. 96; Montgomery County Bank's Appeal, 36 Pa. St. 170; Parker *v.* Jacoby, 3 Grant Cas. (Pa.) 300. See also Boswell *v.* Goodwin, 31 Conn. 74, 81 Am. Dec. 169; Meeker *v.* Clinton, etc., R. Co., 2 La. Ann. 971; Stone *v.* Welling, 14 Mich. 514; Craig *v.* Tappin, 2 Sandf. Ch. (N. Y.) 79; Nicklin *v.* Betts Spring Co., 11 Oregon 406, 50 Am. Rep. 477; McClure *v.* Roman, 52 Pa. St. 458.

3. Record of Mortgage Assignment Not Notice to Mortgagor. — Lawton *v.* Howe, N. Bruns. Eq. Cas. 191; Murphy *v.* Barnard, 162 Mass. 72, 44 Am. St. Rep. 340; James *v.* Johnson, 6 Johns. Ch. (N. Y.) 417; Reed *v.* Marble, 10 Paige (N. Y.) 409; Wolcott *v.* Sullivan, 1 Edw. (N. Y.) 399; New York L. Ins., etc., Co. *v.* Smith, 2 Barb. Ch. (N. Y.) 82; Pettus *v.* McGowan, 37 Hun (N. Y.) 409; Foster *v.* Carson, 147 Pa. St. 157, 159 Pa. St. 477, 39 Am. St. Rep. 696. See also *supra*, III. 2. *c.* (3) *Assignment of Mortgage*.

And see the cases cited in the title MORTGAGES, vol. 20, p. 1047.

By Statute in Some States it is provided that the recording of such assignment shall not of itself be notice to the mortgagor, his heirs or personal representatives so as to invalidate payments made on the mortgage by any of them. Goodale *v.* Patterson, 51 Mich. 532; Johnson *v.* Carpenter, 7 Minn. 176; Hostetter *v.* Alexander, 22 Minn. 559; Robbins *v.* Larson, 69 Minn. 436, 65 Am. St. Rep. 572.

But such statutes apply only to the persons and in the cases specified. Blumenthal *v.* Jassoy, 29 Minn. 177; Eggert *v.* Beyer, 43 Neb. 711; Brewster *v.* Carnes, 103 N. Y. 556; Larned *v.* Donovan, 84 Hun (N. Y.) 533, *affirming* 31 Abb. N. Cas. (N. Y.) 308. And see the cases cited *supra*, III. 2. *c.* (3) *Assignment of Mortgage*.

4. Mortgage Securing Negotiable Note. — Merriam *v.* Bacon, 5 Met. (Mass.) 95; Blumenthal *v.* Jassoy, 29 Minn. 177. For a full citation of cases, see the title MORTGAGES, vol. 20, p. 1047.

5. Record Out of Line of Title Not Notice — *Arkansas.* — Turman *v.* Sanford, 69 Ark. 95.

Conveyance by Grantee in Unrecorded Deed.—Thus, where a conveyance of land is not recorded and the grantee therein subsequently conveys to a third person, the record of the latter conveyance is not constructive notice to a subsequent purchaser from the grantor in the prior unrecorded conveyance, since such purchaser does not trace title through such record.[1]

Purchase-money Mortgage.—And so, where land is conveyed by a deed which is not recorded and the grantee gives a purchase-money mortgage back to the grantor, which is duly recorded, the record of such mortgage will not operate as constructive notice to a subsequent purchaser of the land from the grantor in the unrecorded deed.[2] But such record is, of course, notice to purchasers

Illinois. — Manly *v.* Pettee, 38 Ill. 128; Irish *v.* Sharp, 89 Ill. 261; Miller *v.* Larned, 103 Ill. 562; Grundies *v.* Reid, 107 Ill. 304; Goodkind *v.* Bartlett, 153 Ill. 419.

Maine. — Spofford *v.* Weston, 29 Me. 140; Roberts *v.* Richards, 84 Me. 1.

Mississippi. — Harper *v.* Bibb, 34 Miss. 472, 69 Am. Dec. 397.

Missouri. — Crockett *v.* Maguire, 10 Mo. 34; Digman *v.* McCollum, 47 Mo. 372; Odle *v.* Odle, 73 Mo. 289; Becker *v.* Stroeher, 167 Mo. 306.

Montana. — Chowen *v.* Phelps, 26 Mont. 524.

Nevada. — Sharon *v.* Minnock, 6 Nev. 377.

New York. — Cook *v.* Travis, 20 N. Y. 400; Todd *v.* Eighmie, 4 N. Y. App. Div. 9; Abraham *v.* Mayer, (N. Y. City Ct. Gen. T.) 7 Misc. (N. Y.) 250.

North Dakota. — Doran *v.* Dazey, 5 N. Dak. 167, 57 Am. St. Rep 550.

Ohio. — Leiby *v.* Wolf, 10 Ohio 83; Blake *v.* Graham, 6 Ohio St. 580, 67 Am. Dec. 360; Sternberger *v.* Ragland, 57 Ohio St. 148.

Pennsylvania. — Woods *v.* Farmere, 7 Watts (Pa.) 382, 32 Am. Dec. 772; Maul *v.* Rider, 59 Pa. St. 167; Collins *v.* Aaron, 162 Pa. St. 539.

Tennessee. — Kansas City Land Co. *v.* Hill, 87 Tenn. 589; Parker *v.* Meredith, (Tenn. Ch. 1900) 59 S. W. Rep. 167.

Texas. — Holmes *v.* Buckner, 67 Tex. 107; Jenkins *v.* Adams, 71 Tex. 1; Williams *v.* Slaughter, (Tex. Civ. App. 1897) 42 S. W. Rep. 327.

Utah. — Drake *v.* Reggel, 10 Utah 376.

Virginia. — Claiborne *v.* Holland, 88 Va. 1046.

Title Subject to Recorded Instrument. — Recording a deed gives constructive notice to all persons claiming property under a title which is subject to the title conveyed by the deed. Therefore, where land is sold under mortgage, the record of the deed is notice to a person claiming under a title subject to the mortgage of the passage of title under the sale. Lewis *v.* Jackson, 165 Mass. 481.

1. Conveyance by Grantee in Unrecorded Deed. — Thus, where A conveys to B, who neglects to record his deed, and B subsequently conveys to C, the record of the conveyance from B to C is not constructive notice to a subsequent purchaser from A of the unrecorded deed from A to B.

Alabama. — Fenno *v.* Sayre, 3 Ala. 458; Scotch Lumber Co. *v.* Sage, (Ala. 1902) 32 So. Rep. 607.

Arkansas. — De Yampert *v.* Brown, 28 Ark. 166.

California. — Garber *v.* Gianella, 98 Cal. 527.

Georgia. — Felton *v.* Pitman, 14 Ga. 530; Bazemore *v.* Davis, 55 Ga. 504; Thursby *v.* Myers, 57 Ga. 155.

Illinois. — Chicago *v.* Witt, 75 Ill. 211; Carbine *v.* Pringle, 90 Ill. 302; Kerfoot *v.* Cronin, 105 Ill. 609.

Indiana. — Corbin *v.* Sullivan, 47 Ind. 356.

Iowa. — Huber *v.* Bossart, 70 Iowa 718.

Maine. — Roberts *v.* Bourne, 23 Me. 165, 39 Am. Dec. 614; Tilton *v.* Hunter, 24 Me. 29.

Nebraska. — Traphagen *v.* Irwin, 18 Neb. 195.

New Jersey. — Losey *v.* Simpson, 11 N. J. Eq. 246; Bingham *v.* Kirkland, 34 N. J. Eq. 229.

New York. — Page *v.* Waring, 76 N. Y. 463; Tarbell *v.* West, 86 N. Y. 280; Cook *v.* Travis, 22 Barb. (N. Y.) 338.

North Carolina. — Truitt *v.* Grandy, 115 N. Car. 54.

Oregon. — Advance Thresher Co. *v.* Esteb, 41 Oregon 469.

Pennsylvania. — Lightner *v.* Mooney, 10 Watts (Pa.) 407; Hetherington *v.* Clark, 30 Pa. St. 393; Calder *v.* Chapman, 52 Pa. St. 359, 91 Am. Dec. 163; Smith *v.* Eline, 5 Pa. Dist. 92.

Rhode Island. — Harris *v.* Arnold, 1 R. I. 125.

Texas. — Watson *v.* Chalk, 11 Tex. 93; Thompson *v.* Westbrook, 56 Tex. 265; Holmes *v.* Buckner, 67 Tex. 107; Lumpkin *v.* Adams, 74 Tex. 96; Frank *v.* Heidenheimer, 84 Tex. 642; Ward *v.* League, (Tex. Civ. App. 1894) 24 S. W. Rep. 986; McCreary *v.* Reliance Lumber Co., 16 Tex. Civ. App. 45.

Virginia. — Jones *v.* Byrne, 94 Va. 751.

Washington. — Sayward *v.* Thompson, 11 Wash. 706.

Wisconsin. — Ely *v.* Wilcox, 20 Wis. 523, 91 Am. Dec. 436.

In Louisiana, the contrary rule has been established, and recordation imparts notice notwithstanding a break in the record. In the earlier cases, Slidell, J., dissented from the majority opinion. Stockton *v.* Briscoe, 1 La. Ann. 249; McGill *v.* McGill, 4 La. Ann. 262; Cotton *v.* Stacker, 5 La. Ann. 677; Poydras *v.* Laurans, 6 La. Ann. 771. And a similar decision in a later case was rested upon the doctrine of *stare decisis*. Hollingsworth *v.* Wilson, 32 La. Ann. 1012.

2. Record of Purchase-money Mortgage Not Notice to Subsequent Purchaser — *Iowa.* — Davis *v.* Lutkiewiez, 72 Iowa 254.

Maine. — Veazie *v.* Parker, 23 Me. 170; Pierce *v.* Taylor, 23 Me. 246.

New Jersey. — Losey *v.* Simpson, 11 N. J. Eq. 246; Boyd *v.* Mundorf, 30 N. J. Eq. 545; Bingham *v.* Kirkland, 34 N. J. Eq. 229.

from the grantee.[1] And the record of a trust deed to secure the purchase price is notice of the prior deed to the trustee and beneficiaries in the trust deed, because such record is in their line of title.[2]

bb. Record of Conveyance by Stranger to Title. — To state the same proposition in a somewhat different form, the record of a conveyance by a person who appears from the record to be a stranger to the title is not constructive notice to one subsequently dealing in good faith with the person holding the record title,[3] for otherwise a subsequent purchaser would be under the necessity of examining the records indefinitely and thus the practical advantages of the recording system would be in large measure nullified.[4]

Purchase-money Mortgage. — Thus, where the grantee in a deed gives back a purchase-money mortgage, the record of a previous conveyance by him before he appeared of record as owner of the land will not give constructive notice to the grantor or to a subsequent purchaser from such grantor,[5] though, if the title has actually passed to the grantee, the record of a conveyance by him will give constructive notice.[6]

cc. Exception to Rule — Purchaser from Subsequent Grantee. — An exception to the rule that the record is notice only to persons claiming through it is recognized by the courts in cases where the subsequent purchaser first records his instrument but is chargeable with actual notice of the prior conveyance. Where this is the case, one taking from the subsequent purchaser after the prior conveyance has been recorded is charged with constructive notice from such record; that is, he is put on inquiry thereby as to whether or not his own

New York. — Dusenbury *v.* Hulbert, 59 N. Y. 541; Todd *v.* Eighmie, 4 N. Y. App. Div. 9.

Ohio. — Sternberger *v.* Ragland, 57 Ohio St. 148.

Pennsylvania. — Collins *v.* Aaron, 162 Pa. St. 539, Pyles *v.* Brown, 189 Pa. St. 164, 69 Am. St. Rep. 794.

Texas. — Frank *v.* Heidenheimer, 84 Tex. 642.

See also Bright *v.* Buckman, 39 Fed. Rep. 243.

In South Carolina, however, the court has gone astray on this point and has held, apparently without due consideration, that the record of a purchase-money mortgage from the grantee in an unrecorded deed is constructive notice to a purchaser from the grantor. Van Diviere *v.* Mitchell, 45 S. Car. 127.

It Is Only the Record of a Conveyance from the Grantor for which a purchaser is bound to search. He is under no obligation to look for conveyances to such grantor, who already appears of record as the holder of the legal title. Pyles *v.* Brown, 189 Pa. St. 164, 69 Am. St. Rep. 794; Frank *v.* Heidenheimer, 84 Tex. 642.

1. Notice to Purchaser from Grantee. — Younts *v.* Starnes, 42 S. Car. 22.

2. Notice to Trustee and Beneficiaries in Trust Deed. — Stovall *v.* Judah, 74 Miss. 747.

3. Record of Conveyance by Stranger to Record Title. — Texas Lumber Mfg. Co. *v.* Branch, (C. C. A.) 60 Fed. Rep. 201; Pearce *v.* Smith, 126 Ala. 116; Tennessee Coal, etc., R. Co. *v.* Gardner, 131 Ala. 599; Bates *v.* Norcross, 14 Pick. (Mass.) 224; Robertson *v.* Rentz, 71 Minn. 489; Ford *v.* Unity Church Soc., 120 Mo. 498, 41 Am. St. Rep. 711; Shackleton *v.* Allen Chapel African M. E. Church, 25 Mont. 421; Oliphant *v.* Burns, 146 N. Y. 218.

Contra in Wyoming. — Balch *v.* Arnold, 9 Wyo. 17.

4. Would Necessitate Indefinite Search. — Hetzel *v.* Barber, 69 N. Y. 1; Buckingham *v.* Hanna, 2 Ohio St. 551; Sands *v.* Beardsley, 32 W. Va. 594. See also note to Salisbury Sav. Soc. *v.* Cutting, 50 Conn. 113. But see Edwards *v.* McKernan, 55 Mich. 526; Digman *v.* McCollum, 47 Mo. 372; Van Diviere *v.* Mitchell, 45 S. Car. 127.

5. Conveyance Before Passage of Title — *Georgia.* — Faircloth *v.* Jordan, 18 Ga. 350.

Illinois. — Continental Invest., etc., Soc. *v.* Wood, 168 Ill. 421.

Kansas. — Ely *v.* Pingry, 56 Kan. 17.

Michigan. — Wing *v.* McDowell, Walk. (Mich.) 175.

Minnesota. — Schoch *v.* Birdsall, 48 Minn. 441.

New Jersey. — Boyd *v.* Mundorf, 30 N. J. Eq. 545; Protection Bldg., etc., Assoc. *v.* Knowles, 54 N. J. Eq. 519; Daly *v.* New York, etc., R. Co., 55 N. J. Eq. 595.

New York. — Farmers' L. & T. Co. *v.* Maltby, 8 Paige (N. Y.) 361; Page *v.* Waring, 76 N. Y. 463. But see Tefft *v.* Munson, 57 N. Y. 97.

Pennsylvania. — Calder *v.* Chapman, 52 Pa. St. 359, 91 Am. Dec. 163.

Record Relating Back to Execution. — A purchase-money mortgage, filed for record within the time prescribed by law, relates back to the time of execution, and such execution being simultaneously with the execution of the deed such mortgage has priority over another mortgage by the same grantee although the latter was first recorded. And the record of the purchase-money mortgage operates as notice to a subsequent assignee of the second mortgage. Hiser *v.* Hiser, 13 Montg. Co. Rep. (Pa.) 49.

6. Where Legal Title in Grantee. — Higgins *v.* Dennis, 104 Iowa 605; Trigg *v.* Vermillion, 113 Mo. 230; Semon *v.* Terhune, 40 N. J. Eq. 364.

grantor took a good title.[1] But, of course, where his own grantor had no notice of the prior conveyance at the time the subsequent deed was recorded, such purchaser could obtain a good title from him regardless of notice to himself, whether actual or constructive.[2]

(4) *Notice of What.* — The record of an instrument entitled to registration imparts to such persons as are bound thereby constructive notice of all facts which they could have ascertained by an actual examination of such record, not only of those recited in the record,[3] but also of those as to which it reasonably suggests an inquiry and which would be disclosed by such inquiry.[4] But the constructive notice which flows exclusively from the record cannot be more extensive than the facts stated therein, and must be understood to be only such notice as could have been obtained from an actual inspection of the record.[5] A subsequent purchaser is entitled to rely upon the record, and

1. Purchaser from Subsequent Grantee. — Thus, if A conveys to B, and afterwards to C, who effects the record of his deed before the one to B is recorded, but had actual notice thereof when he bought, the subsequent record of B's deed will charge constructive notice, and any purchaser from C after such record will take subject to B's rights.

United States. — North *v.* Knowlton, 23 Fed. Rep. 163.

California. — Mahoney *v.* Middleton, 41 Cal. 41; County Bank *v.* Fox, 119 Cal. 61.

Illinois. — Morrison *v.* Kelly, 22 Ill. 610, 74 Am. Dec. 169.

Iowa. — English *v.* Waples, 13 Iowa 57.

Michigan. — Van Aken *v.* Gleason, 34 Mich. 477.

Mississippi. — Woods *v.* Garnett, 72 Miss. 78.

New York. — Jackson *v.* Post, 9 Cow. (N. Y.) 120, 15 Wend. (N. Y.) 588; Van Rensselaer *v.* Clark, 17 Wend. (N. Y.) 25, 31 Am. Dec. 280; Schutt *v.* Large, 6 Barb. (N. Y.) 373; Ring *v.* Steele, 3 Keyes (N. Y.) 450; Goelet *v.* McManus, 1 Hun (N. Y.) 306.

South Dakota. — Parrish *v.* Mahaney, 10 S. Dak. 276, 66 Am. St. Rep. 715.

Wisconsin. — Fallass *v.* Pierce, 30 Wis. 443, denying the authority of Ely *v.* Wilcox, 20 Wis. 523, 91 Am. Dec. 436, to the contrary Erwin *v.* Lewis, 32 Wis. 276; Butler *v.* Mazeppa Bank, 94 Wis. 351.

Contra. — Morse *v.* Curtis, 140 Mass. 112, 54 Am. Rep. 456.

Not Charged with Vendor's Actual Knowledge. — It has been held that while the recording of the prior deed after the second is constructive notice of its existence to a purchaser from the vendee in the second deed, such purchaser cannot thereby be affected by the actual knowledge of his vendor. Day *v.* Clark, 25 Vt. 397.

2. See *supra*, XI. 2. *d.* (1) (*a*) *In General.*

3. Constructive Notice of Facts Shown by Record — *United States.* — Northwestern Nat. Bank *v.* Freeman, 171 U. S. 620; The W. B. Cole, (C. C. A.) 59 Fed. Rep. 182; Weldon *v.* Tollman, (C. C. A.) 67 Fed. Rep. 986.

Illinois. — Kotz *v.* Illinois Cent. R. Co., 188 Ill. 578.

Indiana. — Mettart *v.* Allen, 139 Ind. 644.

Kansas. — Taylor *v.* Mitchell, 58 Kan. 194.

Maryland. — Mason *v.* Martin, 4 Md. 124.

Mississippi. — Alliance Trust Co. *v.* Nettleton Hardwood Co., 74 Miss. 584, 60 Am. St. Rep. 531.

Nebraska. — Pleasants *v.* Blodgett, 39 Neb. 741, 42 Am. St. Rep. 624.

New Mexico. — Coon *v.* Bosque Bonita Land, etc., Co., 8 N. Mex. 123.

New York. — McPherson *v.* Rollins, 107 N. Y. 316, 1 Am. St. Rep. 826; Kirsch *v.* Tozier, 63 Hun (N. Y.) 607.

North Carolina. — Ford *v.* Green, 121 N. Car. 70.

Pennsylvania. — Hancock *v.* McAvoy, 151 Pa. St. 439; Hall *v.* Donagan, 186 Pa. St. 300.

Texas. — Powers *v.* Smith, (Tex Civ. App. 1895) 29 S. W. Rep. 416; Johnson *v.* Phelps, etc., Windmill Co., (Tex. Civ. App. 1896) 37 S. W. Rep. 764; Garrett *v.* Parker, (Tex. Civ. App. 1896) 39 S. W. Rep. 147.

The Record of a Mortgage on Land is constructive notice that the mortgagor claims some interest in the mortgaged land. Pleasants *v.* Blodgett, 39 Neb. 741, 42 Am. St. Rep. 624.

A Reservation of a Lien on the Premises in a recorded deed is notice thereof to subsequent purchasers and incumbrancers. Doescher *v.* Spratt, 61 Minn. 326.

A Recorded Deed Reciting a Condition Subsequent, on the happening of which the grantor may re-enter, is notice of such condition to every person thereafter acquiring any right, title or interest in the premises. Gilchrist *v.* Foxen, 95 Wis. 428.

Purchaser from Husband and Wife. — The record of a deed to a married woman for the use of herself and her husband for life, and after her death to her children, is constructive notice to a subsequent purchaser from the husband and wife of the trust in favor of the children, and he takes the property burdened with the trust. Hagan *v.* Varney, 147 Ill. 281.

4. Matters as to Which Inquiry Suggested. — Northwestern Nat. Bank *v.* Freeman, 171 U. S. 620; Talmadge *v.* Interstate Bldg., etc., Assoc., 105 Ga. 550; Mattlage *v.* Mulherin, 106 Ga. 834; Mettart *v.* Allen, 139 Ind. 644; Layman *v.* Vicknair, 47 La. Ann. 679; Carter *v.* Leonard, (Neb. 1902) 91 N. W. Rep. 574; McPherson *v.* Rollins, 107 N. Y. 316, 1 Am. St. Rep. 826; Coleman *v.* Reynolds, 181 Pa. St. 317; Jenkins *v.* Adams, 71 Tex. 1; Cook *v.* Caswell, 81 Tex. 678; McGregor *v.* White, 15 Tex. Civ. App. 299. But see Taylor *v.* Harrison, 47 Tex. 454, 26 Am. Rep. 304.

5. Only Such Notice as Obtainable from Examination — *Alabama.* — Mims *v.* Mims, 35 Ala. 23; Gibson *v.* Clark, 132 Ala. 370.

California. — Chamberlain *v.* Bell, 7 Cal. 294.

Connecticut. — Hunt *v.* Mansfield, 31 Conn. 488.

cannot be charged with constructive notice of latent equities or facts not disclosed or suggested by the record itself.[1]

Description of Property Conveyed. — Where the property conveyed is not described sufficiently to identify it with reasonable certainty, and there is nothing to put the searcher on inquiry, the record will not give constructive notice of the conveyance.[2] But the record, although defective as regards the description of

Georgia. — Shepherd *v.* Burkhalter, 13 Ga. 443, 58 Am. Dec. 523; Johnson *v.* Wheelock, 63 Ga. 623.

Illinois. — Metropolitan Bank *v.* Godfrey, 23 Ill. 579; Manly *v.* Pettee, 38 Ill. 128.

Indiana. — Duke *v.* Strickland, 43 Ind. 496; Gilchrist *v.* Gough, 63 Ind. 576, 30 Am. Rep. 250; Pruitt *v.* Pruitt, 91 Ind. 595; State *v.* Davis, 96 Ind. 539; Singer *v.* Scheible, 109 Ind. 575; Smith *v.* Lowry, 113 Ind. 37.

Iowa. — Miller *v.* Bradford, 12 Iowa 14; Haynes *v.* Seachrest, 13 Iowa 455; Barney *v.* McCarty, 15 Iowa 510, 83 Am. Dec. 427; Whalley *v.* Small, 25 Iowa 184; Miller *v.* Ware, 31 Iowa 524; Disque *v.* Wright, 49 Iowa 538; Fetes *v.* O'Laughlin, 62 Iowa 532.

Maine. — Jones *v.* McNarrin, 68 Me. 334; Hill *v.* McNichol, 76 Me. 314.

Maryland.—Brydon *v.* Campbell, 40 Md. 331.

Michigan. — Barrows *v.* Baughman, 9 Mich. 213; Hinchman *v.* Town, 10 Mich. 508; Barnard *v.* Campau, 29 Mich. 164; Loomis *v.* Brush, 36 Mich. 40; Crawford *v.* Vinton, 102 Mich. 83.

Minnesota. — Parret *v.* Shaubhut, 5 Minn. 323, 80 Am. Dec. 424; Whittacre *v.* Fuller, 5 Minn. 508; Lash *v.* Edgerton, 13 Minn. 210; Bailey *v.* Galpin, 40 Minn. 324.

Missouri. — Terrell *v.* Andrew County, 44 Mo. 309; Stevens *v.* Hampton, 46 Mo. 404; Bishop *v.* Schneider, 46 Mo. 472, 2 Am. Rep. 533.

New Jersey. — Gale *v.* Morris, 29 N. J. Eq. 222, 7 Cent. L. J. 314; Bunker *v.* Anderson, 32 N. J. Eq. 35; Westervelt *v.* Wyckoff, 32 N. J. Eq. 188; Dean *v.* Anderson, 34 N. J. Eq. 508.

New York. — Beekman *v.* Frost, 18 Johns. (N. Y.) 544, 9 Am. Dec. 246; Peck *v.* Mallams, 10 N. Y. 519; New-York L. Ins. Co. *v.* White, 17 N. Y. 469; McPherson *v.* Rollins, 107 N. Y. 316, 1 Am. St. Rep. 826; Beers *v.* Waterbury, 8 Bosw. (N. Y.) 396; Potter *v.* Sachs, 45 N. Y. App. Div. 454.

North Carolina. — Ijames *v.* Gaither, 93 N. Car. 358.

Ohio. — Jennings *v.* Wood, 20 Ohio 261; Brown *v.* Kirkman, 1 Ohio St. 116.

Pennsylvania. — Heister *v.* Fortner, 2 Binn. (Pa.) 40, 4 Am. Dec. 417; Luch's Appeal, 44 Pa. St. 519; Speer *v.* Evans, 47 Pa. St. 141; Schell *v.* Stein, 76 Pa. St. 398, 18 Am. Rep. 416.

Tennessee. — Lally *v.* Holland, 1 Swan (Tenn.) 396; Baldwin *v.* Marshall, 2 Humph. (Tenn.) 116; Turbeville *v.* Gibson, 5 Heisk. (Tenn.) 579.

Texas. — McLouth *v.* Hurt, 51 Tex. 115.

Vermont. — Sawyer *v.* Adams, 8 Vt. 172, 30 Am. Dec. 459; Sanger *v.* Craigue, 10 Vt. 555; Potter *v.* Dooley, 55 Vt. 512.

Virginia. — Davison *v.* Waite, 2 Munf. (Va.) 527; Colquhoun *v.* Atkinson, 6 Munf. (Va.) 550; Bell *v.* Hammond, 2 Leigh (Va.) 416; Mundy *v.* Vawter, 3 Gratt. (Va.) 518.

Washington. — George *v.* Butler, 26 Wash. 469.

West Virginia. — Houston *v.* McCluney, 8 W. Va. 150.

Wisconsin. — State *v.* Titus, 17 Wis. 241; Pringle *v.* Dunn, 37 Wis. 465, 19 Am. Rep. 772.

The Record of a Quitclaim Deed is only notice that the grantor's interest was thereby conveyed, and not that he had an interest. Marshall *v.* Roberts, 18 Minn. 405, 10 Am. Rep. 201.

Only What Appears on Face of Deed. — The recording of a deed, on the back of which were indorsed the names of persons not appearing on the face of the deed as parties thereto, was held not to give constructive notice of a conveyance between, or from, or to such persons. Gibson *v.* Clark, 132 Ala. 370.

Alabama — Record of Incorporation. — As to the extent of the constructive notice given by the record of incorporation proceedings, see Lea *v.* Iron Belt Mercantile Co., 119 Ala. 271.

1. Right to Rely on Record. — Peck *v.* Dyer, 147 Ill. 592; Weaver *v.* Carpenter, 42 Iowa 343; Forrest Milling Co. *v.* Cedar Falls Mill Co., 103 Iowa 619; Baldwin *v.* Owens, 21 Ky. L. Rep. 352, 51 S. W. Rep. 438; Lacassaqne *v.* Abraham, 48 La. Ann. 1160; Lawson *v.* Conolly, 51 La. Ann. 1753; Hooper *v.* De Vries, 115 Mich. 231; Wallach *v.* Schulze, 22 N. Y. App. Div. 57; Sengfelder *v.* Hill, 21 Wash. 371.

Where a Mortgage Is Satisfied of Record by one having apparent authority to discharge it, a person who, in reliance on the record, purchases of the mortgagor will be protected although such discharge of record was fraudulently made. Slaughter *v.* State, 132 Ind. 465; Cornog *v.* Fuller, 30 Iowa 212; Day *v.* Brenton, 102 Iowa 482, 63 Am. St. Rep. 460; Lowry *v.* Bennett, 119 Mich. 301; Lindauer *v.* Younglove, 47 Minn. 62; Evans *v.* Roanoke Sav. Bank, 95 Va. 294. See also *supra*, III. 2. *c.* (3) *Assignment of Mortgage.* And see the title MORTGAGES, vol. 20, p. 1073.

Not Notice of Independent Rights or Claims. — The record of a deed is constructive notice of such rights and claims only as are derived from the grantor by whom the deed was executed. It is not notice of rights or claims derived from others not parties to the deed. Lehman *v.* Collins, 69 Ala. 127.

Stipulation in Bond Secured by Mortgage. — The record of a mortgage given to secure a bond, which is not of record, is not notice to a subsequent purchaser of a stipulation in the bond for attorney's fees in case of suit, such stipulation not being mentioned in the recorded mortgage. Interstate Bldg., etc., Assoc. *v.* McCartha, 43 S. Car. 72.

2. No Notice Unless Property Identified — *California.* — Davis *v.* Ward, 109 Cal. 186, 50 Am. St. Rep. 29.

Illinois. — Rodgers *v.* Kavanaugh, 24 Ill.

the property, will nevertheless operate as notice if sufficient to put a reasonable man on inquiry as to what property was actually conveyed.[1]

Amount of Mortgage. — Unless the record of a mortgage state the amount secured thereby it will not give constructive notice of such amount.[2] And it has been held that if the recorder enter the amount as less than it really is, such record is not notice of the full amount,[3] but only to the extent of the sum appearing on the record.[4] But a statement of the amount as greater than that actually secured would probably be sufficient to give constructive notice of the true amount.[5]

XIII. Destruction of Record. — A grantee in an instrument evidencing a conveyance to him, who has complied with the requirements of the law in effecting the record of the instrument, cannot lose the effect given to such recordation by a subsequent destruction of the record, as by fire or other cause,[6] and, in the absence of any statutory requirement, he is not obliged to

583; Wait *v.* Smith, 92 Ill. 385; Slocum *v.* O'Day, 174 Ill. 215.

Indiana. — Rinehardt *v.* Reifers, (Ind. 1902) 64 N. E. Rep. 459.

Iowa. — State Bank *v.* Felt, 99 Iowa 532, 61 Am. St. Rep. 253; Iowa Lumber Co. *v.* Cassidy, 107 Iowa 564.

Kansas. — American Invest. Co. *v.* Coulter, 8 Kan. App. 841.

Maryland. — Brydon *v.* Campbell, 40 Md. 331

Minnesota. — Simmons *v.* Fuller, 17 Minn. 485; Bailey *v.* Galpin, 40 Minn. 319; Ada Bank *v.* Gullikson, 64 Minn. 91.

Missouri. — Gatewood *v.* House, 65 Mo. 663; Cass County *v.* Oldham, 75 Mo. 50; Ozark Land, etc., Co. *v.* Franks, 156 Mo. 673.

Montana. — Baker *v.* Bartlett, 18 Mont. 446, 56 Am. St. Rep. 594.

Nebraska. — Buck *v.* Davenport Sav. Bank, 29 Neb. 407, 26 Am. St. Rep. 392; Chicago Lumber Co. *v.* Hunter, 58 Neb 328.

New Jersey. — Rutgers *v.* Kingsland, 7 N. J. Eq. 178.

Texas. — Wynne *v.* Admire, (Tex. Civ. App. 1896) 37 S. W. Rep. 33.

See also *supra*, VII. 1. *e. Description of Property Conveyed or Affected.*

1. Sufficient if Searcher Put On Inquiry. — Vercruysse *v.* Williams, (C. C. A.) 112 Fed. Rep. 206; Foster *v.* Cramer, 19 Colo. 405; Myers *v.* Perry, 72 Ill. App. 450; Schweiss *v.* Woodruff, 73 Mich. 479; Cable *v.* Minneapolis Stock Yards, etc., Co., 47 Minn. 417; Coney *v.* Laird, 153 Mo. 408; Regan *v.* Milby, 21 Tex. Civ. App. 21; Swearingen *v.* Reed, 2 Tex. Civ. App. 364; Rankin *v.* McCarthy, (Tex Civ. App. 1896) 37 S. W. Rep. 979; Florance *v.* Morien, 98 Va. 26; Sengfelder *v.* Hill, 21 Wash. 371.

2. Amount Secured By Mortgage. — Bullock *v.* Battenhousen, 108 Ill. 28; Bergman *v.* Bogda, 46 Ill. App. 351. See also Bouton *v.* Doty, 69 Conn. 531; Pearce *v.* Hall, 12 Bush (Ky.) 209. And see *supra*, VII. 1. *f. Nature and Amount of Debt Secured.*

If the Purchaser Is Put on Inquiry as to the debts secured, the record is sufficient. Booth *v.* Barnum, 9 Conn. 286, 23 Am. Dec. 339.

Sufficient to Refer to Note Secured. — Where the record of a mortgage wholly failed to set out the sum of the note secured by it, but referred to the note by its date, the names of the maker and payee, the date of its maturity, the rate of interest provided for, and the time it became payable, it was held that the record was sufficient. Fetes *v.* O'Laughlin, 62 Iowa 532.

Where the Aggregate Amount of Notes Secured was correctly given, the record was held to give notice to a subsequent purchaser although one of the notes was omitted in the description. Dargin *v.* Beeker, 10 Iowa 571.

3. Not Notice of Full Amount. — Hill *v.* McNichol, 76 Me. 314.

4. Notice to Extent of Sum Shown by Record. — Gilchrist *v.* Gough, 63 Ind. 576, 30 Am. Rep. 250; Terrell *v.* Andrew County, 44 Mo. 309; Frost *v.* Beekman, 1 Johns. Ch. (N. Y.) 288; Beekman *v.* Frost, 18 Johns. (N. Y.) 544, 9 Am. Dec. 246.

5. See Crawford *v.* Chicago, etc., R. Co., 112 Ill 314.

6. Destroyed Record Still Operates as Notice — *United States.* — Franklin Sav. Bank *v.* Taylor, (C. C. A.) 53 Fed. Rep. 854; Paxson *v.* Brown, (C. C. A.) 61 Fed. Rep. 874.

Georgia. — Ashburn *v.* Spivey, 112 Ga. 474.

Illinois. — Shannon *v.* Hall, 72 Ill. 354, 22 Am. Rep. 146; Steele *v.* Boone, 75 Ill. 457; Gammon *v.* Hodges, 73 Ill. 140; Heaton *v.* Prather, 84 Ill. 330; Curyea *v.* Berry, 84 Ill. 600; Hall *v.* Shannon, 85 Ill. 473; Franklin Sav. Bank *v.* Taylor, 131 Ill. 376; Tucker *v.* Shaw, 158 Ill. 326; Quinn *v.* Perkins, 159 Ill. 572.

Indiana. — Hyatt *v.* Cochran, 69 Ind. 436.

Minnesota. — Thomas *v.* Hanson, 59 Minn. 274.

Mississippi. — Myers *v.* Buchanan, 46 Miss. 397.

Missouri. — Crane *v.* Dameron, 98 Mo. 567; Geer *v.* Missouri Lumber, etc., Co., 134 Mo. 85, 56 Am. St. Rep. 489.

Nebraska. — Deming *v.* Miles, 35 Neb. 739, 37 Am. St. Rep. 464.

Texas. — Fitch *v.* Boyer, 51 Tex. 336; Houston *v.* Blythe, 71 Tex. 719; Mattfeld *v.* Huntington, 17 Tex. Civ. App. 716.

Virginia. — Armentrout *v.* Gibbons, 30 Gratt. (Va.) 632.

A Subsequent Marring or Alteration of the Record cannot affect the rights of persons holding under the instrument, who had nothing to do with the making of the alteration. Merrick *v.* Wallace, 19 Ill. 486; Dodd *v.* Doty, 98 Ill. 393; Reck *v.* Clapp, 98 Pa. St. 581.

The Illegal Withdrawal from Record of a duly filed instrument by an unauthorized person

record the instrument a second time, or do any other act to notify purchasers, in order to protect his rights acquired thereunder.[1] In some jurisdictions provision is made by statute for the restoration of destroyed records.[2] The previous recording of the instrument may ordinarily be proved by the recorder's certificate thereon.[3]

will not prevent its operation as constructive notice, even where the person who deposited the writing knows of the subsequent withdrawal. Snider *v.* Methvin, 60 Tex. 487. And see Hine *v.* Robbins, 8 Conn. 342.

The Cancellation of a Mortgage on the records by the recorder on the presentation of a false certificate that the note secured by the mortgage had been paid, will not impair the rights of the mortgagee, although an innocent vendee has bought the property on the faith of the certificate that there was no mortgage on the property. De St. Romes *v.* Blanc, 20 La. Ann. 424, 96 Am. Dec. 415.

Decree Varying from Record. — A subsequent lawful decree declaring the terms of the instrument to be different from the record prevents the destroyed record from giving constructive notice of the matters wherein the decree varies from it. Franklin Sav. Bank *v.* Taylor, (C. C. A.) 53 Fed. Rep. 854, *reversing* 50 Fed. Rep. 289.

1. Need Not Be Restored Unless Required by Statute. — Mattfeld *v.* Huntington, 17 Tex. Civ. App 716.

The Georgia Re-recording Act of 1883 does not oblige the grantee to have his deed again recorded in order to retain the benefits of the original record. Ashburn *v.* Spivey, 112 Ga. 474.

2. Proceedings to Restore Record. — See Whitney *v.* Jasper Land Co., 119 Ala. 497; Miller *v.* Stalker, 158 Ill. 514; Quinn *v.* Perkins, 159 Ill. 572; Gage *v.* Thompson, 161 Ill. 403; Cooney *v.* A. Booth Packing Co., 169 Ill. 370; Chicago, etc., R. Co. *v.* Keegan, 185 Ill. 70; Glos *v.* Cary, 194 Ill. 214.

In Texas the destroyed record must be restored within four years, else it will cease to operate as constructive notice. O'Neal *v.* Pettus, 79 Tex. 254; Salmon *v.* Huff, 80 Tex. 133; Barcus *v.* Brigham, 84 Tex. 538; Magee *v.* Merriman, 85 Tex. 105.

And the same is true where the record is only partially destroyed, but there is not enough left to show a valid acknowledgment. Weber *v.* Moss, 3 Tex. Civ. App. 13.

Restoration after four years will not affect the rights of an intermediate purchaser without notice. Salmon *v.* Huff, 80 Tex. 133.

If the original instrument is not in existence it must be proved by parol for re-recording. Tarrant County Agricultural, etc., Assoc. *v.* Kit, 10 Tex. Civ. App. 685.

The act requiring such re-recording is not unconstitutional as impairing vested rights. Salmon *v.* Huff, 9 Tex. Civ. App. 164.

It applies to records destroyed before its enactment. Kempner *v.* Beaumont Lumber Co., 20 Tex. Civ. App. 307.

3. Officer's Certificate Proof of Recording. — Alvis *v.* Morrison, 63 Ill. 181, 14 Am. Rep. 117; Beverley *v.* Ellis, 1 Rand. (Va.) 106. But such certificate may generally be contradicted. Johnson *v.* Burden, 40 Vt. 567, 94 Am. Dec. 436.

As to matters of proof generally, see the titles Lost Papers and Records, vol. 19, p. 552; Secondary Evidence.

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CROSS-REFERENCES.

As to the Record of Deeds, Mortgages, and Other Instruments of a Private Nature, see the title RECORDING ACTS, ante.

Records of Municipalities, see the title MUNICIPAL RECORDS, vol. 21, p. 8.

Record or Transcript on Appeal, see the title APPEALS, 2 ENCYC. OF PL. AND PR. 1.

Proof of Foreign Judgments, see the title FOREIGN JUDGMENTS, vol. 13, p. 974.

Judicial Notice of Records, see the title JUDICIAL NOTICE, vol. 17, p. 892.

Amendment of Judicial Records, see, in addition to the discussion in this title, the title JUDGMENTS AND DECREES, vol. 17, p. 756; *in this work, and OPENING, AMENDING, AND VACATING JUDGMENTS*, 15 ENCYC. OF PL. AND PR. 202.

For matters of PROCEDURE, see the ENCYCLOPÆDIA OF PLEADING AND PRACTICE, vol. 17, p. 905; vol. 18, p. 427.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: ABSTRACT OF TITLE, vol. 1, p. 210; *ACCIDENT (IN EQUITY)*, vol. 1, p. 277; *ACKNOWLEDGMENTS*, vol. 1, p. 483; *ALTERATION OF INSTRUMENTS*, vol. 2, p. 181; *ALTERATION OF RECORDS*, vol. 2, p. 284; *CLERKS OF COURTS*, vol. 6, p. 132; *COUNTY COMMISSIONERS*, vol. 7, p. 975; *COURTS*, vol. 8, p. 21; *CUMULATIVE PUNISHMENT*, vol. 8, p. 479; *DEBT*, vol. 8, p. 982; *DOCUMENTARY EVIDENCE*, vol. 9, p. 877; *EMBEZZLEMENT*, vol. 10, p. 976; *ESTOPPEL*, vol. 11, p. 385; *EVIDENCE*, vol. 11, p. 484; *EXECUTION AND PROOF OF DOCUMENTS*, vol. 11, p. 583; *EXECUTIONS*, vol. 11, p. 604; *FORECLOSURE OF MORTGAGES*, vol. 13, p. 776; *FOREIGN JUDGMENTS*, vol. 13, p. 974; *FOREIGN LAWS*, vol. 13, p. 1050;

FORGERY, vol. 13, p. 1081; *GARNISHMENT*, vol. 14, p. 731; *INFAMY AND INFAMOUS CRIMES*, vol. 16, p. 245; *JUDGMENTS AND DECREES*, vol. 17, p. 756; *JURISDICTION*, vol. 17, p. 1039; *JUSTICES OF THE PEACE*, vol. 18, p. 6; *LETTERS*, vol. 18, p. 829; *LOST PAPERS AND RECORDS*, vol. 19, p. 552; *MANDAMUS*, vol. 19, p. 709; *MECHANICS' LIENS*, vol. 20, p. 255; *MEMORANDUM*, vol. 20, p. 575; *MISTAKE*, vol. 20, p. 805; *MUNICIPAL CORPORATIONS*, vol. 20, p. 1123; *MUNICIPAL COURTS*, vol. 21, p. 1; *NAME*, vol. 21, p. 305; *NOTICE*, vol. 21, p. 580; *ORDINANCES*, vol. 21, p. 943; *PAROL EVIDENCE*, vol. 21, p. 1077; *PEDIGREE*, vol. 22, p. 640; *PRESUMPTIONS*, vol. 22, p. 1232; *PUBLIC OFFICERS*, vol. 23, p. 314; *RECITALS*, *ante*; *REPRIEVE, PARDON, AND AMNESTY*, *post*; *STATUTES*; *TAXATION*.

I. **Definition.** — In its general sense the term record includes anything, whether of a public or private nature, which is set down in writing or delineated for the purpose of preserving memory.[1] But it is proposed to treat in this article only of records of a public nature, and hence the term as used herein signifies a written account, memorial, or memorandum of some act, speech, transaction, or instrument made by a public officer authorized to perform that function, for the purpose of having it remain as permanent evidence of the matters to which it relates;[2] or a writing properly filed in a public office.[3]

Archives. — The term archives means public records and papers required or

1. See Century Dictionary, title Record.

2. **Definition.** — See Anderson's L. Dict.; Bouvier's L. Dict.; Black's L. Dict. And see the following cases:

England. — Reg. *v.* Hughes, L. R. 1 P. C. 91.

United States. — U. S. *v.* Erskine, 4 Cranch (C. C.) 299; Dennison *v.* U. S., 168 U. S. 241; U. S. *v.* Taylor, 147 U. S. 698.

Dakota. — St. Croix Lumber Co. *v.* Pennington, 2 Dak. 470.

Hawaii. — Goo Kim *v.* Holt, 10 Hawaii 655.

Indiana. — Ross *v.* Banta, 140 Ind. 120.

Indian Territory. — Severs *v.* Northern Trust Co., 1 Indian Ter. 1; Bell *v.* Eddy, 2 Indian Ter. 312.

Iowa. — Koehler *v.* Hill, 60 Iowa 582.

Kentucky. — Prewit *v.* Graves, 5 J. J. Marsh. (Ky.) 117.

Louisiana. — State *v.* Anderson, 30 La. Ann. 567.

Maryland. — State *v.* Logan, 33 Md. 8; Davis *v.* Hamblin, 51 Md. 527.

Massachusetts. — Carter *v.* Peak, 138 Mass. 439; Com. *v.* Quigley, 170 Mass. 14.

Nebraska. — McDonald *v.* Penniston, 1 Neb. 326.

Ohio. — Green *v.* Garrington, 16 Ohio St. 550, 91 Am. Dec. 103.

Oregon. — Tustin *v.* Gaunt, 4 Oregon 309.

Pennsylvania. — Chase *v.* Miller, 41 Pa. St. 412.

Tennessee. — Huddleston *v.* State, 7 Baxt. (Tenn.) 56.

Texas. — Vidor *v.* Rawlins, 93 Tex. 259.

Vermont. — Lewis *v.* Brainerd, 53 Vt. 510; Perkins *v.* Cummings, 66 Vt. 488.

Virginia. — Coleman *v.* Com., 25 Gratt. (Va.) 865, 18 Am. Rep. 711.

Records are the memorials of the legislature and of the King's courts of justice, and are authentic beyond all manner of contradiction; for there can be no greater demonstration in a court of justice than to appeal to its own transactions. Buller N. P. 221.

Public Writings consist of the acts of public functionaries in the executive, legislative, and judicial departments of government, including under such general head the transactions which official persons are required to enter into books or registers, or to file, where books are not kept, in the course of their public duties, and which occur within the circle of their own personal knowledge and observation. To this class may be referred the acts of foreign states and the judgments of foreign courts. Gaines *v.* Relf, 12 How. (U. S.) 569.

An Indorsement on a Voucher, not retained by the auditor, but returned to the applicant, is not such a record of the action of the auditor as the statute requires him to keep. State *v.* Cornell, 56 Neb. 143.

"Rules of Record." — See Montana R. Co. *v.* Warren, 137 U. S. 348; Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742; Davidson *v.* Murphy, 13 Conn. 217; Sayles *v.* Briggs, 4 Met. (Mass.) 421; Greene County *v.* Wilhite, 35 Mo. App. 39; Newell *v.* Meyendorff, 9 Mont. 254, 18 Am. St. Rep. 738; Murfree *v.* Carmack, 4 Yerg. (Tenn.) 270, 26 Am. Dec. 232.

"Record of Cause." — See Bracken *v.* State, 29 Tex. App. 364.

"Record of His Conviction." — See Matter of Granger, 15 Nev. 56.

"Debt of Record." — See Burnes *v.* Simpson, 9 Kan. 664; Tyler *v.* Winslow, 15 Ohio St. 366.

3. **There Is a Distinction** between an original writing which may be properly filed in a public office there to remain, and the record of an instrument which belongs in private hands though properly recorded in a public office. See Ayres *v.* Grimes, 3 Har. & J. (Md.) 95; Bradley *v.* Silsbee, 33 Mich. 328. For a treatment of the latter class, see the title Recording Acts, *ante*.

permitted by law to be filed in public places of deposit for preservation and use as evidence of facts.[1]

II. Scope of Article. — It is the purpose of this article to discuss judicial records, legislative and other public records, and also certain records which may properly be termed *quasi*-public; but there will be no treatment whatever, save in one particular,[2] of the record of deeds, mortgages, or other transactions of a purely private nature, as records of this character will be fully discussed in another article, to which reference is made.[3]

III. Judicial Records — 1. Definition. — A record in judicial proceedings is a precise written history of the suit from its commencement to its termination, drawn up by the proper officer for the purpose of perpetuating the exact state of facts and the conclusions of law thereon.[4] It is not, however, to be understood that the record necessarily embraces all the proceedings in a cause, for there are many proceedings of a court, during the progress of a case, of which no minute is or should be made, and of which no notice is or should be taken by the recording officer,[5] and the fact that certain matters have been copied into the record by the clerk of the court or that a certain paper is found among the files in a cause, does not make such matters a part of the record unless they properly belong to it.[6]

2. Necessity For. — While it is true that rendering a judgment is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy as ascertained from the pleadings and the evidence, and technically the ministerial act of spreading upon the record a statement of the final conclusion reached by the court is not included therein,[7] yet under the statutes of some jurisdictions a judgment is not complete, so as to have the full effect to which it is entitled, as a lien and otherwise, until it is entered of record,[8] and a judicial order is a nullity unless entered of record.[9]

3. How Made Up. — At common law the strict mode of procedure is to enter upon a parchment roll all the pleadings and proceedings up to the issue and the award of a venire, and the subsequent proceedings to the judgment inclusive. The roll, when completed by the entry of final judgment, has the name of the judgment roll or record, and is deposited and filed of record in the treasury of the court.[10] This practice in making the record is still in a measure

1. **Archives.** — Texas Mexican R. Co. *v.* Jarvis, 69 Tex. 527.

2. See *infra*, this title, section VIII. *Inspection of Records.*

3. See the title Recording Acts, *ante*.

4. **Judicial Records.** — Davidson *v.* Murphy, 13 Conn. 217. See also Barnes *v.* Lee, 1 Cranch (C. C.) 430; Gregory *v.* Sherman, 44 Conn. 466, and note; Willard *v.* Whitney, 49 Me. 235; Sayles *v.* Briggs, 4 Met. (Mass.) 421; Puckett *v.* Graves, 6 Smed. & M. (Miss.) 384; State *v.* Godwin, 5 Ired. (27 N. Car.) 401, 44 Am. Dec. 42; Noble *v.* Shearer, 6 Ohio 426.

5. Nichols *v.* Bridgeport, 27 Conn. 465. See also Fisher *v.* Cockerell, 5 Pet. (U. S.) 248; Van Cott *v.* Sprague, 5 Ill. App. 99; Kirby *v.* Wood, 16 Me. 81; Hamilton *v.* Com., 16 Pa. St. 129, 55 Am. Dec. 485.

6. See the following cases:

United States. — Sargeant *v.* State Bank, 12 How. (U. S.) 372; England *v.* Gebhardt, 112 U. S. 502.

Arizona. — Grounds *v.* Ralph, 1 Ariz. 227.

Arkansas. — Stone *v.* Bennett, 4 Ark. 71.

California. — Sharp *v.* Daugney, 33 Cal. 513.

Connecticut. — Nichols *v.* Bridgeport, 27 Conn. 465.

Illinois. — McDonald *v.* Arnout, 14 Ill. 58; Anderson *v.* Field, 6 Ill. App. 307.

Iowa. — State *v.* Jones, 11 Iowa 11.

Mississippi. — Kibble *v.* Butler, 14 Smed. & M. (Miss.) 210.

New York. — Chester *v.* Jumel, (Supm. Ct. Gen. T.) 24 N. Y. St. Rep. 229.

Ohio. — Schultz *v.* State, 32 Ohio St. 276.

7. Matter of Cook, 77 Cal. 220, 11 Am. St. Rep. 267; Schuster *v.* Rader, 13 Colo. 329; Durant *v.* Comegys, 2 Idaho 809, 35 Am. St. Rep. 267; Blatchford *v.* Newberry, 100 Ill. 489; Callanan *v.* Votruba, 104 Iowa 672, 65 Am. St. Rep. 538; Conwell *v.* Kuykendall, 29 Kan. 707; Stephens *v.* Santee, 49 N. Y. 39.

8. Callanan *v.* Votruba, 104 Iowa 672, 65 Am. St. Rep. 538; Winter *v.* Coulthard, 94 Iowa 312; Ætna L. Ins. Co. *v.* Hesser, 77 Iowa 381, 14 Am. St. Rep. 297; Balm *v.* Nunn, 63 Iowa 641; Case *v.* Plato, 54 Iowa 64; Brown *v.* Scott, 2 Greene (Iowa) 454; King *v.* Dickson, 114 Iowa 160; Amundson *v.* Wilson, (N. Dak. 1902) 91 N. W. Rep. 37. See also Guthrie *v.* Guthrie, 71 Iowa 744; Babcock *v.* Wolf, 70 Iowa 676.

9. **The Entry of a Probate Order on the Docket** is sufficient under the *Texas* statute, though it is not carried into the minutes, for the probate docket is designated as a record book. West *v.* Keeton, 17 Tex. Civ. App. 139.

10. **Common-law Judgment Roll.** — Ansley *v.*

followed in some states where the papers in the cause are required to be copied with more or less detail into books kept for that purpose.[1] But the usual custom in modern practice is to file the pleadings, process, etc., with the clerk of the court, and the file so made, supplemented by other necessary writings or entries by the clerk, constitutes the record,[2] which is frequently, however, by a survival of the common-law terminology, called the judgment roll.

4. Form — Person and Tense. — Matters in the record should properly be stated in the third person and the present tense,[3] though a failure to state them in this manner will not necessarily invalidate the record.[4]

5. Contents — What Record Must Show — *a.* IN GENERAL. — At the present time the contents of the judicial record are so largely governed by statutory enactments varying in the different jurisdictions,[5] and by local customs, that it would be useless, in a work of this character, to attempt to lay down anything beyond the most general rules as to the contents of the judicial record; but it may be stated generally that whatever proceedings, facts, or papers the law or the practice of the various courts requires to be enrolled are properly a part of the judicial record and should be included therein. In the note are cited a large number of cases which will be found of great value in ascertaining what the law or practice in the various jurisdictions is.[6]

Carlos, 9 Ala. 973; Vail *v.* Iglehart, 69 Ill. 332; Willard *v.* Harvey, 24 N. H. 344; Croswell *v.* Byrnes, 9 Johns. (N. Y.) 287; Matter of Christern, (N. Y. Super. Ct. Spec. T.) 56 How. Pr. (N. Y.) 5; Clark *v.* Depew, 25 Pa. St. 509, 64 Am. Dec. 717.

1. See Ansley *v.* Carlos, 9 Ala. 973; Case *v.* Plato, 54 Iowa 64; Brown *v.* Hathaway, 10 Minn. 303; Williams *v.* McGrade, 13 Minn. 46; Willard *v.* Harvey, 24 N. H. 344; Stimson *v.* Huggins, (Supm. Ct. Gen. T.) 9 How. Pr. (N. Y.) 86; Gibson *v.* Partee, 2 Dev. & B. L. (19 N. Car.) 530; Harvey *v.* Brown, 1 Ohio 268; Harrison *v.* Southern Porcelain Mfg. Co., 10 S. Car. 278.

2. Modern Practice. — Stevison *v.* Earnest, 80 Ill. 513; Vail *v.* Iglehart, 69 Ill. 332; Harding *v.* Larkin, 41 Ill. 423; Schirmer *v.* People, 33 Ill. 282; Thayer *v.* McGee, 20 Mich. 195; Emery *v.* Whitwell, 6 Mich. 486; Willard *v.* Harvey, 24 N. H. 344; Stimson *v.* Huggins, (Supm. Ct. Gen. T.) 9 How. Pr. (N. Y.) 86, 16 Barb. (N. Y.) 658; Clark *v.* Depew, 25 Pa. St. 509, 64 Am. Dec. 717; Myer *v.* Verner, 10 W. N. C. (Pa.) 138.

3. Person and Tense. — Hall *v.* Clarke, 1 Mod. 81; Rex *v.* Perin, 2 Saund. 393; Rex *v.* Youngman, Comb. 358; Hamilton *v.* Com., 16 Pa. St. 129, 55 Am. Dec. 485.

Acts of the Court must be stated in the present tense, though acts of the party may be in the preterperfect. Hall *v.* Clarke, 1 Mod. 81.

4. State *v.* Martin, 2 Ired. L. (24 N. Car.) 191; State *v.* Reeves, 8 Ired. L. (30 N. Car.) 19; Hamilton *v.* Com., 16 Pa. St. 129, 55 Am. Dec. 485; Taylor *v.* Com., 44 Pa. St. 131.

5. See People *v.* O'Brien, 88 Cal. 483; Thayer *v.* McGee, 20 Mich. 195; Thomas *v.* Tanner, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 426; Reid *v.* Case, 14 Wis. 429.

The Record of the Court of a Justice of the Peace consists of the entries upon his docket, every item of which is specially enumerated in the statutes. Goodrich *v.* Burdick, 26 Mich. 39.

6. What Is a Part of Record. — See the following cases:

United States. — Kie *v.* U. S., 27 Fed. Rep. 351; Inglee *v.* Coolidge, 2 Wheat. (U. S.) 363.

Alabama. — Thompson *v.* Ayres, 1 Stew. (Ala.) 171; Dominick *v.* Randolph, 124 Ala. 557.

Arkansas. — Boyd *v.* Carroll, 30 Ark. 527; State *v.* Cheek, 25 Ark. 206; Stewart *v.* State, 13 Ark. 720; Pearce *v.* Baldridge, 7 Ark. 413; Hickey *v.* Smith, 6 Ark. 456; Cox *v.* Garvin, 6 Ark. 431; McQuaid *v.* Tait, 5 Ark. 309; Montgomery *v.* Carpenter, 5 Ark. 264; Lenox *v.* Pike, 2 Ark. 14.

California. — San Francisco Sav. Union *v.* Myers, 76 Cal. 624; Tormey *v.* Pierce, 49 Cal. 306; Caldwell *v.* Parks, 47 Cal. 640; Berry *v.* San Francisco, etc., R. Co., 47 Cal. 643; Packard *v.* Bird, 40 Cal. 378; Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742; Abadie *v.* Carrillo, 32 Cal. 172.

Connecticut. — Nichols *v.* Bridgeport, 27 Conn. 459.

Florida. — Roberson *v.* State, 42 Fla. 223; Morrison *v.* State, 42 Fla. 149; Raines *v.* State, 42 Fla. 141; Duggan *v.* State, 9 Fla. 516.

Illinois. — Holmes *v.* People, 10 Ill. 478; Pate *v.* People, 8 Ill. 644; McKinney *v.* People, 7 Ill. 540, 43 Am. Dec. 65; Saunders *v.* McCollins, 5 Ill. 419; Gardner *v.* People, 4 Ill. 83; Whalen *v.* Muma, 94 Ill. App. 488; Barclay *v.* People, 69 Ill. App. 517; Knouff *v.* People, 6 Ill. App. 154; Morgan *v.* People, 136 Ill. 161.

Indiana. — Applegate *v.* Baxley, 93 Ind. 147; Beauchamp *v.* State, 6 Blackf. (Ind.) 299; Jerauld *v.* Watkins, 1 Ind. App. 466.

Iowa. — Dedric *v.* Hopson, 62 Iowa 562; Mays *v.* Deaver, 1 Iowa 216; Abbee *v.* Higgins, 2 Greene (Iowa) 535; Cook *v.* Steuben County Bank, 1 Greene (Iowa) 447.

Kansas. — Bowersock *v.* Adams, 55 Kan. 681; Backus *v.* Clark, 1 Kan. 303, 83 Am. Dec. 437.

Kentucky. — Cobb *v.* Com., 3 T. B. Mon. (Ky.) 391; Middleton *v.* Hensley, (Ky. 1899) 52 S. W. Rep. 974; Beauchamp *v.* Mudd, Hard. (Ky.) 170.

Louisiana. — State *v.* Hardaway, 50 La. Ann. 1345.

Massachusetts. — Com. *v.* Hogan, 113 Mass. 7; M'Fadden *v.* Otis, 6 Mass. 323; Parker *v.* Framingham, 8 Met. (Mass.) 260; Turns *v.*

b. JURISDICTION. — As a general rule, jurisdiction is presumed where the action of courts of superior general jurisdiction is concerned, even although the record is silent on the subject;[1] although, of course, there can be no such

Com., 6 Met. (Mass.) 224; Jeffries *v.* Com., 12 Allen (Mass.) 145.

Michigan. — Sweet *v.* Gibson, 123 Mich. 699.

Mississippi. — Stubbs *v.* State, 49 Miss. 716; Jenkins *v.* State, 30 Miss. 408; Dyson *v.* State, 26 Miss. 362; Shields *v.* Graves, 6 How. (Miss.) 262; Grigsbey *v.* Francis, 2 How. (Miss.) 845; Mattheny *v.* Totten, 2 Smed. & M. (Miss.) 52.

Missouri. — State *v.* Van Matre, 49 Mo. 268; Brown *v.* Hannibal, etc., R. Co., 37 Mo. 298; Vaughn *v.* Scade, 30 Mo. 600; Loudon *v.* King, 22 Mo. 336; Christy *v.* Myers, 21 Mo. 112; U. S. *v.* Gamble, 10 Mo. 457; State *v.* Rayburn, 31 Mo. App. 385; State *v.* Harvey, 105 Mo. 316.

Nebraska. — Van Etten *v.* Butt, 32 Neb. 285.

New Jersey. — West *v.* State, 22 N. J. L. 212; Berrian *v.* State, 22 N. J. L. 9.

New York. — Thomas *v.* Tanner, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 426; Schenectady, etc., Plank Road Co. *v.* Thatcher, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 226; Anonymous, 4 Wend. (N. Y.) 193; Cook *v.* Dickerson, 1 Duer (N. Y.) 679; Overton *v.* Auburn Nat. Bank, (Supm. Ct. Spec. T.) 3 N. Y. St. Rep. 169.

North Carolina. — State *v.* Godwin, 5 Ired. L. (27 N. Car.) 401, 44 Am. Dec. 42; State *v.* Martin, 2 Ired. L. (24 N. Car.) 101.

Ohio. — Smith *v.* Board of Education, 27 Ohio St. 44; Noble *v.* Shearer, 6 Ohio 426; State *v.* Dawson, 6 Ohio 250.

Pennsylvania. — Anderson *v.* Oliver, 138 Pa. St. 156; Taylor *v.* Com., 44 Pa. St. 131; Lothrop *v.* Blake, 3 Pa. St. 483; Brown *v.* Caldwell, 10 S. & R. (Pa.) 114, 13 Am. Dec. 660; Roushey *v.* Feist, 10 Kulp (Pa.) 79, 16 Montg. Co. Rep. (Pa.) 160; Com. *v.* Hill, 3 Pa. Dist. 216.

South Carolina. — Burwell, etc., Co. *v.* Chapman, 59 S. Car. 581.

South Dakota. — Rapid City First Nat. Bank *v.* McGuire, 12 S. Dak. 226, 76 Am. St. Rep. 598.

Tennessee. — Smith *v.* State, 9 Humph. (Tenn.) 9; Bob *v.* State, 7 Humph. (Tenn.) 129; Calhoun *v.* State, 4 Humph. (Tenn.) 477; Grandison *v.* State, 2 Humph. (Tenn.) 451; Gilman *v.* State, 1 Humph. (Tenn.) 59; State *v.* Denton, 6 Coldw. (Tenn.) 539; Spurlock *v.* Fulks, 1 Swan (Tenn.) 289.

Utah. — Hoagland *v.* Hoagland, 19 Utah 103; Matter of Amy, 12 Utah 278.

Virginia. — Snodgrass *v.* Com., 89 Va. 679.

1. Presumption of Jurisdiction — *Alabama.* — See Commissioners' Ct. *v.* Thompson, 18 Ala. 694.

Arkansas. — Marks *v.* Matthews, 50 Ark. 338.

California. — Mahoney *v.* Middleton, 41 Cal. 51; Hahn *v.* Kelly, 34 Cal. 402, 94 Am. Dec. 742; Barrett *v.* Carney, 33 Cal. 537; Carpentier *v.* Oakland, 30 Cal. 440.

Connecticut. — Stone *v.* Hawkins, 56 Conn. 115; Coit *v.* Haven, 30 Conn. 198, 79 Am. Dec. 244; Sears *v.* Terry, 26 Conn. 280.

Georgia. — See Kelsey *v.* Wyley, 10 Ga. 371.

Illinois. — Nickrans *v.* Wilk, 161 Ill. 76; Anderson *v.* Gray, 134 Ill. 550, 23 Am. St. Rep. 696; Benefield *v.* Albert, 132 Ill. 665; Wallace *v.* Cox, 71 Ill. 548; Osgood *v.* Blackmore, 59 Ill. 261; The Tug Montauk *v.* Walker, 47 Ill. 336; Wells *v.* Mason, 5 Ill. 84. See also Huntington *v.* Metzger, 158 Ill. 272; Kenney *v.* Greer, 13 Ill. 441.

Indiana. — Shoemaker *v.* South Bend Spark Arrester Co., 135 Ind. 471; Nichols *v.* State, 127 Ind. 406; O'Brien *v.* State, 125 Ind. 38; Sites *v.* Miller, 120 Ind. 19; Langsdale *v.* Woollen, 120 Ind. 16; Royse *v.* Turnbaugh, 117 Ind. 539; Walker *v.* Hill, 111 Ind. 223; Jackson *v.* State, 104 Ind. 516; Exchange Bank *v.* Ault, 102 Ind. 322; Quarl *v.* Abbett, 102 Ind. 240; Young *v.* Wells, 97 Ind. 410; McCormick *v.* Webster, 89 Ind. 105; Cavanaugh *v.* Smith, 84 Ind. 380; Coan *v.* Clow, 83 Ind. 417; Bloomfield R. Co. *v.* Burress, 82 Ind. 83; Houk *v.* Barthold, 73 Ind. 21; Anderson *v.* Spence, 72 Ind. 315, 37 Am. Rep. 162; Kinnaman *v.* Kinnaman, 71 Ind. 417; Abdil *v.* Abdil, 33 Ind. 460; Ragan *v.* Haynes, 10 Ind. 348.

Iowa. — Coughran *v.* Gilman, 81 Iowa 442; Weider *v.* Overton, 47 Iowa 538; Doran *v.* Davis, 43 Iowa 86; Hunger *v.* Barlow, 39 Iowa 539; State *v.* Winstrand, 37 Iowa 110; State *v.* Clark, 30 Iowa 168; Bridgman *v.* Wilcut, 4 Greene (Iowa) 563.

Kansas. — Matter of Dill, 32 Kan. 691; Dexter *v.* Cochran, 17 Kan. 450; Haynes *v.* Cowen, 15 Kan. 637.

Maine. — Treat *v.* Maxwell, 82 Me. 76.

Michigan. — Arnold *v.* Nye, 23 Mich. 286.

Minnesota. — Nye *v.* Swan, 42 Minn. 243; Holmes *v.* Campbell, 12 Minn. 221.

Mississippi. — See Gwin *v.* McCarroll, 1 Smed. & M. (Miss.) 351; Root *v.* McFerrin, 37 Miss. 45, 75 Am. Dec. 49.

Missouri. — Hamer *v.* Cook, 118 Mo. 476; St. Louis *v.* Lanigan, 97 Mo. 175; Schad *v.* Sharp, 95 Mo. 573; Gates *v.* Tusten, 89 Mo. 13; State *v.* Williamson, 57 Mo. 192; Schell *v* Leland, 45 Mo. 289.

New York. — Maples *v.* Mackey, 89 N. Y. 146; Bearns *v.* Gould, 77 N. Y. 455; Hart *v.* Seixas, 21 Wend. (N. Y.) 40; Foot *v.* Stevens, 17 Wend. (N. Y.) 483; Wheeler *v.* Raymond, 8 Cow. (N. Y.) 311; Bolton *v.* Jacks, 6 Robt. (N. Y.) 198; Ray *v.* Rowley, 1 Hun (N. Y.) 614.

North Carolina. — See State *v.* Ledford, 6 Ired. L. (28 N. Car.) 5.

Ohio. — Morgan *v.* Burnet, 18 Ohio 535.

Oregon. — Strong *v.* Barnhart, 6 Oregon 103; Tustin *v.* Gaunt, 4 Oregon 305; Fulton *v.* Earhart, 4 Oregon 61; Groslouis *v.* Northcut 3 Oregon 394.

Pennsylvania. — Wetherill *v.* Stillman, 65 Pa. St. 105.

Rhode Island. — Slocum *v.* Providence Steam, etc., Pipe Co., 10 R. I. 112.

Tennessee. — Pope *v.* Harrison, 16 Lea (Tenn.) 82. See also Robertson *v.* Winchester, 85 Tenn. 171; Posey *v.* Eaton, 9 Lea (Tenn.) 500; Harris *v.* Hadden, 7 Lea (Tenn.) 216; Kilcrease *v.* Blythe, 6 Humph. (Tenn.) 389.

Texas. — Williams *v.* Ball, 52 Tex. 603, 36

presumption where the record shows a lack of jurisdiction, but in such case the action of the court is void.[1] There is, however, no such presumption in the case of inferior courts of limited jurisdiction exercising special statutory powers not according to the course of the common law, but their records must affirmatively show the facts which confer jurisdiction,[2] and the same is true in

Am. Rep. 730; Horan *v.* Wahrenberger, 9 Tex. 314, 58 Am. Dec. 145.

Vermont. — Huntington *v.* Charlotte, 15 Vt. 46.

Virginia. — Pulaski County *v.* Stuart, 28 Gratt. (Va.) 872; Cox *v.* Thomas, 9 Gratt. (Va.) 323.

West Virginia. — Mayer *v.* Adams, 27 W. Va. 244.

See also the title JURISDICTION, vol. 17, p. 1074, note 1.

1. Lack of Jurisdiction Apparent on Record — *Alabama.* — Hunt *v.* Ellison, 32 Ala. 173.

Arkansas. — Kimball *v.* Merrick, 20 Ark. 12; Iglehart *v.* Moore, 16 Ark. 55; Barkman *v.* Hopkins, 11 Ark. 157. See also Lusk *v.* Perkins, 48 Ark. 238.

California. — Pioneer Land Co. *v.* Maddux, 109 Cal. 633, 50 Am. St. Rep. 67; Matter of Eichhoff, 101 Cal. 600; Arroyo Ditch, etc., Co. *v.* Superior Ct., 92 Cal. 47, 27 Am. St. Rep. 91; Hyde *v.* Redding, 74 Cal. 493; Junkans *v.* Bergin, 64 Cal. 203; Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742; Smith *v.* Los Angeles, etc., R. Co., (Cal. 1893) 34 Pac. Rep. 242.

Colorado.— Atchison, etc., R. Co. *v.* Nicholls, 8 Colo. 189; Clayton *v.* Clayton, 4 Colo. 416.

Connecticut. — Morey *v.* Hoyt, 62 Conn. 554.

Georgia. — Hobby *v.* Bunch, 83 Ga. 13; Head *v.* Bridges, 67 Ga. 238.

Illinois. — People *v.* Seelye, 146 Ill. 189; Benefield *v.* Albert, 132 Ill. 671; Senichka *v.* Lowe, 74 Ill. 274; Swearengen *v.* Gulick, 67 Ill. 208; Osgood *v.* Blackmore, 59 Ill. 261; Whitney *v.* Porter, 23 Ill. 445.

Indiana. — White County *v.* Gwin, 136 Ind. 562; Thompson *v.* McCorkle, 136 Ind. 484, 43 Am. St. Rep. 334; Pressley *v.* Harrison, 102 Ind. 23.

Iowa. — Seely *v.* Reid, 3 Greene (Iowa) 374. See also Mayfield *v.* Bennett, 48 Iowa 194.

Kansas. — Pray *v.* Jenkins, 47 Kan. 599; Matter of Dill, 32 Kan. 691; Mastin *v.* Gray, 19 Kan. 458, 27 Am. Rep. 149.

Maine. — McVicker *v.* Beedy, 31 Me. 314, 50 Am. Dec. 666.

Massachusetts. — Rand *v.* Hanson, 154 Mass. 87, 26 Am. St. Rep. 210; Wright *v.* Andrews, 130 Mass. 149; Mercier *v.* Chace, 9 Allen (Mass.) 242; Jochumsen *v.* Suffolk Sav. Bank, 3 Allen (Mass.) 87; Peters *v.* Peters, 8 Cush. (Mass.) 543; Woodward *v.* Tremere, 6 Pick. (Mass.) 354; Martin *v.* Com., 1 Mass. 359.

Michigan. — Wilson *v.* Arnold, 5 Mich. 98; Greenvault *v.* Farmers', etc., Bank, 2 Dougl. (Mich.) 498.

Minnesota. — State *v.* Armington, 25 Minn. 29.

Missouri. — Russell *v.* Grant, 122 Mo. 161, 43 Am. St. Rep. 563; Laney *v.* Sweeney, 105 Mo. 360; Laney *v.* Garbee, 105 Mo. 355, 24 Am. St. Rep. 391; McClanahan *v.* West, 100 Mo. 309; Presbyterian Church *v.* McElhinney, 61 Mo. 540. See also Bell *v.* Brinkmann, 123 Mo. 271; Cloud *v.* Pierce, 86 Mo. 357; Rumfelt *v.* O'Brien, 57 Mo. 569.

Nebraska. — Lininger *v.* Glenn, 33 Neb. 187.

New Hampshire. — Whittier *v.* Wendell, 7 N. H. 257; Downer *v.* Shaw, 22 N. H. 277.

New Mexico. — Smith *v.* Montoya, 3 N. Mex. 40.

New York. — Risley *v.* Phenix Bank, 83 N. Y. 318, 38 Am. Rep. 421; Kamp *v.* Kamp, 59 N. Y. 212; Hart *v.* Seixas, 21 Wend. (N. Y.) 40; Corwithe *v.* Griffing, 21 Barb (N. Y.) 9; Savage *v.* Olmstead, 2 Redf. (N. Y.) 478; Sloane *v.* Martin, (Supm. Ct. Spec. T.) 24 N. Y. Supp. 672; Stuyvesant *v.* Weil, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 445, not affected as to this point by reversal in 41 N. Y. App. Div. 551, nor by reversal of judgment of appellate division in 167 N. Y. 421.

North Carolina. — State *v.* Ridley, 114 N. Car. 827; Williams *v.* Whitaker, 110 N. Car. 393.

Ohio. — Arndt *v.* Arndt, 15 Ohio 33.

Oregon. — Furgeson *v.* Jones, 17 Oregon 211; Northcut *v.* Lemery, 8 Oregon 316; Tustin *v.* Gaunt, 4 Oregon 305; Hunsaker *v.* Coffin, 2 Oregon 107.

Pennsylvania. — Gordon's Appeal, 93 Pa. St. 361.

South Carolina. — Martin *v.* Bowie, 37 S. Car. 102; Turner *v.* Malone, 24 S. Car. 401.

Tennessee. — Pope *v.* Harrison, 16 Lea (Tenn.) 82; Barrett *v.* Oppenheimer, 12 Heisk. (Tenn.) 298.

Texas. — Lyne *v.* Sanford, 82 Tex. 58, 27 Am. St. Rep. 852; Martin *v.* Cobb, 77 Tex. 544; Stewart *v.* Anderson, 70 Tex. 588; Paul *v.* Willis, 69 Tex. 261; Parker *v.* Spencer, 61 Tex. 155; Treadway *v.* Eastburn, 57 Tex. 209; Murchison *v.* White, 54 Tex. 78, Withers *v.* Patterson, 27 Tex. 491, 86 Am. Dec. 643; Fitzhugh *v.* Custer, 4 Tex. 391, 51 Am. Dec. 728; Wright *v.* Cullers, 2 Tex. App. Civ. Cas., § 751; Bohl *v.* Brown, 2 Tex. App. Civ. Cas., § 538; Kramer *v.* Breedlove, (Tex. 1887) 3 S. W. Rep. 561.

Vermont. — Ingals *v.* Brooks, 29 Vt. 401; Atkinson *v.* Allen, 12 Vt. 619, 36 Am. Dec. 361.

Virginia. — Dillard *v.* Central Virginia Iron Co., 82 Va. 734; Wade *v.* Hancock, 76 Va. 620.

West Virginia. — Fowler *v.* Lewis, 36 W. Va. 112.

Wisconsin. — Blodgett *v.* Hitt, 29 Wis. 169; Ely *v.* Tallman, 14 Wis. 28; Falkner *v.* Guild, 10 Wis. 563; Matter of Booth, 3 Wis. 157.

See also the title JURISDICTION, vol. 17, p. 1077, note 5.

2. Inferior Courts — *United States.* — Philadelphia, etc., R. Co. *v.* Trimble, 10 Wall. (U. S.) 367; U. S. Bank *v.* Moss, 6 How. (U. S.) 31; Fisher *v.* Cockerell, 5 Pet. (U. S.) 254; Wagner *v.* Frederick County, (C. C. A.) 91 Fed. Rep. 969.

Alabama. — Lister *v.* Vivian, 8 Port. (Ala.) 375; Kennedy *v.* Pickering, Minor (Ala.) 137.

California. — Houghton *v.* Tibbets, 126 Cal. 57.

Maine. — State *v.* Hartwell, 35 Me. 129.

Maryland. — Fahey *v.* Mottu, 67 Md. 250.

cases where courts of general jurisdiction are acting pursuant to a special limited jurisdiction conferred by statute and not embraced within their general jurisdiction nor exercised according to the course of the common law.[1]

Confessed Judgment Entered in Vacation. — Thus where a confession of judgment by attorney is entered in vacation, it is indispensable that the power of attorney should be made a part of the record,[2] for the court acquires jurisdiction over the parties and the subject-matter in such case, by virtue of the power of attorney.[3]

c. SUMMONS AND PROOF OF SERVICE. — The summons and proof of the service thereof are a necessary part of the judgment roll in the case of a judgment obtained by default for want of appearance,[4] but these matters need not appear if jurisdiction is otherwise shown, as by the appearance of the defendant.[5]

d. PLEADINGS. — The pleadings in the case are, of course, a part of the record.[6]

Massachusetts. — Com. *v.* Hogan, 113 Mass. 7; Turns *v.* Com., 6 Met. (Mass.) 224.

Michigan. — Kenyon *v.* Baker, 16 Mich. 373, 97 Am. Dec. 158.

Mississippi. — Gardner *v.* New Orleans, etc., R. Co., 78 Miss. 640.

Missouri. — Nickerson *v.* Eddy, 50 Mo. App. 569.

New York. — Rosenberg *v.* McMichael, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 780; Steiner *v.* Block, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 779; Bristor *v.* Flaherty, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 111; Currier *v.* Roseff, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 767; Price *v.* Eisen, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 769; White *v.* Holding, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 762; Bang *v.* McAvoy, (Supm. Ct App. T.) 29 Misc. (N. Y.) 768; Wolf *v.* Ritt, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 769; De Sisto *v.* Stimmel, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 769; Perlus *v.* Spiess, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 761; Rankin *v.* Ginsberg, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 801; Meuthen *v.* Eyelis, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 792; Rose *v.* Brady, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 791; Janos *v.* Samstag, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 790; Howell *v.* Wright Dairy Co., (Supm. Ct. App. T.) 31 Misc. (N. Y.) 755; Dunican *v.* Conforti, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 799; People *v.* Powers, 7 Barb. (N. Y.) 462, *affirmed* 6 N. Y. 50; Hitt *v.* Simon, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 803.

Pennsylvania. — Roberts *v.* Orr, 56 Pa. St. 176.

Tennessee. — Bittick *v.* McEwen, 7 Heisk. (Tenn.) 1.

West Virginia. — Yates *v.* Taylor County Ct., 47 W. Va. 376; Hamilton *v.* Tucker County Ct., 38 W. Va. 71.

See also the title JURISDICTION, vol. 17, p. 1082, note 4. But *compare* Barbee *v.* Shannon, 1 Indian Ter. 199.

An Information Showing the Facts Necessary to Give Jurisdiction to a justice is a part of the record of a proceeding before him. Knapp *v.* Miller, 133 Pa. St. 275, 26 W. N. C. (Pa.) 29.

The New York Town Bonding Act of 1869 (c. 907) provided that the judgment of a county judge authorizing the bonding of a town "and the record thereof shall have the same force and effect as other judgments and records in courts of record in this state." The evident purpose and legitimate effect of this provision were to clothe such judgment with the usual legal presumptions which attend the adjudications of courts of record having general jurisdiction, and to throw the burden of proving a lack of jurisdiction upon those asserting it. Hoag *v.* Greenwich, 133 N. Y. 152.

1. Special Limited Jurisdiction of Courts of General Jurisdiction. — Marks *v.* McElroy, 67 Miss. 545; Foot *v.* Stevens, 17 Wend. (N. Y.) 488. See also the title JURISDICTION, vol. 17, p. 1079, note 3.

2. Durham *v.* Brown, 24 Ill. 94.

3. Frear *v.* Commercial Nat. Bank, 73 Ill. 473; Anderson *v.* Field, 6 Ill. App. 313.

4. Summons and Proof of Service — *California.* — Barney *v.* Vigoureaux, 75 Cal. 376; Weeks *v.* Garibaldi South Gold Min. Co., 73 Cal. 599; Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742.

Indiana. — Houk *v.* Barthold, 73 Ind. 21; Carver *v.* Carver, 64 Ind. 194; Cochnower *v.* Cochnower, 27 Ind. 253; Rany *v.* Governor, 4 Blackf. (Ind.) 2.

Mississippi. — Houston *v.* Black, (Miss. 1894) 14 So. Rep. 529.

New York. — Macomber *v.* New York, (N. Y. Super. Ct.) 17 Abb. Pr. (N. Y.) 35.

Texas. — Gulf, etc., R. Co. *v.* Eastham, (Tex. Civ. App. 1899) 54 S. W. Rep. 648.

5. Where Jurisdiction Appears Otherwise. — Baldwin *v.* Webster 68 Ind. 133; Hoffnung *v.* Grove, (Supm. Ct.) 18 Abb. Pr. (N. Y.) 14; Miller *v.* White, (Supm. Ct. Gen. T.) 10 Abb. Pr. N. S. (N. Y.) 385; Bosworth *v.* Vandewalker, 53 N. Y. 597; Christal *v.* Kelly, 88 N. Y. 285; Dean *v.* Roseboom, 12 N. Y. Wkly. Dig. 123; Hoagland *v.* Hoagland, 19 Utah 103. See also Calkins *v.* Packer, 21 Barb. (N. Y.) 275.

6. Pleadings. — Gibbs *v.* Dickson, 33 Ark. 107; Strathern *v.* Dakin, 63 Cal. 478; Abbott *v.* Douglass, 28 Cal. 298; Whiting *v.* Fuller, 22 Ill. 33; Whalen *v.* Muma, 94 Ill. App. 488; Thornton *v.* St. Paul, etc., R. Co., 6 Daly (N. Y.) 511. See also Graves *v.* Scoville, 17 Neb. 593; Oppermann *v.* McGown, (Tex. Civ. App. 1899) 50 S. W. Rep. 1078.

Original of Amended Pleading Not a Part of Record. — See Specht *v.* Williamson, 46 Ind. 599; Dexter *v.* Dustin, 70 Hun (N. Y.) 515.

Abandoned Demurrer Not a Part of Record. — See Peck *v.* Cowing, 1 Den. (N. Y.) 222,

e. TIME OF HEARING. — The record of a justice of the peace or alderman need not show at what hour of the day the hearing was had and the judgment rendered, for it will be presumed, in the absence of any exception claiming the facts to be otherwise, that the hearing and judgment did take place at the hour and day named in the summons.[1]

f. FINDINGS OF COURT OR REFEREE. — In some jurisdictions the findings of the court are a part of the record,[2] as is also the accepted report of a referee.[3]

g. EVIDENTIARY MATTERS. — As a general rule, in courts of law, matters which are purely evidentiary in their nature, such as the testimony or other evidence adduced at the trial, bills of particulars, accounts, affidavits used in support of or resistance to motions, and the like, are not properly a part of the record and should not be included therein.[4]

h. INSTRUCTIONS TO JURY. — The charge or instructions given by the court to the jury, or requested instructions which the court has refused to give, are not commonly a part of the record,[5] though in some jurisdictions the

Brown *v.* Saratoga R. Co., 18 N. Y. 495; Sullenberger *v.* Gest, 14 Ohio 204.

Affidavit for Change of Venue. — See McGovern *v.* Keokuk Lumber Co., 61 Iowa 265; Winet *v.* Berryhill, 55 Iowa 411.

Interrogatories to and Answers of a Garnishee. — See Rankin *v.* Simonds, 27 Ill. 352; Brainard *v.* Simmons, 58 Iowa 464.

1. Time of Hearing. — Weisman *v.* Weisman, 133 Pa. St. 89; Blessington *v.* Com., (Pa. 1888) 12 Cent. Rep. 512; Fronheiser *v.* Werner, 14 Pa. Co. Ct. 522, 3 Pa. Dist. 515, *refusing to follow* Lindsay *v.* Sweeny, 6 Phila. (Pa.) 309, 24 Leg. Int. (Pa.) 204; Smith *v.* Fetherston, 10 Phila. (Pa.) 306, 32 Leg. Int. (Pa.) 40; Culver *v.* Behee, 2 Kulp (Pa.) 266; Keeley *v.* Wentzel, 2 Kulp (Pa.) 360; Perrego *v.* Nichols, 3 Kulp (Pa.) 472; Courtright *v.* Harringar, 5 Kulp (Pa.) 372; Lutz *v.* Derb, 5 Kulp (Pa.) 500; Gwinner *v.* Brendt, 6 Kulp (Pa.) 532; Clarke *v.* Vielkoonis, 7 Kulp (Pa.) 61; Link *v.* Repple, 7 Pa. Co. Ct. 138.

2. Findings of Court. — Hidden *v.* Jordan, 28 Cal. 302; Kimball *v.* Stormer, 65 Cal. 116; Fairfield County Bar *v.* Taylor, 60 Conn. 11; Harner *v.* Batdorf, 35 Ohio St. 113.

3. Report of Referee. — Thompson *v* Patterson, 54 Cal. 542. See also Thomas *v.* Tanner, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 426.

When a Report Has Been Returned to the Referee for Amendments making it more definite, the original report is not a part of the judgment roll. Lyddy *v.* Chamberlain, 24 Hun (N. Y.) 377.

4. Evidentiary Matters — *United States.* — England *v.* Gebhardt, 112 U. S. 502; Fisher *v.* Cockerell, 5 Pet. (U. S.) 254.

Alabama. — Ice *v.* Manning, 3 Ala. 121.

Arizona. — Grounds *v.* Ralph, 1 Ariz. 227.

Arkansas. — Scott *v.* State, 26 Ark 521; Collins *v.* McPeak, 10 Ark. 556; Bonne *v.* Kay, 5 Ark. 19; McKnight *v.* Smith, 5 Ark. 409; Clark *v.* Gibson, 2 Ark. 109; Lenox *v.* Pike, 2 Ark. 14.

Connecticut. — Mansfield *v.* Mansfield, 6 Conn. 561, 16 Am. Dec. 76.

Florida. — Burk *v.* Clark, 8 Fla. 9; McKay *v.* Friebele, 8 Fla. 21; Waddell *v.* Cunningham, 27 Fla. 477.

Illinois. — Schlump *v.* Reidersdorf, 28 Ill. 68; Roundy *v.* Hunt, 24 Ill. 598; McDonald *v.* Arnout, 14 Ill. 58; Edwards *v.* Vandemack, 13 Ill. 633; Hatch *v.* Potter, 7 Ill. 725, 43 Am. Dec. 88.

Indiana. — Applegate *v.* Baxley, 93 Ind. 147; Jerauld *v.* Watkins, 1 Ind. App. 466; Gross *v.* Haisley, 2 Ind. App. 23.

Iowa. — Hart *v.* Foley, 67 Iowa 407.

Kansas. — Backus *v.* Clark, 1 Kan. 303, 83 Am. Dec. 437.

Kentucky. — Adams *v.* Bradshaw, Hard. (Ky.) 564.

Maine. — Kirby *v.* Wood, 16 Me. 81.

Massachusetts. — Com. *v.* Farrell, 105 Mass. 180; Peirce *v.* Adams, 8 Mass. 383; Storer *v.* White, 7 Mass. 448; Com. *v.* Davis, 11 Pick. (Mass.) 432.

Michigan. — Hill *v.* People, 16 Mich. 351.

Mississippi. — Kibble *v.* Butler, 14 Smed. & M. (Miss.) 207; Puckett *v.* Graves, 6 Smed. & M. (Miss.) 384; Grant *v.* Planters' Bank, 4 How. (Miss.) 326.

Nebraska. — Plattsmouth *v.* Boeck, 32 Neb. 297; Van Etten *v.* Butt, 32 Neb. 285; Van Etten *v.* Kosters, 31 Neb. 285; Strunk *v.* State, 31 Neb. 119; Richards *v.* State, 22 Neb. 145; Graves *v.* Scoville, 17 Neb. 593.

North Carolina. — State *v.* Godwin, 5 Ired. L. (27 N. Car.) 401, 44 Am. Dec. 42.

Ohio. — Ralston *v.* Kohl, 30 Ohio St. 92; Schultz *v.* State, 32 Ohio St. 276; Garner *v.* White, 23 Ohio St. 192.

Pennsylvania. — Dodds *v.* Dodds, 9 Pa. St. 315.

Tennessee. — Spurlock *v.* Fulks, 1 Swan (Tenn.) 289; Mitchell *v.* Nicholson, 8 Yerg. (Tenn.) 194; Cornelius *v.* Merritt, 2 Head (Tenn.) 97; Williams *v.* Duffy, 7 Humph. (Tenn.) 255.

Washington. — Spokane Falls *v.* Curry, 2 Wash. 541.

Wisconsin. — Reid *v.* Case, 14 Wis. 429.

In Chancery, unlike a case at law, the rule is that the party who asks relief and obtains it must preserve in the decree, or otherwise in the record, evidence or facts found sufficient to support the decree; otherwise the decree will be reversed in the appellate court. Alexander *v.* Alexander, 45 Ill. App. 211.

5. Instructions to Jury — *United States.* — Struthers *v.* Drexel, 122 U. S. 487.

Arkansas. — Jones *v.* Buzzard, 2 Ark. 415.

charge has been made so by statute.[1]

i. OPINION OF COURT. — The opinion of the court, delivered in rendering its decision, is not ordinarily a part of the record,[2] but it is otherwise where the opinion has been reduced to writing and filed, at the request of a party[3] appearing of record,[4] conformably with a statute directing it to be filed when so requested.[5]

Where the Decree Refers to the Opinion of the trial judge, filed with the papers in the cause, for the reasons of the decision, the opinion thus referred to and filed for the express purpose of explaining the decision, becomes a part of the record and may be looked to to explain what was in issue and what was determined.[6]

Opinion of Supreme Court. — It has been said, however, that the opinion of the Supreme Court should be considered a part of the record, for it is not a mere statement of reasons like an opinion of a trial court, but constitutes the findings of fact and conclusions of law upon which the court bases its judgment; it is a decision as well as an opinion and is the only paper from which it can be ascertained what are the conclusions of the court either upon the facts or upon the law.[7]

j. RENDITION OF JUDGMENT. — The record must, of course, show that a judgment was actually rendered in the cause, and what that judgment was.[8]

Connecticut. — Storrs *v.* Robinson, (Conn. 1902) 51 Atl. Rep. 516.

Indiana. — Ellebarger *v.* Swiggett, 1 Ind. App. 598.

Iowa. — Pierce *v.* Locke, 11 Iowa 454; Ewing *v.* Scott, 2 Iowa 447; Claussen *v.* La Franz, 1 Iowa 226; Parker *v.* Pierce, 4 Greene (Iowa) 452.

Ohio. — Pettett *v.* Van Fleet, 31 Ohio St. 536; Lockhart *v.* Brown, 31 Ohio St. 431; Hallam *v.* Jacks, 11 Ohio St. 692.

1. See Storrs *v.* Robinson, (Conn. 1902) 51 Atl. Rep. 516.

Under the California Statute making "written charges asked of the court, if there be any," a part of the record, a charge given to a jury by the court, upon its own motion, forms no part of the judgment roll. People *v.* Hart, 44 Cal. 598.

2. Opinion of Court Not a Part of Record — *United States.* — England *v.* Gebhardt, 112 U. S. 502.

California. — Wixson *v.* Devine, 67 Cal. 341; Keech *v.* Beatty, 127 Cal. 177.

Connecticut. — See Buckingham's Appeal, 60 Conn. 143.

District of Columbia. — See Strong *v.* Grant, 2 Mackey (D. C.) 218.

Louisiana. — See Police Jury *v.* Police Jury, 48 La. Ann. 1299.

Massachusetts. — Coolidge *v.* Inglee, 13 Mass. 50.

New York. — Matter of Broderick, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 534. See also Thomas *v.* Tanner, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 426; Hewlett *v.* Wood, 67 N. Y. 394; Snebley *v.* Conner, 78 N. Y. 218; Clarke *v.* Lourie, 82 N. Y. 580; Koehler *v.* Hughes, 148 N. Y. 507; Randall *v.* New York El. R. Co., 149 N. Y. 211.

Pennsylvania. — Cathcart *v.* Com., 37 Pa. St. 108.

3. The Opinion Must Be Requested. — Alexander *v.* Weidner, 82 Pa. St. 452; Bartolett *v.* Dixon, 73 Pa. St. 129; Lehigh Valley R. Co. *v.* Hall, 61 Pa. St. 361; Meese *v.* Levis, 13 Pa. St. 384.

4. Request Must Appear of Record. — Lancaster *v.* De Normandie, 1 Whart. (Pa.) 49, *overruling* Brown *v.* Caldwell, 10 S. & R. (Pa.) 114, 13 Am. Dec. 660. See Alexander *v.* Weidner, 82 Pa. St. 452.

5. Satterlee *v.* Matthewson, 2 Pet. (U. S.) 380; Parker *v.* Framingham, 8 Met. (Mass.) 260; Northumberland County Bank *v.* Eyer, 58 Pa. St. 97; Wheeler *v.* Winn, 53 Pa. St. 122, 91 Am. Dec. 186; Downing *v.* Baldwin, 1 S. & R. (Pa.) 300. See also Munderbach *v.* Lutz, 14 S. & R. (Pa.) 220.

When the Record of a Foreign Judgment Contains the Opinion of the Court, it will be presumed that this is according to the law of the state in which the judgment was rendered, though the law is otherwise in the state where the record is introduced. Burnham *v.* Ridcock, 58 N. Y. App. Div. 273, *affirming* 33 Misc. (N. Y.) 65.

6. Legrand *v.* Rixey, 83 Va. 862.

7. Fulton *v.* Pomeroy, 111 Wis. 663. See also Strong *v.* Grant, 2 Mackey (D. C.) 218; Sargent *v.* New Haven Steamboat Co., 65 Conn. 116.

The Wisconsin Statute provides in express terms that the "opinion or decision of the Supreme Court * * * shall constitute and be held a part of the record in the action." Fulton *v.* Pomeroy, 111 Wis. 663.

8. Rendition of Judgment. — Page *v.* Coleman, 9 Port. (Ala.) 275; Leathers *v.* Cooley, 49 Me. 337; Green *v.* Com., 12 Allen (Mass.) 155; Sayles *v.* Briggs, 4 Met. (Mass.) 421; Rogers *v.* M'Daniel, 3 How. (Miss.) 172; Story *v.* Kimball, 6 Vt. 541. See also Grignon *v.* Astor, 2 How. (U. S.) 340; Whalen *v.* Muma, 94 Ill. App. 488; Knapp *v.* Abell, 10 Allen (Mass.) 485; Thomas *v.* Tanner, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 426; Weyman *v.* National Broadway Bank, (N. Y. Super. Ct. Spec. T.) 59 How. Pr. (N. Y.) 332; Ellsworth *v.* Learned, 21 Vt. 535.

k. INDICTMENT. — The record in a criminal case should contain the indictment [1] and show that it was duly returned into open court by the grand jury.[2]

l. IMPANELING OF JURY. — The record in a criminal case should show the impaneling of the traverse jury.[3]

m. SWEARING OF JURY. — It has been asserted that the record must show that the jury who tried the issues in the case, and also the grand jurors who found and returned the indictment upon which a defendant was tried, were sworn,[4] but that the oath administered to them need not be shown, as it will be presumed that it was in proper form.[5] But this presumption as to the oath is, of course, overthrown if it is set forth in the record and affirmatively appears to have been insufficient in form.[6]

n. ARRAIGNMENT AND PLEA OF ACCUSED. — It has been held that the record in a criminal case must show the arraignment of the accused [7] and his plea;[8] but as the only object of the arraignment is to obtain a plea it will usually be sufficient if the record shows a plea although it does not show a formal arraignment.[9]

o. JOINDER OF ISSUE. — It is not essential that the record in a criminal

1. Indictment. — McKinney *v.* People, 7 Ill. 552, 43 Am. Dec. 65. See also cases cited in next note.

2. Return of Indictment — *Arkansas.* — Holcomb *v.* State, 31 Ark. 427; Milan *v.* State, 24 Ark. 346; Ross *v.* State, 23 Ark. 198; Green *v.* State, 19 Ark. 178.

Illinois. — Yundt *v.* People, 65 Ill. 372; Aylesworth *v.* People, 65 Ill. 301; Sattler *v.* People, 59 Ill. 68; Kelly *v.* People, 39 Ill. 157; Gardner *v.* People, 20 Ill. 430; Rainey *v.* People, 8 Ill. 71.

Indiana. — State *v.* Dixon, 97 Ind. 125; Mitchell *v.* State, 63 Ind. 276; Adams *v.* State, 11 Ind. 304.

Mississippi. — Jenkins *v.* State, 30 Miss. 408.

Tennessee. — Brown *v.* State, 7 Humph. (Tenn.) 155; Blevins *v.* State, Meigs (Tenn.) 82; Hite *v.* State, 9 Yerg. (Tenn.) 198; Chappel *v.* State, 8 Yerg. (Tenn.) 166.

West Virginia. — State *v.* Fitzpatrick, 8 W. Va. 707; Crookham *v.* State, 5 W. Va. 510.

Records Held Sufficient. — See Parnell *v.* State, 129 Ala. 6; Lee *v.* State, 45 Miss. 114.

When the Record Shows that Two Indictments Were Returned against the defendant, it must identify the one upon which he was tried as one of them. Parks *v.* State, 20 Ind. 513.

3. McKinney *v.* People, 7 Ill. 552, 43 Am. Dec. 65.

4. Swearing of Jury — *Arkansas.* — Barbour *v.* State, 37 Ark. 61; Lawson *v.* State, 25 Ark. 106.

Louisiana. — State *v.* Phillips, 28 La. Ann. 387; State *v.* King, 28 La. Ann. 425; State *v.* Gates, 9 La. Ann. 94.

Mississippi. — Foster *v.* State, 31 Miss. 421; Cody *v.* State, 3 How. (Miss.) 27; Beall *v.* Campbell, 1 How. (Miss.) 24; Holt *v.* Mills, 4 Smed. & M. (Miss.) 110.

Texas. — Drake *v.* Brander, 8 Tex. 351; Nels *v.* State, 2 Tex. 280.

But *compare* State *v.* Schlagel, 19 Iowa 169.

5. Oath Need Not Be Set Out — *United States.* — Leschi *v.* Washington Territory, 1 Wash. Ter. 13.

Alabama. — Collier *v.* State, 2 Stew. (Ala.) 388.

Arkansas. — McDaniel *v.* Hanauer, 25 Ark. 48; Anderson *v.* State, 34 Ark. 257.

Florida. — State *v.* Pearce, 14 Fla. 153.

Iowa. — State *v.* Ostrander, 18 Iowa 435.

Mississippi. — Edwards *v.* State, 47 Miss. 581; Dyson *v.* State, 26 Miss. 362.

Missouri. — State *v.* Schoenwald, 31 Mo. 147.

Texas. — Anderson *v.* State, 42 Tex. 389; Pierce *v* State, 12 Tex. 210; Russell *v.* State, 10 Tex. 288; Johnson *v.* State, 1 Tex. App. 519.

6. Where Oath Affirmatively Appears to Have Been Insufficient — *Alabama.* — Murphy *v.* State, 54 Ala. 178; Gardner *v.* State, 48 Ala. 263; Smith *v.* State, 47 Ala. 540; Johnson *v.* State, 47 Ala. 62; Horton *v.* State, 47 Ala. 58; Bugg *v.* State, 47 Ala. 50; Johnson *v.* State, 47 Ala. 9.

Arkansas. — Harper *v.* State, 25 Ark. 83; Bivens *v.* State, 11 Ark. 455; Bell *v.* State, 10 Ark. 536.

Texas. — Arthur *v.* State, 3 Tex. 403; Smith *v.* State, 1 Tex. App. 408, 516.

7. Arraignment. — McKinney *v.* People, 7 Ill. 552, 43 Am. Dec. 65; State *v.* Walker, 119 Mo. 467.

Record Held Sufficient. — See Com. *v.* Harvey, 103 Mass. 451.

8. Plea — *Illinois.* — Hoskins *v.* People, 84 Ill. 87, 25 Am. Rep. 433; Yundt *v.* People, 65 Ill. 372; Aylesworth *v.* People, 65 Ill. 301; Johnson *v.* People, 22 Ill. 314; McKinney *v.* People, 7 Ill. 552, 43 Am. Dec. 65; Avery *v.* People, 11 Ill. App. 332; Price *v.* People, 9 Ill. App. 36.

Indiana. — Tindall *v.* State, 71 Ind. 314; Graeter *v.* State, 54 Ind. 159.

Michigan. — Grigg *v.* People, 31 Mich. 471.

Texas. — Pate *v.* State, 21 Tex. App. 191; Morehead *v.* State, 7 Tex. App. 126; Perry *v.* State, 4 Tex. App. 566; Satterwhite *v.* State, 3 Tex. App. 428; Peeler *v.* State, 3 Tex. App. 347; Parchman *v.* State, 3 Tex. App. 225; Pringle *v.* State, 2 Tex. App. 300.

Wisconsin. — Douglass *v.* State, 3 Wis. 820.

9. Record Sufficient if Plea Be Shown. — Turpin *v.* State, 80 Ind. 148; Sohn *v.* State, 18 Ind. 389; Harman *v.* State, 11 Ind. 311; State *v.* Braunschweig, 36 Mo. 397; Wilson *v.* State, 17 Tex. App. 525; Plasters *v.* State, 1 Tex. App. 673. But *compare* Grigg *v.* People, 31 Mich. 471.

case should state any issue as having been joined between the state and the defendant.[1]

p. PRESENCE OF DEFENDANT. — When the presence of the defendant in a criminal prosecution is necessary to the validity of a conviction, this must appear by the record.[2] It is not, however, necessary that it should be expressly stated that the defendant was present, but it is sufficient if his presence is shown with reasonable certainty by recitals in the record, or may be properly inferred or implied from the record taken as a whole.[3]

q. ALLOCUTION. — The weight of authority supports the view that when the delivery of the allocution, or formal address of the judge to the prisoner, asking him if he has anything to say why sentence should not be pronounced against him, is requisite to a valid trial and conviction, the record must show that this has been done,[4] though it has been held that this is not necessary where the offense for which the defendant has been convicted is not a capital one,[5] and that it will be presumed, unless the contrary appears, that the court did its duty in this respect.[6]

6. Minute Books. — The minute book or docket kept by the clerk may be considered as the record of a case until the technical record is made up in proper form.[7]

1. Reg. *v.* Purchase, 15 How. St. Tr. 651; Rex *v.* Royce, 4 Burr. 2073; Hawkins *v.* State, 7 Mo. 190; Berrian *v.* State, 22 N. J. L. 9; State *v.* Carroll, 5 Ired. L. (27 N. Car.) 139; State *v.* Smith, Peck (Tenn.) 165. See also Henry *v.* State, 33 Ala. 389; Com. *v.* McCauley, 105 Mass. 69. But see *contra*, State *v.* Fort, 1 Law Repos. (4 N. Car.) 510.

2. Presence of Defendant — *Alabama.* — Graham *v.* State, 40 Ala. 659.

Arkansas. — Bearden *v.* State, 44 Ark. 331; Brown *v.* State, 24 Ark. 620.

Mississippi. — Long *v.* State, 52 Miss. 23; Stubbs *v.* State, 49 Miss. 716; Gaiter *v.* State, 45 Miss. 441; Scaggs *v.* State, 8 Smed. & M. (Miss.) 722.

Missouri. — State *v.* Allen, 64 Mo. 67; State *v.* Jones, 61 Mo. 232; State *v.* Barnes, 59 Mo. 154; State *v.* Ott, 49 Mo. 326; State *v.* Braunschweig, 36 Mo. 397; State *v.* Cross, 27 Mo. 332; State *v.* Matthews, 20 Mo. 55.

Nebraska. — Burley *v.* State, 1 Neb. 385.

Virginia. — Hooker *v.* Com., 13 Gratt. (Va.) 763; Sperry *v.* Com., 9 Leigh (Va.) 623, 33 Am. Dec. 261.

Washington. — Shapoonmash *v.* U. S., 1 Wash. Ter. 188.

In Pennsylvania the presence of the defendant must appear of record in case of a conviction of a capital felony. Dunn *v.* Com., 6 Pa. St. 384; Hamilton *v.* Com., 16 Pa. St. 129, 55 Am. Dec. 485; Dougherty *v.* Com., 69 Pa. St. 286. But in other cases the presence of the defendant is presumed unless the contrary appears by the record. Holmes *v.* Com., 25 Pa. St. 221.

3. Record Need Not Expressly State that Defendant Was Present. — Kie *v.* U. S., 27 Fed. Rep. 351; Sweeden *v.* State, 19 Ark. 205; Martin *v.* State, 42 Fla. 194; Lewis *v.* State, 42 Fla. 253; Schirmer *v.* People, 33 Ill. 276; Rhodes *v.* State, 23 Ind. 24; State *v.* Wood, 17 Iowa 18; Dodge *v.* People, 4 Neb. 220; Stephens *v.* People, 19 N. Y. 549, (Supm. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 510; State *v.* Cartwright, 10 Oregon 193.

Record Showing Presence of Defendant's Counsel When Sentence Passed. — Sudduth *v.* State, 124 Ala. 32.

4. Allocution Must Appear on Record. — Rex *v.* Geary, 2 Salk. 630; Rex *v.* Speke, 3 Salk. 358; Grady *v.* State, 11 Ga. 253; James *v.* State, 45 Miss. 572; Safford *v.* People, (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 476; Graham *v.* People, 63 Barb. (N. Y.) 468, 6 Lans. (N. Y.) 149; Hamilton *v.* Com., 16 Pa. St. 129, 55 Am. Dec. 485; Dougherty *v.* Com., 69 Pa. St. 286.

Records Held Sufficient. — State *v.* Fritz, 27 La. Ann. 360; State *v.* Hugel, 27 La. Ann. 375; Edwards *v.* State, 47 Miss. 581; Taylor *v.* Com., 44 Pa. St. 131.

5. State *v.* Stiefle, 13 Iowa 603; State *v.* Ball, 27 Mo. 324.

6. Carper *v.* State, 27 Ohio St. 572; Bartlett *v.* State, 28 Ohio St. 669.

7. Minute Books — *Alabama.* — Gay *v.* Rogers, 109 Ala. 624.

Connecticut. — State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409.

Maine. — Jay *v.* East Livermore, 56 Me. 107; Leathers *v.* Cooley, 49 Me. 337; Chamberlain *v.* Sands, 27 Me. 467; Longley *v.* Vose, 27 Me. 185. See also Fitzgibbon *v.* Brown, 43 Me. 170.

Massachusetts. — Read *v.* Sutton, 2 Cush. (Mass.) 115; Fay *v.* Wenzell, 8 Cush. (Mass.) 315; Benedict *v.* Cutting, 13 Met. (Mass.) 181; McGrath *v.* Seagrave, 2 Allen (Mass.) 443, 79 Am. Dec. 797; Townsend *v.* Way, 5 Allen (Mass.) 426.

Ohio. — Morgan *v.* Burnet, 18 Ohio 535; Young *v.* Buckingham, 5 Ohio 485.

Minute Docket. — See Davis *v.* Blevins, 123 N. Car. 379.

Docket Entries. — See Davis *v.* Smith, 79 Me. 351.

Where the Statutes Regulating the Making of the Record Were Repealed, but no provisions on the subject substituted, it was held that the files and journal entries of the court were to be deemed a substitute for such record, and as constituting the record itself. Norvell *v.* McHenry, 1 Mich. 227; Prentiss *v.* Holbrook, 2 Mich. 372.

Minutes of Judge. — But the minutes or memoranda which the judge makes upon his own docket or calendar, which the law does not require him to make, but which are kept by him merely for his own convenience and to enable him to see that the clerk accurately makes up the record, are not themselves records.[1]

The Minutes of a Justice of the Peace have been regarded as substantially a record of his proceedings where he has died before making the extended record.[2] But if the magistrate is still alive and able to perfect his record, the minutes will not be allowed to take the place of the regular or statutory record[3] even though the justice is out of the state.[4]

7. Other Books Directed to Be Kept by Statute. — The statutes of the various states prescribe numerous books which are required to be kept among the records of the courts, such as judgment books,[5] record books,[6] judgment dockets,[7] registers of actions,[8] execution dockets,[9] appearance dockets,[10] fee books,[11] jury books,[12] and the like.

8. Papers Filed but Not Incorporated into Record. — Papers and documents which are filed in a case, but not incorporated into the record, constitute no part of it.[13]

9. Orders and Proceedings in Aid of Execution. — In *Kansas*, orders made and proceedings taken before a probate judge in aid of execution do not become records of the probate court.[14]

IV. Legislative Records — 1. The Enrolled Bill. — The usual legislative practice is to enroll a bill or joint resolution in the form in which it is finally passed, and this enrolled bill when signed by the presiding officers of both houses, and approved by the executive, is filed and preserved in one of the public offices, ordinarily that of the secretary of state, as a permanent record.[15]

1. Minutes of Judge.—McCormick *v.* Wheeler, 36 Ill. 114, 85 Am. Dec. 388; Callanan *v.* Votruba, 104 Iowa 672, 65 Am. St. Rep. 538; Traer *v.* Whitman, 56 Iowa 443; Miller *v.* Wolf, 63 Iowa 233; State *v.* Manley, 63 Iowa 344; Burroughs *v.* Ellis, 76 Iowa 649; Rogers *v.* Morton, 51 Iowa 709; Lewis *v.* May, 22 Iowa 599.

But see Boal *v.* King, Wright (Ohio) 223, *affirmed* 6 Ohio 11, in which case the plaintiffs offered in evidence the minutes of the court concerning a proceeding in 1800 and proved that there was no other record, and the court admitted the evidence, saying: "It is the only record of those early times. However informal, it is good until reversed."

Such Minutes May Tend to Show that a Judgment or Decree Has Been Ordered. — Callanan *v.* Votruba, 104 Iowa 672, 65 Am. St. Rep. 538; *In re* Edwards, 58 Iowa 431.

2. Minutes of Justice of the Peace. — West *v.* Hayes, 51 Conn. 533; Davidson *v.* Slocomb, 18 Pick. (Mass.) 464; Baldwin *v.* Prouty, 13 Johns. (N. Y.) 430; Story *v.* Kimball, 6 Vt. 541; Ellsworth *v.* Learned, 21 Vt. 535.

3. Strong *v.* Bradley, 13 Vt. 9; Nye *v.* Kellam, 18 Vt. 594.

4. Wright *v.* Fletcher, 12 Vt. 431.

5. Judgment Book. — See Brown *v.* Hathaway, 10 Minn. 303; Rockwood *v.* Davenport, 37 Minn. 533, 5 Am. St. Rep. 872; Williams *v.* McGrade, 13 Minn. 46; Ferguson *v.* Kumler, 25 Minn. 183; Thompson *v.* Bickford, 19 Minn. 17.

6. Record Book. — See Case *v.* Plato, 54 Iowa 64.

7. Judgment Docket. — See the following cases: Case *v.* Plato, 54 Iowa 64; Rockwood *v.* Davenport, 37 Minn. 533, 5 Am. St. Rep. 872; Sears *v.* Burnham, 17 N. Y. 445; Sheridan *v.* Andrews, 49 N. Y. 478; Whitney *v.* Townsend, 67 N. Y. 40; Sheridan *v.* Linden, 81 N. Y. 182; Amundson *v.* Wilson, (N. Dak. 1902) 91 N. W. Rep. 37; Western Loan, etc., Co. *v.* Currey, 39 Oregon 407.

8. Register of Actions. — See Cooper *v.* People, 28 Colo. 87; Brown *v.* Hathaway, 10 Minn. 303; Western Loan, etc., Co. *v.* Currey, 39 Oregon 407.

9. Execution Docket. — See Hartley *v.* Chandler, 6 Ala. 857; Dunlap *v.* Berry, 5 Ill. 327, 39 Am. Dec. 413; Becker *v.* Quigg, 54 Ill. 390; Green *v.* Goodrum, 4 Met. (Ky.) 274; Western Loan, etc., Co. *v.* Currey, 39 Oregon 407.

10. Appearance Docket. — See Haverly *v.* Alcott, 57 Iowa 171; O'Driscoll *v.* Soper, 19 Kan. 574.

11. Fee Book. — See Western Loan, etc., Co. *v.* Currey, 39 Oregon 407.

12. Jury Book. — See Western Loan, etc., Co. *v.* Currey, 39 Oregon 407.

13. Treat *v.* Maxwell, 82 Me. 76. See also Valentine *v.* Norton, 30 Me. 200; Lawrence *v.* Mt. Vernon, 35 Me. 100.

14. Orders and Proceedings in Aid of Execution. — Hence, copies of the same, certified to by the probate judge, are not admissible in evidence for the purpose of showing what orders and proceedings were made and had. Bowersock *v.* Adams, 55 Kan. 681.

15. Enrolled Bill. — Sherman *v.* Story, 30 Cal. 253, 89 Am. Dec. 93; Harpending *v.* Haight, 39 Cal. 208; People *v.* Hatch, 19 Ill. 286; Koehler *v.* Hill, 60 Iowa 543; State *v.* Whisner, 35 Kan. 280; Pangborn *v.* Young, 32 N. J. L. 29; People *v.* Devlin, 33 N. Y. 282, 88 Am. Dec. 377; Com. *v.* Martin, 107 Pa. St. 185.

The Regular Course of Proceedings in *California* is, after all amendments proposed to a

2. Legislative Journal. — It is very frequently required, or at least contemplated in state constitutions, that each branch of the legislature shall keep a journal of its proceedings,[1] and where this is true the journal so kept is ordinarily regarded as a public record.[2]

V. Miscellaneous Public Records — 1. What Are Public Records — *a.* In General. — As a general rule, it may be stated that books and memorials kept by public officers pursuant to statutory directions,[3] or even books necessary and appropriate to the proper discharge of the duties of the office, are considered as public records.[4] Accordingly it has been held that the force and effect of public records should be given to the records of the governor's office[5] or that of the adjutant-general of a state;[6] the records of a town clerk;[7]

bill have been acted upon, to engross the bill as amended. After engrossment it is put upon its final passage. After it has passed both Houses it is enrolled by the enrolling clerk of the House in which it originated. After enrollment it is passed to the committee on enrolment of that House, and, upon their report that it is correctly enrolled, the act thus enrolled has indorsed upon it the date of its passage through their respective Houses, certified by the secretary of the Senate and clerk of the Assembly. It is then signed by the president of the Senate and speaker of the House, approved by the governor, and deposited with the secretary of state, whose duty it is to retain the "custody of and carefully preserve * * * the manuscript containing the enrolled acts and joint resolutions * * * of the legislature." Sherman *v.* Story, 30 Cal. 253, 89 Am. Dec. 93.

English Practice. — See College of Physicians *v.* Cooper, 3 Keb. 587; Rex *v.* Arundel, Hob. 109.

Municipal Ordinances. — See the title Ordinances, vol. 21, p. 968.

1. See State *v.* Mason, 43 La. Ann. 590; Lincoln *v.* Haugan, 45 Minn. 451; Pacific R. Co. *v.* Governor, 23 Mo. 365.

2. Journal a Public Record — *United States.* — South Ottawa *v.* Perkins, 94 U. S. 260; Gardner *v.* Collector, 6 Wall. (U. S.) 499; Watkins *v.* Holman, 16 Pet. (U. S.) 56.

Alabama. — State *v.* Buckley, 54 Ala. 602; Moody *v.* State, 48 Ala. 115, 17 Am. Rep. 28; Jones *v.* Hutchinson, 43 Ala. 721.

California. — Oakland Paving Co. *v.* Hilton, 69 Cal. 494.

Illinois. — Rockford, etc., R. Co. *v.* Lynch, 67 Ill. 149; Grob *v.* Cushman, 45 Ill. 119; Bedard *v.* Hall, 44 Ill. 91; Illinois Cent. R. Co. *v.* Wren, 43 Ill. 77; Turley *v.* Logan County, 17 Ill. 151; Spangler *v.* Jacoby, 14 Ill. 297, 58 Am. Dec. 571.

Indiana. — State *v.* Denny, 118 Ind. 449; McCulloch *v.* State, 11 Ind. 430.

Iowa. — Koehler *v.* Hill, 60 Iowa 543.

Michigan. — People *v.* Mahaney, 13 Mich. 481.

New York. — People *v.* Chenango County, 8 N. Y. 317.

Ohio. — Fordyce *v.* Godman, 20 Ohio St. 1; State *v.* Moffitt, 5 Ohio 358; Miller *v.* State, 3 Ohio St. 475.

Pennsylvania. — Albertson *v.* Robeson, 1 Dall. (Pa.) 9.

South Carolina. — State *v.* Smalls, 11 S. Car. 262; State *v.* Platt, 2 S. Car. 150, 16 Am. Rep. 647.

Texas. — Houston, etc., R. Co. *v.* Odum, 53 Tex. 343.

West Virginia. — Osburn *v.* Staley, 5 W. Va. 85, 13 Am. Rep. 640.

Wisconsin. — McDonald *v.* State, 80 Wis. 407; *In re* Ryan, 80 Wis. 414.

Journal Not a Record. — See Auditor *v.* Haycraft, 14 Bush (Ky.) 288; Green *v.* Weller, 32 Miss. 650; Com. *v.* Martin, 107 Pa. St. 185.

The Journals of the House of Lords are evidence to prove not only an address to the king, but the king's answer to the House. R. *v.* Franklin, *cited* in Rex *v.* Holt, 5 T. R. 445.

Journals of House of Commons. — See Rex *v.* Gordon, 2 Dougl. 590.

Minutes of Common Council of Municipality. — See the title Ordinances, vol. 21, p. 969.

3. The General Principle is that to entitle records to be received in evidence, they must be public documents or official registers which are sanctioned or authorized by law. Morrissey *v.* Wiggins Ferry Co., 47 Mo. 521.

It Rests with the Legislature to determine what shall become an archive. Texas Mexican R. Co. *v.* Jarvis, 69 Tex. 527; Downing *v.* Diaz, 80 Tex. 436.

A Book Published under a Resolve of the Legislature, containing the record of volunteers in the civil war, has been considered a public record. Worcester *v.* Northborough, 140 Mass. 397.

4. Express Statutory Direction Not Necessary. — Kyburg *v.* Perkins, 6 Cal. 675; Coleman *v.* Com., 25 Gratt. (Va.) 865, 18 Am. Rep. 711. See also Cooper *v.* People, 28 Colo. 87; New York Cent., etc., R. Co. *v.* Brockway Brick Co., 10 N. Y. App. Div. 387, *affirmed* 158 N. Y. 470.

The Book Need Not Be Indispensable; it is sufficient that it be directed by the proper authority to be kept. Kyburg *v.* Perkins, 6 Cal. 675.

Duty to Keep Records. — Whenever a written record of the transactions of a public officer in his office is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that memorial, whether expressly required so to do or not; and when kept it becomes a public document — a public record belonging to the office and not to the officer; is the property of the state and not of the citizen, and is in no sense a private memorandum. Coleman *v.* Com., 25 Gratt. (Va.) 865, 18 Am. Rep. 711; State *v.* Donovan, 10 N. Dak. 203.

5. State *v.* Peelle, 124 Ind. 515. See also Penitentiary Co. No. 2 *v.* Gordon, 85 Ga. 159.

6. Enfield *v.* Ellington, 67 Conn. 459.

7. The Records of a Town Clerk were admitted

the books of the secretary or clerk of a school district;[1] the books of a collector of customs;[2] the records of a post-office;[3] a town clerk's record books;[4] the record of the proceedings of county commissioners;[5] the official book in which the enrollment in a militia company is kept;[6] poll books;[7] the execution book of a county treasurer;[8] books kept by the sheriff recording the issue of liquor licenses;[9] a daybook kept by the copyright clerk of a United States district court;[10] books and papers relating to the sinking fund of the state;[11] the records kept by notaries of their official acts;[12] the record kept by a public weigher of cotton;[13] lighthouse records;[14] the record of lamps kept in the city engineer's office and the register kept by the gas inspector;[15] and a paper directed by law to be deposited among the archives of the city to evidence the fact of its foundation, etc.[16]

What Are Not Public Records. — A book in the custody of the clerk of the county court and termed a "Register of Swamp Lands" has, however, been held to be not a public record, there being no statute requiring any such book to be kept,[17] and the record of a notice of appropriation of water has no force or validity where there is no law authorizing the recording of such a notice.[18] A census or list containing the names and ages of half-breeds who are regarded as entitled to participate in the allotment of Indian lands under a treaty, filed in the office of Indian Affairs, is not an official record;[19] and the blotter of a city police department is at best but a record required for specific purposes and not a public record in such sense as to make its contents evidence of the facts as between private parties.[20] It has also been held that certificate books

in evidence in a *Maine* case on the ground that they pertained to the *res gestæ*, were the acts of the town, and were ancient historical records. And the court said that it did not matter whether they were kept with technical accuracy or not. Greenfield *v.* Camden, 74 Me. 56.

Record of Marriages kept by town clerk pursuant to statute. Shutesbury *v.* Hadley, 133 Mass. 242; Kennedy *v.* Doyle, 10 Allen (Mass.) 161.

The Corporation Books of a Municipal Corporation are generally allowed to be given in evidence when they have been publicly kept as such and the entries made by the proper officer. Rex *v.* Mothersell, 1 Stra. 93.

1. Sanborn *v.* School Dist. No. 10, 12 Minn. 17; Wormley *v.* District Tp., 45 Iowa 666.

2. **Books Recording Bill of Sale of Vessel.** — Merchants' Nav. Co. *v.* Amsden, 25 Ill. App. 307.

Books Recording Manifest. — U. S. *v.* Johns, 4 Dall. (Pa.) 412.

Enrolment of Steamboat in Office of Collector of Customs. — Sampson *v.* Noble, 14 La. Ann. 346. See also Moore *v.* Anderson, 8 Ind. 18. But *compare* Sharp *v.* United Ins. Co., 14 Johns. (N. Y.) 201; Leonard *v.* Huntington, 15 Johns. (N. Y.) 298; Miller *v.* Hill, 10 Humph. (Tenn.) 470.

3. **Post-office Records.** — Merriam *v.* Mitchell, 13 Me. 439, 29 Am. Dec. 514.

Record of Registered Letters. — Gurney *v.* Howe, 9 Gray (Mass.) 404, 69 Am. Dec. 299.

4. People *v.* Hancock County, 21 Ill. App. 271.

Book Recording Quota of Troops Furnished During Civil War. — Wayland *v.* Ware, 104 Mass. 46.

5. **Proceedings of County Commissioners.** — Johnson *v.* Wakulla County, 28 Fla. 720.

6. Thorn *v.* Case, 21 Me. 393.

7. Piatt *v.* People, 29 Ill. 54; State *v.* Hoblitzelle, 85 Mo. 629, 55 Am. Rep. 390, 20 Cent. L. J. 457; Phelps *v.* Schroder, 26 Ohio St. 549.

Registrar's Lists of Electors. — Enfield *v.* Ellington, 67 Conn. 459; State *v.* Williams, 96 Mo. 13.

8. Dent *v.* Bryce, 16 S. Car. 1.

9. Albrecht *v.* State, 62 Miss. 516.

10. **A Daybook** kept by the copyright clerk of a United States District Court, showing the titles of the copyrights, when tendered, the nature of the articles upon which copyrights are sought, the dates of applications, and the times when the articles themselves were deposited, is a record kept by a person "in the discharge of a public duty." Daly *v.* Webster, 1 U. S. App. 573.

11. **Warrant Book of Sinking Fund.**—Coleman *v.* Com., 25 Gratt. (Va.) 865, 18 Am. Rep. 711.

Lists of Lands Belonging to Commissioner of Sinking Fund. — Kerr *v.* Farish, 52 Miss. 101.

12. See the title NOTARY PUBLIC, vol. 21, p. 575.

13. See Springs *v.* South Bound R. Co., 46 S. Car. 104.

14. The Maria Das Dores, Brown & L. 27, 32 L. J. Adm. 163.

15. St. Louis Gas Light Co. *v.* St. Louis, 86 Mo. 495.

16. **A Paper Directed to Be Deposited Among the Archives of a City** to evidence the fact of its foundation, its municipal organization, the duties, powers and rights conferred upon it, and also the rights conferred on its inhabitants, is essentially a public record. Texas Mexican R. Co. *v.* Jarvis, 69 Tex. 527.

17. Carrington *v.* Potter, 37 Fed. Rep. 767.

18. Cruse *v.* McCauley, 96 Fed. Rep. 369.

19. Hegler *v.* Faulkner, 153 U. S. 109.

20. Kerr *v.* Metropolitan St. R. Co., (Supm. Ct. App. T.) 27 Misc. (N. Y.) 190, *reversing* (N. Y. City Ct. Gen. T.) 55 N. Y. Supp. 1142.

of collectors of tolls on a canal operated by lessees from the state, though kept pursuant to statute, are not public records;[1] and that copies of entries on the books of the war department, certified to by the secretary of war, as to the mustering in of recruits, are in no proper sense records importing absolute verity and are not conclusive evidence of the facts stated therein.[2]

b. PROCEEDINGS OF PUBLIC OFFICERS. — The effect of public records should be accorded to the record of the proceedings of a city council,[3] county commissioners,[4] commissioners of highways,[5] county school directors,[6] justices,[7] or a municipal board of public improvements;[8] the selectmen's books, containing a record of their doings in committing a person to the insane hospital;[9] the county school superintendent's books, recording the results of examinations of teachers;[10] a book kept by a county school commissioner, recording his transactions in selling the school lands in his county;[11] and the record of the proceedings of a town or school district meeting.[12]

c. PUBLIC ACCOUNTS. — The effect of public records should also be given to the books of the state auditor;[13] the warrant book of the sinking fund, kept in the office of the second state treasurer;[14] books kept by selectmen, containing accounts of the finances and expenses of the town;[15] the books of accounts kept in the office of an alcalde;[16] the record kept, pursuant to statute, by the clerk of a state house of correction, of the accounts of the institution;[17] the bank pass book kept by the state treasurer;[18] a book kept by the county clerk, showing the account of the county with its treasurer;[19] a book kept by the county treasurer as directed by statute for the purpose of showing all items or amounts received from the tax collector as such,[20] or the books of account of a state house of correction;[21] and the account books of a paymaster are so far public books as to authorize the United States to use them in evidence.[22] But a book called the "county ledger," required by statute to be kept by the county clerk, has been denied the characteristics and effect of a record in evidence, because there was no statute making it admissible in evidence,[23] and it has been held that the official account books of a town are not public records in any such sense as to make their contents evidence;[24] and similarly an account kept by the assessor of taxes with an acknowledgment of indebtedness to the state has been held not to be of the dignity of a record.[25]

d. TAX RECORDS. — Books relating to taxes and tax sales should also be considered as public records, as, for example, tax assessors' or selectmen's books

1. Such books stand on the same footing as the books of a trader or merchant. Chaffee *v.* U. S., 18 Wall. (U. S.) 516.
2. Chapman Tp. *v.* Herrold, 58 Pa. St. 106.
3. Weith *v.* Wilmington, 68 N. Car. 24.
4. Brown *v.* Bon Homme County, 1 S. Dak. 216; Beebe *v.* Scheidt, 13 Ohio St. 406.

Minutes of Proceedings of Police Jury. — State *v.* Simmons, 40 La. Ann. 758.

5. People *v.* Madison County, 23 Ill. App. 386, 125 Ill. 334.
6. Gearhart *v.* Dixon, 1 Pa. St. 224.

Board of Education. — Board of Education *v.* Moore, 17 Minn. 412.

7. Chamberlain *v.* Sands, 27 Me. 467.
8. Fruin Bambrick Constr. Co. *v.* Geist, 37 Mo. App. 509.
9. Jay *v.* Carthage, 48 Me. 353; Eastport *v.* East Machias, 35 Me. 402.
10. School-Dist. No. 10 *v.* Thelander, 32 Minn. 476.
11. Hedrick *v.* Hughes, 15 Wall. (U. S.) 123.

12. Town Meeting. — A town clerk's minutes of the proceedings of a town meeting are considered as records when offered in evidence. People *v.* Zeyst, 23 N. Y. 140. See also Cabot *v.* Britt, 36 Vt. 349.

School District Meeting. — State *v.* Eden, 54 Mo. App. 31.

13. Brewer *v.* Watson, 71 Ala. 299, 46 Am. Rep. 318; Vail *v.* McKernan, 21 Ind. 421; State *v.* Masters, 26 La. Ann. 268.
14. Coleman *v.* Com., 25 Gratt. (Va.) 865, 18 Am. Rep. 711.
15. Thornton *v.* Campton, 18 N. H. 20.
16. Kyburg *v.* Perkins, 6 Cal. 675.
17. People *v.* Kemp, 76 Mich. 410.
18. Com. *v.* Tate, 89 Ky. 587.
19. Rizer *v.* Callen, 27 Kan. 339.
20. Walling *v.* Morgan County, 126 Ala. 326.
21. People *v.* Kemp, 76 Mich. 410.
22. U. S. *v.* Kuhn, 4 Cranch (C. C.) 401.
23. King *v.* Ireland, 68 Tex. 682.
24. Darlington *v.* Atlantic Trust Co., 25 U. S. App. 354.

25. Account Kept by Assessor of Taxes.—"There is no statute which requires the assessors to make such acknowledgments, and no statute which gives to such a paper as the one in question the dignity of a public record." Highsmith *v.* State, 25 Tex. Supp. 137.

containing assessment of taxes,[1] the book of the collector of internal revenue containing the record of the names of persons paying special taxes,[2] tax lists required by statute to be filed in the office of the county clerk,[3] a county treasurer's book of tax sales,[4] "stub receipt books," containing the data of canceled tax certificates, and of lots sold for delinquent city taxes and afterwards redeemed, or the sales assigned by the city to individuals,[5] sales books kept by the receiver of taxes, containing a statement of the sale of lands for delinquent taxes and turned over to the city treasurer, in whose custody it remains, and who, when sales are redeemed or city bids sold, minutes the same therein,[6] or a book known as the "Sale and Redemption Record," kept by the county clerk for the entry of all proceedings in the sale of lands for taxes.[7] But in *Kansas*, a bound book of stubs of tax sale certificates has been held not to be a public record, there being no law requiring any such book to be kept.[8]

e. MAPS AND PLATS. — The effect of public records has been accorded to maps made by authority of law,[9] a map and field book of the survey of a tract of land deposited in a public office,[10] plat books kept by county recorders,[11] maps filed pursuant to a statute requiring all railroad companies to file in the office of the clerks of the counties through which their road passes a map and profile of the lines of their roads, and of any amended or changed location thereof,[12] a record of surveys kept by a county surveyor pursuant to statute,[13] and a book recording the survey of a road.[14]

f. RECORDS OF PUBLIC INSTITUTIONS. — The full force and effect of public records is given to the records of public institutions kept in compliance with some law or authority or by the officers thereof in the performance of their duty,[15] such as a hospital register kept by the superintendent of a state hospital for the insane,[16] or the daily record of an inmate of such a hospital,[17] and even a record of the weather kept at a state insane asylum for a number of years has been admitted in evidence for the purpose of showing the temperature and weather on a certain day.[18] But the court has refused to hold, in the absence of any statute making it so, that a written charge made to the directors of a public institution against an officer thereof is a part of the public records and as such open to inspection.[19]

g. SIGNAL SERVICE RECORDS. — The records of the United States Signal Service Department are of a public nature;[20] as are also the records of a

1. Dudley *v.* Chilton County, 66 Ala. 593; Pittsfield *v.* Barnstead, 40 N. H. 477.

State Land Tax Book. — Aitcheson *v.* Huebner, 90 Mich. 643.

2. State *v.* Gorham, 65 Me. 270.

3. Banking House *v.* Darr, 139 Mo. 660.

4. Groesbeck *v.* Seeley, 13 Mich. 329.

5. Burton *v.* Tuite, 80 Mich. 218.

6. Burton *v.* Tuite, 78 Mich. 363.

7. Gage *v.* Davis, 129 Ill. 236, 16 Am. St. Rep. 260.

8. Noble *v.* Douglass, 56 Kan. 92.

9. Henry *v.* Dulle, 74 Mo. 443.

10. People *v.* Denison, 17 Wend. (N. Y.) 312. See also Dudley *v.* Chilton County, 66 Ala. 593; Ott *v.* Soulard, 9 Mo. 581.

11. Miller *v.* Indianapolis, 123 Ind. 196. But see Smith *v.* Lawrence, 12 Mich. 431, in which a plat book found in the office of the register of deeds was considered not to be a record.

12. New York Cent., etc., R. Co. *v.* Brockway Brick Co., 10 N. Y. App. Div. 387, *affirmed* 158 N. Y. 470.

13. See Pugh *v.* Schindler, 127 Mich. 191.

14. Merrill *v.* Kalamazoo, 35 Mich. 211.

15. **Records of Public Institutions.** — Butler *v.* St. Louis L. Ins. Co., 45 Iowa 93. But see Colnon *v.* Orr, 71 Cal. 43.

16. Naanes *v.* State, 143 Ind. 299.

17. Townsend *v.* Pepperell, 99 Mass. 40; Hempton *v.* State, 111 Wis. 127.

18. De Armond *v.* Neasmith, 32 Mich. 231. See also People *v.* Dow, 64 Mich. 717, 8 Am. St. Rep. 873.

19. Colnon *v.* Orr, 71 Cal. 43.

20. **Records of Signal Service Department.** — Evanston *v.* Gunn, 99 U. S. 660; Chicago, etc., R. Co. *v.* Trayes, 17 Ill. App. 136; People *v.* Dow, 64 Mich. 717, 8 Am. St. Rep. 873.

But Such Records Are Not the Only Evidence of the facts stated therein, such facts being open to the observation of anybody, and capable of being established satisfactorily by oral testimony or minutes kept by a private person, if such minutes refresh his recollection. People *v.* Dow, 64 Mich. 717, 8 Am. St. Rep. 873.

In a Criminal Case the accused is entitled to be confronted with and have the testimony of the person who took the observations and made the record of the same, and without the presence of such person the records cannot be introduced. People *v.* Dow, 64 Mich. 717, 8 Am. St. Rep. 873.

United States weather bureau.[1]

h. LAND OFFICE RECORDS. — The books and files properly kept in the various land offices are public records,[2] and the same has been held of the records of land grants in the office of the secretary of state.[3]

i. PATENTS. — Patents for inventions are public records.[4]

j. REPORTS OR RETURNS. — Where a person is by law or by authority of law required to make a report or return of his acts, the report is a public record of those acts,[5] or if he is required to ascertain facts and include in his return a statement thereof, then it is a record of such facts,[6] but such a report or return is a record only of those facts which he was specifically directed to inquire into,[7] and not as to statements which are simply inferences or conclusions of the person making the report, even though these are required to be set forth.[8]

k. COPIES FILED IN PUBLIC OFFICE. — When a statute directs that copies of certain documents be made and filed in a public office, such copies become public records.[9]

l. PAPERS DEPOSITED IN PUBLIC OFFICE WITHOUT AUTHORITY. — A paper does not become a public record merely from the fact of its being deposited in a public office unless it is of a public nature, or there is some authority in law for its being filed or recorded in such office,[10] though it has been considered that a paper or book kept in such an office and generally

1. Weather Bureau. — Huston *v.* Council Bluffs, 101 Iowa 33.

The Records of a Volunteer Weather Observer, appointed by the United States government, are public in their nature. Knott *v.* Raleigh, etc., R. Co., 98 N. Car. 73, 2 Am. St. Rep. 321.

2. Land Office Records — *United States.* — Galt *v.* Galloway, 4 Pet. (U. S.) 331; Dubois *v.* Newman, 4 Wash. (U. S.) 74; Culver *v.* Uthe, 133 U. S. 655.

Alabama. — Holmes *v.* State, 108 Ala. 24; Stephens *v.* Westwood, 25 Ala. 716.

Florida. — Bell *v.* Kendrick, 25 Fla. 778.

Illinois. — Lane *v.* Bommelmann, 17 Ill. 95.

Louisiana. — Beauvais *v.* Wall, 14 La. Ann. 195.

Montana. — Chambers *v.* Jones, 17 Mont. 156.

Texas. — Downing *v.* Diaz, 80 Tex. 436; Smith *v.* Hughes, 23 Tex. 248; Van Sickle *v.* Catlett, 75 Tex. 404.

See generally the title STATE AND PUBLIC LANDS.

Muster Rolls, made out from the records in the office of the adjutant-general and filed in the general land office, are treated as public records. Stone Land, etc., Co. *v.* Boon, 73 Tex. 548.

Grants or Patents from the sovereign are enrolled in the office from which they emanate and are then records. Candler *v.* Lunsford, 4 Dev. & B. L. (20 N. Car.) 19; Clarke *v.* Diggs, 6 Ired. L. (28 N. Car.) 159, 44 Am. Dec. 73.

Papers Not Pertaining to Records. — Mapes *v.* Leal, 27 Tex. 345.

The Voluntary Affidavit of a Surveyor as to a survey made by him is not an archive of the land office. Daniels *v.* Fitzhugh, 13 Tex. Civ. App. 300; Barrow *v.* Gridley, (Tex. Civ. App. 1900) 59 S. W. Rep. 913, denying hearing of 59 S. W. Rep. 602.

The Blotters Found in the Land Office are not the records of any public transaction, but are private memoranda kept by a clerk for his own convenience and that of other officers in settling their accounts with the government and with one another. Hence they are not entitled to the force and effect of public records. Fox *v.* Lyon, 27 Pa. St. 9. See also Strimpfler *v.* Roberts, 18 Pa. St. 283, 57 Am. Dec. 606.

The Report of the Surveyor-General to the Commissioner of the General Land Office, detailing the history of his operations in making a survey, is inadmissible in evidence to prove the location of the land surveyed. Clark *v.* Hammerle, 36 Mo. 620.

3. New York Cent., etc., R. Co. *v.* Brockway Brick Co., 10 N. Y. App. Div. 387, *affirmed* 158 N. Y. 470.

4. Boyden *v.* Burke, 14 How. (U. S.) 575.

5. Reports and Returns. — Watson *v.* Insurance Co. of North America, 2 Wash. (U. S.) 152; Hiner *v.* People, 34 Ill. 297; Board of Control *v.* Royes, 48 La. Ann. 1061; Erickson *v.* Smith, (Ct. App.) 38 How. Pr. (N. Y.) 454. See also Leonard *v.* New York Cent., etc., R. Co., 44 N. Y. Super. Ct. 575; People *v.* Minck, 21 N. Y. 539; Dulaney *v.* Dunlap, 3 Coldw. (Tenn.) 306. And see the title DOCUMENTARY EVIDENCE, vol. 9, p. 877.

6. Seavey *v.* Seavey, 37 N. H. 125. See also Hayward *v.* Bath, 38 N. H. 179.

7. Swift *v.* State, 89 N. Y. 52.

8. Bohr *v.* Neuenschwander, 120 Ind. 449; Coyner *v.* Boyd, 55 Ind. 166; Erickson *v.* Smith, (Ct. App.) 38 How. Pr. (N. Y.) 454. But see Eel River Draining Assoc. *v.* Topp, 16 Ind. 242.

9. Stone Land, etc., Co. *v.* Boon, 73 Tex. 548. See also Hedden *v.* Overton, 4 Bibb (Ky.) 406; Owings *v.* Ulery, 4 Bibb (Ky.) 450; Rogers *v.* Barnett, 4 Bibb (Ky.) 480; Gholson *v.* Lefever, Litt. Sel. Cas. (Ky.) 191.

10. Papers Deposited Without Authority. — Brown *v.* Hicks, 1 Ark. 232; Reading *v.* Mullen, 31 Cal. 104; Colnon *v.* Orr, 71 Cal. 43; Haile *v.* Palmer, 5 Mo. 403, Bouchaud *v.* Dias, 3 Den. (N. Y.) 238; Broxson *v.* McDougal, 63 Tex. 193.

recognized as a public record for a long period of time may be admitted and treated as such.[1]

2. Sufficiency of Records. — In determining the sufficiency of the records of inferior tribunals and public boards, to express their purposes or to preserve a memorial of their transactions respecting matters within their jurisdiction, technical precision should not be required; on the contrary, they should be liberally construed, and however informal their records may be, if enough appears to show with reasonable certainty that the requirements of the law have been substantially complied with, their proceedings should, upon grounds of public policy if for no other reason, be sustained.[2] Nor should their proceedings be attacked in detail, and an entry or an order separated from the balance of the record, and, if found incomplete when considered alone, the proceedings declared erroneous; instead, the whole is to be construed together, and, if from the entire record it appears that all the statutory steps have been substantially taken, the proceedings should be upheld.[3]

3. Minutes of Proceedings. — Where the secretary of a board of education who was required by statute to keep a record of the proceedings of the board kept minutes at the meeting and the next day transcribed them into the records, the records so made and not the minutes were the original, and consequently the minutes were no longer admissible in evidence.[4]

4. Custody of Records. — Public records are not invalidated by any irregularity in the official oath of their custodian.[5]

VI. Quasi-public Records — 1. In General. — There are also other records, which partake both of a public and a private nature and are treated as the one or the other, sometimes according to the nature of their subject-matter, but generally according to the relation in which one stands to them. Among these may be mentioned the court rolls and books of a manor,[6] heralds' books,[7] the books and numerical lists of the commissioners of a public lottery,[8] and the books and records of the proprietors of common lands.[9]

2. Books of Corporations. — The books of a corporation established for public purposes are the best evidence of their acts and ought to be admitted in evidence whenever those acts are to be proved.[10] And as between the members of or stockholders in a private corporation, the corporate books have to a certaint extent the force and effect of public records, though as to third persons they are merely private books.[11] Questions connected with the admissibility

1. See Sumner *v.* Sebec, 3 Me. 223; St. Louis Public Schools *v.* Erskine, 31 Mo. 110; Whitehouse *v.* Bickford, 29 N. H. 471.

2. Technical Precision Not Required. — Lewis *v.* Laylin, 46 Ohio St. 663. See also Piatt *v.* People, 29 Ill. 54; State *v.* Ring, 29 Minn. 78.

Presumption in Aid of Record. — See Covington *v.* Ludlow, 1 Met. (Ky.) 295; Lexington *v.* Headley, 5 Bush (Ky.) 508.

Jurisdictional Facts Not Presumed. — Matter of Buffalo, 78 N. Y. 362.

Record Must Show Compliance with Statutory Requirements. — Morrison *v.* Lawrence, 98 Mass. 219; Lowell *v.* Wheelock, 11 Cush. (Mass.) 391.

Minutes of City Council. — In the absence of any statutory provision requiring the records of the meetings of the common council of a city to be kept in a bound volume or in any compact or particular form, the minutes of a meeting of the council, taken down by the clerk at the time and approved by the council, are, when verified by the clerk, evidence of the proceedings of the council, though they have never been copied into any bound volume. O'Mally *v.* McGinn, 53 Wis. 353.

3. Entire Record Taken Together. — Lewis *v.* Laylin, 46 Ohio St. 663.

4. Board of Education *v.* Moore, 17 Minn. 412.

5. Mason *v.* Belfast Hotel Co., 89 Me. 384.

6. See Doe *v.* Askew, 10 East 520; Crew *v.* Saunders, 2 Stra. 1005; Groenvelt *v.* Burrell, 1 Ld. Raym. 252; Warriner *v.* Giles, 2 Stra. 95.

7. Heralds' Books are good evidence as to pedigrees. Stainer *v.* Droitwich, 1 Salk. 281, 12 Mod. 86, Skin. 623, Holt K. B. 290. See generally the title Pedigree, vol. 22, p. 640.

8. Schinotti *v.* Bumstead, *cited* in 1 Tidd's Pr. 595.

9. Tolman *v.* Emerson, 4 Pick. (Mass.) 160; Monumoi Great Beach *v.* Rogers, 1 Mass. 159; Whitehouse *v.* Bickford, 29 N. H. 471; Cobleigh *v.* Young, 15 N. H. 493.

10. Corporation Established for Public Purposes. — Owings *v.* Speed, 5 Wheat. (U. S.) 420.

Books of Bank of England. — See Mortimer *v.* M'Callan, 6 M. & W. 58.

Books of East India Company. — See Gery *v.* Hopkins, 7 Mod. 129, 2 Ld. Raym. 851.

11. Books of Private Corporations.—See White Mountains R. Co. *v.* Eastman, 34 N. H. 124;

in evidence of such books have been fully discussed elsewhere in this work.[1]

3. Druggist's Record of Sales. — A record of sales of intoxicating liquors, which a druggist holding a permit to sell such liquors is required by statute to keep, is a public record.[2]

4. Books of Distiller. — The books of a distiller kept in obedience to statutory requirements have also been considered as *quasi*-records.[3]

5. Ship's Log Book. — The log book of a ship is in no just sense proof *per se* of the facts therein stated except in certain cases provided for by statute.[4]

6. Church or Parish Registers — *a.* ENGLISH RULE. — In England, where there is an established church recognized by law, with authority to legislate in respect to parochial registers, such registers made and preserved by the clergy of the established religion, recording baptisms, marriages, and the like, have always been deemed to be authentic and have the characteristics of public records.[5] But this authenticity was denied in respect to dissenters[6] until, in recent times, the rule recognizing none but registers and similar records of churches of the established religion has been abrogated by statute so as to open the door to many other records which all churches keep, and which are quite as likely to be accurate as those of an established church.[7]

b. AMERICAN RULE. — In the United States, there being no religion established by law, church and parish registers are not regarded as public documents or given the force of public records unless they are kept pursuant to some statute,[8] or in some other way a legislative intent that they shall have the force of public records has been indicated.[9] In a number of cases,

Wetherbee *v.* Baker, 35 N. J. Eq. 501; Allen *v.* Coit, 6 Hill (N. Y.) 318; Com. *v.* Woelper, 3 S. & R. (Pa.) 29, 8 Am. Dec. 628; Pittsburgh, etc., R. Co. *v.* Applegate, 21 W. Va. 172.

1. See the title DOCUMENTARY EVIDENCE, vol. 9, pp. 891–897.

2. Druggist's Record of Sales. — State *v.* Donovan, 10 N. Dak. 203.

3. Books of Distiller. — U. S. *v.* Myers, 1 Hughes (U. S.) 533.

4. Ship's Log Book. — U. S. *v.* Gibert, 2 Sumn. (U. S.) 19.

Statutes. — See 17 & 18 Vict., c. 104, §§ 280, 287; Cloutman *v.* Tunison, 1 Sumn. (U. S.) 373; Orne *v.* Townsend, 4 Mason (U. S.) 541. See generally the titles SEAMEN; SHIPS AND SHIPPING.

The Log Books of the Navy are records in *England*. 2 Taylor on Ev. (Am. ed. 1887), § 1485.

5. English Rule — Established Church. — Stainer *v.* Droitwich, 1 Salk. 281, 12 Mod. 86, Skin. 623, Holt K. B. 290; Doe *v.* Barnes, 1 M. & Rob. 386; Wihen *v.* Law, 3 Stark. 63, 14 E. C. L. 163; Birt *v.* Barlow, 1 Dougl. 171; Draycott *v.* Talbot, 3 Bro. P. C. (Toml. ed.) 564; May *v.* May, 2 Stra. 1073; Morrissey *v.* Wiggins Ferry Co., 47 Mo. 521. See also Lynch *v.* Clerke, 3 Salk. 154.

6. Dissenters. — Whittuck *v.* Waters, 4 C. & P. 375, 19 E. C. L. 427; Doe *v.* Bray, 8 B. & C. 813, 15 E. C. L. 339, 3 M. & R. 428; *Exp.* Taylor, 1 Jac. & W. 463, 3 M. & R. 430, note; D'Aglie *v.* Fryer, 13 L. J. Ch. 398; Kennedy *v.* Doyle, 10 Allen (Mass.) 161; Morrissey *v.* Wiggins Ferry Co., 47 Mo. 521. See also Huet *v.* Le Mesurier, 1 Cox Ch. 275; Birt *v.* Barlow, 1 Dougl. 171; Athlone's Claim, 8 Cl. & F. 262.

Jewish Record of Circumcision. — The court has refused to receive in evidence a Jewish record of circumcision, kept at the Great Synagogue, in London, though it was proved that the entries in it were in the handwriting of a deceased Chief Rabbi, whose duty it was to perform the rites and to make corresponding entries in the books. Davis *v.* Lloyd, 1 C. & K. 275, 47 E. C. L. 273.

7. Hunt *v.* Supreme Council, etc., 64 Mich. 671, 8 Am. St. Rep. 855

8. Church and Parish Registers Not Records. — Kennedy *v.* Doyle, 10 Allen (Mass.) 161; Morrissey *v.* Wiggins Ferry Co., 47 Mo. 521; Childress *v.* Cutter, 16 Mo. 24; Chambers *v.* Chambers, (Supm. Ct. Spec. T.) 24 Civ. Pro. (N. Y.) 187.

Parish Registers from Another State are not considered as records unless it is shown that they are kept pursuant to a statute of such state. Morrissey *v.* Wiggins Ferry Co., 47 Mo. 521.

The Register of a Church in Wurtemberg is such a record that a marriage may be proved by it. Hutchins *v.* Kimmell, 31 Mich. 126, 18 Am. Rep. 164.

9. Statutes Relating to Church or Parish Registers. — Hebert's Succession, 33 La. Ann. 1099; Morrissey *v.* Wiggins Ferry Co., 47 Mo. 521.

In Pennsylvania as early as 1700 an act was passed "for keeping a registry in religious societies," which provided that "The registry kept by any religious society in their respective meeting book or books of any marriage, birth or burial within this province or the territories thereof, shall be held good and authentic and shall be allowed of on all occasions whatever." Stoever *v.* Whitman, 6 Binn. (Pa.) 416.

While it does not expressly appear in the case, it is probable that the decision in Lewis *v.* Marshall, 5 Pet. (U. S.) 470, that the entries on the register of burials of a church are admissible in evidence to prove the period of the decease of the person named therein, was

however, such registers have been admitted in evidence, especially after the death of the person by whom the entries were made, on the ground that they were made in the ordinary course of business or in the discharge of an official duty.[1]

VII. Amendment of Records — 1. Judicial Records — *a.* Right to Amend. — It is within the power of a court to amend its records in any way which it deems necessary and proper during the term at which a judgment is rendered.[2] After the expiration of such term, however, the record of proceedings which have progressed to a final judgment cannot be amended in matters of substance,[3] though as to matters of form, such as the correction of errors, the supplying of omissions and the like, the record may be amended at any time so as to make it truly show the proceedings and judgment of the court,[4] even

based upon the fact of the register having been kept pursuant to this statute.

The Wisconsin Statute, which makes official certificates of births, marriages, or deaths issued in foreign countries in which such births, marriages, or deaths occurred, purporting to be founded upon books of record, when authenticated as therein prescribed, presumptive evidence of the facts stated in such certificates, does not make a certificate of baptism admissible in evidence. For such certificate does not purport to be a certificate of the birth of the person, and although it may incidentally mention or recite the age of the infant baptized it is no proof of the birth of such infant. Lavin *v.* Mutual Aid Soc., 74 Wis. 349.

1. How Admissible. — Blackburn *v.* Crawford, 3 Wall. (U. S.) 175; Weaver *v.* Leiman, 52 Md. 708; Whitcher *v.* McLaughlin, 115 Mass. 167; Kennedy *v.* Doyle, 10 Allen (Mass.) 161. See also Gaines *v.* Relf, 12 How. (U. S.) 472; Meconce *v.* Mower, 37 Kan. 298; Hunt *v.* Supreme Council, etc., 64 Mich. 671, 8 Am. St. Rep. 855.

In Pennsylvania a copy of the register of births and deaths of people called Quakers in England, proved to be the true one before the Lord Mayor of London, has been allowed to be given in evidence to prove the death of a person. Hyam *v.* Edwards, 1 Dall. (Pa.) 2.

2. Amendment During Term — *United States.* — Whiting *v.* Equitable L. Assur. Soc., (C. C. A.) 60 Fed. Rep. 197; Barrell *v.* Tilton, 119 U. S. 637. See also Carr *v.* Fife, 156 U. S. 494.

California. — Branger *v.* Chevalier, 9 Cal. 351.

Colorado. — Benedict *v.* People, 23 Colo. 126.

Georgia. — Keener *v.* State, 97 Ga. 388.

Iowa. — Maish *v.* Crangle, 80 Iowa 650.

Massachusetts. — Com. *v.* Phillips, 11 Pick. (Mass.) 28.

Missouri. — Williams *v.* Silvey, 84 Mo. App. 433.

Pennsylvania. — Johnson *v.* Com., 115 Pa. St. 369.

Rhode Island. — Hudson *v.* Fishel, 17 R. I. 69.

Texas. — Carr *v.* State, 36 Tex. Crim. 390; Collins *v.* State, 39 Tex. Crim. 30.

Washington. — Sivyer *v.* Lawyer, 25 Wash. 360.

See also the title Judgments and Decrees, vol. 17, pp. 813-815.

Amendment at Adjourned Term. — Keith *v.* State, 91 Ala. 2.

Right of Magistrates to Amend Their Records. — May *v.* Hammond, 146 Mass. 439.

3. After Term Record Cannot Be Amended in Matters of Substance — *United States.* — Manning *v.* German Ins. Co., (C. C. A.) 107 Fed. Rep. 52, *reversing* 100 Fed. Rep. 581.

Alabama. — Browder *v.* Faulkner, 82 Ala. 257; Wilmerding *v.* Corbin Banking Co., 126 Ala. 268.

Dakota. — Territory *v.* Christensen, 4 Dak. 410.

Illinois. — Peterson *v.* Metropolitan Nat. Bank, 88 Ill. App. 190; Schmelzer *v.* Chicago Ave. Sash, etc., Mfg. Co., 85 Ill. App. 596; Schmidt *v.* Rehwinkel, 86 Ill. App. 267.

Kansas. — Barker *v.* Mecartney, 10 Kan. App. 130.

Missouri. — Williams *v.* Silvey, 84 Mo. App. 433.

Nebraska. — Andresen *v.* Lederer, 53 Neb. 128.

New York. — Morrison *v.* Metropolitan El. R. Co., 60 N. Y. App. Div. 180. See also Matter of Kling, 60 N. Y. App. Div. 512.

Oregon. — Hoover *v.* Hoover, 39 Oregon 456.

Texas. — Sass *v.* Hirschfeld, 23 Tex. Civ. App. 1; Abbott *v.* Foster, (Tex. Civ. App. 1901) 62 S. W. Rep. 121; Segal *v.* Armistead, (Tex. Civ. App. 1901) 62 S. W. Rep. 1073.

See also the title Judgments and Decrees, vol. 17, pp. 816-818.

Court May Expunge False or Fraudulent Interpolations After Term. — Blakemore *v.* Wilson, 61 Ill. App. 454.

4. Amendment as to Matters of Form — *United States.* — *In re* Wight, 134 U. S. 136; Lynah *v.* U. S., 106 Fed. Rep. 121; Morgan's Louisiana, etc., R., etc., Co. *v.* Texas Cent. R. Co., 32 Fed. Rep. 525; Nelson *v.* Barker, 3 McLean (U. S.) 379; Cromwell *v.* Pittsburg Bank, 2 Wall. Jr. (C. C.) 569.

Alabama. — Hastings *v.* Alabama State Land Co., 124 Ala. 608.

Arkansas. — Green *v.* State, 19 Ark. 178.

California. — Homeseekers Loan Assoc. *v.* Gleeson, 133 Cal. 312; Kaufman *v.* Shain, 111 Cal. 16, 52 Am. St. Rep. 139; Morrison *v.* Dapman, 3 Cal. 255; Sullivan *v.* Hume, (Cal. 1893) 33 Pac. Rep. 1121.

Dakota. — Territory *v.* Christensen, 4 Dak. 410.

Georgia. — Holman *v.* State, 79 Ga. 155; Baker *v.* Parrott, 105 Ga. 479.

Idaho. — See Wilcox *v.* Wells, (Idaho 1898) 51 Pac. Rep. 985.

Illinois. — Spellmyer *v.* Gaff, 112 Ill. 29; Gillett *v.* Booth, 95 Ill. 183; Church *v.* English, 81 Ill. 442; Werner *v.* Evans, 94 Ill. App. 328; Gross *v.* Sloan, 58 Ill. App. 302; Gebbie *v.*

after an appeal has been taken or a writ of error sued out,[1] or after the judgment has been affirmed in the appellate court.[2]

b. How Amendment Procured. — A party desiring to procure an amendment of the record should proceed by motion [3] with due notice to the other parties.[4] Or the court may amend the record on its own motion.[5] But the clerk cannot of his own motion make any entry of what occurred at a preceding term which has expired.[6]

c. Evidence to Support Amendment. — The weight of authority supports the view that an amendment of the judicial record after the term can be

Mooney, 22 Ill. App. 369, *affirmed* 121 Ill. 255.

Indiana. — Security Co. *v.* Arbuckle, 123 Ind. 518; State *v.* Pearce, 14 Ind. 426.

Iowa. — Day *v.* Goodwin, 104 Iowa 374, 65 Am. St. Rep. 465; Independent Dist. *v.* Ross, 95 Iowa 69.

Kansas. — Matter of Black, 52 Kan. 64.

Kentucky. — Keans *v.* Rankin, 2 Bibb (Ky.) 88.

Louisiana. — State *v.* Valere, 39 La. Ann. 1060.

Maine. — White *v.* Blake, 74 Me. 489.

Massachusetts. — Merrill *v.* Kaulback, 158 Mass. 328; Tilden *v.* Johnson, 6 Cush. (Mass.) 354; Bacon *v.* Lincoln, 2 Cush. (Mass.) 124.

Missouri. — Cauthorn *v.* Berry, 69 Mo. App. 404; State *v.* Jeffors, 64 Mo. 376; Allen *v.* Sales, 56 Mo. 28; Priest *v.* McMaster, 52 Mo. 60; Gibson *v.* Chouteau, 39 Mo. 536; State *v.* Clark, 18 Mo. 432; Day *v.* State, 13 Mo. 422; Hyde *v.* Curling, 10 Mo. 359; Williams *v.* Silvey, 84 Mo. App. 433.

Nebraska. — Wachsmuth *v.* Orient Ins. Co., 49 Neb. 590; Ackerman *v.* Ackerman, 61 Neb. 72.

New Hampshire. — Frink *v.* Frink, 43 N. H. 508, 80 Am. Dec. 189.

New Mexico. — Borrego *v.* Territory, 8 N. Mex. 446.

New York. — Boyd *v.* Campbell, (N. Y. Super. Ct. Gen. T.) 12 Misc. (N. Y.) 351.

North Carolina. — McDowell *v.* McDowell, 92 N. Car. 227; State *v.* King, 5 Ired. L. (27 N. Car.) 203; Marshall *v.* Fisher, 1 Jones L. (46 N. Car.) 111.

Ohio. — Wright *v.* Lathrop, 2 Ohio 33, 15 Am. Dec. 529; Torbet *v.* Coffin, 6 Ohio 274.

Pennsylvania. — Nimick's Estate, 179 Pa. St. 591; Rhoades *v.* Com., 15 Pa. St. 272; Kittanning Ins. Co. *v.* Adams, (Pa. 1887) 10 Atl. Rep. 895.

Texas. — Russell *v.* Miller, 40 Tex. 494. See also Hamilton-Brown Shoe Co. *v.* Whitaker, 4 Tex. Civ. App. 380.

Virginia. — Weatherman *v.* Com., 91 Va. 796.

Washington. — State *v.* Straub, 16 Wash. 111.

West Virginia. — Miller *v.* Zeigler, 44 W. Va. 484, 67 Am. St. Rep. 777.

Wisconsin. — Bostwick *v.* Van Vleck, 106 Wis. 387.

See also the title Judgments and Decrees, vol. 17, pp. 818–822.

Amendment Must Be Necessary. — See Mansel *v.* Castles, 93 Tex. 414, *reversing* (Tex. Civ. App. 1899) 54 S. W. Rep. 299.

Judgment by Default May Be Amended After Execution Issued and Property Sold. — Dennis *v.* Colley, 112 Ga. 114.

Amendment After Change of Venue. — Church *v.* English, 81 Ill. 442.

Effect of Amendment. — Adams *v.* Higgins, 23 Fla. 13.

1. Amendment After Appeal or Writ of Error — *Alabama.* — Seymour *v.* Thomas Harrow Co., 81 Ala. 250.

Connecticut. — Weed *v.* Weed, 25 Conn. 494.

Illinois. — Sullivan *v.* Eddy, 154 Ill. 199.

Nebraska. — Andresen *v.* Lederer, 53 Neb. 128.

New Jersey. — See West *v.* State, 22 N. J. L. 212.

New Mexico. — Borrego *v.* Territory, 8 N. Mex. 446.

New York. — Peterson *v.* Swan, 119 N. Y. 662.

Texas. — Chestnutt *v.* Pollard, 77 Tex. 86; Cowan *v.* Ross, 28 Tex. 227; Segal *v.* Armistead, (Tex. Civ. App. 1901) 62 S. W. Rep. 1073.

Wisconsin. — State *v.* Delafield, 69 Wis. 264.

But *compare* Morgan's Louisiana, etc., R., etc., Co. *v.* Texas Cent. R. Co., 32 Fed. Rep. 525, in which case the court said: "It is well settled that, after the court has allowed an appeal, and a supersedeas bond is taken, either during or after the term, jurisdiction as to all matters — certainly those of substance — determined by the decree is transferred to the court to which the appeal goes. Draper *v.* Davis, 102 U. S. 371; Goddard *v.* Ordway, 101 U. S. 752; Hovey *v.* McDonald, 109 U. S. 157; Roemer *v.* Simon, 91 U. S. 149; Providence Rubber Co. *v.* Goodyear, 6 Wall. (U. S.) 156."

Appellate Court May Amend Record of Trial Court so as to conform to the facts. People *v.* Bradner, 107 N. Y. 1, *affirming* 44 Hun (N. Y.) 233.

The Supreme Court Will Not Substitute a paper certified to be a memorandum of a journal entry prepared by the judge, for the journal entry itself as it appears in the certified transcript filed in the Supreme Court. Chicago, etc., R. Co. *v.* Anderson, 38 Neb. 112.

Magistrate Cannot Amend His Judgment After Case Carried to Superior Court. — Ramsey *v.* Cole, 84 Ga. 147.

2. Amendment After Affirmance of Judgment. — Rousset *v.* Boyle, 45 Cal. 64; Fallon *v.* Brittan, 84 Cal. 511; McDonald *v.* Patterson, 190 Ill. 121, *affirming* 84 Ill. App. 326.

3. Motion. — Rogers *v.* Hoenig, 46 Wis. 363.

4. Necessity for Notice. — Seiler *v.* Northern Bank, 86 Ky. 128.

See also the title Judgments and Decrees, vol. 17, p. 823.

5. Balch *v.* Shaw, 7 Cush. (Mass.) 282.

6. McQuillen *v.* State, 8 Smed. & M. (Miss.) 587; Graham *v.* People, 6 Lans. (N. Y.) 149. *Compare* Bean *v.* Conway Sav. Bank, 64 N. H. 350.

based only upon some facts appearing in the record itself, especially when the alleged error is such that it should be apparent from the record,[1] but there are also many cases asserting that the amendment may be based on any satisfactory evidence.[2]

d. How Amendment Made. — While it has been held that an amendment of a record should not be made by simply noting the order to amend, but that the actual record itself should be altered so that it will stand and read as if no amendment or correction had ever been necessary,[3] the more generally accepted view is that while a judgment will not be rendered a nullity by the fact that the record thereof has been amended by interlineations, erasures, or other alterations,[4] this is not the proper method of making amendments.[5] The most approved method seems to be by making the order of amendment a part of the record[6] and designating in the original record the portions changed or amended by brackets, underscoring or otherwise,[7] or the judgment may be entered anew as amended.[8]

e. Presumption that Amendment Authorized. — When two exempli-

1. Facts Must Appear in Record — *United States.* — See Nelson *v.* Barker, 3 McLean (U. S.) 379.

Connecticut. — Waldo *v.* Spencer, 4 Conn. 71.

Illinois. — Gillett *v.* Booth, 95 Ill. 183; Stitt *v.* Kurtenbach, 85 Ill. App. 38; Scott *v.* Schnadt, 67 Ill. App. 545; Hotaling *v.* Huntington, 64 Ill. App. 655.

Indiana. — Schoonover *v.* Reed, 65 Ind. 313; Miller *v.* Royce, 60 Ind. 189. See also Williams *v.* Freshour, 136 Ind. 361.

Missouri. — Missouri, etc., R. Co. *v.* Holschlag, 144 Mo. 253, 66 Am. St. Rep. 417; St. Francis Mill Co. *v.* Sugg, 142 Mo. 358; State *v.* Jeffors, 64 Mo. 376; Robertson *v.* Neal, 60 Mo. 579; Priest *v.* McMaster, 52 Mo. 60; Hyde *v.* Curling, 10 Mo. 359; Williams *v.* Silvey, 84 Mo. App. 433.

Texas. — See Segal *v.* Armistead, (Tex. Civ. App. 1901) 62 S. W. Rep. 1073.

Virginia. — Barnes *v.* Com., 92 Va. 794.

See also the title Judgments and Decrees, vol. 17, p. 822, note 5.

Showing Sufficient to Authorize Amendment. — Gore *v.* People, 162 Ill. 259.

Amendment May Be Based on Bill of Exceptions. — Sullivan *v.* Eddy, 154 Ill. 199.

Amendment May Be Based on the Notes of a Stenographer who was recognized by the court as the reporter for the case. Sullivan *v.* Eddy, 154 Ill. 199.

Rule Does Not Apply to Amendments During Term. — Williams *v.* Silvey, 84 Mo. App. 433; McGonigle *v.* Bresnen, 44 Mo. App. 423.

2. Amendment May Be Based on Any Satisfactory Evidence. — *In re* Wight, 134 U. S. 136; Clammer *v.* State, 9 Gill (Md.) 279; Fay *v.* Wenzell, 8 Cush. (Mass.) 315; Balch *v.* Shaw, 7 Cush. (Mass.) 282; Ackerman *v.* Ackerman, 61 Neb. 72; School Dist. No. One *v.* Bishop, 46 Neb. 850; Mayo *v.* Whitson, 2 Jones L. (47 N. Car.) 231.

See also the title Judgments and Decrees, vol. 17, p. 822, note 4.

3. Actual Alteration of Record. — McDowell *v.* McDowell, 92 N. Car. 227; Jones *v.* Lewis, 8 Ired. L. (30 N. Car.) 70, 47 Am. Dec. 338. See also Marshall *v.* Fisher, 1 Jones L. (46 N. Car.) 111.

A Transcript of the Amended Record should give it as amended, exclusive of the order for the amendment. If the clerk sets forth in the transcript when and how he altered the record it is surplusage. Jones *v.* Lewis, 8 Ired. L. (30 N. Car.) 70, 47 Am. Dec. 338.

4. Allen *v.* Sales, 56 Mo. 28; Sluyter *v.* Smith, 2 Bosw. (N. Y.) 673.

Many Amendments May Properly Be Made by Interlineation, especially where the order of court granting them specifies and describes the particular amendment allowed to be made in this wise, as it should always do in such case. King *v.* State Bank, 9 Ark. 185, 47 Am. Dec. 739.

In Chancery the register was sometimes directed to attend with the decree and make the alteration in open court, which the judge countersigned with his initials. Sluyter *v.* Smith, 2 Bosw. (N. Y.) 673.

5. Allen *v.* Sales, 56 Mo. 28; Sluyter *v.* Smith, 2 Bosw. (N. Y.) 673.

Amendments Should Never Be Made by Interlineation, as this manifestly opens a wide door for fraudulent practices. Farrelly *v.* Cross, 10 Ark. 197.

6. Sluyter *v.* Smith, 2 Bosw. (N. Y.) 673.

7. Sluyter *v.* Smith, 2 Bosw. (N. Y.) 673.

8. New Entry. — Allen *v.* Sales, 56 Mo. 28; Sluyter *v.* Smith, 2 Bosw. (N. Y.) 673.

The more regular mode of making amendments after the judgment term is by an order of court reversing the defective entry, followed by a new order, *nunc pro tunc*, such as should have been made. King *v.* State Bank, 9 Ark. 185, 47 Am. Dec. 739.

In all cases where amendments are allowed in the return of an officer he should be required to spread out the full return embracing the additional facts, and in case the proposed amendment concerns a matter of record it should be made only by an order setting aside the defective record. Farrelly *v.* Cross, 10 Ark. 197.

Where a Decree Is Modified by a subsequent decree at the same term of court it would be a better course in the second decree to refer to the first one and state in what particular the latter is intended to modify, supplement, or supersede the former. But this is not essential where a comparison of the two decrees disclosed the additions made to the first by the second. Barrell *v.* Tilton, 119 U. S. 637.

fications of a record are before the Supreme Court, the earlier showing a defective and the later a valid service of process, the court will presume that both exemplifications were correct when given and that subsequent to the first exemplification the return of the officer was amended by leave of the court, although no order of the court authorizing such amendment to be made appears upon the record.[1]

f. EFFECT ON RIGHTS OF THIRD PERSONS. — An amendment of the judicial record will not be allowed to operate so as to prejudice or interfere with intervening rights of third persons acquired in reliance upon the accuracy of the record.[2]

2. Other Public Records — *a.* MAY BE AMENDED. — All public records may, when necessary, be amended so as to state the truth with reference to the facts to which they relate.[3]

b. WHO MAY AMEND — (1) *Board Whose Proceedings Are Recorded.* — It has been held that a public board has power to amend the record of its proceedings, at a subsequent meeting, so as to make it correspond with the facts, and make the truth appear by supplying omitted facts,[4] and that where the records of a school district are to be amended, the amendment must be made by the committee who acted in the matter to which the records relate, though they are out of office at the time the amendment is to be made.[5]

(2) *Maker and Custodian of Record* — (a) **While in Office.** — It is generally held that the clerk or other officer whose duty it is to make the record may make amendments of the same while he is in office, and when no rights have been built up on the faith of the imperfect record.[6]

(b) **After Retirement from Office.** — And there is respectable authority for holding that the officer who made the record may make an amendment thereof even after he has retired from the office,[7] though there are on the other hand

1. Farrelly *v.* Cross, 10 Ark. 197.

2. Rights of Third Persons Cannot Be Prejudiced. — Day *v.* Goodwin, 104 Iowa 374, 65 Am. St. Rep. 465; Newburgh Bank *v.* Seymour, 14 Johns. (N. Y.) 219; Nimick's Estate, 179 Pa. St. 591; Bostwick *v.* Van Vleck, 106 Wis. 387. See also Church *v.* English, 81 Ill. 442. And see the title JUDGMENTS AND DECREES, vol. 17, p. 824, notes 1 and 2.

A Contrary Opinion was asserted in Foster *v.* Woodfin, 65 N. Car. 29.

3. Public Records May Be Amended. — Davis *v.* Sawyer, 66 N. H. 34; Taft *v.* Barrett, 58 N. H. 447.

Records of Town Trustees. — St. Charles *v.* O'Mailey, 18 Ill. 407.

Records of County Commissioners. — Foster *v.* Foster, 87 Ga. 283.

Records and Returns Relating to School Districts. — Leighton *v.* Ossipee School Dist., 66 N. H. 548. See also Harris *v.* School Dist. No. 10, 28 N. H. 58; Bean *v.* Thompson, 19 N. H. 290, 49 Am. Dec. 154.

Records of School Board. — Board of Education *v.* School Trustees, 74 Ill. App. 401, *affirmed* 174 Ill. 510.

Supplying Omitted Signature to Record. — Boyce *v.* Auditor-Gen., 90 Mich. 314, 326.

4. Gilberts *v.* Rabe, 49 Ill. App. 418. See also Ohio, etc., R. Co. *v.* People, 119 Ill. 207. But see *contra*, Samis *v.* King, 40 Conn. 298.

A Change in the Membership of a school board cannot affect its power to direct its clerk to make amendments in the record of a subsequent meeting, for the authority of the board to make such amendments, if it exists, does not depend upon the personal recollection of the individual members of the board, but upon the knowledge of the clerk, or such files, minutes or memoranda as put him in the possession of knowledge of what actually occurred. Board of Education *v.* School Trustees, 174 Ill. 510, *affirming* 74 Ill. App. 401.

5. Leighton *v.* Ossipee School Dist., 66 N. H. 548.

6. Officer Who Made Record — *Connecticut.* — Boston Turnpike Co. *v.* Pomfret, 20 Conn. 590; Samis *v.* King, 40 Conn. 298; Gilbert *v.* New Haven, 40 Conn. 102.

Maine. — Chamberlain *v.* Dover, 13 Me. 466; Jay *v.* Carthage, 48 Me. 353.

Massachusetts. — Halleck *v.* Boylston, 117 Mass. 469.

Michigan. — Shelden *v.* Marion Tp., 101 Mich. 256.

Nebraska. — State *v.* Cornell, 56 Neb. 143.

Oregon. — Vaughn *v.* School Dist. No. Thirty-One, 27 Oregon 57.

Power of Amendment Not Dependent upon Permission of Court in which the record is offered in evidence. Boston Turnpike Co. *v.* Pomfret, 20 Conn. 590; Vaughn *v.* School Dist. No. Thirty-One, 27 Oregon 57.

The Fact that the Vote of a Town May Have the Effect of a Contract with another person does not affect the power of the clerk to amend his record. Boston Turnpike Co. *v.* Pomfret, 20 Conn. 590.

7. Amendment After Retirement from Office. — Shelden *v.* Marion Tp., 101 Mich. 256; Kiley *v.* Cranor, 51 Mo. 541; Gibson *v.* Bailey, 9 N. H. 168.

cases in which this has been denied.[1]

(c) **During Subsequent Term.** — Certainly one who has retired from office, and has since been re-elected, and has custody of the record, may properly make the amendment.[2]

(d) **Successor of Officer Who Made Record.** — A public officer cannot amend records made up by his predecessor in office, or based upon minutes made or taken by such predecessor.[3]

(3) *Amendment by Leave or Order of Court.* — In some jurisdictions the courts have power to allow the amendment of public records when they are offered in evidence so as to make them conform to the truth,[4] and it has also been laid down that a court has undisputed power, by mandamus, to require the clerk of a town to amend his record so as to make it accord with the facts, upon the application of any person who shows a legal right.[5] But on the other hand the right of the courts to amend the record of a public officer has been denied.[6]

c. Evidence on Which Amendment Based. — It has been said that the officer who made a record cannot alter or amend the same upon the testimony of third persons ordinarily,[7] and ought not to do it upon his own recollection, unless in very obvious cases of omission or error, but such amendments should ordinarily be made by the original documents or minutes.[8] But it has also been asserted that the truth of a proposed amendment to a public record which it is sought to have ordered by the court may be established by parol evidence.[9]

d. Effect of Amendment — (1) *In General.* — When a public record is amended so as to show the true facts, the record has the same force and effect as though originally made as amended.[10] And a public record which has been amended by leave of court stands as the record unless again amended. But the amendment is not conclusive against a person who is not a party to a suit

1. Boston Turnpike Co. *v.* Pomfret, 20 Conn. 590; Hartwell *v.* Littleton, 13 Pick. (Mass.) 229; Third School Dist. *v.* Atherton, 12 Met. (Mass.) 105; Vaughn *v.* School Dist. No. Thirty-One, 27 Oregon 57.

2. **Subsequent Term.** — Welles *v.* Battelle, 11 Mass. 477; Shelden *v.* Marion Tp., 101 Mich. 256; Vaughn *v.* School Dist. No. Thirty-One, 27 Oregon 57; Mott *v.* Reynolds, 27 Vt. 206.

Subsequent Term as Deputy. — Where the amendment to be made consists simply of adding the signature of the clerk of the board of supervisors to their records, and the person who was the clerk at the time the record was made is, at the time the amendment is sought, in the sworn custody of the records as deputy clerk, he is properly permitted to make the amendment. Shelden *v.* Marion Tp., 101 Mich. 256.

3. **Successor of Officer Who Made Record.** — Taylor *v.* Henry, 2 Pick. (Mass.) 397.

4. **Amendment by Leave of Court.** — Whiting *v.* Ellsworth, 85 Me. 301; Roberts *v.* Holmes, 54 N. H. 560; Taft *v.* Barrett, 58 N. H. 447; French *v.* Spalding, 61 N. H. 395; Harris *v.* School Dist. No. 10, 28 N. H. 58. See also Gibson *v.* Bailey, 9 N. H. 168; Pierce *v.* Richardson, 37 N. H. 306.

Jurisdiction of Pennsylvania Courts of Common Pleas. — Coleman's Petition, 163 Pa. St. 334, 35 W. N. C. (Pa.) 273; Excelsior Bldg., etc., Assoc. *v.* Reed, 8 Pa. Dist. 417.

5. **Mandamus.** — Samis *v.* King, 40 Conn. 298; Gilbert *v.* New Haven, 40 Conn. 102; Bell *v.* Pike, 53 N. H. 473; Hill *v.* Goodwin, 56 N. H. 441. See also Mayhew *v.* Gay Head Dist., 13 Allen (Mass.) 129.

But the Court Cannot Go Behind a Record which correctly states what transpired at a town meeting. Thus, when a vote has been recorded as declared by the moderator, the court cannot require the clerk to amend the record so as to show the actual vote to have been otherwise than as was declared. Bell *v.* Pike, 53 N. H. 473.

6. **Right of Court to Amend Denied.** — Whatever might be the right of the town clerk to complete his record, or to amend it according to the truth, the court cannot undertake to amend it for him, or to inquire what it should have been. Andrews *v.* Boylston, 110 Mass. 214.

7. Mott *v.* Reynolds, 27 Vt. 206. But *compare* Boston Turnpike Co. *v.* Pomfret, 20 Conn. 590, in which it was considered that an amendment of a record is not invalid because made by the town clerk, not on his own personal knowledge, but on information derived from others.

8. Mott *v.* Reynolds, 27 Vt. 206. See also Pickering *v.* Pickering, 11 N. H. 141.

9. **Parol Evidence Sufficient.**—Davis *v.* Sawyer, 66 N. H. 34.

10. Gilberts *v.* Rabe, 49 Ill. App. 418.

Truth of Amended Record. — An amended record, when offered in evidence, is, like an original record, conclusive evidence of its own truth. Boston Turnpike Co. *v.* Pomfret, 20 Conn. 590; Gilberts *v.* Rabe, 49 Ill. App. 418.

in which it was allowed, and it is open to him or to any other person interested to show that the record as amended is not a true record and to obtain a further amendment.[1]

(2) *Intervening Rights.* — A public record cannot be amended so as to prejudice intervening rights acquired by third persons.[2] But where the record of a village board as originally made does not show that an ordinance was passed by a majority of the board, but is subsequently amended so as to show that it was properly passed, a person who has violated the ordinance after its passage but before the amendment of the record cannot claim immunity from prosecution therefor.[3]

VIII. Inspection of Records — 1. Introductory. — So far as the right to inspect is concerned, it is unnecessary to make any distinction between the different kinds, such as judicial records, legislative records, etc., hence they are all included under the term public records. And this term, as used in this section, unlike its use in all other parts of this article, includes also the public records of deeds, mortgages, and other private writings, the inspection of which is here discussed.

2. The Right to Inspect — *a.* At Common Law — (1) *Necessity of Interest.* — At common law the right to inspect public records, either in person or by an agent, was confined to those who had an interest in the subject-matter to which the record related.[4] It has, however, been denied that this rule of the common law ever obtained in this country.[5]

(2) *Nature of Interest Required.* — While it seems that the person seeking an inspection of public records must have such an interest as will enable him to maintain and defend an action, for which the document can furnish evidence or necessary information, it is not necessary that a cause be pending at the time;[6] nor is it even essential that the interest of such person be private so that he can maintain an action or defense on his own personal behalf; but it

1. French *v.* Spalding, 61 N. H. 395.

2. **Intervening Rights Cannot Be Prejudiced.** — See Board of Education *v.* School Trustees, 74 Ill. App. 401, *affirmed* 174 Ill. 510.

At any time before the rights of third persons have attached, the record of a vote passed at a town meeting may, if erroneous, be amended in accordance with the facts, but it cannot be amended in accordance with facts founded upon the testimony of witnesses after individuals have dealt with the town and invested their money or performed labor upon the faith of the vote as recorded. Sawyer *v.* Manchester, etc., R. Co., 62 N. H. 135, 13 Am. St. Rep. 541. In this case the court said: "In Chamberlain *v.* Dover, 13 Me. 466, 29 Am. Dec. 517, and Boston Turnpike Co. *v.* Pomfret, 20 Conn. 590, the only cases cited as holding that an amendment may be properly allowed in such a case as this, it does not distinctly appear that the plaintiffs acted upon the faith of the original record, or that they did not know the facts to be as stated in the amendment."

When a Town by Its Corporate Vote Makes an Offer or proposition, to be accepted or rejected by a person at his pleasure, substantial reasons might be given for requiring it to see, at its peril, that the proposition is correctly stated in the record, and for holding that after the recorded offer is accepted and acted upon the town is estopped from amending it, or from availing itself of an amendment made according to the fact. New Haven, etc., R. Co. *v.* Chatham, 42 Conn. 465; Sawyer *v.* Manchester, etc., R. Co., 62 N. H. 135, 13 Am. St. Rep. 541.

3. Gilberts *v.* Rabe, 49 Ill. App. 418.

4. **Necessity of Interest** — *England.* — Rex *v.* Merchant Tailors' Co., 2 B. & Ad. 115, 22 E. C. L. 40; Groenvelt *v.* Burrell, 1 Ld. Raym. 253.

United States. — *In re* McLean, 2 Flipp. (U. S.) 512.

Alabama. — Brewer *v.* Watson, 71 Ala. 299, 46 Am. Rep. 318.

Connecticut. — Daly *v.* Dimock, 55 Conn. 579.

Indiana. — State *v.* King, 154 Ind. 621.

Kansas. — Cormack *v.* Wolcott, 37 Kan. 391.

Michigan. — People *v.* Walker, 9 Mich. 328.

New York. — People *v.* Cornell, (Supm. Ct. Gen. T.) 35 How. Pr. (N. Y.) 31, *reversing* 32 How. Pr. (N. Y.) 149, 47 Barb. (N. Y.) 329; People *v.* Poyllon, 2 Cai. (N. Y.) 202.

Pennsylvania. — Owens *v.* Woolridge, 8 Pa. Dist. 305, 22 Pa. Co. Ct. 237.

Rhode Island. — Caswell's Request, 18 R. I. 835, 49 Am. St. Rep. 814.

5. See Burton *v.* Tuite, 78 Mich. 363.

6. Rogers *v.* Jones, 5 Dowl. & R. 484, 16 E. C. L. 243; Rex *v.* Lucas, 10 East 235; Rex *v.* Leicester, 4 B. & C. 891, 10 E. C. L. 466; Rex *v.* Tower, 4 M. & S. 162.

One Who Has a Prima Facie Title to a Copyhold is entitled to inspect the court-rolls, and take copies of them, so far as they relate to the copyhold claimed, though no cause be depending for it at the time. Rex *v.* Lucas, 10 East 236.

will be sufficient that he can properly act in some action in relation to the matter as the representative of the common or public right.[1]

A Citizen and Taxpayer, for example, who desires to discover the condition of the public revenue, and to ascertain if the affairs of his county have been honestly and faithfully administered by the public officials charged with that duty, has such an interest in the matters to which the records and papers in the offices of the auditor and treasurer of his county relate, as entitles him to a general inspection thereof for the purpose which he has in view, even aside from any statute giving him such a right.[2]

(3) *Purpose for Which Inspection Sought.* — It has also been held that the individual demanding access to and inspection of public writings must not only have a direct and tangible interest in the matters to which they relate, but the inspection must be sought for some specific and legitimate purpose. The gratification of mere curiosity or motives merely speculative will not entitle him to demand an examination of such writings.[3]

(4) *When Right Denied.* — The *English* courts have sometimes, to check the improper use of the action for malicious prosecution, resorted to the means of refusing the plaintiff a copy of the record of his acquittal. This was, however, only done when in their opinion there was a probable cause for the prosecution.[4]

b. MODERN RULE — STATUTES — (1) *Rule Stated.* — In the *United States* this limitation of the common law has been very generally done away with by statute, and it is now well established as a general rule that, subject, of course, to proper regulations and restrictions, the public records are open to the inspection of any and all persons who choose to examine them, regardless of whether or not they have any definite interest in the subject-matter thereof.[5] And even in the absence of any statute, the court of *Rhode Island*

1. Rex *v.* Shelley, 3 T. R. 141; Rex *v.* Babb, 3 T. R. 579; Ferry *v.* Williams, 41 N. J. L. 332, 32 Am. Rep. 219; Caswell's Request, 18 R. I. 835, 49 Am. St. Rep. 814.

2. State *v.* King, 154 Ind. 621.

3. Brewer *v.* Watson, 71 Ala. 299, 46 Am. Rep. 318.

4. Groenvelt *v.* Burrell, 1 Ld. Raym. 253; Stone *v.* Crocker, 24 Pick. (Mass.) 81.

5. **Any Person May Inspect** — *United States.* — Lapeyre *v.* U. S., 17 Wall. (U. S.) 191; Bruce *v.* U. S., 17 How. (U. S.) 437; *In re* Chambers, 44 Fed. Rep. 786.

California. — Colnon *v.* Orr, 71 Cal. 43.

Colorado. — Stocknan *v.* Brooks, 17 Colo. 248.

Georgia. — Fain *v.* Garthright, 5 Ga. 6.

Indiana. — State *v.* King, 154 Ind. 621.

Maine. — See Barker *v.* Fogg, 34 Me. 392.

Massachusetts. — Nash *v.* Lathrop, 142 Mass. 29.

Michigan. — Burton *v.* Tuite, 80 Mich. 218; Aitcheson *v.* Huebner, 90 Mich. 643; Day *v.* Button, 96 Mich. 600.

Minnesota. — State *v.* Rachac, 37 Minn. 372.

Nebraska. — State *v.* Ellsworth, 61 Neb. 444.

New Jersey. — Lum *v.* McCarty, 39 N. J. L. 287; Barber *v.* West Jersey Title, etc., Co., 53 N. J. Eq. 158, *affirming* as to this point 49 N. J. Eq. 474.

North Dakota. — State *v.* Donovan, 10 N. Dak. 203.

Pennsylvania. — Com. *v.* Walton, 6 Pa. Dist. 287.

West Virginia. — State *v.* Long, 37 W. Va. 266.

Wisconsin. — Hanson *v.* Eichstaedt, 69 Wis. 538.

Marriage License Docket. — In *Pennsylvania* there has been a conflict of authority as to whether or not the marriage license docket is a public record such as to be open to public inspection, the affirmative having been asserted in Marriage License Docket, 4 Pa. Dist. 162, and the negative in Marriage License Docket, 4 Pa. Dist. 284. But the question has been settled by the Act of May 22, 1895 (Pamph. Laws 99), which requires the marriage license docket to be kept open for inspection by the public and allows copies of the same to be made for publication. Owens *v.* Woolridge, 22 Pa. Co. Ct. 237, 8 Pa. Dist. 305.

Vermont Statute Construed. — The Vermont statute (R. L. 828) giving to persons interested the right to inspect the "books of record" of a justice of the peace does not confer the right to inspect the files of the justice and the memoranda and entries thereon. Perkins *v.* Cummings, 66 Vt. 485.

Right to Procure Authenticated Copies of Laws of Congress or Proclamations of President. — Lapeyre *v.* U. S., 17 Wall. (U. S.) 191.

Appeals in Patent Cases. — Notwithstanding the rules of the Patent Office providing for secret files in certain cases, the files of the Court of Appeals of the District of Columbia relating to an appeal from the Patent Office are subject to public inspection and cannot be preserved in secrecy. *Ex p.* Drawbaugh, 2 App. Cas. (D. C.) 404.

The Records and Papers in Pending Suits may, under the direction of the court, lawfully be withheld from inspection, in order to prevent any statement in regard thereto being made public, until the matters in dispute are made

has intimated a doubt as to whether it would go to the full extent of the common-law rule in denying access to the public records.[1] In *Alabama*, however, the common-law rule appears still to prevail, except in the case of judicial records.[2]

(2) *Right of Particular Persons* — (a) **Abstracter of Titles.** — In some jurisdictions the doctrine obtains that persons or corporations who are engaged in the business of making abstracts of title and furnishing the same to those who desire them, for a compensation, have the same right as any other persons to inspect, examine, and copy the public records.[3] But in other jurisdictions the courts have denied the right to make copies of the records in the public offices for the purpose of making a set of abstract books for private use or speculation.[4]

(b) **Insurer of Titles.** — A corporation engaged in the business of insuring titles has the right, by its properly authorized representatives, to inspect and

public by the consent of the parties or by proceedings in open court. Schmedding *v.* May, 85 Mich. 1, 24 Am. St. Rep. 74. See also Burton *v.* Reynolds, 110 Mich. 354; Park *v.* Detroit Free Press Co., 72 Mich. 560, 16 Am. St. Rep. 544.

The Instructions Given by an Attorney to the Sheriff for the enforcement of a writ of eviction, though they are in writing, are not "public writings" or "public records" of the sheriff's office so as to be under the code "open to the inspection of any citizen." Whelan *v.* San Francisco, 114 Cal. 548.

1. See Caswell's Request, 18 R. I. 835, 49 Am. St. Rep. 814.

2. **Alabama Rule.** — See Brewer *v.* Watson, 71 Ala. 299, 46 Am. Rep. 318, *approved* in Randolph *v.* State, 82 Ala. 527, 60 Am. Rep. 761; Phelan *v.* State, 76 Ala. 49.

The Right of Free Inspection Should Not Be Withheld from those who have an interest in the record, or their lawful agents or attorneys, unless there be some reason of state policy which may, for a time at least, render it proper that some matter, even of record, be not made public. Phelan *v.* State, 76 Ala. 49.

Copying Entire Records. — The *Alabama* court has denied to a person employed by a county surveyor for that purpose the right to copy from the books in the office of the secretary of state all the field notes of survey of all the lands in a certain county, on the ground that there was no authority to remove the books of record and the secretary of state could not be required to furnish a copyist for private emoluments house and desk room for performing the work contemplated by the contract. Phelan *v.* State, 76 Ala. 49.

3. **Abstracters May Inspect Records** — *United States.* — *In re* Chambers, 44 Fed. Rep. 786.

Indiana. — State *v.* King, 154 Ind. 621.

Michigan. — Day *v.* Button, 96 Mich. 600; Burton *v.* Tuite, 78 Mich. 363, *overruling* Webber *v.* Townley, 43 Mich. 534, 38 Am. Rep. 213.

Minnesota. — State *v.* Rachac, 37 Minn. 372.

New Jersey. — West Jersey Title, etc., Co. *v.* Barber, 49 N. J. Eq. 474, *affirmed* as to this point 53 N. J. Eq. 158; Lum *v.* McCarty, 39 N. J. L. 287.

Wisconsin. — Hanson *v.* Eichstaedt, 69 Wis. 538.

In Colorado this right was denied under the Statute of March 4, 1877. Bean *v.* People, 7 Colo. 200.

But in 1885 that statute was amended so as to allow abstract makers access to the records. Stocknan *v.* Brooks, 17 Colo. 248.

In New York the right to inspect and copy public records has been in several instances expressly granted by statute to corporations engaged in the business of furnishing abstracts, lending money on real estate security, and the like. See People *v.* Richards, 99 N. Y. 620; People *v.* Reilly, 38 Hun (N. Y.) 429.

4. **Right to Inspect Denied.** — Randolph *v.* State, 82 Ala. 527, 60 Am. Rep. 761; Land Title Warranty, etc., Co. *v.* Tanner, 99 Ga. 470; Cormack *v.* Wolcott, 37 Kan. 391. See also Buck *v.* Collins, 51 Ga. 391, 21 Am. Rep. 236; Scribner *v.* Chase, 27 Ill. App. 36; Boylan *v.* Warren, 39 Kan. 301, 7 Am. St. Rep. 551; Belt *v.* Prince George's County Abstract Co., 73 Md. 289.

In North Carolina the court has denied the right of any person to make copies or abstracts of the entire records of a public office for a certain year "without having an interest in the same for the prosecution of his business or paying any fee therefor." Newton *v.* Fisher, 98 N. Car. 20.

Taking Copies May Be Permitted. — In Bean *v.* People, 7 Colo. 200, the court said: "We think that the business of relators (abstracters of title) should be treated as any other legitimate private enterprise. There is no law to prevent the clerk from aiding them if he chooses so to do, either gratis or for a stipulated compensation; provided he does not neglect his official duties. But the court should not, by mandamus, compel him to do this against his will."

New Jersey Rule. — The New Jersey court, while conceding that abstract and title insurance companies are entitled to the same right of access to and examination of the public records as an individual would be when they are empowered or requested to examine and guarantee a particular title, has held that such a corporation cannot occupy the offices of the county clerk for the purpose of setting up a rival office whereby the clerk will be deprived of the emoluments of his office. Barber *v.* West Jersey Title, etc., Co., 53 N. J. Eq. 158, *reversing* West Jersey Title, etc., Co. *v.* Barber, 49 N. J. Eq. 474.

examine public records.[1]

(c) **Dealer in Tax Titles.** — The business of a dealer in tax titles is lawful, and, in *Michigan*, is recognized and encouraged by the tax laws, and hence it cannot be successfully contended that such a dealer is not entitled to the examination of the state land tax book for a "lawful purpose." [2]

(d) **Person Accused of Crime.** — Where the testimony of witnesses at a coroner's inquest is by the coroner reduced to writing and lodged with the clerk of the Superior Court, pursuant to statute, a person accused of causing the death of the deceased is entitled to inspect such testimony.[3]

(3) *Copies, Abstracts, and Memoranda* — (a) **Right to Make.** — The right to inspect and examine public records includes of necessity the right to make copies thereof or extracts or memoranda therefrom.[4]

(b) **Demand for Authenticated Copy from Custodian.** — Where it is the duty of the custodian of a record to give an authenticated copy of the same to one who demands it, on payment of the legal fee, the person entitled to such service must request it in a proper manner, and the officer may refuse to comply with a request or demand which is accompanied with personal insult or vulgar abuse, as this is not a legal demand. Such a demand does not, however, release the custodian from the obligation of complying with a subsequent demand made in a proper manner, even though not accompanied by any apology for previous misconduct.[5]

(4) *Use of Indexes.* — The right to inspect public records includes, of course, the right to inspect the indexes kept in the individual record books as required by statute,[6] but it has been held that the right does not extend to the inspection of a set of "patent or short form indexes," which are not required by law to be kept.[7]

(5) *Regulations.* — The right to inspect public records is not absolute and unrestricted, but must be exercised subject to such reasonable regulations as may be imposed by statute or by the custodian of the records,[8] and this even in the case of a corporation which has by statute or charter the right to inspect and copy the records.[9]

(6) *Fee for Inspection.* — In most jurisdictions the custodian of a public

1. **Insurer of Titles.** — Commonwealth Title Ins., etc., Co. *v.* Bell, 105 Fed. Rep. 548, 87 Fed. Rep. 19; West Jersey Title, etc., Co. *v.* Barber, 49 N. J. Eq. 474, *affirmed* as to this point 53 N. J. Eq. 158.

2. **Dealer in Tax Titles.** — Aitcheson *v.* Huebner, 90 Mich. 643.

3. **Person Accused of Crime.** — Daly *v.* Dimock, 55 Conn. 579.

4. **Memoranda, etc.** — Boylan *v.* Warren, 39 Kan. 301, 7 Am. St. Rep. 551; Burton *v.* Tuite, 80 Mich. 218. See also Aitcheson *v.* Huebner, 90 Mich. 643. And see generally cases cited *passim* this section.

5. **Demand.** — Boyden *v.* Burke, 14 How. (U. S.) 575.

6. **Indexes.** — Lum *v.* McCarty, 39 N. J. L. 287; Fidelity Trust Co. *v.* Clerk, 65 N. J. L. 495.

7. **"Patent Indexes."** — Fidelity Trust Co. *v.* Clerk, 65 N. J. L. 495. In this case the court said that under the fee system these patent indexes were used solely for the emolument of the custodian of the records and that the change by which that official was placed upon a salary and the gross receipts of his office declared to be for the sole use of the state did not enlarge the right of special access of the public to the contents of the office.

8. **Regulations** — *Colorado.* — Stocknan *v.* Brooks, 17 Colo. 248; Upton *v.* Catlin, 17 Colo. 546.

Georgia. — See Buck *v.* Collins, 51 Ga. 395, 21 Am. Rep. 236.

Michigan. — Day *v.* Button, 96 Mich. 600; Burton *v.* Tuite, 78 Mich. 363; Burton *v.* Reynolds, 102 Mich. 55.

Minnesota. — State *v.* Rachac, 37 Minn. 372.

Rhode Island. — See Caswell's Request, 18 R. I. 835, 49 Am. St. Rep. 814.

Wisconsin. — Hanson *v.* Eichstaedt, 69 Wis. 538.

Proper Limitation. — The United States Circuit Court has granted to a corporation the right to inspect and examine the indexes, records and papers in the office of the clerk of the court, subject to the restrictions that the inspection and examination must in each case relate and be confined to a transaction or transactions which at the time being shall be current or depending, and that they shall be made only at such times and under such circumstances as will not interfere with the clerk or his assistants in the discharge of their duties, or with the exercise of the right of any other person or persons to have access to the records, indexes, and cross-indexes. Commonwealth Title Ins., etc., Co. *v.* Bell, 105 Fed. Rep. 548, 87 Fed. Rep. 19.

9. People *v.* Richards, 99 N. Y. 620; People *v.* Reilly, 38 Hun (N. Y.) 429.

record is not entitled to demand a fee for allowing a person to inspect the same and make memoranda therefrom,[1] but can demand a fee only when he is required to make the examination or search.[2] Where, however, the statute allows him a fee for an examination by any person, the right to inspect the record is subject to the payment of such fee.[3]

Under the Maryland Statute requiring the custodians of records to give a copy of any record or paper in their custody to any person applying for the same upon being paid the usual fee, it has been held that a corporation having by charter power to "procure copies and abstracts from the public records," and gather information therefrom, did not have the right through its officers and employees to make searches and abstracts of title without paying the fees prescribed by law.[4]

(7) *Personal Supervision of Custodian.* — It being the duty of the custodian of public records to keep them safely and prevent any tampering with them, he should permit no inspection of them unless under his immediate supervision, or that of one of his sworn assistants.[5]

(8) *Abstract for Publication.* — The court of *Georgia* has expressed a doubt as to the right of a private citizen to examine the books of record in the office of the clerk of the Superior Court, for the purpose of making a full abstract of the contents thereof for publication,[6] and in *Rhode Island* the court has advised the clerk that he should not furnish a copy of the proceedings in a divorce case to a newspaper reporter who requested such a copy "for publication or otherwise."[7] Similarly, in *Pennsylvania*, the court has declared itself powerless to compel the county commissioners to allow the publisher of a newspaper to make copies of their orders and minutes and the other public records under their control.[8]

(9) *Enforcement of Right.* — Where a person is wrongfully denied access to a public record, he may obtain a writ of mandamus commanding the custodian of the record to furnish him, under the statute, reasonable facilities for making the inspection and examination of the record and taking memoranda therefrom.[9]

1. No Fee for Inspection — *United States.* — *In re* Chambers, 44 Fed. Rep. 786.

Georgia. — Buck *v.* Collins, 51 Ga. 391, 21 Am. Rep. 236.

Michigan. — Burton *v.* Tuite, 78 Mich. 363.

New Jersey. — Lum *v.* McCarty, 39 N. J. L. 287, *overruling* Flemming *v.* Hudson County, 30 N. J. L. 280; West Jersey Title, etc., Co. *v.* Barber, 49 N. J. Eq. 474, *affirmed* as to this point 53 N. J. Eq. 158. See also Fidelity Trust Co. *v.* Clerk, 65 N. J. L. 495.

Pennsylvania. — Marriage License Docket, 4 Pa. Dist. 162.

West Virginia. — State *v.* Long, 37 W. Va. 266.

But a Person Cannot Make a Full Abstract of the contents of the books of record in the office of the clerk of the Superior Court, thus spending days and weeks in the office in an occupation which cannot lawfully be carried on except under the immediate observation of the clerk, without his consent and without the payment of his fees. Buck *v.* Collins, 51 Ga. 391, 21 Am. Rep. 236.

In North Carolina it has been held that all persons have the right to inspect public records free, but the right to make an abstract of all transfers of real and personal property for a particular year without paying any fee therefor has been denied. Newton *v.* Fisher, 98 N. Car. 20.

2. *In re* Chambers, 44 Fed. Rep. 786; State *v.* Long, 37 W. Va. 266.

3. Hanson *v.* Eichstaedt, 69 Wis. 538.

4. Belt *v.* Prince George's County Abstract Co., 73 Md. 289.

5. Personal Supervision. — Upton *v.* Catlin, 17 Colo. 546; Buck *v.* Collins, 51 Ga. 391, 21 Am. Rep. 236.

6. Abstract for Publication. — Buck *v.* Collins, 51 Ga. 391, 21 Am. Rep. 236.

7. Caswell's Request, 18 R. I. 835, 49 Am. St. Rep. 814.

8. Owens *v.* Woolridge, 22 Pa. Co. Ct. 237, 8 Pa. Dist. 305. In this case, however, the court said: "We would suggest to the commissioners, only as advisory, that they give from time to time to the petitioners, and all other taxpayers who may request it, the results, when reached, of their deliberations on any question of public interest, as well as lists of the orders granted on the county treasurer."

9. Mandamus — *Colorado.* — Stocknan *v.* Brooks, 17 Colo. 248; Upton *v.* Catlin, 17 Colo. 546.

Connecticut. — Daly *v.* Dimock, 55 Conn. 579.

Indiana. — State *v.* King, 154 Ind. 621.

Kansas. — Boylan *v.* Warren, 39 Kan. 301, 7 Am. St. Rep. 551.

Michigan. — Burton *v.* Tuite, 78 Mich. 363; Aitcheson *v.* Huebner, 90 Mich. 643.

Missouri. — See State *v.* Williams, 96 Mo. 13.

New Jersey. — Barber *v.* West Jersey Title,

IX. Records in Evidence — 1. Admissibility — *a.* In General. — Public records or writings are admissible in evidence on account of their public nature, though their authenticity be not confirmed by the usual tests of truth; namely, the swearing and the cross-examination of the persons who prepared them. They are entitled to this extraordinary degree of confidence, partly because they are made under the sanction of an oath of office, or at least under that of official duty, by accredited agents appointed for that purpose. Moreover, as the facts stated in them are entries of a public nature, it would often be difficult to prove them by means of sworn witnesses.[1]

etc., Co., 53 N. J. Eq. 158, *affirming* as to this point 49 N. J. Eq. 474.

New York. — People *v.* Reilly, 38 Hun (N. Y.) 429; People *v.* Richards, 99 N. Y. 620.

Pennsylvania. — Com. *v.* Walton, 6 Pa. Dist. 287.

West Virginia. — See State *v.* Long, 37 W. Va. 266.

Limitation. — In Colnon *v.* Orr, 71 Cal. 43, the court said: "While it is a right of a citizen of this state to inspect the public records at such times as the statute provides, nevertheless a writ of mandate to enforce that right cannot always be invoked. It must be issued upon affidavit, on the application of the party beneficially interested, in all cases where there is not a plain, speedy, and adequate remedy given by law, and not otherwise."

1. Admissibility in General — *England.* — Sturla *v.* Freccia, 5 App. Cas. 623.

United States. — Gaines *v.* Relf, 12 How. (U. S.) 472; Vigel *v.* Naylor, 24 How. (U. S.) 208.

Alabama. — Walling *v.* Morgan County, 126 Ala. 326; Stanley *v.* State, 88 Ala. 154; Brown *v.* Prude, 97 Ala. 639; Williams *v.* State, 130 Ala. 31.

California. — Rogers *v.* Riverside Land, etc., Co., 132 Cal. 9; Watrous *v.* Cunningham, 71 Cal. 30.

Colorado. — Baur *v.* Beall, 14 Colo. 383.

Connecticut. — See State *v.* Hyde, 29 Conn. 564.

District of Columbia. — Mackey *v.* Baltimore, etc., R. Co., 19 D. C. 282.

Florida. — Johnson *v.* Wakulla County, 28 Fla. 720.

Georgia. — Ray *v.* Fleetwood, 106 Ga. 253; Anthanissen *v.* Dart, 94 Ga. 543. See also Richardson *v.* Whitworth, 103 Ga. 741.

Illinois. — Cully *v.* People, 73 Ill. App. 501; Bush *v.* Stanley, 122 Ill. 406; Merchants' Nav. Co. *v.* Amsden, 25 Ill. App. 307; Gage *v.* Davis, (Ill. 1887) 14 N. E. Rep. 36; Harris *v.* Miner, 28 Ill. 135.

Indiana. — Taylor *v.* Williams, 120 Ind. 414; Shugart *v.* Miles, 125 Ind. 445; Weir *v.* State, 96 Ind. 311; Boyer *v.* Berryman, 123 Ind. 451; Adams *v.* Adams, 23 Ind. 50.

Iowa. — American Emigrant Co. *v.* Fuller, 83 Iowa 599; De Forrest *v.* Butler, 62 Iowa 78.

Kansas. — Jordon *v.* Bevins, 10 Kan. App. 428; State *v.* McMurry, 61 Kan. 87; Rizer *v.* Callen, 27 Kan. 339.

Louisiana. — State *v.* Powell, 40 La. Ann. 234, 8 Am. St. Rep. 522.

Maine. — Barker *v.* Fogg, 34 Me. 392.

Maryland. — Jenkins *v.* State, 76 Md. 255.

Massachusetts. — Kennedy *v.* Doyle, 10 Allen (Mass.) 161; Com. *v.* Lucas, 158 Mass. 81; Morrison *v.* Chapin, 97 Mass. 72.

Michigan. — People *v.* Kemp, 76 Mich. 410; Dupuis *v.* Interior Constr., etc., Co., 88 Mich. 103; Busch *v.* Fisher, 89 Mich. 192; Bronson *v.* Leach, 74 Mich. 713.

Minnesota. — Clark *v.* Scott, 84 Minn. 270.

Mississippi. — State *v.* Oliver, 78 Miss. 5; Kerr *v.* Farish, 52 Miss. 101.

Missouri. — Fruin-Bambrick Constr. Co. *v.* Geist, 37 Mo. App. 509; Williams *v.* Mitchell, 112 Mo. 300; Gentry *v.* Field, 143 Mo. 399; Major *v.* Watson, 73 Mo. 661.

Montana. — Johnson *v.* Puritan Min., etc., Co., 19 Mont. 30.

Nevada. — Adams *v.* Smith, 19 Nev. 259.

New Hampshire. — French *v.* Spalding, 61 N. H. 395.

New York. — Dyett *v.* Hyman, (C. Pl. Gen. T.) 13 N. Y. Supp. 895; Phœnix Ins. Co. *v.* Parsons, 129 N. Y. 86; Bissell *v.* Hamblin, 6 Duer (N. Y.) 512; Ward *v.* Sire, 52 N. Y. App. Div. 443; Farmers', etc., Nat. Bank *v.* Erie R. Co., 72 N. Y. 188; Central City Bank *v.* Dana, 32 Barb. (N. Y.) 296; People *v.* Denison, 17 Wend. (N. Y.) 312, 31 Am. Dec. 297.

North Carolina. — Cheatham *v.* Young, 113 N. Car. 161, 37 Am. St. Rep. 617.

Ohio. — Westerhaven *v.* Clive, 5 Ohio 136; Chapman *v.* Seely, 4 Ohio Cir. Dec. 395, 8 Ohio Cir. Ct. 179.

Pennsylvania. — Athens *v.* Carmer, 169 Pa. St. 426; Limbert *v.* Jones, 136 Pa. St. 31.

South Carolina. — Fraser *v.* Charleston, 8 S. Car. 318; State *v.* Foster, 3 McCord L. (S. Car.) 442.

Texas. — Louder *v.* Schluter, 78 Tex. 103; Brown *v.* Mitchell, 88 Tex. 350; Franklin *v.* Tiernan, 62 Tex. 92.

Utah. — Lehi Irrigation Co. *v.* Moyle, 4 Utah 327.

Virginia. — Perkins *v.* Hawkins, 9 Gratt. (Va.) 649.

Washington. — Bardsley *v.* Sternberg, 18 Wash. 612; Gilmore *v.* H. W. Baker Co., 12 Wash. 468.

West Virginia. — Grafton *v.* Reed, 34 W. Va. 172; Blair *v.* Sayre, 29 W. Va. 604.

Wisconsin. — Durr *v.* Wildish, 108 Wis. 401; Hempton *v.* State, 111 Wis. 127.

Certificate of Cause of Death. — Woolsey *v.* Ellenville, 84 Hun (N. Y.) 236, *affirmed* 155 N. Y. 573.

Tax Assessment Roll. — It has been held that the assessment roll of county taxes is not admissible in evidence in support of a tax title without proof that the assessment and valuation was legally made. Kinney *v.* Doe, 8 Blackf. (Ind.) 350.

An Unauthorized Record of a transcript of a will is not admissible. McCarty *v.* Rochel, 85 Iowa 427.

Record Need Not Be Expressly Authorized or Required by Law. — Bell *v.* Kendrick, 25 Fla.

A Record Admissible for Some but Not for All Purposes may be rejected *in toto*, unless the party offering it states the facts proposed to be proved by it.[1]

When a Formal Record Is Not Required by Law or has not yet been made up, those entries, such as the files and the entries in the minute books, which are permitted to stand in the place of it, are admissible in evidence as the record.[2]

b. RELEVANCY AND MATERIALITY. — The admissibility of records is, of course, subject to the general rule that the evidence offered must be relevant [3] and material.[4]

c. DEFECTS AND IRREGULARITIES. — It is true as a general rule that a record not made up in the manner required by law is not admissible as evidence of facts which it purports to show.[5] But this rule should be subject to exception when the general convenience requires it.[6] Thus a probate record showing an order for specific performance of a contract has been held admissible although it contained no caption naming the parties and recited neither the filing of a petition nor notice to the executors, etc.,[7] and the record showing the approval of a guardian's bond has been admitted in an action against

778. But see *contra* Marks *v.* Orth, 121 Ind. 10.

Judicial Record Evidence Only Between Parties and Privies. — McVity *v.* Stanton, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 105. See generally the title RES JUDICATA, *post*.

Order of Court Not Necessary. — The plaintiff in an action for malicious prosecution and another person had been indicted at the Old Bailey for forgery, and acquitted, but a copy of the indictment was granted to the other only. The plaintiff offered the copy in evidence, and the order at the Old Bailey was read by way of objection, but the chief justice said that he could not refuse to let the plaintiff read the copy, for an order was not necessary to make it evidence. Jordan *v.* Lewis, 2 Stra. 1122.

Where the Charge of the Court Is Filed as of Record in a case it is admissible for the purpose of showing what questions were submitted to the jury, for it does not contradict the record but is entirely consistent with it. Follansbee *v.* Walker, 74 Pa. St. 306.

Privileged Communications. — The records of the board of health are not admissible in evidence in so far as they contain declarations of the attending physician as to the cause of a person's death, for in such case they fall under the ban of the statute prohibiting physicians from disclosing information acquired in their professional capacity, for the written declaration of a physician as to the cause of death is no more admissible than would be his sworn statement. Davis *v.* Supreme Lodge, etc., 35 N. Y. App. Div. 354, *affirmed* 165 N. Y. 159. See generally the title PRIVILEGED COMMUNICATIONS, vol. 23, p. 47.

Record of Certified Copy of Record. — Where a certified copy of a record in one county is recorded in another county the record in the latter county is admissible in evidence without any showing that the two records are the same, for in the absence of some showing to the contrary it should be presumed that the records are alike. Collins *v.* Valleau, 79 Iowa 626.

1. Kenan *v.* Holloway, 16 Ala. 53, 50 Am. Dec. 162.

2. **Minutes, etc.** — Reg. *v.* Yeoveley, 8 Ad. & El. 806, 35 E. C. L. 536; Arundell *v.* White, 14 East 216; Jones *v.* Randall, 1 Cowp. 17; Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 307; Washington, etc., Steam-Packet Co. *v.* Sickles, 24 How. (U. S.) 333; Boteler *v.* State, 8 Gill & J. (Md.) 381; Com. *v.* Bolkom, 3 Pick. (Mass.) 281; Prentiss *v.* Holbrook, 2 Mich. 372. See also State *v.* Dawson, 6 Ohio 250; Boal *v.* King, Wright (Ohio) 223.

While the verdict or rule for judgment entered in the minutes of the Common Pleas, until the judgment record is made up, can be evidence of the judgment only when offered as such in a suit in the same court where it is entered, it may, by consent of the parties, be lawfully admitted in evidence in another court. 2 Gen. Stat., p. 1841, § 4; p. 2564, §§ 192-194. When offered in such other court, failure to object is equivalent to consent. Such objection, if not made at the trial, will, on review, be regarded as waived. Rosenberg *v.* Stover, 67 N. J. L. 506.

Where Docket Entries Stand in the Place of Any Other Record, and are regarded as the record by the court which makes them, they receive from other courts the same consideration, as a record, which is accorded to them by the court which permits them to stand in the place of any other record, provided there is no express provision of law prescribing any other record. *In re* Coleman, 15 Blatchf. (U. S.) 426.

3. **Relevancy.** — Fuller *v.* Roller, 45 Minn. 152; Johnson *v.* Johnson, 63 Hun (N. Y.) 1; Collins *v.* Ball, 82 Tex. 259, 27 Am. St. Rep. 877.

4. **Materiality.** — People *v.* Kemp, 76 Mich. 410; Currier *v.* Richardson, 63 Vt. 617; Hempton *v.* State, 111 Wis. 127.

5. Farley *v.* Lewis, 102 Ky. 234.

Where a statute provides for the admission in evidence of county surveyor's records, and also provides what they must contain to make them admissible, a record which is defective within these provisions of the statute should not be received. Pugh *v.* Schindler, 127 Mich. 191.

6. Farley *v.* Lewis, 102 Ky. 234.

Defect in Description of Property — Omission of One Boundary. — Chamberlain *v.* Bradley, 101 Mass. 188, 3 Am. Rep. 331.

7. Williams *v.* Mitchell, 112 Mo. 300.

the county judge for damages resulting from his having accepted an insufficient bond, though the record was not signed by the judge as required by statute.[1]

Irregularity in Pleadings. — It has been held error to exclude a judgment roll because the complaint lacked verification.[2]

d. INTERLINEATIONS AND ADDITIONS. — Where an entry of judgment shows interlineations and additions it should not be admitted in evidence until such interlineations and additions are explained.[3]

e. MUTILATED RECORDS. — A public record book should not be excluded from the consideration of the jury merely by reason of the fact that two leaves have been cut out of the book, where there are no other suspicious circumstances and no evidence is offered tending to show whether the absent leaves contained any part of the records of the town or were entirely blank when taken from the book.[4]

f. MATTERS NOT PROPERLY RECORDS. — The fact that entries are made in public record books, or matters recorded in public record offices, or papers filed in some public office, does not render them admissible in evidence where such entry, recording, or filing was without authority of law, and not in the usual course of the business of the office.[5]

g. JUDGMENTS, ETC., NOT ENTERED OF RECORD. — Under the *Texas* statute,[6] which requires all judgments, etc., of the District Court to be entered of record by the clerk of the court, the record entry of a judgment is indispensable to furnish the evidence of it when it is made the basis of a claim or defense in another court, and hence copies certified by the clerk of original detached orders which do not appear to have been entered of record are not admissible.[7]

h. RECORDING OF JUDGMENTS IN OFFICE OF COUNTY CLERK OR REGISTER. — The *Texas* statute requires that in order that decrees affecting the title to land shall be admissible as evidence of title they must have been recorded in the office of the clerk of the county where the land lies,[8] but it has been held that this statute has no application to a decree offered not as showing title to the land but as indicating acts of ownership,[9] nor in cases where the former decree, though not recorded or not properly recorded, is offered in evidence as between the parties to the suit in which it was rendered.[10]

In North Carolina it has been held that the record of partition proceedings in the Superior Court was admissible in evidence notwithstanding it had not been registered in the office of the register of deeds as required by the code.[11]

1. Farley *v.* Lewis, 102 Ky. 234.

2. Johnson *v.* Puritan Min., etc., Co., 19 Mont. 30.

3. Palmer *v.* Emery, 91 Ill. App. 207.

4. People *v.* Hancock County, 21 Ill. App. 271.

5. **Matters Not Properly Records** — *Illinois.* — People *v.* Hayes, 63 Ill. App. 427.

Louisiana. — See Justus's Succession, 47 La. Ann. 302.

Maine. — See Randall *v.* Bradbury, 30 Me. 256.

Missouri. — Haile *v.* Palmer, 5 Mo. 403; Morrissey *v.* Wiggins Ferry Co., 47 Mo. 521.

New York. — Hardiman *v.* New York, 21 N. Y. App. Div. 614.

South Carolina. — Fraser *v.* Charleston, 8 S. Car. 318.

Texas. — Shifflet *v.* Morelle, 68 Tex. 382. See also Debrell *v.* Ponton, 22 Tex. 686.

Vermont. — Sills Stove Works *v.* Brown, 71 Vt. 478.

Where Letters Appear in the Transcript of a Judicial Record of a case in which there was a consent decree rendered many years ago, and the letters apparently have some relevancy to the fact of consent, they may be treated as a part of the record, and be received in evidence accordingly. Wallace *v.* Jones, 93 Ga. 419.

6. Rev. Stat. Tex., § 1107; Rev. Stat. Tex. (1895), § 1087.

7. International, etc., R. Co. *v.* Moore, (Tex. Civ. App. 1895) 32 S. W. Rep. 379.

8. Rev. Stat. Texas, § 4339; Rev. Stat. Texas (1895), § 4649.

9. Rodriguez *v.* Haynes, 76 Tex. 225.

10. Russell *v.* Farquhar, 55 Tex. 355; Callahan *v.* Hendrix, 79 Tex. 494. See also Lunn *v.* Scarborough, (Tex. Civ. App. 1896) 35 S. W. Rep. 508, in which case the court, while citing the two cases above, seems to have carried the doctrine even farther.

11. **The Reason** given by the court for this holding was that the record obtains no additional validity or authority by reason of such registration, and such registration is not required for the purpose of fixing parties with notice, but simply for convenience in tracing

i. STENOGRAPHIC TRANSCRIPTS NOT FILED. — It has been held in *Vermont*, under a statute providing for stenographic reporters for the courts, and making it their duty to file transcripts of all the proceedings in a case whenever directed by the judge, and providing that such transcripts, duly certified, in cases ordered to be reported, should be admissible in evidence, that such a transcript was admissible in evidence though never filed in the clerk's office nor ordered to be transcribed by the court.[1]

j. FOR AND AGAINST WHOM ADMISSIBLE — (1) *Judicial Records in General.* — A judicial record is always admissible, as between the parties to the action or their privies, to prove any fact which was in issue and was decided in the action or suit, provided that the judgment therein rendered be of such a nature as to be binding upon all the parties,[2] but it is not admissible for this purpose as against strangers to the former action,[3] nor can it be used by a stranger against one of the parties.[4]

(2) *Admissibility of Public Record For or Against Officer Who Made It.* — An entry made by a public officer in the discharge of his official duty, in a book which he is bound to keep as a record of his proceedings, is admissible in evidence even when the officer is a party to the action and it is in his behalf or against him that the proof is offered.[5] Likewise, in a prosecution for embezzlement, records kept by the defendant, or based upon reports made by him, are admissible.[6]

2. Primary or Secondary Evidence. — It is obvious from the nature and characteristics of judicial and other public records that they must, as a general rule, be the best, or primary, evidence of the matters which are therein set forth,[7] but there may be cases in which such records are admissible as

titles and to keep evidence of titles by purchase under one system and in the same office. Lindsay *v.* Beaman, 128 N. Car. 189.

1. Bridgman *v.* Corey, 62 Vt. 1.

2. Admissibility Between Parties and Privies — *United States.* — Janes *v.* Buzzard, Hempst. (U. S.) 240.

Connecticut. — Canaan *v.* Greenwoods Turnpike Co., 1 Conn. 1.

Delaware. — Chase *v.* Jefferson, 1 Houst. (Del.) 257.

Georgia. — Spinks *v.* Glenn, 67 Ga. 744.

Indiana. — Boyer *v.* Berryman, 123 Ind. 451.

Kentucky. — Lowry *v.* McMurtry, Sneed (Ky.) 251; Troutman *v.* Vernon, 1 Bush (Ky.) 482.

Missouri. — Buchanan *v.* Smith, 75 Mo. 463.

Nebraska. — Wilcox *v.* Saunders, 4 Neb. 569.

Nevada. — See Adams *v.* Smith, 19 Nev. 259.

New York. — Miller *v.* Brenham, 68 N. Y. 83.

Utah. — Lehi Irrigation Co. *v.* Moyle, 4 Utah 327.

Vermont. — Spencer *v.* Dearth, 43 Vt. 98.

See also the title RES JUDICATA, *post.*

3. Not Admissible Against Strangers — *England.* — Proctor *v.* Johnson, 2 Salk. 600, 1 Ld. Raym. 669.

Alabama. — Snodgrass *v.* Branch Bank, 25 Ala. 161, 60 Am. Dec. 505; Wilson *v.* Campbell, 33 Ala. 249, 70 Am. Dec. 586.

Iowa. — Costello *v.* Burke, 63 Iowa 361.

Louisiana. — Henderson *v.* Western Marine, etc., Ins. Co., 10 Rob. (La.) 164, 43 Am. Dec. 176.

Maryland. — Clagett *v.* Easterday, 42 Md. 617.

Missouri. — Archer *v.* Bacon, 12 Mo. 149; Cravens *v.* Jameson, 59 Mo. 69.

New Hampshire. — Harrington *v.* Wadsworth, 63 N. H. 400.

New York. — Dows *v.* McMichael, 6 Paige (N. Y.) 139.

North Carolina. — Briley *v.* Cherry, 2 Dev. L. (13 N. Car.) 2, 18 Am. Dec. 561.

South Carolina. — Wilson *v.* Harper, 5 S. Car. 294.

Texas. — Bracken *v.* Neill, 15 Tex. 109; Pratt *v.* Jones, 64 Tex. 695.

Virginia. — Frazier *v.* Frazier, 2 Leigh (Va.) 642; Duncan *v.* Helms, 8 Gratt. (Va.) 68.

West Virginia. — Laidley *v.* Kline, 8 W. Va. 218.

See also the title RES JUDICATA, *post.*

4. Not Admissible for Stranger Against Party. — Davis *v.* Wood, 1 Wheat. (U. S.) 6; Fitzhugh *v.* Croghan, 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 139; Chiles *v.* Conley, 2 Dana (Ky.) 21. See also the title RES JUDICATA, *post.*

5. Admissibility For or Against Officer Who Made Entry. — Union *v.* Bermes, 44 N. J. L. 269, 43 Am. Rep. 369; Bissell *v.* Hamblin, 6 Duer (N. Y.) 512.

6. Stanley *v.* State, 88 Ala. 154. See generally the title EMBEZZLEMENT, vol. 10, pp. 1034, 1035.

7. Primary Evidence — *United States.* — Owings *v.* Speed, 5 Wheat. (U. S.) 424.

Alabama. — Doe *v.* Reynolds, 27 Ala. 364; Perryman *v.* Greenville, 51 Ala. 507; Lyon *v.* Bolling, 14 Ala. 753, 48 Am. Dec. 122.

California. — People *v.* Reinhart, 39 Cal. 449; People *v.* McDonald, 39 Cal. 697; People *v.* Schenick, 65 Cal. 625.

Connecticut. — Enfield *v.* Ellington, 67 Conn. 459; Beach *v.* Baldwin, 9 Conn. 476; Williams *v.* Cheesebrough, 4 Conn. 356; Gilbert *v.* New Haven, 40 Conn. 102.

Georgia. — Cody *v.* Gainesville First Nat. Bank, 103 Ga. 789; Carr *v.* Georgia L. & T.

secondary evidence.[1] It has also been held that where a record required by law is not kept, or is not properly kept, extrinsic evidence is admissible of matters which should, but do not, appear in the record.[2]

Co., 108 Ga. 757; Fain *v.* Garthright, 5 Ga. 6; Peterson *v.* Taylor, 15 Ga. 483, 60 Am. Dec. 705. See also Ramsey *v.* Cole, 84 Ga. 147.

Idaho. — Ralston *v.* Plowman, 1 Idaho 595.

Illinois. — Lane *v.* Sharpe, 4 Ill. 566; Stillman *v.* Palis, 23 Ill. App. 408; People *v.* Madison County, 125 Ill. 334, *affirming* 23 Ill. App. 386.

Indiana. — Alexander *v.* Johnson, 144 Ind. 82; Aurora *v.* Fox, 78 Ind. 1; Bible *v.* Voris, 141 Ind. 569; Brown *v.* Eaton, 98 Ind. 591; Doe *v.* Stephenson, 1 Ind. 115; Byer *v.* New Castle, 124 Ind. 86; Mills *v.* Barnes, 4 Blackf. (Ind.) 438; Fayette County *v.* Chitwood, 8 Ind. 504; Abrams *v.* Smith, 8 Blackf. (Ind.) 95; Reilly *v.* Cavanaugh, 29 Ind. 435.

Indian Territory. — Schwab Clothing Co. *v.* Cromer, 1 Indian Ter. 661.

Iowa. — Callanan *v.* Votruba, 104 Iowa 672, 65 Am. St. Rep. 538.

Kansas. — Pulsifer *v.* Arbuthnot, 59 Kan. 380.

Kentucky. — Farley *v.* Lewis, 102 Ky. 234; Stromburg *v.* Earick, 6 B. Mon. (Ky.) 578; Grimes *v.* Grimes, 1 Dana (Ky.) 234.

Louisiana. — Orr *v.* Hamilton, 36 La. Ann. 790.

Maine. — Knowlton *v.* Knowlton, 84 Me. 283; Moor *v.* Newfield, 4 Me. 44.

Maryland. — Harker *v.* Dement, 9 Gill (Md.) 7, 52 Am. Dec. 670; Duvall *v.* Peach, 1 Gill (Md.) 172.

Massachusetts. — Weld *v.* Nichols, 17 Pick. (Mass.) 538; Andrews *v.* Boylston, 110 Mass. 214; Sheldon *v.* Frink, 12 Pick. (Mass.) 568; Morrison *v.* Lawrence, 98 Mass. 219; Fleming *v.* Clark, 12 Allen (Mass.) 191; Manning *v.* Fifth Parish, 6 Pick. (Mass.) 6. See also Taylor *v.* Henry, 2 Pick. (Mass.) 397.

Michigan. — Stevenson *v.* Bay City, 26 Mich. 44.

Missouri. — State *v.* Richardson, 117 Mo. 586; Milan *v.* Pemberton, 12 Mo. 598; State *v.* Lewis, 80 Mo. 110; State *v.* Douglass, 81 Mo. 231; Lebanon Light, etc., Co. *v.* Lebanon, 163 Mo. 254.

New Hampshire. — Smith *v.* Smith, 43 N. H. 536; Sawyer *v.* Manchester, etc., R. Co., 62 N. H. 135, 13 Am. St. Rep. 541; Hampstead *v.* Plaistow, 49 N. H. 84; Pittsfield *v.* Barnstead, 38 N. H. 115; Orford *v.* Benton, 36 N. H. 395; Greeley *v.* Quimby, 22 N. H. 335; Adams *v.* Mack, 3 N. H. 493.

New Jersey. — State *v.* Newark, 58 N. J. L. 522; Michener *v.* Lloyd, 16 N. J. Eq. 38; Tice *v.* Reeves, 30 N. J. L. 314; Tyrrel *v.* Overseers of Poor, 27 N. J. L. 416.

New York. — People *v.* Zeysi, 23 N. Y. 140; Denning *v.* Roome, 6 Wend. (N. Y.) 651; McVity *v.* Stanton, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 105; Pohalski *v.* Ertheiler, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 33; Duffy *v.* Beirne, 30 N. Y. App. Div. 384; White *v.* Hawn, 5 Johns. (N. Y.) 351; Tuttle *v.* Jackson, 6 Wend. (N. Y.) 213, 21 Am. Dec. 306; Rehberg *v.* New York, 99 N. Y. 652. See also Grimm *v.* Hamel, 2 Hilt. (N. Y.) 434.

North Carolina. — Foster *v.* Woodfin, 65 N. Car. 29; State *v.* McAlpin, 4 Ired. L. (26 N. Car.) 140; Mason *v.* Pelletier, 77 N. Car. 52.

North Dakota. — Amundson *v.* Wilson, (N. Dak. 1902) 91 N. W. Rep. 37.

Ohio. — Inman *v.* Jenkins, 3 Ohio 271; Newcomb *v.* Smith, 5 Ohio 447.

Oregon. — Bowick *v.* Miller, 21 Oregon 25.

Pennsylvania. — Gearhart *v.* Dixon, 1 Pa. St. 224. See also Cox *v.* Cox, 26 Pa. St. 375, 67 Am. Dec. 432.

South Carolina. — State *v.* Rice, 49 S. Car. 418, 61 Am. St. Rep. 816; Messonier *v.* Union Ins. Co., 1 Nott & M. (S. Car.) 155; Lining *v.* Bentham, 2 Bay (S. Car.) 1; Etters *v.* Etters, 11 Rich. L. (S. Car.) 413.

Tennessee. — Jones *v.* Walker, 5 Yerg. (Tenn.) 427; City Sav. Bank *v.* Kensington Land Co., (Tenn. Ch. 1896) 37 S. W. Rep. 1037.

Texas. — Kaffenberger *v.* State, 34 Tex. Crim. 142; Elsner *v.* State, 22 Tex. App. 687; Roberts *v.* Connellee, 71 Tex. 11; Hughes *v.* Christy, 26 Tex. 230.

Vermont. — Austin *v.* Howe, 17 Vt. 654; Cabot *v.* Britt, 36 Vt. 349.

West Virginia. — Phares *v.* State, 3 W. Va. 567, 100 Am. Dec. 777; Battin *v.* Woods, 27 W. Va. 58.

Wisconsin. — Steele *v.* Schricker, 55 Wis. 134; Fornette *v.* Carmichael, 41 Wis. 200. See also Tewksbury *v.* Schulenberg, 48 Wis. 577, *explained* in Steele *v.* Schricker, 55 Wis. 134.

The Time of the proceedings or acts of a court can be proved only by the record. Thomas *v.* Ansley, 6 Esp. 80; Sherman *v.* Smith, 20 Ill. 350; Jenkins *v.* Parkhill, 25 Ind. 473; Weaver *v.* Lammon, 62 Mich. 366; Farnsworth *v.* Briggs, 6 N. H. 561.

The Docket of a Justice of the Peace is only primary evidence of those facts which it is required to contain. Scorpion Silver Min. Co. *v.* Marsano, 10 Nev. 370.

Questions in the Nature of Matters in Pais. — The questions, how many terms of court were held in a certain year, what judge presided, and whether juries were in attendance, though these are facts which might appear from the records, are in the nature of matters *in pais* and are susceptible of proof by parol evidence. Massey *v.* Westcott, 40 Ill. 160.

Record Must Be Authorized or Required by Statute. — Reynolds *v.* Schweinefus, 27 Ohio St. 312; Bays *v.* Trulson, 25 Oregon 109.

1. When Admissible as Secondary Evidence. — See Gaines *v.* Patterson, 3 Dana (Ky.) 408; Morris *v.* Bowen, 52 N. H. 416; Browning *v.* Flanagin, 22 N. J. L. 567; Harvey *v.* Thomas, 10 Watts (Pa.) 63, 36 Am. Dec. 141; Boyd *v.* Com., 36 Pa. St. 355.

But where a record is produced by a party to prove a particular fact, the opposite party is not entitled to avail himself of it as a proof of other facts, for which he could not have used it as primary evidence. Herndon *v.* Givens, 16 Ala. 261.

2. Extrinsic Evidence of Matters Not Recorded — *Indiana.* — Ross *v.* Madison, 1 Ind. 281, 48 Am. Dec. 361.

Kansas. — Rock Creek Tp. *v.* Codding, 42

3. Of What Record Is Evidence — *a.* PUBLIC RECORDS. — A public record is evidence of those matters which are properly incorporated therein,[1] but not of matters which are merely incidentally noted, or do not properly belong in the record.[2]

b. JUDICIAL RECORDS — (1) *Rendition, Terms and Effect of Judgment.* — A judicial record is always admissible to prove the fact that a judgment has been rendered, the time of its rendition, and the terms and effect of the judgment;[3] for the mere fact that a judgment was given, this being a thing done

Kan. 649; Troy *v.* Atchison, etc., R. Co., 13 Kan. 70, 11 Kan. 519; Marbourg *v.* McCormick, 23 Kan. 38.

Maine. — Kellar *v.* Savage, 17 Me. 444; Whiting *v.* Ellsworth, 85 Me. 301; Hathaway *v.* Addison, 48 Me. 440. See also Farnsworth Co. *v.* Rand, 65 Me. 19.

Michigan. — School-Dist. No. One *v.* Union School-Dist. No. One, 81 Mich. 339.

Nebraska. — Keller *v.* Amos, 31 Neb. 438; State *v.* Frank, 60 Neb. 327, 61 Neb. 679.

New Jersey. — See Bigelow *v.* Perth Amboy, 25 N. J. L. 297.

Texas. — Strong *v.* State, 18 Tex. App. 19.

Vermont. — See Hutchinson *v.* Pratt, 11 Vt. 402.

West Virginia. — Anderson *v.* Henry, 45 W. Va. 319.

Wyoming. — Laramie County *v.* Stone, 7 Wyo. 280.

1. Of What Record Is Evidence — *United States.* — Wetmore *v.* U. S., 10 Pet. (U. S.) 647; U. S. *v.* Eggleston, 4 Sawy. (U. S.) 199; Ronkendorff *v.* Taylor, 4 Pet. (U. S.) 349.

Arkansas. — Winter *v.* Bandel, 30 Ark. 362.

California. — Pralus *v.* Pacific Gold, etc., Min. Co., 35 Cal. 30.

Colorado. — Greeley *v.* Hamman, 17 Colo. 30.

Connecticut. — Isbell *v.* New York, etc., R. Co., 25 Conn. 556.

Illinois. — Merchants' Nav. Co. *v.* Amsden, 25 Ill. App. 307; Pike *v.* People, 84 Ill. 80; Ohio, etc., R. Co. *v.* People, 119 Ill. 209; Clapp *v.* Herdman, 25 Ill. App. 509; Gage *v.* Davis, (Ill. 1887) 14 N. E. Rep. 36; Bush *v.* Stanley, 122 Ill. 406.

Indiana. — Cravens *v.* Duncan, 55 Ind. 347; Holcroft *v.* Halbert, 16 Ind. 256.

Iowa. — Wormley *v.* Carroll Tp., 45 Iowa 666; Huston *v.* Council Bluffs, 101 Iowa 33.

Kansas. — Willis *v.* Sproule, 13 Kan. 257.

Maine. — Hodgdon *v.* Wight, 36 Me. 326; State *v.* Gorham, 65 Me. 270; Barker *v.* Fogg, 34 Me. 392.

Massachusetts. — Locke *v.* Bennett, 7 Cush. (Mass.) 445; Edson *v.* Munsell, 10 Allen (Mass.) 557; Elwell *v.* Hinckley, 138 Mass. 225; Westfield Cigar Co. *v.* Insurance Co. of North America, 169 Mass. 382.

Minnesota. — Sanborn *v.* School-Dist. No. 10, 12 Minn. 17.

Missouri. — Williams *v.* Carpenter, 42 Mo. 327.

New Hampshire. — Bishop *v.* Cone, 3 N. H. 513; French *v.* Spalding, 61 N. H. 395.

New York. — Swift *v.* State, 89 N. Y. 52; Markowitz *v.* Dry Dock, etc., R. Co., (C. Pl. Gen. T.) 12 Misc. (N. Y.) 412; Lerche *v.* Brasher, 104 N. Y. 157.

North Carolina. — Cardwell *v.* Mebane, 68 N. Car. 485.

Ohio. — Anderson *v.* Hamilton County, 12 Ohio St. 635; Beebe *v.* Scheidt, 13 Ohio St. 406.

Pennsylvania. — Weston *v.* Stammers, 1 Dall. (Pa.) 2; Dikeman *v.* Parrish, 6 Pa. St. 210, 47 Am. Dec. 455; Cuttle *v.* Brockway, 24 Pa. St. 145; Huzzard *v.* Trego, 35 Pa. St. 9.

South Carolina. — Freeman *v.* Bailey, 50 S. Car. 241.

Texas. — Brewster County *v.* Presidio County, 19 Tex. Civ. App. 638.

Vermont. — Briggs *v.* Taylor, 35 Vt. 57.

Wisconsin. — Roehrborn *v.* Schmidt, 16 Wis. 519.

2. Matters Incidentally Noted or Not Properly Part of Record. — Childress *v.* Cutter, 16 Mo. 24; Morrissey *v.* Wiggins Ferry Co., 47 Mo. 521. See also Colburn *v.* Ellis, 5 Mass. 427; Welles *v.* Battelle, 11 Mass. 477.

Tax Records. — Assessment rolls or tax lists have been held not to be evidence of ownership. Shumway *v.* Leakey, 67 Cal. 458; Doe *v.* Arkwright, 5 C. & P. 575, 24 E. C. L. 462, 2 Ad. & El. 182, note, 29 E. C. L. 67, note, 1 N. & M. 731. Or of the locality of realty. Com. *v.* Heffron, 102 Mass. 148. Or of domicil of the person assessed. Sewall *v.* Sewall, 122 Mass. 156, 23 Am. Rep. 299. Or of the amount of property belonging to the person assessed. Lockhart *v.* Woods, 38 Ala. 631; Kennedy *v.* Holladay, 25 Mo. App. 503. Or of the value of the property. Flint *v.* Flint, 6 Allen (Mass.) 34, 83 Am. Dec. 615; Kenerson *v.* Henry, 101 Mass. 152; Com. *v.* Heffron, 102 Mass. 148.

A Record of Baptism is not evidence of the age of the person baptized, even though it be stated therein.

Maryland. — Weaver *v.* Leiman, 52 Md. 708.

Michigan. — Durfee *v.* Abbott, 61 Mich. 471.

Minnesota. — Houlton *v.* Manteuffel, 51 Minn. 185.

Missouri. — Morrissey *v.* Wiggins Ferry Co., 47 Mo. 521.

New Jersey. — Supreme Assembly *v.* McDonald, 59 N. J. L. 248.

New York. — McGuirk *v.* Mutual Ben. L. Co., (Supm. Ct. Gen. T.) 20 N. Y. Supp. 908, 66 Hun (N. Y.) 628; Kabok *v.* Phœnix Mut. L. Ins. Co., (Supm. Ct. Gen. T.) 4 N. Y. Supp. 718.

Wisconsin. — Lavin *v.* Mutual Aid Soc., 74 Wis. 349.

3. Rendition Terms and Effect of Judgment — *England.* — Legatt *v.* Tollervey, 14 East 302; Rex *v.* Norman, 4 C. B. 884, 56 E. C. L. 884. See also Rex *v.* Browne, M. & M. 315, 22 E. C. L. 319.

United States. — Barr *v.* Gratz, 4 Wheat. (U. S.) 213.

Alabama. — Ewing *v.* Sanford, 21 Ala. 157; Donnell *v.* Jones, 17 Ala. 689, 52 Am. Dec. 194.

California. — Watrous *v.* Cunningham, 71 Cal. 30.

by public authority, can never be considered as *res inter alios acta,* nor can the legal consequences of the rendition of such judgment be so considered.[1]

(2) *Inferences from Record.* — A judicial record is not evidence of any matter which can only be inferred from it by argument.[2]

(3) *Lack of Jurisdiction.* — A judicial record is proper and legitimate evidence for the purpose of showing that in the case involved the court was without jurisdiction of the parties or of the subject-matter, and that consequently an order of sale, a sale of the property in question, and the deeds following the sale, were nullities.[3]

4. Conclusiveness — *a.* JUDICIAL RECORDS — (1) *Rule Stated.* — It is well established as a general rule that a judicial record imports absolute verity, and hence is conclusive concerning the matters to which it relates.[4]

(2) *Extrinsic Evidence to Aid, Vary, or Contradict.* — It necessarily follows

Connecticut. — State *v.* Hyde, 29 Conn. 564.
Indiana. — Splahn *v.* Gillespie, 48 Ind. 397; Johnson *v.* Culver, 116 Ind. 278; Taylor *v.* Williams, 120 Ind. 414.
Iowa. — Plummer *v.* Harbut, 5 Iowa 308; Sowden *v.* Craig, 26 Iowa 156, 96 Am. Dec. 125.
Kentucky. — Head *v.* McDonald, 7 T. B. Mon. (Ky.) 203.
Louisiana. — Fox *v.* Fox, 4 La. Ann. 135.
Maryland. — Key *v.* Dent, 14 Md. 86. See also Gisriel *v.* Burrows, 72 Md. 366.
Massachusetts. — Commercial Bank *v.* Eddy, 7 Met. (Mass.) 181; Com. *v.* M'Pike, 3 Cush. (Mass.) 181, 50 Am. Dec. 727; Goodnow *v.* Smith, 97 Mass. 69.
Missouri. — Jones *v.* Talbot, 9 Mo. 121; Snead *v.* Wegman, 23 Mo. 263; Davidson *v.* Peck, 4 Mo. 438; Archer *v.* Bacon, 12 Mo. 149. See also Beardslee *v.* Steinmesch, 38 Mo. 168.
Nebraska. — Morrison *v.* Boggs, 44 Neb. 248.
New Hampshire. — Vogt *v.* Ticknor, 48 N. H. 242. See also King *v.* Chase, 15 N. H. 9, 41 Am. Dec. 675.
New Jersey. — Den *v.* Hamilton, 12 N. J. L. 109.
New York. — Kip *v.* Brigham, 7 Johns. (N. Y.) 168. See also Beyer *v.* Schultze, 54 N. Y. Super. Ct. 212.
Oregon. — See Gilmore *v.* Taylor, 5 Oregon 89.
Pennsylvania. — McMichael *v.* McDermott, 17 Pa. St. 353, 55 Am. Dec. 560. See also Harger *v.* Thomas, 44 Pa. St. 128, 84 Am. Dec. 422.
South Carolina. — Turpin *v.* Brannon, 3 McCord L. (S. Car.) 261.
Texas. — Hyde *v.* Baker, (Tex. Civ. App. 1901) 62 S. W. Rep. 962; Ware *v.* Bennett, 18 Tex. 794; White *v.* Leavitt, 20 Tex. 703; Warren *v.* Frederichs, 76 Tex. 647.
Vermont. — Spencer *v.* Dearth, 43 Vt. 98.
Virginia. — Ray *v.* Clemens, 6 Leigh (Va.) 600; Shanks *v.* Lancaster, 5 Gratt. (Va.) 110, 50 Am. Dec. 108.

1. Jones *v.* Talbot, 9 Mo. 121.

2. Inferences. — Kingston's Case, 2 Smith Lead. Cas. (8 ed.) 862; McCravey *v.* Remson, 19 Ala. 430, 54 Am. Dec. 194.

3. Lack of Jurisdiction. — Venner *v.* Denver Union Water Co., 15 Colo. App. 495.

4. Judicial Record Imports Absolute Verity — *England.* — Rex *v.* Carlile, 2 B. & Ad. 362, 22 E. C. L. 96; Sintzenick *v.* Lucas, 1 Esp. 44.
Alabama. — *Ex p.* Rice, 102 Ala. 671.
Arkansas. — McCoy *v.* State, 22 Ark. 308.
Connecticut. — Douglass *v.* Wickwire, 19 Conn. 489.
Illinois. — Weigley *v.* Matson, 24 Ill. App. 178, *affirmed* 125 Ill. 64, 8 Am. St. Rep. 335; Consolidated Coal Co. *v.* Schaefer, 135 Ill. 210.
Iowa. — Maynes *v.* Brockway, 55 Iowa 457; Farley *v.* Budd, 14 Iowa 289.
Kentucky. — Stevenson *v.* Flournoy, 89 Ky. 561.
Maine. — Davis *v.* Smith, 79 Me. 351.
Michigan. — Hodges *v.* Bagg, 81 Mich. 243.
Missouri. — Weber *v.* Schmeisser, 7 Mo. 600; Latrielle *v.* Dorleque, 35 Mo. 233; Johnston *v.* Kerkhoff, 35 Mo. 291.
Nebraska. — State *v.* Hopewell, 35 Neb. 822.
New Hampshire. — King *v.* Chase, 15 N. H. 13, 41 Am. Dec. 675.
New Jersey. — Kline *v.* Cutter, 34 N. J. Eq. 329, 15 Cent. L. J. 289.
New York. — Kip *v.* Brigham, 7 Johns. (N. Y.) 168; Dows *v.* McMichael, 6 Paige (N. Y.) 139.
North Carolina. — Jones *v.* Judkins, 4 Dev. & B. L. (20 N. Car.) 454, 34 Am. Dec. 392; Galloway *v.* McKeithen, 5 Ired. L. (27 N. Car.) 12, 42 Am. Dec. 153; Stancill *v.* James, 126 N. Car. 190; Spencer *v.* Credle, 102 N. Car. 68; Henry *v.* Hilliard, 120 N. Car. 479.
Tennessee. — Murfree *v.* Carmack, 4 Yerg. (Tenn.) 270, 26 Am. Dec. 232.
Vermont. — Currier *v.* Richardson, 63 Vt. 617.

The Judicial Records of a Sister State are entitled to the same credit that they are accorded in the state to which they belong. State *v.* Shreve, 137 Mo. 1; Barr *v.* Closterman, 1 Ohio Cir. Dec. 546. See generally the title FOREIGN JUDGMENTS, vol. 13, p. 974.

Where the Clerk's or the Court's Docket Is Treated as the Record, before the extended record is made up, the same rules of presumed verity apply to it as to the record proper. Leathers *v.* Cooley, 49 Me. 337; Read *v.* Sutton, 2 Cush. (Mass.) 115; Jester *v.* Spurgeon, 27 Mo. App. 477.

Recitals in a Decree are at least *prima facie* evidence of the facts recited. Koons *v.* Bryson, 25 U. S. App. 368.

An Entry in the Register of Actions is of itself no evidence that the proceeding has been tried. State *v.* Baldwin, 62 Minn. 518.

that it is never permissible to introduce parol or other extrinsic evidence to vary or contradict a judicial record,[1] but where the record does not on its face show the precise question determined, or in other respects leaves any matter

1. Extrinsic Evidence Not Admissible to Contradict Judicial Record — *England.* — Dickson *v.* Fisher, 1 W. Bl. 664; Keane *v.* O'Brien, Ir. R. 5 C. L. 531. See also Sintzenick *v.* Lucas, 1 Esp. 44.

United States. — Equitable Trust Co. *v.* Smith, (C. C. A.) 77 Fed. Rep. 677.

Alabama. — Hanchey *v.* Coskrey, 81 Ala. 149.

Arkansas. — Smith *v.* Talbot, 11 Ark. 666. See also Wallace *v.* Brown, 22 Ark. 118, 76 Am. Dec. 421.

California. — Hoffman *v.* Superior Ct., 79 Cal. 475.

Idaho. — *In re* Havird, 2 Idaho 652.

Illinois. — Robinson *v.* Ferguson, 78 Ill. 538; Garfield *v.* Douglass, 22 Ill. 100, 74 Am. Dec. 137; Roche *v.* Beldam, 119 Ill. 320; Weigley *v.* Matson, 24 Ill. App. 178, *affirmed* 125 Ill. 64, 8 Am. St. Rep. 335; Dillman *v.* Nadelhoffer, 23 Ill. App. 168; Zimmerman *v.* Zimmerman, 15 Ill. 84; Rubel *v.* Title Guarantee, etc., Co., 101 Ill. App. 439, *affirmed* 199 Ill. 110; Gray *v.* Gillilan, 15 Ill. 453, 60 Am. Dec. 761; Palmer *v.* Sanger, 143 Ill. 34; Saterlee *v.* Hickman, 38 Ill. App. 139; Eaton *v.* Harth, 45 Ill. App. 355.

Indiana. — Bentley *v.* Brown, 123 Ind. 552; Case *v.* State, 5 Ind. 1; Pickrell *v.* Jerauld, 1 Ind. App. 10.

Iowa. — See State *v.* Glover, 3 Greene (Iowa) 249.

Kansas. — Mitchell *v.* Insley, 33 Kan. 654; Matter of Watson, 30 Kan. 753; Winans *v.* Rosecrans, 8 Kan. App. 455; Merrill *v.* Ness County, 7 Kan. App. 717.

Kentucky. — Handley *v.* Russell, Hard. (Ky.) 152; Triplett *v.* Gillen, 6 J. J. Marsh. (Ky.) 564; Pilcher *v.* Ligon, 91 Ky. 228.

Louisiana. — See Gliddon *v.* Goos, 21 La. Ann. 682.

Maine. — Sturtevant *v.* Randall, 53 Me. 149; Goodrich *v.* Senate, 92 Me. 248; Treat *v.* Maxwell, 82 Me. 76. See also Jones *v.* Perkins, 54 Me. 393.

Massachusetts. — Tufts *v.* Hancox, 171 Mass. 148; Butler *v.* Suffolk Glass Co., 126 Mass. 512; May *v.* Hammond, 146 Mass. 439. See also Sayles *v.* Briggs, 4 Met. (Mass.) 421.

Michigan. — Waldron *v.* Palmer, 104 Mich. 556; Weaver *v.* Lammon, 62 Mich. 366; Hodges *v.* Bagg, 81 Mich. 243; Sweet *v.* Gibson, 123 Mich. 699; Holmes *v.* Cole, 95 Mich. 272.

Mississippi. — Jones *v.* Williams, 62 Miss. 183.

Missouri. — Atwood *v.* Atwood, 55 Mo. App. 370; West *v.* Moser, 49 Mo. App. 201; Sweet *v.* Maupin, 65 Mo. 65; Sutton *v.* Cole, 155 Mo. 206, Long *v.* Long, 141 Mo. 352.

Nebraska. — Slater *v.* Skirving, 51 Neb. 108, 66 Am. St. Rep. 444.

New York. — Hard *v.* Shipman, 6 Barb. (N. Y.) 621; People *v.* Powers, 7 Barb. (N. Y.) 462; Brooks *v.* New York, 57 Hun (N. Y.) 104; Matter of Broderick, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 534; Young *v.* Conklin, (County Ct.) 3 Misc. (N. Y.) 122; Lorillard *v.* Clyde, 122 N. Y. 41, 19 Am. St. Rep. 470; Brintnall *v.* Foster, 7 Wend. (N. Y.) 103; Green *v.* Clark, 5 Den. (N. Y.) 497.

North Carolina. — Batts *v.* Staton, 123 N. Car. 45; Forbes *v.* Wiggins, 112 N. Car. 122; Baker *v.* Garris, 108 N. Car. 218.

Ohio. — Barr *v.* Closterman, 1 Ohio Cir. Dec. 546; Topliff *v.* Topliff, 4 Ohio Cir. Dec. 312, 8 Ohio Cir. Ct. 55; Cincinnati *v.* Hosea, 10 Ohio Cir. Dec. 618.

Oregon. — Underwood *v.* French, 6 Oregon 66, 25 Am. Rep. 500.

Pennsylvania. — Cochran *v.* Sanderson, 151 Pa. St. 591; Ritter *v.* Keller, 12 Pa. Co. Ct. 239; Springer *v.* Wood, (Pa. 1886) 5 Cent. Rep. 203; Follansbee *v.* Walker, 74 Pa. St. 306; Susquehanna Mut. F. Ins. Co. *v.* Mardorf, 152 Pa. St. 22; Kapp *v.* Shields, 17 Pa. Super. Ct. 524.

South Carolina. — Hankinson *v.* Charlotte, etc., R. Co., 41 S. Car. 1.

South Dakota. — Lewis *v.* St. Paul, etc., R. Co., 5 S. Dak. 148; Morris *v.* Hubbard, 10 S. Dak. 259.

Tennessee. — Union, etc., Bank *v.* Memphis, 107 Tenn. 66.

Texas. — Freeman *v.* McAninch, 87 Tex. 132, 47 Am. St. Rep. 79, *reversing* 6 Tex. Civ. App. 644; McGrady *v.* Monks, 1 Tex. Civ. App. 611; Irwin *v.* Bexar County, (Tex. Civ. App. 1901) 63 S. W. Rep. 550. See also New York, etc., Land Co. *v.* Votaw, (Tex. Civ. App. 1899) 52 S. W. Rep. 125.

Vermont. — *Re* Bodwell, 66 Vt. 231; Post *v.* Smilie, 48 Vt. 185.

Wisconsin. — Braun *v.* Wisconsin Rendering Co., 92 Wis. 245.

But *compare* Barbee *v.* Shannon, 1 Indian Ter. 199, in which it was held that the record of a judgment rendered in one state may be contradicted in a collateral attack in another state as to the facts necessary to give the court jurisdiction.

Minute Book of Court. — This rule excludes even the minutes of the court whose record is under consideration, if offered to vary or contradict the record. Hobbs *v.* Duff, 43 Cal. 485; Davidson *v.* Murphy, 13 Conn. 213; Cherry *v.* State, 6 Fla. 679; Knight *v.* Kelley, 10 Iowa 104; Southgate *v.* Burnham, 1 Me. 369; Willard *v.* Whitney, 49 Me. 235; Mandeville *v.* Stockett, 28 Miss. 398; Den *v.* Dowmam, 13 N. J. L. 135; Croswell *v.* Byrnes, 9 Johns. (N. Y.) 289; Updergraff *v.* Perry, 4 Pa. St. 291; Williams *v.* Tenpenny, 11 Humph. (Tenn.) 176. See also Hahn *v.* Kelly, 34 Cal. 423.

Fraud. — The testimony of a judge who presided over a court at the time a claim was allowed is admissible to show that fraud, which vitiates everything that it touches, has been employed to defeat the legitimate action of the court over which he presided, and as expressed in the rough minutes of the clerk, by so changing the entry made thereon as to show an absolute unconditional allowance instead of the allowance of a mere judgment of offset as shown originally by those minutes. In such case the testimony is not to contradict

open to doubt, parol and other extrinsic evidence, which is not in conflict with the record, may be introduced to aid and explain it by showing the precise questions which were determined, or that certain questions were not passed upon, or otherwise clearing up any doubts which might exist.[1]

the record and hence the case is not within the operation of the rule which would preclude the judge from stating the character of the judgment which was rendered. Sweet *v.* Maupin, 65 Mo. 65.

But in order to entitle a party to attack an entry on the records of the court, by parol evidence, on the ground that it is not a record, because not properly made and tainted with fraud, the allegation must be fully and fairly made and the issue clearly and positively tendered. *In re* Havird, 2 Idaho 652.

1. Extrinsic Evidence Admissible to Aid or Explain Judicial Record — *England.* — Preston *v.* Peeke, E!. Bl. & El. 336, 96 E. C. L. 336, 27 L. J. Q. B. 424, 6 W. R. 591, 4 Jur. N. S. 613; Seddon *v.* Tutop, 1 Esp. 401, 6 T. R. 607; Martin *v.* Thornton, 4 Esp. 180; Outram *v.* Morewood, 3 East 353; Ravee *v.* Farmer, 4 T. R. 146.

United States. — Russell *v.* Place, 94 U. S. 606; Davis *v.* Brown, 94 U. S. 423; Humphreys *v.* Cincinnati Third Nat. Bank, 43 U. S. App. 698; Ryan *v.* Staples, 40 U. S. App. 427; Merchants' International Steamboat Line *v.* Lyon, 4 McCrary (U. S.) 145; Washington, etc., Steam Packet Co. *v.* Sickles, 5 Wall. (U. S.) 592, 24 How. (U. S.) 333; Miles *v.* Caldwell, 2 Wall. (U. S.) 35; Newton Mfg. Co. *v.* Wilgus, 90 Fed. Rep. 483; Fayerweather *v.* Ritch, 88 Fed. Rep. 713; Thompson *v.* N. T. Bushnell Co., 80 Fed. Rep. 332. See also Ætna L. Ins. Co. *v.* Hamilton County, (C. C. A.) 117 Fed. Rep. 82.

Alabama. — Louisville, etc., R. Co. *v.* Malone, 116 Ala. 600; Hanchey *v.* Coskrey, 81 Ala. 149; Strother *v.* Butler, 17 Ala. 733; Rake *v.* Pope, 7 Ala. 161. See also Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8.

Arkansas. — Smith *v.* Talbot, 11 Ark. 668.

California. — Graves *v.* Hebbron, 125 Cal. 400; Ferrea *v.* Chabot, 63 Cal. 564; Meredith *v.* Santa Clara Min. Assoc., 56 Cal. 178; Lillis *v.* People's Ditch Co., (Cal. 1892) 29 Pac. Rep. 780.

Connecticut. — Fisher *v.* Fielding, 67 Conn. 92, 52 Am. St. Rep. 270; Perkins *v.* Brazos, 66 Conn. 242; Sargent *v.* New Haven Steamboat Co., 65 Conn. 116; Buckingham's Appeal, 60 Conn. 143; Mosman *v.* Sanford, 52 Conn. 23; Supples *v.* Cannon, 44 Conn. 429; Hungerford's Appeal, 41 Conn. 322; Storrs *v.* Robinson, (Conn. 1902) 51 Atl. Rep. 516.

District of Columbia. — Langdon *v.* Evans, 3 Mackey (D. C.) 1.

Georgia. — Ray *v.* Fleetwood, 106 Ga. 253; Ezzell *v.* Maltbie, 6 Ga. 495. See also Hill *v.* Freeman, 7 Ga. 211.

Illinois. — Leopold *v.* Chicago, 150 Ill. 568; Wright *v.* Griffey, 147 Ill. 500; Palmer *v.* Sanger, 143 Ill. 34, *reversing* 36 Ill. App. 485; Chicago, etc., R. Co. *v.* Schaffer, 124 Ill. 112; Merrin *v.* Lewis, 90 Ill. 505; Hall *v.* Jones, 32 Ill. 38; Zimmerman *v.* Zimmerman, 15 Ill. 84; Rubel *v.* Title Guarantee, etc., Co., 101 Ill. App. 439, *affirmed* 199 Ill. 110; Charles E. Henry Sons Co. *v.* Mahoney, 97 Ill. App. 313; Ryan *v.* Potwin, 62 Ill. App. 134.

Indiana. — McGaughey *v.* Woods, 106 Ind. 380; Bottorff *v.* Wise, 53 Ind. 32. See also Palmer *v.* Hayes, 112 Ind. 289.

Iowa. — State *v.* Meek, 112 Iowa 338.

Kansas. — Smith *v.* Auld, 31 Kan. 262.

Kentucky. — Bagby *v.* Warren Deposit Bank, (Ky. 1899) 49 S. W. Rep. 177; Maize *v.* Bowman, 93 Ky. 205.

Louisiana. — Steele's Succession, 7 La. Ann. 111.

Maine. — Parks *v.* Mosher, 71 Me. 304; Lander *v.* Arno, 65 Me. 26; Baker *v.* Stinchfield, 57 Me. 363; Walker *v.* Chase, 53 Me. 258; Sturtevant *v.* Randall, 53 Me. 149; Dunlap *v.* Glidden, 34 Me. 517; Chase *v.* Walker, 26 Me. 559; Whiting *v.* Burger, 78 Me. 287.

Maryland. — Streeks *v.* Dyer, 39 Md. 424; Whitehurst *v.* Rogers, 38 Md. 503; Hughes *v.* Jones, 2 Md. Ch. 178. See also Garrott *v.* Johnson, 11 Gill & J. (Md.) 182.

Massachusetts. — Foye *v.* Patch, 132 Mass. 105; White *v.* Chase, 128 Mass. 158; Hood *v.* Hood, 110 Mass. 463; Perkins *v.* Parker, 10 Allen (Mass.) 22; Sawyer *v.* Woodbury, 7 Gray (Mass.) 499, 66 Am. Dec. 518; McDowell *v.* Langdon, 3 Gray (Mass.) 513; Dutton *v.* Woodman, 9 Cush. (Mass.) 255, 57 Am. Dec. 46; Bridge *v.* Gray, 14 Pick. (Mass.) 55, 25 Am. Dec. 358; New England Bank *v.* Lewis, 8 Pick. (Mass.) 113; Parker *v.* Thompson, 3 Pick. (Mass.) 434; Standish *v.* Parker, 2 Pick. (Mass.) 22, 13 Am. Dec. 393; Butchers' Slaughtering, etc., Assoc. *v.* Boston, 137 Mass. 186. See also Burlen *v.* Shannon, 14 Gray (Mass.) 433; Eastman *v.* Cooper, 15 Pick. (Mass.) 276, 26 Am. Dec. 600.

Michigan. — Bond *v.* Markstrum, 102 Mich. 11; Munro *v.* Meech, 94 Mich. 596; Damm *v.* Gow, 88 Mich. 99; Wood *v.* Faut, 55 Mich. 185; Merchants' Bank *v.* Schulenburg, 48 Mich. 102.

Minnesota. — Mareck *v.* Minneapolis Trust Co., 74 Minn. 538; Drea *v.* Cariveau, 28 Minn. 280.

Missouri. — Sweet *v.* Maupin, 65 Mo. 65; Wright *v.* Salisbury, 46 Mo. 26; Brown *v.* King, 10 Mo. 56; West *v.* Moser, 49 Mo. App. 201; Williams *v.* Dent Iron Co., 30 Mo. App. 662; Snorgrass *v.* Moore, 30 Mo. App. 232; Lightfoot *v.* Wilmot, 23 Mo. App. 5, Tutt *v.* Price, 7 Mo. App. 194.

Nebraska. — Slater *v.* Skirving, 51 Neb. 108, 66 Am. St. Rep. 444; Wilkinson *v.* Carter, 22 Neb. 186.

Nevada. — Sherman *v.* Dilley, 3 Nev. 21. See also McLeod *v.* Lee, 17 Nev. 103.

New Hampshire. — Sanderson *v.* Peabody, 58 N. H. 116; Smith *v.* Smith, 50 N. H. 212.

New York. — Carleton *v.* Lombard, 149 N. Y. 137; Lewis *v.* Ocean Nav., etc., Co., 125 N. Y. 341; Lorillard *v.* Clyde, 122 N. Y. 41, 19 Am. St. Rep. 470; Bowe *v.* Wilkins, 105 N. Y. 322; Smith *v.* Smith, 79 N. Y. 634; Thurst *v.* West, 31 N. Y. 210; Robinson *v.* Jewett, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 732, 64 Hun (N. Y.) 632; Robinson *v.* New York, etc., R. Co., 64 Hun (N. Y.) 41; Bissell *v.* Kellogg, 60 Barb.

(3) *Aiding or Impeaching One Part of Record by Another.* — It must be considered as settled in *Missouri* that a recital in one part of a judgment record may be either aided or impeached by recital in another part;[1] but in *Iowa* the judgment or decree of a court controls the written opinion, and if they are at variance the former determines the rights of the parties.[2]

b. LEGISLATIVE RECORDS. — It is obvious that the only questions which can arise with reference to the conclusiveness of legislative records must relate to whether the statute appears on the enrolled bill or in the statute book in the form in which it was originally passed, and whether the constitutional requirements were observed in its passage. These questions more properly belong to another title in this work, to which reference is made.[3]

c. OTHER PUBLIC RECORDS — (1) *In General.* — It has been laid down that public records other than judicial and legislative are conclusive of the facts stated therein,[4] but it has also been frequently asserted that while they

(N. Y.) 617, *affirmed* 65 N. Y. 432; Burwell *v.* Knight, 51 Barb. (N. Y.) 267; Burt *v.* Sternburgh, 4 Cow. (N. Y.) 559, 15 Am. Dec. 402; Gardner *v.* Buckbee, 3 Cow. (N. Y.) 120, 15 Am. Dec. 256; Wood *v.* Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; Sans *v.* New York, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 559; Matter of Broderick, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 534; Phillips *v.* Berick, 16 Johns. (N. Y.) 136, 8 Am. Dec. 299; Ward *v.* Sire, 52 N. Y. App. Div. 443; Colwell *v.* Bleakley, 1 Abb. App. Dec. (N. Y.) 400.

North Carolina. — Davie *v.* Davis, 108 N. Car. 501.

Ohio. — Mahaffey *v.* Rogers, 6 Ohio Cir. Dec. 88, 10 Ohio Cir. Ct. 24, *affirmed* 56 Ohio St. 767; Topliff *v.* Topliff, 4 Ohio Cir. Dec. 312, 8 Ohio Cir. Ct. 55. See also State *v.* Cincinnati Tin, etc., Co., 66 Ohio St. 182.

Oregon. — Stout *v.* Yamhill County, 31 Oregon 314.

Pennsylvania. — Susquehanna Mut. F. Ins. Co. *v.* Mardorf, 152 Pa. St. 22; Follansbee *v.* Walker, 74 Pa. St. 306; Coleman's Appeal, 62 Pa. St. 252; Roberts *v.* Orr, 56 Pa. St. 176; Fleming *v.* Insurance Co., 12 Pa. St. 391; Carmony *v.* Hoober, 5 Pa. St. 305; Leonard *v.* Leonard, 1 W. & S. (Pa.) 342; Cist *v.* Zeigler, 16 S. & R. (Pa.) 282, 16 Am. Dec. 573; Wilson *v.* Hamilton, 9 S. & R. (Pa.) 424; Haak *v.* Breidenbach, 3 S. & R. (Pa.) 204; Zeigler *v.* Zeigler, 2 S. & R. (Pa.) 286; Kapp *v.* Shields, 17 Pa. Super. Ct. 524; Springer *v.* Wood, (Pa. 1886) 5 Cent. Rep. 203.

Rhode Island. — Jepson *v.* International Fraternal Alliance, 17 R. I. 471; Paine *v.* Schenectady Ins. Co., 12 R. I. 440.

South Dakota. — Taylor *v.* Neys, 11 S. Dak. 605.

Tennessee. — Warwick *v.* Underwood, 3 Head (Tenn.) 238, 75 Am. Dec. 767; Estill *v.* Taul, 2 Yerg. (Tenn.) 467, 24 Am. Dec. 498; Fowlkes *v.* State, 14 Lea (Tenn.) 14.

Texas. — American Freehold Land, etc., Co. *v.* Macdonell, (Tex. Civ. App. 1899) 54 S. W. Rep. 259, *affirmed* as to this point 93 Tex. 398. Freeman *v.* McAninch, 87 Tex. 132, 47 Am. St. Rep. 79, *reversing* 6 Tex. Civ. App. 644; Reast *v.* Donald, 84 Tex. 648; Bouldin *v.* Miller, (Tex. Civ. App. 1894) 26 S. W. Rep. 133; Glasgow *v.* Hill County, (Tex. Civ. App. 1894) 25 S. W. Rep. 989. See also Davis *v.* Schaffner, 3 Tex. Civ. App. 121.

Vermont. — Post *v.* Smilie, 48 Vt. 185; Perkins *v.* Walker, 19 Vt. 144; McLaughlin *v.* Hill, 6 Vt. 20.

Virginia. — Legrand *v.* Rixey, 83 Va. 862; Chrisman *v.* Harman, 29 Gratt. (Va.) 494, 26 Am. Rep. 387.

Washington. — Marble Sav. Bank *v.* Williams, 23 Wash. 766.

Wisconsin. — Grunert *v.* Spalding, 104 Wis. 193; Pfennig *v.* Griffith, 29 Wis. 619; Driscoll *v.* Damp, 16 Wis. 106; Brown *v.* Pratt, 4 Wis. 513, 65 Am. Dec. 330; Ward *v.* Price, 1 Pin. (Wis.) 101.

Briefs. — It is not error to refuse to admit in evidence the brief of counsel upon a former trial for the purpose of showing that the judgment in that case was not upon the merits, for briefs of counsel are not an unerring indication of the basis upon which a judgment has been rendered. They sometimes omit to discuss questions considered by the court and frequently discuss those not involved in the case. Greenlee *v.* Lowing, 35 Mich. 63.

1. Jester *v.* Spurgeon, 27 Mo. App. 477; Cloud *v.* Pierce City, 86 Mo. 357.
2. Goodenow *v.* Litchfield, 59 Iowa 226.
3. See the title STATUTES.
4. **Record Conclusive.** — People *v.* Zeyst, 23 N. Y. 140; Pierce *v.* Wright, (Supm. Ct.) 45 How. Pr. (N. Y.) 1. See also State *v.* Alexander, 107 Iowa 177.

The Record Made by the Clerk of a Town Meeting Is Conclusive of the facts therein stated, not only upon the town, but upon all the world, so long as it stands as the record. Its accuracy cannot be drawn in question collaterally. It can be contradicted or impeached only in proceedings instituted directly for the purpose and to the end that it may be corrected. Sawyer *v.* Manchester, etc., R. Co., 62 N. H. 135, 13 Am. St. Rep. 541.

The Essential Attribute of a Record Is Verity. — Bell *v.* Pike, 53 N. H. 473.

The Book of Selectmen, containing the invoice of the inhabitants of a town, and the sums carried out against their names, is not conclusive evidence of the assessment of such individual, but is subject to alterations and correction, by the selectmen, until recorded in the town book, or left with the town clerk for that purpose. Wakefield *v.* Alton, 3 N. H. 378.

are *prima facie* evidence of such facts,[1] they are not conclusive.[2] It has been said that they are equal to ordinary testimony given under the obligation of an oath, and in relation to remote events they are more satisfactory than the recollection of witnesses,[3] and when they are shown to have been made in the ordinary course of duty, they are, in the absence of any evidence that they have been tampered with, entitled to very great weight.[4] It is probable that as these records vary considerably in their solemnity and dignity of character the decision of a court in any particular case on the question of conclusiveness may be governed to some extent by the character of the particular record under consideration. This would explain the difference between the views which have been announced upon the subject.

(2) *Extrinsic Evidence to Aid, Vary, or Contradict.* — The doctrine that such records are conclusive receives much support from a large number of cases in which it is laid down that they cannot be contradicted by parol or other extrinsic evidence,[5] while there are very few cases in which it has been

1. Prima Facie Evidence — *United States.* — Bruce *v.* U. S., 17 How. (U. S.) 437; U. S. *v.* Harrill, McAll. (U. S.) 243; U. S. *v.* Eggleston, 4 Sawy. (U. S.) 199. *Compare* U. S. *v.* Ralston, 17 Fed. Rep. 895.

Alabama. — Holmes *v.* State, 108 Ala. 24; Stanley *v.* State, 88 Ala. 154.

California. — People *v.* Bircham, 12 Cal. 50; People *v.* Fairfield, 90 Cal. 186; Board of Education *v.* Donahue, 53 Cal. 190.

Illinois. — Pike *v.* People, 84 Ill. 80; Clapp *v.* Herdman, 25 Ill. App. 509; Merchants' Nav. Co. *v.* Amsden, 25 Ill. App. 307; Lowe *v.* Aroma, 21 Ill. App. 599.

Kansas. — Rizer *v.* Callen, 27 Kan. 339.

Louisiana. — Short's Succession, 45 La. Ann. 1485.

Maine. — Goodrich *v.* Senate, 92 Me. 248.

Massachusetts. — Thayer *v.* Stearns, 1 Pick. (Mass.) 109.

Michigan. — See Sauers *v.* Giddings, 90 Mich. 50.

Mississippi. — State *v.* Oliver, 78 Miss. 5.

Missouri. — St. Louis Gas Light Co. *v.* St. Louis, 11 Mo. App. 55, *affirmed* 84 Mo. 202.

Nebraska. — Clarke *v.* Williams, 29 Neb. 691.

New Hampshire. — Hampstead *v.* Plaistow, 49 N. H. 84; Seavey *v.* Seavey, 37 N. H. 125; Blake *v.* Sturtevant, 12 N. H. 567.

New Jersey. — See State *v.* Newark, 58 N. J. L. 522.

North Carolina. — Davenport *v.* McKee, 98 N. Car. 500.

Wisconsin. — Roehrborn *v.* Schmidt, 16 Wis. 519.

2. Not Conclusive — *Alabama.* — Walling *v.* Morgan County, 126 Ala. 326.

Illinois. — Hiner *v.* People, 34 Ill. 297.

Maine. — Goodrich *v.* Senate, 92 Me. 248.

Michigan. — Thurstin *v.* Luce, 61 Mich. 292.

Mississippi. — State *v.* Oliver, 78 Miss. 5.

Missouri. — St. Louis Gas Light Co. *v.* St. Louis, 11 Mo. App. 55, *affirmed* 84 Mo. 202.

North Carolina. — Cheatham *v.* Young, 113 N. Car. 161, 37 Am. St. Rep. 617.

3. Barker *v.* Fogg, 34 Me. 392.

4. Thurstin *v.* Luce, 61 Mich. 292.

5. Record Cannot Be Contradicted by Parol Evidence — *England.* — Dickson *v.* Fisher, 1 W. Bl. 664, 4 Burr. 2267.

Arkansas. — Cooper *v.* Freeman Lumber Co., 61 Ark. 36.

Connecticut. — State *v.* Main, 69 Conn. 123, 61 Am. St. Rep. 30; Gilbert *v.* New Haven, 40 Conn. 102.

Illinois. — People *v.* Madison County, 125 Ill. 334, *affirming* 23 Ill. App. 386.

Indiana. — Weir *v.* State, 96 Ind. 311.

Iowa. — See State *v.* Alexander, 107 Iowa 177.

Kentucky. — Common School Dist. No. 50 *v.* Fishback, (Ky. 1899) 49 S. W. Rep. 29.

Louisiana. — Gaither *v.* Green, 40 La. Ann. 362.

Maine. — Dresden *v.* Bridge, 90 Me. 489.

Massachusetts. — Andrews *v.* Boylston, 110 Mass. 214; Third School Dist. *v.* Atherton, 12 Met. (Mass.) 105; Morrison *v.* Lawrence, 98 Mass. 219; Halleck *v.* Boylston, 117 Mass. 469; Mayhew *v.* Gay Head, 13 Allen (Mass.) 129.

Michigan. — Stevenson *v.* Bay City, 26 Mich. 44.

Mississippi. — Mullins *v.* Shaw, 77 Miss. 900.

New Hampshire. — Franklin Falls Pulp Co. *v* Franklin, 66 N. H. 274.

New York. — People *v.* Zeyst, 23 N. Y. 140; Pooley *v.* Buffalo, (Buffalo Super. Ct. Gen. T.) 15 Misc. (N. Y.) 240; Pierce *v.* Wright, (Supm. Ct.) 45 How. Pr. (N. Y.) 1.

Ohio. — Beebe *v.* Scheidt, 13 Ohio St. 406. But *compare* Westerhaven *v.* Clive, 5 Ohio 136.

Oregon. — Bays *v.* Trulson, 25 Oregon 109.

Texas. — Dallas *v.* Beeman, 18 Tex. Civ. App. 335; Kerr *v.* Corsicana, (Tex. Civ. App. 1895) 35 S. W. Rep. 694.

Vermont. — Eddy *v.* Wilson, 43 Vt. 362; Cameron *v.* School Dist. No. 2, 42 Vt. 507; Taylor *v.* Holcomb, 2 Tyler (Vt.) 344.

See also the title MUNICIPAL RECORDS, vol. 21, p. 9, note 5.

Record Cannot be Collaterally Impeached by Another Record. — The record of the county commissioners of one county, showing the legal location of a way, cannot be impeached collaterally by introducing the record of the county commissioners of another county to show that the record in the first county is erroneous. Bradbury *v.* Benton, 69 Me. 194.

The Minutes of the Proceedings of a Police Jury make up a public record importing absolute verity and they cannot be attacked or contradicted in a collateral action to which the board are not made parties. Nor can their secretary in such an action be required to correct alleged

held admissible to contradict directly such records by evidence of this character.[1] That such records may be aided or explained by parol or other extrinsic evidence is undisputed.[2]

Evidence to Show that Document Not the True Record. — Parol evidence may be given to show that a certain document offered in evidence as a public record is not in fact the true record.[3]

5. Judicial Notice of Records. — A court can and will in a proper case take judicial notice of its own records[4] and also of legislative enactments and of the records kept by the two houses of the legislature.[5] A full discussion of this subject will be found elsewhere in this work.[6]

6. Proof of Records — *a. In General.* — Statutes have been very generally enacted providing a method or methods of proving records,[7] but it is a well recognized rule that the methods so provided are merely cumulative and do not supersede or deprive parties of the right to resort to any other mode of proof allowable at common law unless an intention to abrogate the old rules is clearly indicated.[8]

Where No Mode of Proof Is Provided by Statute, recourse must necessarily be had to the common-law methods of proof.[9]

b. THE USUAL METHODS. — The usual methods of proving a record are by producing either (1) the original record; (2) an exemplification under the great seal; (3) a certified copy or transcript, the certificate as to its correctness being made by the custodian of the record; or (4) a copy proved to be a true copy by the oath of a witness who had personally compared it with the original in the proper custody.[10]

errors or supply alleged omissions in their minutes. State *v.* Simmons, 40 La. Ann. 758.

A Record Kept Though Not Required by Statute may be explained or supplied by parol evidence. Bays *v.* Trulson, 25 Oregon 109.

1. Record May Be Contradicted by Extrinsic Evidence. — People *v.* Fairfield, 90 Cal. 186; Hiner *v.* People, 34 Ill. 297.

A Sheriff's Calendar in which is registered the names of all prisoners committed to the jail under his charge is not conclusive of the facts therein stated, but may be overcome by evidence which shows it to be erroneous. Goodrich *v.* Senate, 92 Me. 248.

A Record of Registered Letters kept at a post-office is not conclusive as to the date of the receipt of a letter, but may be controlled by testimony of the postmaster as to the ordinary course of the mails. Gurney *v.* Howe, 9 Gray (Mass.) 404, 69 Am. Dec. 299.

If the Records of a Post-office Are Fraudulently or Corruptly Kept they are liable to be controverted, but they are entitled to credence until impugned or impeached. Merriam *v.* Mitchell, 13 Me. 439, 31 Am. Dec. 64.

2. Extrinsic Evidence Admissible to Aid or Explain Record — *California.* — Board of Education *v.* Keenan, 55 Cal. 642.

Iowa. — Morgan *v.* Wilfley, 71 Iowa 212.

Maine. — Whiting *v.* Ellsworth, 85 Me. 301.

Michigan. — School Dist. No. Two *v.* Clark, 90 Mich. 435.

Missouri. — St. Louis Gas Light Co. *v.* St. Louis, 11 Mo. App. 55, *affirmed* 84 Mo. 202.

Pennsylvania. — Gearhart *v.* Dixon, 1 Pa. St. 224; Avoca *v.* Pittston, etc., St. R. Co., 7 Kulp (Pa.) 470.

Texas. — District School Trustees *v.* Wimberly, 2 Tex. Civ. App. 404.

Vermont. — See Taylor *v.* Holcomb, 2 Tyler (Vt.) 344.

Supplying Omissions. — Seattle *v.* Doran, 5 Wash. 482.

3. Dyer *v.* Brogan, 70 Cal. 136.

4. Judicial Notice of Court Records. — Amundson *v.* Wilson, (N. Dak. 1902) 91 N. W. Rep. 37; Wilkes *v.* Davies, 8 Wash. 112.

Distinction Between Decision of Supreme Court and Record. — While the decisions of the Supreme Court are matters of which all tribunals in the state take notice, there is no rule of evidence or of practice which would make the record in any other suit evidence in a cause without its production and offer. Downing *v.* Howlett, 6 Colo. App. 291.

5. Judicial Notice of Legislative Records. — State *v.* Frank, 61 Neb. 679, 60 Neb. 327.

6. For a Full Discussion of this question, see the title JUDICIAL NOTICE, vol. 17, pp. 925–927, 928–931.

7. See the statutes of the various jurisdictions.

8. Statutory Methods of Proof Merely Cumulative. — Goodwyn *v.* Goodwyn, 25 Ga. 203; Winham *v.* Kline, 77 Mo. App. 36; Southern R. Co. *v.* Wilcox, 99 Va. 394, 3 Va. Sup. Ct. 321.

9. Shea *v.* Manhattan R. Co., 15 Daly (N. Y.) 528; Stoever *v.* Whitman, 6 Binn. (Pa.) 416.

10. Usual Methods.—Non-Electric Fibre Mfg. Co. *v.* Peabody, 28 N. Y. App. Div. 442. See also Church *v.* Hubbart, 2 Cranch (U. S.) 187; Ayers *v.* Roper, 111 Ala. 651; Williams *v.* Brummel, 4 Ark. 129; Phelps *v.* Hunt, 43 Conn. 194; Betts *v.* New Hartford, 25 Conn. 180; English *v.* Sprague, 33 Me. 440; Stoever *v.* Whitman, 6 Binn. (Pa.) 416; Perry *v.* Mays, 1 Hill L. (S. Car.) 76; Stamper *v.* Gay, 3 Wyo. 322.

In State *v.* Board of Public Works, 57 N. J. L. 313, the court said: " Judicial records are

c. ORIGINAL RECORD — (1) *Admissible.* — The original record is always admissible in evidence,[1] if it is produced from or in the proper custody,[2] and its identity,[3] authenticity and genuineness[4] are established. And the fact that a statute has made a copy of the record admissible does not affect the admissibility of the original.[5]

Original Papers in Suit. — The original detached papers in a suit, on file in the

provable by exemplified copies. An exemplified copy at common law was obtained by removing the record into the court of chancery by certiorari. The great seal was attached to a copy, which was transmitted by a mittimus to the court in which it was to be used as evidence. In this country, says Professor Greenleaf, the great seal being usually if not always kept by the secretary of state, a different course prevails; and an exemplified copy under the seal of the court is usually admitted, even upon a plea of *nul tiel record*, as sufficient evidence. Greenl. Ev., § 502. In addition to copies exemplified by the great seal, or seal of a court, there were certified copies made by the officer in custody of the judicial records, and known as office copies. These were admissible only in the same cause and in the same court. 2 Phil. Ev., marg. p. 347. The third kind of authenticated copy is an examined or sworn copy, which is proved by producing a witness who has compared the copy with the original record word for word, or who has examined the copy while another person read the original. These are the various methods of proving judicial records by a copy. Therefore, a paper certified by the secretary of state under the appropriate seal, as clerk of the Court of Errors and Appeals, or of the Court of Impeachment, or of the Prerogative Court, to be a true copy of a record in one of these courts, would be receivable in evidence."

1. Original Record — *United States.* — Ronkendorff *v.* Taylor, 4 Pet. (U. S.) 349; Bruce *v.* Manchester, etc., R. Co., 19 Fed. Rep. 342; Williams *v.* Conger, 125 U. S. 397.

California. — Macy *v.* Goodwin, 6 Cal. 579; People *v.* Alden, 113 Cal. 264.

Connecticut. — Enfield *v.* Ellington, 67 Conn. 459; Gray *v.* Davis, 27 Conn. 447.

Illinois. — Stevison *v.* Earnest, 80 Ill. 513.

Indiana. — McFadden *v.* Ferris, 6 Ind. App. 454; Britton *v.* State, 54 Ind. 535.

Indian Territory. — Breedlove *v.* Dennie, 2 Indian Ter. 606.

Iowa. — See State *v.* Haskins, 109 Iowa 656, 77 Am. St. Rep. 560.

Maine. — Thorn *v.* Case, 21 Me. 393; Vose *v.* Manly, 19 Me. 331; Folsom *v.* Cressey, 73 Me. 270.

Massachusetts. — Brooks *v.* Daniels, 22 Pick. (Mass.) 498; Odiorne *v.* Bacon, 6 Cush. (Mass.) 185; Day *v.* Moore, 13 Gray (Mass.) 522.

Michigan. — Bronson *v.* Leach, 74 Mich. 713.

New York. — People *v.* Gray, 25 Wend. (N. Y.) 465.

North Carolina. — State *v.* Voight, 90 N. Car. 393; Cheatham *v.* Young, 113 N. Car. 161, 37 Am. St. Rep. 617.

Pennsylvania. — Miller *v.* Hale, 26 Pa. St. 432.

South Dakota. — Coler *v.* Rhoda School Tp., 6 S. Dak. 640.

Texas. — Ewing *v.* State, (Tex. Crim. 1897) 38 S. W. Rep. 618; Herndon *v.* Casiano, 7 Tex. 322. See also Oglesby *v.* Forman, 77 Tex. 647.

Where the Record Is That of the Same Court in which it is sought to be used as evidence, the original record or judgment roll should be produced. Adams *v.* State, 11 Ark. 466; Britton *v.* State, 54 Ind. 535; Harrison *v.* Kramer, 3 Iowa 543; Longley *v.* Vose, 27 Me. 179; Ward *v.* Saunders, 6 Ired. L. (28 N. Car.) 382; Amundson *v.* Wilson, (N. Dak. 1902) 91 N. W. Rep. 37; Burk *v.* Tregg, 2 Wash. (Va.) 215. See also Prescott *v.* Fisher, 22 Ill. 390; Wallis *v.* Beauchamp, 15 Tex. 303.

Where the original record of the proceedings in the court of equity was transferred to the Superior Court, it is evidence in the latter court and a transcript is unnecessary. Geer *v.* Geer, 109 N. Car. 679.

"The Judgments of Inferior Courts are usually proved by producing from the custody the book containing the proceedings. And as the proceedings in these courts are not usually made up in form, the minutes, or examined copies of them, will be admitted if they are perfect. If they are not entered in books, they may be proved by the officer of the court, or by any other competent person. In either case resort will be had to the best evidence to establish the tenor of the proceedings, and, therefore, where the course is to record them, which will be presumed until the contrary is shown, the record, or a copy properly authenticated, is the only competent evidence." Shea *v.* Manhattan R. Co., 15 Daly (N. Y.) 528, *quoting* from 1 Greenl. Ev., § 513.

2. Custody. — Sanborn *v.* School Dist. No. 10, 12 Minn. 17; Tipton *v.* Norman, 72 Mo. 381.

3. Identity — Evidence — *Connecticut.* — Enfield *v.* Ellington, 67 Conn. 459.

Iowa. — Benjamin *v.* Shea, 83 Iowa 392; Ottumwa *v.* Schaub, 52 Iowa 515.

Kansas. — State *v.* Cook, 30 Kan. 82.

Maine. — Hathaway *v.* Addison, 48 Me. 440.

Minnesota. — Sanborn *v.* School Dist. No. 10, 12 Minn. 17.

New Hampshire. — Bean *v.* Smith, 20 N. H. 461.

North Carolina. — Darden *v.* Neuse, etc., River Steamboat Co., 107 N. Car. 437.

South Carolina. — Ober *v.* Blalock, 40 S. Car. 31.

South Dakota. — Coler *v.* Rhoda School Tp., 6 S. Dak. 640.

4. Authenticity and Genuineness. — McVity *v.* Stanton, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 105; Davey *v.* Lohrmann, (N. Y. City Ct. Gen. T.) 14 N. Y. Supp. 922; Franey *v.* Miller, 11 Pa. St. 434; Fowler *v.* Schafer, 69 Wis. 23.

5. Admissibility of Original Not Affected by Statute Making Copies Admissible — *Colorado.* — McAllister *v.* People, 28 Colo. 156.

Indiana. — James *v.* Greensboro, etc., Turnpike Co., 47 Ind. 379.

New Jersey. — Oram *v.* Young, 18 N. J. L. 54.

office where the court records are kept, may be used in evidence with the same court if the complete record has not been made up,[1] but where the final record of a suit has been made up, that, and not the original papers in the case, is the legal evidence to establish what the record contains.[2]

Entries on the Execution Docket of the Circuit Court are not proper evidence of an execution which has been returned by the sheriff into the court, for the execution having become a record, proof thereof is to be regularly made by producing the original or a duly certified copy.[3]

(2) *Record Irregularly Obtained.* — The admissibility of an original record in evidence is not affected by any irregularity or even illegality in the method by which it was obtained from the proper custody, provided it be shown to be the true original, for while a rule of court or a public statute requiring certain documents to remain in the custody of certain officers may furnish sufficient grounds for punishing an officer or other person for removing them or suffering such removal except upon proper order, it does not make them any the less legitimate evidence if otherwise competent.[4]

d. COPY OF RECORD — (1) *In General* — (a) **Admissible.** — It would be obviously improper to allow public records to be removed from the care of their proper custodian, or from their usual place of deposit, whenever they are needed for use as evidence, and hence it is the universal rule that the contents of a judicial or other public record may be proved by a properly authenticated copy thereof.[5]

Ohio. — King *v.* Kenny, 4 Ohio 79; Sheehan *v.* Davis, 17 Ohio St. 571.

Pennsylvania. — Miller *v.* Hale, 26 Pa. St. 432.

Texas. — Ewing *v.* State, (Tex. Crim. 1897) 38 S. W. Rep. 618; Ballinger Nat. Bank *v.* Bryan, 12 Tex. Civ. App. 673; Gray *v.* State, 19 Tex. Civ. App. 521.

Wisconsin. — Weisbrod *v.* Chicago, etc., R. Co., 21 Wis. 602.

But *compare* Ellis *v.* Mills, 99 Ga. 490; Lasher *v.* State, 30 Tex. App. 387, 28 Am. St. Rep. 922.

1. Original Papers. — Buffington *v.* Cook, 39 Ala. 64; Watts *v.* Clegg, 48 Ala. 561; Sharp *v.* Lumley, 34 Cal. 611; Peck *v.* Land, 2 Ga. 1, 46 Am. Dec. 368; Sutcliffe *v.* State, 18 Ohio 469, 51 Am. Dec. 459.

It has even been held that the original separate papers in an inferior court may be received in evidence in a superior court. State *v.* Bartlett, 47 Me. 396; Allis *v.* Beadle, 1 Tyler (Vt.) 179.

2. Original Papers Not Admissible After Final Record Made Up. — Duncan *v.* Freeman, 109 Ala. 185; Watts *v.* Clegg, 48 Ala. 561; Brown *v.* Isbell, 11 Ala. 1009. See also Buffington *v.* Cook, 39 Ala. 64; Wharton *v.* Thomason, 78 Ala. 45. But *compare* State *v.* Bartlett, 47 Me. 396.

3. Ayers *v.* Roper, 111 Ala. 651.

4. Record Irregularly Obtained. — People *v.* Alden, 113 Cal. 264; McFadden *v.* Ferris, 6 Ind. App. 454.

5. Copy of Record — *England.* — Lynch *v.* Clerke, 3 Salk. 154.

United States. — Moses *v.* U. S., 166 U. S. 571; Culver *v.* Uthe, 133 U. S. 655; Bruce *v.* U. S., 17 How. (U. S.) 437; Walton *v.* U. S., 9 Wheat. (U. S.) 651; U. S. *v.* Patterson, Gilp. (U. S.) 44; Woodbridge, etc., Engineering Co. *v.* Ritter, 70 Fed. Rep. 677; U. S. *v.* Ralston, 17 Fed. Rep. 895. See also Gaines *v.* Relf, 12 How. (U. S.) 472.

Alabama. — Stanley *v.* State, 88 Ala. 154.

Arizona. — U. S. *v.* Drachman, (Ariz. 1896) 43 Pac. Rep. 222.

Arkansas. — Dawson *v.* Parham, 55 Ark. 286; Finley *v.* Woodruff, 8 Ark. 328.

California. — Wickersham *v.* Johnston, 104 Cal. 407, 43 Am. St. Rep. 118; Goodwin *v.* McCabe, 75 Cal. 584.

Colorado. — Thalheimer *v.* Crow, 13 Colo. 397.

Connecticut. — Smith *v.* Brockett, 69 Conn. 492.

Florida. — Ropes *v.* Kemps, 38 Fla. 233; Bell *v.* Kendrick, 25 Fla. 778; Simmons *v.* Spratt, 20 Fla. 495.

Georgia. — Richardson *v.* Whitworth, 103 Ga. 741; McFarland *v.* Fricks, 99 Ga. 104. See also Conley *v.* State, 85 Ga. 348.

Illinois. — Columbus, etc., R. Co. *v.* Skidmore, 69 Ill. 566; Piatt *v.* People, 29 Ill. 54; Calhoun *v.* Ross, 60 Ill. App. 309; Merchants' Nav. Co. *v.* Amsden, 25 Ill. App. 307; East St. Louis *v.* Freels, 17 Ill. App. 339.

Indiana. — Nitche *v.* Earle, 117 Ind. 270; Smith *v.* Mosier, 5 Blackf. (Ind.) 51.

Indian Territory. — Breedlove *v.* Dennie, 2 Indian Ter. 606.

Iowa. — Monk *v.* Corbin, 58 Iowa 503.

Kansas. — Rierson *v.* St. Louis, etc., R. Co., 59 Kan. 32; Friend *v.* Miller, 52 Kan. 139, 39 Am. St. Rep. 340; Darcy *v.* McCarthy, 35 Kan. 722; Downing *v.* Haxton, 21 Kan. 178.

Kentucky. — Sneed *v.* Ward, 5 Dana (Ky.) 187.

Louisiana. — Le Bleu *v.* North American Land, etc., Co., 46 La. Ann. 1465; Sampson *v.* Noble, 14 La. Ann. 347; Franklin *v.* Woodland, 14 La. Ann. 184; Lapice *v.* Smith, 13 La. Ann. 92.

Maryland. — Shipley *v.* Fox, 69 Md. 572; Classen *v.* Classen, 57 Md. 510.

Massachusetts. — Oakes *v.* Hill, 14 Pick. (Mass.) 442; Com. *v.* Phillips, 11 Pick. (Mass.) 28; Lowell *v.* Wheelock, 11 Cush. (Mass.) 391; Kennedy *v.* Doyle, 10 Allen (Mass.) 161.

Copies of the Records of Grants or Patents from the sovereign may be used as evidence by all persons except those who would be entitled to the originals.[1]

Printed Copies of records have been rejected in *England* where the original records were extant and accessible.[2]

(b) **Dignity as Evidence.** — A duly certified copy of a record as evidence is equal to the original in dignity.[3]

(c) **Original Must Be Evidence.** — In order that a copy of a record shall be admissible in evidence, the record must be of such a character that the original, if produced, would be evidence in the case.[4]

Michigan. — People *v.* Kemp, 76 Mich. 410; Pierce *v.* Rehfuss, 35 Mich. 53; Goodrich *v.* Burdick, 26 Mich. 39.

Minnesota. — Smith *v.* Petrie, 70 Minn. 433; Williams *v.* McGrade, 13 Minn. 46.

Mississippi. — Johnson *v.* Martin, 68 Miss. 330; Davis *v.* Freeland, 32 Miss. 645; Wray *v.* Doe, 10 Smed. & M. (Miss.) 452; Sessions *v.* Reynolds, 7 Smed. & M. (Miss.) 130.

Missouri. — Banking House *v.* Darr, 139 Mo. 660; State *v.* Hendrix, 98 Mo. 374; Childress *v.* Cutter, 16 Mo. 24.

Nebraska. — Missouri Pac. R. Co. *v.* Baier, 37 Neb. 235.

New Hampshire. — State *v.* Loughlin, 66 N. H. 266; Crowell *v.* Hopkinton, 45 N. H. 9; Farrar *v.* Fessenden, 39 N. H. 268; Whitehouse *v.* Bickford, 29 N. H. 471; Bowman *v.* Sanborn, 25 N. H. 87; Woods *v.* Banks, 14 N. H. 101; Society, etc., *v.* Young, 2 N. H. 310.

New Jersey. — State *v.* Newark, 58 N. J. L. 522; Condit *v.* Blackwell, 19 N. J. Eq. 193.

New York. — New York Cent., etc., R. Co. *v.* Brockway Brick Co., 158 N. Y. 470, *affirming* 10 N. Y. App. Div. 387; Lerche *v.* Brasher, 104 N. Y. 157, *reversing* 37 Hun (N. Y.) 385; Woolsey *v.* Ellenville, 84 Hun (N. Y.) 236, *affirmed* 155 N. Y. 573; Jackson *v.* King, 5 Cow. (N. Y.) 237, 15 Am. Dec. 468; Wells *v.* Davis, 105 N. Y. 670.

North Carolina. — Aiken *v.* Lyon, 127 N. Car. 171; Wallace *v.* Douglas, 114 N. Car. 450; Cheatham *v.* Young, 113 N. Car. 161, 37 Am. St. Rep. 617; Clarke *v.* Diggs, 6 Ired. L. (28 N. Car.) 159, 44 Am. Dec. 73.

Oklahoma. — Dean *v.* Stone, 2 Okla. 13.

Pennsylvania. — Grant *v.* Levan, 4 Pa. St. 393; Oliphant *v.* Ferren, 1 Watts (Pa.) 57; Harper *v.* Farmers, etc., Bank, 7 W. & S. (Pa.) 204.

Texas. — Van Sickle *v.* Catlett, 75 Tex. 404; Stone Land, etc., Co. *v.* Boon, 73 Tex. 548; Texas Mexican R. Co. *v.* Jarvis, 69 Tex. 527; Cannon *v.* Cannon, 66 Tex. 682; Mason *v.* McLaughlin, 16 Tex. 24; Paschal *v.* Perez, 7 Tex. 348; Houston *v.* Perry, 3 Tex. 390; Hamilton-Brown Shoe Co. *v.* Whitaker, 4 Tex. Civ. App. 380; Dikes *v.* Miller, 25 Tex. Sup. 281, 78 Am. Dec. 571; O'Connor *v.* Vineyard, (Tex. Civ. App. 1897) 43 S. W. Rep. 55.

Virginia. — Southern R. Co. *v.* Wilcox, 99 Va. 394, 3 Va. Supm. Ct. 321; Pollard *v.* Lively, 4 Gratt. (Va.) 73.

Washington Territory. — Ward *v.* Moorey, 1 Wash. Ter. 104.

Wisconsin. — McIntosh *v.* Marathon Land Co., 110 Wis. 296.

Copy Must Be Certified — *United States.* — U. S. *v.* Pinson, 102 U. S. 548.

Alabama. — Kilgore *v.* Stoner, (Ala. 1892) 12 So. Rep. 60.

District of Columbia. — Ewing *v.* U. S., 3 App. Cas. (D. C.) 353.

Kentucky. — Woolley *v.* McCormick, (Ky. 1898) 45 S. W. Rep. 885.

Missouri. — Pabst Brewing Co. *v.* Smith, 59 Mo. App. 476.

Montana. — Chambers *v.* Jones, 17 Mont. 156.

New York. — People *v.* Turner, 49 Hun (N. Y.) 466; Bella *v.* New York, etc., R. Co., (Buffalo Super. Ct. Gen. T.) 24 N. Y. St. Rep. 921.

Certification Must Be Enjoined or Permitted by Statute. — In respect to public documents or entries not of a judicial character, proof may be made by examined or sworn copies. State *v.* Hutchinson, 10 N. J. L. 242; State *v.* Clothier, 30 N. J. L. 351. But a paper purporting to be a certified copy of a public document, although certified by the officer in whose custody it is placed, whether under seal or not, is not receivable in evidence unless such certification is enjoined or permitted by statute. State *v.* Board of Public Works, 57 N. J. L. 313. See also State *v.* Newark, 58 N. J. L. 522.

A Certified Copy of the Docketing is not sufficient to prove a judgment. Todd *v.* Johnson, 50 Minn. 310.

Judgments of Foreign Countries must be clothed with all the forms required to prove their authenticity in the country in which they are pronounced; otherwise copies of the record thereof will not be considered authentic and cannot be admitted in evidence. Lorenz's Succession, 41 La. Ann. 1091.

Examined Copy — Testimony of Witness. — See Winham *v.* Kline, 77 Mo. App. 36; State *v.* Collins, 68 N. H. 299; State *v.* Loughlin, 66 N. H. 266; Harvey *v.* Cummings, 68 Tex. 599.

1. Clarke *v.* Diggs, 6 Ired. L. (28 N. Car.) 159, 44 Am. Dec. 73.

2. **Printed Copies.** — Crawford Peerage, 2 H. L. Cas. 534.

3. **Copy Equal to Original in Dignity as Evidence** — *Alabama.* — Glover *v.* Hill, 85 Ala. 41.

Arkansas. — Dawson *v.* Parham, 55 Ark. 286.

Illinois. — American Surety Co. *v.* U. S., 77 Ill. App. 106.

Montana. — Murray *v.* Polglase, 17 Mont. 455.

Nebraska. — Missouri Pac. R. Co. *v.* Baier, 37 Neb. 235.

New Jersey. — State *v.* Newark, 58 N. J. L. 522.

Duly Certified Copy Is Original Evidence. — Richardson *v.* Whitworth, 103 Ga. 741.

4. **Copy Not Evidence Unless Original Would Be.** — Donohue *v.* Whitney, 133 N. Y. 178, *reversing* (Supm. Ct. Gen. T.) 15 N. Y. Supp. 622.

(d) **Copies of Lost Papers.** — When the original office papers of a justice's court have been lost, but copies thereof have been established according to law, certified copies of those established copies are admissible in evidence.[1]

(e) **Copy of Transcript Filed on Change of Venue.** — Where by a change of venue a transcript is sent from one county and filed in the Circuit Court of another county, it becomes a record of the latter court, and a transcript of such record, if made out by the clerk and properly certified, is entitled to as much credit as the transcript of any other pleading filed in the cause, and is not open to the objection that it is a copy of a copy.[2]

(f) **Translations.** — A translation is not admissible in evidence as a copy.[3]

(g) **Accounting for Original.** — It is not necessary in order that a certified copy of a record shall be admissible in evidence that the original shall be produced or accounted for,[4] nor that there shall be proof that the original cannot be produced.[5]

(h) **Error in Copy.** — Where a date in the certified copy of a judicial record has by a manifest clerical error been improperly transcribed, and the true date is obviously inferable from other parts of the record, the error may be disregarded and the copy received in evidence as if the true date appeared directly instead of indirectly.[6]

(i) **Amendment of Copy.** — In a criminal trial a clerical error in a copy of a record offered in evidence may, at any time before the cause is given to the jury, be amended so as to conform to the original.[7]

(j) **Contradiction of Copy.** — While the certificate of the custodian of a record as to the correctness of a copy introduced in evidence, when authorized by law, is ordinarily the best evidence of what the record contains,[8] such certificate cannot be accepted as a conclusive solution of a controversy as to which word or figure is meant by a particular character found in the record, but in case of such a controversy it may be proved by witnesses who have examined the original record, and by photographic copies of the record, that the particular character in question has more the appearance of another word or figure than of that which is set out in the copy.[9]

(2) *Authentication* — (a) **Of Judicial Records** — *aa.* At Common Law. — At common law the manner of authentication was by certificate of the officer having custody of the record,[10] or by exemplification, that is, affixing the great seal

1. Bell *v.* Bowdoin, 109 Ga. 209.

2. State *v.* Rayburn, 31 Mo. App. 385.

3. **Translation.** — Bixby *v.* Bent, 51 Cal. 590.

4. **Original Need Not Be Produced or Accounted For.** — Van Sickle *v.* Catlett, 75 Tex. 404.

5. **Proof that Original Cannot Be Produced Not Necessary.** — Metzger *v.* Burnett, 5 Kan. App. 374.

6. Head *v.* Woods, 92 Ga. 548.

7. Com. *v.* Phillips, 11 Pick. (Mass.) 28.

8. **Certificate Ordinarily the Best Evidence.** — Mutual L. Ins. Co. *v.* Baker, 10 Tex. Civ. App. 515.

The mere inability of the solicitor of a party to find a certain resolution upon the record of the board of supervisors cannot be allowed to prevail against a paper certified under the law as a true copy of a portion of the record. Boyce *v.* Auditor-Gen., 90 Mich. 314, 90 Mich. 326.

Presumption as to Correctness. — Where a properly certified copy of a grant in the general land office recites that a map or plat of the land is attached thereto, but there is no plat and its absence is not accounted for, but the field notes contained in the copy are specific and identify the land, the recitals in the copy do not raise the presumption, against the certificate of the officer, that the plat was really attached, but the presumption is that the copy discloses the instrument as it is in the land office. Hooks *v.* Colley, 22 Tex. Civ. App. 1.

9. **Contradiction.** — Mutual L. Ins. Co. *v.* Baker, 10 Tex. Civ. App. 515.

10. **Certificate of Custodian.** — Garden City Sand Co. *v.* Miller, 157 Ill. 225.

It is well settled in the United States that an officer having the legal custody of public records is *ex-officio* competent to certify copies of their contents. Stamper *v.* Gay, 3 Wyo. 322.

Ordinarily, the clerk of one court has not the authority to authenticate transcripts of the records kept by another court. Comstock *v.* Kerwin, 57 Neb. 1.

Must Appear that Person Signing Certificate Is Custodian. — Stamper *v.* Gay, 3 Wyo. 322. But see Barret *v.* Godshaw, 12 Bush (Ky.) 592.

The Rhode Island Justice Court, under the statute by which it was established, is the successor of the Court of Magistrates and as such received from it all its books, records and papers. Therefore copies of the records and papers of the Court of Magistrates, certified by the clerk of the Justice Court, are en-

of the state.[1] It is a sufficient authentication of a record of a judgment of a court of a state, when offered in evidence in another court in the same state, that it be certified by the clerk under the seal of the court.[2]

bb. STATUTORY PROVISIONS — (*aa*) *Federal Statute.* — Pursuant to the authority granted to it by the constitution,[3] Congress has enacted that "the records and judicial proceedings of the courts of any state or territory, or of any such country (subject to the jurisdiction of the United States), shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form."[4]

This Mode of Authentication is Not Exclusive, however, for it is well settled that the several states may provide any other method that they may see fit,[5] and while they cannot require more proof than the act of Congress provides, they may establish their own laws as to what shall be deemed sufficient evidence of foreign records, and dispense with some of the requirements of the act of Congress.[6]

(*bb*) *State Statutes.* — Accordingly most, if not all, of the states have passed their own laws in reference to the proof of such records. Most of such statutes are, however, very similar in their requirements, and not a few of them are identical with the act of Congress on the subject.[7]

(*cc*) *Compliance with Statutes.* — Where there is an attempt to prove a record by the statutory method, the certificate must conform to the statutory requirements.[8] It is not, however, necessary that the certificate should be in exact verbal conformity with the statute, but a certificate containing in substance what the statute requires will suffice.[9]

titled to be received in evidence the same as if they were copies of the records of the Justice Court. Clarke *v.* Rice, 15 R. I. 132.

1. Exemplification. — Garden City Sand Co. *v.* Miller, 157 Ill. 225.

Foreign Judgments may in all cases be authenticated under the great seal of the state in which they are rendered. Sloan *v.* Wolfsfeld, 110 Ga. 70.

In all Cases Where the Act of Congress Is Not Applicable, authentication under the great seal of the state is required. Sloan *v.* Wolfsfeld, 110 Ga. 70.

2. Garden City Sand Co. *v.* Miller, 157 Ill. 225.

3. U. S. Constitution, art. IV., § 1.

4. U. S. Rev. Stat., § 905; Willock *v.* Wilson, 178 Mass. 68; Steinke *v.* Graves 16 Utah 293.

In the Absence of Any State Legislation on the subject, when a judgment of a foreign state is sought to be introduced in evidence it is necessary that it shall be attested by the clerk under the seal of the court together with a certificate of the presiding judge that the attestation is in due form. Garden City Sand Co. *v.* Miller, 157 Ill. 225.

Court with No Clerk. — The act of Congress does not provide a method of authenticating judgments rendered by a court which has no clerk. Sloan *v.* Wolfsfeld 110 Ga. 70.

5. Mode Provided by Statute Not Exclusive. — Sloan *v.* Wolfsfeld, 110 Ga. 70; Garden City Sand Co. *v.* Miller, 157 Ill. 225; Willock *v.* Wilson, 178 Mass. 68; *In re* Ellis, 55 Minn. 401, 43 Am. St. Rep. 514; Thrasher *v.* Ballard, 33 W. Va. 285, 25 Am. St. Rep. 894.

6. Garden City Sand Co. *v.* Miller, 157 Ill. 225.

7. As to the Requirements in Various States, see Rowe *v.* Barnes, 101 Iowa 302; Williams *v.* Duncan, 92 Ky. 125; Westerman *v.* Sheppard, 52 Neb. 124; Phipps *v.* Oprandy, 69 N. Y. App. Div. 497.

West Virginia Rule as to Virginia Records. — See Thrasher *v.* Ballard, 33 W. Va. 285, 25 Am. St. Rep. 894.

Certification by Successor of Justice under Kansas Statute. — See Drumm *v.* Cessnum, 61 Kan. 467.

8. Necessity for Compliance with Statutes. — Westerman *v.* Sheppard, 52 Neb. 124; Comstock *v.* Kerwin, 57 Neb. 1.

Certificate Held Insufficient. — See Rowe *v.* Barnes, 101 Iowa 302.

9. Substantial Compliance Sufficient. — Bills *v.* Keesler, 36 Mich. 69; Huntoon *v.* O'Brien, 79 Mich. 227.

Certificates Held Sufficient. — See Cofer *v.* Schening, 98 Ala. 338; Yeager *v.* Wright, 112 Ind. 230; Vail *v.* Rinehart, 105 Ind. 6; Com. *v.* Quigley, 170 Mass. 14; O'Connor *v.* Vineyard, (Tex. Civ. App. 1897) 43 S. W. Rep. 55; Thrasher *v.* Ballard, 33 W. Va. 285, 25 Am. St. Rep. 894.

A Certificate of a Justice of the Peace attached to a transcript which is in the following form: "I hereby certify that the above and foregoing is a true and correct copy, as appears of record on my docket, together with the costs taxed at," etc., dated and signed, is sufficient, under Burns Rev. Stat. *Indiana*, 1894, § 624, which requires the justice "to make out and certify a true and complete transcript of the proceedings and judgment," but does not prescribe the form of certificate to be made in such cases. Collier *v.* Collier, 150 Ind. 276.

Where a Copy of a Record Is Twice Attested, once

cc. SEAL.—The authentication of a judicial record must ordinarily be under the seal of the court,[1] though this may be dispensed with.[2] Where the seal is required it is sufficiently affixed by making an impression on the paper with the seal, without the use of either wax or a paper wafer.[3]

dd. CERTIFICATE OF JUDGE—(*aa*) *That Attestation Is in Due Form.*—Where a certificate of the judge, chief justice, or presiding magistrate that the clerk's attestation is in due form of law is required, a copy of a record to which there is no such certificate cannot be admitted in evidence.[4] As the attestation of the clerk should be in the form prescribed for the court in which the judgment was rendered, a certificate of the judge that the clerk's attestation is in due form is conclusive.[5]

(*bb*) *That Clerk Is Custodian of Records.* — Where, under the statute, the clerk of the court is the custodian of the records, his certificate of any record that is under his custody is sufficient, and it is not necessary that the judge should certify that the clerk is the custodian of the records.[6]

(*cc*) *As to Official Character of Clerk.* — It has been held that where the certificate of the judge to a transcript of the record from another state is as follows: "D., whose genuine signature is subscribed to the above certificate, is now, and was at the time of his signing the same, the duly elected, commissioned, qualified and acting clerk of the circuit court in and for said county," it cannot be successfully objected that the certificates attached to the copy of the judgment do not show that the clerk was the chief clerk, but merely the acting clerk.[7]

ee. ATTESTATION BY DEPUTY CLERK. — As to whether an attestation by a deputy clerk who signs the name of the clerk, *per* himself as deputy, is sufficient under the United States statute, different opinions have been expressed[8] and the sufficiency of such attestation under state statutes must depend upon the terms of the statute.[9]

ff. RULE WHERE JUDGE IS EX-OFFICIO CLERK. — Where the judge of a court is *ex-officio* the clerk thereof he may sign the necessary certificates in both capacities.[10]

gg. ATTACHING CERTIFICATE TO TRANSCRIPT. — An objection that the transcript of a judgment of a sister state, and the certificates thereto, are on different sheets of paper, is properly overruled where it appears that there are three different sheets of paper on which the transcript and certificates are written, but all the

by H. as clerk, and again by him as assistant clerk, H. being actually the assistant clerk, the attestation by him as clerk may be regarded as surplusage and the words "a copy, attest, H. assistant clerk," are sufficient. Com. *v.* Quigley, 170 Mass. 14.

1. Seal Necessary. — McCarthy *v.* Burtis, 3 Tex. Civ. App. 439.

2. Seal May Be Dispensed With. — Conley *v.* State, 85 Ga. 348; Hunt *v.* Hunt, (N. J. 1887) 9 Atl. Rep. 690.

3. Impression on Paper Sufficient. — Hunt *v.* Hunt, (N. J. 1887) 9 Atl. Rep. 690.

4. Necessity for Certificate of Judge. — Smith *v.* Brockett, 69 Conn. 492; Westerman *v.* Sheppard, 52 Neb. 124.

The Certificate of a District Judge to the record of a United States Circuit Court that the attestation of the clerk is in due form is sufficient in the absence of the circuit judge and the associate justice. Stephens *v.* Bernays, 119 Mo. 143.

Where the Judge Is Clerk of His Own Court his certificate must still contain the statement that the attestation is in due form of law, else the copy cannot be admitted in evidence. Rowe *v.* Barnes, 101 Iowa 302.

5. Certificate of Judge Conclusive. — Edwards *v.* Jones, 113 N. Car. 453.

6. Bignold *v.* Carr, 24 Wash. 415.

7. Little Rock Cooperage Co. *v.* Hodge, 112 Ga. 521.

8. Attestation by Deputy Sufficient. — Steinke *v.* Graves, 16 Utah 293. *Contra*, Willock *v.* Wilson, 178 Mass. 68.

9. Sufficiency of Certificate by Deputy under Massachusetts Statute. — See Willock *v.* Wilson, 178 Mass. 68.

10. Signing in Both Capacities.—Cox *v.* Jones, 52 Ga. 438. See also Sloan *v.* Wolfsfeld, 110 Ga. 70; Rowe *v.* Barnes, 101 Iowa 302.

Under the Georgia Code a certificate as to an exemplification of a record on file in the Court of Ordinary must show upon its face whether it is signed by the Ordinary himself acting as clerk or by another holding the office of clerk by appointment. Lay *v.* Sheppard, 112 Ga. 111.

One Certificate. — An objection to the authentication to the probate of a will from another state that it consists of only one certificate made by the same officer in his capacity of judge and clerk is not well taken. Welder *v.* McComb, 10 Tex. Civ. App. 85.

sheets are attached in the usual way at the top by mucilage and also by a brass fastener or brad through the top margin of the paper, near the centre.[1]

hh. Showing that Copy Taken from Original. — Where certified copies of papers filed in a public office are offered in evidence, the certificate should show that they are copies of the original papers, and not of a transcript of them.[2]

ii. Records of United States Courts. — It has been asserted that a transcript of a record of the proceedings of a United States Circuit Court is properly admitted where the certificates of the clerk and judge conform to the requirements of the act of Congress, the court considering that while that act does not in terms include the judicial proceedings of the federal courts, it has been the uniform practice to follow its requirements in authenticating the records and proceedings of those courts, and such authentication has always been held sufficient.[3] But in *Missouri* it has been held that where a judgment of a federal court sitting in that state was offered in evidence in a state court, it was sufficient if it was attested by the certificate of the clerk with the seal of the federal court.[4]

jj. Records of Justice of the Peace. — It has been held that the signature of a justice of the peace to a transcript of his record must be authenticated in the same way as the law requires that signatures to papers in general shall be proven.[5]

(b) **Of Other Public Records** — *aa.* Statutes. — Statutes providing for the authentication of public records other than judicial have also been enacted, both by Congress and the various state legislatures.[6] These statutes must be complied with,[7] though as a rule a substantial compliance is considered sufficient.[8]

bb. By Whom Certified. — The proper person to certify copies of public records is the legal custodian of the records,[9] who is *ex-officio* competent to

1. Little Rock Cooperage Co. *v.* Hodge, 112 Ga. 521.

2. Drumm *v.* Cessnum, 58 Kan. 331.

3. **Record of United States Court.** — O'Hara *v.* Mobile, etc., R. Co., 40 U. S. App. 471.

The mode of authenticating the documents, records, and proceedings of any of the departments or courts of the United States is governed by the laws of the United States, and by the practice of such departments and courts, and not by the statutes of the state. Gilman *v.* Riopelle, 18 Mich. 145; Lacey *v.* Davis, 4 Mich. 140, 66 Am. Dec. 524.

4. McGregor *v.* Hampton, 70 Mo. App. 98. But *compare* Stephens *v.* Bernays, 119 Mo. 143.

5. **Signature of Justice of the Peace.** — Wagner *v.* Frederick County, (C. C. A.) 91 Fed. Rep. 969.

The Secretary of State of Maryland has no power to certify that the signature of a justice of the peace to a particular paper which is presented to him is genuine. Wagner *v.* Frederick County, (C. C. A.) 91 Fed. Rep. 969.

6. **Statutes.** — See Walker *v.* Aurora, 140 Ill. 402; American Surety Co. *v.* U. S., 77 Ill. App. 106; Jerman *v.* Tenneas, 44 La. Ann. 620; Barcello *v.* Hapgood, 118 N. Car. 712.

In *Georgia* exemplifications of the records of municipal corporations were not admissible until made so by the Act of September 19, 1891 (Civil Code, § 5216), which merely provides that they shall be admitted in evidence when certified under seal. Consequently a certified copy of an ordinance of a town is not admissible unless the seal of the town is attached thereto. Central of Georgia R. Co. *v.* Bond, 111 Ga. 13.

7. **Necessity for Compliance with Statutes.** — U. S. *v.* Pinson, 102 U. S. 548; Ewing *v.* U. S., 3 App. Cas. (D. C.) 353; Naanes *v.* State, 143 Ind. 299; Chambers *v.* Jones, 17 Mont. 156; Nolan *v.* Nolan, 35 N. Y. App. Div. 339.

8. **Certificates Held Sufficient.** — Moses *v.* U. S., 166 U. S. 571; Ballew *v.* U. S., 160 U. S. 187; Huntoon *v.* O'Brien, 79 Mich. 227; People *v.* Tobey, 153 N. Y. 381, *modifying* 8 N. Y. App. Div. 468, 17 N. Y. App. Div. 621.

Certification as Requisite to Filing. — It has been held in *New York* that a substantial compliance with the requirements of the statute with reference to the certification of a map of the state canals and the lands adjacent thereto by the canal commissioners, as a prerequisite to its being filed in the office of the comptroller is sufficient to entitle a copy of such map to be admitted in evidence under the statute making such copies admissible. Alsheimer *v.* Boon, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 333.

Strict Compliance with Statute Necessary. — U. S. *v.* Harrill, McAll. (U. S.) 243.

Certificate Not Covering Entire Copy. — See Gilman *v.* Riopelle, 18 Mich. 145.

9. **Legal Custodian.** — State *v.* Cooper, (Tenn. Ch. 1899) 53 S. W. Rep. 391. See also Woolley *v.* McCormick, (Ky. 1898) 45 S. W. Rep. 885.

Certificate as Proof of Official Character. — The official character of an officer as the legal custodian of a document and thereby authorized to certify a copy of it is proved *prima facie* by his certificate of its correctness. Galvin *v.* Palmer, 113 Cal. 46; Barcello *v.* Hapgood, 118 N. Car. 712; Walker *v.* Aurora, 140 Ill. 402.

make the necessary certificate.[1]

cc. AFFIDAVIT NOT NECESSARY. — In *Louisiana* it has been held that it is not necessary for the auditor of public accounts to verify copies by affidavit, as that does not give any additional weight to his official signature and seal.[2]

e. CERTIFICATE OF CUSTODIAN AS TO CONTENTS. — In the absence of an express statutory provision making it so, a certificate of the custodian of a record, stating generally its contents, is not evidence thereof.[3]

f. REPORTS OF DECISIONS. — The printed reports of the decisions of a Supreme Court and of the opinions delivered in announcing the decisions are not competent as original evidence of the judgment rendered in any particular case, though they may, in case the original record has been destroyed, be admitted as secondary evidence.[4]

g. PRINTED COPIES OF STATUTES, ETC. — The printed and published copies of the statutes of a state, the ordinances of a municipality, and the like, are held admissible in evidence to prove such statutes, ordinances, etc., where they are published by the proper authority and the copies are properly authenticated.[5] And the court of *Michigan* has admitted a compilation of the laws of another state which, though not purporting to have been published under the authority of the state, was shown to be the only compilation of the statute laws of such state and to be commonly admitted in all courts and in all proceedings in that state as *prima facie* evidence of such laws.[6]

State Papers. — Similarly it has been held that printed copies of state papers, such as treaties, commissions, pardons, state grants, proclamations, official letters, and the like, purporting to be published in pursuance of a statute or resolution of the legislative department and properly authenticated, are evidence of the existence and contents of such records and papers.[7]

7. Whether Entire Record Must Be Produced — *a.* JUDICIAL RECORDS. — The authorities will be found to differ as to whether a portion of the judicial

Commissioner of Land Office. — See Murray *v.* Polglase, 17 Mont. 455.

Identical Records in Two Offices. — See Clark *v.* Empire Lumber Co., 87 Ga. 742.

1. Banking House *v.* Darr, 139 Mo. 660.

2. Affidavit Not Necessary. — Surget *v.* Newman, 43 La. Ann. 873.

3. Certificate of Custodian — *Illinois.* — People *v.* Lee, 112 Ill. 113.

Iowa. — Keller *v.* Killion, 9 Iowa 329.

Kentucky. — See Williams *v.* Duncan, 92 Ky. 125.

Maine. — Jay *v.* East Livermore, 56 Me. 107; McGuire *v.* Sayward, 22 Me. 230.

Massachusetts. — Oakes *v.* Hill, 14 Pick. (Mass.) 442; Greene *v.* Durfee, 6 Cush. (Mass.) 362.

Missouri. — Carr *v.* Youse, 39 Mo. 346, 90 Am. Dec. 470.

North Carolina. — State *v.* Champion, 116 N. Car. 987.

See also Williams *v.* Duncan, 92 Ky. 125.

4. Reports of Decisions. — Donellan *v.* Hardy, 57 Ind. 393; Taylor *v.* Com., 29 Gratt. (Va.) 780.

5. Printed Copies. — Atchison, etc., R. Co. *v.* Cupello, 61 Ill. App. 432; People *v.* McQuaid, 85 Mich. 123; Barcello *v.* Hapgood, 118 N. Car. 712; Harvey *v.* Cummings, 68 Tex. 599; Quint *v.* Merrill, 105 Wis. 406. See also the title ORDINANCES, vol. 21, p. 1004, note 10, and the title STATUTES.

How Authority Shown. — The *Wisconsin* court, without deciding exactly what would suffice to meet a call of the statute that the printed copy should purport to be published by authority, has said that it was necessary that there should be some declaration in or upon, and as a part of, the book or pamphlet that its publication is by reason of some competent authority. Quint *v.* Merrill, 105 Wis. 406.

A Copy of a Statute of Another State, certified by the secretary of state, is not rendered inadmissible merely because the certificate of such official shows that the copy is taken from the official published acts deposited in his office, and not from the original bill as enrolled and signed. Harvey *v.* Cummings, 68 Tex. 599.

6. People *v.* McQuaid, 85 Mich. 123.

7. State Papers — *England.* — Rex *v.* Holt, 5 T. R. 436; Thelluson *v.* Cosling, 4 Esp. 266.

United States. — Watkins *v.* Holman, 16 Pet. (U. S.) 55; Dredge *v.* Forsyth, 2 Black. (U. S.) 563; Talbot *v.* Seeman, 1 Cranch (U. S.) 38; Gregg *v.* Forsyth, 24 How. (U. S.) 179; Bryan *v.* Forsyth, 19 How. (U. S.) 334.

Florida. — Doe *v.* Roe, 13 Fla. 602.

Illinois. — Lurton *v.* Gilliam, 2 Ill. 577, 33 Am. Dec. 430.

Louisiana. — Dutillet *v.* Blanchard, 14 La. Ann. 97.

Maine. — Milford *v.* Greenbush, 77 Me. 330.

Massachusetts. — Whiton *v.* Albany City Ins. Co., 109 Mass. 24; Worcester *v.* Northborough, 140 Mass. 397.

Mississippi. — Nixon *v.* Porter, 34 Miss. 697, 69 Am. Dec. 408.

New York. — Radcliff *v.* United Ins. Co., 7 Johns. (N. Y.) 50.

Authentication Necessary. — Marks *v.* Orth, 121 Ind. 10.

record or a copy of the judgment merely is admissible without a copy of the entire proceedings in the case. Some courts have held that a copy of the entire proceedings is requisite to a proper proof of the judgment.[1] Others have held that in certain cases it is only necessary to introduce a copy of the judgment itself,[2] or of such parts of the record as relate to the matters in issue.[3]

1. Entire Record Must Be Produced — *California.* — Wickersham *v.* Johnston, 104 Cal. 407, 43 Am. St. Rep. 118; Mason *v.* Wolff, 40 Cal. 246.

Florida. — Ashmead *v.* Wilson, 22 Fla. 255; Walls *v.* Endel, 20 Fla. 86.

Illinois. — Vail *v.* Iglehart, 69 Ill. 332.

Indiana. — Brown *v.* Eaton, 98 Ind. 591; State *v.* Hawkins, 81 Ind. 486; Foot *v.* Glover, 4 Blackf (Ind.) 313. See also Miller *v.* Deaver, 30 Ind. 371; Miles *v.* Wingate, 6 Ind. 458; Dygert *v.* Dygert, 4 Ind. App. 276.

Michigan. — Kenyon *v.* Baker, 16 Mich. 373, 97 Am. Dec. 158.

New York. — See Non-Electric Fibre Mfg. Co. *v.* Peabody, 28 N. Y. App. Div. 442.

North Carolina. — State *v.* Misenheimer, 123 N. Car. 758.

Pennsylvania. — Hampton *v.* Speckenagle, 9 S. & R. (Pa.) 212, 11 Am. Dec. 704; Coleman's Estate, 7 Pa. Dist. 731.

Tennessee. — Renshaw *v.* Lahoma First Nat. Bank, (Tenn. Ch. 1900) 63 S. W. Rep. 194; Brown *v.* Patton, (Tenn. Ch. 1898) 48 S. W. Rep. 277.

This Rule Applies Only to Matters That Are Legitimately a Part of the Record and not to mere collateral papers incidentally connected with the proceedings. State *v.* Hawkins, 81 Ind. 486.

A Record Is Sufficient where it contains the pleadings of all the parties claiming an interest in the subject-matter of the controversy and the proceedings of the court thereon up to and including the final decree, though it omits certain depositions which by agreement of counsel were not printed in the record prepared on an appeal of the former case to the Supreme Court of the United States. Gregory *v.* Pike, 94 Me. 27.

Certificate Importing Complete Copy. — A certificate from the prothonotary annexed to the exemplification of a record that the paper is "truly copied from the records" or is "a copy of the record" imports that it is a copy of the whole record and not merely an extract therefrom. Edmiston *v.* Schwartz, 13 S. & R. (Pa.) 135; Voris *v.* Smith, 13 S. & R. (Pa.) 334; Christine *v.* Whitehill, 16 S. & R. (Pa.) 98.

But where a paper which is called an exemplification from the records of the proceedings of a certain county court contains only a statement that a certain person appeared and agreed to take certain lands at the appraisement and the decree of the court assigning them to him, etc., and contains no mention of a petition and no copy of it, and no award of inquisition, nor any inquisition, it is not admissible in evidence, although there is appended to it a certificate in these words. "I certify that the foregoing is a true copy, taken from the original record." Christine *v.* Whitehill, 16 S. & R. (Pa.) 98.

Papers on File but Not Offered as Records. — See Brown *v.* Patton, (Tenn. Ch. 1898) 48 S. W. Rep. 277.

2. Copy of Judgment Sufficient — *Georgia.* — Stringfellow *v.* Stringfellow, 112 Ga 494.

Kentucky. — Chinn *v.* Caldwell, 4 Bibb (Ky.) 543.

Minnesota. — Williams *v.* McGrade, 13 Minn. 46.

Mississippi. — Doe *v.* Gildart, 4 How. (Miss.) 267.

Missouri. — Lee *v.* Lee, 21 Mo. 531, 64 Am. Dec. 247.

Tennessee. — Verhine *v.* Ragsdale, 96 Tenn. 532; Lowry *v.* M'Durmott, 5 Yerg. (Tenn.) 225.

West Virginia. — Guinn *v.* Bowers, 44 W. Va. 507.

An Order Appointing Receivers is admissible to establish the receivership though the pleadings in the case are not shown. Ocean Steamship Co. *v.* Wilder, 107 Ga. 220.

A Decree of the County Court for the Partition of Real Estate which shows that it was made upon the report of commissioners based upon the consent of the parties may be introduced in evidence in *Texas* without showing the proceedings leading up to such decree, the record containing nothing indicating a want of jurisdiction to make the partition. Warren *v.* Frederichs, 76 Tex. 647.

The South Carolina Statute which provides that a certified copy of the letters of administration "shall be sufficient evidence of the appointment of such executor or administrator in any court of this state," (Gen. Stat., § 2182) supersedes the necessity of introducing the whole record of the proceedings in the Court of Probate, which would have been necessary in the absence of any statute upon the subject. Hankinson *v.* Charlotte, etc., R. Co., 41 S. Car. 1.

English Statute. — The statute 14 and 15 Vict., c. 99, § 13, which provides that "whenever in any proceeding whatever it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offense, * * * it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof," is applicable to proof in a civil action as well as in another criminal proceeding. Richardson *v.* Willis, L. R. 8 Ex. 69, 42 L. J. Ex. 15, 27 L. T. N. S. 828, 12 Cox C. C. 298.

3. Parts Relating to Matters in Issue Sufficient. — O'Hara *v.* Mobile, etc., R. Co., 40 U. S. App. 471.

While garbled extracts of the proceedings would not be permitted to be used as evidence, yet when all of the record which could have any bearing on the case before the court is offered there seems to be no good reason why it should not be admitted even although the

The Best Opinion is that of those courts which have held that where the judgment is relied on as an estoppel or as showing the adjudication of some point involved in the suit, or to establish any particular state of facts upon which the judgment is based, it is necessary to introduce a copy of the record of the entire proceedings in order that the court may determine whether the precise point was decided or adjudicated, but that where it is desired merely to show the existence and contents of the judgment, as that a money judgment for a certain amount has been rendered in favor of one person against another, it is not necessary to put in evidence more than a properly authenticated copy of the judgment itself.[1] And application of this rule to the facts of particular cases will go far towards reconciling the differences of opinion on this question.

Entire Record Admissible. — It is undisputed, however, that as the judicial record as a whole imports verity, so every part of it is admissible to prove that which it legitimately sets forth,[2] and hence the entire record is always admissible;[3] and where one party has introduced a portion of the record in evidence, the other party is clearly entitled to introduce the remainder of the record.[4]

entire record is not offered. Henderson *v.* Cargill, 31 Miss. 367.

The general rule is that when copies of records are used in evidence the entire record should be produced, and that extracts are not admissible in evidence unless it appears that the copy of the record contains all that relates to the matter in question. Morrill *v.* Foster, 33 N. H. 379.

Omission of Immaterial Depositions. — Gregory *v.* Pike, 94 Me. 27.

In Proof of Title under a Sheriff's Sale, the copy of the judgment and so much of the record as shows an appearance of the parties, or service of the process on the defendant, is sufficient, without a complete transcript. McGuire *v.* Kouns, 7 T. B. Mon. (Ky.) 386, 18 Am. Dec. 187.

Partition Proceedings. — See Baeder *v.* Jennings, 40 Fed. Rep. 199.

Proceedings in Bankruptcy. — See Michener *v.* Payson, 13 Nat. Bankr. Reg. 49.

In Louisiana it has been settled that the production of the entire record in mortuary or insolvency proceedings, in order to prove a single fact or date or a certain part of the proceedings, is not necessary. Sarrazin *v.* W. R. Irby Cigar, etc., Co., (C. C. A.) 93 Fed. Rep. 624; McIntosh *v.* Smith, 2 La. Ann. 756; Stafford's Succession, 2 La. Ann. 886; Price *v.* Emerson, 14 La. Ann. 137; Broom's Succession, 14 La. Ann. 67; Henderson *v.* Maxwell, 22 La. Ann. 357.

Kansas Rule — Presumptions. — A part of a record will generally prove what it purports to prove. Capital Bank *v.* Huntoon, 35 Kan. 577. But cannot prove more than that, and no liberal presumptions can be entertained or resorted to for the purpose of supplying omissions, aiding deficiencies, or extending the import of its language. It is only when the whole of the record is introduced in evidence that liberal presumptions can be invoked to aid the record. Capital Bank *v.* Huntoon, 35 Kan. 580; Haynes *v.* Cowen, 15 Kan. 637; Ogden *v.* Walters, 12 Kan. 227.

If a party does not introduce the whole record, all presumptions from silence or absence will be against him. Ogden *v.* Walters, 12 Kan. 227.

1. **Best Rule.** — Watson *v.* Jones, 41 Fla. 241; Little Rock Cooperage Co. *v.* Hodge, 112 Ga. 521; Kerchner *v.* Frazier, 106 Ga. 437; Gibson *v.* Robinson, 90 Ga. 756, 35 Am. St. Rep. 250; Rainey *v.* Hines, 121 N. Car. 318. See also Locke *v.* Winston, 10 Ala. 849; Clark *v.* Hebert, 15 La. Ann. 279.

In an Action on a Foreign Judgment it is not necessary to introduce an authenticated copy of the record of the entire proceeding, but a *prima facie* case is made up by the introduction of a properly authenticated copy of the judgment itself. Little Rock Cooperage Co. *v.* Hodge, 112 Ga. 521.

In West Virginia the rule has been stated to be that in all cases other than a criminal trial for perjury it is only necessary to introduce in evidence such parts of the record of another proceeding as relate to the matters in issue. Section 4, c. 158 of the Code requires the consent of the accused, before a part only of such record may be given in evidence in a criminal prosecution for perjury. McClaugherty *v.* Cooper, 39 W. Va. 313.

2. Numbers *v.* Shelly, 78 Pa. St. 426.

3. **Entire Record Admissible.** — Fairfield County Bar *v.* Taylor, 60 Conn. 11; Miles *v.* Wingate, 6 Ind. 458; Dygert *v.* Dygert, 4 Ind. App. 276; Smith *v.* Smith, 22 Iowa 516.

Docket Entries. — As the docket entries of a case are entries required by law to be kept by the clerk showing there was a justice, they cannot be excluded when taken in connection with a copy of the judgment. Shipley *v.* Fox, 69 Md. 572.

A Bond to Dissolve an Attachment being provided for by law, it becomes a part of the record, so that a copy of it as such part of the record is clearly admissible evidence under the provisions of the Maryland Code. Shipley *v.* Fox, 69 Md. 572.

4. **Where One Party Has Introduced Portion Other May Introduce Remainder.** — O'Hara *v.* Mobile, etc., R. Co., 40 U. S. App. 471; Patrick's Succession, 20 La. Ann. 204; Thayer *v.* McGee, 20 Mich. 195; Hankinson *v.* Charlotte, etc., R. Co., 41 S. Car. 1; Fowler *v.* Stonum, 6 Tex. 60. See also Morrill *v.* Foster, 33 N. H. 379.

b. Other Public Records. — In the case of public records other than judicial, it is usually considered sufficient to introduce in evidence only so much of the record as relates to the matter in question,[1] though it has been said that where a record is proper evidence of a fact it will be admitted and the opposite party be left to his motion to exclude irrelevant matter from the consideration of the jury.[2]

8. Record Not to Be Submitted to Jury. — It results from the rule that judicial records are conclusive that where such a record is introduced in evidence there are no questions of fact to be submitted to the jury in respect thereto, but the facts shown by the record should be ascertained by the court upon an inspection thereof, and the jury should be instructed that the facts properly appearing of record are established, instead of the matter being submitted to the jury for their decision.[3]

X. Lost and Destroyed Records. — 1. Restoration. — Records which have been lost or destroyed may be restored;[4] and while some method of doing this is usually provided by statute, such method is not exclusive.[5] This subject has already received a full treatment in another part of this work, to which reference is made.[6]

2. Evidence of Contents. — The question of how to prove the contents of such records has also been fully discussed,[7] and hence it is sufficient to state here that when the former existence and loss or destruction of a record is satisfactorily proved,[8] secondary evidence of its contents is admissible.[9]

XI. Pencil Writing in Public Records. — The general rule is that writing in pencil is not sufficient in public records,[10] though entries in pencil have been held admissible where made under exceptional circumstances,[11] or where there was other evidence of the fact so entered;[12] and it has also been held

1. Part Relating to Matter in Question Sufficient. — Hoffman *v.* Pack, 114 Mich. 1; Whitehouse *v.* Bickford, 29 N. H. 471; Woods *v.* Banks, 14 N. H. 101.

But there should generally be an entire copy of the proceedings of a particular meeting, or anything else done and transacted at a particular time. Records are usually in parts, and there should be a copy of all the matter made up and attested as a record at any particular time, so that the jury may have the whole evidence, and the courts be enabled to give the right construction to what was done. But where what relates to the matter in question is a distinct and independent record, a copy of that is sufficient. Woods *v.* Banks, 14 N. H. 101.

Map. — Where a map is introduced in evidence under the California statute it is not necessary to produce a copy of the whole map, but only of such portion as shows the land in question and the enclosing boundaries. Galvin *v.* Palmer, 113 Cal. 46.

Mining Rules. — A party cannot offer in evidence an abstract or a single clause of the book of mining rules of a district, but must produce all the rules in the book, for the whole of the rules, making up the body of the local law, constitutes one entire instrument and it is necessary to a fair understanding of any one part that the whole should be inspected. English *v.* Johnson, 17 Cal. 107, 76 Am. Dec. 574.

2. Soulard *v.* Clark, 19 Mo. 570.

3. Record Not to Be Submitted to Jury. — Currier *v.* Richardson, 63 Vt. 617.

4. Inherent Power of Courts. — Blakemore *v.* Wilson, 61 Ill. App. 454. See also Goetz *v.* Koehler, 20 Ill. App. 233; Fisher *v.* Sievres, 65 Ill. 99.

5. Statutory Method Not Exclusive. — Koons *v.* Bryson, 25 U. S. App. 368. See also the title Lost Papers and Records, vol. 19, p. 561, note 1.

6. See the title Lost Papers and Records, vol. 19, p. 552.

7. See the title Lost Papers and Records, vol. 19, p. 552.

8. Former Existence and Loss or Destruction Must Be Established. — Ayers *v.* Roper, 111 Ala. 651. See also Baucum *v.* George, 65 Ala. 259; Stewart *v.* Conner 9 Ala. 803; Lyon *v.* Boiling, 14 Ala. 753, 48 Am. Dec. 122.

9. Secondary Evidence. — Aiken *v.* Lyon, 127 N. Car. 171; Isley *v.* Boon, 109 N. Car. 555. See also State *v.* Durham, 121 N. Car. 546; Converse *v.* Wead, 142 Ill. 132.

Where a Superior Court Record is Lost a certified copy of the transcript of the same in the Supreme Court is sufficient evidence of the record. Aiken *v.* Lyon, 127 N. Car. 171.

Parol Evidence. — U. S. *v.* Price, 113 Fed. Rep. 851; Corwin *v.* Morehead, 51 Iowa 99; Surget *v.* Newman, 43 La. Ann. 873; State *v.* Stewart, 45 La. Ann. 1164; Sawyer *v.* Manchester, etc., R. Co., 62 N. H. 135, 13 Am. St. Rep. 541. See also the title Lost Papers and Records, vol. 19, p. 562, note 8.

10. Pencil Writing.—Meserve *v.* Hicks, 24 N. H. 295; Franklin *v.* Tiernan, 62 Tex. 92. See also Stone *v.* Sprague, 24 N. H. 309.

11. Franklin *v.* Tiernan, 56 Tex. 618, *explained* in 62 Tex. 92.

12. Kerr *v.* Farish, 52 Miss. 101, *explained* in Franklin *v.* Tiernan, 62 Tex. 92.

that a demurrer written in pencil and found among the original papers in a cause might be admitted.[1]

XII. Print in Public Records. — The fact that an ordinance was recorded in print instead of in manuscript, by being printed and pasted in the book which is proved to contain the town ordinances, is no reason for holding the ordinance invalid, because the object of reducing the ordinance to record is that it may be preserved for future reference and certainty as to its provisions, which object is as well obtained by print as by manuscript.[2]

XIII. Indexing Records. — The *Pennsylvania* statute imposing upon the courts the power and duty of directing the making of full and complete indexes of certain records contemplated that the courts should have the power to intrust the labor to competent persons — to persons who had such knowledge of the records to be indexed as would enable them to undertake the work intelligently, and such skill in penmanship as would insure the execution of the duty in a neat and legible manner. It could not have been intended by the legislature that the courts should be compelled to commit the work only to the person who might happen to be the incumbent of the office, however inexperienced as to the labor to be performed, however ill informed of the records which the office contains, or however illegible his chirography might be.[3]

XIV. Recopying or Rebinding Records. — Under the *Alabama* statute, which provides that the judge of probate, deeming it necessary to recopy or rebind any books in his office, must submit the same to the examination of the court of county commissioners, which, if it deems such rebinding or recopying necessary, must upon its minutes order the same to be done and allow the probate judge a reasonable compensation therefor,[4] the determination of the question of the necessity for recopying a record is exclusively for the court of county commissioners.[5]

XV. Removal, Destruction, Etc., of Records — 1. Statutes Regulating Removal. — In several of the states the removal of judicial and other public records is regulated and restricted by statute.[6]

2. Legal Custody of Removed Records. — Where a paper which has been properly received and filed by the clerk has been taken from the files of his office with his consent, by an attorney of the court, and a receipt given for the same by such attorney, the paper is, nevertheless, in contemplation of law, in the possession of the clerk while absent from his office. The clerk loses no actual control of it at any time.[7]

3. Removal by Order of Court for Purpose of Destruction — Assuming the power of the court to remove its records from the clerk's office for the purpose of destruction, it is apparent that the power should be exercised with the greatest caution, and only in the most exceptional cases. Of course affidavits and

1. Fail *v.* Presley, 50 Ala. 342.

2. Ewbanks *v.* Ashley, 36 Ill. 177.

Print in Record of Deed or Mortgage. — See Maxwell *v.* Hartmann, 50 Wis. 660. And see generally the title Recording Acts, *ante*.

3. **Indexes.** — McCommon *v.* Spong, (Pa. 1888) 14 Atl. Rep. 260. In this case it was further held that as the act referred to (Act of March 29, 1827) also provided for having the books of record of the several offices bound anew, this indicated that their removal was contemplated by the legislature and might be authorized under certain circumstances.

4. Code Alabama 1896, § 3366.

5. Washington County *v.* Porter, 128 Ala. 278.

6. **Under the South Carolina** statute the Circuit Court has no power to order records removed outside the limits of the state. Georgia *v.* Jennings, 50 S. Car. 156.

Virginia Statute. — Section 3178 of the Virginia Code is not violated by the keeping of the records and papers of the courts of a county in its clerk's office at the court house of the county, which is duly located at a place within the county which has been subsequently embraced within the territorial limits of a city thereafter incorporated, by which incorporation jurisdiction over the locality is placed in the court of the city and not in the court of the county. Nor would the keeping of a portion of the records and papers in an extension of the clerk's office offend against the statute. Norfolk County *v.* Cox, 98 Va. 270.

7. **Legal Custody.** — Pollock *v.* Aikens, 4 S. Dak. 374.

documents not strictly part of the records of the court and filed by mistake would properly be directed to be removed. So, also, the court should not suffer its records to be used to publish libels, and scandalous accusations wholly irrelevant to the cause should be suppressed. But where the papers are entirely germane to the litigation and contain nothing irrelevant, the records should not be destroyed.[1]

4. Penal Statutes. — In several of the states the statutes have made it a criminal offense for any person to remove, mutilate, destroy, secrete, or obliterate public records, or for the custodian of such records to allow this to be done.[2]

RECORDUM. — A record; a judicial record. The word is used in the phrase *prout patet per recordum*, which is a formula employed in pleading for reference to a record, signifying "as appears by the record."[3]

RECOUNT. — See note 4.

RECOUPMENT. (See also the title SET-OFF, RECOUPMENT, AND COUNTER-CLAIM.) — See note 5.

RECOURSE. (See also the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, pp. 276, 478, 486; and see WITH RECOURSE; WITHOUT RECOURSE.) — See note 6.

RECOVER — RECOVERY — RECOVERED. — To recover, in law, is to recover anything, or the value thereof, by judgment, as if a man sue for any land or other thing, movable or immovable, and have a verdict or judgment for him;[7] to obtain by course of law.[8]

Recovery is the obtaining of a thing by the judgment of a court, as the result of an action brought for the purpose;[9] "the obtaining of the right to something by a verdict and judgment of a court from an opposing party in a suit; as the recovery of a debt, damages, and costs by a plaintiff; the recovery

1. Removal by Order of Court for Purpose of Destruction. — Schecker *v.* Woolsey, 2 N. Y. App. Div. 52.

2. Penal Statutes. — See the title ALTERATION OF RECORDS, vol. 2, p. 284. See also the following cases:

Michigan. — People *v.* Bussey, 82 Mich. 49.

Montana. — State *v.* Bloor, 20 Mont. 574.

New York. — People *v.* Peck, 138 N. Y. 386, *affirming* 67 Hun (N. Y.) 560.

Oregon. — *Ex p.* Tongue, 29 Oregon 48.

South Carolina. — Georgia *v.* Jennings, 50 S. Car. 156.

3. Recordum. — And. L. Dict.; 1 Chitty on Pleading (3d Am. ed.) 355; Philpot *v.* McArthur, 10 Me. 127.

All writings admitted in evidence or rejected to which an exception is taken should appear in the bill of exceptions with a *prout.* Wilson *v.* Horner, 59 Pa. St. 160.

4. Recount. — In Matter of Stiles, 69 N. Y. App. Div. 593, it was held that as the terms "count" and "canvass" were often used interchangeably in the election statutes under consideration, the term *recount* would include a recanvass where such recanvass was necessary to establish a correct count. The court said: "I think that the term *recount* does not require that in the first instance there should be a recanvass in the sense that the votes actually distributed to the various columns of the tally sheets by the 'canvass' already made should be redistributed therein."

5. Recoup in the Sense of Counterclaim. — See Ely *v.* Spiero, 28 N. Y. App. Div. 488; Thomson-Houston Electric Co. *v.* Durant Land Imp. Co., 144 N. Y. 34.

Recoup Is Said to Be Synonymous with Defalk or Discount. — Hatchett *v.* Gibson, 13 Ala. 595; Ives *v.* Van Epps, 22 Wend. (N. Y.) 156.

6. Recourse. — Collaterals were given to secure the payment of a note which contained the following clause: "If *recourse* is had to the collaterals, any excess of collaterals upon this note shall be applicable to any other note * * * against the maker or makers hereof." It was held that notice of intention to sell collaterals, followed by the postponement of the sale by agreement of the parties, was not *recourse* to the collaterals within the meaning of the note. The court said: "By the *recourse* mentioned in the note was intended an efficient resort to the collaterals by sale for the purpose of realizing their value, with a view to a proper application of the same to the debts of the makers; and it would seem clear that a mere notice of intention to exercise the power of sale could not be considered as an actual or efficient *recourse* or resort to the collaterals for any real or practical purpose." Winkler *v.* Madgeburg, 100 Wis. 428.

7. Recover. — Jacob's L. Dict. [*followed* in Norton *v.* Winter, 1 Oregon 47, 62 Am. Dec. 297]; Leslie *v.* York, (Ky. 1902) 66 S. W. Rep. 751.

8. Burr. L. Dict. [*followed* in Keiny *v.* Ingraham, 66 Barb. (N. Y.) 257]; Leslie *v.* York, (Ky. 1902) 66 S. W. Rep. 751.

9. Recovery. (See also RECOVERABLE, *post.*) — Burr. L. Dict. [*followed* in Keiny *v.* Ingra-

of costs by a defendant; the recovery of land in ejectment;"[1] the obtaining of anything by judgment or trial at law.[2]

ham, 66 Barb. (N. Y.) 257]; Leslie *v.* York, (Ky. 1902) 66 S. W. Rep. 751.

1. Matter of Hollister, 47 Hun (N. Y.) 417, *per* Parker, J., *dissenting*.

2. **Judgment.** — U. S. *v.* Morris, 1 Paine (U. S.) 230; Jones *v.* Shore, 1 Wheat. (U. S.) 468; Gawtry *v.* Adams, 10 Mo. App. 33; Hoover *v.* Clark, 3 Murph. (7 N. Car.) 171.

Process of Law. — ***Recovery***, in its general use, means a ***recovery*** had by process and course of law. Jones *v.* Walker, 2 Paine (U. S.) 719. And the word was held to have been used in this sense in Pol. Code Cal., § 3886 (repealed in 1895, but which provided that " the fines, forfeitures, and penalties incurred by a violation of any of the provisions of this title must be paid into the treasury of the county where the person against whom the ***recovery*** is had resides "), as referring only to those forfeitures and penalties to be ***recovered*** by action under the statute, and not to the interest of two per cent. per month on delinquent taxes, which was obtained by the ordinary method of collection without suit. People *v.* Reis, 76 Cal. 279.

Same — Distress. — " The word ***recover*** has a technical meaning in law whereby it signifies to recover by action and by the judgment of the court; * * * but it is said that there are cases which may be found in which the word has been held to be used in the larger and more popular sense of ***recover*** by any legal means, which would include, *e. g.*, a distress." Stroud's Jud. Dict., *citing* Haines *v.* Welch, L. R. 4 C. P. 91, in which case it was held that the word as used in the statute 14 & 15 Vict., c. 25, § 1, included the right to distrain.

Same — Compromise. — Code Va. (1873), c. 145, § 9 (Code Va. 1887, § 2904), provided that the amount ***recovered*** in an action by an administrator for the killing of his intestate should be paid to the wife, husband, parent, and child in such proportion as the jury might direct, or if they did not direct, according to the statute of distributions. In Powell *v.* Powell, 84 Va. 415, it was held that where an action for debt never came to trial, but was compromised, still the money obtained by the compromise was ***recovered***, within the meaning of the statute. Lewis, P., said: " In support of this view we are told that the legal definition of the term ***recover*** is ' to be successful in a suit; to obtain a final judgment in a suit.' But manifestly the term was not used in the statute in this restricted and technical sense, but in the more comprehensive sense of ' receive.' In other words, it embraces all moneys received by the plaintiff on account of the action or claim."

But in Lapham *v.* Almy, 13 Allen (Mass.) 301, upon the construction of a revenue statute giving one-fourth of the forfeiture or fine ***recovered*** from smugglers to the informer, the court came to a different conclusion as to the meaning of the word ***recovery***.

Amount Actually Obtained. — ***Recovery*** refers not to the amount ***recovered*** by the judgment, but to the amount actually obtained. Thompson *v.* Bradbury, (Idaho 1898) 51 Pac. Rep. 758. See also U. S. *v.* Morris, 1 Paine (U. S.) 209; Jones *v.* Shore, 1 Wheat. (U. S.) 468; State Treasurers *v.* Bates, 2 Bailey L. (S. Car.) 375.

Same — Judgment for Penalty. — It was provided by a *New Jersey* act that " if in any suit commenced in the Supreme Court, the plaintiff shall not ***recover*** above two hundred dollars exclusive of costs, then such plaintiff shall not be entitled to costs." In Meyer *v.* Arnold, 43 N. J. L. 144, an action was brought upon a bond with penalty, and judgment was given for the penalty of five hundred dollars, but the jury assessed the damages of the plaintiff at thirty-six dollars. It was contended that the former sum was the amount ***recovered*** within the meaning of the above statute, and that the plaintiff was entitled to costs. The court held that " the word ***recovery*** should have its ordinary significance, and in that sense the plaintiff cannot be said to ***recover*** more than he obtains by his suit. He gets less than two hundred dollars," and therefore is not entitled to costs. *Citing* Johnson *v* Harris, 15 C. B. 357, 80 E. C. L. 357; Gowens *v.* Moore, 3 H. & N. 540, and Roll *v.* Maxwell, 5 N. J. L. 568.

Same — Actual Possession. — The assignor of a bond agreed to pay the amount of the bond, with all charges accruing thereon, to the assignee, " in case the same cannot be ***recovered*** of the within-named William Sharman." In an action upon this agreement the court said: " One of the technical definitions of the word ***recovery*** is the actual possession of anything or its value, by judgment of a legal tribunal; and it is not to be doubted that this is the sense in which the word was used in this covenant." Strohecker *v.* Farmers' Bank, 6 Pa. St. 45.

Same — Contingent Fee. — By a contract between attorney and client it was provided that the client should pay to the attorney an amount equal to one-half of what he might ***recover***. It was held that ***recover*** in this connection meant the actual obtaining of the thing sought, and that the client was bound to pay to the attorney only one-half of the money that he actually obtained by the suit, and not one-half of the amount of the judgment. Leslie *v.* York, (Ky. 1902) 66 S. W. Rep. 751. And see to the same effect Deering *v.* Schreyer, 171 N. Y. 451.

Bankruptcy. — In McKey *v.* Lee, (C. C. A.) 105 Fed. Rep. 923, the court said: " The law provides alternatively for the regaining of the preferential payments by the trustee, first, by visiting the creditor with the danger of a penalty — the disallowance of any portion of his claim; and secondly, in case of the knowing creditor, the right upon the part of the trustee to bring a suit. In either case the payments are gotten back, there is a ***recovery***, and in both, whether under the stress of the penalty or by virtue of a suit, it is the law that makes them recoverable." See also Peterson *v.* Nash, (C. C. A.) 112 Fed. Rep. 314.

Common Recovery. — See the title REAL PROPERTY, vol. 23, p. 943, and see COMMON, vol. 6,

Recovered, in its general sense, imports a payment compelled by judicial proceedings.[1]

p. 234, note; FINE AND COMMON RECOVERY, vol. 13, p. 51.

Costs. — Where costs were conditioned upon a *recovery* of one or more of the causes of action set forth in the complaint, the court said: "The meaning of the word *recover* used in this section clearly contemplates a decision upon a question of fact which, if allowed to remain unreversed, is conclusive upon the parties in respect to the issue there presented." Burns *v.* Delaware, etc., R. Co., 63 Hun (N. Y.) 22.

A *New York* statute provided that if the plaintiff "shall not *recover* above the sum of fifty dollars, besides costs, he shall not *recover* any costs, but shall pay costs to the defendant." In Van Horne *v.* Petrie, 2 Cai. (N. Y.) 213, it was held that "the *recovery* here spoken of means the damages assessed by the jury, *eo nomine*, exclusive of the costs which they may arbitrarily find;" and where the jury found for the plaintiff a verdict of fifty dollars with six cents costs, that the plaintiff had not *recovered* more than fifty dollars, and was not entitled to costs. See also Seaman *v.* Bailey, 2 Cai. (N. Y.) 214.

Same — Affirmative Finding. — Under Code Civ. Pro. N. Y., § 3234, which provides that where, in certain actions, the complaint sets forth separately two or more causes of action upon which issues are joined, and each party "*recovers* upon one or more of the issues," each shall be entitled to costs, the fact that the defendant has defeated one or more of the causes of action does not alone entitle him to costs; there must be a *recovery* in his favor, *i. e.*, an affirmative finding, verdict, or judgment in his favor which will have the effect of disposing of the cause of action as to which the plaintiff has failed. Burns *v.* Delaware, etc., R. Co., 135 N. Y. 268. See also Turner *v.* Hamilton, 88 Fed. Rep. 473.

Decree Directing — Sale of Realty. — In Gawtry *v.* Adams, 10 Mo. App. 29, it was held that a decree rendered against a married woman charging her separate estate with the payment of her promissory note and directing a sale of the realty charged was a judgment by which a debt was *recovered*.

Have Judgment. — In Potter *v.* Eaton, 26 Wis. 383, it was said: "The words 'have judgment,' in the entry here, are equivalent to 'hereby have judgment,' or *recover*, as found in the same connection in ordinary entries or forms of judgment."

Matter of Defense. — In Turner *v.* Hamilton, 88 Fed. Rep. 473, it was said: "The term *recovery*, as thus employed, both from the context and its ordinary legal acceptation, implies an affirmative action by which a party, by formal judgment in his favor, obtains redress from something 'which has been taken or withheld from him.' It is never employed to indicate a matter of defense." See also Burns *v.* Delaware, etc., R. Co., 135 N. Y. 268.

Same — Nonsuit. — An involuntary nonsuit has been held not to be a *recovery* on the part of the defendant. Fisher *v.* Dougherty, 42 Hun (N. Y.) 167; Cooper *v.* Jolly, 30 Hun (N. Y.) 224; Burns *v.* Delaware, etc., R. Co., 63 Hun (N. Y.) 21. *Compare* Blashfield *v.* Blashfield, 41 Hun (N. Y.) 249.

Replevin. — A statute conferred appellate jurisdiction upon the Supreme Court in actions brought for the *recovery* of specific personal property. It was held that this statute evidently referred to actions of replevin, for the direct and immediate *recovery* of the possession of personal property, and did not allow an appeal from an order and judgment of the lower court, directing the appellant to dismiss, at his own costs, an action instituted by him for the foreclosure of a mortgage and to turn over two promissory notes in his hands to the defendants. Rauh *v.* Weis, 133 Ind. 264; *Ex p.* Sweeney, 126 Ind. 583.

Recovery of Claim — Subject-matter Involved. — See Devlin *v.* New York, (C. Pl. Spec. T.) 15 Abb. Pr. N. S. (N. Y.) 31.

Settlement. — In Wenham *v.* Essex, 103 Mass. 117, it was held, where an action of one town against another was to recover the expenses of supporting a pauper, and was settled by the payment by the defendant of the claim and costs and the nonentry of the writ by the plaintiffs, that this was not a *recovery* by the plaintiffs which would bar the defendants from disputing with them the settlement of the pauper in a future action for his support.

Same — Term Applicable to Judgment for Either Party. — A *Maine* statute provided that in a suit by one town against another for the support of a pauper, a *recovery* should bar the town against which it was had from disputing the settlement of the same pauper with the prevailing town in any future action brought for his support. In Oxford *v.* Paris, 33 Me. 181, the plaintiffs had been defeated in an earlier action against the defendants, involving the settlement of the pauper whose support was in question. It was contended for the plaintiffs that a *recovery*, in order to operate as a bar in a subsequent suit for supporting paupers, is one had, not against a plaintiff party, but against a defendant party. Shepley, C. J., said: "To *recover*, in legal proceedings, is to be successful in a suit. It is to obtain a favorable judgment. The word *recovery*, as used in the statute, means the obtaining of a final judgment in such a suit. When a defendant has obtained a judgment against a plaintiff in a suit, he, in legal language, is said to have *recovered* in that suit."

1. **Recovered.** — Gawtry *v.* Adams, 10 Mo. App. 33, *quoting* Abb. L. Dict.

Adjudged and Received. — A United States customs act provided that in a case where certain penalties, fines, and forfeitures should be *recovered* in pursuance of information given to a collector of customs by an informer, a certain proportion of such penalty, etc., should go to the informer. It was held that the money must be adjudged to the United States, and received by the marshal or other officer of the court, before it could be held to be *recovered*. U. S. *v.* Morris, 1 Paine (U. S.) 209; Jones *v.* Shore, 1 Wheat. (U. S.) 468; Lapham *v.* Almy, 13 Allen (Mass.) 305. See also M'Lane *v.* U. S., 6 Pet. (U. S.) 404.

RECOVERABLE. — A thing is recoverable when it is susceptible of being regained or gotten back.[1]

RECOVERABLE SUMMARILY. — See SUMMARILY RECOVERABLE.

RECREATION. — The word "recreation" is defined as "refreshment of the strength and spirits, after toil; amusement, diversion; relief from toil or pain; amusement, in sorrow or distress."[2]

RECRIMINATION. — See note 3.

RECTIFIER — RECTIFYING. (See also the title REVENUE LAWS, *post.*) — A rectifier is one who changes liquors by adding to them, compounding them, or rectifying them.[4]

RECTOR. — A rector, as the word is understood by the canons of the Episcopal church, is a duly ordained clergyman of the church, in priest's orders, who has been elected to a rectorship by the vestry of the parish, agreeably to the canons of the church, and in whose call, or invitation, or notification of election there is no limitation of time specified when the engagement or contract is to cease.[5]

REDDENDUM. — See the title DEEDS, vol. 9, p. 142.

REDEEM — REDEMPTION. (See also the titles EQUITY OF REDEMPTION, vol. 16, p. 205; JUDICIAL SALES, vol. 17, p. 948; PLEDGE AND COLLATERAL SECURITY, vol. 22, p. 839; SHERIFFS' SALES; TAX SALES.) — To redeem is

"Recovered" and "Collected" Used Synonymously. — State Treasurers *v.* Bates, 2 Bailey L. (S. Car.) 375.

Duly Given or Made. — It has been held that an allegation that the plaintiff "*recovered* judgment" was not equivalent to an allegation that a judgment was "duly given or made." Midland R. Co. *v.* Eller, 7 Ind. App. 216. *Compare* Pierstoff *v.* Jorges, 86 Wis. 128, set out under DULY, vol. 10, p. 317, note.

1. Recoverable. — McKey *v.* Lee, (C. C. A.) 105 Fed. Rep. 923; Gans *v.* Ellison, (C. C. A.) 114 Fed. Rep. 736.

In construing an undertaking by a solicitor to his client that "should the damages or costs not be *recoverable* in this action * * * I shall charge you costs out of purse only," it was held that the result of the action, and not the solvency of the defendant therein, was referred to. *In re* Stretton, 14 M. & W. 806, 15 L. J. Exch. 16.

Capability of Being Obtained by Course of Law. — In *In re* Seckler, 106 Fed. Rep. 485, the court said: "The term *recoverable*, in its larger and more popular sense, implies a capability of being obtained by course of law. Recovery, as a legal expression, signifies a restoration of a right by means of a judicial proceeding; and it is not material whether it is the result of a proceeding especially instituted for that purpose, or is by law made a condition to the accomplishment of some other purpose for which suit is brought."

Suit. (See generally the title INFORMERS, vol. 16, p. 323.) — A statute provided that "every person who violates this section shall be liable to a penalty of one hundred dollars, *recoverable*, one-half to the use of the informer." In Omaha, etc., R. Co. *v.* Hale, 45 Neb. 418, in distinguishing this statute from the one governing the case at bar, the court said: "The word *recoverable*, in this statute, would seem to authorize a suit for the penalty by the informer."

2. Recreation. — Corey *v.* Bath, 35 N. H. 538, *quoting* Webst. Dict. But of the meaning of the term as used in a Sunday Act prohibiting any game, play, or *recreation* on Sunday, the court said: "The word in this, its popular sense, is of very comprehensive signification, and manifestly quite too broad and loose for the definition of a legal offense." See also the title SUNDAY AND HOLIDAYS.

3. Recrimination. — See the title DIVORCE, vol. 9, p. 816 *et seq.*, and see De Haley *v.* De Haley, 74 Cal. 492.

4. Rectifier. — U. S. *v.* Thirty-two Barrels Distilled Spirits, 5 Fed. Rep. 190, where the court said further: "And yet the courts have held, under the statute defining what a *rectifier* is, that the mere addition of water to his spirits would not make him a *rectifier*, or the mixing of certain spirits of the same character, if they were under a certain age, would not be rectification. 10 Int. Rev. Rec. 121; Bump's Int. Rev. Law 217; Int. Rev. Manual (1879), p. 182."

Rectifier, as used in the internal revenue laws, means "not merely a person who runs spirits through charcoal, but any one who rectifies or purifies spirits in any manner whatever, or who makes any mixture of spirits with anything else, and sells it under any name, is a *rectifier*. A Quantity Distilled Spirits, 3 Ben. (U. S.) 73.

Distinguished from Distiller. — See DISTILLED SPIRITS, vol. 9, p. 615.

Rectifying Process — Manufacturing. — In Com. *v.* Giltinan, 64 Pa. St. 105, it was said: "The *rectifying* process is not a manufacturing process. Webster says it means 'correcting; amending; refining by distillation, sublimation; adjusting.' *Rectifying* distilled spirits, therefore, made in another state, does not constitute it spirituous liquor manufactured within this commonwealth." See also State *v.* American Sugar-Refining Co., 51 La. Ann. 562.

5. Rector. — Bird *v.* St. Mark's Church, 62 Iowa 569. See also Youngs *v.* Ransom, 31 Barb. (N. Y.) 56.

defined as to purchase back; to regain possession by payment of a stipulated price; to repurchase;[1] to regain, as mortgaged property, by paying what is due; to receive back by paying the obligation.[2]

REDEEMABLE. — See note 3.

REDEEMABLE RIGHTS. — Redeemable rights are defined to be those rights which return to the conveyor or disposer of land, etc., upon payment of the sum for which such rights are granted.[4]

REDEMPTIONER. — A redemptioner is a creditor holding a subsequent lien on the property.[5]

1. **Redeem.** — Swearingen *v.* Roberts, 12 Neb. 335, *quoting* Webst. Dict.

2. Miller *v.* Ratterman, 47 Ohio St. 156.

When used in legal documents and contracts the term is ordinarily understood to mean the right to release property pledged or mortgaged from the lien or claim of the pledgee or mortgagee. Musgat *v.* Pumpelly, 46 Wis. 664.

Redeem and Reconvey. — ***Redeem*** is sometimes used in the sense of reconvey. Lawley *v.* Hooper, 3 Atk. 278; Flagg *v.* Mann, 2 Sumn. (U. S.) 536.

Redeem and Pay. — See King *v.* Fountain County, 49 Ind. 21.

No One Redeeming. — A statute provided that at the expiration of the time allowed for ***redemption***, and no one ***redeeming***, the court, upon the application of a proper party, should grant a final decree. In construing this provision in Bovey De Laittre Lumber Co. *v.* Tucker, 48 Minn. 230, the court said: "Does the phrase 'no one ***redeeming***' include a ***redemption*** which operates to assign the right acquired at the sale, or only such as annuls the sale? As we can see no reason why the purchaser, or one claiming from him by a conventional assignment, should have the assurance of title afforded by the final decree that does not with equal, if not greater, force apply to the case of one succeeding to the purchaser's right by ***redemption***, we think the first two questions must be answered in the affirmative, and that the words 'no one ***redeeming***' must be held to refer to a ***redemption*** which annuls the sale."

Redemption. — Courts of equity are very loath to limit the rights of ***redemption*** when they see that the first object of the victim was to borrow money, and not to sell property. Moss *v.* Green, 10 Leigh (Va.) 278.

Redemption and Assignment. — In Ellsworth *v.* Lockwood, 42 N. Y. 97, it was said: "A bill or action to have a bond and mortgage assigned to the plaintiff is not, and cannot be viewed as, a bill or action to ***redeem***. The right of ***redemption*** and of subrogation by law is inconsistent with the right to an assignment of the debt and of the evidence of the debt, so far, or inasmuch, as the assignment assumes the continued existence of the debt and the subrogation by law assumes its payment." See also Lamb *v.* Montague, 112 Mass. 353; Bigelow *v.* Cassedy, 26 N. J. Eq. 559; Chedel *v.* Millard, 13 R. I. 462.

Redemption of Certificates of Debt. — In Swasey *v.* North Carolina R. Co., 1 Hughes (U. S.) 17, it was held that where stock in a corporation had been pledged for the "***redemption*** of the certificate of debt," and the certificate bound the debtor for the payment of "the sum therein mentioned, with interest thereon," the stock was bound for the payment of the interest itself, and a foreclosure might be decreed on default in payment of any instalment of interest.

Redemption Distinguished from Statute of Limitations. — In Reynolds *v.* Baker, 6 Coldw. (Tenn.) 224, it was said: "Essential differences exist, which distinguish them [the law of ***redemption*** and the statute of limitations] beyond the possibility of confusion. The law of ***redemption*** is a statute which confers upon the party where land is sold for debt by executions, etc., the right to ***redeem*** or repurchase the land within two years after the sale. A statute of limitations is a law which prescribes the time during which a title may be acquired to property by virtue of adverse possession and enjoyment; or, it is a law which prescribes the time at the end of which no action at law or suit in equity can be maintained."

Survival of Terms. — In Kortright *v.* Cady, 21 N. Y. 365, Comstock, C. J., said: "There are terms of the ancient law which have come down to us, having long survived the principles of which they were the appropriate expression. * * * So, we have the terms ***redemption*** and 'equity of ***redemption***,' which belonged to a system of law that gave the legal estate, defeasibly before default, and absolutely afterwards, to the mortgagee, and which, while that system prevailed, were descriptive of the mortgagor's right to go into equity on the condition of paying his debt, to ***redeem*** a forfeited estate and demand a reconveyance. These descriptive words yet survive, and are in use, although the ideas that they once represented have long since become obsolete."

3. **Redeemable.** — A prospectus of a company inviting subscriptions for debentures stated that they were to be ***redeemable*** within a certain time. In construing this provision the court said: "The more important point is this: Does ***redeemable*** mean 'liable to redemption,' or does it mean that the debentures are to be all, in fact, redeemed within the specified period? In my opinion, it means that they are to be liable to redemption, and there is no obligation on the company to redeem them." *In re* Chicago, etc., Granaries Co., (1898) 1 Ch. 267.

4. **Redeemable Rights.** — Musgat *v.* Pumpelly, 46 Wis. 665, *quoting* Jacob's L. Dict.

5. **Redemptioner.** — Sharp *v.* Miller, 47 Cal. 85.

By Code Civ. Pro. Cal. the right to redeem from judicial sales made subject to redemption is given to two classes of persons: First, the judgment debtor or his successors in interest; and second, creditors having subsequent liens by judgment or mortgage. It was held that a grantee by deed from a judgment debtor after foreclosure sale was a successor in in-

REDISTRICT. — See note 1.

REDOUND. — See REQUIRE, REQUIRED, ETC., *post.*

RED TAPE. — Red tape is order carried to fastidious excess; system run out into trivial extremes.[2]

REDUCE — REDUCTION. — See note 3.

REDUCED BY PAYMENT. — See the title PAYMENT, vol. 22, p. 513.

REDUCTION INTO POSSESSION. — See the title HUSBAND AND WIFE, vol. 15, p. 785.

REDUNDANCY. (See also ENCYC. OF PL. AND PR., titles SCANDAL AND IMPERTINENCE, vol. 19, p. 181; SURPLUSAGE, IRRELEVANT, OR REDUNDANT MATTER, vol. 21, p. 223.) — Redundancy in pleading is the introduction of matters foreign to or unnecessary to the cause of action or defense stated.[4]

REED. — See note 5.

RE-EMPLOYMENT. — See note 6.

RE-ENACT. — See the title STATUTES.

RE-ENTER. — See note 7.

RE-EXAMINATION. — See the title WITNESSES, and see the title EXAMINATION OF WITNESSES, 8 ENCYC. OF PL. AND PR. 70.

RE-EXCHANGE. — See the title EXCHANGE AND RE-EXCHANGE, vol. 11, p. 558.

terest, and not a ***redemptioner.*** Phillips *v.* Hagart, 113 Cal. 552. See also the title JUDICIAL SALES, vol. 17, p. 1035.

1. Redistrict. — In State *v.* Atherton, 19 Nev. 344, it was held that the title of an act "to ***redistrict*** the state of Nevada, prescribe the number and salaries of district judges, and fix the places of holding courts" did not contravene the constitution in embracing more than "one subject and matter properly connected therewith." The court said: "The word ***redistrict*** was not evasive of the subject of the act."

2. Red Tape. — Webster *v.* Thompson, 55 Ga. 434.

3. Reduce. — In Halsey *v.* Adams, 63 N. J. L. 335, it was held that parol evidence was admissible to explain the meaning of the word ***reduce.*** The court said: "There are but few words in our language that have so many technical meanings as this one. In the medical profession instructions to ***reduce*** a fracture would mean one thing; in the military world, to ***reduce*** a fort, quite another; to the mathematician, to ***reduce*** a problem, another; to the chemist, to ***reduce*** a substance, still another; and so on. But in each case it would be competent to show by parol evidence, if any exigency required it, just what the words 'to ***reduce***' meant in the connection in which they were used."

Wills. — See Hayward *v.* Loper, 147 Ill. 49.

Reduction. — In *Scotland* ***reduction*** is "a rescissory action peculiar to the Court of Session, whereby deeds, decrees, etc., may be rendered void." Monroe *v.* Douglas, 4 Sandf. Ch. (N. Y.) 202, *quoting* Bell's L. Dict.

Reduction of Capital. — In Thomson *v.* Trustees, etc., Ins. Corp., (1895) 2 Ch. 454, a limited company, having power to invest its capital, and acting within the scope of its business as described in its memorandum of association, was held to be at liberty to surrender part of a particular investment with a view to improving the remainder; and such a remainder was held not to be a "***reduction*** of capital" within the English Companies Acts, 1867 and 1877.

Reduction and Set-off Used Synonymously. — See Burch *v.* State, 4 Gill & J. (Md.) 452.

4. Redundancy. — Carpenter *v.* Reynolds, 58 Wis. 671, in which case it was said: "Or, under the code, ***redundancy*** may consist in the needless repetition of material averments, or in the detail of what may be the evidence by which issuable facts are established." See Stat. Wis. (1898), §§ 2646, subdiv. 2, 2655, subdiv. 2.

5. Reed. — See Foppes *v.* Magone, 40 Fed. Rep. 571, and see the title REVENUE LAWS.

6. Re-employment. — The plaintiff, a brakeman, entered into the employment of a railroad as a spare brakeman, and while in his employment was injured. He then entered into a contract with the railroad to release all damages in consideration of his ***re-employment.*** The court said: "The term ***re-employment***, used in the contract, means the same service in which he had formerly been employed, namely, that of a 'spare brakeman' — liable to be laid off when no brakeman was needed, and to be re-employed when one was." Sax *v.* Detroit, etc., R. Co., (Mich. 1902) 89 N. W. Rep. 369. See also Phares *v.* Lake Shore, etc., R. Co., 20 Ind. App. 54.

7. Re-enter. (See also the titles LANDLORD AND TENANT, vol. 18, p. 371 *et seq.*; LEASES, vol. 18, p. 602.) — In Michaels *v.* Fishel, 169 N. Y. 381, it was said: "The right to ***re-enter*** * * * means the recovery of possession in one way only. The use of a purely technical term, especially when it is found in the midst of the quaint words of ancient leases, gives rise to the presumption that the parties used it with its strict common-law meaning. This presumption is strengthened when the technical word occurs in an instrument drawn by one learned in the law, as the lease before us obviously was. ***Re-enter*** was coeval with the common law in origin, and it has come down to modern times with its meaning unchanged. Narrow and technical to begin with, it has so continued throughout its history, and is narrow and technical to this day."

RE-EXECUTION. — See the titles LOST PAPERS AND RECORDS, vol. 19, p. 555; RESCISSION, CANCELLATION, AND REFORMATION, *post*.

RE-EXPATRIATION. — See the title CITIZENSHIP, vol. 6, p. 30.

REFER. — See note 1.

1. Referred To. — In construing a statute which provided that if the accused should not avail himself of his right to testify, such refusal should not be *referred* to by any attorney in the case, the court said: "The words '*referred* to' evidently mean 'alluded to.' *Refer* is a synonym of 'allude,' and these words are used interchangeably. If the object of the statute was to prevent the jury from considering the fact that a defendant has failed to testify, it is easy to see that as much could be accomplished to defeat that object by an allusion to such fact as by *reference* thereto." State *v.* Moxley, 102 Mo. 393. See also the title ARGUMENTS OF COUNSEL, 2 ENCYC. OF PL. AND PR. 698, and see the title WITNESSES.

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CROSS-REFERENCES.

For matters of PROCEDURE, see the ENCYCLOPÆDIA OF PLEADING AND PRACTICE, vol. 17, p. 978.
And see in this work the title ARBITRATION AND AWARD, vol. 2, p. 533.

I. DEFINITIONS — **Referee.** — A referee is a person to whom a cause pending in court is referred by the court, to take testimony, hear the parties, and report thereon to the court, and upon whose report, if confirmed, judgment is entered.[1]

Master in Chancery. — A master in chancery is a ministerial officer appointed

1. **Referee Defined.** — Mills *v.* Miller, 3 Neb. 87. See also Rushing *v.* Thompson, 20 Fla. 584; Carson *v.* Smith, 5 Minn. 78, 77 Am. Dec. 539; Briggs *v.* Hiles, 87 Wis. 438.
Referee Is Legislative Substitute for Jury. — Indiana Cent. R. Co. *v.* Bradley, 7 Ind. 49; Alexander *v.* Fink, 12 Johns. (N. Y.) 218.
Origin and History. — 3 Black. Com. 453; Tomkins *v.* Willshear, 5 Taunt. 431, 1 E. C. L. 145; Godfrey *v.* Saunders, 3 Wils. C. Pl. 94; Williams *v.* Lee, 1 Mod. 42; Magown *v.* Sinclair, 5 Daly (N. Y.) 68.
Meaning of "Referred." — Billington *v.* Sprague, 22 Me. 34.
Referred in "Summary Way." — Sale *v.* Lake Erie, etc., R. Co., 32 Ont. 159.
A Referee in Life Insurance is a person selected to give information to an insurer about the party insured. See Swete *v.* Fairlie, 6 C. & P. 1, 25 E. C. L. 249; Huckman *v.* Fermé, 3 M. & W. 505; Everett *v.* Desborough, 5 Bing. 503, 15 E. C. L. 518; Lindenau *v.* Desborough, 8 B. & C. 586, 15 E. C. L. 306; Wheelton *v.* Hardisty, 8 El. & Bl. 232, 92 E. C. L. 232; Rawls *v.* American Mut. L. Ins. Co., 27 N. Y. 282, 36 Barb. (N. Y.) 357; Mutual L. Ins. Co. *v.* Wager, 27 Barb. (N. Y.) 354; Fraternal Mut. L. Ins. Co. *v.* Applegate, 7 Ohio St. 292.
Referee in Case of Need. — 1 Randolph on Com. Paper, § 4; Story on Bills of Exchange, § 65; Bills of Exchange Act, 45 & 46 Vict., c. 61, § 15; Laws N. Y. 1897, c. 612, § 215, p. 746.
Auditor Defined. — See Dwyer *v.* Kalteyer, 68 Tex. 554; Kempner *v.* Galveston County, 76 Tex. 450; Bupp *v.* O'Connor, 1 Tex. Civ. App. 328.

by the court to assist by performing various services, mainly of a clerical character, in the progress of a case.[1]

II. CONSENT REFERENCES. — Consent references were known to the common law, and have been recognized in the state courts, and also in the federal courts.[2]

How Consent Given. — The consent of the parties is sometimes required to be in writing,[3] or entered of record.[4] It has been held, however, that the necessary consent may be given orally in open court by the parties or their attorneys.[5]

1. Master in Chancery Defined. — Ennesser *v.* Hudek, 169 Ill. 494. See also Boston *v.* Nichols, 47 Ill. 353; Hards *v.* Burton, 79 Ill. 504; Stewart *v.* Turner, 3 Edw. (N. Y.) 458; Phillips's Appeal, 68 Pa. St. 130; *Ex p.* Gray, Bailey Eq. (S. Car.) 77; Hathaway *v.* Hagan, 64 Vt. 135.

Origin and Duties.—3 Black. Com. 453; Schuchardt *v.* People, 99 Ill. 501, 39 Am. Rep. 34.

Distinction Between Master and Referee. — Central Trust Co. *v.* Wabash, etc., R. Co., 32 Fed. Rep. 684.

2. Consent References at Common Law. — Hall *v.* Mister, 1 Salk. 84. See also Lyons *v.* Lyons Nat. Bank, 8 Fed. Rep. 374.

Consent References in State Courts. — Shain *v.* Peterson, 99 Cal. 486; Graves *v.* Fisher, 5 Me. 70; Miller *v.* Miller, 2 Pick. (Mass.) 570; Smith *v.* Warner, 14 Mich. 152; Yates *v.* Russell, 17 Johns. (N. Y.) 461; Holt *v.* Johnson, 128 N. Car. 67; Kelly *v.* State, 25 Ohio St. 567; Sanders *v.* Rochester Fire Dist. No. 1, 70 Vt. 561; Duncan *v.* Erickson, 82 Wis. 128.

Consent References in Federal Courts.— Heckers *v.* Fowler, 2 Wall. (U. S.) 123; New York, etc., R. Co. *v.* Myers, 18 How. (U. S.) 246; Tyler *v.* Angevine, 15 Blatchf. (U. S.) 536; Robinson *v.* Mutual Ben. L. Ins. Co., 16 Blatchf. (U. S.) 194; Lyons *v.* Lyons Nat. Bank, 8 Fed. Rep. 374.

Consent of All Proper Parties Necessary. — Benham *v.* Rowe, 2 Cal. 261; Hastings *v.* Cunningham, 35 Cal. 549; Waters *v.* Manhattan R. Co., 66 Hun (N. Y.) 60. See also Gamache *v.* Prevost, 71 Mo. 84.

When Consent Presumed —*California.* — Shain *v.* Peterson, 99 Cal. 486.

Colorado. — Terpening *v.* Holton, 9 Colo. 306.

Iowa. — McShane *v.* Gray, 13 Iowa 504. See also Vandall *v.* Vandall, 13 Iowa 247.

Missouri. — Young *v.* Powell, 87 Mo. 128.

Nebraska. — Hosford *v.* Stone, 6 Neb. 378. See also Sherwin *v.* Gaghagen, 39 Neb. 238; Morris *v.* Haas, 54 Neb. 579.

New Mexico. — See De Cordova *v.* Korte, 7 N. Mex. 678.

New York. — Bocklin *v.* Chapin, 53 Barb. (N. Y.) 488, 35 How. Pr. (N. Y.) 155; Quinn *v.* Lloyd, 7 Robt. (N. Y.) 157; Diedrick *v.* Richley, 2 Hill (N. Y.) 271.

North Carolina. — Grant *v.* Hughes, 96 N. Car. 177; Smith *v.* Hicks, 108 N. Car. 248; Blalock *v.* Kernersville Mfg. Co., 110 N. Car. 99.

South Carolina. — Cudd *v.* Williams, 39 S. Car. 452.

Wisconsin. — Duncan *v.* Erickson, 82 Wis. 128. See also Dinsmore *v.* Smith, 17 Wis. 20.

Compare Shaw *v.* Kent, 11 Ind. 80; Tunison *v.* Snover, 56 N. J. L. 41; Brendlinger *v.* Yeagley, 53 Pa. St. 464.

Cannot Compel Consent to Obtain Favor or Avoid Penalty. — Cordier *v.* Cordier, (Supm. Ct. Gen. T.) 26 How. Pr. (N. Y.) 187; Barnes *v.* West, 16 Hun (N. Y.) 68. *Compare* Coston *v.* Morris, 51 Hun (N. Y.) 643, 4 N. Y. Supp. 89; Ferguson *v.* Harrison, 34 S. Car. 169.

Enlargement of Rule of Reference Requires Consent of Parties. — Rice *v.* Clark, 8 Vt. 104.

Party Cannot Revoke Consent. — Robinson *v.* Nelson, (Idaho 1895) 43 Pac. Rep. 64; Dexter *v.* Young, 40 N. H. 130; Ferris *v.* Munn, 22 N. J. L. 161; Keystone Driller Co. *v.* Worth, 117 N. Car. 515. See also Perry *v.* Tupper, 77 N. Car. 413; Smith *v.* Hicks, 108 N. Car. 248; Jeffers *v.* Hazen, 69 Vt. 456; Sanders *v.* Rochester Fire Dist. No. 1, 70 Vt. 561.

Court May Rescind Consent Order. — Dexter *v.* Young, 40 N. H. 130; Ferris *v.* Munn, 22 N. J. L. 161.

Consent Order Changeable to Compulsory Order Only by Consent. — Kerr *v.* Hicks, 129 N. Car. 141.

Municipal Court Cannot Order Consent Reference. — Barber *v.* Lane, 60 N. Y. App. Div. 87.

Effect of Consent Reference — Jury Trial Waived by Applying for or Acquiescing in Reference. — Garrity *v.* Hamburger Co., 136 Ill. 499; Hewitt *v.* Egbert, 34 Iowa 485; St. Paul, etc., R. Co. *v.* Gardner, 19 Minn. 132, 18 Am. Rep. 334. McKinney *v.* London, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 565; Battle *v.* Mayo, 102 N. Car. 413; Smith *v.* Hicks, 108 N. Car. 248, Blevins *v.* Morledge, 5 Okla. 141; Rhodes *v.* Russell, 32 S. Car. 585; Wheeler *v.* Ralph, 4 Wash. 617. See also Baird *v.* New York, 74 N. Y. 382.

Referability of Action Admitted. — Bloore *v.* Potter, 9 Wend. (N. Y.) 480; Yates *v.* Russell, 17 Johns. (N. Y.) 461; Eau Claire Fuel, etc., Co. *v.* Laycock, 92 Wis. 82.

Objection to Jurisdiction of Action or to Make Order Waived. — Shepherd *v.* Shepherd, 108 Mich. 82; Maxfield *v.* Scott, 17 Vt. 634. *Compare* Garcie *v.* Sheldon, 3 Barb. (N. Y.) 234; Crumbie *v.* Manhattan R. Co., 83 Hun (N. Y.) 1.

Defects in Writ, etc., Waived. — Hix *v.* Sumner, 50 Me. 290; Waterman *v.* Connecticut, etc., R. Co., 30 Vt. 610, 73 Am. Dec. 326.

3. Written Consent. — Smith *v.* Polack, 2 Cal. 92; Shaw *v.* Kent, 11 Ind. 80; Stone *v.* Merrill, 43 Wis. 72. See also Leaycroft *v.* Fowler, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 259; Waterman *v.* Waterman, (Supm. Ct. Spec. T.) 37 How. Pr. (N. Y.) 36.

4. Consent Entered of Record. — Morisey *v.* Swinson, 104 N. Car. 555. See also Smith *v.* Polack, 2 Cal. 92.

5. Oral Consent in Open Court. — Keator *v.* Ulster, etc., Plank Road Co., (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 41; Heald *v.* Yumisko,

Consent to New Referee or to Rereference to Same Referee Necessary. — Where a reference is made by stipulation to a referee named, there is no power to appoint a new one without the consent of the parties.[1] And where a new trial is granted after a referee has reported, the parties are restored to their original position and either party can demand a trial by jury or object to a rereference.[2]

III. Compulsory References — 1. In General. — The power to order compulsory references in actions at law is derived entirely from statute, and therefore such a reference will not be ordered except in cases provided for by statute.[3] It seems, however, that a court of equity may, without any statutory authority, in a proper case, order a compulsory reference.[4]

2. Constitutionality — *a.* Actions in Equity. — It is well settled that compulsory references of actions of an equitable nature are constitutional.[5]

b. Actions at Law — (1) *In Federal Courts.* — The rule generally laid down is that a compulsory reference cannot be ordered by a federal court in an action at common law, as such reference would violate the seventh amendment of the Constitution of the United States, providing that "in suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[6]

7 N. Dak. 422. See also Lennon *v.* Smith, (C. Pl. Spec. T.) 22 Civ. Pro. (N. Y.) 22; Waterman *v.* Waterman, (Supm. Ct. Spec. T.) 37 How. Pr. (N. Y.) 36; Bonner *v.* McPhail, 31 Barb. (N. Y.) 106; Kelly *v.* State, 25 Ohio St. 567.

1. Consent to New Referee Necessary. — Smith *v.* Warner, 14 Mich. 152.

2. Consent to Rereference Necessary. — Daverkosen *v.* Kelley, 43 Cal. 477. *Compare* Park *v.* Mighell, 7 Wash. 304.

Under the New York Statute, if the referee named in a consent reference refuses to serve, or if a new trial is granted, the court must appoint another referee unless the stipulation expressly provides otherwise. Code Civ. Pro. N. Y., § 1011; Knowlton *v.* Atkins, 134 N. Y. 313; Mitchell *v.* White Plains, 9 N. Y. App. Div. 258, *distinguishing* Maicas *v.* Leony, 113 N. Y. 619; May *v.* Moore, 24 Hun (N. Y.) 351, *distinguishing* Devlin *v.* New York, 11 N. Y. Wkly. Dig. 116. See also Masten *v.* Budington, 18 Hun (N. Y.) 105. Prior to the enactment of this statute, the consent of the parties was necessary to the appointment of another referee. Preston *v.* Morrow, 66 N. Y. 452; Haner *v.* Bliss, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 246; Billings *v.* Vanderbrek, (Supm. Ct. Spec. T.) 15 How. Pr. (N. Y.) 295.

3. Power to Order Compulsory Reference of Action at Law — *United States.* — Field *v.* Schell, 4 Blatchf. (U. S.) 435; Howe Mach. Co. *v.* Edwards, 15 Blatchf. (U. S.) 402; U. S. *v.* Rathbone, 2 Paine (U. S.) 578.

Colorado. — Terpening *v.* Holton, 9 Colo. 306.

Kansas. — Alford *v.* Buford, etc., Implement Co , 7 Kan. App. 754.

Missouri. — Martin *v.* Hall, 26 Mo. 386; Caruth-Byrnes Hardware Co. *v.* Wolter, 91 Mo. 484; Caulk *v.* Blyth, 55 Mo. 293; Creve Coeur Lake Ice Co. *v.* Tamm. 138 Mo. 385.

New Jersey. — American Saw Co. *v.* Trenton First Nat. Bank, 58 N. J. L. 438.

New York. — Camp *v.* Ingersoll, 86 N. Y. 433; Jacquelin *v.* Manhattan R. Co., (N. Y. Super. Ct. Gen. T.) 12 Misc. (N. Y.) 330; Peabody *v.* Cortada, (Supm. Ct. Gen. T.) 50 N. Y. St. Rep. 743.

Pennsylvania. — Stranahan *v.* Stranahan, 146 Pa. St. 44; Reed *v.* Long, 10 Pa. Co. Ct. 253.

South Carolina. — Smith *v.* Bryce, 17 S. Car. 538; Wilson *v.* York Tp., 43 S. Car. 299.

South Dakota. — Betts *v.* Letcher, 1 S. Dak. 182.

Wisconsin. — Mead *v.* Walker, 17 Wis. 189.

Not Ordered, though Convenient and Within Spirit of Law. — Camp *v.* Ingersoll, 86 N. Y. 433.

4. Power of Court of Equity to Order Compulsory Reference. — Commercial Bank *v.* McAuliffe, 92 Wis. 242.

5. Compulsory Reference of Equitable Actions Constitutional — *California.* — Grim *v.* Norris, 19 Cal. 140, 79 Am. Dec. 206; Williams *v.* Benton, 24 Cal. 424; Jones *v.* Gardner, 57 Cal. 641.

Georgia. — Mackenzie *v.* Flannery, 90 Ga. 590.

Illinois. — Moss *v.* McCall, 75 Ill. 190; Patten *v.* Patten, 75 Ill. 446.

Iowa. — State *v.* Orwig, 25 Iowa 280; Burt *v.* Harrah, 65 Iowa 643.

Massachusetts. — Topliff *v.* Jackson, 12 Gray (Mass.) 565.

Minnesota. — St. Paul, etc., R. Co. *v.* Gardner, 19 Minn. 132, 18 Am. Rep. 334; Fair *v.* Stickney Farm Co., 35 Minn. 380; Bond *v.* Welcome, 61 Minn. 43.

Nebraska. — Mills *v.* Miller, 3 Neb. 87

New Hampshire. — Perkins *v.* Scott, 57 N. H. 55; Bellows *v.* Bellows, 58 N. H. 60.

New York. — Camp *v.* Ingersoll, 86 N. Y. 433.

Oklahoma. — See Van Trees *v.* Territory, 7 Okla. 353.

South Carolina. — Bouland *v.* Carpin, 27 S. Car. 235; Ferguson *v.* Harrison, 34 S. Car. 169; Green *v.* Green, 50 S. Car. 514, 62 Am. St. Rep. 846.

Washington. — Wheeler *v.* Ralph, 4 Wash. 617.

6. Compulsory References in Federal Courts Unconstitutional. — Field *v.* Schell, 4 Blatchf. (U. S.) 435; Howe Mach. Co. *v.* Edwards, 15 Blatchf. (U. S.) 402; U. S. *v.* Rathbone, 2 Paine (U. S.) 578. See also St. Paul, etc., R. Co. *v.* Gardner, 19 Minn. 132, 18 Am. Rep. 334.

(2) *In State Courts.*—In most of the states there is a general constitutional provision that the right of trial by jury shall remain inviolate, and in construing this provision different views have been taken as to the constitutionality of compulsory references of actions at law. In some of the states this provision has been held to prohibit compulsory references; in others the courts have taken the opposite view; and in others still, when compulsory references were granted before the adoption of the state constitution containing this clause, it has been held that this provision merely continues the right of jury trials as it existed previously, and does not take away from the courts their former power to order references.[1] The constitutionality of compulsory references of actions involving long accounts is generally recognized.[2]

3. When Granted — *a.* ACTIONS INVOLVING LONG ACCOUNTS — (1) *In General.* — Compulsory references are granted, as a rule, in actions of contract where long accounts are involved.[3] It is not enough to justify a compulsory

Reference to Auditor to State Accounts Constitutional. — Simmons *v.* Morrison, 13 App. Cas. (D. C.) 161, *distinguishing* Howe Mach. Co. *v.* Edwards, 15 Blatchf. (U. S.) 402, and U. S. *v.* Rathbone, 2 Paine (U. S.) 578.

Provision Not Applicable to State Courts. — Edwards *v.* Elliott, 21 Wall. (U. S.) 532; Huston *v.* Wadsworth, 5 Colo. 213.

1. Constitutionality of Compulsory References in State Courts — *California.* — Smith *v.* Polack, 2 Cal. 92; Benham *v.* Rowe, 2 Cal. 261; Smith *v.* Rowe, 4 Cal. 6; Grim *v.* Norris, 19 Cal. 140, 79 Am. Dec. 206.

Colorado. — Huston *v.* Wadsworth, 5 Colo. 213.

Florida. — Lavey *v.* Doig, 25 Fla. 611.

Georgia. — See Poullain *v.* Brown, 80 Ga. 30; Mackenzie *v.* Flannery, 90 Ga. 590; Culver *v.* Hood, 97 Ga. 550; Hudson *v.* Hudson, 98 Ga. 147.

Iowa. — McMartin *v.* Bingham, 27 Iowa 234; Blair Town Lot, etc., Co. *v.* Walker, 50 Iowa 376; Burt *v.* Harrah, 65 Iowa 643; District Tp. *v.* Bulles, 69 Iowa 525.

Kansas. — Williams *v.* Elliott, 17 Kan. 523; Galbraith *v.* McCormick, 23 Kan. 706.

Maryland. — Wisner *v.* Wilhelm, 48 Md. 1.

Minnesota. — Whallon *v.* Bancroft, 4 Minn. 109; Carson *v.* Smith, 5 Minn. 78, 77 Am. Dec. 539; St. Paul, etc., R. Co. *v.* Gardner, 19 Minn. 132, 18 Am. Rep. 334; Fair *v.* Stickney Farm Co., 35 Minn. 380; Bond *v.* Welcome, 61 Minn. 43.

Missouri. — Shepard *v.* State Bank, 15 Mo. 143; Edwardson *v.* Garnhart, 56 Mo. 81; Creve Coeur Lake Ice Co. *v.* Tamm, 138 Mo. 385.

Nebraska. — Mills *v.* Miller, 3 Neb. 87; Lamaster *v.* Scofield, 5 Neb. 148; Kinkaid *v.* Hiatt, 24 Neb. 562; Kuhl *v.* Pierce County, 44 Neb. 584.

New Hampshire. — Copp *v.* Henniker, 55 N. H. 179, 20 Am. Rep. 194; Sargent *v.* Putnam, 58 N. H. 182.

New Jersey. — Tunison *v.* Snover, 56 N. J. L. 41; American Saw Co. *v.* Trenton First Nat. Bank, 58 N. J. L. 438.

New York. — Lee *v.* Tillotson, 24 Wend. (N. Y.) 337, 35 Am. Dec. 624; Sands *v.* Harvey, 4 Abb. App. Dec. (N. Y.) 147; Van Marter *v.* Hotchkiss, 4 Abb. App. Dec. (N. Y.) 484; Sands *v.* Tillinghast, (Supm. Ct. Gen. T.) 24 How. Pr. (N. Y.) 435; Shepard *v.* Eddy, (Supm. Ct. Gen. T.) 15 Civ. Pro. (N. Y.) 403; Sands *v.* Kimbark, 27 N. Y. 147; Steck *v.* Colorado Fuel, etc., Co., 142 N. Y. 236; Allentown Rolling Mills *v.* Dwyer, 26 N. Y. App Div. 101.

North Carolina. — Klutts *v.* McKenzie, 65 N. Car. 102; Leek *v.* Covington, 87 N. Car. 501; Wilson *v.* Featherstone, 120 N. Car. 446.

Ohio. — Johnson *v.* Wallace, 7 Ohio (pt. ii.) 62; Averill Coal, etc., Co. *v.* Verner, 22 Ohio St. 372.

Oklahoma. — Van Trees *v.* Territory, 7 Okla. 355; Grant County *v.* McKinley, 8 Okla. 128; Brewer *v.* Asher, 8 Okla. 231.

Oregon. — Tribou *v.* Stowbridge, 7 Oregon 156; McDonald *v.* American Mortg. Co., 17 Oregon 626; Trummer *v.* Konrad, 32 Oregon 54; Salem Light, etc., Co. *v.* Anson, 41 Oregon 562.

South Carolina. — De Walt *v.* Kinard, 19 S. Car. 286; Anderson *v.* O'Donnell, 29 S. Car. 355, 13 Am. St. Rep. 728; Wilson *v.* York Tp., 43 S. Car. 299.

Texas. — Bupp *v.* O'Connor, 1 Tex. Civ. App. 328; Hunt *v.* Ullibari, (Tex. Civ. App. 1896) 35 S. W. Rep. 298.

Vermont. — Plimpton *v.* Somerset, 33 Vt. 287.

Wisconsin. — Gaston *v.* Babcock, 6 Wis. 506; Stilwell *v.* Kellogg, 14 Wis. 461; Mead *v.* Walker, 17 Wis. 189; Dane County *v.* Dunning, 20 Wis. 210; Cairns *v.* O'Bleness, 40 Wis. 469; Monitor Iron Works Co. *v.* Ketchum, 47 Wis. 177.

2. See *infra*, this section, *When Granted.*

3. Long Accounts — *California.* — Williams *v.* Benton, 24 Cal. 425; Clarkson *v.* Hoyt, (Cal. 1894) 36 Pac. Rep. 382.

Colorado. — Wilson *v.* Union Distilling Co., (Colo. 1901) 66 Pac. Rep. 170.

District of Columbia. — Simmons *v.* Morrison, 13 App. Cas. (D. C.) 161.

Florida. — Moulie *v.* Hughes, 28 Fla. 617; St. John, etc., R. Co. *v.* Ransom, 33 Fla. 406.

Hawaii. — Hawaiian Government *v.* Brown, 6 Hawaii 750.

Illinois. — Glos *v.* Gerrity, 190 Ill. 545.

Kentucky. — Day Bros. Lumber Co. *v.* Daniel, 62 S. W. Rep. 866, 23 Ky. L. Rep. 285.

Massachusetts. — Janvrin, Petitioner, 174 Mass. 514.

Michigan. — Hollands *v.* Wayne Circuit Judge, 117 Mich. 326; Stockman *v.* Michell, 120 Mich. 293.

Mississippi. — Marlar *v.* State, 62 Miss. 677.

Missouri. — Ittner *v* St. Louis Exposition,

reference that the case may, by possibility, involve the examination of a long account. A compulsory reference cannot be ordered unless it appears with reasonable certainty that the hearing of the case will require the examination of a long account.[1] The account to be examined must be the immediate object of the action. It must be directly, not collaterally, involved.[2]

(2) *What Constitutes "Account."* — An account, in its ordinary legal acceptation, means a statement of debits and credits between parties having reciprocal dealings.[3] It has been said, however, that whatever presents the

etc., Assoc., 97 Mo. 561; Creve Coeur Lake Ice Co. *v.* Tamm, 138 Mo. 385; Vette *v.* Geist, 155 Mo. 27; McCormick *v.* St. Louis, 166 Mo. 315; Buxton *v.* Debracht, (Mo. App. 1902) 69 S. W. Rep. 616; Kent *v.* Highleyman, 28 Mo. App. 614.

New Hampshire. — Sargent *v.* Putnam, 58 N. H. 182; Davis *v.* Dyer, 62 N. H. 231; Low *v.* Independent Christian Soc., 67 N. H. 488.

New Jersey. — American Saw Co. *v.* Trenton First Nat. Bank, 58 N. J. L. 438.

New York. — Camp *v.* Ingersoll, 86 N. Y. 433; Thayer *v.* McNaughton, 117 N. Y. 111; Randall *v.* Sherman, 131 N. Y. 669; Doyle *v.* Metropolitan El. R. Co., 136 N. Y. 505; Spence *v.* Simis, 137 N. Y. 617; Cassidy *v.* McFarland, 139 N. Y. 201; Johnson *v.* Atlantic Ave. R. Co., 139 N. Y. 449; Empire State Telephone, etc., Co. *v.* Bickford, 142 N. Y. 224; Feeter *v.* Arkenburgh, 147 N. Y. 237; Richards *v.* Stokes, 1 N. Y. App. Div. 305; Nicoll *v.* Haas, 5 N. Y. App. Div. 206; McAleer *v.* Sinnott, 30 N. Y. App. Div. 318; Claflin *v.* Drake, 38 Hun (N. Y.) 144; Maxwell *v.* Cottle, 72 Hun (N. Y.) 529; Cochrane Carpet Co. *v.* Howells, 86 Hun (N. Y.) 243; Irving *v.* Irving, 90 Hun (N. Y.) 422; Loverin *v.* Lenox Corporation, 35 N. Y. App. Div. 263; Standard Fashion Co. *v.* Siegel-Cooper Co., 44 N. Y. App. Div. 121; Brennan *v.* Gale, 44 N. Y. App. Div. 396; Stein *v.* New York News Pub. Co., 47 N. Y. App. Div. 550; Clinch *v.* Henck, 49 N. Y. App. Div. 183; Smith *v.* Smith, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 109; Connor *v.* Jackson, 53 N. Y. App. Div. 322; Importers, etc., Nat. Bank *v.* Werner, 54 N. Y. App. Div. 435; Russell *v.* Lyth, 66 N. Y. App. Div. 290; Leary *v.* Albany Brewing Co., 66 N. Y. App. Div. 407.

North Carolina. — Klutts *v.* McKenzie, 65 N. Car. 102; Woody *v.* Brooks, 102 N. Car. 334; Tarboro Bank *v.* Fidelity, etc., Co., 126 N. Car. 320; Austin *v.* Stewart, 126 N. Car. 525; Kerr *v.* Hicks, 129 N. Car. 141.

Oregon. — Tribou *v.* Strowbridge, 7 Oregon 156; McDonald *v.* American Mortg. Co., 17 Oregon 626; Mitchell *v.* Oregon Flax Assoc., 38 Oregon 503; Salem Light, etc., Co. *v.* Anson, 41 Oregon 562.

Rhode Island. — Blanding *v.* Sayles, 21 R. I. 211.

South Carolina. — McCrady *v.* Jones, 36 S. Car. 136; Green *v.* McCarter, 64 S. Car. 290.

South Dakota. — Betcher *v.* Grant County, 9 S. Dak. 82.

Wisconsin. — Dane County *v.* Dunning, 20 Wis. 210; Cairns *v.* O'Bleness, 40 Wis. 469; Littlejohn *v.* Regents, 71 Wis. 437; Turner *v.* Nachtsheim, 71 Wis. 16; Briggs *v.* Hiles, 79 Wis. 571; Chicago, etc., R. Co. *v.* Faist, 87 Wis. 360; Lyle *v.* Esser, 98 Wis. 234; Jordan *v.* Warner, 107 Wis. 539.

Canada. — Fisher *v.* McPhee, 28 Nova Scotia 523.

Actions Involving Mutual Accounts. — Tufts *v.* Norris, 115 Iowa 250; Frick *v.* Kabaker, (Iowa 1902) 99 N. W. Rep. 498; Williams *v.* Elliott, 17 Kan. 523; Noble *v.* Dowell, 22 Kan. 498; Galbraith *v.* McCormick, 23 Kan. 706; Abbott *v.* Arkansas City Bldg., etc., Assoc., 63 Kan. 888, 66 Pac. Rep. 1041; Van Trees *v.* Territory, 7 Okla. 353; Brewer *v.* Asher, 8 Okla. 231.

Not Allowed for Purposes of Discovery. — C., etc., Electric Co. *v.* Walker Co., 35 N. Y. App. Div. 426; Middleton *v.* Ames, 41 N. Y. App. Div. 498; Millhiser *v.* McKinley, 98 Va. 207.

No Reference of Claims Already Adjudicated. — Walter *v.* F. E. McAllister Co., (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 562.

Reference Not Matter of Right. — Godfrey *v.* Williamsburgh City F. Ins. Co., (N. Y. Super. Ct. Spec. T.) 12 Abb. Pr. N. S. (N. Y.) 250; Felt *v.* Tiffany, 11 Hun (N. Y.) 62. See also Place *v.* Chesebrough, 4 Hun (N. Y.) 577; Atocha *v.* Garcia, (N. Y. Super. Ct. Spec. T.) 15 Abb. Pr. (N. Y.) 303; M'Mahon *v.* Allen, (Supm. Ct. Spec. T.) 10 How. Pr. (N. Y.) 384; Brown *v.* Bradshaw, 1 Duer (N. Y.) 635.

Matter for Court's Discretion. — Stockman *v.* Michell, 120 Mich. 293; Welsh *v.* Darragh, 52 N. Y. 592; Cassidy *v.* McFarland, 139 N. Y. 201; Maxwell *v.* Cottle, 72 Hun (N. Y.) 529; Ferguson *v.* Harrison, 34 S. Car. 169.

1. Account Necessarily Involved. — Thayer *v.* McNaughton, 117 N. Y. 111; Spence *v.* Simis, 137 N. Y. 616; Cassidy *v.* McFarland, 139 N. Y. 201; Loverin *v.* Lenox Corporation, 35 N. Y. App. Div. 263; Standard Fashion Co. *v.* Siegel-Cooper Co., 44 N. Y. App. Div. 121; Brennan *v.* Gale, 44 N. Y. App. Div. 396; Leary *v.* Albany Brewing Co., 66 N. Y. App. Div. 407; Keeler *v.* Poughkeepsie, etc., Plank Road Co., (Supm. Ct.) 10 How. Pr. (N. Y.) 11. *Compare* New York *v.* Genet, 67 Barb. (N. Y.) 275.

2. Directly Involved. — Camp *v.* Ingersoll, 86 N. Y. 433; Steck *v.* Colorado Fuel, etc., Co., 142 N. Y. 236; Turner *v.* Taylor, 2 Daly (N. Y.) 278; Read *v.* Lozin, 31 Hun (N. Y.) 286; Claflin *v.* Drake, 38 Hun (N. Y.) 144; Keller *v.* Payne, 51 Hun (N. Y.) 316; Streat *v.* Rothschild, (C. Pl. Gen. T.) 12 Abb. N. Cas. (N. Y.) 383; C., etc., Electric Co. *v.* Walker Co., 35 N. Y. App. Div. 426; Importers, etc., Nat. Bank *v.* Werner, 54 N. Y. App. Div. 435; Stacy *v.* Milwaukee, etc., R. Co., 72 Wis. 331.

3. Account Defined. — Ittner *v.* St. Louis Exposition, etc., Assoc., 97 Mo. 561; American Saw Co. *v.* Trenton First Nat. Bank, 58 N. J. L. 438; Chambers *v.* Appleton, 84 N. Y. 649; McMaster *v.* Booth, (Supm. Ct. Spec. T.) 4 How. Pr. (N. Y.) 427; Van Rensselaer *v.* Jewett, 6 Hill (N. Y.) 373, 41 Am. Dec. 750;

same kind of difficulties as a strict account for the action of a jury should be sent to a referee,[1] and that an action may be referred though the account involved is that of one party only.[2] Numerous items of damage do not constitute an account, technically and properly speaking.[3] This rule has been applied in actions on insurance policies where there were many items of loss.[4]

(3) *What Constitutes "Long Account."* — Just what constitutes a long account has not been, and in the nature of things cannot be, exactly determined. Each case must depend upon its own facts. Where, however, the conclusion can be fairly drawn from the facts disclosed by affidavit, or upon the face of the pleadings, that so many separate and distinct items will be litigated or examined that the jurors cannot keep the evidence in mind in regard to those items and give to that evidence the proper weight and application when they retire to deliberate upon their verdict, the case may be referred as involving a long account.[5] A few items, requiring simply proof of their value, do not constitute a long account.[6]

People *v.* Wood, 54 Hun (N. Y.) 438; Betcher *v.* Grant County, 9 S. Dak. 82; Andrus *v.* Home Ins. Co , 73 Wis 642; Chicago, etc., R. Co. *v.* Faist, 87 Wis. 360.

1. Hossack *v.* Heyerdahl, 38 N. Y. Super. Ct. 391.

2. Camp *v.* Ingersoll, 86 N. Y. 433.

3. **Items of Damage Not Account.** — Camp *v.* Ingersoll, 86 N. Y. 433; Untermyer *v.* Beinhauer, 105 N. Y. 521; Johnson *v.* Atlantic Ave. R. Co., 139 N. Y. 449; Van Rensselaer *v.* Jewett, 6 Hill (N. Y.) 373, 41 Am. Dec. 750; McDonnell *v.* Stevens, 9 Hun (N. Y.) 28; People *v.* Wood, 54 Hun (N. Y.) 438; Stevenson *v.* Buxton, 37 Barb. (N. Y.) 13, 15 Abb. Pr. (N. Y.) 352; Dewey *v.* Field, (Supm. Ct. Spec. T.) 13 How. Pr. (N. Y.) 437; Stacy *v.* Milwaukee, etc., R. Co., 72 Wis. 331; Andrus *v.* Home Ins. Co., 73 Wis. 642.

4. **Actions on Insurance Policies Not Referable.** — Andrus *v.* Home Ins. Co., 73 Wis. 642, *distinguishing* Dane County *v.* Dunning, 20 Wis. 210; Cairns *v.* O'Bleness, 40 Wis. 469. See also Untermyer *v.* Beinhauer, 105 N. Y. 521; Dane *v.* Liverpool, etc., Ins. Co., 21 Hun (N. Y.) 259. But see Samble *v.* Mechanics' Fire Ins. Co., 1 Hall (N. Y.) 560; Ryan *v.* Atlantic Mut. Ins. Co., (N. Y. Super. Ct. Spec. T.) 50 How. Pr. (N. Y.) 321; Lewis *v.* Irving F. Ins. Co., (Supm. Ct. Spec. T.) 15 Abb. Pr. (N. Y.) 303, note; Godfrey *v.* Williamsburgh F. Ins. Co., (N. Y. Super. Ct. Spec. T.) 12 Abb. Pr. N. S. (N. Y.) 250.

No Reference When Answer Sets up Fraud. — Levy *v.* Brooklyn F. Ins. Co., 25 Wend. (N. Y.) 687; McLean *v.* East River Ins. Co., 8 Bosw. (N. Y.) 700; Freeman *v.* Atlantic Mut. Ins. Co., (Supm. Ct. Gen. T.) 13 Abb. Pr. (N. Y.) 124. But see Lewis *v.* Irving F. Ins. Co., (Supm. Ct. Spec. T.) 15 Abb. Pr. (N. Y.) 303, note; Dean *v.* Empire State Mut Ins. Co., (Supm. Ct. Gen. T.) 9 How. Pr. (N. Y.) 69.

5. **Test as to "Long Account"** — *New Hampshire.* — Low *v.* Independent Christian Soc., 67 N. H. 488.

New York. — Doyle *v.* Metropolitan El. R. Co., 136 N. Y. 505; Spence *v.* Simis, 137 N. Y. 617; Steck *v.* Colorado Fuel, etc., Co., 142 N. Y. 236; Feeter *v.* Arkenburgh, 147 N. Y. 237; Cantine *v.* Russell, 168 N. Y. 484; Hedges *v.* Methodist Church, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 174, 23 N. Y. App. Div. 348; Weidenfeld *v.* Woolfolk, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 150; Stein *v.* New York News Pub. Co., 47 N. Y. App. Div. 550; Clinch *v.* Henck, 49 N. Y. App. Div. 183; Smith *v.* New York Cent., etc., R. Co., (Supm. Ct. App. Div.) 62 N. Y. Supp. 1147, 47 N. Y. App. Div. 634; Connor *v.* Jackson, 53 N. Y. App. Div. 322; Fisher *v.* Haines, 62 N. Y. App. Div. 66. See also Malone *v.* St. Peter, etc., Church, 172 N. Y. 269.

Oregon. — Mitchell *v.* Oregon Flax Assoc., 38 Oregon 503; Salem Light, etc., Co. *v.* Anson, 41 Oregon 562.

South Dakota. — Betcher *v.* Grant County, 9 S. Dak. 82.

Long Account When Fifteen or More Items Involved — *Missouri.* — Smith *v.* Haley, 41 Mo. App. 611; Ittner *v.* St. Louis Exposition, etc., Assoc., 97 Mo. 561.

New York. — Robinson *v.* New York, etc., R. Co., 55 N. Y. Super. Ct. 152; Welsh *v.* Darragh, 52 N. Y. 590; Shipman *v.* State Bank, 53 Hun (N. Y.) 637, 6 N. Y. Supp. 292; Risley *v.* Jewett, 53 Hun (N. Y.) 636, 6 N. Y. Supp. 315; Canda *v.* Robbins, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 895; Masterton *v.* Howell, (C. Pl. Spec. T.) 10 Abb. Pr. (N. Y.) 118; Hibbard *v.* Commercial Alliance L. Ins. Co., 141 N. Y. 549, (N. Y. Super. Ct. Gen. T.) 4 Misc. (N. Y.) 422; Nicoll *v.* Haas, 5 N. Y. App. Div. 206. *Compare* Spence *v.* Simis, 137 N. Y. 616.

Oregon. — McDonald *v.* American Mortg. Co., 17 Oregon 626; Craig *v.* California Vineyard Co., 30 Oregon 43.

Wisconsin. — Crocker *v.* Currier, 65 Wis. 662; Sutton *v.* Wegner, 74 Wis. 347; La Coursier *v.* Russell, 82 Wis. 265; Van Oss *v.* Synon, 85 Wis. 661; Chicago, etc., R. Co. *v.* Faist, 87 Wis. 360. *Compare* Turner *v.* Nachtsheim, 71 Wis. 16.

Referable When Items Composed of Numerous Small Items. — Williams *v.* Allen, 2 Hun (N. Y.) 377.

6. **Few Items Not Long Account** — *District of Columbia.* — U. S. *v.* Groome, 13 App. Cas. (D. C.) 460.

Illinois. — Cusack *v.* Budasz, 187 Ill. 392; Glos *v.* Boettcher, 193 Ill. 534.

Missouri. — Kenneth Invest. Co. *v.* National Bank, (Mo. App. 1902) 70 S. W. Rep. 173; Creve Coeur Lake Ice Co. *v.* Tamm, 138 Mo. 385; Dooley *v.* Barker, 2 Mo. App. 325; Kent *v.* Highleyman, 28 Mo. App. 614.

New York. — Parker *v.* Snell, 10 Wend. (N.

(4) *Actions for Attorneys' Fees.* — Though references in actions for attorneys' fees are not favored,[1] they have sometimes been granted when it clearly appeared that long accounts were necessarily involved.[2]

(5) *Difficult Questions of Law Not Involved.* — Under the *New York* Code of Civil Procedure, in order that a compulsory reference may be ordered it must not only appear that the trial will require the examination of a long account, but it must also appear that it will not require the decision of difficult questions of law.[3]

(6) *How Referability Determined.* — Whether an action is referable is generally to be determined from the character of the claim made in the complaint.[4] The answer must, however, in some cases be examined in order to determine whether an action is referable, for though the cause of action set up in a complaint may upon its face involve a long account, it is not referable unless the items of the account are put in issue. So if the cause of action set up in a complaint appears on its face to be nonreferable, yet if the defense interposed to such cause of action shows that the trial of that issue will necessarily involve a long account, a compulsory reference may be ordered.[5] Although upon examination of the complaint and answer it appears that the

Y.) 577; Harris *v.* Mead, (C. Pl. Gen. T.) 16 Abb. Pr. (N. Y.) 257; Dickinson *v.* Mitchell, (Supm. Ct. Gen. T.) 19 Abb. Pr. (N. Y.) 286; Merritt *v.* Vigelius, 28 Hun (N. Y.) 420; Smith *v.* Brown, (Spec. T.) 3 How. Pr. (N. Y.) 9; Adams *v.* Utica, (Supm. Ct. Spec. T.) 6 Civ. Pro. (N. Y.) 294; Dittenhoeffer *v.* Lewis, 5 Daly (N. Y.) 72.

Wisconsin. — Knips *v.* Stefan, 50 Wis. 286.

See also Bush *v.* Murphy, 113 Ga. 345.

1. References in Actions for Fees of Attorneys Denied. — Randall *v.* Sherman, 131 N. Y. 669; Feeter *v.* Arkenburgh, 147 N. Y. 237; Cantine *v.* Russell, 168 N. Y. 484; Flanders *v.* Odell, 2 Hun (N. Y.) 664, (Supm. Ct. Gen. T.) 16 Abb. Pr. N. S. (N. Y.) 247; Martin *v.* Windsor Hotel Co., 10 Hun (N. Y.) 304; Felt *v.* Tiffany, 11 Hun (N. Y.) 62; Merritt *v.* Vigelius, 28 Hun (N. Y.) 420; Fitch *v.* Volker, etc., Mfg. Co., 70 Hun (N. Y.) 71; Maxwell *v.* Cottle, 72 Hun (N. Y.) 529; Abbott *v.* Corbin, 22 N. Y. App. Div. 584; Hoar *v.* Wallace, 24 N. Y. App. Div. 161; Hoes *v.* Allen, (N. Y. City Ct. Gen. T.) 28 Misc. (N. Y.) 450; Hassard *v.* Warner, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 771; Randall *v.* Kingsland, (C. Pl.) 53 How. Pr. (N. Y.) 512; Tracy *v.* Stearns, (Supm. Ct. Gen. T.) 61 How. Pr. (N. Y.) 265. See also Harris *v.* Aktiebolaget Separator Co., (Supm. Ct. Gen. T.) 4 N. Y. Supp. 126.

2. References Granted. — Hale *v.* Swinburne, (Supm. Ct. Spec. T.) 17 Abb. N. Cas. (N. Y.) 381; Carr *v.* Berdell, 22 Hun (N. Y.) 130; Stebbins *v.* Cowles, 30 Hun (N. Y.) 523; Schermerhorn *v.* Wood, 4 Daly (N. Y.) 158; Perry *v.* Rollins, (Supm. Ct. Gen. T.) 56 How. Pr. (N. Y.) 242; Bowman *v.* Sheldon, 1 Duer (N. Y.) 607; Estes *v.* Dean, 1 N. Y. App. Div. 34; Angel *v.* Rae, (N. Y. City Ct. Gen. T.) 57 N. Y. Supp. 817.

3. No Reference When Difficult Questions of Law Involved. — Magown *v.* Sinclair, 5 Daly (N. Y.) 63; Dane *v.* Liverpool, etc., Ins. Co., 21 Hun (N. Y.) 259; Shaw *v.* Ayrs, 4 Cow. (N. Y.) 52; Rochester *v.* New York, (Supm. Ct.) 3 How. Pr. N. S. (N. Y.) 527.

Objection to Be Taken on Motion for Reference. — Dustin *v.* Wallace, 13 N. Y. Wkly. Dig. 518.

Must Be Questions of Real Difficulty. — Anonymous, 5 Cow. (N. Y.) 423. See also National Shoe, etc., Bank *v.* Baker, 90 Hun (N. Y.) 277, *affirmed* 148 N. Y. 581.

Must Be Pointed Out Specifically. — Ryan *v.* Atlantic Mut. Ins. Co., (N. Y. Super. Ct. Spec. T.) 50 How. Pr. (N. Y.) 321; Hibbard *v.* Commercial Alliance L. Ins. Co., (N. Y. Super. Ct. Gen. T.) 4 Misc. (N. Y.) 422, *affirmed* 141 N. Y. 549. See also Salisbury *v.* Scott, 6 Johns. (N. Y.) 329; Dewey *v.* Field, (Supm. Ct. Spec. T.) 13 How. Pr. (N. Y.) 439; Cass *v.* Cass, 61 Hun (N. Y.) 460; Millen *v.* Fogg, (N. Y. Super. Ct. Gen. T.) 13 N. Y. Supp. 614; Patterson *v.* Stettauer, 39 N. Y. Super. Ct. 413.

Questions Need Not Arise Out of Facts Presented by Issues. — Goodyear *v.* Brooks, (N. Y. Super. Ct. Gen. T.) 2 Abb. Pr. N. S. (N. Y.) 296.

4. Complaint Determines Whether Referable — *Missouri.* — Ittner *v.* St. Louis Exposition, etc., Assoc., 97 Mo. 561.

New Jersey. — Gopsill *v.* Hervey, 34 N. J. L. 435; Tunison *v.* Snover, 56 N. J. L. 41.

New York. — Welsh *v.* Darragh, 52 N. Y. 590; Untermyer *v.* Beinhauer, 105 N. Y. 521; Cassidy *v.* McFarland, 139 N. Y. 201; Steck *v.* Colorado Fuel, etc., Co., 142 N. Y. 236; Townsend *v.* Hendricks, (Ct. App.) 40 How. Pr. (N. Y.) 143; Childs *v.* Mayer, 52 Hun (N. Y.) 615, 5 N. Y. Supp. 340; People *v.* Wood, 54 Hun (N. Y.) 438; Ludlow *v.* American Exch. Nat. Bank, 59 Barb. (N. Y.) 509; Booss *v.* Mihan, (N. Y. Super. Ct. Gen. T.) 4 Misc. (N. Y.) 614; Dalzell *v.* Fahys Watch Case Co., (N. Y. Super. Ct. Gen. T.) 12 Misc. (N. Y.) 357.

And see *infra*, this section, *Actions Involving Fraud.*

5. When Answer to Be Examined. — Irving *v.* Irving, 90 Hun (N. Y.) 422, *distinguishing* Steck *v.* Colorado Fuel, etc., Co., 142 N. Y. 251. See also Haig *v.* Boyle, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 155.

When an Answer Is Treated as an Affirmative Defense, it takes the place of the complaint in an examination to see whether the action is referable. Guaranty Trust Co. *v.* Robinson, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 277.

cause of action of the plaintiff is referable, yet if a counterclaim sets up a cause of action in favor of the defendant which would entitle him to a trial by jury, he does not lose his right to such trial although so much of the action as involves the plaintiff's claim is referred.[1] A reference may be ordered though one of several issues in an action on contract does not require the examination of a long account.[2] It seems that if independent issues are raised by the pleadings, or issues the determination of which may render an accounting unnecessary, they should first be tried in the proper form, and if, upon their determination, an accounting is necessary, the action should be referred to determine them.[3] In *North Carolina* the rule is that where there is a plea in bar it must be disposed of before a reference can be ordered.[4] It is otherwise where the matter pleaded in bar would not defeat the action if such matter was found in favor of the defendant.[5]

b. ACTIONS INVOLVING FRAUD. — A compulsory reference may be granted although fraud is alleged by the plaintiff, if the question of fraud is not the main question in issue.[6] If, however, fraud is the plaintiff's substantial issue, and an accounting will not be necessary unless the fraud is established, a compulsory reference will not be granted.[7] An action to recover damages for fraud and deceit is not referable,[8] neither is an action to set aside fraudulent conveyances, transfers, releases, and settlements.[9] It seems that an allegation of fraud in the answer will not prevent a reference.[10]

c. ACTIONS INVOLVING TORT. — A compulsory reference will not be granted in an action to recover damages for a tort[11] except in cases expressly

1. Effect of Counterclaim. — Hoffman House *v.* Hoffman House Café, 36 N. Y. App. Div. 176, *disapproving* Brooklyn, etc., R. Co. *v.* Reed, 21 Hun (N. Y.) 273; Robinson *v.* New York, etc., R. Co., 55 N. Y. Super. Ct. 152. See also Deeves *v.* Metropolitan Realty Co., (C. Pl. Gen. T.) 6 Misc. (N. Y.) 91, *affirmed* 141 N. Y. 587.

2. Reference Ordered though All Issues Do Not Involve Long Account. — Place *v.* Chesebrough, 63 N. Y. 315, 4 Hun (N. Y.) 577, *distinguishing* Townsend *v.* Hendricks, (Ct. App.) 40 How. Pr. (N. Y.) 143; Evans *v.* Kalbfleisch, (N. Y. Super. Ct. Gen. T.) 16 Abb. Pr. N. S. (N. Y.) 13; National Shoe, etc., Bank *v.* Baker, 148 N. Y. 581, *affirming* 90 Hun (N. Y.) 277. See also Goodyear *v.* Brooks, 4 Robt. (N. Y.) 682, Whitaker *v.* Desfosse, 7 Bosw. (N. Y.) 678; Batchelor *v.* Albany City Ins. Co., (N. Y. Super. Ct. Gen. T.) 6 Abb. Pr. N. S. (N. Y.) 240. *Compare* Ross *v.* Combes, 37 N. Y. Super. Ct. 289; Maryott *v.* Thayer, 39 N. Y. Super. Ct. 417.

3. Independent Issues to Be Tried First. — Malone *v.* St. Peter, etc., Church, 172 N. Y. 279, 69 N. Y. App. Div. 420; Graham *v.* Golding, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 260; Knox *v.* Gleason, 63 N. Y. App. Div. 99. See also Camp *v.* Ingersoll, 86 N. Y. 433; Morrison *v.* Horrocks, 40 Hun (N. Y.) 428. But see Batchelor *v.* Albany City Ins. Co., (N. Y. Super. Ct. Gen. T.) 6 Abb. Pr. N S. (N. Y.) 240; Whitaker *v.* Desfosse, 7 Bosw. (N. Y.) 678.

4. No Reference When Plea in Bar. — Atlantic, etc., R. Co. *v.* Morrison, 82 N. Car. 141; Cox *v.* Cox, 84 N. Car. 141; Neal *v.* Becknell, 85 N. Car. 299; Commissioners *v.* Raleigh, 88 N. Car. 120; Leak *v.* Covington, 95 N. Car. 193; Clements *v.* Rogers, 95 N. Car. 250; Woody *v.* Brooks, 102 N. Car. 334; Royster *v.* Wright, 118 N. Car. 152; Smith *v.* Goldsboro, 121 N. Car. 350; Iredell County *v.* White, 123 N. Car. 534; Tarboro Bank *v.* Fidelity, etc., Co., 126 N. Car. 320; Austin *v.* Stewart, 126 N. Car. 525; Kerr *v.* Hicks, 129 N. Car. 141.

5. Humble *v.* Mebane, 89 N. Car. 410; Grant *v.* Hughes, 96 N. Car. 177.

6. Reference Granted When Fraud Incidental. — Hall *v.* U. S. Reflector Co., 88 N. Y. 655; Harrington *v.* Bruce, 84 N. Y. 103; Schermerhorn *v.* Wood, 4 Daly (N. Y.) 158; Bensel *v.* Galt, 5 Thomp. & C. (N. Y.) 186, 2 Hun (N. Y.) 678; Atocha *v.* Garcia, (N. Y. Super. Ct. Spec. T.) 15 Abb. Pr. (N. Y.) 303. See also King *v.* Barnes, 109 N. Y. 267.

7. Reference Refused if Fraud Principal Issue.— Morrison *v.* Horrocks, 40 Hun (N. Y.) 428. See also Camp *v.* Ingersoll, 86 N. Y. 433.

8. Actions for Fraud and Deceit Not Referable. — Verplanck *v.* Kendall, 45 N. Y. Super. Ct. 525.

9. Actions to Set Aside Fraudulent Conveyances Not Referable.— Rochester *v.* New York, (Supm. Ct.) 3 How. Pr. N. S. (N. Y.) 527, 9 Civ. Pro. (N. Y.) 226.

10. Reference Not Defeated by Allegation of Fraud in Answer. —Welsh *v.* Darragh, 52 N. Y. 590; Kingsley *v.* Brooklyn, (Brooklyn City Ct. Spec. T.) 1 Abb. N. Cas. (N. Y.) 108, (Ct. App.) 7 Abb. N. Cas. (N. Y.) 28, 78 N. Y. 200; Lewis *v.* Irving F. Ins. Co., (Supm. Ct. Spec. T.) 15 Abb. Pr. (N. Y.) 303, note; Devlin *v.* New York, (C. Pl. Gen. T.) 54 How. Pr. (N. Y.) 50; Patterson *v.* Stettauer, 39 N. Y. Super. Ct. 413. See also Hall *v.* U. S. Reflector Co., 88 N. Y. 655. *Contra*, Levy *v.* Brooklyn F. Ins. Co., 25 Wend. (N. Y.) 687; Freeman *v.* Atlantic Mut. Ins. Co., (Supm. Ct. Gen. T.) 13 Abb. Pr. (N. Y.) 124; McLean *v.* East River Ins. Co., 8 Bosw. (N. Y.) 700; Mayor *v.* Tenth Nat. Bank, (N. Y. 1881) 11 Rep. 475.

11. Actions Ex Delicto Not Referable — *New York.* — Welsh *v.* Darragh, 52 N. Y. 590; Vilmar *v.* Schall, 61 N. Y. 564; Harden *v.* Corbett,

provided for by statute.[1]

d. IN OTHER CASES. — Reference may also be ordered in various other cases authorized by law.[2]

IV. SELECTION OF REFEREE — 1. In General. — A person should be selected to act as master or referee who is without bias or partiality towards either party,[3] and who is specially qualified to perform the duties imposed upon him.[4]

2. Persons Disqualified — *a.* ATTORNEY. — An attorney of either party cannot act as referee.[5]

6 Hun (N. Y.) 522; Hoffman *v.* Sparling, 12 Hun (N. Y.) 83; Wickham *v.* Frazee, 13 Hun (N. Y.) 431; Durkin *v.* Sharp, 22 Hun (N. Y.) 132; Clark *v.* Candee, 29 Hun (N. Y.) 139; People *v.* Wood, 54 Hun (N. Y.) 438; Silmser *v.* Redfield, 19 Wend. (N. Y.) 21; Dederick *v.* Richley, 19 Wend. (N. Y.) 109; McMaster *v.* Booth, (Supm. Ct. Spec. T.) 4 How. Pr. (N. Y.) 427; Hewitt *v.* Howell, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 346; Dewey *v.* Field, (Supm. Ct. Spec. T.) 13 How. Pr. (N. Y.) 439; Sharp *v.* New York, (Supm. Ct. Spec. T.) 18 How. Pr. (N. Y.) 213, 9 Abb. Pr. (N. Y.) 426, 31 Barb. (N. Y.) 579; Ross *v.* New York, (N. Y. Super. Ct. Spec. T.) 32 How. Pr. (N. Y.) 164, 2 Abb. Pr. N. S. (N. Y.) 266; Townsend *v.* Hendricks, (Ct. App.) 40 How. Pr. (N. Y.) 143; Wood *v.* Hope, (Brooklyn City Ct. Gen. T.) 2 Abb. N. Cas. (N. Y.) 186; Beardsley *v.* Dygert, 3 Den. (N. Y.) 380; Warner *v.* Western Transp. Co., 3 Robt. (N. Y.) 705; Reilly *v.* Byrne, (Supm. Ct. Spec. T.) 1 Civ. Pro. (N. Y.) 201; Verplanck *v.* Kendall, 45 N. Y. Super. Ct. 525. *Contra*, Sheldon *v.* Wood, 3 Sandf. (N. Y.) 739.

Wisconsin. — Stacy *v.* Milwaukee, etc., R. Co., 72 Wis. 331; Van Oss *v.* Synon, 85 Wis. 661.

1. Reference to Ascertain Damages Occasioned by Tort. — Ratté *v.* Booth, 16 Ont. Pr. 185.

Reference to Ascertain Damages Resulting from Injunction. — O'Connor *v.* New York, etc., Land Imp. Co., (C. Pl. Gen. T.) 8 Misc. (N. Y.) 243.

Reference to Ascertain Damages Occasioned by Failure of Other Party to Obey Injunction. — Ray *v.* New York Bay Extension R. Co., 48 N. Y. App. Div. 502.

2. Referee Appointed by Surrogate to Take Testimony. — Matter of Ferrigan, 42 N. Y. App. Div. 1, *affirmed* 160 N. Y. 689.

Reference to Take Testimony under Antimonopoly Act. — Matter of Davies, 168 N. Y. 89, *reversing* People *v.* Nussbaum, 55 N. Y. App. Div. 245.

Reference to Master to Take Testimony. — Green *v.* Green, 50 S. Car. 514, 62 Am. St. Rep. 846.

Reference of Claims Against Personal Representatives. — Jenkinson *v.* Harris, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 714.

Reference to Determine Valuation. — People *v.* Garmon, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 350, 63 N. Y. App. Div. 530.

Reference in Case of Claim of Interpleader to Attached Property. — Walsh *v.* Tyler, 2 Indian Ter. 52.

Reference of Petition of Provisional Railroad Corporation. — Milford, etc., R. Co.'s Petition, 68 N. H. 570.

Reference to Determine Question of Fact Arising upon Motion. — Doyle *v.* Metropolitan El. R. Co., 136 N. Y. 505; Anderson *v.* De Braekeleer, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 343; Matter of Hanlein, 65 N. Y. App. Div. 159; People *v.* Erster Zloczower, etc., Verein, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 420; Green *v.* McCarter, 64 S. Car. 290. See also Judson *v.* Flushing Jockey Club, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 350; Nichtauser *v.* Lehmann, (N. Y. City Ct. Gen. T.) 15 Misc. (N. Y.) 447; Woodward *v.* Musgrave, 14 N. Y. App. Div. 291.

Should Be Ordered Only in Exceptional Cases. — Wamsley *v.* Horton, 68 Hun (N. Y.) 549; Weinberger *v.* Metropolitan Traction Co., 63 N. Y. App. Div. 240; Matter of Hanlein, 65 N. Y. App. Div. 159.

3. Impartiality Necessary. — Goldberger *v.* Manhattan R. Co., (N. Y. Super. Ct. Gen. T.) 3 Misc. (N. Y.) 441; Horne *v.* Greer, (Tenn. Ch. 1897) 43 S. W. Rep. 774. See also Fox *v.* Hazelton, 10 Pick. (Mass.) 275; Rogers *v.* Rogers, (Tenn. Ch. 1896) 42 S. W. Rep. 70.

Friend and Legal Adviser of Relative Not Disqualified. — Durant *v.* O'Brien, (Supm. Ct. Spec. T.) 2 How. Pr. N. S. (N. Y.) 313.

Being on Friendly Terms with One Party Does Not Necessarily Disqualify. — Eichberg *v.* Wickham, (Supm. Ct. Spec. T.) 21 N. Y. Supp. 647.

Question of Improper Relationship Between Party and Referee Addressed to Discretion of Court. — Baird *v.* New York, 74 N. Y. 382.

Selected by Court. — Finance Committee *v.* Warren, (C. C. A.) 82 Fed. Rep. 525.

Agreement of Parties upon Referee Merely Nomination. — Klein *v.* Continental Ins. Co., 62 Hun (N. Y.) 341.

When Court Must Designate Consent Referee. — Fallon *v.* Egberts Woolen Mill Co., (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 304.

Statute Providing for Selection by Parties in All Cases. — Rev. Stat. Mo. (1899), § 699; State *v.* Johnson, 132 Mo. 105; Sanguinett *v.* Webster, 153 Mo. 343.

4. Special Fitness Required. — Hoe *v.* Scott, 87 Fed. Rep. 220.

Court Should Be Satisfied of Fitness of Consent Referee. — Litchfield *v.* Burwell, (Supm. Ct. Spec. T.) 5 How. Pr. (N. Y.) 341.

Requirement that Referee Be Attorney. — New York Gen. Rules Prac., Rule 79; Campbell *v.* Fayette County, 127 Pa. St. 86.

5. Attorney of Either Party Disqualified. — Stebbins *v.* Brown, 65 Barb. (N. Y.) 272; Fortunato *v.* New York, 31 N. Y. App. Div. 271; Phillips's Estate, 10 Pa. Co. Ct. 374; Bowers *v.* Bowers, 29 Gratt. (Va.) 697. See also Brown *v.* Byrne, Walk. (Mich.) 453; M'Laren *v.* Charrier, 5 Paige (N. Y.) 530.

Where it is shown that each of two attorneys in different actions has the cause of the client of the other in his hands to decide as a referee, upon the application of the opposing party in either action, duly made, the reference

b. JUDGE. — The judge of the court in which an action is pending cannot act as a referee in such action,[1] even by consent of the parties.[2]

c. PERSON WHO HAS TRIED SAME OR SIMILAR CASE. — When an action has been referred and tried by the referee, if his decision is reversed upon the facts alone a new referee should be appointed; but if his decision is reversed entirely on questions of law, it seems that there is no ground for substituting a new referee.[3] A reference should not be made to a person who has already tried an action between the same parties involving the same questions.[4] And where two cases between the same parties involving similar questions of law have been referred to the same person, after one of the causes has been decided by him a new referee may be appointed by the court in the exercise of its discretion.[5] It has been held, however, that where several actions were brought by one plaintiff against different defendants, involving substantially the same questions of law, the fact that the referee had tried one of these cases did not disqualify him from acting as referee in the other cases.[6]

3. Residence of Referee. — It is not necessary that a referee should be a resident of the county in which the venue is laid, although it is advisable that he should be.[7]

Waiver. — As a general rule, if a party knows of the objections to a referee and proceeds without raising them, he is deemed to have waived them.[8]

4. Effect of Disqualification. — When a referee for any reason becomes disqualified to act, all proceedings upon the trial before him are necessarily ended. The parties are entitled to have the judicial officer who is to pass upon their rights hear the testimony of the witnesses, and form his determination upon the issues therefrom. They are not compelled to have their rights passed upon in segments or divisions — rulings as to one branch by one judge, and as to another branch by a different judge.[9]

V. REMOVAL OF REFEREE — 1. For Bias or Misconduct. — A referee, being always under the control of the court, may be removed in its discretion for sufficient cause, as where it is shown that he is prejudiced in favor of one of

should be vacated. Carroll *v.* Lufkins, 29 Hun (N. Y.) 17.

1. Judge Disqualified. — Woodin *v.* Phœnix, 41 Mich. 655, 32 Am. Rep. 172; Crane *v.* Hand, 3 N. J. L. 9; Rogers *v.* Woodmanse, 3 N. J. L. 510.

Justice Who Takes Acknowledgment of Parties to Rule of Reference Disqualified. — Drew *v.* Canady, 1 Mass. 158; Drew *v.* Mulikin, 5 N. H. 153.

New York Constitutional and Statutory Provisions. — Const. N. Y., art. 6, § 20, expressly provides that certain judges shall not act as referees. *Construed* in Settle *v.* Van Evrea, 49 N. Y. 281; Countryman *v.* Norton, 21 Hun (N. Y.) 17; Heerdegen *v.* Loreck, 17 N. Y. App. Div. 515. And by statute it is provided that the judge of the court in which the action is brought cannot be appointed referee except by the written consent of the parties. Code Civ. Pro. N. Y., § 1024.

2. Hills *v.* Passage, 21 Wis. 294, *overruling* Dinsmore *v.* Smith, 17 Wis. 20.

Judge of Another Circuit May Act. — Andrews *v.* Elderkin, 24 Wis. 531, *distinguishing* Hills *v.* Passage, 21 Wis. 294.

3. New Referee for Second Trial. — Billings *v.* Vanderbrek, (Supm. Ct. Spec. T.) 15 How. Pr. (N. Y.) 295, *distinguishing* Schermerhorn *v.* Van Alen, (Supm. Ct. Spec. T.) 13 How. Pr. (N. Y.) 82. See also Sharp *v.* New York, 31 Barb. (N. Y.) 578; Murphy *v.* Winchester, 35 Barb. (N. Y.) 616.

New Trial Before Same Referee unless Otherwise Provided. — Catlin *v.* Adirondack Co., 81 N. Y. 379, *affirming* 19 Hun (N. Y.) 389.

4. Person Having Determined Same Question Between Same Parties Disqualified. — Matter of Bliss, 39 Hun (N. Y.) 594.

5. Conley *v.* Petrie, (Brooklyn City Ct. Spec. T.) 60 How. Pr. (N. Y.) 299; Caldwell *v.* Mutual Reserve Fund L. Assoc., (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 510. *Compare* Clark *v.* Clark, 7 Robt. (N. Y.) 62.

6. Not Disqualified When Parties Different. — Klein *v.* Continental Ins. Co., 62 Hun (N. Y.) 341.

7. Rule as to Residence of Referee. — O'Brien *v.* Catskill Mountain R. Co., 32 Hun (N. Y.) 636. See also Wheeler *v.* Maitland, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 35; Sherwood *v.* Tremper, 11 Johns. (N. Y.) 406. But see Chubb *v.* Berry, 7 Wend. (N. Y.) 483.

8. Waiver of Objections. — Fischer *v.* Hayes, 22 Fed. Rep. 92; Story *v.* De Armond, 179 Ill. 510, *affirming* 77 Ill. App. 74; Fox *v.* Hazelton, 10 Pick. (Mass.) 275; Burnham *v* Goffstown, 50 N. H. 560; Carroll *v.* Lufkins, 29 Hun (N. Y.) 17; Rouse *v.* Goodman, (N. Y. City Ct. Gen. T.) 8 Misc. (N. Y.) 691; Moore *v.* Waco Bldg. Assoc., 19 Tex. Civ. App. 68.

9. Heerdegen *v.* Loreck, 17 N. Y. App. Div. 515, *distinguishing* Countryman *v.* Norton, 21 Hun (N. Y.) 17; Roberts *v.* White, 73 N. Y. 375.

the parties, or has done acts or made agreements which would tend to prevent his deciding impartially.[1] As, however, a referee is usually selected by the court, or upon stipulation of the parties in reference to his character, learning, and fitness for the position, he should not be removed by the court pending the trial of a case in which he has been appointed, accepted, and qualified, without good and substantial reason.[2]

2. For Delay. — A referee who unreasonably delays proceeding in the reference, or whose private business is such that he cannot proceed with reasonable dispatch, will be removed.[3]

VI. Oath of Referee — 1. Necessity. — Unless it is expressly required by statute or otherwise, neither a master nor a referee need be sworn.[4]

Statutory Requirement. — Referees are generally expressly required by statute to take an oath to perform their duties faithfully.[5]

2. Presumption as to Oath. — A referee's report being silent as to whether he took the prescribed oath or not, the presumption is that he was properly sworn, unless the contrary clearly appears.[6]

3. Waiver of Oath. — The objection that a referee was not sworn is waived by appearing and going to trial without requiring the oath to be administered.[7]

VII. Powers and Duties of Referee — 1. Powers — *a.* In General. — A referee derives his powers from the statute under an appointment by the court.[8] The terms of the order of reference determine the scope of the referee's authority, and any action taken by him must not exceed, but be strictly within, the authority conferred.[9] In case of a reference of all the

1. When Referee Removable. — Devlin *v.* New York, 7 Daly (N. Y.) 466; Goldberger *v.* Manhattan R. Co., (N. Y. Super. Ct. Gen. T.) 3 Misc. (N. Y.) 441; New York Bank Note Co. *v.* Hamilton Bank Note Engraving, etc., Co., (Supm. Ct. App. Div.) 75 N. Y. Supp. 520; Ford *v.* Ford, 53 Barb. (N. Y.) 525.

Objection to Referee's Conduct Should Be Disclosed Before Decision. — Barrett *v.* Kling, (Brooklyn City Ct. Gen. T.) 40 N. Y. St. Rep. 823.

Consent Referee Not Removed Because of Rulings Alleged to Show Bias or Incapacity. — Marie *v.* Garrison, (N. Y. Super. Ct. Spec. T.) 1 How. Pr. N. S. (N. Y.) 32.

2. Sufficient Cause Necessary. — Klein *v.* Continental Ins. Co., 62 Hun (N. Y.) 341.

3. Delay as Cause for Removal. — Forrest *v.* Forrest, 3 Bosw. (N. Y.) 650. See also Parkhurst *v.* Berdell, 87 N. Y. 145.

4. Necessity for Oath. — Thompson *v.* Smith, 2 Bond (U. S.) 320; Sloan *v.* Smith, 3 Cal. 406; Daggy *v.* Cronnelly, 20 Ind. 474; Underwood *v.* McDuffee, 15 Mich. 361, 93 Am. Dec. 194; McGowan *v.* Newman, (N. Y. Super. Ct. Spec. T.) 4 Abb. N. Cas. (N. Y.) 80.

5. Oath Required by Statute — *Delaware.* — Ray *v.* Hall, 1 Harr. (Del.) 106; Kinney *v.* Short, 2 Harr. (Del.) 357.

Illinois. — Pardridge *v.* Ryan, 134 Ill. 247, 35 Ill. App. 230.

Iowa. — Sears *v.* Sellew, 28 Iowa 501; Shindler *v* Luke, 43 Iowa 89.

Missouri. — Toler *v.* Hayden, 18 Mo. 399; Walt *v.* Huse, 38 Mo. 210; Fassett *v.* Fassett, 41 Mo. 516; Vogt *v.* Butler, 105 Mo. 479; Bissell *v.* Warde, 129 Mo. 439.

New York. — Katt *v.* Germania F. Ins. Co., 26 Hun (N. Y.) 429; Exchange F. Ins. Co. *v.* Early, (C. Pl. Spec. T.) 4 Abb. N. Cas. (N. Y.) 78.

Oklahoma. — Province *v.* Lovi, 4 Okla. 672.

And see generally the codes and statutes of the various states. See also the title Oaths and Affirmations, vol. 21, p. 743.

6. Oath Presumed to Have Been Taken. — Garrity *v.* Hamburger Co., 136 Ill. 499; Story *v.* De Armond, 179 Ill. 510, *affirming* 77 Ill. App. 74; Leyde *v.* Martin, 16 Minn. 38; Atchison, etc., R. Co. *v.* Washburn, 5 Neb. 117; Gilbank *v.* Stephenson, 31 Wis. 592.

Recital in Report Prima Facie Evidence that Oath Was Taken. — Edwardson *v.* Garnhart, 56 Mo. 81; Bissell *v.* Warde, 129 Mo. 439.

7. Oath Waived. — Newcomb *v.* Wood, 97 U. S. 581; Pardridge *v.* Ryan, 134 Ill. 247, 35 Ill. App. 230; Garrity *v.* Hamburger Co., 136 Ill. 499; Story *v.* De Armond, 179 Ill. 516, *affirming* 77 Ill. App. 74; Atchison, etc., R. Co. *v.* Washburn, 5 Neb. 117; Lamaster *v.* Scofield, 5 Neb. 148; Nason *v.* Luddington, (C. Pl. Gen. T.) 56 How. Pr. (N. Y.) 172; Milwaukee County *v.* Ehlers, 45 Wis. 281.

Requirement as to Subscribing Oath Waived. — Vogt *v.* Butler, 105 Mo. 479.

8. Authority Derived from Statute. — Jackson *v.* Puget Sound Lumber Co., (Cal. 1898) 52 Pac. Rep. 838; Hoffman House *v.* Hoffman House Café, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 423; Jones *v.* Beaman, 117 N. Car. 259; Betts *v.* Letcher, 1 S. Dak. 182. See also Eldred *v.* Eames, 115 N. Y. 401.

9. Authority Determined by Order — *California.* — Hihn *v.* Peck, 30 Cal. 280.

Idaho. — Robinson *v.* Nelson, (Idaho 1895) 43 Pac. Rep. 64.

Kansas. — Arn *v.* Coleman, 11 Kan. 460; De Long *v.* Stahl, 13 Kan. 558.

Missouri. — Farmers, etc., Bank *v.* McMullen, 85 Mo. App. 142.

Montana. — Bradshaw *v.* Morse, 20 Mont. 214; Murphy *v.* Patterson, 24 Mont. 575.

New Hampshire. — Drury *v.* Amoskeag F. Ins. Co., 65 N. H. 111.

issues, a referee is substituted for the court. He has all the powers thereof, and may decide matters of both fact and law.[1]

b. ORDER OF REFERENCE. — Before a master or referee can do any valid act there must be an order of reference made by the court.[2] Questions as to the form and contents of such order are discussed elsewhere.[3]

c. TERMINATION OF AUTHORITY. — When the time within which, by the terms of the order, the referee must act has expired, his office has ceased and his powers are ended.[4] When the referee has performed the duty imposed

New York. — Hoffman House *v.* Hoffman House Café, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 423; Sullivan *v.* Sullivan, 41 N. Y. Super. Ct. 519, 52 How. Pr. (N. Y.) 453.

Pennsylvania. — See *In re* Emig, 186 Pa. St. 409.

South Carolina. — People's Loan, etc., Bank *v.* Garlington, 54 S. Car. 413, 71 Am. St. Rep. 800.

Wisconsin. — Stone *v.* Merrill, 43 Wis. 72; Best *v.* Pike, 93 Wis. 408.

Another Person Cannot Act by Consent of Counsel. — Norvell *v.* Gibson, 6 Mo. App. 581.

By Whom Successor Appointed in Case of Resignation. — Brady *v.* Kennedy, 65 N. Y. App. Div. 190.

Powers of Consent Referee Depend upon Agreement of Parties. — Billington *v.* Sprague, 22 Me. 34.

Master's Authority Derived from Order. — Felch *v.* Hooper, 4 Cliff. (U. S.) 489; Finance Committee *v.* Warren, (C. C.A.) 82 Fed. Rep. 525; Deimel *v.* Parker, 164 Ill. 627, 59 Ill. App. 426; Copeland *v.* Crane, 9 Pick. (Mass.) 73; Blauvelt *v.* Ackerman, 20 N. J. Eq. 141; Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495; Connor *v.* Edwards, 36 S. Car. 563; Pitman *v.* England, (Tenn. Ch. 1898) 46 S. W. Rep. 464; Trigg *v.* Trigg, (Tex. 1891) 18 S. W. Rep. 314; Mott *v.* Harrington, 15 Vt. 185; Bland *v.* Stewart, 35 W. Va. 518.

1. Has Powers of Court — *California.* — Phelps *v.* Peabody, 7 Cal. 50; Plant *v.* Fleming, 20 Cal. 92.

Colorado. — Terpening *v.* Holton, 9 Colo. 306; Belmont Min., etc., Co. *v.* Costigan, 21 Colo. 471.

Indiana. — McCutchen *v.* McCutchen, 141 Ind. 697.

Iowa. — Sage *v.* Nichols, 51 Iowa 44.

Maine. — Sweetsir *v.* Kenney, 32 Me. 464; Whitmore *v.* Le Ballistier, 35 Me. 488; Hall *v.* Decker, 51 Me. 31; Frison *v.* De Peiffer, 83 Me. 71.

Massachusetts. — Locke *v.* Bennett, 7 Cush. (Mass.) 445; Gould *v.* Norfolk Lead Co., 9 Cush. (Mass.) 338, 57 Am. Dec. 50; Lowe *v.* Pimental, 115 Mass. 44; Corbett *v.* Greenlaw, 117 Mass. 167.

Michigan. — Gibson *v.* Burrows, 41 Mich. 713.

Minnesota. — Lundell *v.* Cheney, 50 Minn. 470.

New Hampshire. — Mason *v.* Knox, 66 N. H. 545.

New York. — Schuyler *v.* Smith, 51 N. Y. 309, 10 Am. Rep. 609; Palmer *v.* Palmer, (Supm. Ct. Gen. T.) 13 How. Pr. (N. Y.) 363; Woodruff *v.* Dickie, (Supm. Ct. Gen. T.) 31 How. Pr. (N. Y.) 164; Erhard *v.* Kings County, (Supm. Ct. Spec. T.) 36 N. Y. Supp. 656.

North Carolina. — Perkins *v.* Berry, 103 N. Car. 131.

North Dakota. — Illstad *v.* Anderson, 2 N. Dak. 167.

Ohio. — Wesleyan Cemetery *v.* Woodruff, 2 Disney (Ohio) 216.

Oregon. — Stimson *v.* Estes, 3 Oregon 521.

Pennsylvania. — McCracken *v.* Clarke, 31 Pa. St. 498.

Utah. — Reever *v.* White, 8 Utah 188.

Vermont. — Downer *v.* Downer, 11 Vt. 395.

2. Order Necessary. — Webster *v.* Powell, (Fla. 1901) 30 So. Rep. 654; Hawley *v.* Simons, 157 Ill. 219, 53 Ill. App. 287.

What Constitutes Sufficient Order. — Gerity *v.* Seeger, etc., Co., 163 N. Y. 119, *affirming* 47 N. Y. Supp. 1136, 20 N. Y. App. Div. 637.

Must Be Entered of Record. — Bonner *v.* McPhail, 31 Barb. (N. Y.) 106; Kent *v.* Dakota F. & M. Ins. Co., 2 S. Dak. 300; Stone *v.* Merrill, 43 Wis. 72.

Cannot Be Waived. — Stone *v.* Merrill, 43 Wis. 72. *Compare* Kent *v.* Dakota F. & M. Ins. Co., 2 S. Dak. 300.

Parties Entitled to Notice Before Order Made. — Acme Copying Co. *v.* McLure, 41 Ill. App. 397; Jerauld County *v.* Williams, 7 S. Dak. 196.

Order Made in Open Court Without Notice Valid. — Nobles *v.* Hogg, 36 S. Car. 322.

3. See the title REFERENCES, 17 ENCYC. OF PL. AND PR., 1009 *et seq.*

4. Expiration at End of Time Fixed by Order. — Manning *v.* Nelson, 107 Iowa 34; De Long *v.* Stahl, 13 Kan. 558; Creedon *v.* Patrick, (Neb. 1902) 91 N. W. Rep. 872. And see *infra*, this title, *Report of Referee — Filing Report — Time of Filing.*

Expiration of Authority Waived. — Morris *v.* Haas, 54 Neb. 579.

Termination under New York Statute. — Under the New York Code of Civil Procedure, § 1019, a referee's report must, within sixty days after the matter is finally submitted to him, be filed with the clerk, or be delivered to the attorney of one of the parties, and if it is not filed or delivered within this time, either party to the action may, before it is filed or delivered, serve notice upon the attorney for the adverse party that he elects to end the reference, and thereafter the action must proceed as if the reference had not been directed. The referee, in that event, is not entitled to any fees. Geib *v.* Topping, 83 N. Y. 46; Phipps *v.* Carman, 84 N. Y. 650; Little *v.* Lynch, 99 N. Y. 112; Douglas *v.* Smith, 65 Hun (N. Y.) 11; O'Neill *v.* Howe, 16 Daly (N. Y.) 181; Patterson *v.* Knapp, (Supm. Ct. Gen. T.) 24 Civ. Pro. (N. Y.) 251; Birdseye *v.* Goddard, 17 N. Y. Wkly. Dig. 228; Gregory *v.* Cryder, (Ct. App.) 10 Abb. Pr. N. S. (N. Y.)

by the order, his authority ceases.[1]

2. Duties. — A referee should be present at all times during the progress of the hearing;[2] and where there are several referees, all should be present to hear the allegations and proofs of the parties.[3]

VIII. Trial or Hearing Before Referee — 1. In General. — A trial before a referee should be conducted in the same manner as though it was had before a court.[4] It is competent for a referee, in conducting a hearing, to adopt any reasonable method which seems to him best calculated to promote the convenience of the parties and secure the ends of justice.[5]

2. Notice. — Due notice of the time and place of hearing should be given to the parties to a reference.[6]

3. Time of Hearing. — The time within which a reference is to be heard is generally either fixed by the order of reference or regulated by statute.[7]

4. Place of Hearing. — A reference ordered by a court of special and limited

289; Bishop *v.* Bishop, (N. Y. Super. Ct. Spec. T.) 30 Abb. N. Cas. (N. Y.) 296; Nealis *v.* Meyer, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 344; Sproull *v.* Star Co., 45 N. Y. App. Div. 575; Gill *v.* Clark, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 337; Sounier *v.* Barnum, (Supm. Ct Spec. T.) 31 Misc. (N. Y.) 357; Morrow *v.* McMahon, 71 N. Y. App. Div. 171.

1. Authority Expires When Duty Performed. — Robinson *v.* Nelson, (Idaho 1895) 43 Pac. Rep. 64; Rowland *v.* Young Men's Christian Assoc., (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 421, 54 N. Y. App. Div. 618.

Authority Ended When Report Delivered. — Indiana Cent. R. Co. *v.* Bradley, 7 Ind. 49; Conklin *v.* Morton, 40 Ind. 76; Pratt *v.* Stiles, (Supm. Ct. Gen. T.) 17 How. Pr. (N. Y.) 211. See also Coope *v.* Bowles, 42 Barb. (N. Y.) 87; Kissam *v.* Hamilton, (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 369.

Power to Revise and Amend Report After Filing. — Kelso *v.* Youngren, 86 Minn. 177. *Compare* Indiana Cent. R. Co. *v.* Bradley, 7 Ind. 49.

2. Duty to Attend Hearing. — Metcalf *v.* Baker, (N. Y. Super. Ct. Gen. T.) 11 Abb. Pr. N. S. (N. Y.) 434.

3. All Referees Should Be Present. — Short *v.* Pratt, 6 Mass. 496; Walker *v.* Melcher, 14 Mass. 149; M'Inroy *v.* Benedict, 11 Johns. (N. Y.) 402. See also Townsend *v.* Glen's Falls Ins. Co., (N. Y. Super. Ct. Gen. T.) 10 Abb. Pr. N. S. (N. Y.) 277.

All Presumed to Be Present. — Yates *v.* Russell, 17 Johns. (N. Y.) 462.

Under Oklahoma Statute Failure of One to Attend Does Not Invalidate Acts. — Blevins *v.* Morledge, 5 Okla. 141.

4. Mode of Conducting Hearing. — Goodrich *v.* Marysville, 5 Cal. 430; Phelps *v.* Peabody, 7 Cal. 50; Gibson *v.* Burrows, 41 Mich. 713; Perkins *v.* Berry, 103 N. Car. 131; Stimson *v.* Estes, 3 Oregon 521.

Compliance with Statutory Provisions Necessary. — Morey *v.* Warrior Mower Co., 90 Ill. 307; Butler *v.* Cornell, 148 Ill. 276; Manning *v.* Manning, 87 Hun (N. Y.) 221.

North Carolina Statute Regulating Proceedings Construed. — Green *v.* Castlebury, 70 N. Car. 20; Battle *v.* Mayo, 102 N. Car. 413.

Adjournments — Right to Adjourn Hearing on Own Motion. — Rickards *v.* Patterson, 5 Harr. (Del.) 235; Campau *v.* Brown, 48 Mich. 145; *Ex p.* Rutter, 3 Hill (N. Y.) 467; Perkins *v.* Berry, 103 N. Car. 131. See also Belmont Min., etc., Co. *v.* Costigan, 21 Colo. 471; Loan, etc., Bank *v.* Miller, 39 S. Car. 175.

Grounds for Adjournment. — Philadelphia Third Nat. Bank *v.* National Bank, (C. C. A.) 86 Fed. Rep. 852; Billings *v.* Vanderbrek, (Supm. Ct. Spec. T.) 15 How. Pr. (N. Y.) 295.

Report Set Aside for Abuse of Discretion in Ordering Adjournment. — Cooley *v.* Huntington, (Supm. Ct. Spec. T.) 16 Abb. Pr. (N. Y.) 384, note; Forbes *v.* Frary, 2 Johns. Cas. (N. Y.) 224; Forrest *v.* Forrest, 3 Bosw. (N. Y.) 650.

5. Waterman *v.* Merrow, 94 Me. 237.

6. Notice Necessary. — Le Baron *v.* Overstreet, 39 Fla. 628; Rice *v.* Schofield, 9 N. Mex. 314; Green *v.* Castlebury, 70 N. Car. 20. See also Adams *v.* Fry, 29 Fla. 318; Ballard *v.* Lippman, 32 Fla. 481; Acme Copying Co. *v.* McLure, 41 Ill. App. 397; Wardlaw *v.* Erskine, 21 S. Car. 359; Holt *v.* Holt, 37 W. Va. 305; Bassett *v.* McDonel, 13 Wis. 444.

Notice Required by Statute. — Johnson *v.* Meyer, 54 Ark. 437; Dickinson *v.* Earle, 31 N. Y. App. Div. 236.

Written Notice Not Essential. — Stephens *v.* Strong, (County Ct.) 8 How. Pr. (N. Y.) 339; Sage *v.* Mosher, (Supm. Ct. Spec. T.) 17 How. Pr. (N. Y.) 367.

Reasonable Notice Required. — Bernie *v.* Vandever, 16 Ark. 616; Le Baron *v.* Overstreet, 39 Fla. 628; Strang *v.* Allen, 44 Ill. 428; Moore *v.* Bruce, 85 Va. 139.

Waiver of Notice or Defect Therein. — Harding *v.* Wallace, 8 B. Mon. (Ky.) 536; Wetter *v.* Schlieper, (C. Pl. Spec. T.) 7 Abb. Pr. (N. Y.) 92.

Who May Serve Notice. — Kerosene Lamp Heater Co. *v.* Fisher, 1 Fed. Rep. 91; Thompson *v.* Krider, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 248.

Absence of Party After Notice Will Not Prevent Hearing. — Bray *v.* English, 1 Conn. 498; M'Inroy *v.* Benedict, 11 Johns. (N. Y.) 402; Stephens *v.* Strong, (County Ct.) 8 How. Pr. (N. Y.) 339; Sage *v.* Mosher, (Supm. Ct. Spec. T.) 17 How. Pr. (N. Y.) 367. See also State *v.* McIntyre, 53 Me. 214.

7. How Time Fixed. — Davis *v.* Caldwell, 100 Iowa 658; Bullock *v.* Beemis, 3 A. K. Marsh. (Ky.) 285; Lancaster *v.* Barton, 92 Va. 615; Smith *v.* Brown, 44 W. Va. 342. See also Hoofstitler *v.* Hostetter, 172 Pa. St. 575.

Hearing Held by Master During Vacation. — Sweeney *v.* Kaufmann, 168 Ill. 233.

jurisdiction must be held within such jurisdiction.[1] Where, however, the parties consent that a referee shall hold his hearings beyond the jurisdiction of the court, the proceedings so held are legal.[2]

5. Evidence. — The general rules governing the admission of evidence in trials before courts are applicable to trials before referees.[3]

IX. Report of Referee — 1. Form, Execution, and Contents — *a.* Form and Execution. — The report of the referee or master should be in writing[4] and signed by him.[5]

Where There Are Several Referees, it has been held that the report should be signed by all of them.[6] Where the parties agree to a reference to three referees, a report made by only two of them is not binding.[7] If, however, it is so agreed, a report made by one or more of several referees may be received.[8]

In New York, under the statute providing that where the reference is made to more than one referee all must meet together and hear all the allegations

1. Hearing Within Jurisdiction. — Bonner *v.* McPhail, 31 Barb. (N. Y.) 106.

Need Not Be Held in County of Venue. — Newland *v.* West, 2 Johns. (N. Y.) 188; Pierce *v.* Voorhees, (Supm. Ct.) 3 How. Pr. (N. Y.) 111.

Provision in Order of Reference for Holding in Any County. — Hart *v.* Trotter, 4 Wend. (N. Y.) 198; O'Brien *v.* Catskill Mountain R. Co., 32 Hun (N. Y.) 636.

Place Not Changed by Appointing Nonresident of County. — Wheeler *v.* Maitland, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 35.

Master Appointed by United States Court May Act Outside of Jurisdiction. — Bate Refrigerating Co. *v.* Gillette, 28 Fed. Rep. 673. See also Consolidated Fastener Co. *v.* Columbian Button, etc., Co., 85 Fed. Rep. 54.

Waiver of Objection as to Place of Hearing. — Blake *v.* Lyon, etc., Mfg. Co., 77 N. Y. 626; Catlin *v.* Catlin, 2 Hun (N. Y.) 378. See also Blevens *v.* Morledge, 5 Okla. 141.

2. Hearing Outside of Jurisdiction by Consent. — Matter of Davenport, (Surrogate Ct.) 37 Misc. (N. Y.) 179.

3. Evidence in Trials Before Referees — *Alabama.* — Gibson *v.* Trowbridge Furniture Co., 96 Ala. 357.

California. — De La Riva *v.* Berreyesa, 2 Cal. 195.

Illinois. — Pardridge *v.* Ryan, 134 Ill. 247; Ronan *v.* Bluhm, 173 Ill. 277.

Massachusetts. — National Bank of Commerce *v.* New Bedford, 175 Mass. 257.

Missouri. — Vogt *v.* Butler, 105 Mo. 479.

New Hampshire. — Mason *v.* Knox, 66 N. H. 545.

New York. — Mutual L. Ins. Co. *v.* Anthony, 50 Hun (N. Y.) 101; Smith *v.* Kirtland, 45 N. Y. App. Div. 25.

North Carolina. — Kerr *v.* Hicks, 131 N. Car. 90.

Oregon. — Crown Point Gold Min. Co. *v.* Crismon, 39 Oregon 364.

Canada. — *In re* Canadian Pac. R. Co., 27 Ont. App. 54.

And see the title Evidence, vol. 11, p. 484, and the cross-references there given.

Evidence Confined to Question Submitted. — McMahon *v.* Paris, 87 Ga. 660.

Weight and Credibility to Be Determined by Referee. — Kinney *v.* Short, 2 Harr. (Del.) 357; Hogan *v.* Laimbeer, 66 N. Y. 604; Leach *v.* Kelsey, 7 Barb. (N. Y.) 466; Beach *v.* Raymond, 2 E. D. Smith (N. Y.) 496.

Improper Admission or Rejection of Evidence Immaterial When Result Not Affected. — Groth *v.* Kersting, 4 Colo. App. 395; Tripp *v.* Forsaith Mach. Co., 69 N. H. 233; Floyd *v.* Floyd, 46 S. Car. 184.

Viewing Locality or Subject-matter. — West *v.* Kiersted, 15 N. Y. Wkly. Dig. 549; Yale *v.* Gwinits, (Supm. Ct. Spec. T.) 4 How. Pr. (N. Y.) 253.

Evidence Admissible upon Reference under Canada Real-property Act. — *Re* Joyce, 6 Manitoba 281.

Power to Summon Witnesses and Compel Attendance. — Smith *v.* Minnick, 88 Me. 484.

Swearing Witnesses. — Bonner *v.* McPhail, 31 Barb. (N. Y.) 106; Security F. Ins. Co. *v.* Martin, (Supm. Ct.) 15 Abb. Pr. (N. Y.) 479; Parsons *v.* Suydam, 3 E. D. Smith (N. Y.) 276.

Rights and Duties of Witnesses. — Stewart *v.* Turner, 3 Edw. (N. Y.) 458.

Punishment of Witnesses for Contempt. — State *v.* Barclay, 86 Mo. 55; *In re* Haldorn, 10 Mont. 222; State *v.* Baum, 14 Mont. 12; U. S. *v.* Church of Jesus Christ, etc., 6 Utah 15. And see the title Contempt, vol. 7, p. 25.

4. Written Report Required. — Lee Sack Sam *v.* Gray, 104 Cal. 243; Watson *v.* Lockwood, 2 Harr. (Del.) 364.

Letter Written by Referee Not Report. — District of Columbia *v.* Talty, 182 U. S. 510.

Report in Lead Pencil and Containing Unintelligible Abbreviations Not Confirmed. — *In re* Turner, 2 N. Bruns. Eq. 318.

Report Written by Party Valid. — Longmire *v.* Fain, 89 Tenn. 393.

Not Necessary to Attach Order of Reference to Report. — Shaw *v.* Wise, 166 Mass. 433. *Compare* Holt *v.* Holt, 37 W. Va. 305.

In Canada it is otherwise by stat. 53 Vict., c. 4, § 170; *In re* Turner, 2 N. Bruns. Eq. 318.

5. Signing Necessary. — Kissam *v.* Hamilton, (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 369.

6. Report Should Be Signed by All. — Rhodes *v.* Baird, 16 Ohio St. 573. See also The Nineveh, 1 Lowell (U. S.) 400; Eames *v.* Eames, 41 N. H. 177.

7. Anderson *v.* Farnham, 34 Me. 161.

8. Report of One Valid by Agreement. — Wright *v.* Macey, 21 Ind. 301.

and proofs of the parties,[1] it has been decided that there must be a conference of all the referees, and that there must, at such conference, be a substantial conclusion agreed to by the majority upon the several questions of law and fact necessary to be embodied in the report.[2]

b. CONTENTS — (1) *In General.* — While a report should be as concise as possible,[3] it should contain a sufficient statement of facts to form a basis for the conclusions of law, and should substantially show the disposition made by the referee of the specific issues in the cause, or of such of them as are embraced in his determination.[4]

(2) *Findings upon Issues.* — Where an action is referred to a referee to hear and determine all the issues therein, he should hear and determine all the material issues made by the pleadings and report his conclusions upon them.[5]

(3) *Findings of Fact and Law* — (a) **In General.** — A referee's findings of fact and conclusions of law should be separately stated in his report.[6] When several distinct causes of action are stated, a general finding by the referee is insufficient. The same reasons for separate findings would seem to apply to a referee as to a verdict by a jury.[7] As a rule, a general finding of fact is sufficient unless specific findings are requested.[8] It is sometimes provided by

1. Code Civ. Pro. N. Y., § 1026; Fielden *v.* Lahens, (N. Y. Super. Ct.) 14 Abb. Pr. (N. Y.) 48.

2. **New York Statute Construed.** — Townsend *v.* Glen's Falls Ins. Co., (N. Y. Super. Ct. Gen. T.) 10 Abb. Pr. N. S. (N. Y.) 277. See also M'Inroy *v.* Benedict, 11 Johns. (N. Y.) 402; Clark *v.* Fraser, (Supm. Ct. Spec. T.) 1 How. Pr. (N. Y.) 98; Harris *v.* Norton, 7 Wend. (N. Y.) 534; Jackson *v.* Ives, 22 Wend. (N. Y.) 637.

Notice to All Necessary. — Brower *v.* Kingsley, 1 Johns. Cas. (N. Y.) 334.

3. **Conciseness Desirable.** — See Green *v.* Lanier, 5 Heisk. (Tenn.) 662; Mott *v.* Harrington, 15 Vt. 185.

4. **Sufficiency of Report.** — Van Slyke *v.* Hyatt, 46 N. Y. 259, *per* Rapallo, J. See also Weirich *v.* Cook, 39 Mich. 134.

Rereference When Facts Found Are Insufficient. — Stine's Estate, 16 Pa. Super. Ct. 12.

No Judgment When Findings Contradictory. — Stevens *v.* Fellows, 70 N. H. 148.

5. **Issues Raised by Pleadings to Be Determined** — *California.* — Adams *v.* Helbing, 107 Cal. 301; Clark *v.* Hewitt, 136 Cal. 77.

Kansas. — Bulsom *v.* Lampman, 1 Kan. 324; Foster *v.* Voigtlander, 36 Kan. 572.

Michigan. — Mason *v.* Fractional School Dist. No. 1, 34 Mich. 228.

Minnesota. — Bazille *v.* Ullman, 2 Minn. 134; Brainard *v.* Hastings, 3 Minn. 45; O'Brien *v.* St. Paul, 18 Minn. 176.

New York. — Maicas *v.* Leony, 113 N. Y. 619; Collins *v.* Clark, 54 Barb. (N. Y.) 184; Garczynski *v.* Russell, 75 Hun (N. Y.) 492; Pinsker *v.* Pinsker, 44 N. Y. App. Div. 501, 65 N. Y. Supp. 1143; Cable Flax Mills *v.* Early, 72 N. Y. App. Div. 213. See also Lee *v.* Tillotson, 24 Wend. (N. Y.) 337, 35 Am. Dec. 624; Marston *v.* Johnson, (Supm. Ct. Gen. T.) 13 How. Pr. (N. Y.) 93.

Oregon. — Sutton *v.* Clarke, 40 Oregon 508.

Report Confined to Issues Raised by Pleadings. — Fountain *v.* Harrington, 3 Harr. (Del.) 22; Lundell *v.* Cheney, 50 Minn. 472; Barkley *v.* Tarrant County, 53 Tex. 251.

Doubtful Issues to Be Found Against Party Having Burden of Proof. — Strong *v.* Place, 4 Robt. (N. Y.) 385, 33 How. Pr. (N. Y.) 114; Bradley *v.* McLaughlin, 8 Hun (N. Y.) 545.

Failure to Find upon Nonessential Issue Immaterial. — Cook *v.* Stevenson, 30 Mich. 243.

Not Necessary to Report Negatively upon Issue. — Quincey *v.* Young, 5 Daly (N. Y.) 44; Patterson *v.* Graves, (Supm. Ct. Gen. T.) 11 How. Pr. (N. Y.) 91; Nelson *v.* Ingersoll, (Supm. Ct. Gen. T.) 27 How. Pr. (N. Y.) 1; Ingraham *v.* Gilbert, 20 Barb. (N. Y.) 151; Sermont *v.* Baetjer, 49 Barb. (N. Y.) 362; McAndrew *v.* Whitlock, 2 Sweeny (N. Y.) 632.

Specific Findings Not Annulled by General Findings. — Gillis *v.* Cobe, 177 Mass. 584. See also Robinson *v.* Hooker, 174 Mass. 490; Phelps *v.* Vischer, 50 N. Y. 72; Bennett *v.* Buchan, 76 N. Y. 386.

6. **Separate Statements of Findings of Fact and Law.** — Lambert *v.* Smith, 3 Cal. 408; Oaks *v.* Jones, 11 Kan. 443; Bazille *v.* Ullman, 2 Minn. 134; Van Slyke *v.* Hyatt, 46 N. Y. 260; Maicas *v.* Leony, 113 N. Y. 619, 22 Abb. N. Cas. (N. Y.) 465; Rowlands *v.* Young Men's Christian Assoc., (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 421, 54 N. Y. App. Div. 618; Klutis *v.* McKenzie, 65 N. Car. 102; Lindsay *v.* Waymart Water Co., 4 Pa. Dist. 765; Kent *v.* Dakota F. & M. Ins. Co., 2 S. Dak. 300. See also Riley *v.* Coghill, 1 Cinc. Super. Ct. 241.

Immaterial that Findings Improperly Designated. — Weirich *v.* Cook, 39 Mich. 134; Sherman *v.* Hudson River R. Co., 64 N. Y. 254; Thomas *v.* Fuller, 68 Hun (N. Y.) 361; Matter of Clark, 119 N. Y. 427; Evans *v.* Howell, 75 Hun (N. Y.) 199. See also Wright *v.* Loud, 39 N. Y. App. Div. 270.

Evidence Admitted on Trial Not to Be Ignored in Report. — Monson *v.* Cooke, 5 Cal. 436; Meyers *v.* Betts, 5 Den. (N. Y.) 81; Allen *v.* Way, 7 Barb. (N. Y.) 585.

7. State *v.* Peterson, 142 Mo. 526.

8. **General Findings Sufficient.** — Ashley *v.* Marshall, 29 N. Y. 494; Hartford, etc., R. Co. *v.* New York, etc., R. Co., 3 Robt. (N. Y.) 411; Hanley *v.* Crowe, 50 Hun (N. Y.) 605, 3 N. Y. Supp. 154; Rouse *v.* Bowers, 111 N. Car. 360; Philadelphia Co. *v.* United Gas Imp. Co., 180 Pa. St. 235.

statute that, upon the request of either party, a referee shall make special findings.[1]

(b) **Findings of Fact.** — The report should contain a statement of the conclusions of fact found upon the evidence, and not merely the evidence itself.[2]

(c) **Findings of Law.** — Findings of law need not be stated when only issues of fact are referred. If, however, issues of law are referred, the referee's findings upon them should be reported.[3]

(4) *Accounts.* — The parties are entitled to a statement from the referee of all the items of account between them, in order that either may, if he thinks proper, except to any particular item.[4]

(5) *Arguments.* — Conclusions, either of law or of fact, should not be stated argumentatively, but should be set forth concisely, directly, and without repetition, and without any attempt to state the process of reasoning by which the referee's conclusions were reached.[5]

(6) *Evidence.* — Unless it is so required by statute,[6] the referee need not report the evidence taken by him.[7]

1. Statutes Providing for Special Findings. — Oaks *v.* Jones, 11 Kan. 443; Dodd *v.* Hills, 21 Kan. 707; Walker *v.* Hosack, 56 Kan. 468; Crim *v.* Starkweather, 136 N. Y. 635; Steubing *v.* New York El. R. Co., 138 N. Y. 658. See also Bame *v.* Neuss, (Supm. Ct. Gen. T.) 2 Civ. Pro. (N. Y.) 185; Friedman *v.* Bierman, 43 Hun (N. Y.) 387; Havemeyer's Estate, (Surrogate Ct.) 25 Civ. Pro. (N. Y.) 59.

Failure to Find Nonessential Fact Immaterial. — Huffman *v.* Beever, 69 Hun (N. Y.) 557. See also Robinson *v.* Smith, 53 Hun (N. Y.) 638, 7 N. Y. Supp. 38.

2. Findings of Fact Should Be Reported — *California.* — Lee Sack Sam *v.* Gray, 104 Cal. 243.

Florida. — Nims *v.* Nims, 20 Fla. 204.

Indiana. — Wabash, etc., Canal *v.* Huston, 12 Ind. 276.

Massachusetts. — Dean *v.* Emerson, 102 Mass. 480; Jones *v.* Keen, 115 Mass. 170; Parker *v.* Nickerson, 137 Mass. 487.

Michigan. — Weirich *v.* Cook, 39 Mich. 134.

New York. — Avery *v.* Foley, 4 Hun (N. Y.) 415; Dolan *v.* Merritt, 18 Hun (N. Y.) 27; Beck *v.* Sheldon, 48 N. Y. 369; Jarvis *v.* Jarvis, 66 Barb. (N. Y.) 331; Matter of Hemiup, 3 Paige (N. Y.) 305; Dorr *v.* Noxon, (Supm. Ct.) 5 How. Pr. (N. Y.) 29; Patterson *v.* Graves, (Supm. Ct. Gen. T.) 11 How. Pr. (N. Y.) 91.

North Carolina. — Pilkington *v.* Cotten, 2 Jones Eq. (55 N. Car.) 238; Foushee *v.* Beckwith, 119 N. Car. 178.

North Dakota. — Illstad *v.* Anderson, 2 N. Dak. 167.

Vermont. — Mott *v.* Harrington, 15 Vt. 185; Herrick *v.* Balknap, 27 Vt. 673.

In Case of Nonsuit No Finding Necessary. — Gilson Quartz Min. Co. *v.* Gilson, 47 Cal. 597; Reever *v.* White, 8 Utah 188.

Not to Report Facts Unless Ordered. — When an order of reference does not require the referee to report to the court the facts found by him, he has no authority to report them. Royal *v.* Baer, 17 Ind. 332; Way *v.* Fravel, 61 Ind. 162.

3. When Findings of Law to Be Reported. — Kent *v.* Dakota F. & M. Ins. Co., 2 S. Dak. 300. See also Illstad *v.* Anderson, 2 N. Dak. 167.

Unauthorized Findings of Law Not Prejudicial. — Shindler *v.* Luke, 43 Iowa 89. See also Perseverance Min. Co. *v.* Bisaner, 87 Ga. 193.

Alternative Conclusions Sufficient. — Hudson *v.* Hudson, 98 Ga. 147.

Effect of Facts Stated in Detail a Conclusion of Law. — Hotchkiss *v.* Mosher, 48 N. Y. 478.

4. Items of Account Should Be Stated. — O'Neill *v.* Perryman, 102 Ala. 522; Jackson *v.* Puget Sound Lumber Co., (Cal. 1898) 52 Pac. Rep. 838; Gage *v.* Arndt, 121 Ill. 491; Hurdle *v.* Leath, 63 N. Car. 366; McCampbell *v.* McClung, 75 N. Car. 393; Sharpe *v.* Eliason, 116 N. Car. 665; Cameron *v.* Decatur First Nat. Bank, 4 Tex. Civ. App. 309; Park *v.* Mighell, 3 Wash. 737; Dewing *v.* Hutton, 40 W. Va. 521; Gapen *v.* Gapen, 41 W. Va. 422. See also Nims *v.* Nims, 20 Fla. 204; Doyle *v.* Reilly, 18 Iowa 108, 85 Am. Dec. 582; Hartman *v.* Proudfit, 6 Bosw. (N. Y.) 191; Green *v.* Lanier, 5 Heisk. (Tenn.) 662.

Items of Final Account of an Assignee for Benefit of Creditors disallowed by the referee should be fully set out by him. Matter of Kautsky, 56 N. Y. App. Div. 440.

5. Should Not Contain Arguments. — Lundell *v.* Cheney, 50 Minn. 470; Jackson *v.* Jackson, 3 N. J. Eq. 96; Glacius *v.* Black, 50 N. Y. 145, 10 Am. Rep. 449; Mills *v.* Thursby, (Ct. App.) 12 How. Pr. (N. Y.) 417; Dolan *v.* Merritt, 18 Hun (N. Y.) 27; Wilson *v.* Knapp, 42 N. Y. Super. Ct. 25, 70 N. Y. 596; Evans *v.* Evans, 2 Coldw. (Tenn.) 143. See also Herrick *v.* Belknap, 27 Vt. 673; Bates *v.* Sabin, 64 Vt. 511. *Compare* Frazier *v.* Swain, 36 N. J. Eq. 156.

6. Statutes Requiring Evidence to Be Reported. — Johnson *v.* Meyer, 54 Ark. 437; Ronan *v.* Bluhm, 173 Ill. 277; Hayes *v.* Hammond, 162 Ill. 133; Kent *v.* Dakota F. & M. Ins. Co., 2 S. Dak. 300; Bash *v.* Culver Gold Min. Co., 7 Wash. 123.

Evidence Reported When Exceptions Taken. — Sutterfield *v.* Magowan, 12 S. Dak. 139; Kester *v.* Lyon, 40 W. Va. 161; Ward *v.* Ward, 40 W. Va. 611, 52 Am. St. Rep. 911; Central City Brick Co. *v.* Norfolk, etc., R. Co., 44 W. Va. 286.

7. Unnecessary to Report Evidence — *United States.* — See Donnell *v.* Columbian Ins. Co., 2 Sumn. (U. S.) 366.

Alabama. — Mahone *v.* Williams, 59 Ala. 202.

Connecticut. — Goodman *v.* Jones, 26 Conn. 264.

(7) *Exceptions.* — It is sometimes required by statute that all the exceptions taken during the trial before the referee shall be reported by him.[1]

2. Filing Report — *a.* WITH WHOM FILED. — The report should be filed with the clerk,[2] or delivered to the attorney for one of the parties.[3]

b. TIME OF FILING. — The time within which the report should be filed is regulated by statute, or fixed by the order of reference;[4] and it has been held that a report filed after such time is invalid.[5] But the view has been taken that filing the report out of time is an irregularity only, and does not invalidate it.[6]

3. Setting Aside Report. — The report of a referee will be set aside for partiality, corruption, or misconduct.[7]

Florida. — Nims *v.* Nims, 20 Fla. 204.

Illinois. — Friedman *v.* Schoengen, 59 Ill. App. 376.

Indiana. — McKinney *v.* Pierce, 5 Ind. 422; Wabash, etc., Canal *v.* Huston, 12 Ind. 276; Beard *v.* Hand, 88 Ind. 183.

Maine. — Howe *v.* Russell, 36 Me. 115; Gilmore *v.* Gilmore, 40 Me. 50; Bailey *v.* Myrick, 52 Me. 132; Simmons *v.* Jacobs, 52 Me. 147.

Massachusetts. — Parker *v.* Nickerson, 137 Mass. 487; Bowers *v.* Cutler, 165 Mass. 441; Silva *v.* Turner, 166 Mass. 407. See also Sparhawk *v.* Wills, 5 Gray (Mass.) 423.

Minnesota. — Lundell *v.* Cheney, 50 Minn. 470.

New York. — Beck *v.* Sheldon, 48 N. Y. 369; Jarvis *v.* Jarvis, 66 Barb. (N. Y.) 331; Dorr *v.* Noxon, (Supm. Ct.) 5 How. Pr. (N. Y.) 29; Patterson *v.* Graves, (Supm. Ct. Gen. T.) 11 How. Pr. (N. Y.) 91; Matter of Hemiup, 3 Paige (N. Y.) 305.

North Carolina. — Pilkington *v.* Cotten, 2 Jones Eq. (55 N. Car.) 238.

Rhode Island. — See Clapp *v.* Sherman, 16 R. I. 370.

Vermont. — Mott *v.* Harrington, 15 Vt. 185; Herrick *v.* Belknap, 27 Vt. 673; Enright *v.* Amsden, 70 Vt. 183.

West Virginia. — See Holt *v.* Holt, 37 W. Va. 305.

Duty to Report Evidence at Request of Party When Exceptions Filed. — Warren *v.* Lawson, 117 Ala. 339; Huling *v.* Farwell, 33 Ill. App. 238; Heffron *v.* Gore, 40 Ill. App. 257; Parker *v.* Nickerson, 137 Mass. 487. See also Union Sugar Refinery *v.* Mathiesson, 3 Cliff. (U. S.) 146; Harper *v.* McVeigh, 82 Va. 757.

Discretionary Power to Report Evidence. — Union Sugar Refinery *v.* Mathiesson, 3 Cliff. (U. S.) 146; Jackson *v.* Jackson, 3 N. J. Eq. 96.

Evidence Reported by Order of Court. — Freeland *v.* Wright, 154 Mass. 492. See also Gleason, etc., Mfg. Co. *v.* Hoffman, 168 Ill. 25; Arnold *v.* Slaughter, 36 W. Va. 589.

1. Exceptions to Be Reported. — Illstad *v.* Anderson, 2 N. Dak. 167; Hulst *v.* Benevolent Hall Assoc., 9 S. Dak. 144; Sutterfield *v.* Magowan, 12 S. Dak. 139.

2. Filed with Clerk. — Stewart *v.* Crane, 87 Ga. 328. See also Donaldson *v.* Johnson, 16 R. I. 346.

3. Delivered to Attorney. — Code Civ. Pro. N. Y., § 1019. See also Little *v.* Lynch, 99 N. Y. 112; Russell *v.* Lyth, 66 N. Y. App. Div. 290. And see the statutory provisions of the several states.

4. Time Fixed by Statute. — Keller *v.* Sutrick, 22 Cal. 472; Little *v.* Lynch, 99 N. Y. 112; Agricultural Ins. Co. *v.* Darrow, 70 N. Y. App. Div. 413; James *v.* West, (Ohio 1902) 65 N. E. Rep. 156; Lancaster *v.* Barton, 92 Va. 615. And see the statutory enactments of the several states.

Time Fixed by Order. — De Long *v.* Stahl, 13 Kan. 558; Dietrichs *v.* Lincoln, etc., R. Co., 13 Neb. 43; White *v.* Kemble, 3 N. J. L. 53. See also Union Sugar Refinery *v.* Mathiesson, 3 Cliff. (U. S.) 146; Bullock *v.* Beemis, 3 A. K. Marsh. (Ky.) 285.

To Be Filed at Next Term When Time Not Fixed. — Jeffers *v.* Hazen, 69 Vt. 456. See also Lazell *v.* Houghton, 32 Vt. 579; Knapp *v.* Fisher, 49 Vt. 94.

Right of Court to Extend Time. — Norton *v.* Huntoon, 43 Kan. 275; Mayberry *v.* Morse, 39 Me. 105; Stacker *v.* Cooper Circuit Ct., 25 Mo. 401.

Court Authorized to Extend Time by Agreement of Counsel. — Shore *v.* White City State Bank, 61 Kan. 246.

Proper to File Within Statutory Time When Attorney of Party Dies. — Agricultural Ins. Co. *v.* Darrow, 70 N. Y. App. Div. 413.

Notice of Filing Required. — Stewart *v.* Mathews, 19 Fla. 752; St. Johns, etc., R. Co. *v.* Shalley, 33 Fla. 397; St. Johns, etc., R. Co. *v.* Ransom, 33 Fla. 406; Arnau *v.* Florida First Nat. Bank, 36 Fla. 398; James *v.* Horn, 19 N. J. App. Div. 259. See also Catlin *v.* Catlin, 2 Hun (N. Y.) 378.

Proof of Service of Notice of Filing Necessary. — Bailey *v.* Carter, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 270.

5. Invalid When Filed After Time. — Davis *v.* Caldwell, 100 Iowa 658; De Long *v.* Stahl, 13 Kan. 558; White *v.* Kemble, 3 N. J. L. 53; Brower *v.* Kingsley, 1 Johns. Cas. (N. Y.) 334; Hanner *v.* Coffin, 1 Oregon 99. See also Goodale *v.* Case, 71 Iowa 434.

6. Valid though Filed After Time. — Keller *v.* Sutrick, 22 Cal. 472; Dietrichs *v.* Lincoln, etc., R. Co., 13 Neb. 43; Creedon *v.* Patrick, (Neb. 1902) 91 N. W. Rep. 872; James *v.* West, (Ohio 1902) 65 N. E. Rep. 156.

7. When Report Set Aside. — Leonard *v.* Mulry, 93 N. Y. 392; Yale *v.* Gwinits, (Supm. Ct. Spec. T.) 4 How. Pr. (N. Y.) 253; Dorlon *v.* Lewis, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 1; Roosa *v.* Saugerties, etc., Turnpike Road Co., (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 297; Carroll *v.* Lufkins, 29 Hun (N. Y.) 17; Greenwood *v.* Marvin, 29 Hun (N. Y.) 99; Burrows *v.* Dickinson, 35 Hun (N. Y.) 492; Stebbins *v.* Brown, 65 Barb. (N. Y.) 272; Reynolds *v.* Moore, 1 N. Y. App. Div. 108; Fortunato *v.* New York, 31 N. Y. App. Div. 271;

X. Effect of Death upon Reference — 1. Death of Referee. — If the report of the referee has been rendered before his death, judgment may be entered upon the report without a retrial.[1] If the referee dies before rendering his report, a compulsory reference is not terminated, but a new referee must be appointed.[2] A voluntary reference is, however, terminated by the referee's death.[3]

2. Death of Party. — The effect of the death of a party, or the transfer of his interest pending the reference, is discussed elsewhere.[4] An order of reference made in ignorance of the death of a necessary party to the action, and before such action is revived, should be vacated.[5]

XI. Review of Decision — 1. Findings of Law. — The court retains the cause and its jurisdiction in every case of reference, with power to review and reverse the conclusions of law of the referee, and a discretion to modify and set aside his report.[6]

2. Findings of Fact. — The findings of fact of a referee have every reasonable presumption in their favor. They are to be regarded by the court as having the same force and weight as a verdict of a jury, and should not be disturbed if the evidence is conflicting, and they are supported by some evidence, or are not clearly against the weight of evidence.[7]

Dickinson *v.* Earle, 63 N. Y. App. Div. 134, 35 Misc. (N. Y.) 235; Goldberger *v.* Manhattan R. Co , (N. Y. Super. Ct. Gen. T.) 3 Misc. (N. Y.) 441. See also Matter of Koch, (Surrogate Ct.) 33 Misc. (N Y) 153. And see *supra*, this title, *Selection of Referee*.

Mere Suspicions and Surmises Not Sufficient Cause. — Gray *v.* Fisk, (N. Y. Super. Ct. Gen. T.) 12 Abb. Pr. N. S. (N. Y.) 213.

Conclusion Not to Be Made Known Before Report Delivered. — Ayrault *v.* Sackett, (Supm. Ct.) 17 How. Pr. (N. Y) 461.

Should Not Attempt to Have Action Compromised. — Livermore *v.* Bainbridge, 56 N. Y. 72, (Supm. Ct. Gen. T.) 14 Abb. Pr. N. S. (N. Y.) 227, (Ct. App.) 15 Abb. Pr. N. S. (N. Y.) 436, (Supm. Ct. Spec. T.) 44 How. Pr. (N. Y.) 357, 47 How. Pr. (N. Y.) 350.

It Is Not Misconduct to talk with one of the parties having custody of books introduced in evidence, and to look over them with him. Weakley *v.* Cherry Tp., 62 Kan. 867, 63 Pac. Rep 433.

1. Report Rendered Before Death. — Juliand *v.* Grant, (Supm. Ct. Spec. T.) 34 How. Pr. (N. Y.) 132.

2. Effect of Death upon Compulsory Reference. — Devlin *v.* New York, 9 Daly (N. Y.) 334, 62 How. Pr. (N. Y.) 260.

3. Effect of Death upon Voluntary Reference. — Emmet *v.* Bowers, (N. Y. Super. Ct. Spec. T) 23 How. Pr. (N. Y.) 300.

4. See the title References, 17 Encyc. of Pl. and Pr. 1043, and the cross-references there given. See also Moore *v.* Hamilton, 44 N. Y. 673; Chittenango Cotton Co. *v.* Stewart, 67 Barb. (N. Y.) 423; Kissam *v.* Hamilton, (Supm Ct. Spec. T.) 20 How. Pr. (N. Y.) 369.

5. Reference Made After Death of Party Vacated. — Waters *v.* Manhattan R Co., 66 Hun (N. Y.) 60.

6. Cummings *v.* Swepson, 124 N. Car. 579; Brackett *v.* Gilliam, 125 N. Car. 380.

7. Findings of Fact. — See the titles Appeals, 2 Encyc. of Pl. and Pr. 401; References, 17 Encyc. of Pl and Pr. 1054, 1066. See also the following cases:

United States. — Fidelity, etc., Co. *v.* St. Matthews Sav. Bank, (C. C. A.) 104 Fed. Rep. 858.

District of Columbia. — Smith *v.* American Bonding, etc., Co., 12 App. Cas. (D. C) 192.

Illinois. — Story *v.* De Armond, 179 Ill. 510.

Iowa. — Weitnauer *v.* Weitnauer, (Iowa 1902) 91 N. W. Rep. 815.

Massachusetts. — Speirs *v.* Union Drop Forge Co., 180 Mass. 87.

New Hampshire. — Drown *v.* Hamilton, 68 N. H. 23; Danforth *v.* Freeman, 69 N. H. 466.

Oklahoma. — Erisman *v.* Kerwin, 8 Okla. 92; Jackson *v.* Thornton, 8 Okla. 331.

Pennsylvania. — Conner's Estate, 9 Pa. Dist. 172; Fidelity Ins., etc., Co. *v.* Earle, 9 Pa. Dist. 198; Davison *v.* Hibernians, 9 Kulp (Pa) 356; Reynolds *v.* Williams, 9 Kulp (Pa.) 380.

Texas. — Herbert *v.* Harbert, (Tex. Civ. App. 1900) 59 S. W. Rep. 594.

Wisconsin. — Leasia *v.* Penokee Lumber Co., 103 Wis. 304; Erickson *v.* McGeehan Constr. Co., 107 Wis. 49; Remington *v.* Eastern R. Co., 109 Wis. 154.

Entitled to the Same Credit in the Trial Court that the findings of the trial court possess in the appellate court. Zoesch *v.* Thielman, 105 Wis. 117; Johnson *v.* Goult, 106 Wis. 247.

When Findings Advisory Only. — Murphy *v.* Patterson, 24 Mont. 575.

Stipulation that Findings of Fact Shall Have Effect of Verdict of Jury. — U. S. Projectile Co. *v.* Sharpless, 115 Fed. Rep. 996.

Stipulation Providing for Review of Evidence. — People *v.* Westchester County, 53 N. Y. App. Div. 339.

Conclusions Binding When No Exceptions Taken. — Carter *v.* Jackson, 115 Ga. 676; State *v.* Standard Oil Co., (Neb. 1901) 88 N. W. Rep. 175; Chicago Lumber Co. *v.* Bancroft, (Neb. 1902) 89 N. W. Rep. 780.

No Review of Facts When No Exceptions to Conclusions of Law. — Wolcott *v.* Merchant's Gargling Oil Co., 45 N. Y. App Div. 379.

Force and Effect of Auditor's Report. — Weaver *v.* Cosby, 109 Ga. 310; Berger *v.* Clendinen, 88 Md. 151; Johnson *v.* Kimball, 172 Mass.

XII. Fees of Referee — 1. In General. — When fixed by the court, the fee allowed to a referee or master should be an amount which is reasonable in view of the services rendered.[1] In fixing a referee's fees, a wide discretion is allowed to the trial court, and upon appeal a clear case of abuse of this discretion must appear, or the judgment will be affirmed.[2]

2. Fees Fixed by Statute. — The fees of referees are sometimes fixed by statute, and when this is so, in the absence of an express agreement, the referee is entitled only to such statutory fees.[3]

3. Fees Fixed by Agreement. — In some jurisdictions the parties to a reference have the right to agree that the referee shall receive a greater compensation than that fixed by statute.[4] Such stipulation should be made in advance,[5] and a definite rate of compensation should be agreed upon.[6]

398; Connolly *v.* Sullivan, 173 Mass. 1; Wyman *v.* Whicher, 179 Mass. 276.

In Missouri it has been held that where the nature of the action is such that it may be referred by the court without the consent of the parties, the finding of a referee upon the evidence is only advisory, and may be set aside by the trial court and new findings made by it upon the evidence. Wentzville Tobacco Co. *v.* Walker, 123 Mo. 662; Utley *v.* Hill, 155 Mo. 232, 78 Am. St. Rep. 569; Lack *v.* Brecht, 166 Mo. 242; Bond *v.* Finley, 74 Mo. App. 22; Raines *v.* Lumpee, 80 Mo. App. 203.

1. Entitled to Reasonable Fees. — Finance Committee *v.* Warren, 82 Fed. Rep. 525, 53 U. S. App. 472; Stokes *v.* Brown, 7 Fred. Eq. (42 N. Car.) 33; Powel's Estate, 163 Pa. St. 349; Sailor's Estate, 2 Pa. Dist. 489. See also Cummins *v.* Robinson, 2 Okla. 494.

Judicial Compensation Just Standard. — Middleton *v.* Bankers', etc., Tel. Co., 32 Fed. Rep. 524. See also *In re* Haldorn, 10 Mont. 281. But see Finance Committee *v.* Warren, 82 Fed. Rep. 527, 53 U. S. App. 472.

2. Discretion of Trial Court. — Treadwell *v.* Treadwell, 134 Cal. 158.

3. Statutory Fees — *Kentucky.* — Russell *v.* Avritt, (Ky. 1897) 39 S. W. Rep. 699.

Montana. — *In re* Haldorn, 10 Mont. 281.

New York. — Shultz *v.* Whitney, (C. Pl. Spec. T.) 9 Abb. Pr. (N. Y.) 71, 17 How. Pr. (N. Y.) 471; People *v.* Continental L. Ins. Co., 15 N. Y. Wkly. Dig. 569; Duhrkop *v.* White, 13 N. Y. App. Div. 293; Finkel *v.* Kohn, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 367; Blanck *v.* Spies, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 19; Dickinson *v.* Earle, 63 N. Y. App. Div. 140.

Virginia. — Shipman *v.* Fletcher, 83 Va. 349.

Washington. — Park *v.* Mighell, 3 Wash. 737.

And see generally the statutory enactments of the several states.

No Extra Compensation for Long and Unusual Hours. — Matter of Bieber, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 341.

Fee for Time Taken to Prepare Report. — Nealis *v.* Meyer, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 344. See also Rothschild *v.* Warner, 4 N. Y. L. Bul. 28; Von Prochazka *v.* Von Prochazka, (Supm. Ct. Spec. T.) 2 City Ct. (N. Y.) 440.

Fees for Reasonable Time Employed in Obtaining Signatures of Witnesses. — Brush *v.* Kelsey, 47 N. Y. App. Div. 270.

Filing Paper Not Hearing for Which Fee Chargeable. — Jones *v.* Newton, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 510.

No Fee for Services of Third Person Acting as Referee. — Shultz *v.* Whitney, (C. Pl. Spec. T.) 9 Abb. Pr. (N. Y.) 71, 17 How. Pr. (N. Y.) 471.

Fees Allowed for Postponements Made at Time Set for Hearing. — Jones *v.* Newton, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 510; Brush *v.* Kelsey, 47 N. Y. App. Div. 270.

No Fee for Postponement Made in Advance. — Mead *v.* Tuckerman, 105 N. Y. 557.

Fees When Two Actions Between Same Parties Tried Together. — Holmes, etc., Mfg. Co. *v.* Morse, (N. Y. Super. Ct. Spec. T.) 28 Abb. N. Cas. (N. Y.) 133; Brown *v.* Sears, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 559.

Extra Fee for Examining Difficult Question of Law. — Vandemark's Estate, 4 Pa. Dist. 628.

Allowance of Stenographer's Fees. — Griggs *v.* Guinn, (N. Y. Super. Ct. Spec. T.) 23 Civ. Pro. (N. Y.) 46; Pfaudler Barm Extracting Bunging Apparatus Co. *v.* Sargent, 43 Hun (N. Y.) 154; Clegg *v.* Aikens, (Supm. Ct.) 17 Abb. N. Cas. (N. Y.) 88; Blanck *v.* Spies, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 19; Cummins *v.* Robinson, 2 Okla. 494; Park *v.* Mighell, 3 Wash. 737. And see the title Stenographers.

4. Stipulation for Increased Fees. — *In re* Haldorn, 10 Mont. 281; Cooperstown First Nat. Bank *v.* Tamajo, 77 N. Y. 478; Mark *v.* Buffalo, 87 N. Y. 184; Dickinson *v.* Earle, 63 N. Y. App. Div. 134, 35 Misc. (N. Y.) 235; O'Neill *v.* Howe, 16 Daly (N. Y.) 181.

Stipulation Should Be Reasonable. — *In re* Haldorn, 10 Mont. 281.

Stipulation Binding in Absence of Fraud or Collusion. — Mark *v.* Buffalo, 87 N. Y. 184. See also Wolff *v.* Horn, (C. Pl. Gen. T.) 9 Misc. (N. Y.) 100; Thurman *v.* Fiske, (Supm. Ct. Gen. T.) 30 How. Pr. (N. Y.) 397; Covell *v.* Hart, 14 Hun (N. Y.) 252.

Fee Fixed by Attorney. — Mark *v.* Buffalo, 87 N. Y. 184. See also Cooperstown First Nat. Bank *v.* Tamajo, 77 N. Y. 478; Chase *v.* James, 16 Hun (N. Y.) 14. *Compare* Matter of Currier, 8 Daly (N. Y.) 119.

5. Agreement to Be Made in Advance. — Chase *v.* James, 16 Hun (N. Y.) 14.

6. Agreement to Be Definite. — Cooperstown First Nat. Bank *v.* Tamajo, 77 N. Y. 476; Chase *v* James, 16 Hun (N. Y.) 14. See also Griggs *v.* Day, 135 N. Y. 469, (N. Y. Super. Ct. Gen. T.) 22 Civ. Pro. (N. Y.) 146. See also Griggs *v.* Guinn, (N. Y. Super. Ct. Spec. T.) 23 Civ. Pro. (N. Y.) 46. *Compare* Burt *v.* Oneida Community, 59 Hun (N. Y.) 234, (Supm. Ct. Gen. T.) 20 Civ. Pro. (N. Y.) 167.

4. When Fees Payable. — As a general rule, a referee is not entitled to his fees in advance.[1] A referee is not, however, bound to file or deliver his report without payment of his fees;[2] but rather than lose his fees by having the reference terminated by notice under the statute, he may prefer to file or deliver his report before his fees are paid.[3] To prevent the termination of the reference and the consequent loss of his fees, a referee must file his report with the clerk, or actually deliver it to the attorney of one of the parties.[4] Although his report is filed after the statutory time, he will still be entitled to his fees if neither of the parties has elected to terminate the reference.[5] A referee is entitled to compensation as soon as he has delivered his report, and this right is unaffected by the fact that the appellate court disagrees with the conclusions reached by him.[6]

5. Who Liable for Fees. — A referee must rely in the first instance for the payment of his fees upon the interest of the prevailing party to take up the report.[7] If the prevailing party does not take up the report and pay the fees, the referee may, by a common-law action, recover compensation for his services without proving an express promise to pay, for the obligation to compensate is implied from the beneficial nature of the services, aided by the attendance of the parties, from which their consent sufficiently appears.[8] If the fees are paid by the prevailing party he in turn recovers them from the adverse party as taxable disbursements.[9]

Attorneys. — The attorneys of the parties to a reference are not liable for the fees of the referee.[10]

REFERENCE. — See note 11.

1. Fees Not Payable in Advance. — Ellsworth *v.* Brown, 16 Hun (N. Y.) 1, (Supm. Ct. Gen. T.) 56 How. Pr. (N. Y.) 237; Clapp *v.* Clapp, 38 Hun (N. Y.) 540; Matter of Kraus, 4 Dem. (N. Y.) 217.

Not Entitled to Payment of Fees from Day to Day. — Gallagher *v.* Moncton, 2 N. Bruns. Eq. 269, 37 Can. L. J. 670.

Deposit of Fees Required under Special Circumstances. — Ellsworth *v.* Brown, 16 Hun (N. Y.) 1, (Supm. Ct. Gen. T.) 56 How. Pr. (N. Y.) 237.

Payment of Proportionate Part Ordered When Litigation Prolonged. — Powel's Estate, 163 Pa. St. 349.

Payment of Monthly Amounts Improper. — Goldberger *v.* Manhattan R. Co., (N. Y. Super. Ct. Gen. T.) 3 Misc. (N. Y.) 441.

2. No Obligation to Deliver Report Before Payment. — Matter of Kraus, 4 Dem. (N. Y.) 217; Little *v.* Lynch, 99 N. Y. 112; Duhrkoy *v.* White, 13 N. Y. App. Div. 293. *Compare* Trail *v.* Somerville, 22 Mo. App. 308.

3. Delivery to Prevent Termination of Reference. — Russell *v.* Lyth, 66 N. Y. App. Div. 290. See also Douglas *v.* Smith, 65 Hun (N. Y.) 11; Morrow *v.* McMahon, 71 N. Y. App. Div. 171.

4. Actual Delivery Necessary. — Phipps *v.* Carman, 84 N. Y. 650; Little *v.* Lynch, 99 N. Y. 112, *distinguishing* Geib *v.* Topping, 83 N. Y. 46; Bishop *v.* Bishop, (N. Y. Super. Ct. Spec. T.) 30 Abb. N. Cas (N. Y.) 296; Sounier *v.* Barnum, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 357.

5. Election to Terminate Necessary. — Nealis *v.* Meyer, (Supm Ct. App. T.) 21 Misc. (N. Y.) 344.

6. Right to Fees When Report Delivered. — Russell *v.* Lyth, 66 N. Y. App. Div. 290. See also Little *v.* Lynch, 99 N. Y. 112.

7. Payment by Prevailing Party. — Geib *v.* Topping, 83 N. Y. 46; Little *v.* Lynch, 99 N. Y. 112; Bishop *v.* Bishop, (N. Y. Super. Ct. Spec. T.) 30 Abb. N. Cas. (N. Y.) 296; Sounier *v.* Barnum, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 357.

8. Implied Promise to Pay. — Geib *v.* Topping, 83 N. Y. 46; Little *v.* Lynch, 99 N. Y. 112; Hinman *v.* Hapgood, 1 Den. (N. Y.) 188, 43 Am. Dec. 663; Bishop *v.* Bishop, (N. Y. Super. Ct. Spec. T.) 30 Abb. N. Cas. (N. Y.) 296; Nealis *v.* Meyer, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 344; Thompson *v.* Rich, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 265; Sounier *v.* Barnum, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 357; Russell *v.* Lyth, 66 N. Y. App. Div. 290. See also Sloan's Estate, 24 Pa. Co. Ct. 288, 9 Pa. Dist. 498.

Payment Not Enforceable by Contempt Process. — Perkins *v.* Taylor, (N. Y. Super. Ct. Spec. T.) 19 Abb. Pr. (N. Y.) 146.

Fees Paid from Funds in Court or in Hands of Receiver. — Hurd's Estate, (Surrogate Ct.) 31 Abb. N. Cas. (N. Y.) 109; Matter of Merry, 11 N. Y. App. Div. 597; Atty.-Gen. *v.* Continental L. Ins. Co., 93 N. Y. 45.

The Defendants Are Liable for the Balance when the plaintiffs have paid the amount of fees apportioned by the referee. Brooks *v.* Georgian Bay Saw-Log Salvage Co., 17 Ont. Pr. 34.

9. Recovery by Prevailing Party. — Clegg *v.* Aikens, (Supm. Ct.) 17 Abb. N. Cas. (N. Y.) 88.

10. Attorneys Not Liable. — Judson *v.* Gray, 11 N. Y. 408; Geib *v.* Topping, 83 N. Y. 46; Howell *v.* Kinney, (Supm. Ct. Spec. T.) 1 How. Pr. (N. Y.) 105.

11. Reference to Business. — In Pollard *v.* Phœnix Ins. Co., 63 Miss. 258, it was said: "The phrase 'in *reference* to the business' is

REFINE. — See note 1.

REFINEMENT. — A refinement, in stating a criminal charge, is understood to be the verbiage which is frequently found in indictments in setting forth what is not essential to the constitution of the offense, and therefore not required to be proved on the trial.[2]

REFINER. — See note 3.

REFINERY. — See note 4.

REFLECTION. — See note 5.

REFORMATION AND CANCELLATION. — See the title RESCISSION, CANCELLATION, AND REFORMATION, *post*.

REFORMATORY. (See also the title HOUSES OF REFUGE AND CORRECTION, vol. 15, p. 777.) — This word, used as a noun, includes all institutions and places in which efforts are made either to cultivate the intellect, instruct the conscience, or improve the conduct; places in which persons voluntarily assemble, receive instruction, and submit to discipline, or are detained for either of these purposes by force.[6]

REFRACTORY. — "Refractory" is thus defined: "Noting earths or metals that are infusible, or require an extraordinary degree of heat to fuse them."[7]

REFRESHMENT. — See note 8.

REFRIGERATOR CAR. — See note 9.

REFUND. — See note 10.

synonymous with having relation to, regarding, in respect to, concerning, pertaining to, it, and the contracts which the delinquent is incapacitated to claim the benefit of are those included in these terms."

1. Refined Coal. — See COAL, vol. 6, p. 170, note.

Refined Oil Distinguished from Lard Oil. — Weisenberger *v.* Harmony F. & M. Ins. Co., 56 Pa. St. 444.

2. Refinement. — State *v.* Gallimore, 2 Ired. L. (24 N. Car.) 377.

3. Refiner. — For the construction of the term ***refiner*** in the Constitution of *Louisiana*, see American Sugar Refining Co. *v.* Louisiana, 179 U. S. 95.

4. Oil Refinery — Mechanic's Lien. — In holding that an oil ***refinery*** was a proper subject of a mechanic's lien, the court said: "An oil ***refinery*** is not a single structure, in the same sense as a dwelling; it consists of a variety of structures, peculiar in form, large and small, each adapted to some particular use in the process of refining oil; but the whole of these several and various structures taken together is but a single establishment, and is known and used as an oil ***refinery***." Linden Steel Co. *v.* Imperial Refining Co., 138 Pa. St. 20.

5. Reflection. — In McLure *v.* Colclough, 17 Ala. 101, it was said: "***Reflection***, according to common usage, refers to past time, and although it may be properly used with reference to present time, we think we would not be justified in considering it so used in the present instance."

6. Reformatory. — Hughes *v.* Daly, 49 Conn. 34.

7. Refractory. — Jenkins *v.* Johnson, 9 Blatchf. (U. S.) 519.

8. Public Refreshment. — An *English* statute provided that "all houses, rooms, shops, or buildings kept open for * * * resort and entertainment" during certain hours of the night should be deemed ***refreshment*** houses and required to take out licenses. It was held that a shop kept open for the sale of ginger beer and lemonade, without a license, during the prohibited hours, was a shop kept open for public ***refreshment***. Howes *v.* Board of Inland Revenue, 1 Ex. D. 385.

Saloon. — In Rhone *v.* Loomis, 74 Minn. 204, the court conceded that the word ***refreshment*** might include intoxicating liquors, but it was held that in the particular case, by application of the doctrine of *ejusdem generis*, the term "place of ***refreshment***" did not include a saloon.

9. Refrigerator Car — Freight Car. — In Gulf, etc., R. Co. *v.* Lone Star Salt Co., (Tex. Civ. App. 1901) 63 S. W. Rep. 1027, it was said: "A ***refrigerator car*** is built for the purpose of carrying freight, and the only material difference between it and an ordinary freight car is that the former is provided with appliances for using ice, in order to preserve its contents, while the latter is not."

10. Refund always includes the idea of something having been received. Hayner *v.* Trott, 4 Kan. App. 684.

Refunded in Sense of Paid. — In Maynard *v.* Mechanics' Nat. Bank, 1 Brews. (Pa.) 484, it was said: "The question, therefore, is simply this: Was the change from a state to a national bank a paying off and ***refunding*** of the stock? It is very clear that the shares were never, in fact, paid off; for had this been done, Eliza Finley would have had the cash. I do not dwell on the word ***refunded***, which, in strictness meaning 'to pour back,' was evidently used by the testator as a synonym for 'paid,' which is also one of its definitions."

Sale of New Securities. — An act of Congress provided that "nothing in this act shall be construed to prohibit the ***refunding*** of any existing indebtedness of such territory." It was contended by counsel that nothing more was intended by this than that new bonds might be exchanged, dollar for dollar, for old bonds, without reference to the rate of interest reserved on either class of bonds. The court

REFUSAL — REFUSE. — To refuse is defined to mean "to deny, as a request, demand, or invitation; to decline to accept; reject; as, to refuse an offer."[1] Refusal is the act of refusing; denial of anything demanded, solicited, or offered for acceptance.[2]

REFUSE. — See note 3.

said: "We have not been able to discover any provision in the Act of July 30, 1886, which would warrant the inference that the right to *refund* existing debts which is therein recognized was intended to be confined to an actual exchange of new for old securities. It was, doubtless, well known to Congress that it often happens that an old indebtedness on the part of a municipality can only be retired by the sale of new securities, and that this is one of the most common methods by which an old indebtedness is *refunded* when the new securities are designed to bear a lower rate of interest." Lawrence County *v.* Jewell, (C. C. A.) 100 Fed. Rep. 908.

1. Refuse. — Bowen *v.* Young, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 550, *quoting* Cent. Dict. See also Burns *v.* Fox, 113 Ind. 205; Duffy *v.* Edson, 60 Neb. 812; Shaler *v.* Van Wormer, 33 Mo. 388.

2. Refusal. — Duffy *v.* Edson, 60 Neb. 825, *quoting* Webst. Dict.

Demand, Notice, Etc. — *Refusal* implies demand, knowledge, or notice. Hill *v.* Mutual L. Ins. Co., 113 Fed. Rep. 45; Mutual L. Ins. Co. *v.* Hill, 178 U. S. 347; Shaler *v.* Van Wormer, 33 Mo. 388.

In Daniels *v.* Ellison, 3 N. H. 287, it was said: "The word *refuse* much more emphatically imports notice than the word 'neglect.'"

In Burns *v.* Fox, 113 Ind. 206, the appellee alleged in her complaint that there was an oral agreement with her father whereby he bound himself to convey a certain tract of land to her, upon a valuable consideration; that she entered upon the land and made valuable improvements; "that her father failed, neglected, and *refused* to convey according to the agreement;" and, further, that after his death his heirs, the appellants, *refused* to make a conveyance to her. It was held that as the complaint alleged "that both the father, in his lifetime, and the appellants, who succeeded to the legal title of the land as heirs, *refused* to convey in compliance with the contract, a sufficient excuse was shown for not having made a further demand."

"Refuse" and "Fail" Equivalent. — See FAIL — FAILURE, vol. 12, p. 709, note.

Not to Comply. — In Beall *v.* Deale, 7 Gill & J. (Md.) 225, it was said: "According to Johnson and Webster, the word *refuse* may import not only the *refusal* of a thing demanded, but signifies also 'not to comply,' and according to the true construction of Jacob Franklin's will may well mean a non-compliance with the condition to convey thereby imposed."

Nonexecution. — A tenant conveyed his interest in leasehold premises to trustees for the benefit of his creditors by a deed containing a proviso that if all and every of the creditors should *refuse* to execute or consent to the deed within six months from the date thereof it should be void. It was held that the non-execution of the deed by a particular creditor was not evidence of a *refusal* by him to execute or assent, but that it was incumbent on a party seeking to avoid the deed to show a positive *refusal* to execute or assent to the deed. Holmes *v.* Love, 3 B. & C. 242, 10 E. C. L. 64.

Refusal to Take Official Oath. (See also the title PUBLIC OFFICERS, vol. 23, p. 354 *et seq.*) — In Duffy *v.* Edson, 60 Neb. 812, it was held, where a person elected to a judicial office failed to take the constitutional oath of office within the time contemplated by statute, because of a mistake on his part as to the proper official oath to be by him taken, but soon thereafter took and subscribed to the proper oath and filed it in the proper office, before the office had been declared vacant or any other right or title had intervened, that such failure did not of itself forfeit the office, and was not a *refusal* to take the constitutional oath within the meaning of the word as used in the constitution.

Refusal of Property. — A son agreed to give to his father the *refusal* of a piece of land, and afterwards, without further communication on the subject, executed a deed of the land to the father, had it recorded, and mailed it to him. The plaintiff levied an attachment on the land after the execution of the deed, and before its receipt by the father. The court, *per* Adams, C. J., said: "The most that can be said is that L. H. Nelson agreed to give his father the preference as a purchaser; that is, the right to purchase in preference to any one else if he should see fit; or, taking what was said in a more literal sense, the right to *refuse* the land. Without question, we think that it was James Nelson's right, when he received the deed, to *refuse* to accept it on the terms mentioned." Deere *v.* Nelson, 73 Iowa 188.

Refusal of Premises. — See the title LEASES, vol. 18, p. 686. See also Tracy *v.* Albany Exch. Co., 7 N. Y. 472, 57 Am. Dec. 538.

3. Refuse Coal. — In Lance *v.* Lehigh, etc., Coal Co., 163 Pa. St. 98, in construing a lease which provided that the lessor should have all the culm or *refuse* coal from the mines, the court said: "The words 'culm or *refuse* coal,' as used in the lease, meant *refuse* coal — that is to say, coal refused by the lessee because it was unsalable, and which of necessity, to make room for the operation of the works, was removed and thrown into a pile."

Refuse Salt. — See SALT, *post.*

Refuse of Trade, Manufacture, or Business. — In St. Martin's *v.* Gordon, (1891) 1 Q. B. 61, it was held that clinkers produced in the furnaces of boilers belonging to a hotel were not *refuse* of a "trade, manufacture, or business" within the meaning of the English Metropolis Management Act, 1855, § 128.

But in Gay *v.* Cadby, 2 C. P. D. 391, it was held that ashes arising from coal burnt in a furnace of a steam engine, used for the purpose of sawing and lifting timber and other

REGISTER. (See also the titles RECORDING ACTS, *ante*, p. 73; RECORDS, *ante*, p. 155.) — See note 1.

REGISTERED TONNAGE. — See note 2.

REGISTERED VOTERS. (See also the title ELECTIONS, vol. 10, p. 552, and see VOTER.) — See note 3.

REGISTER OF DEEDS. — See RECORDER OF DEEDS, *ante*, p. 72.

REGISTER OF SHIPS. — See the title SHIPS AND SHIPPING.

REGISTER OF WILLS. (See also the titles PROBATE AND LETTERS OF ADMINISTRATION, vol. 23, p. 109; RECORDING ACTS, *ante*, p. 73; WILLS.) — See note 4.

REGISTRATION. (See also the titles ELECTIONS, vol. 10, p. 552; RECORDING ACTS, *ante*, p. 73; RECORDS, *ante*, p. 155.) — Registration is the act of making a list, catalogue, schedule, or register.[5] As applied to elections it has been held to have no technical meaning and to indicate any list or schedule containing a list of voters, the being on which constitutes a prerequisite to voting, unless there is a system of registration described by statute.[6]

REGRATING. — See note 7.

REGULAR. (See also GENERAL, vol. 14, p. 948; IRREGULAR — IRREGULARITY, vol. 17, p. 481.) — The term "regular" is derived from *regula*, a rule, and means conformable to a rule; agreeable to an established rule, law, or principle, to a prescribed mode, or according to established customary forms.[8]

materials and carrying on the business of a pianoforte manufacturer, were *refuse* of a "trade, manufacture, or business" within the same act. See also Reg. *v.* Bridge, 24 Q. B. D. 609.

"Refuse" Synonymous with "Waste." — State *v.* Howard, 72 Me. 465.

Refuse Wood or Timber. — A statute forbade the throwing of *refuse* wood or timber of any sort into a certain river. It was held that this prohibited the throwing of shingle sawdust, long sawdust, and shingle or jointer shavings into the river. State *v.* Howard, 72 Me. 459.

1. Register — English Bills of Sale Act. — In Crew *v.* Cummings, 20 Q. B. D. 537, the term *register*, as used in the English Bills of Sale Act, 1878, was defined as follows: "It is a book which the registrar is to keep and in which he is to make an entry of certain particulars relating to each bill of sale in a prescribed form. The form in the schedule to the act does not contain a space for the addresses and occupations of the attesting witnesses."

2. Registered Tonnage. — See the titles MARINE INSURANCE, vol. 19, p. 1019; SHIPS AND SHIPPING. See also The Brunel, (1900) P. 24; The Petrel, (1893) P. 327.

3. Registered Voters. — In statutes relating to elections, the phrase *registered voters* uniformly refers to persons whose names are placed upon the registration books provided by law as the sole record or memorial of the duly qualified voters. Chalmers *v.* Funk, 76 Va. 719.

4. Register of Wills. — As to whether a *register of wills* is a judge, see Worknot *v.* Millen, 1 Harr. (Del.) 139.

5. Registration. — *In re* Appointment of Supervisors of Election, 1 Fed. Rep. 5.

Stock. (See also the titles STOCK; STOCKHOLDERS.) — A statute required for the validity of a transfer of stock of a corporation that the transfer should be registered or made upon the books of the company. In construing this provision the court said: "The word *registration*, in our judgment, is used here in the sense of entering in a book a statement or memorandum of facts to serve as memorials or evidence." Fisher *v.* Jones, 82 Ala. 122.

6. *In re* Supervisors of Election, 1 Fed. Rep. 5.

7. Regrating. — See FORESTALLING AND ENGROSSING, vol. 13, p. 1072, and see the titles MONOPOLIES AND CORPORATE TRUSTS, vol. 20, p. 844; RESTRAINT OF TRADE, *post*. See also Brown *v.* Jacob's Pharmacy Co., 15 Ga. 429.

8. Regular. — Myers *v.* Rasback, (Supm. Ct. Spec. T.) 4 How. Pr. (N. Y.) 83, *quoting* Webst. Dict.

Regular and Ordinary. — In Zulich *v.* Bowman, 42 Pa. St. 87, it was said: "Webster defines *regular* — conformed to a rule, methodical, periodical; and the adverb 'regularly' — in uniform order, at certain intervals or periods; as, day and night regularly returning. So also the word 'ordinary,' a synonym of *regular*, is defined methodical, *regular*, according to established order."

Regular Clerk. (See also the title PUBLIC OFFICERS, vol. 23, p. 314.) — In People *v.* Dalton, 34 N. Y. App. Div. 302, *affirmed* 159 N. Y. 235, an inspector of water supply to shipping in the department of public works in the city of New York was held not to be a *regular* clerk, within a statute providing that a *regular* clerk should not be removed without a hearing.

So in People *v.* Dalton, 31 N. Y. App. Div. 630, 54 N. Y. Supp. 1112, it was held that a foreman of repairs was not a *regular* clerk.

In People *v.* Fire Com'rs, 73 N. Y. 437, it was held that the term *regular* clerk was used in the popular sense — that is, as applicable to persons employed in one of the departments to keep the records or accounts — and that it did not apply to subordinate ministerial officers, although in the performance of their duties, or as an incident thereto, they rendered some service which might have been per-

REGULAR COURSE OF BUSINESS. — See the titles BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 65; FRAUD AND DECEIT, vol. 14, p. 12.

REGULAR DEPOT OR STATION. (See also the title STATIONS (RAILROAD.) — The term "regular depot or station" contemplates a fixed and established place on the line of the railroad, equipped with suitable buildings and furnished with the necessary offices and servants for the regular transaction of business, for the receipt and delivery of freight, and the comfort and convenience of passengers.[1]

formed by a clerk. See also People *v.* Fire Com'rs, 86 N. Y. 149; People *v.* Cram, (N. Y. Super. Ct. Gen. T.) 15 Misc. (N. Y.) 12; People *v.* Health Dep't, 24 N. Y. Wkly. Dig. 197.

Regular Minister. — An English statute disqualified *regular* ministers of dissenting congregations from holding office. In construing this statute Mellor, J., said: "It appears to me that the legislature had an object in view in using the word *regular*, and that the disqualification was not intended to apply to a person occasionally preaching, but to a person who is appointed to be the minister of a particular congregation, and not merely asked temporarily to hold the office." Reg. *v.* Oldham, L. R. 4 Q. B. 292.

Regular Physician. (See also the title PHYSICIANS AND SURGEONS, vol. 22, p. 778.) — In an action for fraud in the sale of the defendant's business as a physician, the declaration alleged that the practice was *regular* and legitimate. It was held that the testimony of a *regular* practitioner of the allopathic school and a member of the county medical society that the *regular* physicians of the town refused to associate with the defendant because his practice was irregular and eclectic was admissible to prove that the defendant was not associated with the witness as one of the *regular* physicians of the town, and that his practice was irregular and illegitimate. Bradbury *v.* Bardin, 35 Conn. 577.

In Mays *v.* Hogan, 4 Tex. 26, where a physician sued for professional services and the defendant requested the judge to charge the jury that the plaintiff was not entitled to recover unless he proved to its satisfaction that he was a *regular* physician, but the court used, instead of the word *regular*, the words "skillful and efficient," it was held that there was no error.

Regular Place of Business — Railroads. — An act of Congress provided that the United States courts should have jurisdiction in cases of infringement of patents in any district where the defendant had a *regular* and established place of business. It was held that a railroad company which had an office in a certain district and maintained an agent in that district who solicited business, but had no authority to make contracts for freight or carriage of passengers, did not maintain a *regular* and established place of business in that district. Weller *v.* Pennsylvania R. Co., 113 Fed. Rep. 505.

Regular Proceeding. — In Myers *v.* Rasback, (Supm. Ct. Spec. T.) 4 How. Pr. (N. Y.) 83, upon the question whether a proceeding in partition was a "*regular* judicial proceeding," as these words were used in the definition of a "civil action" in Code Pro. N. Y., §§ 2, 4, 6, Gridley, J., said: "The word *regular* seems to have been used by the legislature as opposed to special, and to have been designed to distinguish 'actions' from 'special proceedings.' The action for partition, therefore, prosecuted under the code in lieu of the old suit in equity, is a *regular* proceeding, inasmuch as it is prosecuted by and against *regular* parties, and according to the same forms of proceeding and rules of practice with other actions under the code."

Regular Passenger Train. (See also the title CARRIERS OF PASSENGERS, vol. 5, p. 566.) — In Illinois Cent. R. Co. *v.* People, 143 Ill. 434, a train denominated a fast mail train and used primarily for the carrying of mails, but which had passenger coaches attached, was held to be a *regular* passenger train within a statute regulating the stoppage at stations of such trains. See also Ohio, etc., R. Co. *v.* People, 29 Ill. App. 561; Phillips *v.* Chicago, etc., R. Co., 64 Wis. 475, 23 Am. & Eng. R. Cas. 456.

Regular Sessions. (See also ADJOURN — ADJOURNMENT, vol. 1, p. 639, and the title COURTS, vol. 8, p. 34. And see the title ADJOURNMENTS, 1 ENCYC. OF PL. AND PR. 238.) — Within the meaning of a statute prescribing that certain petitions should be presented at a "*regular* session" of the county commissioners, it was held, in Bethel *v.* Oxford County, 60 Me. 535, that a session held by adjournment from a *regular* session was a "*regular* session," as a session of the Commissioners' Court includes all its adjournments, which are but parts of its session. See also Waterville *v.* Kennebec County, 59 Me. 80; Harpswell *v.* Cumberland County, 78 Me 100.

But in Com. *v.* Gibbons, 196 Pa. St. 97, it was held that a meeting of school directors called by the president, following a previous meeting adjourned "to meet at the call of the president," was not a *regular* meeting, because it was not held in accordance with any standing regulations of the board, nor by adjournment "to a time and place certain."

Regular Term of Court. — Rev. Codes N. Dak. (1895), § 7755, provides that "issues of fact in all criminal actions and proceedings must be tried at a *regular* term of the court." It was held that the words "at a *regular* term of the court" meant a term at which jurors are regularly drawn and summoned, whether such terms are *regular* or special in respect to the manner of calling them. State *v.* Boucher, 8 N. Dak. 277.

1. Regular Depot or Station. — Land *v.* Wilmington, etc., R. Co., 104 N. Car. 48, 40 Am. & Eng. R. Cas. 18. See also Kellogg *v.* Suffolk, etc., R. Co., 100 N. Car. 158; State *v.* New Haven, etc., R. Co., 41 Conn. 134.

A place not on a public road, where a railroad company was in the habit of stopping its trains for the sole purpose of taking on or

REGULAR ELECTION. — See note 1.

REGULAR INDORSEMENT. — See the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 65.

REGULAR INTERVALS. — See note 2.

REGULARLY. (See also REGULAR, *ante*, p. 241.) — Regularly, in common English, means constituted, appointed, or conducted in the proper manner; conformable to law or custom; duly authorized.[3]

REGULATE — REGULATING — REGULATION. (See also the titles INTERSTATE COMMERCE, vol. 17, p. 34; MARKETS, vol. 19, p. 1139; POLICE POWER, vol. 22, p. 914. And see CONTROL, vol. 7, p. 457; DULY, vol. 10, p. 315.) — To regulate means to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws.[4] The term is one of broad import.[5] A power to "regulate" does not properly include

putting off passengers who had notified those in charge of trains to do so, was held not to be a "*regular depot* or stopping-place," within Code Ala. (1876), § 1699 (Civ. Code Ala. 1896, § 3440), requiring that a bell or whistle be sounded within a quarter of a mile thereof. Cook *v.* Central R., etc., Co., 67 Ala. 533.

Local Usage. — In Chicago, etc., R. Co. *v.* Flagg, 43 Ill. 364, it was held that *regular station* meant the usual stopping-place for the discharge of passengers; and a local usage adopted by persons of getting on or off a train, for their own convenience, at a place other than the *regular station* does not make such place a *regular station* for the discharge of passengers.

1. Regular Election Held to Be Synonymous with General Election. — See GENERAL, vol. 14, pp. 948, 949, notes.

But in Matthews *v.* Shawnee County, 34 Kan. 611, it was said: "The words *regular election* do not necessarily mean general election, or township election, or any state, county, city, or district election. They simply mean the *regular election* prescribed by law for the election of the particular officer to be elected." See also People *v.* Budd, 114 Cal. 168; State *v.* Philips, 30 Fla. 579; State *v.* Cobb, 2 Kan. 32; Smith *v.* Holt, 24 Kan. 773; People *v.* Wilson, 72 N. Car. 155.

2. Regular Intervals. — See Hanifen *v.* Armitage, 117 Fed. Rep. 850. This was a patent case.

3. Regularly. — Matter of McCusker, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 450. See also Myers *v.* Rasback, (Supm. Ct. Spec. T.) 4 How. Pr. (N. Y.) 83.

Regularly, in a statute requiring evidence that a debt has been "*regularly* given in for taxes," means given in according to rule; conformably to the law applicable to taxation of rights in action; not necessarily given in each such successive year. Macon, etc., R. Co. *v.* Little, 45 Ga. 383.

Continuously — Regularly. — In *Ex p.* Cain, 39 Ala. 442, it was said: "The word *regularly* means according to rule; in uniform order; methodically. It is not the synonym of 'continuously.'"

Regularly Employed in the Coasting Trade. (See also the title PILOTS, vol. 22, p. 813.) — The words "*regularly* employed" in Stat. Mass. (1873), c. 284, § 1 (Rev. Laws Mass. 1902, c. 67, § 28), exempting a vessel "*regularly* employed in the coasting trade" from compulsory pilotage, include the case of a vessel actually and legally so employed at the time when the services of a pilot are tendered, even though the vessel is sailing under a register, and is not continuously so employed. Wilson *v.* Gray, 127 Mass. 98.

Regularly Laid Out Public Highway. (See generally the titles CROSSINGS, vol. 8, p. 363; HIGHWAYS, vol. 15, p. 343.) — A statute provided that it should be the duty of railroad companies to construct and keep in repair at each crossing of any *regularly* laid out public highway a good and substantial crossing. It was held that this section did not embrace a way generally traveled by the public for more than fifteen years as a road if it had not been *regularly* laid out under the provisions of the statute or set apart by dedication upon the public records as a highway or street. Missouri, etc., R. Co. *v.* Long, 27 Kan. 684, 6 Am. & Eng. R. Cas. 254.

4. Regulate. — Webst. Dict.; Otto Gas Engine Works *v.* Hare, 64 Kan. 78; State *v.* Ream, 16 Neb. 683; State *v.* McCann, 4 Lea (Tenn.) 13. See also Conlin *v.* San Francisco, 114 Cal. 404; Fisher *v.* Brower, (Ind. 1902) 64 N. E. Rep. 618.

To *regulate* means to direct; to rule; to govern; to conduct. Chicago Packing, etc., Co. *v.* Chicago, 88 Ill. 221; Perry *v.* Salt Lake City, 7 Utah 148.

Restriction and Restraint. — "The Century Dictionary defines the verb *regulate* to mean to 'govern by or subject to certain rules or restrictions;' and it was said in a case where the right to control the business of slaughtering animals was involved, that 'to *regulate* implies a power of restriction and restraint.'" Rochester *v.* West, 29 N. Y. App. Div. 130. See also Duckwall *v.* New Albany, 25 Ind. 284.

5. Baltimore *v.* Baltimore Trust, etc., Co., 166 U. S. 684; St. Louis *v.* Western Union Tel. Co., 149 U. S. 469; State *v.* Murphy, 134 Mo. 548.

Control. — In State *v.* Ream, 16 Neb. 683, it was held that an authority to *regulate* included the power to control. See also CONTROL, vol. 7, p. 457, note; and see *infra*, this note, *Commerce*.

Regulate in Sense of Adjust. — In Higgins *v.* Mitchell County, 6 Kan. App. 314, it was said that the word *regulate* in the title of an act to *regulate* the salaries of public officers meant "to adjust by rule, method, or established mode; to direct by rule or restriction; to sub-

a power to "suppress" or "prohibit," for the very essence of regulation is the

ject to governing principles or laws." See also State *v.* Newbold, 56 Kan. 71.

Same — Regulate Compensation of Officers. — The Constitution of *California* declares that the legislature, by general and uniform laws, shall ***regulate*** the compensation of all public officers. In Dougherty *v.* Austin, 94 Cal. 604, it was held that the word ***regulate*** was used in the sense of to fix or adjust.

Where the purpose of a statute was to ***regulate*** and equalize the salaries of certain public officers, it was held that this meant to adjust by rule the salaries of certain public officers so as to equalize them. State *v.* McCann, 4 Lea (Tenn.) 13.

Same — Irrigation. (See generally the title IRRIGATION, vol. 17, p. 485.) — A *Colorado* statute was entitled "an act to ***regulate*** the use of water for irrigation," etc. It was held that the words "***regulate*** the use of water" were not confined to the forbidding of injustice in the distribution, the prevention of waste, or the apportionment in times of scarcity, but were broad enough to include the fixing of reasonable rates; and that the statute, in providing for this latter object, did not infringe the constitutional rule that the objects of a statute shall be expressed in its title. Golden Canal Co. *v.* Bright, 8 Colo. 149.

Discretion. — A power to ***regulate*** imports a right to use discretion. People *v.* Board of Excise, (Brooklyn City Ct. Gen. T.) 16 N. Y. Supp. 798, *affirmed* 133 N. Y. 683.

Same — Intoxicating Liquors. (See also the title INTOXICATING LIQUORS, vol. 17, pp. 227, 254.) — In Perry *v.* Salt Lake City, 7 Utah 143, it was held that under the charter of a city which granted to it the power to license, ***regulate***, and tax the manufacturing, selling, giving away, or in any manner disposing of intoxicating liquors, the city council had a reasonable discretion as to the person to whom the license might be granted and as to the place of business, notwithstanding the fact that the person seeking the license showed a compliance in all respects with the express requirements of the ordinances in making his application.

Billboards. — A city ordinance provided that no person should carry on the business of bill posting within the city without having procured a license and that no person should erect any billboard more than six feet in height in the city without the permission of the common council. It was held that this was authorized under authority conferred by charter to license and ***regulate*** bill posting, bill distributing, and sign advertising. Rochester *v.* West, 29 N. Y. App. Div. 125.

Burial of Dead. — See the title CEMETERIES, vol. 5, p. 792.

Collection of Costs. — In Grinage *v.* Times-Democrat Pub. Co., 107 La. 124, it was held that the phrase "***regulate*** the collection" of costs due to clerks of courts and other officials, found in the title of an act, was a term broad enough to cover the requirement of security for costs which the statute authorized the defendant to exact from the plaintiff. See generally the title STATUTES.

Commerce. (See also COMMERCE, vol. 6, p. 217, and see the titles CONSTITUTIONAL LAW, vol. 6, p. 882; INTERSTATE COMMERCE, vol. 17, p. 34; NAVIGABLE WATERS, vol. 21, p. 424; REVENUE LAWS, *post;* SEAMEN; SHIPS AND SHIPPING; TAXATION.) — In Gibbons *v.* Ogden, 9 Wheat. (U. S.) 196, Chief Justice Marshall said, as to the power to ***regulate*** commerce: "It is the power to ***regulate;*** that is, to prescribe the rule by which commerce is to be governed."

In Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 203, it was said that the power to ***regulate*** commerce "is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions." See also Sang Lung *v.* Jackson, 85 Fed. Rep. 505; Scranton *v.* Wheeler, 16 U. S. App. 192; Gilman *v.* Philadelphia, 3 Wall. (U. S.) 724; State *v.* Foreman, 8 Yerg. (Tenn.) 316.

This definition was *disapproved* in Young *v.* Fountain Inn Graded School, 64 S. Car. 137. the court saying: "We cannot adopt this view. It is true, ***regulate*** is one of the meanings of the word 'control.' In its primary sense the word 'control' imports a check by a countercheck or register or duplicate account. Gradually an enlarged meaning has been given to the word, so that it now means 'to exercise a restraining influence over;' 'to check;' 'to counteract;' 'to restrain;' 'to ***regulate.***'" See also *supra*, this note, *Control.*

Conditional Sales. — In Otto Gas-engine Works *v.* Hare, 64 Kan. 78, it was held that an authority to ***regulate*** conditional sales included the power to make and preserve a record of them for the protection of innocent parties dealing with those in possession of the property where no title thereto was reserved to the vendor.

County Business. — In Youngs *v.* Hall, 9 Nev. 212, it was held that a statute prescribing the manner in which the payment of the indebtedness of a county should be conducted was a law ***regulating*** county business. See also Vesey *v.* Benton, 13 Nev. 284.

Election. — The term ***regulating***, when applied to an election, has been said to mean "the establishment of fixed rules and methods of proceeding for the government of the election." Matter of Long Island R. Co., 19 Wend. (N. Y.) 39.

Erection of Building. — In Rochester *v.* West, 29 N. Y. App. Div. 130, it was held that the term ***regulate*** related not only to the manner of conducting a specified business, but also to the erection of the building in which it was conducted.

Erection of Harbor. — A city charter conferred upon the city power to erect, repair, and ***regulate*** public wharves and docks and to fix the rates of wharfage thereof. It was held that this provision did not confer upon the city any power to incur expenses for the purpose of erecting a harbor or improving one by obtaining an increased supply of water. Spengler *v.* Trowbridge, 62 Miss. 46.

Physicians and Surgeons. (See also the title PHYSICIANS AND SURGEONS, vol. 22, p. 780.) — In construing an act entitled "an act to ***regulate*** the practice of medicine in the state of

existence of something to be regulated.[1] But the power to "regulate" a business, trade, etc., authorizes a municipality to confine the exercise of such business to certain localities, to certain hours of the day, etc.[2]

Regulation means any rule for the ordering of affairs, public or private.[3]

Illinois," the court said: "'To *regulate*' necessarily means to establish certain rules and restrictions by which the practice of medicine is to be governed in this state. To *regulate* is to adjust by rule, to subject to governing principles, or to restrict within certain rules and limitations." People *v.* Blue Mountain Joe, 129 Ill. 377.

Packing Houses. — A statute gave to municipalities the power to direct the location and *regulate* the management and construction of packing houses, etc., within their limits and to the distance of one mile beyond. It was held that this conferred the power to license such establishments as one means of *regulating* them. Chicago Packing, etc., Co. *v.* Chicago 88 Ill. 221.

Railroads. (See also the title RAILROADS, vol. 23, p. 667.) — In Ames *v.* Union Pac. R. Co., 64 Fed. Rep. 178, it was said: "The power of *regulating* railroads is often said to be a legislative power vested in the lawmaking body, to be exercised for the general welfare. Within the term *regulation* are embraced two ideas. One is the mere control of the operation of the roads, prescribing the rules for the management thereof — matters which affect the convenience of the public in their use. *Regulation*, in this sense, may be considered as purely public in its character, and in no manner trespassing upon the rights of the owners of railroads. But within the scope of the word *regulation*, as commonly used, is embraced the idea of fixing the compensation which the owners of railroad property shall receive for the use thereof; and when *regulation*, in this sense, is attempted, it necessarily affects the property interests of the railroad owners."

Same — Running of Cars. — In Buffalo, etc., R. Co. *v.* Buffalo, 5 Hill (N. Y.) 211, it was said: "A large discretion is therefore conferred upon the common council. They are to *regulate* the running of the cars; that is, according to the ordinary acceptation of the term, to prescribe rules or laws by which the 'running' of cars within the city is to be governed; and the power may, without any strained construction, well apply to the means or force by which the cars are propelled. A right to *regulate* the 'running' seems *ex vi termini* to imply an authority to *regulate* the power by which they are driven."

Streets. (See also the title STREETS AND SIDEWALKS.) — A power to *regulate* streets confers a large power upon a city. Baltimore *v.* Baltimore Trust, etc., Co., 166 U. S. 684.

In St. Louis *v.* Western Union Tel. Co., 149 U. S. 465, it was held that under a power to *regulate* its streets, a city was authorized to impose upon a telegraph company putting its poles in the streets a charge in the nature of rental for the parts so used. See also the title TELEGRAPHS AND TELEPHONES.

Where, by charter, the right to *regulate* its streets was granted to a city, it was held that it had authority to grant to a company the right to occupy the streets by subways with the necessary machinery and wires to conduct electricity, although no control over the company was reserved to the city. State *v.* St. Louis, 145 Mo. 551.

1. Prohibit. (See also the titles INTOXICATING LIQUORS, vol. 17, p. 286; OCCUPATION, BUSINESS, AND PRIVILEGE TAXES, vol. 21, p. 770; and see RESTRAIN — RESTRAINT, *post.*) — *England.* — Ward *v.* Folkestone Waterworks Co., 24 Q. B. D. 334.

Alabama. — *Ex p.* Byrd, 84 Ala. 17.

Iowa. — Cantril *v.* Sainer, 59 Iowa 26.

Kansas. — Emporia *v.* Shaw, 6 Kan. App. 808; Emporia *v.* Volmer, 12 Kan. 630; Stebbins *v.* Mayer, 38 Kan. 575.

Massachusetts. — Austin *v.* Murray, 16 Pick. (Mass.) 121.

Michigan. — People *v.* Gadway, 61 Mich. 285; Matter of Hauck, 70 Mich. 396.

Ohio. — Thomas *v.* Mt. Vernon, 9 Ohio 290; Piqua *v.* Zimmerlin, 35 Ohio St. 507; Bronson *v.* Oberlin, 41 Ohio St. 478, 52 Am. Rep. 90.

Texas. — Austin *v.* Austin City Cemetery Assoc., 87 Tex. 330.

The term implies the continued existence of the subject-matter to be *regulated*. State *v.* Clarke, 54 Mo. 34.

In Andrews *v.* State, 3 Heisk. (Tenn.) 195, Nelson, J., *dissenting*, said: "To *regulate* does not mean to destroy, but 'to adjust by rule,' 'to put in good order.'"

A charter authorized the board of aldermen of a city to pass an ordinance to "*regulate* and control the driving of cattle through the streets." It was held that "to *regulate* and control the driving of cattle, etc., cannot mean to prevent such driving altogether, but to establish rules and limits according to and within which it may be done." McConvill *v.* Jersey City, 39 N. J. L. 44.

Disorderly Houses. — See the titles DISORDERLY HOUSES, vol. 9, p. 512; NUISANCES, vol. 21, p. 739.

Ferries. — See the title FERRIES, vol. 12, p. 1113.

Repeal of Charter. — The Constitution of *New Jersey* prohibits the passage of any private, local, or special law *regulating* the internal affairs of towns and counties. It was held that "the repeal of a charter does not *regulate* the internal affairs of a city; it extinguishes it, leaving no internal affairs to be *regulated*." Tiger *v.* Court C. Pl., 42 N. J. L. 633. See also Gloucester Land Co. *v.* Gloucester City, 43 N. J. L. 544.

As to the distinction between "*regulating* internal affairs of towns and counties" and "relating to towns and counties," see Pell *v.* Newark, 40 N. J. L. 75.

2. *Ex p.* Byrd, 84 Ala. 17; Shea *v.* Muncie, 148 Ind. 23; *In re* Wilson, 32 Minn. 145; State *v.* Beattie, 16 Mo. App. 131; Cronin *v.* People, 82 N. Y. 318, 37 Am. Rep. 564. See also the titles INTOXICATING LIQUORS, vol. 17, p. 280 *et seq.*; STATUTES.

3. Regulation. — Kepner *v.* Com., 40 Pa. St. 129.

Regulations. — The phrase "a *regulation* of

REHEARING. — See the title REHEARING, 18 ENCYC. OF PL. AND PR. 1.

REIMBURSE. — To "reimburse" is to "pay back." [1]

REIMBURSEMENT. — Reimbursement means the return of money or putting back money taken from the purse of another who has disbursed it.[2]

REINSTATE. (See also the titles FIRE INSURANCE, vol. 13, p. 378; PUBLIC OFFICERS, vol. 22, p. 453.) — To reinstate is to restore to a state from which one has been removed.[3]

REINSTATEMENT. — See the title REINSURANCE, *post.*

an executive department," in an act of Congress, should be understood as meaning general rules relating to the subject upon which a department acts, made by the head of a department under some act of Congress conferring power to make such *regulations*, and thereby giving to them the force of law. It does not include a mere order of the President or of a secretary. Harvey's Case, 3 Ct. Cl. 42.

Where the Constitution of *Montana* conferred appellate jurisdiction on the Supreme Court under "such limitations and *regulations* as may be prescribed by law," the court said that the word *regulations* referred "to the establishment of the procedure by means of which the power may be set in motion, and in obedience to which it may be exercised." Finlen *v.* Heinze, 26 Mont. 544, 69 Pac. Rep. 832.

In Bullion, etc., Min. Co. *v.* Eureka Hill Min. Co., 5 Utah 185, it was held that an appeal from the Supreme Court of Utah Territory to the Supreme Court of the United States must be taken in the same manner and under the same *regulations* as from the Circuit Court of the United States. The court said: "By the term *regulations* is meant the rules by which the action of the Circuit Courts of the United States is limited and controlled in granting appeals, and the action of this court is limited and controlled by the rules which govern those courts."

Regulations, By-laws, Ordinances, and Resolutions. — See Kepner *v.* Com., 40 Pa. St. 129.

Conditions in Sense of Regulations. — See Pittsburgh's Appeal, 115 Pa. St. 23.

1. Reimburse. — Philadelphia Trust, etc., Co. *v.* Audenreid, 83 Pa. St. 264, in which case it was held that this, the primary meaning of the word, is to be imputed to it when the meaning is not controlled by contract stipulations.

The primary meaning of the word *reimburse* is to pay back; to make return or restoration of an equivalent for something paid, expended, or lost; to indemnify; to make whole. Woerz *v.* Schumacher, 161 N. Y. 536; Water-Power Co. *v.* Brown, 23 Kan. 691.

Interest. — The term *reimburse* has been held to include interest on an advancement. Woerz *v.* Schumacher, 161 N. Y. 536.

Suretyship. (See also the title SURETYSHIP.) — In Water-Power Co. *v.* Brown, 23 Kan. 677, it was held that a deposit of bonds made, as expressed, to *reimburse* a surety did not necessarily imply that the surety looked solely to the bonds for indemnity and release the principal from the implied obligation to protect him against loss by reason of the suretyship.

2. Reimbursement. — Forstall *v.* Consolidated Assoc., 34 La. Ann. 770; Hope *v.* Board of Liquidation, 43 La. Ann. 761. See also Fuller *v.* Atwood, 13 R. I. 316.

3. Reinstate. — South *v.* Sinking Fund Com'rs, 86 Ky. 190, *quoting* Webst. Dict.

Reinstate or Replace — Insurance Policy. — When a fire-insurance policy gives to the insurers an option to "*reinstate* or replace" the insured property instead of making payment for damage, the word *reinstate* applies to property which is damaged, and the word "replace" to that which is destroyed, and "when one is dealing with property in the nature of chattels, the term *reinstate* means to replace (qy., restore) the chattels not *in situ*, but *in statu;* and all that the insurers are bound to do is to make the chattels as good as they were before the fire." Anderson *v.* Commercial Union Assur. Co., 55 L. J. Q. B. 149, in which case it was held that the insurer's option, as regarded machinery, would not be affected by the mere fact that the building in which it was had been destroyed, or that the term of the assured had been determined.

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By Hiram Thomas.

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CROSS-REFERENCES.

For matters of PROCEDURE, *see in the* ENCYCLOPÆDIA OF PLEADING AND PRACTICE, *the title* INSURANCE, vol. 11, p. 375, *and cross-reference there given.*

For other matters of SUBSTANTIVE LAW *and* EVIDENCE *related to this subject, see the following titles in this work:* INDEMNITY CONTRACTS, vol. 16, p. 167; INSURANCE, vol. 16, p. 830, *and cross-references there given.*

I. Definition. — Reinsurance "is insurance by the first insurer of the whole or some part of his interest in the risk created by his contract of insurance; or as it is otherwise defined, it is the contract that one insurer makes with another to protect the first from a risk he has already assumed." [1]

II. Nature of Reinsurance — 1. A Contract of Indemnity. — Although, in a certain sense, reinsurance may be an insurance upon property, it is really a contract of indemnity against the risk incurred in the original insurance.[2] It

1. Reinsurance Defined. — Iowa L. Ins. Co. *v.* Eastern Mut. L. Ins. Co., 64 N. J. L. 348, *citing* Port. on Ins. 259, May on Ins., § 9.

Other Definitions. — See Joyce *v.* Realm Marine Ins. Co., L. R. 7 Q. B. 586; Commercial Mut. Ins. Co. *v.* Detroit F. & M. Ins. Co., 38 Ohio St. 15, 43 Am. Rep. 413; Fire Ins. Assoc. *v.* Canada F. & M. Ins. Co., 2 Ont. 496; Fame Ins. Co.'s Appeal, 83 Pa. St. 407; Goodrich's Appeal, 109 Pa. St. 529.

As Defined by the Civil Code of California, "a contract of reinsurance is one by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance." (Civ. Code Cal., § 2646.) Union Ins. Co. *v.* American F. Ins. Co., 107 Cal. 330, 48 Am. St. Rep. 140; Whitney *v.* American Ins. Co., 127 Cal. 470.

Contract Construed. — An agreement between the A. company and the B. company that the A. company shall take a risk and issue a policy of insurance upon certain property, in lieu of a policy which the B. company has ordered to be canceled, does not constitute a contract of reinsurance by the B. company against its risk so as to give it a right of action in its own name for a loss occurring before the cancellation of the first policy and the delivery of the latter. Merchants' Ins. Co. *v.* Union Ins. Co., 162 Ill. 173, *reversing* 58 Ill. App. 611. See also Excelsior F. Ins. Co. *v.* Royal Ins. Co., 55 N. Y. 343, 14 Am. Rep. 271, *affirming* 7 Lans. (N. Y.) 138.

2. Reinsurance a Contract of Indemnity — *England.* — Joyce *v.* Realm Marine Ins. Co., L. R. 7 Q. B. 583.

United States. — Cashau *v.* Northwestern Nat. Ins. Co., 5 Biss. (U. S.) 478.

Massachusetts. — Manufacturers' F. & M. Ins. Co. *v.* Western Assur. Co., 145 Mass. 419;

is not a wager.[1]

2. Valid at Common Law. — A contract of reinsurance is a valid contract at common law;[2] and this appears to be true irrespective of the nature of the risk — whether the original policy is of fire or marine insurance.[3]

Reinsurance Not Against Public Policy. — There appears to be no principle of public policy forbidding an underwriter to seek indemnity by way of reinsurance.[4]

Liable to Legislative Restrictions. — But if contracts of reinsurance are perverted to improper purposes, as appears to have been the case at one time in *England*, then it is clearly within the province of the legislature to interfere and prescribe the cases in which reinsurance shall not be permitted.[5]

3. Creates No Privity Between Reinsurer and Party Originally Insured. — The ordinary contract of reinsurance operates solely between the insurer and the reinsurer, and creates no privity whatever between the reinsurer and the person originally insured; the contract of insurance and that of reinsurance remain totally distinct and unconnected, and the reinsurer is in no respect liable, either as surety or otherwise, to the person originally insured.[6] In *New Hampshire*, however, where the reinsured company becomes insolvent, a different rule is applied.[7]

And a Direct Liability May Be Incurred by the Reinsurer to the original insured if the intention to create it sufficiently appears from the contract of reinsurance.[8]

4. Reinsurance and Double Insurance Distinguished. — Reinsurance is to be distinguished from double insurance by the circumstance that the former is an insurance of a risk under an original policy, while the latter is a second insurance of the identical interest or subject-matter covered by the first insurance.[9]

Faneuil Hall Ins. Co. *v.* Liverpool, etc., Ins. Co., 153 Mass. 63.

Minnesota. — Barnes *v.* Hekla F. Ins. Co., 56 Minn. 38, 45 Am. St. Rep. 438.

New York. — Hone *v.* Mutual Safety Ins. Co., 1 Sandf. (N. Y.) 137, *affirmed* 2 N. Y. 235; New York Bowery F. Ins. Co. *v.* New York F. Ins. Co., 17 Wend. (N. Y.) 362; Yonkers, etc., F. Ins. Co. *v.* Hoffman F. Ins. Co., 6 Robt. (N. Y.) 316.

Pennsylvania. — Commonwealth Ins. Co. *v.* Globe Mut. Ins. Co., 35 Pa. St. 479.

Tennessee. — Royal Ins. Co. *v.* Vanderbilt Ins. Co., 102 Tenn. 267.

Under the California Civil Code "a reinsurance is presumed to be a contract of indemnity against liability, and not merely against damage." Civ. Code Cal., § 2648; Union Ins. Co. *v.* American F. Ins. Co., 107 Cal. 330, 48 Am. St. Rep. 140.

1. Not a Wager. — New York Bowery F. Ins. Co. *v.* New York F. Ins. Co., 17 Wend. (N. Y.) 362; Yonkers, etc., F. Ins. Co. *v.* Hoffman F. Ins. Co., 6 Robt. (N. Y.) 316.

2. Reinsurance Valid at Common Law. — Davenport F. Ins. Co. *v.* Moore, 50 Iowa 619; Merry *v.* Prince, 2 Mass. 176; New York Bowery F. Ins. Co. *v.* New York F. Ins. Co., 17 Wend. (N. Y.) 362; Herckenrath *v.* American Mut. Ins. Co., 3 Barb. Ch. (N. Y.) 68; Hone *v.* Mutual Safety Ins. Co., 1 Sandf. (N. Y.) 137, *affirming* 2 N. Y. 235; Commercial Mut. Ins. Co. *v.* Detroit F. & M. Ins. Co., 38 Ohio St. 16, 43 Am. Rep. 413. See also Phœnix Ins. Co. *v.* Erie, etc., Transp. Co., 117 U. S. 323.

3. Nature of Original Risk Immaterial. — New York Bowery F. Ins. Co. *v.* New York F. Ins. Co., 17 Wend. (N. Y.) 362; Hone *v.* Mutual Safety Ins. Co., 1 Sandf. (N. Y.) 137, *affirmed* 2 N. Y. 235.

4. Reinsurance Not Violative of Public Policy. — Merry *v.* Prince, 2 Mass. 176; New York Bowery F. Ins. Co. *v.* New York F. Ins. Co., 17 Wend. (N. Y.) 362; Commercial Mut. Ins. Co. *v.* Detroit F. & M. Ins. Co., 38 Ohio St. 16, 43 Am. Rep. 413.

5. Reinsurance May Be Restricted by Statute. — New York Bowery F. Ins. Co. *v.* New York F. Ins. Co., 17 Wend. (N. Y.) 362. And see *infra*, this title, *Statutes Prohibiting, Restricting, or Regulating Reinsurance.*

6. Reinsurance Creates No Privity Between Reinsurer and Party Originally Insured — *Maryland.* — Consolidated Real Estate, etc., Ins. Co. *v.* Cashow, 41 Md. 74.

Minnesota. — Barnes *v.* Hekla F. Ins. Co., 56 Minn. 38, 45 Am. St. Rep. 438.

Missouri. — Strong *v.* Phœnix Ins. Co., 62 Mo. 289, 21 Am. Rep. 417; Gantt *v.* American Cent. Ins. Co., 68 Mo. 533; Price *v.* St. Louis Mut. L. Ins. Co., 3 Mo. App. 262.

New Jersey. — Iowa L. Ins. Co. *v.* Eastern Mut. L. Ins. Co., 64 N. J. L. 351.

New York. — Hastie *v.* De Peyster, 3 Cai. (N. Y.) 195; Carrington *v.* Commercial F. & M. Ins. Co., 1 Bosw. (N. Y.) 152; Yonkers, etc., F. Ins. Co. *v.* Hoffman F. Ins. Co., 6 Robt. (N. Y.) 316; Wise *v.* Morgan, 13 Daly (N. Y.) 402, *affirmed* 103 N. Y. 682; Jackson *v.* St. Paul F. & M. Ins. Co., 99 N. Y. 124; Mason *v.* Cronk, 125 N. Y. 500; Hoffman *v.* North British, etc., Ins. Co., (Supm. Ct. App. T.) 35 Misc. (N. Y.) 40. See also Atty.-Gen. *v.* Continental L. Ins. Co., (Supm. Ct. Gen. T.) 6 N. Y. St. Rep. 644.

Tennessee. — Royal Ins. Co. *v.* Vanderbilt Ins. Co., 102 Tenn. 267.

7. See *infra*, this title, *Insolvency of Reinsured — Rule in New Hampshire.*

8. See *infra*, this title, *Rights of Party Originally Insured — Under Reinsurance Contract Made for His Benefit.*

9. Reinsurance and Double Insurance Dis-

5. Insurable Interest and Subject-matter of the Contract — *a.* In General. — Although an insurer has no property in the subject-matter of the original insurance, but has only an interest in its preservation, yet this interest constitutes an insurable interest sufficient to support a contract of reinsurance; in other words the subject-matter of reinsurance is the risk incurred under the original policy.[1] This insurable interest may arise from a time policy as well as from any other.[2]

Reinsurance Need Not Be for Same Risk as Original Policy — Quantum of Risk. — While a contract of reinsurance implies the same subject-matter of insurance as the original policy, and runs against perils of the same kind, it need not be for the identical hazards or risks insured against in the first policy.[3] The reinsurance may be for a less, but may not be for a greater risk than that under the original insurance.[4] In brief, while the reinsurance applies to the same risk in kind as that of the original policy, it cannot exceed it in quantum or duration.[5]

Risk Not Assumed by First Insurer. — Neither, it has been held, can there be a valid reinsurance of a marine risk which the original underwriter has not assumed.[6] In cases of fire insurance, both in original insurance and in reinsurance, there must be an insurable interest at the date of the contract. Therefore, a contract to reinsure existing risks and also risks which the first insurer may assume in the future, is not supported by an insurable interest as to the risks not yet assumed; and if the contract is for a single consideration and is not apportionable, it is altogether void on the ground that it is a

tinguished. — Mutual Safety Ins. Co. *v.* Hone, 2 N. Y. 240, *affirming* 1 Sandf. (N. Y.) 137. See also Godin *v.* London Assur. Co., 1 Burr. 495; Alliance Marine Assur. Co. *v.* Louisiana State Ins. Co., 8 La. 1, 28 Am. Dec. 117; May on Insurance, vol. 1, § 13, and the title Insurance, vol. 16, p. 842, note.

The term "reinsurance," however, is sometimes erroneously used by the courts in the sense of double insurance, or a second contract of insurance by the same person. See *e. g.*, Lovick *v.* Providence L. Assoc., 110 N. Car. 97.

1. What Constitutes Insurable Interest — *England.* — Mackenzie *v.* Whitworth, L. R. 10 Exch. 151, *affirmed* 1 Ex. D. 36.

Massachusetts. — Eastern R. Co. *v.* Relief F. Ins. Co., 98 Mass. 420; Manufacturers' F. & M. Ins. Co. *v.* Western Assur. Co., 145 Mass. 419.

New Jersey. — Sun Ins. Office *v.* Merz, 63 N. J. L. 365.

New York. — Mutual Safety Ins. Co. *v.* Hone, 2 N. Y. 235, *affirming* 1 Sandf. (N. Y.) 137; New York Bowery F. Ins. Co. *v.* New York F. Ins. Co., 17 Wend. (N.Y.) 362; Herckenrath *v.* American Mut. Ins. Co., 3 Barb. Ch. (N. Y.) 63; Yonkers, etc., F. Ins. Co. *v.* Hoffman F. Ins. Co., 6 Robt. (N. Y.) 321.

Pennsylvania. — Delaware Ins. Co. *v.* Quaker City Ins. Co., 3 Grant Cas. (Pa.) 72; Philadelphia Ins. Co. *v.* Washington Ins. Co., 23 Pa. St. 250; Fame Ins. Co.'s Appeal, 83 Pa. St. 407.

Tennessee. — Royal Ins. Co. *v.* Vanderbilt Ins. Co., 102 Tenn. 267.

Wisconsin. — Johannes *v.* Phenix Ins. Co., 66 Wis. 53, 57 Am. Rep. 249.

In Case of a Reinsurance upon a Reinsurance the same principle applies; that is, the risk of the first reinsurer constitutes an insurable interest sufficient to support the second reinsurance. Uzielli *v.* Boston Marine Ins. Co., 15 Q. B. D. 11.

2. Risk under Time Policy an Insurable Interest. — Philadelphia Ins. Co. *v.* Washington Ins. Co., 23 Pa. St. 250.

3. Reinsurance Need Not Be for Same Specific Risks as First Policy. — London Assur. Corp. *v.* Thompson, 170 N. Y. 94, *affirming* 54 N. Y. App. Div. 637; Philadelphia Ins. Co. *v.* Washington Ins. Co., 23 Pa. St. 250.

Where an original insurance is against marine risks which include loss by fire, the reinsurance may be for a limited amount and against loss by fire only, and limited to voyages between specified ports. Imperial Marine Ins. Co. *v.* Fire Ins. Corp., 4 C. P. D. 166.

4. Quantum of Risk. — Merry *v.* Prince, 2 Mass. 187; London Assur. Corp. *v.* Thompson, 170 N. Y. 94, *affirming* 54 N. Y. App. Div. 637; Philadelphia Ins. Co. *v.* Washington Ins Co., 23 Pa. St. 250; Commonwealth Ins. Co. *v.* Globe Mut. Ins. Co., 35 Pa. St. 475.

Where the contract of reinsurance provided that the reinsurance should apply to the excess of original insurance above a certain sum, but the original insurance did not equal that sum, it was held that there was no valid reinsurance since there was nothing to which it could attach. Mercantile Mut. Ins. Co. *v.* State Mut. F. & M. Ins. Co., 25 Barb. (N. Y.) 319.

5. Reinsurance Cannot Exceed Original Risk in Quantum or Duration. — Philadelphia Ins. Co. *v.* Washington Ins. Co., 23 Pa. St. 250.

6. No Reinsurance of Risk Not Assumed. — Commonwealth Ins. Co. *v.* Globe Mut. Ins. Co., 35 Pa. St. 475 (a case of marine insurance). See also Louisiana Mut. Ins. Co. *v.* New Orleans Ins. Co., 13 La. Ann. 246; Yonkers, etc., F. Ins. Co. *v.* Hoffman F. Ins. Co., 6 Robt. (N. Y.) 320.

wagering contract.[1] On the other hand it has been held that inasmuch as in marine insurance it is sufficient if there is an insurable interest when the risk begins and when the loss occurs, a contract of reinsurance of marine risks has a sufficient insurable interest to support it if these conditions are complied with. Therefore, a reinsurance limited to a certain time and a certain amount upon such marine risks as the first insurer has when the contract is made, or may incur during the time it has to run, is not invalid as a wager contract or policy, but is a binding contract which attaches to and covers the risks as they are incurred by the original insurer.[2] In order for this principle to apply, however, so as to make the reinsurance cover an additional or subsequently increased risk, the contract or policy of reinsurance must clearly show an intention that it shall not be confined to the number or amount of risks existing at the time of the reinsurance.[3]

Insurance for Voyage, "Lost or Not Lost" — Termination of Voyage Before Reinsurance. — Where the original insurance is upon a cargo by a certain vessel "lost or not lost," for a certain voyage, and the reinsurance is effected after the vessel with its cargo has in fact arrived safely at the port of destination, this fact being unknown to both parties, it is held that notwithstanding this there is an insurable interest sufficient to support the policy of reinsurance.[4] In such a case the original risk includes both the voyage commenced with necessary conditions to make the underwriters liable, and also the chance of loss during its performance. While in the latter sense there is no risk at the time of the reinsurance, yet in the former sense the risk clearly exists.[5]

In Cases of Life Insurance, it is sufficient that an insurable interest existed at the time of effecting a policy of reinsurance, and it seems not to be essential that the insurable interest should exist at the time of the death; the policy of reinsurance remains valid though the insurable interest has greatly decreased when the death occurs.[6] But the contrary has been held.[7]

b. DESCRIPTION OF INTEREST REINSURED. — Unless otherwise provided by statute, the fact that the contract is one of reinsurance need not be expressed in the policy, but the description of the subject-matter of the contract may be the same as that in the policy of original insurance; for although the risk is really the subject-matter of the reinsurance, this in a sense partakes of an interest in the subject-matter of the original insurance.[8] Such a description, therefore, does not amount to a concealment of the nature of the interest reinsured.[9]

1. Fire Insurance — Risks Existing and to Be Incurred. — Sun Ins. Office *v.* Merz, 63 N. J. L. 365.

2. Marine Risks Existing and to Be Incurred. — Boston Ins. Co. *v.* Globe F. Ins. Co., 174 Mass. 229, 75 Am. St. Rep. 303. The reinsurance contract in this case applied to losses by fire under marine policies. *Compare* Commonwealth Ins. Co. *v.* Globe Mut. Ins. Co., 35 Pa. St. 475.

3. Lower Rhine, etc., Ins. Assoc. *v.* Sedgwick, (1899) 1 Q. B. 179, 80 L. T. N. S. 6, *reversing* (1898) 1 Q. B. 739, 78 L. T. N. S. 499.

4. Bradford *v.* Symondson, 7 Q. B. D. 456.

5. Bradford *v.* Symondson, 7 Q. B. D. 456, *per* Bramwell, L. J., at page 464.

6. Decrease or Cessation of Insurable Interest. — Dalby *v.* India, etc., L. Assur. Co., 15 C. B. 365, 80 E. C. L. 365, 28 Eng. L. & Eq. 312, *overruling* Godsall *v.* Boldero, 9 East 72. In this case the original insurance was to the extent of three thousand pounds and was covered by four policies. Reinsurance was effected for one thousand pounds of that amount. Afterwards the holder of the original policies, in consideration of an annuity, surrendered the policies to the original insurer and three of them were canceled. The reinsured, however, continued to pay premiums to the reinsurer upon the policy of reinsurance until the death occurred. It was held that inasmuch as the reinsured had an insurable interest to the amount of one thousand pounds at the time when the policy of reinsurance was effected, they were entitled to recover that amount from the reinsurer.

7. India, etc., L. Assur. Co. *v.* Dalby, 4 De G. & Sm. 462, 15 Jur. 982. This case involved the same state of facts as the one discussed in the foregoing note, but it was held by Knight Bruce, V. C., that a bill in equity could be maintained to stay an action upon the policy of reinsurance, and to have the policy delivered up for cancellation.

8. Policy Need Not Purport to Be a Reinsurance. — Mackenzie *v.* Whitworth, 1 Ex. D. 36, *affirming* L. R. 10 Exch. 142; Fire Ins. Assoc. *v.* Canada F. & M. Ins. Co., 2 Ont. 497; Insurance Co. of North America *v.* Hibernia Ins. Co., 140 U. S. 573. See also *infra*, this title, *Formal Requisites of Contract or Policy*.

9. Mackenzie *v.* Whitworth, 1 Ex. D. 36,

III. Powers of Insurance Companies in Respect to Reinsurance — 1. In General. — The power of an insurance company to make contracts of reinsurance, either of its own risks or of the risks of another company, must generally be determined by its charter or articles of incorporation and the local statutes relating to insurance and insurance companies.[1] Cases in which the question of corporate power has been raised are briefly discussed in the notes.[2]

2. Power to Transfer Assets in Consideration of Reinsurance — *a.* In General .— Since it is competent for an insurance company to reinsure its risks, it may, in consideration of the reinsurance, transfer to the reinsurer any of its property in which it has the absolute right of ownership.[3]

b. Transfer of Premium Notes. — The property which an insurance company may transfer in consideration of the reinsurance of its risks, has been held to include notes given for premiums on policies of original insurance.[4] But when, by the charter of the company, the premium notes form a part of its capital stock, and thus constitute a trust fund for the benefit of the company's creditors, the company can make no valid transfer of them even as a consideration for the reinsurance of its risks in another company.[5]

c. Transfer of Entire Assets. — The implied contract of an insurance company with its policy holders is, that it will continue its business, keep on hand the fund required by law for their security, and remain in a condition, so long as its contracts continue, to perform its obligations. Where the company reinsures all its outstanding risks with another company, and turns over to the latter all its assets and ceases to do business, this implied contract is broken.[6] Likewise it is held that although an insurance company may have

affirming L. R. 10 Exch. 142; Insurance Co. of North America *v.* Hibernia Ins. Co., 140 U. S. 573.

1. Whether Company Can Reinsure. — See generally the titles Corporations, vol. 7, p. 695 *et seq.*; Insurance, vol. 16, p. 878 *et seq.* See also Beaver, etc., Mut. F. Ins. Co. *v.* Trimble, 23 U. C. C. P. 252, and *infra*, this title, *Statutes Prohibiting, Restricting, or Regulating Reinsurance.*

2. See New York Bowery F. Ins. Co. *v.* New York F. Ins. Co., 17 Wend. (N. Y.) 362.

Where an act incorporating an insurance company makes the company subject to the provisions of a general statute relating to insurance and authorizing companies "to reinsure themselves," the company is not limited to the reinsurance of its own risks, but can lawfully reinsure the risks of another insurance company. Fame Ins. Co.'s Appeal, 83 Pa. St. 396.

Where a statute designating the powers of insurance companies grants the power to take risks generally without limitation as to the mode of its exercise, it seems that this power to insure means a power to insure in every lawful mode, and includes the right to be insured, or the right of the company to reinsure its own risks; and the addition of an express power "to reinsure themselves," appears to be merely cumulative. Fame Ins. Co.'s Appeal, 83 Pa. St. 407.

A statute providing that certain firms and individuals may insure others against loss or damage by fire and lightning, and may underwrite policies of insurance issued therefor under the Lloyds form, (Stat. of N. J., March 25, 1895; Gen. Stat. N. J., p. 1784) has been construed to confer authority to reinsure in favor, not only of the owners of property, but also of all those who have any insurable interest therein, and therefore to include the authority to make contracts of reinsurance. And an amendatory statute prohibiting the transaction of the business of insurance by individuals, except as provided in the foregoing act (N. J. Stat. of March 26, 1896; Laws of 1896, p. 156), has been held not to make a contract of reinsurance unlawful. Sun Ins. Office *v.* Merz, 63 N. J. L. 365.

Mutual Benefit Association Without Power to Reinsure Risks of Another Association. — It has been held that in the absence of express authority in its articles of incorporation, a mutual benefit association is without power to contract to pay the death losses of another association in consideration of the transfer by the latter of its assets and membership, and that such contract is *ultra vires* and void. In such a case the association attempting to reinsure is not estopped from denying its liability under the contract, although it has received the benefits thereof, where it appears that the party originally insured in the other company has in no way been prejudiced, because of the bankruptcy of that company at the time of the contract. Twiss *v.* Guaranty L. Assoc., 87 Iowa 733, 43 Am. St. Rep. 418. See also Dishong *v.* Iowa Loan, etc., Assoc., 92 Iowa 163. *Compare* Milborne *v.* Royal Ben. Soc., 14 N. Y. App. Div. 406.

3. What May Be Transferred in Consideration of Reinsurance. — Davenport F. Ins. Co. *v.* Moore, 50 Iowa 619. See also Jameson *v.* Hartford F. Ins. Co., 14 N. Y. App. Div. 380.

4. Premium Notes. — Davenport F. Ins. Co. *v.* Moore, 50 Iowa 619.

5. Premium Notes Part of Capital Stock. — Home Ins. Co. *v.* Shultz, 30 Mo. App. 91.

6. Transfer of Entire Assets and Cessation of Business. — People *v.* Empire Mut. L. Ins. Co., 92 N. Y. 105; Meade *v.* St. Louis Mut. L. Ins.

by its charter the right to reinsure its risks, this right does not include the right to transfer its entire assets in consideration for reinsurance of its risks where not all its policy holders assent thereto, and such a transfer or a contract therefor, as against the dissenting policy holders, is *ultra vires* and void.[1] Similarly, the fact that a life insurance company is authorized to reinsure its risks, or that it is permitted to discontinue its business and wind up its affairs, does not release it from any of its existing obligations; such a company has no power to turn its policy holders, against their consent, over to another company, and the policy holders are under no obligation, in order to protect their legal rights, to protest against such a course of action.[2] Hence one holding a policy of life insurance does not forfeit his policy by omitting to pay annual premiums thereon after the company issuing the policy has ceased to do business, transferred all of its assets, reinsured all its risks, and become insolvent.[3]

IV. Formal Requisites of Contract or Policy. — It seems that the law has not settled any particular form which shall be essential to a contract or policy of reinsurance, but as a matter of practice reinsurance policies not infrequently follow in general terms the form of policies of original insurance, with such variations as are necessary to meet the exigencies of the particular case.[4] Ordinarily such a form will be deemed sufficient;[5] but in the absence of any distinctive form of policy, proof must be adduced to show that the contract is one of reinsurance;[6] and where the form of policy used is that of an original insurance it should be so altered as to omit provisions not applicable to reinsurance.[7]

A Parol Acceptance of a Written Proposal for reinsurance constitutes a binding contract, in the absence of any statute requiring such a contract to be in writing; and a statute relating to policies of insurance does not apply.[8] Such a contract a court of equity will specifically enforce; and treating what was agreed to be done as if it were actually done, the court will ascertain the amount due under the contract and enforce payment thereof.[9]

If the Contract is Oral, all its essential elements must be agreed upon and expressly stated.[10]

Whether Contract Within Statute of Frauds. — Where the contract of reinsurance is

Co., (Supm. Ct. Spec. T.) 51 How. Pr. (N. Y.) 1. See also Mason *v.* Cronk, 125 N. Y. 496, and the cases in the following note.

1. Transfer Ultra Vires as Against Dissenting Policy Holders. — Barden *v.* St. Louis Mut. L. Ins. Co., 3 Mo. App. 248; Price *v.* St. Louis Mut. L. Ins. Co., 3 Mo. App. 262; Smith *v.* St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 727. See also Insurance Com'r *v.* Provident Aid Soc., 89 Me. 413; and the titles Consolidation of Corporations, vol. 6, p. 800; Corporations, vol. 7, p. 735 *et seq.*; Insurance, vol. 16, p. 881 *et seq.*; Stock and Stockholders; Ultra Vires. *Compare* Jameson *v.* Hartford F. Ins. Co., 14 N. Y. App. Div. 380.

2. People *v.* Empire Mut. L. Ins. Co., 92 N. Y. 105. See also Insurance Com'r *v.* Provident Aid Soc., 89 Me. 413. *Compare* Jameson *v.* Hartford F. Ins. Co., 14 N. Y. App. Div. 380.

3. People *v.* Empire Mut. L. Ins. Co., 92 N. Y. 105.

4. Matters of Form — No Fixed Form Necessary. — Fire Ins. Assoc. *v.* Canada F. & M. Ins. Co., 2 Ont. 491. See also General Marine Assur. Co. *v.* Ocean Marine Ins. Co., 16 Quebec Super. Ct. 170, where an "interim covering memorandum" was held sufficient.

5. General Form Applicable. — Excelsior F. Ins. Co. *v.* Royal Ins. Co., 55 N. Y. 348, 14 Am. Rep. 271, *per* Folger, J.; New York Bowery F. Ins. Co. *v.* New York F. Ins. Co., 17 Wend. (N. Y.) 359. See also *supra*, this title, *Nature of Reinsurance — Description of Interest Reinsured.*

6. Necessity to Prove Contract to Be One of Reinsurance. — Excelsior F. Ins. Co. *v.* Royal Ins. Co., 55 N. Y. 348, 14 Am. Rep. 271.

7. Provisions Inapplicable to Reinsurance Should Be Omitted. — See Imperial F. Ins. Co. *v.* Home Ins. Co., 68 Fed. Rep. 698, 30 U. S. App. 409; Faneuil Hall Ins. Co. *v.* Liverpool, etc., Ins. Co., 153 Mass. 63; Manufacturers' F. & M. Ins. Co. *v.* Western Assur. Co., 145 Mass. 424; North Pennsylvania F. Ins. Co. *v.* Susquehanna Mut. F. Ins Co., 2 Pearson (Pa.) 291; Royal Ins. Co. *v.* Vanderbilt Ins. Co., 102 Tenn. 267.

8. Parol Acceptance of Proposal. — Commercial Mut. Marine Ins. Co. *v.* Union Mut. Ins. Co., 19 How. (U. S.) 318, *affirming* 2 Curt. (U. S.) 524.

9. Contract Specifically Enforced. — Commercial Mut. Marine Ins. Co. *v.* Union Mut. Ins. Co., 19 How. (U. S.) 318, *affirming* 2 Curt. (U. S.) 524.

10. Manchester F. Assur. Co. *v.* Illinois Ins. Co., 91 Ill. App. 609.

made not merely for the indemnity of the reinsured but also for the benefit of the first insured so that the latter may maintain an action upon it, it has been held in *Louisiana* that the purpose of the contract is to answer for the debt of another and is within the statute of frauds, so that it cannot be proved by parol evidence.[1] But the contrary has been held in *Iowa*.[2]

Rules of Original Insurance Applicable. — In respect to these matters the rules applicable to original insurance appear to apply with equal force to reinsurance.[3]

V. Construction and Interpretation — 1. General Principles. — The general rules of construction applicable to contracts and written instruments generally apply to contracts and policies of reinsurance.[4] A contract of this character, like any other contract, depends upon the intention of the parties, to be gathered from the words used in the instrument, taking into consideration, when the meaning is doubtful, the circumstances attending the transaction.[5] The court should give to the instrument a reasonable and sensible construction; one which appears to conform the nearest to the justice of the case and the purpose which the parties sought to accomplish.[6] The contract should receive a construction that will be uniform throughout the various transactions in which it is involved. It must not be so construed as to have a certain meaning before a loss occurs and another thereafter, or in one way for the purpose of collecting premiums and in another for the purpose of determining liability.[7]

The General Rule that Parol Evidence Is Not Admissible to contradict the express terms of a written instrument, applies with full force to policies and contracts of reinsurance.[8] Thus where the contract by its terms is clearly one of ordinary reinsurance intended to operate solely between the parties thereto, parol evidence will not be received to show that the intention was to contract directly for the benefit of the first insured so as to give him a right of action against the reinsurer.[9]

Risks Not Included in Contract. — The contract of reinsurance will not be so construed as to include a risk not clearly within its terms.[10]

1. Statute of Frauds. — Egan *v.* Fireman's Ins. Co., 27 La. Ann. 368.

English Stamp Act. — A contract for reinsurance contained in a document called "open cover," has been held to be a "contract for sea insurance" within the provisions of the British Stamp Act of 1891 (54 & 55 Vict., c. 39, §§ 92–97). Home Marine Ins. Co. *v.* Smith, (1898) 2 Q. B. 351.

2. Bartlett *v.* Fireman's Fund Ins. Co., 77 Iowa 155.

3. See the title Insurance, vol. 16, pp. 851, 852, 853.

4. General Rules of Construction Applicable to Contracts of Reinsurance. — Yonkers, etc., F. Ins. Co. *v.* Hoffman F. Ins. Co., 6 Robt. (N. Y.) 316; London Assur. Corp. *v.* Thompson, 170 N. Y. 99, *affirming* 54 N. Y. App. Div. 637. See generally the titles Interpretation and Construction, vol. 17, p. 1; Insurance, vol. 16, p. 862 *et seq.*

5. Intention of the Parties. — Yonkers, etc., F. Ins. Co. *v.* Hoffman F. Ins. Co., 6 Robt. (N. Y.) 316; London Assur. Corp. *v.* Thompson, 170 N. Y. 99, *affirming* 54 N. Y. App. Div. 637.

6. Continental Ins. Co. *v.* Ætna Ins. Co., 138 N. Y. 22.

7. Construction Must Be Uniform. — Continental Ins. Co. *v.* Ætna Ins. Co., 138 N. Y. 16, *per* O'Brien, J.

Ascertaining the Amount of Original Risk. — Where a contract of reinsurance by its terms applied to every original risk that equaled or exceeded a specified sum, it was held that the contract must be applied to all risks which were entered or written for that sum or more, and not that its application should be governed by a fluctuating value of the goods insured, or the opinion of an adjuster as to their value, or by the judgment of a court or jury; in other words, that the amount for which the goods were insured, and not their actual value, should determine the risks upon which the reinsurance operated. Continental Ins. Co. *v.* Ætna Ins. Co., 138 N. Y. 22, *reversing* 62 Hun (N. Y.) 554, and *distinguishing* Arnold *v.* Pacific Mut. Ins. Co., 78 N. Y. 7.

8. Parol Evidence Rule. — St. Nicholas Ins. Co. *v.* Mercantile Mut. Ins. Co., 5 Bosw. (N. Y.) 238; Mercantile Mut. Ins. Co. *v.* State Mut. F. & M. Ins. Co., 25 Barb. (N. Y.) 319.

9. Carrington *v.* Commercial F. & M. Ins. Co., 1 Bosw. (N. Y.) 152.

10. Risks Outside the Contract. — German-American Ins. Co. *v.* Commercial F. Ins. Co., 95 Ala. 469.

Thus where the contract of reinsurance by its terms applied to risks in a certain state only, and not elsewhere, it was held that the contract could not be extended to a risk taken by the reinsured in that state, but on properties located elsewhere. London, etc., F. Ins Co. *v.* Lycoming F. Ins. Co., 105 Pa. St. 424.

And where the original insurance was on a vessel, her cargo and freight, and the reinsur-

Ratification of Risk Outside Contract. — The reinsurer cannot be charged with acquiescence in, or ratification of, a risk not included in the terms of the contract, upon the ground that he failed to object thereto after notice, unless the notice included all the facts going to show that the risk was outside of the contract. In such a case, the burden is on the reinsured to prove that full notice was given as required by his fiduciary position.[1]

Rules as to Ambiguity. — Where an ambiguity occurs in a policy or contract of reinsurance so that as to the matter presented for construction the policy is capable of two interpretations equally reasonable, the general rule is that the construction which is most favorable to the reinsured must be adopted; the reason being that since insurance policies are generally unilateral contracts prepared by the reinsurers, the latter are *prima facie* responsible for any ambiguity arising out of the language used by them.[2] Where, however, the reinsured is responsible for the ambiguous words used in the policy, as where he is the one who furnished them, then upon the same principle the ambiguity is to be resolved against the reinsured and in favor of the reinsurer.[3]

An Inaccurate Description of the Property which is the subject-matter of the original policy will not necessarily defeat the policy of reinsurance containing the description; and it will not have this effect where the error relates to a matter which is neither a necessary nor a material part of the description, and if rejected would leave the description substantially sufficient.[4] In such a case, if the words used are sufficient to supply the means of making the correction, or if the instrument taken as a whole clearly shows the fact that there is an error and also shows with equal certainty the manner in which the error ought to be and may be corrected, then the correction may be made either by admitting extrinsic evidence, or by applying well-settled rules of construction.[5]

2. As Affected by Custom of Underwriters. — The principles whereby a known custom or usage is presumed to enter into the intentions of contracting parties and to form a part of the contract,[6] are applicable to contracts of reinsurance.[7]

Question of Fact. — Whether the custom or usage in a given case is to be taken as a part of the contract of reinsurance; that is, whether the parties had it in view in their negotiations and intended that their contract should be read and construed with reference to and in the light of the usage, is always a question of fact.[8]

ance by the terms of the contract applied to the risk on the cargo only, parol evidence was held inadmissible to show that the reinsurance applied to the risk on the freight or the ship. Mercantile Mut. Ins. Co. *v.* State Mut. F. & M. Ins. Co., 25 Barb. (N. Y.) 319.

1. Ratification of Unauthorized Risk. — German-American Ins. Co. *v.* Commercial F. Ins. Co., 95 Ala. 469.

2. Ambiguity Resolved Against Reinsurer. — London Assur. Corp. *v.* Thompson, 170 N. Y. 94, *affirming* 54 N. Y. App. Div. 637; Royal Ins. Co. *v.* Vanderbilt Ins. Co., 102 Tenn. 264. See also Commonwealth Ins. Co. *v.* Globe Mut. Ins. Co., 35 Pa. St. 480. See generally the title INSURANCE, vol. 16, p. 863.

But in such a case, of course, the construction must be a reasonable one. Commonwealth Ins. Co *v.* Globe Mut. Ins. Co., 35 Pa. St. 480.

3. London Assur. Corp. *v.* Thompson, 170 N. Y. 94, *affirming* 54 N. Y. App. Div. 637.

4. Inaccuracy in Description of Property. — Yonkers, etc., F. Ins. Co. *v.* Hoffman F. Ins. Co., 6 Robt. (N. Y.) 316.

5. Yonkers, etc., F. Ins. Co. *v.* Hoffman F. Ins. Co., 6 Robt. (N. Y.) 316.

6. See the title USAGES AND CUSTOMS, and the various insurance titles in this work.

7. When Usage or Customs Forms Part of Contract. — Imperial Marine Ins. Co. *v.* Fire Ins. Corp., 4 C. P. D. 166; General Marine Assur. Co. *v.* Ocean Marine Ins. Co., 16 Quebec Super. Ct. 175; Union Ins. Co. *v.* American F. Ins. Co., 107 Cal. 328, 48 Am. St. Rep. 140; Louisiana Mut. Ins. Co. *v.* New Orleans Ins. Co., 13 La. Ann. 246; St. Nicholas Ins. Co. *v.* Merchants' Mut. F. & M. Ins. Co., 83 N. Y. 605, *reversing* 11 Hun (N. Y.) 108; London Assur. Corp. *v.* Thompson, 170 N. Y. 99, *affirming* 54 N. Y. App. Div. 637.

Fire Insurance Company Reinsuring Marine Risk. — Where a fire insurance company issues a policy of reinsurance to a marine insurance company upon a marine risk, it is held that the reinsurer contracts according to the usage of the particular trade or business to which the contract relates; that is, the trade or business of marine insurance; and therefore that a well-settled custom of marine insurers enters into and forms a part of the contract. Imperial Marine Ins. Co. *v.* Fire Ins. Corp., 4 C. P. D. 166.

8. Question of Fact. — German-American Ins. Co. *v.* Commercial F. Ins. Co., 95 Ala. 474.

Usage Must Be Known to Both Parties. — Since, of course, it cannot be said that a man has contracted with reference to a fact of which he was ignorant, it is obvious that it must be shown that the usage in question was known to both parties to the contract, or that it was so well established, certain, uniform, and reasonable in its character, and of such general acceptance and consequent notoriety as to raise a *prima facie* inference of knowledge on the part of the one who is sought to be affected thereby.[1] In brief, the custom must ordinarily be general, uniform, and well settled.[2]

Express Provisions of Contract Not Open to Contradiction. — Where a contract of reinsurance is clear and full in its terms and without any ambiguity, it is not competent to vary it by proof of a local usage.[3]

Local Custom. — Where the custom or usage obtains only among underwriters in a particular city, it cannot affect a contract of reinsurance made elsewhere.[4] Where the party sought to be charged with liability by force of such a custom had a foreign domicil at the time of the contract of reinsurance, it seems that he can be bound by the terms of the custom only on clear proof that he was cognizant thereof or had actual or constructive notice of its existence. In such a case, the custom being not general but local, no inference of knowledge on his part arises.[5]

Burden of Proof. — Where one party to a contract of reinsurance seeks to impose upon the other a liability by virtue of a custom or usage of underwriters, he has the burden of proving the existence of the usage at the time of the contract, and that the other party had actual or constructive notice thereof.[6]

3. Determining Commencement and Duration of Risk. — The general rule appears to be that a policy of reinsurance, if delivered, takes effect from its date, unless the policy contains other stipulations, or unless some evidence appears that the parties had a different intention.[7] The doctrine of relation[8] is applicable to policies of original insurance, the agreement or contract to insure being the principal act to which the payment of the premium and the formal execution and delivery of the policy will have relation though subsequent in time and though a loss intervenes.[9] This principle has been considered applicable to reinsurance.[10] Where the exact time of the commencement and termination of the risk are specified in the policy, or, if no policy has been written, in the contract for reinsurance, the specification is controlling,[11] and will determine whether a loss under the policy of original insurance is covered by the reinsurance.[12] Where no time has been expressly indicated

1. Knowledge of Usage. — German-American Ins. Co. *v.* Commercial F. Ins. Co., 95 Ala. 474.

2. German-American Ins. Co. *v.* Commercial F. Ins. Co., 95 Ala. 475; London Assur. Corp. *v.* Thompson, 170 N. Y. 100, *affirming* 54 N. Y. App. Div. 637.

3. Evidence of Usage Not Received to Contradict Express Terms of Contract. — Milwaukee Mechanics' Ins. Co. *v.* Palatine Ins. Co., 128 Cal. 71; Hone *v.* Mutual Safety Ins. Co., 1 Sandf. (N. Y.) 137; St. Nicholas Ins. Co. *v.* Mercantile Mut. Ins. Co., 5 Bosw. (N. Y.) 238; Mercantile Mut. Ins. Co. *v.* State Mut. F. & M. Ins. Co., 25 Barb. (N. Y.) 319. *Compare* General Marine Assur. Co. *v.* Ocean Marine Ins. Co., 16 Quebec Super. Ct. 175.

4. Custom Confined to Certain Locality. — Insurance Co. of North America *v.* Hibernia Ins. Co., 140 U. S. 565.

5. Local Usage Not Binding on Reinsurer with Foreign Domicil. — German-American Ins. Co. *v.* Commercial F. Ins. Co., 95 Ala. 475.

6. Burden of Proof. — German-American Ins. Co. *v.* Commercial F. Ins. Co., 95 Ala. 474.

7. When Contract or Policy Attaches. — Union Ins. Co. *v.* American F. Ins. Co., 107 Cal. 328, 48 Am. St. Rep. 140; Milwaukee Mechanics' Ins. Co. *v.* Palatine Ins. Co., 128 Cal. 71.

8. See the title RELATION, *post.*

9. Lightbody *v.* North American Ins. Co., 23 Wend. (N. Y.) 18; Whitaker *v.* Farmers' Union Ins. Co., 29 Barb. (N. Y.) 312; Davenport *v.* Peoria M. & F. Ins. Co., 17 Iowa 276; Worth *v.* German Ins. Co., 64 Mo. App. 583.

10. Union Ins. Co. *v.* American F. Ins. Co., 107 Cal. 331, 48 Am. St. Rep. 140.

11. Union Ins. Co. *v.* American F. Ins. Co., 107 Cal. 333, 48 Am. St. Rep. 140; Milwaukee Mechanics' Ins. Co. *v.* Palatine Ins. Co., 128 Cal. 71.

12. Milwaukee Mechanics' Ins. Co. *v.* Palatine Ins. Co., 128 Cal. 71.

Thus where an insurance company intending to cease doing business enters into a contract of reinsurance with another company, the contract providing that the first company shall discharge its own outstanding obligations, and that the latter company shall assume the other's trade, contingent liabilities, and good will, the contract going into effect

in the policy or contract for the commencement or termination of the risk, the circumstances under which the instrument was made will be considered for the purpose of determining the question, and the intention of the parties thus determined will be decisive.[1] If there are no extrinsic circumstances indicating the intention of the parties and no time is specified in the contract, the risk will be deemed to have commenced at the date of the contract.[2] And in such case if before the contract of reinsurance is made the property has ceased to exist, although unknown to the parties, the risk does not attach.[3]

Termination of Voyage Before Reinsurance Effected. — Where the original insurance is upon cargo by a certain vessel "lost or not lost," for a certain voyage, and reinsurance is effected upon the same risk, but before the policy is effected the vessel and cargo, unknown to both parties, has in fact arrived safely at the port of destination, it is held that, notwithstanding this latter fact, the policy of reinsurance attaches, and therefore that the reinsurer is entitled to the premium.[4]

4. Limitation Clauses. — Although a policy of reinsurance contains a clause that it shall be "subject to the same risks, conditions, modes of settlement," etc., "as the policies reinsured," it has been held that an action upon the policy of reinsurance is not barred by a provision in the original policy fixing a limitation of the period in which an action may be brought against the insurer.[5] Similarly, where the form of policy used in the reinsurance is that of an ordinary policy of original insurance, and contains a clause that no action shall be maintained for the recovery of any claim under the policy until after an award shall have been obtained fixing the amount of the claim, nor unless the suit or action shall be commenced within a certain time after the occurring of the loss, it is held that these stipulations relate only to a contract of original insurance, and that the right of the reinsured to recover on such a policy is unaffected thereby.[6] Where the period of limitation mentioned is so short as to be unreasonable, and is therefore void,[7] the right of action on the policy of reinsurance remains, of course, unaffected.[8]

at a certain designated time; a loss occurring before that time falls upon the reinsured and not upon the reinsurer under the latter's assumption of liability. Olsen *v.* California Ins. Co., 11 Tex. Civ. App. 371.

1. Union Ins. Co. *v.* American F. Ins. Co., 107 Cal. 333, 48 Am. St. Rep. 140; Philadelphia L. Ins. Co. *v.* American L., etc., Ins. Co., 23 Pa. St. 65.

2. Union Ins. Co. *v.* American F. Ins. Co., 107 Cal. 333, 48 Am. St. Rep. 140.

3. Union Ins. Co. *v.* American F. Ins. Co., 107 Cal. 327, 48 Am. St. Rep. 140, where the reinsurance was of a risk under a policy of fire insurance, and it was held that, there being no evidence of mutual intention to give the contract a retrospective effect, the reinsurer was not liable for a loss accruing prior to the contract, though at that time neither party knew of the loss.

Effect of Custom. — Where a local custom obtains among fire insurance companies to charge and collect premiums on reinsurance policies or contracts as from the date of the reinsurance, and to frame their policies in such a way as to make them operative from the date of reinsurance, it is presumed that the parties to the contract were cognizant of this custom, and that they contracted with reference thereto, unless some circumstances appear to show the contrary; in other words such custom or usage forms a part of the contract. Union Ins. Co. *v.* American F. Ins. Co., 107 Cal. 328, 48 Am. St. Rep. 140. *Compare* Milwaukee Mechanics' Ins. Co. *v.* Palatine Ins. Co., 128 Cal. 71.

4. Reinsurance on Risk for Certain Voyage — Voyage Completed Before Reinsurance Effected. — Bradford *v.* Symondson, 7 Q. B. D. 456. In this case it was said, *per* Brett, L. J., at page 463, "This decision seems to me to come to this, that where the subject-matter insured has been or is or will be at risk, the policy attaches to it and covers it, whether the policy be made before, or during, or after the time when the subject-matter was at risk; if that risk is properly described in the policy."

5. Limitation Clause. — Faneuil Hall Ins. Co. *v.* Liverpool, etc., Ins. Co., 153 Mass. 63.

6. Jackson *v.* St. Paul F. & M. Ins. Co., 99 N. Y. 124. See also Royal Ins. Co. *v.* Vanderbilt Ins. Co., 102 Tenn. 264; Alker *v.* Rhoads, 73 N. Y. App. Div. 158; *contra* Atlas Mut. Ins. Co. *v.* Downing, 12 Pa. Super. Ct. 305.

7. See the title Life Insurance, vol. 19, p. 102 *et seq.*

8. In *Indiana* a clause in a policy of original insurance limiting to six months the time for bringing an action thereon has been held void, and therefore incapable of affecting the reinsured's right of action on the policy of reinsurance, although the latter was expressly made subject to the conditions of the original policy. Eagle Ins. Co. *v.* Lafayette Ins. Co., 9 Ind. 443.

VI. Rights of Party Originally Insured — 1. In General. — It has already been stated that in the ordinary contract of reinsurance there is no privity of contract between the reinsurer and the party originally insured.[1] Therefore, as a general rule the liability of the reinsurer is solely to the reinsured, and the party originally insured has no right of action against the reinsurer upon the contract of reinsurance.[2] In order to give him such a right of action it must clearly appear that the contract was made directly for his benefit.[3]

2. Under Reinsurance Contract Made for His Benefit — *a.* General Principles. — It is competent, however, for the reinsurer to make the reinsurance contract inure directly to the benefit of the party originally insured, and in jurisdictions where a third person is allowed to maintain an action on a contract made for his benefit, he may, in such a case, recover directly from the reinsurer. Thus, where in reinsuring risks for which policies are outstanding, the reinsurer contracts with the reinsured to assume the policies and to pay the holders thereof all such sums as the reinsured may become liable to pay, the persons to whom these original policies are payable acquire a direct right of action against the reinsurer, and can sue in their own names and recover upon the contract of reinsurance, and it is immaterial that they are not named in the policy or contract.[4] Under such circumstances the fact that before the reinsurance contract in question the reinsured had effected other policies of reinsurance with other parties for the same risk, and has collected the sums due under such policies, does not affect the right of the holder of an original policy to sue on the contract of reinsurance, unless such other policies of reinsurance were made for his benefit, so as to give him a claim under them and thus afford him double security.[5] The holder of an original policy of insurance acquires a right of action on a contract of reinsurance, where the original insurer sells its business and good will to another company, and the latter company in consideration thereof reinsures the risks of the first company, and contracts to pay the losses under the first company's outstanding policies.[6]

Issuance of New Policies by Reinsurer. — Where an underwriter reinsures all his outstanding risks and the contract provides for the issuance by the reinsurer

1. See *supra*, this title, *Nature of Reinsurance — Creates No Privity Between Reinsurer and Party Originally Insured.*

2. **First Insured Has No Right of Action on Contract of Reinsurance.** — Barnes *v.* Hekla F. Ins. Co., 56 Minn. 38, 45 Am. St. Rep. 438; Strong *v.* Phœnix Ins. Co., 62 Mo. 289, 21 Am. Rep. 417; Carrington *v.* Commercial F. & M. Ins. Co., 1 Bosw. (N. Y.) 152; Wise *v.* Morgan, 13 Daly (N. Y.) 402, *affirmed* 103 N. Y. 682; Mason *v.* Cronk, 125 N. Y. 500; Hoffman *v.* North British, etc., Ins. Co., (Supm. Ct. App. T.) 35 Misc. (N. Y.) 40. Goodrich's Appeal, 109 Pa. St. 523. See also Travelers' Ins. Co. *v.* California Ins. Co., 1 N. Dak. 151.

3. **That Reinsurance Is for Benefit of Insured Must Clearly Appear.** — Carrington *v.* Commercial F. & M. Ins. Co., 1 Bosw. (N. Y.) 152; Wise *v.* Morgan, 13 Daly (N. Y.) 402, *affirmed* 103 N. Y. 682; Atty.-Gen. *v.* Continental L. Ins. Co., (Supm. Ct. Gen. T.) 6 N. Y. St. Rep. 644; Goodrich's Appeal, 109 Pa. St. 523. See also Mason *v.* Cronk, 125 N. Y. 500. And *supra*, this title, *Construction and Interpretation.*

4. **Right of Original Insured to Sue on Contract of Reinsurance Made for His Benefit** — *California.* — Whitney *v.* American Ins. Co., 127 Cal. 464.

Kansas. — See Alliance Mut. L. Assur. Soc. *v.* Welch, 26 Kan. 641.

Minnesota. — Barnes *v.* Hekla F. Ins. Co., 56 Minn. 38, 45 Am. St. Rep. 438.

New York. — Glen *v.* Hope Mut. L. Ins. Co., 56 N. Y. 379, *affirming* 1 Thomp. & C. (N. Y.) 463; Fischer *v.* Hope Mut. L. Ins. Co., 69 N. Y. 161. *Compare* Atty.-Gen. *v.* Continental L. Ins. Co., (Supm. Ct. Gen. T.) 6 N. Y. St. Rep. 644.

North Carolina. — Shoaf *v.* Palatine Ins. Co., 127 N. Car. 308.

North Dakota. — Travelers' Ins. Co. *v.* California Ins. Co., 1 N. Dak. 151.

This result has been reached under a contract of reinsurance expressly providing that holders of original policies should not be entitled to enforce the contract against the reinsurer. Shoaf *v.* Palatine Ins. Co., 127 N. Car. 308.

5. Glen *v.* Hope Mut. L. Ins. Co., 56 N. Y. 379.

6. **Sale of Business and Good Will and Assumption of Policies.** — Alliance Mut. L. Assur. Soc. *v.* Welch, 26 Kan. 641; Johannes *v.* Phenix Ins. Co., 66 Wis. 50, 57 Am. Rep. 249; Fischer *v.* Hope Mut. L. Ins. Co., 40 N. Y. Super. Ct. 291, *affirmed* 69 N. Y. 161; Shoaf *v.* Palatine Ins. Co., 127 N. Car. 308. See also Whitney *v.* American Ins. Co., 127 Cal. 464. *Compare* Atty.-Gen. *v.* Continental L. Ins. Co., (Supm. Ct. Gen. T.) 6 N. Y. St. Rep. 644.

Recovery of Damages from Reinsurer for Failure of Reinsured to Keep Original Policy Alive. — Fischer *v.* Hope Mut. L. Ins. Co., 40 N. Y. Super. Ct. 291, *affirmed* 69 N. Y. 161.

of new policies to the original policy holders, and such policies are accordingly issued and accepted, the holders thereof can, of course, maintain thereon direct actions against the reinsurer.[1]

Reinsurer Cannot Sue on Policy Issued to First Insured. — Where the agreement between the parties is for a reinsurance, but subsequently the agreement is altered and the reinsurer issues a policy directly to the first insured, and the policy is in the form of an original insurance, the party intended to be reinsured under the original agreement cannot maintain an action on the policy; for in such a case the completed transaction is an original insurance solely for the benefit of the policy holder.[2]

b. ORIGINAL INSURER NOT RELEASED FROM LIABILITY WITHOUT CONSENT OF INSURED. — A novation cannot be established so as to give the first insured a right of action against the reinsurer and to release the first insurer from his liability, without the assent of the first insured, since one party to a contract cannot, by any bargain that he may make with a third person, deprive the other party of his right to rely on his own contract. In brief, while under a reinsurance the first insured may acquire a right of action against the reinsurer, he cannot without his assent be deprived of his right of action against the first insurer.[3]

c. INSURED NOT PUT TO AN ELECTION OF REMEDIES. — Where the contract of reinsurance is made directly for the benefit of the original insured so as to give him a direct right of action against the reinsurer, the original insured is not put to an election as to which party he shall sue, but he may proceed either against the original insurer or the reinsurer, although he can have but one satisfaction; provided, however, that there is not a substitution of debtors, or a novation. These remedies are not inconsistent. In such a case it seems that an action against one of the parties is not a bar to an action against the other; thus if the original insured files his claim in insolvency proceedings against the reinsurer, his right of action against the original insurer is not thereby barred.[4] It has moreover been held that where the reinsurer assumes

1. Reinsurer Issuing New Policies to First Insured. — Peoples' Mut. Assur. Fund *v.* Boesse, 92 Ky. 290; Cahen *v.* Continental L. Ins. Co., 69 N. Y. 300, *reversing* 41 N. Y. Super. Ct. 296. And in such a case the written request of the first insured to the reinsurer for a transfer of the insurance, has been held to constitute an acceptance of a new policy in advance. Peoples' Mut. Assur. Fund *v.* Boesse, 92 Ky. 290. See also National Mut. Ins. Co. *v.* Home Ben. Soc., 181 Pa. St. 443, 59 Am. St. Rep. 666.

Statement Made in Application for First Policy — Warranty. — Under the circumstances indicated in the text, where the new policy recites that it is issued " for and in consideration and upon the faith of " statements and warranties contained in an application for insurance to the first insurer; in an action upon this policy the reinsurer will not be permitted to show that the policy was issued upon the faith of a " health certificate " executed by the plaintiff at the time the policy was issued, since such defense would show an inconsistent and not merely an additional consideration for the last policy. Peoples' Mut. Assur. Fund *v.* Boesse, 29 Ky. 290.

Reinsurance Without Medical Examination. — Where an assessment life insurance association has insured a person, by reinsurance, without a medical examination as required by its by-laws, it cannot resist payment on the certificate for want of such examination, since a corporation may waive the provisions of its by-laws. Watts *v.* Equitable Mut. L. Assoc., 111 Iowa 90.

To What Time Warranty Relates. — Cahen *v.* Continental L. Ins. Co., 69 N. Y. 300. See also Foster *v.* Mentor L. Assur. Co., 3 El. & Bl. 48, 77 E. C. L. 48.

Character of Particular Risk Immaterial. — Cahen *v.* Continental L. Ins. Co., 69 N. Y. 300. See also National Mut. Ins. Co. *v.* Home Ben. Soc., 181 Pa. St. 443, 59 Am. St. Rep. 666.

2. No Right of Action by Reinsured. — Excelsior F. Ins. Co. *v.* Royal Ins. Co., 55 N. Y. 343, 14 Am. Rep. 271, *affirming* 7 Lans. (N. Y.) 138. See also Merchants' Ins. Co. *v.* Union Ins. Co., 162 Ill. 173, *reversing* 58 Ill. App. 611.

3. Consent of First Insured Essential to Novation. — Barnes *v.* Hekla F. Ins. Co., 56 Minn. 38, 45 Am. St. Rep. 438; Barden *v.* St. Louis Mut. L. Ins. Co., 3 Mo. App. 248; Price *v.* St. Louis Mut. L. Ins. Co. 3 Mo. App. 262; Iowa L. Ins. Co. *v.* Eastern Mut. L. Ins. Co., 64 N. J. L. 351; People *v.* Empire Mut. L. Ins. Co., 92 N. Y. 105; Smith *v.* St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 736. See also Davenport F. Ins. Co. *v.* Moore, 50 Iowa 626, and the following subsection. See generally the title NOVATION, vol. 21, p. 659.

4. Original Insured May Sue Either Insurer or Reinsurer. — Barnes *v.* Hekla F. Ins. Co., 56 Minn. 38, 45 Am. St. Rep. 438. See also Fischer *v.* Hope Mut. L. Ins. Co., 40 N. Y. Super. Ct. 291, *affirmed* 69 N. Y. 161. But see Atty.-Gen. *v.* Continental L. Ins. Co., (Supm. Ct. Gen. T.) 6 N. Y. St. Rep. 644.

the payment of the original policies, his liability to the policy holders is joint with that of the reinsured and that both may be sued as co-defendants.[1]

3. Under Assignment of Reinsurance Policy. — After a loss has occurred on a policy of original insurance, the risk under which has been reinsured, the party reinsured may assign the policy of reinsurance to the party originally insured, and the latter may, in equity or under the "code system," maintain an action against the reinsurer on the assigned policy. In such a case the assignment is in effect merely of a right of action, and the fact that the policy of reinsurance contains a clause providing that the reinsurance thereby effected shall not be assignable or salable, relates only to an assignment made before a loss has occurred under the original policy.[2] An action on the original policy of insurance against the original insurer cannot, however, properly be joined with an action against the reinsurer upon an assigned policy of reinsurance, and there cannot be a joint judgment against the two parties, since in respect to the facts in issue there is no privity between the parties defendant.[3]

VII. Rights, Duties, and Liabilities of Parties to the Contract — 1. In Respect to Extent of Reinsurance — *a.* Reinsurance of Whole or Part of Risk. — In the absence of a statutory provision, known usage, or specific stipulation to the contrary, it is competent for an insurance company to reinsure the whole of a risk under an original policy, as well as a part thereof, and a contract for such reinsurance is valid and binding.[4]

b. Reinsurance of All Outstanding Risks. — Likewise it has been held that an insurance company may reinsure all of its outstanding risks, as well as any particular part of them, and that this course of action presents merely a question of policy for the company, dependent upon its circumstances or its purposes for the future.[5] Instances of this practice are common.[6]

c. Reinsurance of Different Portions of Risk with Different Companies. — In the absence of a statute, a known custom, or a stipulation in the policy to the contrary, an insurer who has reinsured part of a risk with one company may lawfully reinsure the residue of the risk with another company; and in such a case each reinsurer will be liable according to his contract.[7] Likewise where a policy of reinsurance is limited by its terms to so much of the original insurer's risk as exceeds a certain sum, this does not prevent the insurer from effecting reinsurance elsewhere to an amount within the sum mentioned; and consequently, another reinsurance limited to that sum does not render invalid the first reinsurance in excess of that sum.[8]

d. Local Custom as to Division of Risk. — Where there is a well-settled local custom among underwriters to divide the risk — that is, for the reinsurer to assume part and the reinsured to retain part — and the application for reinsurance is silent as to the extent of the risk desired to be

1. Reinsurer and Reinsured Jointly Liable. — Whitney *v.* American Ins. Co., 127 Cal. 464.

2. Assignment of Policy to First Insured. — Lee *v.* Fraternal Mut. Ins. Co., 1 Handy (Ohio) 217. See also Consolidated Real Estate, etc., Ins. Co. *v.* Cashow, 41 Md. 78.

3. Reinsurer and Reinsured Not Jointly Liable. — Lee *v.* Fraternal Mut. Ins. Co., 1 Handy (Ohio) 217.

4. Whole of Risk May Be Reinsured. — Fire Ins. Assoc. *v.* Canada F. & M. Ins. Co., 2 Ont. 481, 495; Insurance Co. of North America *v.* Hibernia Ins. Co., 140 U. S. 565; Chalaron *v.* Insurance Co. of North America, 48 La. Ann. 1582; Goodrich's Appeal, 109 Pa. St. 523. But see *infra*, this section, *Local Custom as to Division of Risk*.

5. All Outstanding Risks May Be Reinsured. — Goodrich's Appeal, 109 Pa. St. 523; Jameson *v.* Hartford F. Ins. Co., 14 N. Y. App. Div. 380.

6. See Fire Ins. Assoc. *v.* Canada F. & M. Ins. Co., 2 Ont. 481, 495; Davenport F. Ins. Co. *v.* Moore, 50 Iowa 626; Fischer *v.* Hope Mut. L. Ins. Co., 40 N. Y. Super. Ct. 291, *affirmed* 69 N. Y. 161; Cahen *v.* Continental L. Ins. Co., 69 N. Y. 300, *reversing* 41 N. Y. Super. Ct. 296; Johannes *v.* Phenix Ins. Co., 66 Wis. 50, 57 Am. Rep. 249.

7. Several Reinsurances on Different Portions of Risk. — Fire Ins. Assoc. *v.* Canada F. & M. Ins. Co., 2 Ont. 481, 495.

8. Insurance Co. of North America *v.* Hibernia Ins. Co., 140 U. S. 565.

reinsured, the custom forms a material provision of the contract, and this is violated by the reinsurance of that part of the risk which the reinsured ought to retain.[1] Such a custom, however, does not affect a policy of reinsurance which is executed in a place where the custom obtains, but which becomes operative only by acceptance in a place where the custom does not obtain.[2]

e. DOUBLE REINSURANCE — CONTRIBUTION BETWEEN REINSURERS. — Where an insurance company reinsures the same risk with two different reinsurers, there then exists what is termed a double reinsurance. Under these circumstances the reinsured is entitled to but one satisfaction, and the liabilities of the respective reinsurers are ratable only; hence if one reinsurer pays the amount for which he is liable on his contract, he may recover contribution from the other.[3]

2. In Respect to Misrepresentation and Concealment. — Where an underwriter is seeking to reinsure his risks, his duty to disclose all material facts is no less than the similar duty imposed upon a person seeking an original insurance; the obligation in both cases is one of the strictest good faith.[4] In some instances indeed the duty of the reinsured in this respect may be greater than the duty of one seeking an original insurance.[5] Although as to misrepresentation, concealment, and the like, the rules applicable to cases of original insurance will perhaps generally apply to cases of reinsurance, yet, inasmuch as these rules are not uniform, but vary to some extent according to the kind of insurance in question, it seems clear that in particular reinsurance cases that may arise the law will vary accordingly, and that the few decisions that are to be found on this branch of reinsurance will hardly of themselves furnish complete criteria. In this connection, therefore, the titles dealing with the different classes of original insurance should be consulted.[6]

The Following Principles have been declared by the courts to be applicable to cases of reinsurance: An underwriter entering into a policy of reinsurance is obliged to communicate to the reinsurer his knowledge of all facts and circumstances which are material to the risk or to the amount of premium to be charged, and which are likely to influence the judgment of the reinsurer in accepting the risk, and his failure in this respect will be ground for declaring the policy of reinsurance to be void.[7] In such a case the question whether

1. Local Custom as to Division of Risk. — Louisiana Mut. Ins. Co. *v.* New Orleans Ins. Co., 13 La. Ann. 246. See also Traill *v.* Baring 10 Jur. N. S. 87, *affirmed* 10 Jur. N. S. 377. *Compare* Chalaron *v.* Insurance Co. of North America, 48 La. Ann. 1582.

Misrepresentation by Reinsured as to Retaining Part of Risk. — See *infra*, this section, *In Respect to Misrepresentation and Concealment.*

2. Conflict of Laws. — Thus where an open policy of reinsurance "for the account of whom it may concern" was executed in New Orleans, La., and sent to Philadelphia, Pa., where it was to become operative by the acceptance of a risk by the insurer's agent, which was done; it was held that this was a contract made in Pennsylvania, since it did not become operative until the acceptance of the risk, and therefore, that a local usage of the character mentioned, obtaining in New Orleans, did not affect the policy. Insurance Co. of North America *v.* Hibernia Ins. Co., 140 U. S. 565.

For a Full Discussion of the principle involved, see the title PRIVATE INTERNATIONAL LAW, vol. 22, p. 1349.

3. Contribution Between Reinsurers in Case of Double Reinsurance. — Fire Ins. Assoc. *v.* Canada F. & M. Ins. Co., 2 Ont. 495. See generally the titles CONTRIBUTION AND EXONERATION, vol. 7, p. 352; INSURANCE, vol. 16, p. 841 *et seq.*

4. Misrepresentation and Concealment. — Traill *v.* Baring, 10 Jur. N. S. 87, *affirmed* 10 Jur. N. S. 377; Sun Mut. Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485; Louisiana Mut. Ins. Co. *v.* New Orleans Ins. Co., 13 La. Ann. 248. See also the title INSURANCE, vol. 16, pp 919, 932 *et seq.*, and the cross-references given at the beginning of that title.

5. Thus in reinsurance the party seeking to shift the risk he has taken is bound to communicate to the reinsurer his knowledge of the character of the original party insured in every case where such information would be likely to influence the judgment of an underwriter; while in cases of original insurance, it has been said that the party insured "was not bound, nor could it be expected that he should speak evil of himself." Sun Mut. Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485, *quoting* the language of Bronson, J., in New York Bowery F. Ins. Co. *v.* New York F. Ins. Co., 17 Wend. (N. Y.) 367.

6. See the titles referred to in the Cross-reference table of the title INSURANCE, vol. 16, p. 837.

7. Traill *v.* Baring, 10 Jur. N. S. 87, *affirmed*

the omission was the result of mistake or design is not an important inquiry. The duty of communication is independent of intention and is violated by the fact of concealment, even where there is no design to deceive.[1] This duty may be violated, even where the concealment arises from a mistaken apprehension that the communication of the fact in question would be slanderous.[2] The reinsured cannot excuse himself for failure to communicate to the reinsurer all facts material to the risk upon the ground that these facts were actually known to the reinsurer, unless perhaps the knowledge of the latter was as full and complete as his own.[3] In brief, if the facts in question are material, the reinsured acts at his peril in withholding the information.[4]

Misrepresentation as to Retaining Part of Risk. — Where an underwriter in negotiating for a policy of reinsurance on a risk which he has insured, stipulates or represents that he will retain a portion of the risk, and the contract of reinsurance is made upon the faith of that statement, but when the contract is concluded between the parties the representation is in fact untrue by reason of the fact that the reinsured has not retained a portion of the risk but has reinsured it with another company, the policy of reinsurance will be declared void as falling within the principle that an untrue representation of a material, existing, independent, or collateral fact affecting a risk vitiates the policy.[5] Where the contract of reinsurance is made in a place where a custom obtains that the reinsured shall retain a part of the risk, and the application for reinsurance states falsely that the reinsured has insured a portion of the property to which the reinsurance relates, it is held that the misrepresentation is material and is fatal to the contract.[6]

Promissory Representation Not Incorporated in Policy. — But where the reinsured, before the policy of reinsurance is issued, makes a promissory representation, without fraud or falsehood, that he will retain part of the risk, and this representation is not incorporated in the policy when issued, his subsequent failure to comply therewith does not constitute a ground of defense to an action on the policy; the reasons being that the written instrument subsequently executed constitutes the only evidence of the duties and obligations of the parties, and that an oral representation honestly made, as to a future fact, can have no legal effect upon a subsequently written contract which does not contain it.[7]

3. In Respect to Waiver of Conditions and Increase of Risk. — It is generally conceded that where an existing risk is reinsured, nothing should be done by the party reinsured, without the reinsurer's consent, to alter substantially the nature or extent of the risk, whereby the reinsurer may be prejudiced or his liability increased; and that such an act will avoid the policy or contract of reinsurance.[8] Thus, where the waiver of a condition in a policy of reinsurance will result in an increase of the original risk, the waiver of it, as between the

10 Jur. N. S. 377; Sun Mut. Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485; New York Bowery F. Ins. Co. *v.* New York F. Ins. Co., 17 Wend. (N. Y.) 362; Louisiana Mut. Ins. Co. *v.* New Orleans Ins. Co., 13 La. Ann. 246.

1. Sun Mut. Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485; New York Bowery F. Ins. Co. *v.* New York F. Ins. Co., 17 Wend. (N. Y.) 362.

2. New York Bowery F. Ins. Co. *v.* New York F. Ins. Co., 17 Wend. (N. Y.) 359.

3. Sun Mut. Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485.

4. New York Bowery F. Ins. Co. *v.* New York F. Ins. Co., 17 Wend. (N. Y.) 359.

5. **Misrepresentation by Reinsured as to Retaining Part of Risk — Cancellation of Policy.** — Traill *v.* Baring, 10 Jur. N. S. 87, *affirmed* 10 Jur. N. S. 377, holding that under the circumstances the policy of reinsurance should be delivered up for cancellation.

6. Louisiana Mut. Ins. Co. *v.* New Orleans Ins. Co., 13 La. Ann. 246.

7. **Failure to Comply with Oral Promissory Representation No Defense.** — Prudential Assur. Co. *v.* Ætna L. Ins. Co., 52 Conn. 576, 23 Fed. Rep. 438, *distinguishing* Trail *v.* Baring, 10 Jur. N. S. 377.

For a Full Discussion of the Rule that Oral Agreements Are Presumed to Be Merged in a Subsequent Written Contract, see the title PAROL EVIDENCE vol. 21, p. 1077.

For a Full Discussion of Representations as to Matters in Futuro, see the title FRAUD AND DECEIT, vol. 14, p. 47 *et seq.*

8. **Liability of Reinsurer Shall Not Be Increased Without His Consent.** — Lower Rhine, etc., Ins. Assoc. *v.* Sedgwick, (1899) 1 Q. B. 179, 80 L. T. N. S. 6, (*reversing* (1898) 1 Q. B. 739, 78 L. T. N. S. 499); Fire Ins. Assoc. *v.* Canada F. & M. Ins. Co., 2 Ont. 493; St. Nicholas Ins.

reinsured and the first insured without the reinsurer's consent, will avoid the policy.[1] The effect of a waiver of condition by the reinsured, however, so far as regards the reinsurer, appears to depend largely upon the question whether the waiver will operate to enhance the risk and so increase the reinsurer's burden; and unless the contrary is specially provided in the policy or contract of reinsurance, there seems to be nothing in the nature of that contract to prevent the reinsured from assenting to any reasonable or proper waiver of conditions of the original policy, provided it is made in good faith and is not shown to be likely to affect the loss or to increase the burdens of the reinsurer.[2] Thus the rights of the reinsurer have been held not violated, and the reinsurance not avoided, by the assent of the reinsured to an assignment of the original policy which did not produce an increase of the risk.[3] Likewise the transfer of the legal title to the property insured accompanied by an assignment of the policy, this being done with the consent of the reinsured, has been held not to affect the reinsurer's liability, although it was done without his knowledge or consent.[4] And where the subject-matter of the first insurance was personal property, the giving of a chattel mortgage upon a portion thereof with the assent of the reinsured, but without the assent of the reinsurer, has been held not to release the latter from liability, inasmuch as his burden was in no way increased by the giving of the mortgage.[5]

Unauthorized Use of Property Insured. — The rules applicable to original insurance in cases where by an unauthorized or unusual use of the premises insured the risk is increased, are applicable to cases of reinsurance.[6]

4. In Action on Contract of Reinsurance — *a.* NOTICE AND PROOF OF LOSS. — In ordinary cases of reinsurance, the reinsured in order to recover on the contract is obliged to prove the subject at risk and the loss thereof, in the same manner as if the first insured were the plaintiff and the action were upon the original policy.[7] The reinsured must show that a claim exists against him for the loss, and that the claim is valid.[8] Where the reinsured has paid the loss, he cannot by showing the mere fact of payment establish a sufficient proof of the loss and thereby place upon the reinsurer the burden of showing that the loss was wrongfully paid.[9] In respect to these requirements, no distinction exists between reinsurance and original insurance.[10]

Co. *v.* Merchants' Mut. F. & M. Ins. Co., 83 N. Y. 604, *reversing* 11 Hun (N. Y.) 108.

1. St. Nicholas Ins. Co. & Merchants' Mut. F. & M. Ins. Co., 83 N. Y. 604, *reversing* 11 Hun (N. Y.) 108.

2. Effect of Waiver as to Reinsurer Dependent upon Increase of Risk. — Fire Ins. Assoc. *v.* Canada F. & M. Ins. Co., 2 Ont. 481; Faneuil Hall Ins. Co. *v.* Liverpool, etc., Ins. Co., 153 Mass. 63. See also Consolidated Real Estate, etc., Ins. Co. *v.* Cashow, 41 Md. 59.

3. Assignment of Original Policy Without Reinsurer's Consent Held Not to Affect Reinsurance. — Faneuil Hall Ins. Co. *v.* Liverpool, etc., Ins. Co., 153 Mass. 63.

4. Manufacturers' F. & M. Ins. Co. *v.* Western Assur. Co., 145 Mass. 419.

5. Giving Chattel Mortgage on Property Insured. — Fire Ins. Assoc. *v.* Canada F. & M. Ins. Co., 2 Ont. 493.

6. Washington Mut. Ins. Co. *v.* Merchants, etc., Mut. Ins. Co., 5 Ohio St. 457. See generally the title FIRE INSURANCE COMPANY, vol. 13, p. 284 *et seq.*

7. Reinsured Must Prove Subject at Risk and Loss Thereof. — Phœnix Ins. Co. *v.* Erie, etc., Transp. Co., 117 U. S. 323; Eastern R. Co. *v.* Relief F. Ins. Co., 98 Mass. 423; Yonkers, etc., F. Ins. Co. *v.* Hoffman F. Ins. Co., 6 Robt. (N. Y.) 316; Pennsylvania Ins. Co. *v.* Telfair, 45 N. Y. App. Div. 564; *reversing* (Supm. Ct. Tr. T.) 27 Misc. (N. Y.) 247. See also Hastie *v.* De Peyster, 3 Cai. (N. Y.) 190. *Compare* North Pennsylvania F. Ins. Co. *v.* Susquehanna Mut. F. Ins. Co., 2 Pearson (Pa.) 291.

Under a contract of reinsurance whereby all the outstanding policies of the reinsured are assumed by the reinsurer, and all the agencies of the former are revoked and transferred to agents of the latter, and reinsurer and reinsured become jointly liable to the first insured; proof of loss directed to the reinsured (which issued the policy under which the loss occurred) and presented to the authorized agents of the reinsurer within a proper time after the loss, has been held sufficient as against both companies. Whitney *v.* American Ins. Co., 127 Cal. 464.

8. Yonkers, etc., F. Ins. Co. *v.* Hoffman F. Ins. Co., 6 Robt. (N. Y.) 320; Pennsylvania Ins. Co. *v.* Telfair, 45 N. Y. App. Div. 564; *reversing* (Supm. Ct. Tr. T.) 27 Misc. (N. Y.) 247.

9. Yonkers, etc., F. Ins. Co. *v.* Hoffman F. Ins. Co., 6 Robt. (N. Y.) 320.

10. Yonkers, etc , F. Ins. Co. *v.* Hoffman F. Ins. Co., 6 Robt. (N. Y.) 316. See generally the title INSURANCE, vol. 16, p. 959.

Stipulation for Giving Notice and Proof of Loss Within Fixed Time. — The reinsured is bound by a stipulation in the policy of reinsurance that notice and proof of loss shall be given to the reinsurer within a certain designated time.[1]

Preliminary Proofs. — In an action on a policy of reinsurance, preliminary proofs are not evidence in chief except to show a compliance with a condition in the policy, and do not constitute evidence of the loss.[2]

Stipulation that Adjustment Between Reinsured and First Insured Shall Be Controlling. — Where the policy of reinsurance provides that it shall be " subject to the same risks, valuations, conditions, and mode of settlement as are or may be adopted or assumed " by the reinsured in respect to the original policy, and these matters have been settled between the reinsured and the original insured, these stipulations dispense with the necessity for the reinsured to furnish the reinsurer with preliminary proofs of loss, and render such proof wholly unnecessary.[3]

Objections to Proofs of Loss. — Where the reinsured has served upon the reinsurer notice and proof of loss, objections thereto must be made by the reinsurer within a reasonable time, or the objections will be deemed to have been waived.[4]

In Case of Abandonment and Total Loss. — Although the first insured, in a case of marine insurance, has abandoned to his insurer as for a total loss, the reinsured is not obliged to abandon in turn to the reinsurer, in order to recover against the latter.[5] Neither need notice of abandonment by the first insured be given to the reinsurer.[6]

b. EFFECT OF ESTABLISHING VALIDITY OF ORIGINAL CLAIM. — If the reinsured establishes that the claim against him under the original policy was valid, he then makes out a *prima facie* case for recovery against the reinsurer.[7]

c. PAYMENT OF LOSS NOT PREREQUISITE TO RECOVERY BY REINSURED. — In the absence of a contrary provision in the policy, it is not necessary for the party reinsured to pay the loss to the party originally insured before proceeding against the reinsurer, but if the liability has accrued, he may at once resort to his action on the contract of reinsurance.[8] And an intention to make the payment of the loss a condition precedent to a recovery on the policy of reinsurance must clearly and unequivocally appear from the terms of that instrument.[9]

1. Notice and Proof of Loss Within Certain Time. — Eastern R. Co. *v.* Relief F. Ins. Co., 98 Mass. 420. See also New York Bowery F. Ins. Co. *v.* New York F. Ins. Co., 17 Wend. (N. Y.) 359.

2. Preliminary Proofs of Loss as Evidence. — Yonkers, etc., F. Ins. Co. *v.* Hoffman F. Ins. Co., 6 Robt. (N. Y.) 316. See generally the title INSURANCE, vol. 16, p. 968.

3. When Preliminary Proofs of Loss Unnecessary. — Consolidated Real Estate, etc., Ins. Co. *v.* Cashow, 41 Md. 59.

4. Waiver of Objections to Notice and Proofs of Loss. — *Ex p.* Norwood, 3 Biss. (U. S.) 504; Cashau *v.* Northwestern Nat. Ins. Co., 5 Biss. (U. S.) 476. See generally the title INSURANCE, vol. 16, p. 959.

5. Abandonment to Reinsurer Not Necessary. — Hastie *v.* De Peyster, 3 Cai. (N. Y.) 190.

6. Notice of Abandonment Not Necessary. — Uzielli *v.* Boston Marine Ins. Co., 15 Q. B. D. 11.

7. Hastie *v.* De Peyster, 3 Cai. (N. Y.) 195.

8. Reinsured May Sue Without Paying Loss. — Fire Ins. Assoc. *v.* Canada F. & M. Ins. Co., 2 Ont. 498; *In re* Republic Ins. Co., 8 Nat. Bankr. Reg. 197, 20 Fed. Cas. No. 11,705; Eagle Ins. Co. *v.* Lafayette Ins. Co., 9 Ind. 447; Gantt *v.* American Cent. Ins. Co., 68 Mo. 503; Hone *v.* Mutual Safety Ins. Co., 1 Sandf. (N. Y.) 137, *affirmed* 2 N. Y. 235; Norwood *v.* Resolute F. Ins. Co., (N. Y. Super. Ct.) 47 How. Pr. (N. Y.) 43; Fame Ins. Co.'s Appeal, 83 Pa. St. 396; Goodrich's Appeal, 109 Pa. St. 529.

9. *In re* Eddystone Marine Ins. Co., (1892) 2 Ch. 423; *Ex p.* Norwood, 3 Biss. (U. S.) 504; *In re* Republic Ins. Co., 8 Nat. Bankr. Reg. 197, 20 Fed. Cas. No. 11,705; Cashau *v.* Northwestern Nat. Ins. Co., 5 Biss. (U. S.) 476; Norwood *v.* Resolute F. Ins. Co., (N. Y. Super. Ct.) 47 How. Pr. (N. Y.) 43; Fame Ins. Co.'s Appeal, 83 Pa. St. 396.

Construction of Particular Clauses. — Under a clause in a reinsurance policy providing that the loss, if any, should be " payable *pro rata* at the same time and with the reinsured," it was held that it was not necessary that actual payment by the reinsured should precede or accompany payment by the reinsurer, but that the clause merely fixed the time of payment by the reinsurer and made it the same as was fixed for payment by the reinsured. Blackstone *v.* Alemannia F. Ins. Co., 56 N. Y. 104, *affirming* 4 Daly (N. Y.) 299.

A clause in a policy providing that in case

d. REMEDIES. — The liability arising under a contract of reinsurance is ordinarily enforced by a common-law action.[1] But in *Pennsylvania* a bill in equity has been maintained.[2]

e. DEFENSES. — In an action by the reinsured against the reinsurer on a policy of reinsurance it is a general rule that the reinsurer is entitled to avail himself of every defense and to take every objection which the reinsured might urge in defense to an action by the party originally insured.[3]

Ascertaining What Defenses Are Available — Where Loss Not Adjusted. — In determining what defenses might be made by the reinsured as against the original insured, the court considers the case as it stands at the time when the reinsurer is sued, except as to the fact of payment by the original insurers. Where the original insurers have not paid or adjusted the loss, and the case, as between them and the original insured stands upon the terms of the policy and the facts connected with the loss at the time the action is brought against the reinsurers, then the latter should be permitted to make every defense which the original insurers could then make.[4] This rule is especially applicable in a case where by the terms of the reinsurance policy it is provided that the liabilities of the reinsurers shall be controlled solely by the terms of the original policy.[5]

f. EXTENT OF REINSURER'S LIABILITY — (1) *In Absence of Special Stipulations.* — The ordinary contract of reinsurance binds the reinsurer to pay to the reinsured the whole loss that the latter has sustained in respect to the subject insured, to the extent of the sum for which the contract of reinsurance was made; in other words, the liability of the reinsurer is measured by the liability of the party reinsured, provided this does not exceed the amount of the reinsurance.[6] In ascertaining the amount recoverable on the contract of reinsurance, the amount which the reinsured has actually paid to discharge his liability to the original insured is not material, unless, of course, the contract of reinsurance otherwise provides; in brief the material inquiry is, not what the reinsured has paid, but what he has become liable to pay by reason of the loss.[7] This principle is a necessary consequence of the broader rule

of loss the reinsurer "shall pay *pro rata* at and in the same time and manner as the reinsured," has been held to mean merely that the reinsurer should pay at and in the same time and manner as the reinsured should pay or be bound to pay, according to the original policy, and that the reinsurer should have all the advantages of the time and manner of payment specified in the original policy. Cashau *v.* Northwestern Nat. Ins. Co., 5 Biss. (U. S.) 476. For like constructions of similar clauses, see *In re* Eddystone Marine Ins. Co., (1892) 2 Ch. 423; *In re* Republic Ins. Co., 8 Nat. Bankr. Reg. 197, 20 Fed. Cas. No. 11,705; *Ex p.* Norwood, 3 Biss. (U. S.) 504; Norwood *v.* Resolute F. Ins. Co., (N. Y. Super. Ct.) 47 How. Pr. (N. Y.) 43.

1. See generally the cases throughout this subdivision of this section.

2. Fame Ins. Co.'s Appeal, 83 Pa. St. 396.

3. **Same Defenses Available to Reinsurer as to Reinsured.** — New York State Marine Ins. Co. *v.* Protection Ins Co., 1 Story (U. S.) 458; Eastern R. Co. *v.* Relief F. Ins. Co., 98 Mass. 423; Strong *v.* Phœnix Ins. Co., 62 Mo. 296, 21 Am. Rep. 417; Gantt *v.* American Cent. Ins. Co., 68 Mo. 503; Hastie *v.* De Peyster, 3 Cai. (N. Y.) 190; Delaware Ins. Co. *v.* Quaker City Ins. Co., 3 Grant Cas (Pa.) 72.

Rule Unaffected by Consent of Reinsured to Constructive Total Loss by Abandonment. — Merchants' Mut. Ins. Co. *v.* New Orleans Ins. Co., 24 La. Ann. 305.

No Waiver of Defense When Facts Not Known. — German-American Ins. Co. *v.* Commercial F. Ins. Co., 95 Ala. 469.

4. **How Defenses Are Ascertained — Loss Not Adjusted.** — Eagle Ins. Co. *v.* Lafayette Ins. Co., 9 Ind. 447.

5. Eagle Ins. Co. *v.* Lafayette Ins. Co., 9 Ind. 447. See also North Pennsylvania F. Ins. Co. *v.* Susquehanna Mut. F. Ins. Co., 2 Pearson (Pa.) 291; and *infra*, this section, *Extent of Reinsurer's Liability.*

6. **Liability of Reinsurer Measured by Liability of Reinsured.** — *In re* Republic Ins. Co., 8 Nat. Bankr. Reg. 197, 20 Fed. Cas. No. 11,705; Cashau *v.* Northwestern Nat. Ins. Co., 5 Biss. (U. S.) 479; *Ex p.* Norwood, 3 Biss. (U. S.) 504; Eagle Ins. Co. *v.* Lafayette Ins. Co., 9 Ind. 447; Chalaron *v.* Insurance Co. of North America, 48 La. Ann. 1,582; Gantt *v.* American Cent. Ins. Co., 68 Mo. 540; Herckenrath *v.* American Mut. Ins. Co., 3 Barb. Ch. (N. Y.) 63; Hone *v.* Mutual Safety Ins. Co., 1 Sandf. (N. Y.) 137, *affirmed* 2 N. Y. 235. See also *infra*, this title, *Insolvency of Reinsured.*

In *Illinois*, however, a different principle has been announced. See *infra*, this section, par. *Compromise Between Reinsured and Original Insured.*

7. *Ex p.* Norwood, 3 Biss. (U. S.) 504; *In re*

that the reinsured may maintain an action against the reinsurer without showing payment of the loss.[1]

Usage as to Amount Recoverable. — Where there is no ambiguity in the contract or policy of reinsurance it is not competent to limit the amount recoverable under it by proof of a local usage by which the reinsurer pays the same proportion of the entire loss sustained by the original insured that the sum reinsured bears to the sum of the first insurance.[2]

Liability Limited to Amount of Original Insurance. — It is a cardinal principle of the law of reinsurance that the reinsurer cannot be liable on his contract of reinsurance for more than the amount of the original insurance.[3]

Compromise Between Reinsured and Original Insured. — Where upon a loss under an original policy the reinsured compromises and discharges his liability to the original insured for a sum which is less than the amount of the original policy, this fact does not in any way affect the liability of the reinsurer to the full amount of the policy of reinsurance; and, of course, if the amount so paid is greater than the amount reinsured, the result is the same; that is, the reinsurer must nevertheless pay the whole amount of the reinsurance, provided, of course, in all such cases, that the policy of reinsurance contains no provisions for prorating the loss or limiting the liability of the reinsurer.[4] A different principle has been announced in *Illinois*, however, and it seems to be the rule in that jurisdiction that where an insurance company has reinsured a particular risk in another company for a specified sum, and the company reinsured discharges its liability to the party originally insured by the payment of a sum less than the maximum amount of the original policy, the amount of this payment is the measure of recovery against the reinsurers; in other words, that the actual loss sustained by the reinsured is the measure of indemnity to which he is entitled in a case where this sum is less than the sum of the original insurance.[5]

Liability as Affected by Salvage. — In the case of a technical total loss, by the abandonment the property salved passes to the insurer, and, according to its value, reduces practically the amount to be paid by him; and the reinsurer in

Republic Ins. Co., 8 Nat. Bankr. Reg. 197, 20 Fed. Cas. No. 11,705; Cashau *v.* Northwestern Nat. Ins. Co., 5 Biss. (U. S.) 479; Gantt *v.* American Cent. Ins. Co., 68 Mo. 540; Herckenrath *v.* American Mut. Ins. Co., 3 Barb. Ch. (N. Y.) 63.

1. Gantt *v.* American Cent. Ins. Co., 68 Mo. 540. See *supra*, this section, *Payment of Loss Not Prerequisite to Recovery by Reinsured*.

2. Hone *v.* Mutual Safety Ins. Co., 1 Sandf. (N. Y.) 137, *affirmed* 2 N. Y. 235. See generally the title USAGES AND CUSTOMS.

3. **No Liability Beyond Amount of Original Insurance.** — Iowa L. Ins. Co. *v.* Eastern Mut. L. Ins. Co., 64 N. J. L. 348; Delaware Ins. Co. *v.* Quaker City Ins. Co., 3 Grant Cas. (Pa.) 72. See also Merchants' Mut. Ins. Co. *v.* New Orleans Mut. Ins. Co., 24 La. Ann. 307.

Amount of Original Insurance Not in Evidence. — Consequently where the contract of reinsurance is for a certain sum, while the amount of the original policy does not appear, the sum mentioned in the contract of reinsurance will be the maximum of the reinsurer's liability, but will not necessarily be the measure of that liability, since the liability of the reinsured under the original policy may be for less than the amount of the reinsurance. Iowa L. Ins. Co. *v.* Eastern Mut. L. Ins. Co., 64 N. J. L. 348.

4. **Reinsurer's Liability Unaffected by Compromise of Original Claim.** — Commercial Mut. Ins. Co. *v.* Detroit F. & M. Ins. Co., 38 Ohio St. 11, 43 Am. Rep. 413. See also Gantt *v.* American Cent. Ins. Co., 68 Mo. 534; Merchants' Mut. Ins. Co. *v.* New Orleans Mut. Ins. Co., 24 La. Ann. 305.

5. **Illinois Rule.** — Illinois Mut. F. Ins. Co. *v.* Andes Ins. Co., 67 Ill. 362, 16 Am. Rep. 620, (*disapproving* Eagle Ins. Co. *v.* Lafayette Ins. Co., 9 Ind. 443, and Hone *v.* Mutual Safety Ins. Co., 1 Sandf. (N. Y.) 137). In this case, although the decision might have been put upon the ground that there was a provision in the policy of reinsurance for prorating the loss (see *infra*, this section and subdivision, *As Affected by Special Stipulations — Stipulation for Prorating Loss*, notes), the case was evidently not rested solely on that ground; for it was said, *per* Sheldon, J., at p. 365, "We can understand how the reinsured party, where the amount of his liability has been ascertained, may be admitted to recover to the full extent of the liability so long as the liability to pay continues, although he may not have made payment, or may be insolvent and unable to pay. But where the liability has become actually discharged by the payment of a sum less in amount, it is difficult to perceive, on principle, why the sum paid in discharge of the liability should not be taken as the amount of damage sustained, and as the measure of indemnity to be recovered under a contract which is confessedly one of indemnity."

settling with him is clearly entitled to this credit, whatever it may be. The reinsurer has therefore an interest in the disposition of the salvage, and has a right to ask that it should be prudently and carefully managed, and its disposition may become the subject of agreement between him and the underwriter.[1]

(2) *As Affected by Special Stipulations* — **Stipulation that Policy Shall Be Subject to Settlement Made by Reinsured.** — Where a policy of reinsurance provides that it shall be "subject to the same risks, valuations, conditions, and mode of settlement as are or may be adopted or assumed" by the reinsured in respect to the original policy, this stipulation fastens the responsibility of the reinsurer to the settlement and adjustment made by the reinsured with the original insured as to the amount of the loss. By such a stipulation the reinsurer submits himself to any settlement or adjustment of the original liability which the reinsured may in good faith adopt or assume, and it makes no difference that the settlement is made by way of judgment by confession, or that the judgment was recovered without notice to the reinsurer.[2]

Stipulation for Prorating Loss. — It is not infrequent that policies of reinsurance contain a clause whereby the liability of the reinsurer shall be proportioned according to the amount of the loss. Under such a policy, if the loss is less than the amount of the original insurance, the reinsurer is not liable to the full amount of the reinsurance, but only *pro rata;* that is, for such a proportion of the loss as the amount of the reinsurance bears to the amount of the original insurance.[3] Where the loss equals or exceeds the amount of the original insurance the reinsurer is, of course, liable to the full amount of the reinsurance; but, in the absence of some special provision applicable to the reinsurance, he cannot be held liable for more than the amount specified in the contract.[4]

5. In Action Against Reinsured on Contract of Original Insurance — *a.* RIGHT OF REINSURED TO DEFEND. — Since ordinarily there is no privity of contract between the reinsurers and the party originally insured, the reinsured not-

1. Reinsurer's Liability Reduced by Salvage. — Delaware Ins. Co. *v.* Quaker City Ins. Co., 3 Grant Cas. (Pa.) 72.

2. Consolidated Real Estate, etc., Ins. Co. *v.* Cashow, 41 Md. 59. See also New York Ins. Co. *v.* Associated Manufacturers' Mut. F. Ins. Corp., 70 N. Y. App. Div. 69.

3. Loss Prorated under the Terms of Policy. — Consolidated Real Estate, etc., Ins. Co. *v.* Cashow, 41 Md. 59; Blackstone *v.* Alemannia F. Ins. Co., 56 N. Y. 104, *affirming* 4 Daly (N. Y.) 299, (in both the foregoing cases the reinsurance was for half the amount originally insured, and the loss was less than the amount of the original insurance. It was held that the reinsurer was bound to pay not the full amount reinsured, but only one-half the amount of the loss); Jackson *v.* St. Paul F. & M. Ins. Co., 99 N. Y. 124, *reversing* 33 Hun (N. Y.) 60, (the prorating clause does not appear and is not mentioned in the report in 99 N. Y., but is mentioned in the report in 33 Hun, at p. 67); Norwood *v.* Resolute F. Ins. Co., (N. Y. Super. Ct.) 47 How. Pr. (N. Y.) 43; Home Ins. Co. *v.* Continental Ins. Co., 62 N. Y. App. Div. 63.

Construction of Prorating Clauses. — Under a policy of reinsurance containing the clause "loss, if any, payable *pro rata* at the same time and in the same manner as the reinsured company," it was held that upon a loss the reinsurer was bound to pay to the reinsured at the same rate that the reinsured paid to the party originally insured, so that where the reinsured paid only ten cents on the dollar of the amount of the original policy, the reinsurer was liable to pay only at the same rate on the policy of reinsurance, and this although the policy of reinsurance was for a less amount than the original policy of insurance. Illinois Mut. F. Ins. Co. *v.* Andes Ins. Co., 67 Ill. 362, 16 Am. Rep. 620.

But in the case of *In re* Republic Ins. Co., 8 Nat. Bankr. Reg. 197, 20 Fed. Cas. No. 11,705, a similar clause was held to mean that the reinsurer should pay the amount for which the reinsured was liable, and not merely the amount which the reinsured might actually pay.

For like constructions, see Norwood *v.* Resolute F. Ins. Co., (N. Y. Super. Ct.) 47 How. Pr. (N. Y.) 43; Cashau *v.* Northwestern Nat. Ins. Co., 5 Biss. (U. S.) 476; *Ex p.* Norwood, 3 Biss. (U. S.) 504.

Prorating Clause — "Other Insurance." — A clause contained in a policy of reinsurance providing that in case there is any other insurance prior or subsequent on the property insured, the party reinsured shall be entitled, in the event of a loss, to only a proportionate part thereof, has been held to refer to a double insurance only, and not otherwise to limit the liability of the reinsurer. Mutual Safety Ins. Co. *v.* Hone, 2 N. Y. 235, *affirming* 1 Sandf. (N. Y.) 137.

4. Reinsurer Not Liable Beyond His Contract — "Suing and Laboring Clause" Held Inapplicable. — Uzielli *v.* Boston Marine Ins. Co., 15 Q. B. D. 11.

withstanding the contract of reinsurance, has the right to defend himself in any way he thinks proper against an action by the party with whom he has contracted for the original insurance.[1] Indeed, since the reinsurer may make the same defenses against the reinsured which the latter could have made against the original insured,[2] and the reinsured is thus bound at his peril to know that the claim of the original insured is valid, he is justified in submitting the matter to the decision of the court; and it seems that it is his duty to pursue this course unless the fact of the loss and its extent are plain and there is no reasonable ground of defense.[3]

b. RIGHT OF REINSURER TO DEFEND. — Since the reinsurer may become bound by the judgment rendered against the reinsured in an action on the original insurance,[4] it necessarily follows that the reinsurer is at liberty to become a party to that action, and to make any defense thereto which is necessary and proper for the protection of his rights.[5]

c. EFFECT OF REINSURER'S FAILURE TO DEFEND — (1) *In General.* — Where the person originally insured brings an action on his policy to recover for a loss, or threatens to do so, and the reinsured gives notice thereof to the reinsurer, the latter then has a fair opportunity to exercise an election whether to contest or admit the claim. It is his duty to act upon such notice when given within a reasonable time. If he does not disapprove of the proposed contest of the action, or does not authorize the reinsured to compromise or settle it, he must be deemed to require that it should be carried on.[6]

(2) *Reinsured Becomes Agent of Reinsurer.* — Under such circumstances if the reinsurer fails, after notice, to participate in the defense of the action, the reinsured, by operation of law, becomes the reinsurer's agent *sub modo* for the management of the defense, and in the conduct thereof he is bound to exercise the utmost good faith.[7] He does not, however, become a trustee for the reinsurer or incur a trustee's liability.[8] And the failure of the reinsurer, after notice, to take part in the defense of the action by the original insured, does not irrevocably commit the defense to the reinsured alone, but at any time during the progress of the cause the reinsurer is entitled to interfere and interpose his defense to protect his own interests, as a party who may be bound by the judgment to be rendered.[9]

(3) *Judgment Against Reinsured Binding on Reinsurer* — (a) **General Principles.** — It is a general rule that where a person is bound to protect another from a liability, he is bound by the result of a litigation to which the other person is a party, provided he had notice of the litigation and was afforded the opportunity to control and manage it.[10] This principle is applicable to a case of reinsurance. Thus where the party originally insured has brought an action against his insurer who has reinsured the risk, and the reinsurer has had due notice of the beginning of the action and has had the opportunity to interfere and make defense, but has not done so, the judgment rendered against the reinsured in that action is conclusive and binding upon the reinsurer as to all matters which could have been litigated therein, and fixes his liability under

1. Right of Reinsured to Defend Action on Original Policy. — Hastie *v.* De Peyster, 3 Cai. (N. Y.) 190.

2. See *supra*, this section, *In Action on Contract of Reinsurance — Defenses.*

3. Hastie *v.* De Peyster, 3 Cai. (N. Y.) 190.

4. See *infra*, this section, *Effect of Reinsurer's Failure to Defend — Judgment Against Reinsured Binding on Reinsurer.*

5. Reinsurer May Defend an Action Against Reinsured. — New York State Marine Ins. Co. *v.* Protection Ins. Co., 1 Story (U. S.) 458; Gantt *v.* American Cent. Ins. Co., 68 Mo. 503; Strong *v.* Phœnix Ins. Co., 62 Mo. 289, 21 Am. Rep. 417; Hastie *v.* De Peyster, 3 Cai. (N. Y.) 190; New York Cent. Ins. Co. *v.* National Protection Ins. Co., 20 Barb. (N. Y.) 468, *reversed* on other grounds 14 N. Y. 85.

6. Effect of Notice of Threatened or Pending Action. — New York State Marine Ins. Co. *v.* Protection Ins. Co., 1 Story (U. S.) 458; Gantt *v.* American Cent. Ins. Co., 68 Mo. 534.

7. Gantt *v.* American Cent. Ins. Co., 68 Mo. 503.

8. Reinsured Not Trustee for Reinsurer. — Gantt *v.* American Cent. Ins. Co., 68 Mo. 503.

9. Gantt *v.* American Cent. Ins. Co., 68 Mo. 503

10. See the title RES JUDICATA, *post.*

the contract of reinsurance.[1] It seems clear, however, that no judgment obtained against the reinsured by collusion will be binding upon the reinsurer.[2]

(b) **Reinsurer Precluded from Raising Question of Misdescription.** — Where the liability of the reinsurer has become fixed by a judgment against the reinsured, as indicated above, the reinsurer when sued on his contract of reinsurance cannot raise a question as to misrepresentation in the description of the property insured; the reason being that this is a matter connected solely with the policy of original insurance, and that the liability under that policy and all questions connected therewith have been finally settled by the judgment.[3]

(4) *Reinsurer Liable for Costs and Expenses of Defense.* — Where after notice the reinsurer has failed to defend the action by the original insured, and judgment has been rendered in the latter's favor, the reinsured may recover from the reinsurer, not only the amount of the judgment rendered, but also the costs and expenses necessarily and *bona fide* incurred in defending that action.[4] The foregoing rule is especially applicable in a case where the reinsurers have notice that the action has been commenced, and that they will be considered responsible for the costs and expenses, and, after such notice, no objection is made by them.[5] It seems unquestionable, however, that the costs and expenses incurred in the action must have been incurred necessarily and in good faith, and not wantonly or unnecessarily in a plain case of loss, where there was no reasonable ground of defense.[6]

(5) *Necessity of Notice to Reinsurer.* — In order to charge the reinsurer with liability for the costs and expenses of conducting the defense of an action on an original policy, notice of the threatened or pending action appears to be essential.[7]

(6) *Unauthorized Compromise by Reinsured.* — Where it is stipulated between the reinsurer and the reinsured that an action on the original policy shall be contested and that the reinsured shall have the conduct, management, and control of the defense for itself and as agent of the reinsurer, but pending the action the reinsured abandons the defense, compromises and settles the claim, and has the action dismissed without the authority, knowledge, or consent of the reinsurer, the latter is not liable on the contract of reinsurance.[8]

6. Subrogation of Reinsurer to Rights of Reinsured Against Carrier. — Where the original insurance is of a marine risk, as in case of insurance of a cargo, and upon a loss the reinsurer pays the amount of his liability to the reinsured, and the latter fully satisfies the owner for the loss; the reinsurer may, upon the principle of subrogation, maintain in his own name a libel *in rem* to recover of the carrier the amount paid under the contract of reinsurance, with interest.[9]

1. **Reinsurer Failing to Defend, Is Bound by Judgment against Reinsured.** — Strong *v.* Phœnix Ins. Co., 62 Mo. 289, 21 Am. Rep. 417; Gantt *v.* American Cent. Ins. Co., 68 Mo. 503. See also New York State Marine Ins. Co. *v.* Protection Ins. Co., 1 Story (U. S.) 458; Hastie *v.* De Peyster, 3 Cai. (N. Y.) 190; Jackson *v.* St. Paul F. & M. Ins. Co., 99 N. Y. 124. *Compare* Merchants' Mut. Ins. Co. *v.* New Orleans Mut. Ins. Co., 24 La. Ann. 305.

2. **Judgment Must Be Bona Fide.** — Gantt *v.* American Cent. Ins. Co., 68 Mo. 503.

3. **Question of Misdescription.** — Jackson *v.* St. Paul F. & M. Ins. Co., 99 N. Y. 124.

4. **Reinsured May Recover Costs and Expenses of Unsuccessful Defense.** — Strong *v.* Phœnix Ins. Co., 62 Mo. 289, 21 Am. Rep. 417; Gantt *v.* American Cent. Ins. Co., 68 Mo. 503; New York State Marine Ins. Co. *v.* Protection Ins. Co., 1 Story (U. S.) 458; Faneuil Hall Ins. Co. *v.* Liverpool, etc., Ins. Co., 153 Mass. 63; New York Cent. Ins. Co. *v.* National Protection Ins. Co., 20 Barb. (N. Y.) 468, *reversed* on other grounds 14 N. Y. 85; Hastie *v.* DePeyster, 3 Cai. (N. Y.) 190.

These Expenses Include Counsel Fees. — New York State Marine Ins. Co. *v.* Protection Ins. Co., 1 Story (U. S.) 458. See also Gantt *v.* American Cent. Ins. Co., 68 Mo. 503.

5. New York State Marine Ins. Co. *v.* Protection Ins Co., 1 Story (U. S.) 458.

6. **Costs and Expenses Must Have Been Necessarily Incurred.** — New York State Marine Ins. Co. *v.* Protection Ins. Co., 1 Story (U. S.) 458.

7. **Reinsurer Must Have Notice.** — Faneuil Hall Ins. Co. *v.* Liverpool, etc., Ins. Co., 153 Mass. 63. See also New York State Marine Ins. Co. *v.* Protection Ins. Co., 1 Story (U. S.) 461.

8. **Unauthorized Compromise by Reinsured.** — Commercial Union Assur. Co. *v.* American Cent. Ins. Co., 68 Cal. 430.

9. **Subrogation.** — The Ocean Wave, 5 Biss. (U. S.) 378. And see the title SUBROGATION.

VIII. Insolvency of Reinsured — 1. General Principles. — The liability of the reinsurer is not affected by the fact that the reinsured is insolvent or unable to fulfill his own contract with the party originally insured; the reason being that the claim of the reinsured upon the reinsurer rests upon the former's liability to pay the loss to the party originally insured, and not upon the quantum of his ability to pay it.[1] And even though the original insured has received but a small dividend from the estate of the bankrupt insurer, the reinsurer is nevertheless liable to pay to the trustee of the bankrupt the whole amount of the reinsurance, and this without deducting the dividend.[2]

Original Party Insured Not a Preferred Creditor. — Where the reinsured has become insolvent, the money paid or payable under the contract of reinsurance is distributable *pro rata* to the creditors of the insolvent company. Even after a loss under the original policy the person originally insured has no equitable lien or preferable claim upon the proceeds of the reinsurance.[3] Under such circumstances the original insured does not come within the equitable rule that the principal creditor is entitled to the benefit of all counter bonds and collateral securities given by the principal debtor to his surety.[4] These general principles result largely from the theory that there is no privity of contract between the reinsurer and the person originally insured.[5]

2. Rule in New Hampshire. — Where the reinsured becomes insolvent, a different rule obtains in New Hampshire from that prevailing in other jurisdictions. There the principle is applied that a creditor of an insolvent debtor may in equity avail himself for the satisfaction of his debt of any subsisting provision made by the debtor for its payment; and that an appropriation or pledge of property by the debtor for the purpose of indemnifying against the debt any person liable upon it is equitably equivalent to a provision for its payment. Hence it is held that the sole duty of the reinsurer is to hold the reinsured harmless from the loss; that the amount of the reinsurance is for the sole benefit of the original insured; that to avoid circuity of action the reinsurer may lawfully pay the amount of the loss directly to the party originally insured, and in so doing he fully performs his contract; and that the amount of the reinsurance does not constitute a part of the general assets of the insolvent reinsured for *pro rata* distribution among the latter's creditors. In such a case the original insured may, by taking the proper proceedings, be entitled to a judgment that the money be paid directly to him.[6] But the reinsurers are liable, in case of loss, to pay the entire amount of the reinsurance, and not merely such a proportion of that sum as the reinsured may be able to pay to its creditors.[7]

1. **Insolvency of Reinsured.** — *In re* Eddystone Marine Ins. Co., (1892) 2 Ch. 423; *In re* Republic Ins. Co., 8 Nat. Bankr. Reg. 197, 20 Fed. Cas. No. 11,705; Eagle Ins. Co. *v.* Lafayette Ins. Co., 9 Ind. 447; Consolidated Real Estate, etc., Ins. Co. *v.* Cashow, 41 Md. 59; Hone *v.* Mutual Safety Ins. Co., 1 Sandf. (N. Y.) 137, [*affirmed* 2 N. Y. 235, and *approved* in Blackstone *v.* Alemannia F. Ins. Co., 56 N. Y. 104, *affirming* 4 Daly (N. Y.) 299]; Carrington *v.* Commercial F. & M. Ins. Co., 1 Bosw. (N. Y.) 152; Goodrich's Appeal, 109 Pa. St. 529.

2. *In re* Republic Ins. Co., 8 Nat. Bankr. Reg. 197, 20 Fed. Cas. No. 11,705; Consolidated Real Estate, etc., Ins. Co. *v.* Cashow, 41 Md. 59.

3. **No Preference to Original Insured.**—Consolidated Real Estate, etc., Ins. Co. *v.* Cashow, 41 Md. 59; Herckenrath *v.* American Mut. Ins. Co., 3 Barb. Ch. (N. Y.) 63; Carrington *v.* Commercial F. & M. Ins. Co., 1 Bosw. (N. Y.) 152; Goodrich's Appeal, 109 Pa. St. 523.

4. Herckenrath *v.* American Mut. Ins. Co., 3 Barb. Ch. (N. Y.) 63.

5. Herckenrath *v.* American Mut. Ins. Co., 3 Barb. Ch. (N. Y.) 63.

6. **New Hampshire Doctrine.** — Hunt *v.* New Hampshire F. Underwriters' Assoc., 68 N. H. 305, 73 Am. St. Rep. 602, *disapproving* the rule of Herckenrath *v.* American Mut. Ins. Co., 3 Barb. Ch. (N. Y.) 63.

Successive Reinsurances. — The same rule applies where the original insurer reinsures with another company which in turn reinsures with a third, and the original insurer pays the loss and the first reinsurer becomes insolvent. In such a case, the last reinsurance money does not constitute general assets of the insolvent company, and the third company may lawfully pay the money directly to the original insurer who has paid the loss. Hunt *v.* New Hampshire F. Underwriters' Assoc., 68 N. H. 305, 73 Am. St. Rep. 602.

7. Hunt *v.* New Hampshire F. Underwriters' Assoc., 68 N. H. 305, 73 Am. St. Rep. 602.

3. Authority of Receiver of Insolvent Company. — In the absence of a statute conferring the authority, it has been held that a receiver of an insolvent insurance company is not authorized to reinsure risks already assumed by the company, or to pay premiums therefor out of the company's assets. But where he is authorized by statute to cancel the policies with the assent of their holders, and to refund to the holders so much of the premiums which may have been paid, or shall be, in proportion to the period the policy has to run at the time of the cancellation,[1] it seems that the proper course for the receiver to pursue is that indicated by the statute.[2] In some jurisdictions, however, the authority to reinsure has been expressly conferred upon receivers by statute, as in *New Jersey*.[3]

IX. Statutes Prohibiting, Restricting, or Regulating Reinsurance — **1. Statutes in England** — *a.* Provisions of Statute 19 Geo. II., c. 37, § 4. — In England about the middle of the 18th century the practice of reinsurance, having come to be employed as a method of speculating in the rise and fall of premiums, and being likely to be used as a cover for wager policies, was declared unlawful by a statute, unless the insurer were insolvent, bankrupt, or dead, in which event reinsurance was permitted provided that the transaction was expressed in the policy to be a reinsurance.[4]

b. Scope and Effect. — Every policy of marine reinsurance effected in *England*, whether by British subjects or by foreigners, and whether upon risks as to British or foreign ships, was held to fall within the prohibition of the statute.[5] Where a policy of reinsurance was void under the statute an action for money had and received would not lie to recover the premium paid upon the ground that there being no risk the money was retained against conscience.[6]

c. Statute Not Generally in Force in United States. — This statute, however, did not in terms extend to the British colonies in North America, and has not generally been adopted in the United States.[7]

d. Statute in Force in Maryland as to Marine Risks. — In Maryland, however, this statute is in force, but is construed to apply only to reinsurance of marine risks.[8]

e. Repeal of Statute in England. — The English statute mentioned was repealed by subsequent acts of Parliament,[9] and reinsurance of marine risks was made lawful.[10] Under the existing statute in England,[11] reinsurance became legal by virtue of the common law; and the law of such a policy is now the law of any other policy and is to be found in the various provisions

1. 2 N. Y. Rev. Stat., p. 470, §§ 75, 77.

2. **Powers and Duties of Receiver.** — In the Matter of Croton Ins. Co., 3 Barb. Ch. (N. Y.) 642. See generally the title Receivers, vol. 23, p. 992.

3. See *infra*, this title, *Statutes Prohibiting, Restricting, or Regulating Reinsurance — Statutes in the United States*.

4. **English Statute Prohibiting Reinsurance.** — 19 Geo. II., c. 37, § 4. See Arnould on Marine Insurance, vol. 1, p. 103; Mackenzie *v.* Whitworth, 1 Ex. D. 40. See also Consolidated Real Estate, etc., Ins. Co. *v.* Cashow, 41 Md. 59; Merry *v.* Prince, 2 Mass. 185; New York Bowery F. Ins. Co. *v.* New York F. Ins. Co., 17 Wend. (N. Y.) 362; Commercial Mut. Ins. Co. *v.* Detroit F. & M. Ins. Co., 38 Ohio St. 16, 43 Am. Rep. 413.

5. **Scope of Statute.** — Andree *v.* Fletcher, 2 T. R. 161.

6. **Premium Paid on Policy Not Recoverable.** — Andree *v.* Fletcher, 3 T. R. 266.

7. **English Statute Not Generally in Force in the United States.** — Merry *v.* Prince, 2 Mass. 176; Hastie *v.* De Peyster, 3 Cai. (N. Y.) 190; New York Bowery F. Ins. Co. *v.* New York F. Ins. Co., 17 Wend. (N. Y.) 362; Commercial Mut. Ins. Co. *v.* Detroit F. & M. Ins. Co., 38 Ohio St. 16, 43 Am. Rep. 413.

8. **English Statute in Force in Maryland as to Marine Risks.** — Consolidated Real Estate, etc., Ins. Co. *v.* Cashow, 41 Md. 59.

9. **English Statute Repealed.** — 27 & 28 Vict., c. 56, § 1; 30 & 31 Vict., c. 23, sched. D.; 30 & 31 Vict., c. 59, (Stat. Law Revision Act). See Arnould on Marine Insurance, vol. 1, p. 103; Mackenzie *v.* Whitworth, 1 Ex. D. 40; Consolidated Real Estate, etc., Ins. Co. *v.* Cashow, 41 Md. 73.

10. **Reinsurance on Maritime Risks Made Lawful — 27 & 28 Vict. c. 56, § 1.** — Mackenzie *v.* Whitworth, 1 Ex. D. 40; Consolidated Real Estate, etc., Ins. Co. *v.* Cashow, 41 Md. 73.

11. 30 & 31 Vict., c. 23, §§ 3, 4, and Sched. D. and c. 59, (Stat. Law Revision Act).

of the statute.[1] Since these repealing statutes, the fact that the policy is one of reinsurance need not appear on the face of it.[2]

2. Statutes in the United States. — In addition to the *English* statute mentioned above as being in force in *Maryland*,[3] other statutes have been passed in the United States restricting the power of insurance companies to reinsure and issue policies of reinsurance.

Thus in New Jersey a statute has been enacted forbidding any domestic life insurance company to reinsure any of its outstanding risks or policy obligations in any other company, or itself to reinsure such risks or obligations of another company, unless two-thirds in number of the holders of the policies proposed to be reinsured shall assent thereto in writing; and declaring that the contract for such reinsurance shall be utterly invalid until it shall have been submitted to the secretary of state and by him approved, after due inquiry and upon satisfactory evidence that the interests of the policy holders are fully protected, and that the consent of two-thirds of them has been had in writing is provided.[4] It is held that this statute is not in violation of the constitution of the United States on the ground that it deprives a person of liberty or property without due process of law; the reason being that the statute deprives no natural person of any natural right, but simply regulates the powers of corporations, which are artificial persons and, by the law of their being, are subject to such regulation.[5] It is held also that the duties imposed upon the secretary of state by the statute and subsequently transferred to the commissioner of banking and insurance,[6] are neither legislative nor judicial, but are administrative only, and therefore that the statute is not invalid as an attempt to delegate to the secretary of state a legislative or a judicial power.[7] A contract of reinsurance relating to a single original policy of life insurance is as much within the terms of the statute as a reinsurance of the entire risks of a company or any considerable portion of them.[8] Another New Jersey statute permits the receiver of a domestic life insurance company under certain circumstances to reinsure all or part of the policy obligations of the company, subject to restrictive provisions similar to those of the statute before mentioned.[9]

In Kansas the statutes prescribing the duties and obligations of an insurance company desiring to discontinue its business, provides for reinsurance of its outstanding policies, subject to certain conditions.[10] These statutes are held valid.[11]

General Insurance Statute Requiring Age Limit. — A provision in a general insurance statute prohibiting insurance upon the lives of persons above a certain age, has been held not to affect a member of an insurance company which, under the authority of a statute, has "transferred its risks to, or insured them in,

1. 1 Arnould on Marine Ins., p. 103; Consolidated Real Estate, etc., Ins. Co. *v.* Cashow, 41 Md. 73.

2. **Policy Need Not Recite that It Is a Reinsurance.** — Arnould on Marine Insurance, vol. 1, p. 105; Mackenzie *v.* Whitworth, 1 Ex. D. 36, *affirming* L. R. 10 Exch. 142.

3. See *supra*, this section, *Statute in Force in Maryland as to Marine Risks*.

4. **New Jersey Statute Restricting Reinsurance.** — Insurance Act, § 66, Gen. Stat. N. J., p. 1755.

5. **Statute Not in Violation of U. S. Constitution.** — Iowa L. Ins. Co. *v.* Eastern Mut. L. Ins. Co., 64 N. J. L. 340.

6. At the time the foregoing statute was passed the secretary of state was *ex officio* commissioner of insurance; but afterwards when the department of banking and insurance was established, his duties devolved upon a new officer called the commissioner of banking and insurance. Gen. Stat. N. J., pp. 137, 1752, § 51.

7. **Statute Does Not Attempt to Confer Legislative or Judicial Powers.** — Iowa L. Ins. Co. *v.* Eastern Mut. L. Ins. Co., 64 N. J. L. 340.

8. **Reinsurance of Single Risk Within Statute.** — Iowa L. Ins. Co. *v.* Eastern Mut. L. Ins. Co., 64 N. J. L. 340.

9. **Statute Authorizing Reinsurance by Receiver.** — Insurance Act of March 8, 1877, Supp., § 4, incorporated in the revision of 1875, Gen. Stat. N. J., p. 1754. See Iowa L. Ins. Co. *v.* Eastern Mut. L. Ins. Co., 64 N. J. L. 343.

10. **Kansas Statute.** — Comp. Laws 1879, p. 496, as amended by Laws of 1881, p. 217.

11. Alliance Mut. L. Assur. Soc. *v.* Welch, 26 Kan. 632.

another corporation," although the member is at the time of the transfer beyond the age limit; and a subsequent amending statute providing that the age limit shall not apply in cases of transfer or reinsurance, has been held not to determine that the original statute did not have the same meaning, and not to affect the duty or power of the courts in respect to its construction.[1]

Statute Prohibiting Corporation from Transferring Effects in Contemplation of Insolvency. — A statute prohibiting a corporation from transferring its effects in contemplation of insolvency with intent to give a preference to any particular creditor, and rendering its directors personally liable in case of such transfer, has been held applicable to an insurance company obtaining temporary reinsurance at a time when the company is in fact insolvent, although the directors authorizing the reinsurance do not know of the insolvency and act in good faith.[2]

Failure of Company to Comply with Statute as to Stock and Assets.— The failure of an insurance company to comply with statutes regulating corporations and requiring certain conditions to be performed as to the amount of capital before doing business and the amount of assets to be maintained, has been held not to prevent the company from lawfully reinsuring its risks already assumed, although it might prevent it from assuming other risks; the law only authorizing proceedings to close the business of the company, and not itself producing that effect.[3]

REJECT — REJECTION. — To reject means to throw away; to discard; to refuse to receive; to refuse to grant; as, to reject a prayer or request.[4]

REJOINDER. — See the title REJOINDERS AND SUBSEQUENT PLEADINGS, 18 ENCYC. OF PL. AND PR. 70.

RELATE. — See note 5.

1. Statute Relating to Age Limit Not Applicable to Reinsurance. — Rand *v.* Massachusetts Ben. L. Assoc., (Supm. Ct. Tr. T.) 18 Misc. (N. Y.) 336, *affirmed* 20 N. Y. App. Div. 392, *construing* on this point, Mass. Stat., April 21, 1885, §§ 7 and 10, Acts of 1890, c. 421. To the same effect see Cathcart *v.* Equitable Mut. L. Assoc., 111 Iowa 471.

2. Reinsurance in Contemplation of Insolvency Within Prohibition of Statute. — Casserly *v.* Manners, 9 Hun (N. Y.) 695, *reversing* 48 How. Pr. (N. Y.) 219.

3. Statutes Regulating Corporations — Conditions of Doing Business. — Davenport F. Ins. Co. *v.* Moore, 50 Iowa 619.

4. Reject. — Webst. Dict., *quoted* in Preston *v.* Fidelity Trust, etc., Co., 94 Ky. 302, in which case it was held that a refusal to probate a will was a ***rejection*** of the will within the meaning of a *Kentucky* statute giving an appeal, and that to constitute such ***rejection*** it was not necessary that a judgment should first be rendered invalidating the paper.

Reject and Challenge. — In Zimmerly *v.* Road Com'rs, 25 Pa. St. 136, it was said: "The commissioners are authorized to ***reject*** (a word which we understand as synonymous with challenge) four jurors or any less number, but not peremptorily."

5. Relate. — In Wyatt *v.* Larimer, etc., Irrigation Co., 18 Colo. 298, ***relate*** and "involve" were held to be equivalent in a statute conferring the right of appeal to the Supreme Court in matters ***relating*** to franchises or freeholds.

Regulating and Relating. — See REGULATE — REGULATING — REGULATION, *ante*.

RELATION.

By Hiram Thomas.

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CROSS-REFERENCES.

For the doctrine of Relation as applied to a principal's ratification of an agent's unauthorized act, see the title AGENCY, vol. 1, p. 1123 *et seq. See also RATIFICATION*, vol. 23, pp. 889, 890.

For the doctrine in connection with attachments, see the title ATTACHMENT, vol. 3, p. 223.

For the doctrine as applied to a deed delivered to a third person for the benefit of the grantee, see the title DEEDS, vol. 9, p. 161, *note; and for the effect of the doctrine so applied as to intervening equities, see the same title*, p. 162, *note.*

For the doctrine as applied to a deed delivered in escrow, see the title ESCROW, vol. 11, p. 346 *et seq.*

For the doctrine as applied to judgments and decrees, see the title JUDGMENTS AND DECREES, vol. 17, p. 793.

For the doctrine in connection with judicial sales, see the title JUDICIAL SALES, vol. 17, p. 993.

For the doctrine as applied to powers, see the title POWERS, vol. 22, p. 1125 *et seq.*

For the doctrine in connection with sheriff's sales, see the title SHERIFF'S SALES.

For the doctrine as applied to grants of public lands, see the titles SPANISH AND MEXICAN LAND GRANTS; STATE AND PUBLIC LANDS.

For other matters of Substantive Law and Evidence related to this title, see the following titles in this work: ESTOPPEL, vol. 11, p. 385; *PUBLIC OFFICERS*, vol. 23, p. 356; *RECORDING ACTS, ante; SPECIFIC PERFORMANCE; TRESPASS; TROVER AND CONVERSION; VENDOR AND PURCHASER.*

I. Definition and Scope of Title — **Doctrine of Relation Defined.** — By the doctrine of relation is meant that principle by which an act done at a certain time is considered by a fiction of law to have been done at some antecedent time. It is usually applied where several proceedings are essential to complete a particular transaction, the last proceeding which consummates the transaction being held for certain purposes to take effect by relation as of the day when the first proceeding was had.[1] The doctrine is a fiction of law resorted to for the promotion of justice and of the lawful intention of parties, by giving effect to acts or instruments which without it would be invalid.[2]

Scope of Title. — The subject-matter of this title is confined to conveyances of real property or interests therein by voluntary act of the parties.

II. Various Applications of Doctrine — **1. In General.** — A number of instances of the application of this doctrine are discussed in other titles in this work where the specific matters to which the doctrine is applied are treated.[3]

2. Conveyances of Real Property — *a.* Statement of Principle. — The doctrine of relation finds perhaps its most frequent application in connection with conveyances of real property, and is invoked for the promotion of justice and the protection of purchasers; the principle being that where a contract is made to convey real property or interests therein and afterwards a conveyance is executed and delivered pursuant to the contract, the deed "relates back to the contract," or in other words, the title is considered as having vested in the grantee not merely from the date of the actual conveyance but from the time when the contract was made.[4]

b. Particular Applications — (1) *In Equity.* — The principle, while generally applicable in common law or statutory proceedings, is particularly appropriate to proceedings in equity and is adopted by courts of chancery in analogy to the maxim that "equity considers as done that which ought to be done."[5]

(2) *Under the Recording Acts.* — Under the recording acts in some jurisdictions a deed recorded within the time prescribed by the statute but at a day subsequent to its execution operates by relation to vest the title in the grantee from the time when it was executed.[6]

1. Doctrine of Relation Defined. — Gibson *v.* Chouteau, 13 Wall. (U. S.) 100, *per* Field, J., *approved* in Ormiston *v.* Trumbo, 77 Mo. App. 316. To the same effect see Viner's Abr., tit. Relation, vol. 18, p. 290, and Cruise on Real Property, vol. 5, pp. 510, 511, *quoted* in Welch *v.* Dutton, 79 Ill. 467.

2. Ormiston *v.* Trumbo, 77 Mo. App. 316; Ozark Land, etc., Co. *v.* Franks, 156 Mo. 690.

3. See the table of cross-references at the beginning of this title.

4. Operation of Deed by Relation. — Viner's Abr., tit. Relation, vol. 18, pp. 285, 290.

Alabama. — Nelson *v.* Holly, 50 Ala. 3.

California. — Thompson *v.* Spencer, 50 Cal. 532.

Illinois. — Ferguson *v.* Miles, 8 Ill. 358, 44 Am. Dec. 702; Kruse *v.* Wilson, 79 Ill. 240; Welch *v.* Dutton, 79 Ill. 465; Schneider *v.* Botsch, 90 Ill. 577; Edwardsville R. Co. *v.* Sawyer, 92 Ill. 382; Sutherland *v.* Goodnow, 108 Ill. 528, 48 Am. Rep. 560.

Kentucky. — Clary *v.* Marshall, 5 B. Mon. (Ky.) 266.

Minnesota. — Cummings *v.* Newell, 86 Minn. 130.

New York. — Jackson *v.* Bull, 1 Johns. Cas. (N. Y.) 81; Jackson *v.* Raymond, 1 Johns. Cas. (N. Y.) 87, note; Johnson *v.* Stagg, 2 Johns. (N. Y.) 510; Heath *v.* Ross, 12 Johns. (N. Y.) 140; Thurman *v.* Anderson, 30 Barb. (N. Y.) 621; Simmons *v.* Cloonan, 47 N. Y. 3, (*reversing* 2 Lans. (N. Y.) 346); Judd *v.* Seekins, 62 N. Y. 267; Young *v.* Guy, 87 N. Y. 457.

North Carolina. — Fortune *v.* Watkins, 94 N. Car. 304.

A Deed Executed Nineteen Years After a Sale made by virtue of a power in a mortgage, was held to operate as between the parties, by relation, from the date of the sale, no rights of third persons intervening. Demarest *v.* Wynkoop, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467.

Conveyance under Order of Court. — It has been held in *South Carolina* that a conveyance executed under an order of court takes effect from delivery, and not from the date of the order. Burden *v.* McElmoyle, Bailey Eq. (S. Car.) 375.

5. Doctrine Adopted in Equity. — Paine *v.* Meller, 6 Ves. Jr. 349; Demarest *v.* Wynkoop, 3 Johns. Ch. (N. Y.) 146, 8 Am. Dec. 467. See generally the titles Equity, vol. 11, p. 180 *et seq.*; Specific Performance; Vendor and Purchaser.

6. Recording Acts — *District of Columbia.* — Clarke *v.* White, 12 Pet. (U. S.) 178.

Kentucky. — M'Connell *v.* Brown, Litt. Sel. Cas. (Ky.) 459.

Maryland. — Betts *v.* Union Bank, 1 Har. & G. (Md.) 175, 18 Am. Dec. 283.

Massachusetts. — Terry *v.* Briggs, 12 Met. (Mass.) 17; Pray *v.* Pierce, 7 Mass. 381, 5 Am. Dec. 59.

(3) *Parol Contract for Sale of Lands.* — It has been held that a parol contract for the sale of lands is not absolutely void under the statute of frauds, and hence that a subsequent conveyance pursuant thereto will take effect by relation as of the date of the contract.[1]

(4) *Lease for Term of Years.* — The principle is applicable to a lease for a term of years as well as to a conveyance of an estate in fee simple.[2]

(5) *Grant of Pueblo Lands.* — Where the board of trustees of a town make a grant of a portion of pueblo lands by order duly entered in their records, and subsequently execute and deliver a deed to the grantee, title vests by relation as of the date of the grant.[3]

c. LIMITS OF APPLICATION — **Provision for Date of Delivery of Deed.** — It has been held that where the contract provided for delivery of the deed at a certain time, the deed if subsequently delivered will relate back only to the time when it was due by the terms of the contract.[4] Thus it has been held in *New York* that upon a foreclosure sale the purchaser is not entitled to the rents of the premises accruing between the time of the purchase and the time when the deed is delivered pursuant to the terms of the sale.[5] But in a later case not involving a foreclosure, the foregoing limitation was not recognized, and a deed executed and delivered on the date fixed by the contract was held to relate back to the date of the contract and to operate as a valid and effectual conveyance from that time.[6]

Absence of Prior Contract. — The doctrine of relation in connection with conveyances of lands can apply only in cases where there was a prior contract or some pre-existing equity in the purchaser; where this element is lacking and the conveyance by deed is without a valuable consideration, the doctrine obviously can have no application and the deed takes effect only from delivery.[7]

Innocent Third Persons. — It is stated in another part of this title that the doctrine of relation will not be applied to the prejudice of innocent third persons.[8]

III. OPERATION AND EFFECT OF DOCTRINE — 1. In Respect to Title and Jus Disponendi. — Where a deed is executed and delivered pursuant to a previous contract, the conveyance operates by relation to divest the vendor of title from the time of the contract and to vest in the purchaser full title and rights

Mississippi. — Claiborne *v.* Holmes, 51 Miss. 146.

North Carolina. — Clark *v.* Arnold, 2 Hayw. (3 N. Car.) 287; Phifer *v.* Barnhart, 88 N. Car. 333; Gadsby *v.* Dyer, 91 N. Car. 311.

Tennessee. — Patton *v.* Cooper, Brun. Col. Cas. (U. S.) 193, Cooke (Tenn.) 133; Waterhouse *v.* Martin, Peck (Tenn.) 392; Hale *v.* Darter, 10 Humph. (Tenn.) 92; Ward *v.* Daniel, 10 Humph. (Tenn.) 603.

Vermont. — Norton *v.* Spooner, N. Chip. (Vt.) 74.

Though the Deed is Executed by a Tenant in Tail for the purpose of barring the entail, and is not recovered until after the grantor's death, it takes effect under the statute from the date of delivery. Terry *v.* Briggs, 12 Met. (Mass.) 17.

An Instrument Acknowledging that the Purchase Money for a Conveyance is Unpaid, and giving to the vendor the right to hold possession of the land until payment, will, when duly recorded, be operative as notice from its date. Melross *v.* Scott, 18 Ind. 250.

The Delivery of a Deed to the County Clerk for record and for the use of the grantee, constitutes a perfect delivery by the grantor, and upon acceptance by the grantee the deed takes effect as of the date of such delivery. Rathbun *v.* Rathbun, 6 Barb. (N. Y.) 98. See also the title DEEDS, vol. 9, p. 161, note.

For a Full Discussion of the doctrine of relation under the recording acts, see the title RECORDING ACTS, *ante.*

1. Relation of Deed to Prior Parol Contract. — Clary *v.* Marshall, 5 B. Mon. (Ky.) 269. But see Day *v.* Willy, 3 Brews. (Pa.) 43.

2. Doctrine Applicable to Lease. — Johnson *v.* Stagg, 2 Johns. (N. Y.) 510.

3. Pueblo Lands. — Thompson *v.* Spencer, 50 Cal. 532. See generally the title SPANISH AND MEXICAN LAND GRANTS.

4. Contract Providing for Time of Delivery of Deed. — Paine *v.* Meller, 6 Ves. Jr. 349; Cheney *v.* Woodruff, 45 N. Y. 100.

5. Foreclosure Sale — Mesne Rents. — Cheney *v.* Woodruff, 45 N. Y. 98.

6. Limitation as to Time for Delivery Not Recognized. — Young *v.* Guy, 87 N. Y. 457.

7. Voluntary Deed Without Prior Contract. — Barncord *v.* Kuhn, 36 Pa. St. 383.

8. Innocent Third Persons Not Affected. — See *infra*, this title, *Operation and Effect of Doctrine — As Affecting Strangers to the Contract — Innocent Third Persons.*

of ownership from that date; therefore any intermediate disposition of the same land by the vendor is invalid and nugatory;[1] while on the other hand, every intermediate sale or incumbrance, or other disposition of land by the purchaser, is valid and effectual.[2] Thus the doctrine as applied to a lease for a term of years renders valid and operative a demise by way of mortgage made by the lessee between the contract and the execution of the lease.[3]

Assignment of Contract by Purchaser. — The validity and binding effect of an alienation or incumbrance made by the purchaser under the contract is in no wise affected by the fact that he assigns the contract to a third person who has notice of the alienation or incumbrance and who thereafter obtains a deed for the land. In such a case the deed operates by relation from the date of the contract and the assignee is bound by the alienation in the same manner as the assignor.[4]

2. As Affecting Intermediate Adverse Possession. — Where a contract is made for the sale of land, and at a time subsequent thereto a conveyance is executed, if it is intended to be shown that nothing passed by the conveyance for the reason that when it was made the land was held adversely by another than the grantor, the principle applies that the conveyance relates back to the time when the contract for the purchase was finally concluded between the grantor and grantee, and consequently the intermediate adverse possession is ineffectual to defeat or impair the conveyance.[5]

3. As Affecting Relinquishment of Dower by Vendor's Wife. — Under a statute providing that a wife may relinquish her right to dower by joining with her husband in a conveyance of the land, or subsequent to such a conveyance by her husband, by an instrument in writing releasing her right to dower in the land so conveyed,[6] it has been held that where the husband has made a contract of sale, especially if he has put the purchaser in possession and received the purchase money, his deed subsequently executed will take effect by relation as of the date of the contract, and thus a relinquishment of dower by the wife between the date of the contract and that of the deed is subsequent to the conveyance within the meaning of the statute and will be upheld.[7]

4. As Affecting Strangers to the Contract — *a.* INNOCENT THIRD PERSONS. — The doctrine of relation will be enforced only for the furtherance of justice, and will not be applied to defeat or impair intervening rights or equities of innocent third persons who are strangers to the transaction.[8]

b. PURCHASERS WITH NOTICE OF CONTRACT. — As against the vendor's grantees who are chargeable with notice of the contract, the subsequent deed operates by relation so as to have the same effect as if its delivery were con-

1. Intermediate Disposition of Land by Vendor. — Nellis *v.* Lathrop, 22 Wend. (N. Y.) 122, 34 Am. Dec. 285. See also Young *v.* Guy, 87 N. Y. 457.

2. Intermediate Disposition of Land by Purchaser. — Thompson *v.* Spencer, 50 Cal. 532; Welch *v.* Dutton, 79 Ill. 465; Jackson *v.* Bull, 1 Johns. Cas. (N. Y.) 81; Johnson *v.* Stagg, 2 Johns. (N. Y.) 510; Thurman *v.* Anderson, 30 Barb. (N. Y.) 621; Judd *v.* Seekins, 62 N. Y. 266.

Deed as Evidence. — A deed thus executed is by relation evidence of an executed sale as of the date of the contract. Sutherland *v.* Goodnow, 108 Ill. 528, 48 Am. Rep. 560. And under the recording acts in some states it is held that a deed recorded at a day subsequent to its execution is evidence of seisin in the grantee from the date of execution. Pray *v.* Pierce, 7 Mass. 381. 5 Am. Dec. 59; Hale *v.* Darter, 10 Humph. (Tenn.) 92; Ward *v.* Daniel, 10 Humph. (Tenn.) 603. See further the title RECORDING ACTS, *ante*.

3. Mortgage by Lessee. — Johnson *v.* Stagg, 2 Johns. (N. Y.) 510.

4. Thurman *v.* Anderson, 30 Barb. (N. Y.) 621.

5. Intermediate Adverse Possession. — Jackson *v.* Raymond, 1 Johns. Cas. (N. Y.) 87, note, *approved* in Jackson *v.* Bull, 1 Johns. Cas. (N. Y.) 81.

6. Rev. Code Ala., § 1626.

7. Nelson *v.* Holly, 50 Ala. 3.

8. Doctrine Not Applied to Injury of Innocent Third Persons. — Viner's Abr., tit. Relation, vol. 18, p. 293; Johnston *v.* Jones, 1 Black (U. S.) 221; Fite *v.* Doe, 1 Blackf. (Ind.) 127; Frost *v.* Beekman, 1 Johns. Ch. (N. Y.) 298; Jackson *v.* Bard, 4 Johns. (N. Y.) 230, 4 Am. Dec. 267; Hawley *v.* Cramer, 4 Cow. (N. Y.) 725; Jackson *v.* Douglass, 5 Cow. (N. Y.) 458; Pratt *v.* Potter, 21 Barb. (N. Y.) 589; Jackson *v.* Davenport, 20 Johns. (N. Y.) 537; Wood *v.* Ferguson, 7 Ohio St. 291. See also the titles DEEDS, vol. 9, p. 162, note; ESCROW, vol. 11, p. 348.

temporaneous with the execution of the contract, and such grantees, therefore, take nothing.[1]

c. PURCHASERS NOT PAYING VALUE. — The foregoing principle applies equally to the vendor's grantees or mortgagees who by reason of their not paying a valuable consideration do not occupy the favored position of *bona fide* purchasers.[2]

d. TRESPASSERS — (1) *Trespassers Not Protected.* — The doctrine of relation is applied only for the promotion of justice and for the protection of persons who stand in some privity with the party who has acquired the equitable claim or right to the land. It will not be given operation to shield a trespasser from liability for his wrongful acts.[3]

(2) *Rights of Purchaser as Against Trespasser* — (a) **In General.** — Where between the date of the contract and the time of the conveyance a trespasser has cut and carried away timber from the land, the doctrine of relation enables the purchaser to maintain an action of trover against the trespasser, since by operation of the doctrine the purchaser has title and full rights of ownership as from the date of the contract.[4]

(b) **Acts Done under License from Vendor.** — But the foregoing rule has been held inapplicable where the timber was cut and carried away under a prior license from the vendor, since the act was lawful when it was committed and cannot be made a trespass by a legal fiction.[5]

(3) *Rights of Vendor in Possession as Against Trespasser.* — Where the vendor remains in lawful possession of the land pending the performance of the contract by the purchaser, he can maintain an action against a trespasser who, during the period between the date of the contract and the time of the conveyance, has wrongfully cut and removed timber from the land; and in such a case the doctrine of relation will not be applied to defeat his right of action.[6]

RELATIVE — RELATION — RELATIONSHIP. (See also the titles CHILD — CHILDREN, vol. 5, p. 1082; FAMILY, vol. 12, p. 866; HEIR, HEIRS, AND THE LIKE, vol. 15, p. 318; NEXT OF KIN, vol. 21, p. 537; SHELLEY'S CASE (RULE IN); SUCCESSION; WILLS. As to insulting conduct towards a female relative, see the title MURDER AND MANSLAUGHTER, vol. 21, p. 83. As to fiduciary relationship, see FIDUCIARY, vol. 13, p. 10, and the references there given.) — The definition commonly given of "relative" or "relation" is "a person connected with another by consanguinity or affinity;"[7] but in view of the deci-

1. **Doctrine Operative as Against Purchasers with Notice Pending the Deed.** — Demarest *v.* Ray, 29 Barb. (N. Y.) 563. See also Nellis *v.* Lathrop, 22 Wend. (N. Y.) 122, 34 Am. Dec. 285.

For a Discussion of the Law of Notice and its Applications to Purchasers of Land, see the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 472, and the cross-references there given.

2. **Mortgagee for Antecedent Debt Not Protected.** — Young *v.* Guy, 87 N. Y. 457. And see the cross-reference in the preceding note.

3. **Doctrine Not Applied to Protect Trespasser.** — Stahl *v.* Lynn, 86 Wis. 75. See also Heath *v.* Ross, 12 Johns. (N. Y.) 140.

4. **Purchaser May Have Action Against Trespasser.** — Heath *v.* Ross, 12 Johns. (N. Y.) 140.

5. **Cutting Timber under License from Vendor.** — Pratt *v.* Potter, 21 Barb. (N. Y.) 589, *distinguishing* Heath *v.* Ross, 12 Johns. (N. Y.) 140. See also Case *v.* De Goes, 3 Cai. (N. Y.) 261, and see the title TRESPASS.

6. **Vendor in Possession May Sue Trespasser.** — Stahl *v.* Lynn, 86 Wis. 75. See also the titles TRESPASS; TROVER AND CONVERSION.

7. **Relative — Relation.** — Esty *v.* Clark, 101 Mass. 36, 3 Am. Rep. 320.

Broad Sense. — In its broad sense the word *relatives* means all persons connected with another by blood or affinity, however remote the connection. Snow *v.* Durgin, 70 N. H. 121.

"*Relation* is a very general word, and takes in any kind of connection, but the most common use of it is to express some sort of kindred either by blood or affinity, though properly by blood." Davies *v.* Bailey, 1 Ves. 84.

Relatives Held to Include Relation by Affinity. — Simcoke *v.* Grand Lodge, etc., 84 Iowa 383; Lewis *v.* Mynatt, 105 Tenn. 508; Churchill *v.* Churchill, 12 Vt. 661.

In People's Bank *v.* Ætna Ins. Co., (C. C. A.) 74 Fed. Rep. 507, it was held that a husband of a first cousin of the insured was related to the insured and disqualified as a notary to give a certificate to the company of proof of loss.

Family. — "The word *relations*, in its widest extent, embraces persons of every degree of consanguinity. When not restricted in its

sions it would seem that the word has not, technically, so extensive a meaning as this, and is more properly confined to connections by consanguinity alone.[1]

Husband and Wife. — It has been held frequently that in its strict technical sense the word "relative" or "relation" does not include a husband or wife.[2]

meaning by other words, it extends to all persons who are descended from the same common ancestors. It is synonymous with 'kindred,' and is expressed also by the word 'family,' in its largest sense." Huling *v.* Fenner, 9 R. I. 411.

En Ventre Sa Mere. — A testator left a certain fund to his executors in trust to dispose of as they should think fit among such of testator's ***relations*** as should not be worth two thousand pounds. It was held that a child born after the death of the testator was not within the description, although *en ventre sa mère* on the testator's death. Bennett *v.* Honywood, Ambl. 708.

Disqualification of Judge or Juror. (See also the titles JUDGE, vol. 17, p. 736; JURY AND JURY TRIAL, vol. 17, p. 1124.) — In Churchill *v.* Churchill, 12 Vt. 661, it was held that the ***relationship*** to the party which disqualifies the juror is the same as disqualifies a judge or justice; that ***relationship*** is affinity or consanguinity within the fourth degree, reckoned according to the civil and not the canon law. See also People's Bank *v.* Ætna Ins. Co., (C. C. A.) 74 Fed. Rep. 507.

Great-nephews and Great-nieces. — Under a bequest to ***relations***, great-nephews and great-nieces, if the next of kin of the testator, are entitled. Jones *v.* Colbeck, 8 Ves. Jr. 38.

"Blood Relations" Held to Be Equivalent to "Heirs." — Cummings *v.* Cummings, 146 Mass. 507.

Nearest Relations. — Under a devise of real and personal estate in trust for the nearest ***relations*** "of the Pyots," it was held that the latter term was *nomen collectivum*, and descriptive of that particular stock, and that this mixed fund should not go to the heir at law of that name. Pyot *v.* Pyot, 1 Ves. 335.

Children. — In Hargadine *v.* Pulte, 27 Mo. 423, the testator bequeathed all his estate, real, personal, and mixed, to his wife, "to the exclusion of all and every person or persons, be the same ***relatives*** or not." The court held that the term ***relatives*** might be very naturally understood as not embracing the testator's children. See also Boman *v.* Boman, 7 U. S. App. 68, and see the title WILLS.

Persons Legally Bound to Support. — Code Iowa (1873), § 1433 (Code Iowa 1897, § 2297), enacted that "the provisions herein made for the support of the insane at public charge shall not be construed to release the estates of such persons nor their ***relatives*** from liability for their support," and further provided that the supervisors of the county might relieve the ***relations*** of a patient from the burden of his support, if it should seem to them reasonable or just. It was held that the words ***relatives*** and ***relations*** as here used might be construed to mean the persons legally bound for the support of the insane person, and could not be extended to include all his ***relatives***; and that a county could not recover from a father for the support of his adult son at an asylum. Monroe County *v.* Teller, 51 Iowa 670.

1. Confined to Connections by Consanguinity — *England.* — Anonymous, 1 P. Wms. 327; Thomas *v.* Hole, Cas. t. Talb. 251; Harding *v.* Glyn, 1 Atk. 469, note; Worsley *v.* Johnson, 3 Atk. 761; Maitland *v.* Adair, 3 Ves. Jr. 231; Atty.-Gen. *v.* Buckland, apparently not reported, but *cited* in Goodinge *v.* Goodinge, 1 Ves. 231, and in note to Edge *v.* Salisbury, Ambl. 70; Davies *v.* Bailey, 1 Ves. 84; Whithorne *v.* Harris, 2 Ves. 527; Isaac *v.* Defriez, Ambl. 595; Green *v.* Howard, 1 Bro. C. C. 31; Hands *v.* Hands, apparently not reported, but *cited* in Phillips *v.* Garth, 3 Bro. C. C. 69, and in other cases; Rayner *v.* Mowbray, 3 Bro. C. C. 234; Spring *v.* Biles, 1 T. R. 435, note; Stamp *v.* Cooke, 1 Cox Ch. 234; Devisme *v.* Mellish, 5 Ves. Jr. 529; Jones *v.* Colbeck, 8 Ves. Jr. 38; Mahon *v.* Savage, 1 Sch. & Lef. 111; Cruwys *v.* Colman, 9 Ves. Jr. 319; Doe *v.* Over, 1 Taunt. 263; Pope *v.* Whitcombe, 3 Meriv. 689; Smith *v.* Campbell, Coop. t. Eld. 275, 19 Ves. Jr. 400; Wright *v.* Atkyns, T. & R. 143; Harvey *v.* Harvey, 5 Beav. 134.

Kentucky. — Thompson *v.* Myers, 95 Ky. 597.

Maine. — Elliot *v.* Fessenden, 83 Me. 197.

New Jersey. — Supreme Council, etc. *v.* Bennett, 47 N. J. Eq. 39.

New York. — Ennis *v.* Pentz, 3 Bradf. (N. Y.) 385.

Pennsylvania. — Storer *v.* Wheatley, 1 Pa. St. 506; McNeilledge *v.* Barclay, 11 S. & R. (Pa.) 103.

Tennessee. — Hill *v.* Page, (Tenn. Ch. 1895) 36 S. W. Rep. 741.

Washington. — Matter of Renton, 10 Wash. 533.

In Lewis *v.* Mynatt, 105 Tenn. 512, it was said: "There can be no doubt that the word ***relative***, when employed in a strictly technical sense, signifies a ***relationship*** by blood only; but as ordinarily used it includes ***relationship*** by affinity as well as by consanguinity."

Sister-in-Law. — In Harvey *v.* Harvey, 5 Beav. 134, it was held that the widow of a deceased brother did not come within the terms of a power to appropriate for the benefit of ***relations***.

2. Husband and Wife Not Relatives. — Worseley *v.* Johnson, 3 Atk. 758; Garrick *v.* Camden, 14 Ves. Jr. 372; Wells *v.* Wells, L. R. 18 Eq. 504; Drew *v.* Wakefield, 54 Me. 291; Keniston *v.* Adams, 80 Me. 290; Esty *v.* Clark, 101 Mass. 36, 3 Am. Rep. 320; Kimball *v.* Story, 108 Mass. 382; Storer *v.* Wheatley, 1 Pa. St. 506; Matter of Renton, 10 Wash. 533: Cleaver *v.* Cleaver, 39 Wis. 96, 20 Am. Rep. 30.

In Storer *v.* Wheatley, 1 Pa. St. 506, a bequest to "my nearest ***relations*** or connections" was held not to include the testator's widow.

Relatives Held to Include Husband and Wife. — But in some cases the term has been held to include a husband or wife. Simcoke *v.* Grand Lodge, etc., 84 Iowa 383; Bennett *v.* Van Riper, 47 N. J. Eq. 563; Lewis *v.* Mynatt, 105 Tenn. 508; Mattison *v.* Sovereign Camp, (Tex. Civ. App. 1901) 60 S. W. Rep. 897.

Legacy. — In a statute providing that a devise to a relative shall not lapse by the death of the devisee during the lifetime of the testator, if the devisee leaves lineal descendants, the word includes only relatives by blood, and not by affinity.[1]

Benefit Societies. — But the words "related to" in a provision permitting persons related to a member of a benefit society to be beneficiaries have been held to include relatives by affinity as well as by blood.[2]

Illegitimates. — The term does not include illegitimates.[3]

Statute of Distributions — Next of Kin. — While the word "relatives" or "relations," in its widest sense, includes all the kindred of the person spoken of, it has long been settled that in the construction of wills it includes only those persons who are entitled as next of kin under the statute of distributions.[4]

RELATIVE AMOUNT. — See note 5.

RELATIVE PROPORTIONS. — See note 6.

1. Legacy. (See also the title LEGACIES AND DEVISES, vol. 18, p. 757.) — Keniston *v.* Adams, 80 Me. 290; Elliot *v.* Fessenden, 83 Me. 205; Horton *v.* Earle, 162 Mass. 448; Bramell *v.* Adams, 146 Mo. 89; Matter of Renton, 10 Wash. 533; Cleaver *v.* Cleaver, 39 Wis. 96.

2. Benefit Societies — Affinity. — Simcoke *v.* Grand Lodge, etc., 84 Iowa 383; Bennett *v.* Van Riper, 47 N. J. Eq. 563; Mattison *v.* Sovereign Camp, (Tex. Civ. App. 1901) 60 S. W. Rep. 897.

But in Elliot *v.* Fessenden, 83 Me. 197, it was held that the *relationship* must be by consanguinity, and not by affinity.

Agreement. — An agreement between parties to act towards each other as uncle and niece does not have the effect to make them such, and to bring the plaintiff within the class who may be beneficiaries as *relatives*. Supreme Council, etc. *v.* Green, 71 Md. 263.

3. Illegitimate Child. — Elliot *v.* Fessenden, 83 Me. 197; Esty *v.* Clark, 101 Mass. 36; Kimball *v.* Story, 108 Mass. 382.

In Montegut *v.* Bacas, 42 La. Ann. 158, it was held that a legitimate child of a natural aunt of the deceased was not his legitimate *relation*.

Benevolent Societies. — In Lavigne *v.* Ligue Des Patriotes, 178 Mass. 25, it was held that an illegitimate child of a member of a benevolent society was not a *relative*.

Illegitimates Included. — But where it appears from other parts of the will that the testator has used the word *relatives* as including illegitimates, the term may be extended to include them. Seale-Hayne *v.* Jodrell, (1891) A. C. 304, 44 Ch. D. 590.

4. Relatives Limited to Relatives Within Statute of Distributions — *England.* — Harding *v.* Glyn, 1 Atk. 469; Brown *v.* Higgs, 5 Ves. Jr. 501; Devisme *v.* Mellish, 5 Ves. Jr. 529; Whithorne *v.* Harris, 2 Ves. 527; Smith *v.* Campbell, 19 Ves. Jr. 400; Widmore *v.* Woodroffe, Ambl. 636; Doe *v.* Over, 1 Taunt. 263; Stamp *v.* Cooke, 1 Cox Ch. 234; Green *v.* Howard, 1 Bro. C. C. 31; Anonymous, 1 P. Wms. 327; Roach *v.* Hammond, Prec. Ch. 401.

Maine. — Drew *v.* Wakefield, 54 Me. 291.

Massachusetts. — Cummings *v.* Cummings, 146 Mass. 507.

Missouri. — Bramell *v.* Adams, 146 Mo. 89.

New Hampshire. — Varrell *v.* Wendell, 20 N. H. 431; Snow *v.* Durgin, 70 N. H. 121.

New York. — Gallagher *v.* Crooks, 132 N. Y. 338.

Infant's Relations. — Under the practice of the Court of Chancery, where a guardian was applied for, to refer the application to a master to report the circumstances, etc., of an infant "and what *relations* he has," "the term *relations* is said to mean those who would, if he died intestate, be entitled to a distributive share of the infant's estate." Taff *v.* Hosmer, 14 Mich. 257.

Next of Kin. — The term *relatives* or *relations* has been frequently construed as "next of kin." Grant *v.* Lyman, 4 Russ. 292; Brown *v.* Higgs, 5 Ves. Jr. 501; Harding *v.* Glyn, 1 Atk. 469; Pope *v.* Whitcombe, 3 Meriv. 689; Drew *v.* Wakefield, 54 Me. 291; McNeilledge *v.* Barclay, 11 S. & R. (Pa.) 103; Hill *v.* Page, (Tenn. Ch. 1895) 36 S. W. Rep. 741.

Thus, in Isaac *v.* Defriez, Ambl. 595, it was held that where there was a bequest to *relations* and the persons named were nephews and nieces and great-nephews and great-nieces, only the nephews and nieces were entitled.

In Harding *v.* Glyn, 1 Atk. 469, where it was uncertain what persons were meant by *relations*, the master of the rolls decreed that the property should be divided among such of the testator's *relations* as were his next of kin.

But the term may be shown to have a broader meaning. Spring *v.* Biles, 1 T. R. 435, note; Drew *v.* Wakefield, 54 Me. 291.

In Supple *v.* Lowson, Ambl. 729, there was a bequest of the residue of an estate to a brother in trust to dispose of among such of the testator's *relations* and in such manner as he should think fit, without regard to the legacies before given. It was held that the term *relations* was not confined to next of kin.

A testator devised his property to his wife "believing she will do justice between her *relatives* and mine at her death." It was held that the term *relatives* was not confined to next of kin. Hill *v.* Page, (Tenn. Ch. 1895) 36 S. W. Rep. 741.

5. Relative Amount. — See Matter of Klock, 30 N. Y. App. Div. 41.

6. Relative Proportions. — A statute provided that the county commissioners should determine and fix the *relative proportions* of expenses for maintaining a bridge to be borne by a city or county and any of the cities and

RELATIVE VALUE. — See note 1.
RELAYING. — See note 2.

towns lying near to or contiguous to the bridge. The court said: "The ***relative proportion*** is to be fixed with reference to all the circumstances of benefit to the respective municipalities affected, and to their population, extent, and ability to bear the burden. Such a comparison does not require an absolute mathematical ratio for the other branch of the proportion. We are of opinion that it was within the power of the county commissioners to fix the proportion by assigning to each town a specific part of the bridge, if in their judgment that was just and equitable; and that such an apportionment was proper and reasonable." Com. *v.* Newburyport, 103 Mass. 134.

1. Relative Value. (See also VALUE.) — In Drhew *v.* Altoona, 121 Pa. St. 418, it was said: "From these provisions of the contract it seems plain that monthly estimates were required as mere approximations; they were to be made of the ***relative value*** of the work done; that is to say, the value was not absolute; it was the estimated value of a part, as it stood in connection with the whole."

2. Relaying — Repaving.— A statute provided that the expenses of maintaining and ***relaying*** streets should be paid from the general city or ward fund. It was held that the word ***relaying*** must be construed as simply covering the ***relaying*** of some part of the existing pavement in the ordinary course of repairs, and not the entire repaving of the street. Adams *v.* Beloit, 105 Wis. 375.

RELEASE AND DISCHARGE.

By Herbert Wharton Beall.

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CROSS-REFERENCES.

For matters of PROCEDURE, see the ENCYCLOPÆDIA OF PLEADING AND PRACTICE, vol. 18, p. 88.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: ACCORD AND SATISFACTION, vol. 1, p. 408; *ALTERATION OF INSTRUMENTS*, vol. 2, p. 181; *COMPOSITION WITH CREDITORS*, vol. 6, p. 376; *COVENANTS*, vol. 8, p. 43; *ESCROW*, vol. 11, p. 333; *FRAUD AND DECEIT*, vol. 14, p. 12; *MISTAKE*, vol. 20, p. 805; *NOVATION*, vol. 21, p. 659; *PAYMENT*, vol. 22, p. 513; *RECEIPTS*, vol. 23, p. 977; *SUBROGATION; WAIVER.*

I. DEFINITION AND SCOPE OF TITLE. — A release is the giving or discharging of the right or action which a man has, or may have or claim, against another man, or that which is his. Or it is the conveyance of a man's interest or right which he has to a thing to another that has the possession thereof or some estate therein.[1] The distinction between the release of a right and of an estate, indicated in the above definition, has been preserved in practice. Some releases transfer from the releasor to the releasee things personal or real, or the releasor's interest therein; others discharge the releasee from his obligations to the releasor, and from the actions and demands of the releasor.[2] The bulk of the ancient law of releases dealt with the release as a mode of conveying the releasor's interest in property, but much of such law has become obsolete. The discussion of a release as a secondary mode of conveyance will be found elsewhere in this work.[3] The present title deals with release as a relinquishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced.[4]

Release Distinguished from Receipt. — While a release is sometimes contained in a document purporting to be a receipt, and while a receipt is sometimes construed to be a release, there is an essential difference between the two. A receipt is merely the evidence of a fact, while a release is a contract; hence while a receipt is open to parol explanation and modification, a release cannot be contradicted or explained by parol. A receipt is evidence of the extinguishment of a debt, but a release is the extinguishment itself, and if under seal usually estops and concludes forever.[5] The acknowledgment of

1. **Definition.** — Shep. Touch., c. 19, p. *320.
2. Binsse *v.* Ohl, 51 N. J. L. 50.
3. See the title DEEDS, vol. 9, p. 87.
4. Black's Law Dict. *sub nom.*, RELEASE.
5. **Release Distinguished from Receipt** — *England.* — Middleditch *v.* Sharland, 5 Ves. Jr. 87; Stocks *v.* Dobson, 4 De G. M. & G. 11.

United States. — The David Pratt, 1 Ware (U. S.) 495; The Cayuga, 59 Fed. Rep. 483, 16 U. S. App. 582, *distinguishing* Fire Ins. Assoc. *v.* Wickham, 141 U. S. 564.

Minnesota. — Gross *v.* Diller, 33 Minn. 424; Cummings *v.* Baars, 36 Minn. 353.

Mississippi. — Foster *v.* Walker, 34 Miss. 365; Baum *v.* Lynn, 72 Miss. 932.

Nebraska. — Price *v.* Treat, 29 Neb. 536.

New Jersey. — Crane *v.* Alling, 15 N. J. L. 423.

New York. — M'Crea *v.* Purmort, 16 Wend. (N. Y.) 474; Kirchner *v.* New Home Sewing Mach. Co., 135 N. Y. 188.

North Carolina. — Lowe *v.* Weatherley, 4 Dev. & B. L. (20 N. Car.) 212.

South Carolina. — Allen *v.* Allen, 13 S. Car. 528, 36 Am. Rep. 716.

A distinction was once made in *New Jersey* between an equitable release and a legal release, Leddel *v.* Starr, 20 N. J. Eq. 274; but the distinction was subsequently repudiated. Irwin *v.* Johnson, 36 N. J. Eq. 347.

The rule now in force is that no act or conduct on the part of a creditor, indicating an intention to release or forgive a debt, will operate as a release or discharge in equity, unless it is entitled to the same effect at law. Cross *v.* Sprigg, 6 Hare 552; Peace *v.* Hains, 11 Hare 151; Traphagen *v.* Voorhees, 44 N. J. Eq. 30.

satisfaction of a judgment on the margin of a record is not to be regarded as a technical common-law release under seal, although such acknowledgment have the seal or scroll of the judgment creditor attached. It is nothing more than an acknowledgment of the payment of the debt, and is entitled to no further force than any other written receipt, and is subject, therefore, to explanation and even contradiction.[1] A receipt to one of several covenantors for his individual part, which states that the covenantee intended to sue all for the balance because requisite by the forms of law, but that the plaintiff would look to the other defendants only for satisfaction, is no release.[2] A release which is not technical because not under seal, and which cannot operate as an accord and satisfaction, nor as a release of any kind because the whole tenor thereof is at enmity with the notion of an admission of payment, may nevertheless operate as a receipt in full of all demands, or as an agreement not to enforce liability by reason of the judgment.[3]

Release Distinguished from Waiver. — A mere waiver signifies nothing more than an intention not to insist upon a right, and in equity will not bar the right any more than at law accord without satisfaction would be a plea. A release, however, is the execution of the intention to abandon a right, and is equivalent to an accord executed.[4]

Release Distinguished from Extinguishment. — A release is a discharge of a debt by act of the party; an extinguishment is a discharge by operation of law.[5]

II. Form and Kinds. — There is no set form of words necessary to constitute a release. It may be under seal or parol, may be express or implied, or even by operation of law.[6] All that is necessary is that it set forth clearly the intention of the parties. A covenant not to sue is often construed as a release, and conversely, a formal release has often been construed to be no more than a covenant not to sue.[7] In some states an agreement to discharge one of several joint obligors on a written contract, or to release an interest in property either real or personal, must be in writing.[8] The release, however, of a demand growing out of a simple contract is not required to be in writing; it is only necessary that it should be founded upon a sufficient consideration.[9] Although Blackstone says that a deed must be signed as well as sealed and delivered,[10] it has been held that signing is not necessary to a release if it is sealed and delivered.[11] On the other hand an oral agreement between tenants in common, that the interest of one of them should be relieved of certain

1. Winter *v.* Kansas City Cable R. Co., 160 Mo. 159.

2. Legrand *v.* Baker, 6 T. B. Mon. (Ky.) 244.

3. Irvine *v.* Milbank, (Ct. App.) 15 Abb. Pr. N. S. (N. Y.) 378.

In a Will the words " I return A. his bond " make not a release but a legacy, and having lapsed, the bond remains in force against a surviving co-obligor. Maitland *v.* Adair, 3 Ves. Jr. 231.

4. **Release Distinguished from Waiver.** — Stackhouse *v.* Barnston, 10 Ves. Jr. 465. See the distinction commented upon and somewhat modified in Maxfield *v.* Terry, 4 Del. Ch. 629. See generally the title Waiver.

5. **Release Distinguished from Extinguishment.** — Baker *v.* Baker, 28 N. J. L. 20. It will be seen below, however, that there is a release which takes effect by operation of law.

6. **Form and Kinds** — *England.* — Co. Litt. 264; Bac. Abr., Release (A); Com. Dig., Release (A, 1).

Kentucky. — Bruce *v.* Halbert, 3 T. B. Mon. (Ky.) 67.

Maine. — Southwick *v.* Hopkins, 47 Me. 362, *distinguishing* Lunt *v.* Stevens, 24 Me. 534.

Mississippi. — Stebbins *v.* Niles, 25 Miss. 268.

New York. — Dearborn *v.* Cross, 7 Cow. (N. Y.) 48; Morgan *v.* Smith, 70 N. Y. 543.

Pennsylvania. — Whitehill *v.* Wilson, 3 P. & W. (Pa.) 405.

South Carolina. — Burgiss *v.* Westmoreland, 38 S. Car. 425.

7. See *infra*, this title, *Construction*.

8. **Must Sometimes Be Written.** — Swan *v.* Benson, 31 Ark. 728; Brands *v.* DeWitt, 44 N. J. Eq 545, 6 Am. St. Rep. 909; Simpson *v.* Moore, 6 Baxt. (Tenn.) 371.

9. Meyers *v.* Stix, (C. Pl. Gen. T.) 13 N. Y. Supp. 304. See *infra*, this title, *Consideration*.

10. **Signing Not Necessary.** — Black. Commentaries, vol. 2, p. 305.

11. Taunton *v.* Pepler, 6 Madd. 166. See the titles Deeds, vol. 9, p. 87; Seals.

The statement made in Hart *v.* Freeman, 42 Ala. 567, that the code requires settlements for the composition of debts to be in writing, has been pronounced to be manifestly erroneous as a general proposition, although correct as to the particular case in which it was used. Singleton *v.* Thomas, 73 Ala. 205.

burdens, has been held of no effect because not in writing.[1] An instrument which was apparently an attempt to release the maker's right and title, has been held to be good as a bill of sale although not a technical release.[2]

Implied Release. — An implied release is one which arises from acts of the creditor or owner without any express agreement.[3] The acts from which a release may be implied are many and various. Thus it has been held that a release will be implied where the creditor voluntarily delivers to his debtor his bond, note, or other evidence of his claim, or where the bond is canceled with the intent to discharge the debt.[4] And merely erasing the signature of one of the makers of a note will operate as a release to such maker,[5] and even an agreement by a creditor to accept certain securities in his hands, accompanied by a receipt in full of a debt, has been construed to be a release of the debtor's liability as indorser upon securities so held.[6] But a bond, given by a son to his father, is not released by a memorandum which was apparently intended to be embodied in a codicil to the father's will, and which enumerated the bond as going to make up a part of the legacy to the son.[7] Nor will a release of rent be implied from the mere fact of the lessor's assent to the assignment of his interest by one of the lessors to the other.[8] But where a lessee accepts new leases from the lessor, a release of the old will be presumed.[9] Examining a party as a witness, is an equitable release to him as to the matter about which he is examined.[10]

Constructive Release. — A constructive release is one which the law implies from the acts of the parties. Instances are most frequently found in cases where the creditor releases a joint debtor or a joint trespasser. The general effect of such an arrangement, resulting not from the intention of the parties but as a positive rule of law, is, that a codebtor or cotrespasser is likewise discharged. The operation of the rule will be seen in numerous cases collected below.[11]

Release by Estoppel. — Although there might be technical grounds of objection to a release, the releasor may by his conduct be estopped to deny the legal and binding force of the release; as where he signs the instrument in ignorance of its contents, but neglects an opportunity to inform himself, and relies upon another's statement,[12] or has deliberately recorded the release,[13] or has allowed another to proceed upon the assumption that the release was valid,[14] or accepts benefits from a relief association.[15] A court record operating as an estoppel may be equivalent to a release,[16] and an accord and satisfaction by one of several wrongdoers has been held to estop the injured party to demand relief from the others.[17] But a recital of payment as between the parties will not raise an estoppel in favor of one who knows that such recital is not intended to be binding.[18]

1. Porter *v.* Muller, 65 Cal. 512.

2. **Release Good as Bill of Sale.** — McAllister *v.* McAllister, 12 Ired. L. (34 N. Car.) 184.

3. **Implied Release.** — Bouvier's Law Dict., *sub nom. Release, citing* Pothier, Obl. 608, 609; Flower *v.* Marten, 2 Myl. & C. 459; Jones *v.* Austin, 26 Ind. App. 399.

4. **From Delivering Bond, Etc.** — Vanderbeck *v.* Vanderbeck, 30 N. J. Eq. 265; Beach *v.* Endress, 51 Barb. (N. Y.) 578; Larkin *v.* Hardenbrook, 90 N. Y. 334, 43 Am. Rep. 176; Licey *v.* Licey, 7 Pa. St. 251, 47 Am. Dec. 513; Albert *v.* Ziegler, 29 Pa. St. 50.

5. **Erasing Signature.** — Nashville First Nat. Bank *v.* Shook, 100 Tenn. 436.

6. **From Agreement Plus Receipt.** — Airy *v.* Nelson, 39 Ark. 43.

7. **Insufficient Memorandum.** — Chester *v.* Urwick, 23 Beav. 404.

8. **Release of Rent.** — Wilson *v.* Gerhardt, 9 Colo. 585.

9. **Release of Old Lease by Taking New.** — Springstein *v.* Schermerhorn, 12 Johns. (N. Y.) 357.

10. **Examining as Witness.** — Burton *v.* Stamper, 6 Ired. Eq. (41 N. Car.) 16.

11. See *infra*, this title, *Release of Joint Debtor; Release of Joint Tortfeasor.*

12. **Release by Estoppel.**—Wallace *v.* Chicago, etc., R. Co., 67 Iowa 551.

13. Workman *v.* Doran, 34 W. Va. 605.

14. Van Rensselaer *v.* Akin, 22 Wend. (N. Y.) 549; Jenks *v.* Robertson, 2 Thomp. & C. (N. Y.) 258.

15. Johnson *v.* Charleston, etc., R. Co., 55 S. Car. 152.

16. **Estoppel by Court Record.** — Carlisle *v.* Foster, 10 Ohio St. 198.

17. **By Accord and Satisfaction.**—Metz *v.* Soule, 40 Iowa 236.

18. Anderson *v.* McCloud-Love Live Stock Commission Co., 58 Neb. 674.

III. Delivery and Acceptance. — It is a general rule that a release, to be operative, must be delivered and accepted by the parties.[1] It has been held, however, that delivery, if such were necessary, will be presumed to have been made.[2] But a formal delivery is not essential; it is sufficient if such acts appear as show an intention to deliver.[3] The presumption is entertained that a release was delivered on the day of its date.[4] A release may be delivered and held in escrow,[5] but the burden of showing that it was not delivered with the intent that it should take effect absolutely, is upon the releasee.[6] A release may be delivered, however, to take effect upon a contingency, and when the contingency happens it becomes absolute as the releasor's deed, by relation as from the first delivery, and it is not in the releasor's power to revoke such an instrument.[7]

IV. Seal. — Whether or not a release must be under seal, depends chiefly upon the nature of the obligation to be discharged. The old common-law rule was that every contract or agreement ought to be dissolved by matter of as high a nature as the contract or agreement itself; and it was a further rule that a release of a right of action, whether founded on a simple contract or a specialty, had to be by deed under seal to be of any efficacy.[8] A release under seal is sometimes called a technical release; and although in equity it has no greater effect than a parol release, yet it differs from the latter in one respect, namely, that it is self-sustaining, the seal implying a consideration.[9] It is still often asserted to be the general rule that a release should be under seal, and such is universally true where there is no consideration given for the release, since a discharge under seal imports a consideration and renders one unnecessary, and a release without seal and without consideration is totally void.[10] On the other hand, since the dissipation of the solemnity which was anciently supposed to attach to a seal, many jurisdictions have materially modified the common-law rule above stated. And while the courts continue to lay down the technical rule, little attention is paid thereto in actual practice; it has even been maintained that in every conceivable case, where the

1. Delivery and Acceptance. — Buck *v.* Sanders, 1 Dana (Ky.) 187; Daves *v.* Haywood, 1 Jones Eq. (54 N. Car.) 253.

2. Foerster's Succession, 43 La. Ann. 190; Stevenson *v.* Mudgett, 10 N. H. 342; Fitch *v.* Forman, 14 Johns. (N. Y.) 172.

3. Cincinnati, etc., R. Co. *v.* Iliff, 13 Ohio St. 235; Goodrich *v.* Walker, 1 Johns. Cas. (N. Y.) 250.

In Walker *v.* Ferrin, 4 Vt. 523, it was held that there was sufficient delivery of a release which did not actually come into possession of the releasee at all, but was destroyed by the releasor before delivery.

4. Crager *v.* Reis, 16 Daly (N. Y.) 450.

5. Delivery in Escrow. — Wolcott *v.* Coleman, 1 Conn. 375; Walter *v.* Walter, 9 Ohio Dec. (Reprint) 351, 12 Cinc. L. Bul. 212.

6. Davison *v.* Tams, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 156.

7. Timothy *v.* Wright, 8 Gray (Mass.) 527.

8. Seal. — Co. Litt. 264*a*, 291*a*; Rutland's Case, 5 Coke 26. See also the title Seals.

9. Kidder *v.* Kidder, 33 Pa. St. 269.

10. Seal Necessary if No Consideration — *England.* — Kaye *v.* Waghorne, 1 Taunt. 428; Preston *v.* Christmas, 2 Wils. C. Pl. 86; Brooks *v.* Stuart, 9 Ad. & El. 854, 36 E. C. L. 304; Harman *v.* Harman, Comb. 35.

United States. — Wagner *v.* National L. Ins. Co., (C. C. A.) 90 Fed. Rep. 400.

Alabama. — Teague *v.* Russell, 2 Stew. (Ala.) 420; Governor *v.* Daily, 14 Ala. 469.

California. — Armstrong *v.* Hayward, 6 Cal. 186.

Illinois. — Murphy *v.* Halleran, 50 Ill. App. 595.

Kentucky. — Handley *v.* Moorman, 4 Bibb (Ky.) 1; Gibson *v.* Weir, 1 J. J. Marsh. (Ky.) 446.

Massachusetts. — Shaw *v.* Pratt, 22 Pick. (Mass.) 308; Dunham *v.* Branch, 5 Cush. (Mass.) 561; Gold Medal Sewing Mach. Co. *v.* Harris, 124 Mass. 208.

Nevada. — Davis *v.* Bowker, 1 Nev. 487.

New Jersey. — Landon *v.* Hutton, 50 N. J. Eq. 500.

New York. — Seymour *v.* Minturn, 17 Johns. (N. Y.) 170, 8 Am. Dec. 380; Suydam *v.* Jones, 10 Wend. (N. Y.) 184, 25 Am. Dec. 552; Bronson *v* Fitzhugh, 1 Hill (N. Y.) 185; Honegger *v.* Wettstein, 47 N. Y. Super. Ct. 126.

North Carolina. — Redmond *v.* Coffin, 2 Dev. Eq. (17 N. Car.) 437; Smithwick *v.* Ward, 7 Jones L. (52 N. Car.) 64, 75 Am. Dec. 453.

Pennsylvania. — *In re* Campbell, 7 Pa. St. 100, 47 Am. Dec. 503; Kidder *v.* Kidder, 33 Pa. St. 269.

South Carolina. — Hope *v.* Johnston, 11 Rich. L. (S. Car.) 135.

Tennessee. — Smith *v.* Harris, 3 Sneed (Tenn.) 553.

In Barnard *v.* Darling, 11 Wend. (N. Y.) 30, it is said that the cases seem to leave in a little obscurity and doubt the question whether or not the performance of covenants contained

parties are bound to one another by writing under seal, the obligor will be discharged by parol proof of facts if sufficient in themselves to constitute a discharge.[1] In some jurisdictions the abrogation of the ancient rule has been effected by legislation, the effect of which is to make valid and operative written discharges and written settlements though executed without a seal and even without new or additional consideration.[2] In *California*, a written instrument is presumptive evidence of a consideration, and an obligation is extinguished by a release given to a debtor by the creditor upon a new consideration, or in writing with or without new consideration.[3] A contract may, before breach, be discharged by parol where the contract is itself parol.[4] It seems, moreover, that a parol executory agreement may discharge a written obligation, provided it be founded upon a new consideration.[5] And it has even been held that a contract in writing, whether under seal or not, if it is executory in all its terms, may be rescinded or released by a subsequent parol agreement, and that the mutual assent of the parties is a sufficient consideration to support their agreement to this effect.[6] Moreover, a parol agreement which has been executed will discharge an antecedent contract, when so intended by the parties, whether such prior contract be parol or under seal.[7] Under the statutes of *Michigan*, a seal is only presumptive evidence of consideration and may be rebutted.[8] By the *Indiana* statutes, the consideration of any specialty when made the foundation of, or set up as a defense to, an action, may be inquired into in like manner as though it were a simple instrument.[9] A sealed agreement to release does not operate as a present release.[10]

Discharge of Sealed Instruments. — The rule of the common law that a contract under seal can be released or discharged only by an instrument of equal dignity, as well as the distinction sometimes made between covenants before breach and after breach, is discussed elsewhere in this work.[11]

V. CONSIDERATION. — Since the release of a contract or other obligation is itself a contract, the general rule of law applies that it must be based upon a legal and sufficient consideration.[12] And a party may release a cause of action

in a sealed instrument can be discharged by a parol agreement between the parties. See *infra*, the section *Consideration*.

1. Modern Rule — Seal Unnecessary. — Ryan *v.* Dunlap, 17 Ill. 40, 63 Am. Dec. 334; White *v.* Walker, 31 Ill. 434; Lewiston *v.* Junction R. Co., 7 Ind. 597; Lancaster *v.* Elliot, 42 Mo. App. 510. See further Benjamin *v.* McConnell, 9 Ill. 536, 46 Am. Dec. 474.

2. Legislation on the Subject. — Civ. Code Ala., § 1806; Hart *v.* Freeman, 42 Ala. 567; Motley *v.* Motley, 45 Ala. 555; McArthur *v.* Dane, 61 Ala. 539; Singleton *v.* Thomas, 73 Ala. 205; Cleere *v.* Cleere, 82 Ala. 581, 60 Am. Rep. 750.

3. California Rule. — Civ. Code Cal., §§ 1614, 1541.

4. Release of Contract Before Breach. — Goss *v.* Nugent, 5 B. & Ad. 65, 27 E. C. L. 33; Adams *v.* Wordley, 1 M. & W. 374; Edwards *v.* Weeks, 1 Mod. 262; Robinson *v.* McFaul, 19 Mo. 549; Bryant *v.* Thesing, 46 Neb. 244.

5. Hunt *v.* Barfield, 19 Ala. 120.

6. Robinson *v.* Bullock, 66 Ala. 548; Maness *v* Henry, 96 Ala. 454.

7. Barelli *v.* O'Conner, 6 Ala. 617; Wallis *v.* Long, 16 Ala. 738; Adams *v.* Nichols, 19 Pick. (Mass.) 275, 31 Am. Dec. 137.

8. Howell's Annot. Stat. Mich., § 75; Green *v.* Langdon, 28 Mich. 225.

9. Rev. Stat. Ind., § 214; Leonard *v.* Bates, 1 Blackf. (Ind.) 172.

In Mitchell *v.* Pratt, Taney (U. S.) 448, it was held that a paper purporting to be a receipt by a seaman to the master of his vessel discharging a claim for damages for assault and battery, and containing two wafer seals, could not, in the absence of proof that either of the seals was that of the person giving the receipt, operate as a release in the technical sense of the word as known to the common law.

10. Ludwig *v.* Highley, 5 Pa. St. 132.

11. Discharge of Sealed Instruments. — See the title COVENANTS, vol. 8, pp. 166, 167; SEALS.

12. Consideration — *England.* — Mountstephen *v.* Brooke, 1 Chit. 390, 18 E. C. L. 111; Hey *v.* Moorhouse, 6 Bing. N. Cas. 52, 37 E. C. L. 276.

Alabama. — Scharf *v.* Moore, 102 Ala. 468; Mobile, etc., R. Co. *v.* Owen, 121 Ala. 505.

Arkansas. — Swan *v.* Benson, 31 Ark. 728; Mendel *v.* Davies, 46 Ark. 420.

California. — Upper San Joaquin Irrigating Canal Co. *v.* Roach, 78 Cal. 555.

Colorado. — Heckman *v.* Manning, 4 Colo. 543.

Indiana. — Carter *v.* Zenblin, 68 Ind 437; Harris *v.* Boone, 69 Ind. 300; Hanlon *v.* Doherty, 109 Ind. 39; Henes *v.* Henes, 5 Ind. App. 100; Wray *v.* Chandler, 64 Ind. 146.

Iowa. — Metcalf *v.* Kent, 104 Iowa 487.

Michigan. — Averill *v.* Wood, 78 Mich. 342.

Minnesota. — Hale *v.* Dressen, 76 Minn. 183.

against one person, upon a consideration flowing from another.[1]

In Some Instances No Consideration Is Required to support a release; as, for instance, where the obligee delivers up the obligation which he holds against another party, with the intent and for the purpose of discharging the debt, and there is no fraud or mistake alleged or proved. Such surrender will operate in law as a release and discharge of the liability upon the obligation.[2]

The Courts of Pennsylvania attempted, on the authority of Lord Mansfield's dictum,[3] to introduce the doctrine that no consideration was necessary to support a release.[4] But the attempt was repudiated by Chief Justice Gibson, who laid down the rule that an unsealed release was nevertheless parol, and that the delivery of the written evidence of it could no more dispense with the necessity of a consideration, than could the delivery of a promissory note dispense with it between the original parties by operating as a gift of money; and his opinion that a release in favor of a child might be supported without further consideration, was eventually abandoned as untenable.[5]

Release upon Part Payment of Debt. — While it is true that payment of a part of a debt is no consideration for a release of the remainder,[6] a formal release under seal executed upon payment of a portion, will discharge such remainder.[7] The rule that the payment of a less sum than the real debt will be no satisfaction of a larger sum without a release by deed, applies only to conceded or undisputed demands. Where the claims are in dispute, the compromise and part payment thereof are sufficient consideration to support the discharge.[8]

Mississippi. — Young *v.* Power, 41 Miss. 197; Anthony *v.* Capel, 53 Miss. 350.

Montana. — Northwestern Nat. Bank *v.* Great Falls Opera House Co., 23 Mont. 1.

New Jersey. — Katzenbach *v.* Holt, 43 N. J. Eq. 536.

New York. — Crawford *v.* Millspaugh, 13 Johns. (N. Y.) 87; Jackson *v.* Stackhouse, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514; De Zeng *v.* Bailey, 9 Wend. (N. Y.) 336; Barnard *v.* Darling, 11 Wend. (N. Y.) 28; De Voss *v.* Johnson, 18 Barb. (N. Y.) 170; Purdy *v.* Rome, etc., R. Co., 52 Hun (N. Y.) 267; Honegger *v.* Wettstein, 47 N. Y. Super. Ct. 126; Mayer *v.* Townsend, (Marine Ct. Tr. T.) 1 City Ct. (N. Y.) 358; Kennedy *v.* Strobel, 77 Hun (N. Y.) 96; Ferris *v.* Ferris, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 577.

North Carolina. — Dockery *v.* French, 73 N. Car. 420

Pennsylvania. — Albert *v.* Ziegler, 29 Pa. St. 50; Kidder *v.* Kidder, 33 Pa. St. 269; Brooks *v.* Meadville First Presb. Church, 128 Pa. St. 408.

South Carolina. — Corbett *v.* Lucas, 4 McCord L. (S. Car.) 323; Allen *v.* Allen, 13 S. Car. 528, 36 Am. Rep. 716.

Compare Tufnell *v.* Constable, 8 Sim. 69, with Flower *v.* Marten, 2 Myl. & C. 459. In the first case the debtor was not allowed to avail himself of the indorsement on his bond forgiving the debtor a portion of the bond on the ground that he had given no consideration for the indorsement. In the latter case the court ordered a bond for a sum of money to be delivered up to be canceled, on the ground that the obligee's conduct and mode of dealing with the bond in his lifetime amounted in equity to a release of the debt. It seems difficult to reconcile the two cases.

1. Consideration Paid by Third Person. — Wheaton *v.* Newcombe, 48 N. Y. Super. Ct. 215. See also Tuckerman *v.* Sleeper, 9 Cush. (Mass.) 177; Cook *v.* Lister, 13 C. B. N. S. 543, 106 E. C. L. 543; Harrison *v.* Hicks, 1 Port. (Ala.) 423, 27 Am. Dec. 638.

2. Consideration Not Always Necessary. — Larkin *v.* Hardenbrook, 90 N. Y. 334, 43 Am. Rep. 176; Albert *v.* Ziegler, 29 Pa. St. 50; Beach *v.* Endress, 51 Barb. (N. Y.) 570; Hathaway *v.* Lynn, 75 Wis. 186.

3. Martin *v.* Mowlin, 2 Burr. 979.

4. Wentz *v.* Dehaven, 1 S. & R. (Pa.) 312; Coe *v.* Hutton, 1 S. & R. (Pa.) 398.

5. Whitehill *v.* Wilson, 3 P. & W. (Pa.) 413; Kidder *v.* Kidder, 33 Pa. St. 268.

The provision of section 1541 of the Civil Code of *California*, that a written release is good without a consideration, has been held to apply only to formal releases purporting to be such, and not to things which might operate as such in a roundabout way. Upper San Joaquin Irrigating Canal Co. *v.* Roach, 78 Cal. 552; Rogers *v.* Kimball, 121 Cal. 247. See also Civ. Code Tenn., §§ 1804, 1805; Evans *v.* Pigg, 3 Coldw. (Tenn.) 395.

6. Release upon Part Payment of Debt. — *United States.* — Fire Ins. Assoc. *v.* Wickham, 141 U. S. 564.

Arkansas. — Heaslet *v.* Spratlin, 54 Ark. 185; Reynolds *v.* Reynolds, 55 Ark. 369.

Illinois. — Davidson *v.* Burke, 143 Ill. 140, 36 Am. St. Rep. 367.

Indiana. — Fitzgerald *v.* Smith, 1 Ind. 314.

Iowa. — Small *v.* Older, 57 Iowa 326; Bender *v.* Been, 78 Iowa 284.

Massachusetts. — Ruggles *v.* Patten, 8 Mass. 483; Lathrop *v.* Page, 129 Mass. 21.

New York. — Bolen *v.* Crosby, 49 N. Y. 186.

North Carolina. — Winston *v.* Dalby, 64 N. Car. 299.

See the title ACCORD AND SATISFACTION, vol. 1, p. 413.

7. Maclary *v.* Reznor, 3 Del. Ch. 445; Braden *v.* Ward, 42 N. J. L. 518.

8. Farmers' Bank *v.* Blair, 44 Barb. (N. Y.) 651.

During the pendency of a motion for a new trial, a verdict for a given amount may be released for a much smaller amount.[1] And the payment of a proportionate part of a joint note by one of the makers, if accepted in full satisfaction of his liability thereupon, and if acquiesced in by the other makers, is sufficient consideration to sustain the release of such maker.[2]

A Promise of Employment Given to an Injured Employee is sufficient consideration for the release by the employee of a claim for damages for injuries received through the negligence of the employer, prior to such discharge.[3] But where a stipulation for employment is for such time as will suit the employer,[4] or where no new employment is tendered to or accepted by the employee, and no other consideration than such indefinite promise of employment is paid, a release based upon such promise to employ is void for want of consideration.[5] And an agreement to receive, in satisfaction of his claim for both wages and damages, the wages to which he is already entitled by his contract of hiring and concerning which there is no dispute, is, in so far as it purports to release the claim for damages, without consideration.[6] An employee permitted to ride free may still be a passenger for hire; and being such, a release executed by him discharging the road from liability for injuries sustained while using permit, is without consideration and void.[7]

The Acceptance of Relief from the Relief Department of a railroad is sufficient consideration for an agreement on the part of an injured employee to release the railroad from all claims for injuries; and the promise made to the relief department is available to the railroad company as a defense.[8]

Payment of Doctor's Fees by the company inflicting the injuries is no consideration for the employee's release, the company being liable for expenses which the injuries occasioned.[9]

Payment of Benefits. — An employee may release his employer from liability in return for a contract to pay him certain benefits; in such case, the consideration for the release is the obligation or promise to make such payments, and the release is not conditioned on full performance of such promise.[10]

Illegality of Consideration may not be shown by the releasor, since the law will not lend its aid to enforce an unlawful executory contract, nor interfere to rescind a contract based upon illegal consideration.[11]

A Surrender of the Property and an agreement to pay the costs of reletting are a sufficient consideration for a release of a tenant from the terms of his lease.[12]

Where there Is an Antecedent Indebtedness, the giving of a discharge thereof is a good consideration for the promise to pay a certain amount, and the discharge cannot operate or cut off the promise to pay of which it is the consideration.[13]

Trespass. — A return by the defendant to the plaintiff of converted property

1. Staples *v.* Wellington, 62 Me. 9.

2. Nashville First Nat. Bank *v.* Shook, 100 Tenn. 436.

3. **Promise of Employment a Consideration.** — Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 51 Am. St. Rep. 289; Hobbs *v.* Brush Electric Light Co., 75 Mich. 550; Smith *v.* St. Paul, etc., R. Co., 60 Minn. 332; Carroll *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1902) 69 S. W. Rep. 1004.

4. Gulf, etc., R. Co. *v.* Winton, 7 Tex. Civ. App. 58. But see Texas Midland R. Co. *v.* Sullivan, 20 Tex. Civ. App. 50.

5. Purdy *v.* Rome, etc., R. Co., 125 N. Y. 209, 21 Am. St. Rep. 736.

6. Carlton *v.* Western, etc., R. Co., 81 Ga. 531.

7. Delaware, etc., R. Co. *v.* Ashley, 28 U. S. App. 375.

8. **Acceptance of Relief from Relief Department.** — Chicago, etc., R. Co. *v.* Bell, 44 Neb. 44; Ringle *v.* Pennsylvania R. Co., 164 Pa. St. 529, 44 Am. St. Rep. 628; Johnson *v.* Charleston, etc., R. Co., 58 S. Car. 488; Otis *v.* Pennsylvania R. Co., 71 Fed. Rep. 136; Chicago, etc., R. Co. *v.* Miller, (C. C. A.) 76 Fed. Rep. 439; Martin *v.* Baltimore, etc., R. Co., 41 Fed. Rep. 125.

9. **Payment of Doctor's Fees.** — Richmond, etc., R. Co. *v.* Walker, 92 Ga. 485. But see Jennings *v.* Ft. Worth, 7 Tex. Civ. App. 329.

10. **Release for a Promised Benefit.** — Johnson *v.* Charleston, etc., R. Co., 58 S. Car. 488.

11. **Illegality of Consideration Not Provable by Releasor.** — Harvey *v.* Tama County, 53 Iowa 228; Manion *v.* Titsworth, 18 B. Mon. (Ky.) 582.

12. **Release of Lease.** — Tallman *v.* Earle, (C. Pl. Gen. T.) 13 N. Y. Supp. 805.

13. **Release Cannot Discharge Its Own Consideration.** — Allen *v.* Frisbee, 2 Root (Conn.) 77.

as a consideration for the release from a suit for the conversion, is based on valuable consideration only in case the defendant was lawfully entitled to the property.[1] And while a restoring of goods wrongfully taken may not be sufficient consideration for a release of the trespass, carrying them to a place designated by the plaintiff and storing them there for him are sufficient consideration for such release.[2]

A Mere Verbal Waiver by one party, unsupported by any consideration moving from the other, cannot avail to discharge the obligation imposed upon the other party by a contract.[3]

Conditions Unperformed. — And where the agreement for a release is executory, depending upon the performance of certain conditions, the nonperformance of such conditions leaves a release without obligatory force.[4]

Failure of Consideration. — Where an award made by arbitrators is set aside by the court it is void; and a release filed by one of the parties in pursuance of the award of arbitration is also void, the consideration which moved the parties to enter into the submission having failed.[5] And where the releasor repudiates the note given as consideration for a release, on the ground of coverture, he destroys the consideration upon which the release was given and revives the original debt.[6]

Transfer of Pledge. — The transfer, by a surety to the administrator, of property held by the surety as indemnity, is no consideration for a release from a judgment given by the administrator to such surety.[7]

In Equity an agreement to discharge debts may be regarded as effective as a family settlement, even though the consideration therefor be questionable.[8]

Where the Release Is under Seal it is, of course, subject to the general rule that a seal imports a consideration and renders unnecessary any actual consideration to support it.[9]

Evidence. — The sufficiency of a consideration for a release is a question for the jury.[10] Where no consideration is expressed in a release, parol evidence may be given of the actual consideration in order to give effect to the release.[11]

Burden of Proof. — Where it is claimed that a release is without consideration and was obtained through fraud or mistake, the burden is upon the releasee to rebut the presumption of fraud arising from want of consideration.[12]

VI. CONSTRUCTION — 1. Intention of Parties. — Much of the attention of the courts, especially of courts of equity, has been occupied in construing releases, and documents and agreements claimed to be releases; and certain well-defined principles of construction have been worked out. Great liberality is now allowed in construing such instruments and agreements. It is a general principle that a release shall be construed from the standpoint which the parties occupied at the time of its execution, and confined to the intention of the parties at the time of such execution.[13] This rule has sometimes been

1. **Release of Trespass.** — Hawkins *v.* Collins, 61 S. Car. 537.

2. Petty *v.* Allen, 134 Mass. 265.

3. **Waiver Without Consideration.** — Maness *v.* Henry, 96 Ala. 454.

4. **Conditions Unperformed.** — Memphis *v.* Brown, 20 Wall. (U. S.) 289.

5. **Failure of Consideration.** — Muldrow *v.* Norris, 12 Cal. 331.

6. Saeger *v.* Runk, 148 Pa. St. 77.

7. **Transfer of Pledge.** — Alsobrook *v.* Alsobrook, 14 S. Car. 170.

Where a Creditor Agrees to Release a Claim Against His Bankrupt Debtor, in consideration that the latter will pay the other creditors a certain per cent. of their claims and procure a dismissal of pending bankruptcy proceedings, the debtor can avail himself of such agreement only by showing that he has paid the other creditors the per cent. agreed upon; and the general averment that he has "settled with them" is not sufficient. Scott *v.* Scott, 105 Ind. 584.

8. **Family Settlements.** — Hurlbut *v.* Phelps, 30 Conn. 42.

9. **Seal Imports Consideration.** — Singleton *v.* Thomas, 73 Ala. 207; Reznor *v.* Maclary, 4 Houst. (Del.) 241; Union Bank *v.* Call, 5 Fla. 409; Brown *v.* Marsh, 7 Vt. 327.

10. **Evidence.** — Hawkins *v.* Collins, 61 S. Car. 537.

11. Frink *v.* Green, 5 Barb. (N. Y.) 455.

12. **Burden of Proof.** — Boutten *v.* Wellington, etc., R. Co., 128 N. Car. 337.

13. **Releases Construed in Accordance with Intention of Parties** — *England.* — Willis *v.* De Castro, 4 C. B. N. S. 216, 93 E. C. L. 216; Morley *v.* Frear, 6 Bing. 547, 19 E. C. L. 161;

thus stated: the words employed in a release should not be extended beyond the consideration; otherwise the courts make a release for the parties which they never intended or contemplated.[1]

Ignorance of Full Effect. — However, the mere fact that when a release is executed, the parties are ignorant that its effect will be broader than they intended, will not prevent its so operating, if executed and delivered unconditionally and without reference to its bearing upon other parties.[2]

Fraud. — If one receives a release from another knowing that it was designed by him to bear a particular interpretation and to be used only for a specific purpose, then the former has no right to give it a different interpretation or to use it for a different purpose, though such new purpose may be consistent with the language of the instrument. So to use it would be to commit a fraud.[3]

Language of Instrument. — This intention of the parties, however, is to be sought in the language of the instrument itself, and read in the light of circumstances which surrounded the transaction.[4] Furthermore, in construing the release the court must take into consideration the entire language of the instrument, and so construe it as, if possible, to give effect to all its parts, *ut res magis valeat quam pereat.*[5]

Intent of Both Parties. — And the intent must be that of both of the parties. No rule has ever prevailed that it is limited to the intent of only one of the parties.[6]

In Futuro. — Furthermore the court cannot rely upon the expression of an intention to do something in the future, but it must find words or acts which are sufficient to operate as an actual release or which afford evidence to go to a jury that a release has been executed.[7]

O'Brien *v.* Osborne, 10 Hare 92; Solly *v.* Forbes, 2 Brod. & B. 38, 6 E. C. L. 27.

United States. — Fee *v.* Orient Fertilizing Co., 36 Fed. Rep. 509.

California. — Grunwald *v.* Freese, (Cal. 1893) 34 Pac. Rep. 73.

Connecticut. — Smith *v.* Smith, 1 Root (Conn.) 235.

Georgia. — Norris *v.* Ham, R. M. Charlt. (Ga.) 269.

Illinois. — Parmelee *v.* Lawrence, 44 Ill. 409.

Indiana. — Walls *v.* Baird, 91 Ind. 434; Rowe *v.* Rand, 111 Ind. 211.

Iowa. — Bonney *v.* Bonney, 29 Iowa 448.

Kentucky. — Williamson *v.* McGinnis, 11 B. Mon. (Ky.) 75.

Maine. — Southwick *v.* Hopkins, 47 Me. 362.

Massachusetts. — Croade *v.* Ingraham, 13 Pick. (Mass.) 35; Rice *v.* Woods, 21 Pick. (Mass.) 30; Hayden *v.* Smith, 12 Met. (Mass.) 511; Dunbar *v.* Dunbar, 5 Gray (Mass.) 104.

Minnesota. — Donnelly *v.* Simonton, 13 Minn. 301.

New York. — Kirby *v.* Taylor, 6 Johns. Ch. (N. Y.) 242; Irvine *v.* Milbank, (Ct. App.) 15 Abb. Pr. N. S. (N. Y.) 378; Kirby *v.* Turner, Hopk. (N. Y.) 334; Tripp *v.* Vincent, 3 Barb. Ch. (N. Y.) 613; McIntyre *v.* Williamson, 1 Edw. (N. Y.) 34.

Pennsylvania. — M'Lenachan *v.* Com., 1 Rawle (Pa.) 361; Burke *v.* Noble, 48 Pa. St. 168; Ege's Appeal, 3 Watts (Pa.) 495.

South Carolina. — Massey *v.* Brown, 4 S. Car. 94.

West Virginia. — Stribling *v.* Splint Coal Co., 31 W. Va. 82.

1. Words Not Extended Beyond the Consideration. — Lyman *v.* Clark, 9 Mass. 238; Rapp *v.* Rapp, 6 Pa. St. 45; McLarren *v.* Robertson, 20 Pa. St. 125; Codding *v.* Wood, 112 Pa. St. 371.

Where a release was executed of an entire debt, and there was a debt owing by each party to the other, the court held the effect of the release to be to release the difference between the sums due, as that was the real debt in commercial understanding. Fazakerly *v.* M'Knight, 6 El. & Bl. 795, 88 E. C. L. 795.

A written agreement by creditors to discharge a debtor upon receipt of a certain percentage of their respective claims, not specifying the amount, applies only to such claims as were then held by the several creditors. Fowler *v.* Perley, 14 Allen (Mass.) 18.

2. Effect Not Limited by Mistakes of Parties. — Parmelee *v.* Lawrence, 44 Ill. 405, *overruling* Benjamin *v.* McConnell, 9 Ill. 536, 46 Am. Dec. 474, and Rice *v.* Webster, 18 Ill. 331.

3. Parmelee *v.* Lawrence, 44 Ill. 405.

4. Intention to Be Found in the Instrument. — Parmelee *v.* Lawrence, 44 Ill. 409; Rice *v.* Woods, 21 Pick. (Mass.) 30; Bronson *v.* Fitzhugh, 1 Hill (N. Y.) 185; Irvine *v.* Milbank, (Ct. App.) 15 Abb. Pr. N. S. (N. Y.) 378.

5. Willis *v.* De Castro, 4 C. B. N. S. 216, 93 E. C. L. 216; Hayden *v.* Smith, 12 Met. (Mass.) 511.

6. Harbeck *v.* Pupin, 73 Hun (N. Y.) 5.

7. Peace *v.* Hains, 11 Hare 155. And see further Aston *v.* Pye, 5 Ves. Jr. 350, note.

Thus where creditors severally agreed and covenanted that they would receive their respective proportions of certain moneys in full satisfaction of their several demands, and would forever release and discharge the defendant, the court construed such words to

Preliminary Negotiations. — Releases are amenable to the general rule that all preliminary negotiations are presumed to be merged in them, and from the time of their execution they must be deemed to be the only competent evidence of the agreement of the parties upon the subjects to which they relate, unless avoided for fraud, mistake, duress, or some other like cause.[1]

In Courts of Law the rule is applied that where the parties employed legal terms in reference to legal proceedings, it will be presumed that they fully understood the legal import of the words used, and such shall consequently be the construction placed upon them by the court.[2]

If a Release Can Operate in Two Ways, one consistent with the intention, and the other repugnant to it, the courts will ever be astute so to construe the release as to give effect to the intent.[3]

Question for Court. — The legal construction of a release is a question of law which the court may determine without the intervention of a jury.[4]

Presumption. — A writing purporting to be a release is presumed to be a technical release under seal, but that presumption may be rebutted.[5]

State Legislation. — Several of the states of this country have legislated upon the subject of releases, laying down rules as to the construction and effect thereof. Thus it has been provided that all receipts, releases and discharges in writing, etc., must have effect according to the intention of the parties thereto, and that all settlements in writing must be taken to operate according to the intention of the parties, though no release under seal is given and no new consideration is passed.[6]

Comity Applied to a Release. — It has been held that a release having a certain effect in *New York* would be allowed the same effect by comity in *Michigan*, unless to give it such effect would violate some fundamental law or the public policy of the state, or injuriously affect the right of the citizens.[7]

2. Covenant Not to Sue Construed as Release. — A covenant never to sue a debtor or all of several debtors joint or joint and several, is often construed by the courts as equivalent to a release and discharge of the debt on the ground that allowing the covenantee to plead such covenant as a release avoids circuity of action. It is considered absurd to allow A to recover against B in one action the identical sum which B would have a right to recover in another action against A.[8] But a covenant or agreement not to sue is never technically a release. A release is an absolute extinguishment of a debt, and is essentially different from an engagement which extends merely to prevent enforcing a claim at law. Hence an agreement not to sue may be pleaded

operate as a present release on the ground that a release ought to take effect instantly in the absence of a clear intention that a future release was intended. Tuckerman *v.* Newhall, 17 Mass. 585.

The words "in consideration of your having released the said J. W. from such debt," were recognized as ambiguous, but were considered by the court to mean that "if at some future day the plaintiff should have released the debt," etc. King *v.* Cole, 2 Exch. 628.

1. Kirchner *v.* New Home Sewing Mach. Co., 135 N. Y. 187.

2. Knott *v.* Burleson, 2 Greene (Iowa) 601.

3. Ambiguous Releases. — Greenwald *v.* Kaster, 86 Pa. St. 47.

4. Knott *v.* Burleson, 2 Greene (Iowa) 601.

5. Dillingham *v.* Estill, 3 Dana (Ky.) 21.

6. State Legislation. — Civ. Code Ala., §§ 1805, 1806; Carroll *v.* Corbitt, 57 Ala. 581; Singleton *v.* Thomas, 73 Ala. 207; Code Civ. Pro. N. Y. (1901), § 1942; Richardson *v.* McLemore, 5 Baxt. (Tenn.) 586; Hamilton *v.* Ritchie, (Tenn. Ch. 1899) 53 S. W. Rep. 198. To the same effect see Shannon's Code of Tenn. (1896), §§ 5570, 5571. See also the Act of 1838, c. 257, of the Laws of New York.

7. Comity Applied to a Release. — Holdridge *v.* Farmers', etc., Bank, 16 Mich. 73.

8. Covenant Not to Sue Construed as Release — *England.* — Lacy *v.* Kynaston, 2 Salk. 575.

United States. — Garnett *v.* Macon, 2 Brock. (U. S.) 185.

Indiana. — Harvey *v.* Harvey, 3 Ind. 473.

Kentucky. — McNeal *v.* Blackburn, 7 Dana (Ky.) 170; Peddicord *v.* Hill, 4 T. B. Mon. (Ky.) 373; Arnold *v.* Park, 8 Bush (Ky.) 3.

New Jersey. — Line *v.* Nelson, 38 N. J. L. 358. *following* Harrison *v.* Close, 2 Johns. (N. Y.) 448, 3 Am. Dec. 444, and Pond *v.* Williams, 1 Gray (Mass.) 630.

New York. — Cuyler *v.* Cuyler, 2 Johns. (N. Y.) 186; Phelps *v.* Johnson, 8 Johns. (N. Y.) 54.

North Carolina. — Stinson *v.* Moody, 3 Jones L. (48 N. Car.) 56; White *v.* Richmond, etc., R. Co., 110 N. Car. 456.

only between the actual parties to the contract, and it will never be construed as a release unless it gives the covenantee a right of action which will precisely countervail that to which he was liable, and unless also it was the intention of the parties that the one obligation should cancel the other.[1]

Covenant Not to Sue One of Several Debtors. — The doctrine that a contract not to sue amounts to a release is technical and will not be extended in its construction; and where the debt is joint or joint and several and the covenant not to sue is made to a portion only of the debtors, the covenant will not be deemed a release to any of them, but the party holding the covenant will, if sued, be left to his action upon it.[2]

To Construe a Covenant to a Joint Debtor as a release would discharge the other debtors, which would usually contravene the clear intent of the parties.[3] The statement that a covenant not to sue one joint debtor is not a release to any of them is true when the action is brought against the debtors jointly. If, however, the sole covenantee be sued alone he may, of course, set up the covenant in defense, and if he is sued jointly with the others he may bring an independent action for breach of the covenant.[4]

A Covenant Not to Sue for a Limited Time is merely a collateral contract and does not operate as a release, nor can it be pleaded in bar in an action upon an obligation or other demand. The covenantee, if sued within the time limited, may bring his action for breach of the covenant, but cannot plead it in bar.[5]

3. Release Construed as Covenant Not to Sue. — Conversely, courts sometimes construe releases as covenants not to sue; as where it affirmatively appears that the release executed did not contemplate a discharge as large as the words of the release might logically embrace,[6] or where it is shown that the releasor has not received full satisfaction for the injury released.[7] To construe an instrument as a release, in many cases, disappoints the intention of the parties

1. Walmesley *v.* Cooper, 11 Ad. & El. 216, 39 E. C. L. 51; Ledger *v.* Stanton, 2 Johns. & H. 687; Bozeman *v.* State Bank, 7 Ark. 328, 46 Am. Dec. 291; Durell *v.* Wendell, 8 N. H. 372.

2. **Covenant Not to Sue One of Several Debtors** — *England.* — Hutton *v.* Eyre, 6 Taunt. 296, 1 E. C. L. 388.

United States. — Scriba *v.* Deanes, 1 Brock. (U. S.) 165; Tuthill *v.* Babcock, 2 Woodb. & M. (U. S.) 302.

California. — Matthey *v.* Gally, 4 Cal. 62, 60 Am. Dec. 595.

Connecticut. — Gould *v.* Stanton, 16 Conn. 22.

Georgia. — Kendrick *v.* O'Neil, 48 Ga. 631.

Illinois. — Chicago *v.* Babcock, 143 Ill. 358; West Chicago St. R. Co. *v.* Piper, 165 Ill. 325; Chicago, etc., R. Co. *v.* Hines, 82 Ill. App. 492; Chicago *v.* Smith, 95 Ill. App. 335.

Kentucky. — Mason *v.* Jouett, 2 Dana (Ky.) 108.

Maine. — Walker *v.* McCulloch, 4 Me. 426.

Massachusetts. — Goodnow *v.* Smith, 18 Pick. (Mass.) 414, 29 Am. Dec. 600; Emerson *v.* Baylies, 19 Pick. (Mass.) 55; Foster *v.* Purdy, 5 Met. (Mass.) 442; Richards *v.* Fisher, 2 Allen (Mass.) 527.

Missouri. — Carondelet *v.* Desnoyer, 27 Mo. 36.

New Hampshire. — Parker *v.* Holmes, 4 N. H. 98.

New York. — Rowley *v.* Stoddard, 7 Johns. (N. Y.) 207; Hosack *v.* Rogers, 8 Paige (N. Y.) 229; Harrison *v.* Close, 2 Johns. (N. Y.) 449, 3 Am. Dec. 444.

3. Lane *v.* Owings, 3 Bibb (Ky.) 247; Durell *v.* Wendell, 8 N. H. 372; Chenango Bank *v.* Osgood, 4 Wend. (N. Y.) 611; Couch *v.* Mills, 21 Wend. (N. Y.) 425. See *infra*, the section *Release of Joint Debtor*.

4. Walker *v.* McCulloch, 4 Me. 426; McAllester *v.* Sprague, 34 Me. 298.

5. **Covenant Not to Sue for a Limited Time** — *England.* — Thimbleby *v.* Barron, 3 M. & W. 210; Ayloffe *v.* Scrimpshire, Carth. 63; Hutton *v.* Eyre, 6 Taunt. 294, 1 E. C. L. 387.

California. — Howland *v.* Marvin, 5 Cal. 501.

Indiana. — Berry *v.* Bates, 2 Blackf. (Ind.) 119; Mendenhall *v.* Lenwell, 5 Blackf. (Ind.) 126, 33 Am. Dec. 458; Thalman *v.* Barbour, 5 Ind. 178.

Massachusetts. — Perkins *v.* Gilman, 8 Pick. (Mass.) 230; Reed *v.* Stoddard, 100 Mass. 426.

New York. — Winans *v.* Huston, 6 Wend. (N. Y.) 471.

6. **Release Construed as Covenant Not to Sue** — *England.* — Ford *v.* Beech, 11 Q. B. 852, 63 E. C. L. 852; Bateson *v.* Gosling, L. R., 7 C. P. 9; Solly *v.* Forbes, 2 Brod. & B. 46, 6 E. C. L. 31; Henderson *v.* Stobart, 5 Exch. 99. But see Reeves *v.* Brymer, 6 Ves. Jr. 516.

Illinois. — Thomason *v.* Clark, 31 Ill. App. 404.

Iowa. — Seymour *v.* But er, 8 Iowa 307.

Massachusetts. — Wiggin *v.* Tudor, 23 Pick. (Mass.) 444; Shed *v.* Pierce, 17 Mass. 628.

New Hampshire. — Durell *v.* Wendell, 8 N. H. 369.

Pennsylvania. — Whitehill *v.* Wilson, 3 P. & W. (Pa.) 413.

Texas. — Elgin City Banking Co. *v.* Self, (Tex. Civ. App. 1896) 35 S. W. Rep. 954.

7. Arnett *v.* Missouri Pac. R. Co., 64 Mo. App. 368.

and carries the legal effect of the instrument beyond its meaning. For this reason the courts incline to adopt that construction of a doubtful agreement which gives to the instrument the effect of a covenant not to sue, and the intention of the parties is carried out by allowing the creditor to take judgment at law, leaving the party who holds the covenant to his remedy in equity.[1] It has been thought that while the construction of releases as contracts not to sue relieves some of the difficulties in pleading, nevertheless when the operative terms of the instrument are strictly words of release, it seems like violence to both language and intent to give them such an effect and no more; and since this construction drives the covenantee to an action upon his covenant or promise not to sue, this promotes rather than avoids circuity of action, a thing which the law always seeks to avoid.[2]

4. General Words Restrained by Particular Recitals. — **As a Corollary** from the great rule that instruments shall be construed according to the intent of the parties, it is a general principle in the construction of releases that where there are general words of release embracing in terms all demands, and also the recital of a particular demand released, the effect of the general words will be restrained by the particular recital, and the release will be construed to relate solely to the latter.[3] But an instrument containing both general words and particular recitals will not be construed to release particular demands not specified and not known to exist at the time the release was executed.[4] And where a schedule includes a debt accurately described, it will not be extended to include another debt that will not so well fit the description.[5] Moreover, a release to an executor "of all demands by virtue of a will" will not apply to a demand for a legacy due from another source,[6] nor will a general release of all "demands, notes, and accounts," include a pending suit.[7] It has been said that where there is a particular recital and then general words follow, the general words shall be qualified by the particular recital.[8] It is not to be inferred from this, however, that it is an inflexible requirement that the mere order of arrangement of the component parts of the release is controlling, but that order is of great significance.[9] The cases generally do not seem to lay stress upon the order of the clauses or words.[10]

Where Only General Words Are Used, they will be construed most strongly against the party executing the release.[11] And so a release is held to include all

1. Russell *v.* Adderton, 64 N. Car. 417.

2. Circuity of Action Not Always Prevented. — Burke *v.* Noble, 48 Pa. St. 175.

3. General Words Restrained by Particular Recitals — *England.* — Payler *v.* Homersham, 4 M. & S. 423; Ramsden *v.* Hylton, 2 Ves. 305; Simons *v.* Johnson, 3 B. & Ad. 180, 23 E. C. L. 48; Thorpe *v.* Thorpe, 1 Ld. Raym. 235; Warwick *v.* Richardson, 14 Sim. 281; Upton *v.* Upton, 1 Dowl. 400; Boyes *v.* Bluck, 13 C. B. 652, 76 E. C. L. 652; Cole *v.* Knight, 3 Mod. 277; Hancock *v.* Field, Cro. Jac. 170; Knight *v.* Cole, 1 Show. 150; Lyall *v.* Edwards, 6 H. & N. 348; Lindo *v.* Lindo, 1 Beav. 496; Solly *v.* Forbes, 2 Brod. & B 38, 6 E. C. L. 27; Wright *v.* Russell, 3 Wils. C. P 530.

United States. — Union Pac. R. Co. *v.* Artist, (C. C. A.) 60 Fed. Rep. 367.

Connecticut. — Tryon *v.* Hart, 2 Conn. 122.

Illinois. — Todd *v.* Mitchell, 168 Ill. 199.

Massachusetts. — Hyde *v.* Baldwin, 17 Pick. (Mass.) 307; Rich *v.* Lord, 18 Pick. (Mass.) 325; Averill *v.* Lyman, 18 Pick. (Mass.) 353; Rice *v.* Woods, 21 Pick. (Mass.) 30; Wiggin *v.* Tudor, 23 Pick. (Mass.) 444; Reed *v.* Tarbell, 4 Met. (Mass.) 101; Lyman *v.* Clark, 9 Mass. 238.

Missouri. — Blair *v.* Chicago, etc., R. Co., 89 Mo. 383.

New York. — Jackson *v.* Stackhouse, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514; Kirchner *v.* New Home Sewing Mach. Co., 59 Hun (N. Y.) 186, 135 N. Y. 187; McIntyre *v.* Williamson, 1 Edw. (N. Y.) 34.

Pennsylvania. — Matlack's Appeal, 7 W. & S. (Pa.) 79.

4. Union Pac. R. Co. *v.* Artist, (C. C. A.) 60 Fed. Rep. 365.

5. Averill *v.* Lyman, 18 Pick. (Mass.) 354.

6. Lyman *v.* Clark, 9 Mass. 235.

7. Learned *v.* Bellows, 8 Vt. 79.

8. Order of the Clauses. — Jackson *v.* Stackhouse, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514.

9. Dunbar *v.* Dunbar, 5 Gray (Mass.) 103; Slayton *v.* Hemken, 91 Hun (N. Y.) 582.

10. Jackson *v.* Stackhouse, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514; Hoes *v.* Van Hoesen, 1 Barb. Ch. (N. Y.) 380; Romaine *v.* Sweet, 57 N. Y. App. Div. 615.

11. Where Only General Words Are Used — *England.* — Fazakerly *v.* M'Knight, 6 El. & Bl. 795, 88 E. C. L. 795; Solly *v.* Forbes, 2 Brod. & B. 38, 6 E. C. L. 27; Lyall *v.* Edwards, 6 H. & N. 337.

demands embraced by its terms, whether particularly contemplated or not; and direct parol evidence that a certain claim was not in the minds of the parties is not admissible.[1] It has been held that a release of "all writings obligatory," will not release a covenant not broken, since that is releasable only by special name.[2]

5. Release Containing Words of Reservation. — Instruments containing present words releasing one, but reserving rights against others, jointly liable, have been differently construed at different times. It was once claimed that full effect could not be given to all parts of such instrument without violating well-established principles of the law of releases. If regarded as an absolute release of one, the entire claim against all would be canceled. If regarded as a reservation of the liability of one, it could not be a release of any. The early cases applied to such an instrument the rule that a saving clause repugnant to the nature of the grant is void, the grant remaining absolute and unqualified.[3] But subsequently, on the principle of attempting to reconcile all parts so as to carry out the apparent object of the parties, courts have given effect to the words of present release by construing them to be merely executory or equivalent to a covenant not to sue. The intention of the releasor not to abandon his claim to the rights reserved is as plainly indicated in such an instrument as is the intention to relinquish the rights against the releasee; hence both purposes can be accomplished by restricting the right of proceedings against the releasee to actions against him, since that will leave the right of proceeding against the other party.[4]

VII. Who May Release — 1. In General. — Since a release and discharge is a form of contract, the general rules as to capacity to contract apply; but certain modifications and qualifications of the general rule are noticed in the following subsections.[5]

2. Agents. — The general principles as to the powers of agents, and the conclusiveness of their acts, apply to agents when executing releases. A contract under seal entered into by an agent, to be binding upon the principal, must on its face purport to have been made by the principal, and to have been executed in his name and not in that of the agent.[6] But in reference to less formal writings, a more liberal interpretation prevails. And while, in general, a release executed by an agent in his own name not purporting on its face to have been made by the principal, is not binding upon the latter

Indiana. — Rowe *v.* Rand, 111 Ind. 212.
Iowa. — Seymour *v.* Butler, 8 Iowa 304.
Massachusetts. — Rich *v.* Lord, 18 Pick. (Mass.) 322.
New York. — jackson *v.* Stackhouse, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514.

1. The Cayuga, 16 U. S. App. 583, 59 Fed. Rep. 485; Duff *v.* Hutchinson, 57 Hun (N. Y.) 152; Slayton *v.* Hemken, 91 Hun (N. Y.) 582; Pierson *v.* Hooker, 3 Johns. (N. Y.) 68, 3 Am. Dec. 467.

2. Carthage *v.* Manby, 2 Show. 90. See also generally *Ex p.* Kirk, 5 Ch. D. 800; Squire *v.* Ford, 9 Hare 47; Reed *v.* Tarbell, 4 Met. (Mass.) 102.

3. **Release Containing Words of Reservation.** — 5 Bac. Abr. 702 G.; Price *v.* Barker, 4 El. & Bl. 760, 82 E. C. L. 760, 30 Eng. L. & Eq. 157; Benjamin *v.* McConnell, 9 Ill. 544, 46 Am. Dec. 474; Rice *v.* Webster, 18 Ill. 331, *overruled* by Parmelee *v.* Lawrence, 44 Ill. 405; Yates *v.* Donaldson, 5 Md. 389, 61 Am. Dec. 283. See also Nicholson *v.* Revill, 4 Ad. & El. 675, 31 E. C. L. 166, as *explained* by Baron Park in Kearsley *v.* Cole, 16 M. & W. 136; Cheetham *v.* Ward, 1 B. & P. 630.

4. **Construed as Covenants Not to Sue** — *England.* — Thompson *v.* Lack, 3 C. B. 540, 54 E. C. L. 540; Kearsley *v.* Cole, 16 M. & W. 135; Solly *v.* Forbes, 2 Brod. & B. 38, 6 E. C. L. 27; Price *v.* Barker, 4 El. & Bl. 760, 82 E. C. L. 760; North *v.* Wakefield, 13 Q. B. 536, 66 E. C. L. 536; Green *v.* Wynn, L. R. 4 Ch. 207.
United States. — U. S. *v.* Murphy, 15 Fed. Rep. 594.
California. — Northern Ins. Co. *v.* Potter, 63 Cal. 157; French *v.* McCarthy, 125 Cal. 511.
Indiana. — Aylesworth *v.* Brown, 31 Ind. 271.
Maryland. — Campbell *v.* Booth, 8 Md. 116.
New York. — Kirby *v.* Taylor, 6 Johns. Ch. (N. Y.) 252; Lysaght *v.* Phillips, 5 Duer (N. Y.) 116; Matthews *v.* Chicopee Mfg. Co., 3 Robt. (N. Y.) 713; Hood *v.* Hayward, 124 N. Y. 1; Whittemore *v.* Judd Linseed, etc., Oil Co., 124 N. Y. 574; Brogan *v.* Hanan, 55 N. Y. App. Div. 92.
But see Ellis *v.* Bitzer, 2 Ohio 89, 15 Am. Dec. 534.

5. **Who May Release.** — See the specific titles in this work dealing with the capacity of the various parties to contract.

6. **Agents.** — Reed *v.* Shaw, 1 Blackf. (Ind.) 245. See the title Agency, vol. 1, p. 930.

and cannot be set up in bar to a recovery; still it is competent for the debtor to prove a ratification by the principal of the acts of the agent.[1]

Release by Bank. — A release of one of the joint makers of a note executed by a bank holding the note for collection is not binding upon the owner of the note,[2] and the release by a bank in excess of its powers and so known to be by the releasee is not available to the latter beyond the powers known to have been conferred upon the bank.[3] But in an extreme case a bank may exceed its powers and exercise its discretion and best judgment in compromising and releasing demands, and will not be liable in such case for an amount beyond that actually received in settlement.[4]

By Corporate Officers. — Directors of a corporation have no power to release codirectors for malfeasance,[5] but the president of the corporation having general authority to contract by parol, may likewise release a contract.[6]

Membership in an Incorporated Company confers no authority to release a debt due to the corporation.[7]

An Agent Having Power to Release a Lien after payment cannot without more authority release a lien without payment. The lien is extinguished by the payment and the release amounts to little more than a receipt, but the release of a lien under seal without payment requires special authority.[8]

Agents for Both Parties. — Where it is not improper for the same party to act as agent for both the releasor and releasee, the releasor may make the agent of the releasee his own agent for the purpose of holding a release as an escrow, and of returning it to him in case of condition broken.[9]

If an Agent Converts Money to His Own Use, given him to pay for a release, and obtains the release by false pretenses, his acts are imputable to the principal, and the latter will be compelled to pay the money a second time with interest.[10]

A Factor Selling Goods for his consignor on a credit and having the right to take a note in his own name, has the power to release such note, and the consignor is bound by such release and cannot as indorsee of the note recover thereon against the maker.[11]

Where Trespass is Committed by a Servant, by command of the master, acceptance of satisfaction from the master discharges the right of action against the servant.[12]

3. Attorneys. — An attorney at law has no power, except by special authority from his client, to release his client's unpaid judgment,[13] nor his right of action,[14] nor to release an indorser from his liability as such,[15] nor, unless authorized by writing under seal, to execute a deed of release under seal in the name of his principal, although such a release may under the issue of *non assumpsit* amount to an agreement not to sue.[16] And he may not, by virtue of verbal authority to appear in the cause, release the interest of a witness.[17]

1. **Ratification.** — Evans *v.* Wells, 22 Wend. (N. Y.) 324.
2. **Release by Bank.** — Torbit *v.* Heath, 11 Colo. App. 492.
3. Hammons *v.* Bigelow, 115 Ind. 363.
4. Exeter Bank *v.* Gordon, 8 N. H. 66.
5. **By Corporate Officers.** — Gilbert *v.* Finch, 72 N. Y. App. Div. 38. But see Pneumatic Gas Co. *v.* Berry, 113 U. S. 322.
6. Indianapolis Rolling Mill *v.* St. Louis, etc., R. Co., 120 U. S. 256.
7. Harris *v.* Muskingum Mfg. Co., 4 Blackf. (Ind.) 267, 29 Am. Dec. 372.
8. **Release of Lien.** — Deacon *v.* Greenfield, 141 Pa. St. 467. See also Corr *v.* Greenfield, 134 Pa. St. 506.
9. **Agents for Both Parties.** — Cincinnati, etc., R. Co. *v.* Iliff, 13 Ohio St. 235.
10. **Paying Released Debt Twice.** — Vandaleur *v.* Blagrave, 6 Beav. 565.
11. **Release by Factor.** — West Boylston Mfg. Co. *v.* Searle, 15 Pick. (Mass.) 225.
12. **Release to Master Discharges Servant.** — Thurman *v.* Wild, 11 Ad. & El. 453, 39 E. C. L. 145.
13. **Attorneys.** — Rounsaville *v.* Hazen, 33 Kan. 71.
14. Sharpe *v.* Williams, 41 Kan. 56; Gilliland *v.* Gasque, 6 S. Car. 406.
15. Varnum *v.* Bellamy, 4 McLean (U. S.) 87; Stoll *v.* Sheldon, 13 Neb. 207; East River Bank *v.* Kennedy, 9 Bosw. (N. Y.) 544.
16. Cooper *v.* Rankin, 5 Binn. (Pa.) 613.
17. Murray *v.* House, 11 Johns. (N. Y.) 464.

For a Full Discussion of this subject see the title ATTORNEY AND CLIENT, vol. 3, p. 372.

4. Husband and Wife. — During coverture a husband may release his wife's choses in action and thereby defeat her right as survivor.[1]

Future Interests. — It has been held, however, that while a husband may release an obligation presently due and owing to his wife, he cannot release a debt not presently due but in respect of which she may afterwards have an interest.[2] He may also release damages for personal torts committed against his wife.[3]

Fraud. — But where the husband is induced by fraud to execute a release, he is not estopped to repudiate such release because his wife has received the entire benefits of the transaction.[4]

Where Husband and Wife Are Living Separate under a Deed giving to her separate and distinct property and providing that he would not impede the operation of the deed, but would ratify all lawful or equitable proceedings to be brought in his or their names to recover obligations due to her, the husband may not release a debt to recover which the wife has begun an action in the names of her husband and herself.[5]

Wife's Guardian. — A release obtained by a guardian from the husband of his ward of all liability to account to her as guardian, is without consideration if based upon nothing else than an unfounded claim for board of the ward before the guardian became such.[6]

Insurance for Wife's Benefit. — A husband insured in the relief department of a company for the benefit of his wife, has no power to release the company from payment of damages to his widow in case of his death by the neglect or default of such company.[7]

The Power of a Wife to Release Her Claims without joining her husband is largely dependent upon the statutes enlarging the powers of married women in modern times.[8] A wife living separate from her husband may release him from all duties, liabilities, and obligations of every kind whatsoever which otherwise she might claim under or by virtue of the marriage relation, and such release if based upon a good consideration is valid and binding.[9]

Joint Release. — In some states a wife cannot release or dispose of her separate estate without the assent or concurrence of her husband.[10]

Release by Marriage. — Whether where two or more persons unite in the commission of a trespass and the plaintiff shall afterwards intermarry with one of said joint trespassers, such intermarriage has the effect of a technical satisfaction of the trespass so as to bar the plaintiff's right of action against the wrongdoers, seems to be not decided. There is no doubt but that such intermarriage will destroy the plaintiff's right of action against the joint trespasser with whom he intermarries.[11]

5. Infants. — An infant's release of a demand is voidable at his election,[12]

1. Release by Husband. — Hore *v.* Becher, 12 Sim. 465; Manion *v.* Titsworth, 18 B. Mon. (Ky.) 583.

2. Release of Future Interest. — Rogers *v.* Acaster, 14 Beav. 445.

3. Release of Torts. — Southworth *v.* Packard, 7 Mass. 95. See also the title HUSBAND AND WIFE, vol. 15, p. 859.

4. When Fraudulent. — Averill *v.* Wood, 78 Mich. 342.

5. Release of Action. — Innell *v.* Newman, 4 B. & Ald 419, 6 E. C. L. 542.

6. Husband's Release to Wife's Guardian. — Barnes *v.* Ward, Busb. Eq. (45 N. Car.) 93, 57 Am. Dec. 590.

7. Release of Wife's Interest in Policy. — Maney *v.* Chicago, etc., R. Co., 49 Ill. App. 105.

8. Release by Wife. — Blair *v.* Chicago, etc., R. Co., 89 Mo. 383; Lancaster *v.* Dolan, 1 Rawle (Pa.) 248, *overruling* Newlin *v.* Newlin, 1 S. & R. (Pa.) 275, and *following* M. E. Church *v.* Jaques, 3 Johns. Ch. (N. Y.) 108. See the titles HUSBAND AND WIFE, vol. 15, p. 859; SEPARATE PROPERTY OF MARRIED WOMAN.

9. Release to Husband by Wife. — Scott's Estate, 117 Pa. St. 102.

10. Joint Release.—Scharf *v.* Moore, 102 Ala. 468; Hall *v.* Short, 81 N. Car. 273. But see Arrington *v.* Arrington, 102 N. Car. 492. And see Loth *v.* Friederick, 95 Mich. 598.

11. Release by Marriage. — Turner *v.* Hitchcock, 20 Iowa 310, by an equally divided court.

For release of dower see the title DOWER, vol. 10, p. 122.

12. Infant's Release Voidable. — Wilson *v.* Judge, 18 Ala. 757; St. Louis, etc., R. Co. *v.* Higgins, 44 Ark. 293; Baker *v.* Lovett, 6 Mass. 80; Walker *v.* Ferrin, 4 Vt. 523.

but in some instances the court has held an infant's release to be totally void; as where he was young and needy and hurriedly executed the release to men of high character who misinformed him of the facts;[1] or where the release was clearly injurious.[2] On the other hand his release has been held binding where executed on a *bona fide* and sufficient satisfaction of a debt due;[3] or where a releasee relies upon the infant's statement that he is of age;[4] or where the infant seeks to make an engine of fraud out of the principles of the law in favor of infants.[5] A female infant of the age of eighteen, able to make a contract to marry, is competent to release the contractor from his obligation.[6]

6. Executors and Administrators. — The act of one executor or administrator is deemed in law the act of all. Hence a release executed by one of several executors or administrators without the concurrence of the others is sufficient.[7] Where a covenant or other written evidence of debt is payable to two or more executors jointly, releases should be executed by them jointly and not severally.[8] There is a distinction in this respect between executors and technical trustees; the latter must execute the duties of their office in their joint capacity, and a release by one of them alone without the knowledge or consent of the others will not discharge the debt.[9] Where administrators compromise and release a debt, though contrary to the wishes of one-third of those entitled to distribution, such release will not be set aside unless fraud be shown between the debtor and the administrators.[10] Where an administrator releases the interest of a witness to render him competent to testify, such release does not necessarily imply a payment, and the administrator has power in such case to release the claim of the estate against the witness without receiving actual payment.[11] There is no distinction as to the rights and powers of executors arising out of the fact that property held by them was acquired after the testator's death;[12] and where upon settlement by an executor with legatees the estate in hand is insufficient to pay the entire legacies, and a release is executed by the executor for the balance, such release is not binding as to funds subsequently coming to the estate of the testator, and the court will decree that the executor pay the legatees the balance of legacies out of such funds.[13] Where an executor executes a release but does not sign it as executor, and does not in terms embrace claims due him in his representative capacity, the claims being such as he might enforce by a suit in his own right, he may also in his own name release them. Such a release may be considered in the light of surrounding circumstances to ascertain the intention of the parties.[14] A release by an executor is of no effect if he is kept in ignorance of

1. Sometimes Void. — Wheeler *v.* Smith, 9 How. (U. S.) 55.

2. Langford *v.* Frey, 8 Humph. (Tenn.) 446.

3. Sometimes Binding. — Walker *v.* Ferrin, 4 Vt. 523.

4. Wright *v.* Snowe, 2 De G. & Sm. 321.

5. Baker *v.* Lovett, 6 Mass. 81.

6. Female Infant. — Develin *v.* Riggsbee, 4 Ind. 467.

7. Executors and Administrators — *England.* — Herbert *v.* Pigot, 4 Tyrw. 285.

Maine. — Shaw *v.* Berry, 35 Me. 280.

New York. — Wheeler *v.* Wheeler, 9 Cow. (N. Y.) 34; Murray *v.* Blatchford, 1 Wend. (N. Y.) 583, 19 Am. Dec. 537; Stuyvesant *v.* Hall, 2 Barb. Ch. (N. Y.) 160.

Pennsylvania. — Fesmire *v.* Shannon, 143 Pa. St. 201.

West Virginia. — Stribling *v.* Splint Coal Co., 31 W. Va. 83.

Wisconsin. — Weir *v.* Mosher, 19 Wis. 311.

See also the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 926.

May Release Only upon Payment. — In Water Valley Mfg. Co. *v.* Seaman, 53 Miss. 660, it was held that an executor or administrator cannot release without payment any valid security belonging to the trust estate in his hands. See the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 927.

8. When All Should Sign Release. — Clark *v.* Gramling, 54 Ark. 526; Pearce *v.* Savage, 51 Me. 410.

9. Distinction Between Executors and Trustees. — Fesmire *v.* Shannon, 143 Pa. St. 201.

10. Set Aside Only for Fraud. — Murray *v.* Blatchford, 1 Wend. (N. Y.) 583, 19 Am. Dec. 537.

11. Release to Witness. — Huntington *v.* Wilder, 6 Vt. 339.

12. Fesmire *v.* Shannon, 143 Pa. St. 201.

13. Anonymous, 31 Beav. 310.

14. Not Signing as Executor. — Sherburne *v.* Goodwin, 44 N. H. 271. But see Wiggins *v.* Norton, R. M. Charlt. (Ga.) 15.

material facts amounting to imposition or fraud.[1]

7. Parties Plaintiff. — A party plaintiff may discharge an action if the discharge be based upon valuable consideration.[2]

Where a Plaintiff Assigned a Portion of His Judgment to his attorneys to secure their fees, and subsequently executed a release to the defendant of the entire judgment, it was held that the release discharged the entire judgment, although the plaintiff made affidavit that he intended to discharge only that portion thereof left after the assignment of a portion to his attorneys.[3]

Agreement with Attorney. — The fact that the plaintiff has agreed with his attorney to pay him a certain per cent. of the recovery is no reason why the plaintiff may not release the defendant; and if in such case the attorney desires to prosecute the action in the plaintiff's name for his own benefit, he may do so upon his assuming the payment of any judgment for costs which may be recovered by the defendant.[4]

Suit for Use of Another. — A party who brings a suit for the use of another cannot discharge the same by an agreement with the defendant.[5] Nor can an attorney appointed by the court to conduct the case of a pauper plaintiff execute a release of the cause of action.[6]

Nor Can the Plaintiff in a Qui Tam Action where part of the penalty goes to the county release the action without leave of the court and the assent of the county attorney, and the latter officer may, notwithstanding any adjustment made by the parties, proceed with the cause until the penalty is paid.[7]

And Generally Where a Nominal Plaintiff is not the real party in interest, but is compelled for technical reasons to allow the use of his name, he cannot execute a release of the cause of action.[8]

A Release by One of Several Parties Plaintiff in an action is a bar and extinguishment of the debt.[9] This may be the effect of a release by a joint party, although he assumes to release only his own interest.[10] And a release fraudulently executed by one of several plaintiffs, the court will order to be delivered up to be canceled.[11]

8. Trustees. — It is a general rule that a release by a trustee executed without the consent of the beneficiary is of no effect.[12] It has been held, how-

1. Barnhardt *v.* Smith, 86 N. Car. 474.
The effect of a testator's appointing his debtor or creditor as executor is discussed elsewhere in this work. See the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 787.

2. **Parties Plaintiff.** — Fash *v.* Blake, 38 Ill. 363; Hawkins *v.* Collins, 61 S. Car. 537; Livesley *v.* Pier, 11 Wash. 268.

3. Atchison, etc., R. Co. *v.* Johnson, 29 Kan. 218.

4. O'Brien *v.* Metropolitan St. R. Co., 27 N. Y. App. Div. 2.

5. Emmons *v.* Myers, 7 How. (Miss.) 375.

6. Wright *v.* Burroughes, 3 C. B. 344, 54 E. C. L. 344. But see Jones *v.* Bonner, 2 Exch. 230.

7. Burley *v.* Burley, 6 N. H. 200.

8. Payne *v.* Rogers, 1 Dougl. 407; Hickey *v.* Burt, 7 Taunt. 48, 2 E. C. L. 48; Fidelity Title, etc., Co. *v.* Peoples Natural Gas Co., 150 Pa. St. 8. But see Casey *v.* Casey, 2 Root (Conn.) 269.

9. **Release by One of Several Plaintiffs.** — Furnival *v.* Weston, 7 Moo. 356, 17 E. C. L. 81; Jones *v.* Herbert, 7 Taunt. 421, 2 E. C. L. 420; Lumberman's Ins. Co. *v.* Preble, 50 Ill. 335; Myrick *v.* Dame, 9 Cush. (Mass.) 254; Tuckerman *v.* Newhall, 17 Mass. 581; Austin *v.* Hall, 13 Johns. (N. Y.) 286, 7 Am. Dec. 376; Decker *v.* Livingston, 15 Johns. (N.Y.) 479.

But a release executed by one of several plaintiffs without the assent or authority of the others, has been held not to affect the right of recovery of the others. Mountstephen *v.* Brooke, 1 Chit. 390, 18 E. C. L. 111; Harris *v.* Swanson, 67 Ala. 486. But see Rawstorne *v.* Gandell, 15 M. & W. 308.

In order that a release of one of several obligees may discharge the entire obligation, such must be its intended effect, and the transaction must be free from all fraud upon the rights of obligees not joining in the execution of the release. Lumberman's Ins Co. *v.* Preble, 50 Ill. 335. See also Parmelee *v.* Lawrence, 44 Ill. 405.

It has been held that while one or more of several joint creditors can release a common debtor so as to conclude their cocreditors and thereby defeat an action at law, it does not follow that a recovery in equity may not be had, since equity does not require a joinder of joint creditors when justice would be defeated by such requirement. Upjohn *v.* Ewing, 2 Ohio St. 18.

10. James *v.* Aiken, 47 Vt. 23.

11. Barker *v.* Richardson, 1 Y. & J. 362.

12. **Trustees.** — Manning *v.* Cox, 7 Moo. 617, 17 E. C. L. 87; Lincoln University *v.* Richardson, 11 Colo. App. 151; O'Reilly *v.* Miller, 52 Mo. 210.

ever, that where a trustee under the power conferred by will has made a loan and taken a mortgage to secure it, he will have a right, in the absence of some express restriction in the will, to receive the money and execute a release of the mortgage.[1] If a trustee executes alone a release of a deed of trust before the time of payment named in the deed, the purchaser is put upon inquiry to ascertain whether the notes secured by the trust deed have in fact been paid.[2]

Fraud. — If a trustee fraudulently collude with the debtor of the *cestui que trust* and give a release without consideration or upon an inadequate consideration, such release will not be permitted to avail him in a court of equity, but the debt still exists for the benefit of the real creditor of the *cestui que trust* who may enforce it against the debtor.[3]

Release by One Cotrustee. — While it is true that where there are cotrustees they all should join in a release, if a release signed by only one of them be treated as a valid instrument by an assignee of the trustees, all persons deriving title from such assignee are estopped to question its validity.[4] And where power is conferred upon one trustee by the others to act for them, his release is valid and effective.[5]

9. Cestuis Que Trustent. — The law looks with suspicion upon releases executed by *cestuis que trustent* to trustees or others standing in a relation of trust and confidence,[6] and the burden is upon the trustee to prove the fairness and good faith of the transaction.[7] A release executed after the trust relationship ends is equally subject to suspicion and explanation.[8] But where such release has been executed freely and fairly without any fraud, misrepresentation, or undue means to obtain it, it is valid.[9]

10. Testators and Intestates. — In sundry cases the courts have been required to construe clauses in wills, letters, and other documents and verbal declarations made in the lifetime of parties since deceased, by which it appeared that they intended and attempted to discharge obligations due in their lifetime. In certain of these cases the courts have held upon evidence of entry in the testator's hand and other memoranda that the acts were sufficient to amount to a release of a debt, and have therefore declared the obligation to be canceled and have ordered instruments to be delivered up for cancellation.[10]

The Delivery of a Bond to the Obligor or to a third person with the intention and direction that it shall be canceled will extinguish the debt, and in such a case the declarations of the obligee to other persons at different times that he did not intend to demand or claim the debt from the obligor may be received as corroborative evidence of the intention to destroy it.[11]

The Holder of a Note may discharge a debt represented thereby by writing

1. Dickinson *v.* Worthington, 4 Hughes (U. S.) 430.

2. Jackson *v.* Blackwood, MacArthur & M. (D. C.) 188.

3. Dockery *v.* French, 73 N. Car. 420.

4. **Release by One Cotrustee.** — Van Rensselaer *v.* Akin, 22 Wend. (N. Y.) 549.

5. Schofield *v.* McGregor, 1 Thomp. & C. (N. Y.) 404.

6. **Cestuis Que Trustent.** — *In re* Garnett, 31 Ch. D. 1; Barton *v.* Hassard, 3 Dr. & War. 461; Aspland *v.* Watte, 20 Beav. 474; Kirby *v.* Turner, Hopk. (N. Y.) 309; Stevenson *v.* Rogers, 2 Hill L. (S. Car.) 292; Bixler *v.* Kunkle, 17 S. & R. (Pa.) 298; Brooks *v.* Meadville First Presb. Church, 128 Pa. St. 408.

7. Cunningham's Appeal, 122 Pa. St. 464, 9 Am. St. Rep. 121.

8. Parker *v.* Bloxam, 20 Beav. 295; Stewart's Estate, 140 Pa. St. 124; Womack *v.* Austin, 1 S. Car. 421.

9. Parker *v.* Bloxam, 20 Beav. 295; Rhodes *v.* Robie, 9 App. Cas. (D. C.) 306; Kirby *v.* Taylor, 6 Johns. Ch. (N. Y.) 242.

10. **Testators and Intestates.**—Eden *v.* Smyth, 5 Ves. Jr. 341; Aston *v.* Pye, 5 Ves. Jr. 350, note; Wekett *v.* Raby, 2 Bro. P. C. (Toml. ed.) 386; *In re* Applebee, (1891) 3 Ch. 422; Flower *v.* Marten, 2 Myl. & C. 459; Sibthorp *v.* Moxom, 3 Atk. 580; Yeomans *v.* Williams, 35 Beav. 130; Gilbert *v.* Wetherell, 2 Sim. & St. 257; Hobart *v.* Stone, 10 Pick. (Mass.) 221; Edwards *v.* Campbell, 23 Barb. (N. Y.) 423; Brinckerhoff *v.* Lawrence, 2 Sandf. Ch. (N. Y.) 400; Whitehill *v.* Wilson, 3 P. & W. (Pa.) 413, *overruling* Wentz *v.* Dehaven, 1 S. & R. (Pa.) 312.

11. Albert *v.* Zielger, 29 Pa. St. 50.

across the face, " This note is paid in full," and filing it away among other papers, although the maker of the note does not know of the attempted release, since an acceptance in such case will be presumed.[1]

A Gift of a Debt by Will is primarily a legacy and may operate as a release only in case there be available other assets sufficient to pay all debts.[2]

Such Attempts Held Ineffectual. — On the other hand, such indirect evidence of release has been treated as insufficient for the purposes claimed. Expressions of intention to do something in the future have not been relied upon, but words or acts sufficient to operate as an actual release or which at least afford evidence to go to a jury, have been required.[3] It has been held that to make a valid gift of a debt due by parol or open account, the creditor must, in writing, release or discharge such debt, or do some act by which the debt is placed beyond his legal control or dominion.[4]

11. Heirs. — An heir at law may, for a sufficient consideration, release to his father a share which he might have at the parent's decease in his estate, either real or personal, so that he will be thereby estopped from establishing any claim thereto as one of his heirs at law or next of kin.[5] Such releases, however, when they concern lands, are subject to the statute of frauds, and unless they are in writing cannot be enforced.[6]

12. Partners. — One partner may release a copartnership debt by an instrument executed under his hand and seal, in the name of the copartnership.[7] One of two partners may, even after dissolution, release a defendant after action brought, without the consent of the other.[8] A distinction is made between the power of one partner to bind his copartner in a new obligation, and his power to release an existing obligation.[9] But the rule that a release by one of several joint creditors discharges the debt as to all has been held not to apply to releases by partners *inter se*. Hence certain of several partners, when sued, may not release another partner from his partnership obligation so as to make him a competent witness.[10] A fraudulent release executed by one partner is, as to the other partner, voidable at his election.[11] As to the effect upon the other partners of the release of one partner from a partnership liability, reference is made to another title in this work.[12]

1. Foerster's Succession, 43 La. Ann. 190.

2. Rider *v.* Wager, 2 P. Wms. 331.

3. **Such Attempts Ineffectual** — *England.* — Byrn *v.* Godfrey, 4 Ves. Jr. 6; Reeves *v.* Brymer, 6 Ves. Jr. 516; Peace *v.* Hains, 11 Hare 155; Hooper *v.* Goodwin, 1 Swanst. 490; Elliott *v.* Davenport, 2 Vern. 522. But see Tufnell *v.* Constable, 8 Sim. 69.

Canada. — Woodworth *v.* Woodworth, Russ. Eq. Dec. (Nova Scotia) 337.

Illinois. — Myers *v.* Malcom, 20 Ill. 621.

Mississippi. — Young *v.* Power, 41 Miss. 197.

New Jersey. — Irwin *v.* Johnson, 36 N. J. Eq. 349.

New York. — Grey *v.* Grey, 47 N. Y. 552.

Pennsylvania. — Ege's Appeal, 3 Watts (Pa.) 496.

Virginia. — Swecker *v.* Swecker, 87 Va. 305.

Wisconsin. — Brunn *v.* Schuett, 59 Wis. 260, 48 Am. Rep. 499.

4. Young *v.* Power, 41 Miss. 197.

5. **Heirs** — *Kentucky.* — Lee *v.* Page, (Ky. 1887) 2 S. W. Rep. 503.

Massachusetts. — Quarles *v.* Quarles, 4 Mass. 680; Kenney *v.* Tucker, 8 Mass. 143.

Mississippi. — Dunlap *v.* Petrie, 35 Miss. 591.

New Jersey. — Havens *v.* Thompson, 26 N. J. Eq. 383; Green *v.* Hathaway, 36 N. J. Eq. 471; Brands *v.* De Witt, 44 N. J. Eq. 545, 6 Am. St. Rep. 909.

Pennsylvania. — Share *v.* Anderson, 7 S. & R. (Pa.) 43, 10 Am. Dec. 421; Miller's Appeal, 31 Pa. St. 340; Power's Appeal, 63 Pa. St. 443.

6. **Of Realty.** — Hancock *v.* Hancock, 2 Vern. 665; Lockyer *v.* Savage, 2 Stra. 947; Medcalfe *v.* Ives, 1 Atk. 63; Heron *v.* Heron, 2 Atk. 160; Green *v.* Hathaway, 36 N. J. Eq. 471.

A legatee may release another from the payment of a legacy, although such payment be expressly charged upon the land devised to the person charged with its payment. Bunnell *v.* Bunnell, 73 Ind. 164.

7. **Partners** — *England.* — Furnival *v.* Weston, 7 Moo. 356, 17 E. C. L. 81; Phillips *v.* Clagett, 11 M. & W. 94. But see Beggs *v.* McDonald, Russ. Eq. Dec. (Nova Scotia) 17.

New Hampshire. — Morse *v.* Bellows, 7 N. H. 567.

New York. — Pierson *v.* Hooker, 3 Johns. (N. Y.) 68, 3 Am. Dec. 467; Bulkley *v.* Dayton, 14 Johns. (N. Y.) 387; Bruen *v.* Marquand, 17 Johns. (N. Y.) 58.

North Carolina. — Gates *v.* Pollock, 5 Jones L. (50 N. Car.) 344.

8. Arton *v.* Booth, 4 Moo. 192, 16 E. C. L. 373; Hawn *v.* Seventy-Six Land, etc., Co., 74 Cal. 419.

9. Morse *v.* Bellows, 7 N. H. 567; Crutwell *v.* De Rosset, 5 Jones L. (50 N. Car.) 264.

10. Curtis *v.* Monteith, 1 Hill (N. Y.) 356.

11. Stanek *v.* Libera, 73 Minn. 172.

12. See the title PARTNERSHIP, vol. 22, p. 182.

13. Legislature. — It is competent for the legislature to release a debt due to a municipality. Such power is of the same kind as the power to impose a debt upon the municipality. It can do neither arbitrarily or capriciously, and must do either within the scope of a proper superintending control and trusteeship. Its power to release a municipal claim depends upon the illegal, inequitable, or unjust character of the claim, and the moral obligation to release it. Thus the legislature may lawfully release the county treasurer from his liability to repay money stolen from him without his fault;[1] and may release a debt due to the state bank secured by mortgage;[2] and a penalty accruing to a county after verdict but before judgment;[3] and may confer upon the county court power to release sureties of a public officer, but such a release will be strictly construed and will extend no further than the express terms justify.[4] Where the legislature, upon his petition, affords relief to a convict for injuries received in the course of his employment under contractors for convict labor, he cannot thereafter maintain an action against the contractors for damages for the same injury.[5]

14. Arbitrators. — Arbitrators, under a general submission of all controversies and demands, have power to award that mutual releases shall be given upon the performance of the duties prescribed by the award.[6] But it has been held that arbitrators had no power to compel executors of a deceased party to the controversy to execute releases.[7]

15. Joint Tenants and Tenants in Common. — A release by one joint tenant or tenant in common is a bar to an action by the other.[8]

16. Compounding Creditors — **Complete Discharge.** — It is usual, where creditors compound with an insolvent debtor, to execute a release and discharge of their respective claims. Such a discharge is binding upon all the creditors and is a complete discharge of the debtor.[9]

Seal. — Such a discharge need not be under seal.[10]

Fraud. — Where a debtor fraudulently released a judgment assigned by him to his creditor prior to such composition, and the creditor signed the composition deed in ignorance of the fraud committed upon him, it was held that the creditor might ignore the discharge and bring an action for a breach of the covenant contained in the assignment.[11]

General Release. — Where it was the intention that all compounding creditors should sign and seal their names in the schedule opposite to the sums for which they claimed to be creditors, but the defendant neglected to write the amount of his debt or to sign opposite thereto, but did sign a general release, it was held that the release would, as a general release, be a bar.[12]

The Acceptance by a Creditor of a Dividend without any agreement on his part to accept a voluntary assignment as a satisfaction for his debt is no bar to an action for the balance of the debt, the court holding that in such case no agreement is obligatory unless it assumes the form of a technical release.[13]

Assent to Assignment. — The mere assent by a creditor that his debtor may make an assignment for the benefit of his creditors cannot have the effect to

1. **The Legislature.** — Pearson *v.* State, 56 Ark. 148, 35 Am. St. Rep. 91.
2. Ernst *v.* State Bank, 1 Ill. 86.
3. Coles *v.* Madison County, 1 Ill. 154, 12 Am. Dec. 161.
4. Frederick *v.* Moore, 13 B. Mon. (Ky.) 473.
5. Metz *v.* Soule, 40 Iowa 236.
6. **Arbitrators.** — Whitcher *v.* Whitcher, 49 N. H. 176, 6 Am. Rep. 486. And see for a full discussion the title ARBITRATION AND AWARD, vol. 2, p. 533.
7. Edmunds *v.* Cox, 2 Chit. 432, 18 E. C. L. 390.
8. **Joint Tenants and Tenants in Common.** — Ruddock's Case, 6 Coke 25; Bradley *v.* Boynton, 22 Me. 291; Wetmore *v.* White, 2 Cai. Cas. (N. Y.) 87; Austin *v.* Hall, 13 Johns. (N. Y.) 286, 7 Am. Dec. 376; Decker *v.* Livingston, 15 Johns. (N. Y.) 482.
9. **Compounding Creditors.** — See the title COMPOSITION WITH CREDITORS, vol. 6, p. 376.
10. Paddleford *v.* Thacher, 48 Vt. 574.
11. Russell *v.* Rogers, 15 Wend. (N. Y.) 353.
12. Teede *v.* Johnson, 11 Exch. 840, *distinguishing* Payler *v.* Homersham, 4 M. & S. 423.
13. Allen *v.* Roosevelt, 14 Wend. (N. Y.) 100.

release and discharge the debt. At most it could only be held to require him to look to the fund for his portion to be applied on his claim, and leave him to collect the remainder out of the debtor.[1]

17. Parents. — Where the right to the proceeds of an action for injuries, from the effects of which his child dies, is in the father, he may discharge such right of action.[2]

18. Guardians. — It is a general rule that a guardian cannot release a security belonging to his ward.[3]

19. Persons Non Compos Mentis. — Insane persons cannot execute a binding release. Where a release has been executed the sanity of the releasor is presumed, but this presumption is one of fact and not of law, and is to be determined by the jury.[4] Mere weakness of mind, lack of skill, or immaturity of judgment is not of itself sufficient to invalidate a release.[5]

VIII. SUBJECT-MATTER OF RELEASE — 1. Release of Joint Debtor. — The release of one of several joint debtors, or joint obligors, operates as a release of the others.[6]

It Is a Qualification of the Rule Above Stated, almost as broad as the rule itself, that the release of one joint debtor that will operate to discharge his codebtors must be a technical release under seal.[7]

1. Howlett *v.* Mills, 22 Ill. 344.

2. Parents. — Stuebing *v.* Marshall, 10 Daly (N. Y.) 408; Quin *v.* Moore, 15 N. Y. 432.

3. Guardians. — See the title GUARDIAN AND WARD, vol. 15, p. 71. See also Dibrell *v.* Smith, 40 Tex. 447.

Where a release is executed by a guardian through mistake, misrepresentation and fraud, the ward is not concluded thereby, but may go behind the settlement and show the facts. Montgomery *v.* Rauer, 125 Cal. 227.

4. Persons Non Compos Mentis. — Missouri Pac. R. Co. *v.* Brazzil, 72 Tex. 235.

5. Texas, etc., R. Co. *v.* Crow, 3 Tex. Civ. App. 266; Chickering *v.* Brooks, 61 Vt. 554; Chesapeake, etc., R. Co. *v.* Mosby, 93 Va. 93.

6. Release of a Joint Debtor — *England.* — Nicholson *v.* Revill, 4 Ad. & El. 675, 31 E. C. L. 166.

United States. — U. S. *v.* Thompson, Gilp. (U. S.) 614; U. S. *v.* Murphy, 15 Fed. Rep. 594; Connecticut F. Ins. Co. *v.* Oldendorff, (C. C. A.) 73 Fed. Rep. 88.

Canada. — Fisher *v.* Patton, 5 U. C. Q. B. O. S. 741.

Georgia. — Campbell *v.* Brown, 20 Ga. 415.

Illinois. — Benjamin *v.* McConnell, 9 Ill. 544, 46 Am. Dec. 474.

Indiana. — Thomas *v.* Wilson, 6 Blackf. (Ind.) 203.

Maine. — Houston *v.* Darling, 16 Me. 413.

Maryland. — Gibson *v.* McCormick, 10 Gill & J. (Md.) 67; Booth *v.* Campbell, 15 Md. 569.

Massachusetts. — Ward *v.* Johnson, 13 Mass. 148; Leddy *v.* Barney, 139 Mass. 394.

Nebraska. — Neligh *v.* Bradford, 1 Neb. 451; Lamb *v.* Gregory, 12 Neb. 506; Scofield *v.* Clark, 48 Neb. 711.

New Hampshire. — Gould *v.* Gould, 4 N. H. 174.

New York. — Coonley *v.* Wood, 36 Hun (N. Y.) 559.

North Carolina. — Dudley *v.* Bland, 83 N. Car. 220.

Oregon. — Crawford *v.* Roberts, 8 Oregon 324.

South Carolina. — Willson *v.* Winn, 2 Bay (S. Car.) 517; Massey *v.* Brown, 4 S. Car. 93.

West Virginia. — Maslin *v.* Hiett, 37 W. Va. 16.

It has been likewise held, that the plaintiff's release of one obligor from imprisonment on an execution was a discharge of his co-obligor. Abel *v.* Forgue, 1 Root (Conn.) 502.

The release of an infant cosigner of a joint note, if he repudiates the contract, will not discharge the other signer. Young *v* Currier, 63 N. H. 419.

7. Rule Qualified — *England.* — Brooks *v.* Stuart, 9 Ad. & El. 854, 36 E. C. L. 304.

United States. — Beltzhoover *v.* Stockton, 4 Cranch (C. C.) 695.

California. — Armstrong *v.* Hayward, 6 Cal. 186.

Iowa. — Haney, etc., Mfg. Co. *v.* Adaza Co-operative Creamery Co., 108 Iowa 313.

Kentucky. — Williamson *v.* McGinnis, 11 B. Mon. (Ky.) 75, 52 Am. Dec. 561.

Maine. — Drinkwater *v.* Jordan, 46 Me. 432.

Massachusetts. — Shaw *v.* Pratt, 22 Pick. (Mass.) 305; Pond *v.* Williams, 1 Gray (Mass.) 636; Bemis *v.* Hoseley, 16 Gray (Mass.) 63.

Missouri. — McAllister *v.* Dennin, 27 Mo. 40, *distinguished* Prior *v.* Kiso, 81 Mo. 248.

New Hampshire. — Berry *v.* Gillis, 17 N. H. 9, 43 Am. Dec. 584, *following* Garnett *v.* Macon, 2 Brock. (U. S.) 218.

New Jersey. — Crane *v.* Alling, 15 N. J. L. 425; Line *v.* Nelson, 38 N. J. L. 358.

New York. — Harrison *v.* Close, 2 Johns. (N. Y.) 448, 3 Am. Dec. 444; Rowley *v.* Stoddard, 7 Johns. (N. Y.) 207; Dewey *v.* Derby, 20 Johns. (N. Y.) 462; Catskill Bank *v.* Messenger, 9 Cow. (N. Y.) 37; De Zeng *v.* Bailey, 9 Wend. (N. Y.) 336; Bronson *v.* Fitzhugh, 1 Hill (N. Y.) 185; Frink *v.* Green, 5 Barb. (N. Y.) 455; Honegger *v.* Wettstein, 47 N. Y. Super. Ct. 126; Schramm *v.* Brooklyn Heights R. Co., 35 N. Y. App. Div. 334; Finch *v.* Simon, 61 N. Y. App. Div. 141.

Pennsylvania. — Milliken *v.* Brown, 1 Rawle (Pa.) 391; Burke *v.* Noble, 48 Pa. St. 174; Greenwald *v.* Kaster, 86 Pa. St. 47.

South Carolina. — Hope *v.* Johnston, 11 Rich. L. (S. Car.) 135.

As a Test whether one or more than one shall be discharged, it has been laid down that where the effect is to increase the responsibility of those who are not included in its terms, the release of one or more joint or joint and several debtors operates as a discharge of all the others from the obligation of the debt. But when the effect will be not to increase the responsibility of the other obligors, it operates as a release *pro tanto* merely.[1]

Takes Place by Operation of Law. — The discharge of one co-obligor as a consequence of the release of another takes place by operation of law without the assent or intention of the parties, and even in contravention of such intention. The release, being under seal, may not be modified in its effect by parol evidence of intention.[2]

Joint and Several Obligations. — It has been settled also that the rule applies to obligations that are joint and several as well as to those that are merely joint.[3]

Several Obligations. — But where the obligation is several and not joint and several, a discharge of one of the obligors will not discharge any of the others. In such a case each obligor is bound in a different penalty, although it may be to the same amount.[4]

The Reason why a release to one debtor releases all jointly liable is because, unless it was held to be so, the codebtor after paying the debt might sue the releasee for contribution, and so in effect he would not be released.[5]

Applies to Release by Operation of Law. — A release of one joint debtor results from a release of another of them, as well where the release of such other takes place by operation of law as where it takes place by the act of the parties.[6]

Rule Limited. — It has been held, however, that the rule is not to be extended to cases not within the reason of the rule; thus, it is a generally recognized principle of bankruptcy law that a discharge under it of an insolvent debtor unable to pay his debts in full does not release his solvent codebtor.[7] Of

Tennessee. — Evans *v.* Pigg, 3 Coldw. (Tenn.) 395.

Texas. — Clifton *v.* Foster, (Tex. Civ. App. 1892) 20 S. W. Rep. 1005.

Vermont. — Brown *v.* Marsh, 7 Vt. 326.

1. Test of Discharge. — State *v.* Matson, 44 Mo. 305, *explained* Scott *v.* Crews, 72 Mo. 266; Hood *v.* Hayward, 124 N. Y. 1, (Ct. App.) 26 Abb. N. Cas. (N. Y.) 272; Mortland *v.* Himes, 8 Pa. St. 265; Schock *v.* Miller, 10 Pa. St. 401. See also *Ex p.* Gifford, 6 Ves. Jr. 805.

2. Takes Place by Operation of Law — *England.* — Cocks *v.* Nash, 9 Bing. 341, 23 E. C. L. 300.

United States. — Willings *v.* Consequa, 1 Pet. (C. C.) 301.

Colorado. — Heckman *v.* Manning, 4 Colo. 543.

Indiana. — Allen *v.* Wheatley, 3 Blackf. (Ind.) 332.

Maryland. — Williams *v.* Hodgson, 2 Har. & J. (Md.) 474, 3 Am. Dec. 563.

Massachusetts. — Deland *v.* Amesbury Woollen, etc., Mfg. Co., 7 Pick. (Mass.) 244; Hale *v.* Spaulding, 145 Mass. 482, 1 Am. St. Rep. 475.

New York. — Harbeck *v.* Pupin, 73 Hun (N. Y.) 5; Van Bokkelen *v.* Taylor, 62 N. Y. 105.

3. Joint and Several Obligations — *England.* — Nicholson *v.* Revill, 4 Ad. & El. 675, 31 E. C. L. 166.

Colorado. — Heckman *v.* Manning, 4 Colo. 543; Hochmark *v.* Richler, 16 Colo. 265.

Illinois. — Benjamin *v.* McConnell, 9 Ill. 536, 46 Am. Dec. 474.

Massachusetts. — Tuckerman *v.* Newhall, 17 Mass. 581.

New York. — Rowley *v.* Stoddard, 7 Johns. (N. Y.) 207.

4. Several Obligations. — Mathewson's Case, 5 Coke 23; Collins *v.* Prosser, 1 B. & C. 682, 8 E. C. L. 287; Starr *v.* Stiles, (Ariz. 1888) 19 Pac. Rep. 225; Poughkeepsie Bank *v.* Ibbotson, 5 Hill (N. Y.) 461.

5. Reason of the Rule. — North *v.* Wakefield, 13 Q. B. 536, 66 E. C. L. 536; State *v.* Matson, 44 Mo. 305.

On the above principle, it has been held that the release of a debtor from his part of the corporate debt releases both the corporation and the other stockholders. Prince *v.* Lynch, 38 Cal. 528, 99 Am. Dec. 427 (Rhodes and Crockett, JJ., *dissenting*).

6. Applies to Release by Operation of Law. — Cheetham *v.* Ward, 1 B. & P. 630; U. S. *v.* Thompson, Gilp. (U. S.) 614; Bruton *v.* Gregory, 8 Ark. 180; Hunt *v.* Terril, 7 J. J. Marsh. (Ky.) 67, Frederick *v.* Moore, 13 B. Mon. (Ky.) 473. But see Boyd *v.* Gault, 3 Bush (Ky.) 647.

One who has been released from a joint obligation by operation of law may nevertheless pay the obligation, and if he chooses to confess judgment for the amount thereof at the instance of another one of his creditors, no one else can set up the discharge. Harrison *v.* McCormick, 122 Cal. 652; Thomas *v.* Mueller, 106 Ill. 36.

7. Rule Limited. — Megrath *v.* Gray, L. R. 9 C. P. 216; Moore *v.* Stanwood, 98 Ill. 608; Tooker *v.* Bennett, 3 Cai. (N. Y.) 4. But see

course the rule has no application where the release is made by the consent of all parties to the instrument or agreement.[1] Moreover, it does not apply to a case where, the release not being under seal, there is an express agreement between the releasor and the releasee that those jointly liable shall not be discharged, or where it is sufficiently apparent from the facts of the case that such was their expectation or intention,[2] as where, for instance, instead of a release the creditor has executed a covenant not to sue.[3]

Legislation. — Several states have legislated upon the effect of the release of one or more of several joint debtors, providing generally that such release shall operate as a satisfaction or discharge of the releasee's share, but not of that of the other joint debtors.[4] And it has been held that this rule is not affected by the fact that the consideration paid by the releasee was of greater value than the amount of his proportion of liability, or greater in value than the whole amount of the debt.[5]

Under the Laws of the State of New York, "for the relief of partners and joint debtors," it was competent for a creditor to release a partner or joint debtor

Ex p. Slater, 6 Ves. Jr. 146. See generally the title INSOLVENCY AND BANKRUPTCY, vol. 16, p. 630.

1. Release by Consent — *England.* — Smith *v.* Winter, 4 M. & W. 454; Boultbee *v.* Stubbs, 18 Ves. Jr. 20; North *v.* Wakefield, 13 Q. B. 536, 66 E. C. L. 536.

Alabama. — Browning *v.* Grady, 10 Ala. 999.

Arkansas. — Pettigrew Mach. Co. *v.* Harmon, 45 Ark. 290.

Kentucky. — Wandelohr *v.* Logan, (Ky. 1900) 56 S. W. Rep. 412; Marks *v.* Deposit Bank, (Ky. 1899) 50 S. W. Rep. 1104.

Maryland. — Campbell *v.* Booth, 8 Md. 116.

New York. — Chenango Bank *v.* Osgood, 4 Wend. (N. Y.) 607.

Tennessee. — Williams *v.* Hitchings, 10 Lea (Tenn.) 326; Bank *v.* Shook, 100 Tenn. 436.

2. Or by Agreement — *England.* — Solly *v.* Forbes, 2 Brod. & B. 38, 6 E. C. L. 27; Hutton *v.* Eyre, 6 Taunt. 289, 1 E. C. L. 385; Lacy *v.* Kynaston, 12 Mod. 548, 1 Ld. Raym. 690, Holt K. B. 178; Dean *v.* Newhall, 8 T. R. 168; Price *v.* Barker, 4 El. & Bl. 760, 82 E. C. L. 760; Willis *v.* De Castro, 4 C. B. N. S. 216, 93 E. C. L. 216; North *v.* Wakefield, 13 Q. B. 536, 66 E. C. L. 536.

United States. — Garnett *v.* Macon, 2 Brock. (U. S.) 217.

California. — Northern Ins. Co. *v.* Potter, 63 Cal. 157.

Connecticut. — Rogers *v.* Hemsted, Kirby (Conn.) 44.

Georgia. — Norris *v.* Ham, R. M. Charlt. (Ga.) 269.

Illinois. — Parmelee *v.* Lawrence, 44 Ill. 405, *distinguishing* and in fact *overruling* Benjamin *v.* McConnell, 9 Ill. 536, 46 Am. Dec. 474, and Rice *v.* Webster, 18 Ill. 331.

Indiana. — Aylesworth *v.* Brown, 31 Ind. 271.

Iowa. — Bonney *v.* Bonney, 29 Iowa 448.

Louisiana. — Rec. Civ. Code La., vol. 2, § 3, art. 2203 (2199); Irwin *v.* Scribner, 15 La. Ann. 584.

Maine. — McLellan *v.* Cumberland Bank, 24 Me. 566; Auburn First Nat. Bank *v.* Marshall, 73 Me. 79; Bradford *v.* Prescott, 85 Me. 487.

Massachusetts. — Rice *v.* Woods, 21 Pick. (Mass.) 30; Kenworthy *v.* Sawyer, 125 Mass. 28.

Michigan. — Seligman *v.* Pinet, 78 Mich. 50.

Missouri. — Carson *v.* Smith, 133 Mo. 606; Badger Lumber Co. *v.* McColgin, 63 Mo. App. 470.

New Hampshire. — Durell *v.* Wendell, 8 N. H. 369.

New York. — Stewart *v.* Eden, 2 Cai. (N. Y.) 121, 2 Am. Dec. 222; Frink *v.* Green, 5 Barb. (N. Y.) 455; Kirby *v.* Taylor, 6 Johns. Ch. (N. Y.) 242; Kirby *v.* Turner, Hopk. (N. Y.) 309; Lysaght *v.* Phillips, 5 Duer (N. Y.) 106; Whittemore *v.* Judd Linseed, etc., Oil Co., 124 N. Y. 573; Hood *v.* Hayward, (Ct. App.) 26 Abb. N. Cas. (N. Y.) 283.

Pennsylvania. — Burke *v.* Noble, 48 Pa. St. 168.

Tennessee. — Richardson *v.* McLemore, 5 Baxt. (Tenn.) 586; Hamilton *v.* Ritchie, (Tenn. Ch. 1899) 53 S. W. Rep. 198.

Texas. — Marchants' Nat. Bank *v.* McAnulty, (Tex. Civ. App. 1895) 31 S. W. Rep. 1092, *following* Parmelee *v.* Lawrence, 44 Ill. 413.

Wisconsin. — Ellis *v.* Esson, 50 Wis. 138, 36 Am. Rep. 830.

3. Covenant Not to Sue — *England.* — Duck *v.* Mayeu, (1892) 2 Q. B. 511, *following* Cocke *v.* Jennor, Hob. 66, Price *v.* Barker, 4 El. & Bl. 777, 82 E. C. L. 777, and Bateson *v.* Gosling, L. R. 7 C. P. 9.

New Hampshire. — Snow *v.* Chandler, 10 N. H. 92, 34 Am. Dec. 140; Benton *v.* Mullen, 61 N. H. 125.

New York. — Catskill Bank *v.* Messenger, 9 Cow. (N. Y.) 38, *following* Harrison *v.* Close, 2 Johns. (N. Y.) 448, 3 Am. Dec. 444, and Rowley *v.* Stoddard, 7 Johns. (N. Y.) 207.

North Carolina. — Winston *v.* Dalby, 64 N. Car. 299.

Virginia. — Ward *v.* Johnson, 6 Munf. (Va.) 6.

4. Legislation. — Code Civ. Pro. N. Y. (1901) 1942. See the following: Code Cal., § 1543; Code Dak., § 869; Code Miss., § 1003; Code Nev., § 465; Shannon's Code of Tenn. (1896), art. 4, p. 1395, §§ 5570, 5571; Hager *v.* McDonald, 65 Fed. Rep. 200; Wristen *v.* Curtiss, 76 Cal. 6; Gen. Stat. Kan. (1897), c. 114, § 5; Mason *v.* Banking House, 59 Kan. 775, 52 Pac. Rep 885; Davies *v.* Jones, 61 Kan. 602; Howard *v.* Yost, 6 Kan. App. 374.

5. Mason *v.* Banking House, 59 Kan. 775, 52 Pac. Rep. 885.

without affecting the liability of the other partners or joint debtors for their proportion of the debt.[1]

Partners Within the Rule. — The general principles of this section apply as well to partners as to others indebted *in solido*.[2] Where the releasee is one of a firm of partners, a release of all actions and causes of action against him is not a release of a cause of action against the firm;[3] and a bequest to one of all debts which shall be due to the testator by the releasee at the time of the testator's death will not release a partnership debt for which the releasee is liable, and for which he had given with the other partner a joint and several promissory note.[4] On the other hand, where a partner who has individual claims against his firm debtor discharges such individual claims, the release, if containing no reference to the firm debt, affects only the personal debt.[5] A release which, by its terms, discharges members of the firm from all individual liability will release a dormant partner.[6] It would seem that where a partner and an outsider collude to defraud the copartnership, the release of such partner by the other members of the firm from all claim on account of such fraud is a bar to any relief against the other party to the fraud.[7]

2. Release of Joint Tortfeasor. — A release or discharge of one or more joint tortfeasors, executed in satisfaction of the tort, is a discharge of them all, on the ground that the party injured can have but one satisfaction for his injury. Each is considered as sanctioning all the acts of the others, thereby making them his own, and each is liable for the whole damage as if it had been occasioned by himself alone; hence the law considers that he who pays for the injury has paid for it all, and there is nothing left for which the other tortfeasors can be liable.[8]

1. New York Law. — Stat. of 1838, c. 257; Hoffman *v.* Dunlop, 1 Barb. (N. Y.) 185; Herries *v.* Platt, 21 Hun (N. Y.) 134; Commercial Nat. Bank *v.* Taylor, 64 Hun (N. Y.) 499; Bolen *v.* Crosby, 49 N. Y. 186; Irvine *v.* Millbank, 36 N. Y. Super. Ct. 264, *affirmed* 56 N. Y. 635.

A similar provision is now incorporated in the code of civil procedure (1901), § 1942, p. 536.

The court of another state called upon to construe the effect of a release of a contract to be performed in the state of New York, will be guided by this statute and the construction based thereupon by the New York courts. Holdridge *v.* Farmers', etc., Bank, 16 Mich. 70.

Where a joint and several note is made payable to the order of one of the makers, and is by him indorsed and negotiated, it is a joint and several debt due to the holder from the promisors, in the same manner as if the payee had not been one of them; and a release of one of the several joint makers will release all. American Bank *v.* Doolittle, 14 Pick. (Mass.) 126.

If a creditor permits joint debtors to give separate notes for their respective shares of the joint debt, the acceptance of such notes is a discharge of the debtors from the first obligation, and their obligation is then several and not joint. Yates *v.* Donaldson, 5 Md. 390, 61 Am. Dec. 283; Crafts *v.* Sweeney, 18 R. I. 734.

The fact that joint debtors not guilty of collusion in fraud have been discharged, will not discharge those who were guilty of collusion. Haney, etc., Mfg. Co. *v.* Adaza Co-operative Creamery Co., 108 Iowa 313.

Mere failure to sue a joint debtor until the statute of limitations renders a suit impossible, will not discharge a codebtor. A release must be founded upon some consideration moving a releasor thereto. McCarter *v.* Turner, 49 Ga. 311.

2. Partners Within the Rule. — *Exp.* Good, 5 Ch. D. 46; Elliott *v.* Holbrook, 33 Ala. 659; Sewall *v.* Sparrow, 16 Mass. 24; Robinson *v.* McFaul, 19 Mo. 549; Grant *v.* Holmes, 75 Mo. 109, *affirmed* Carter *v.* Prior, 78 Mo. 224, *followed* Howard *v.* Lillard, 17 Mo. App. 230.

3. Paret *v.* Bryson, 2 West. Jur. 351, 18 Fed. Cas. No. 10,710; Reading R. Co. *v.* Johnson, 7 W. & S. (Pa.) 317.

4. *Exp.* Kirk, 5 Ch. D. 800.

5. Robertson *v.* Hunter, 29 S. Car. 9.

6. Dormant Partner. — Harbeck *v.* Pupin, 145 N. Y. 70, *distinguishing* Robinson *v.* Wilkinson, 3 Price 538.

7. Parsons *v.* Hughes, 9 Paige (N. Y.) 591.

8. Release of a Joint Tortfeasor — *England.* — Co. Litt. 232; Cocke *v.* Jennor, Hob. 66; Dufresne *v.* Hutchinson, 3 Taunt. 117; Brown *v.* Allen, 4 Esp. 158; Wynne *v.* Anderson, 3 C. & P. 596, 14 E. C. L. 471; Com. Dig. Pleader, 3 M. 12; Littleton, § 376; Thurman *v.* Wild, 11 Ad. & El. 453, 39 E. C. L. 145; Kiffin *v.* Willis, 4 Mod. 379.

Arkansas. — Montgomery *v.* Erwin, 24 Ark. 540.

California. — Urton *v.* Price, 57 Cal. 270; Tompkins *v.* Clay St. R. Co., 66 Cal. 163; Chetwood *v.* California Nat. Bank, 113 Cal. 426.

Connecticut. — Ayer *v.* Ashmead, 31 Conn. 452.

Iowa. — Turner *v.* Hitchcock, 20 Iowa 310; Long *v.* Long, 57 Iowa 497; Atwood *v.* Brown, 72 Iowa 723.

Kansas. — Westbrook *v.* Mize, 35 Kan. 299.

Another Reason for the Rule, as stated by the court, is that the release being taken most strongly against the releasor is conclusive evidence that he has been satisfied for the wrong; and after satisfaction, although it moved from only one of the tortfeasors, no foundation remains for an action against any one. A sufficient atonement having been made for the trespass, the whole matter is at an end. It is as though the wrong had never been done.[1]

Release Pro Tanto. — But it is a well-settled rule that where a release of one wrongdoer is not a technical release under seal, then the intention of the parties is to govern, and it becomes a question of fact for the court or jury whether or not what the releasor has received was received in full satisfaction of his wrong; and if it appears that it was not so received, it is only *pro tanto* a bar to an action against the other wrongdoers.[2]

Applies to Quasi-joint Tortfeasors. — The rule under discussion applies not only to those who are strictly joint tortfeasors, but to all who may be jointly and severally liable in damages, whether or not there was any concert of action between them, provided the injury be single.[3]

Where the Release of One Tortfeasor is under Seal, or expresses full satisfaction on its face, a proviso or reservation by which the releasor attempts to preserve rights against other joint tortfeasors is void as being repugnant to the legal effect and operation of the release.[4]

Louisiana. — Owen *v.* Brown, 13 La. Ann. 201; Orr *v.* Hamilton, 36 La. Ann. 791.

Maine. — Gilpatrick *v.* Hunter, 24 Me. 19.

Maryland. — Gunther *v.* Lee, 45 Md. 67.

Massachusetts. — Brown *v.* Cambridge, 3 Allen (Mass.) 474.

New Jersey. — Spurr *v.* North Hudson County R. Co., 56 N. J. L. 346.

New York. — Johanson *v.* New York, 71 N. Y. App. Div. 561; Lord *v.* Tiffany, 98 N. Y. 412, 50 Am. Rep. 689.

North Carolina. — Brown *v.* Louisburg, 126 N. Car. 701, 78 Am. St. Rep. 677; Burns *v.* Womble, 131 N. Car. 173.

Texas. — McGehee *v.* Shafer, 15 Tex. 198.

Vermont. — Eastman *v.* Grant, 34 Vt. 387.

Virginia. — Ruble *v.* Turner, 2 Hen. & M. (Va).) 38.

But see Owen *v.* Brockschmidt, 54 Mo. 285.

1. Turner *v.* Hitchcock, 20 Iowa 310; Bronson *v.* Fitzhugh, 1 Hill (N. Y.) 185.

2. Release Pro Tanto — *Alabama.* — Smith *v.* Gayle, 58 Ala. 600.

Colorado. — Bowman *v.* Davis, 13 Colo. 302.

Maine. — McCrillis *v.* Hawes, 38 Me. 568.

New York. — Knapp *v.* Roche, 94 N. Y. 329; Irvine *v.* Milbank, (Ct. App.) 15 Abb. Pr. N. S. (N. Y.) 378.

Vermont. — Chamberlin *v.* Murphy, 41 Vt. 110.

West Virginia. — Bloss *v.* Plymale, 3 W. Va. 393, 100 Am. Dec. 752.

Wisconsin. — Ellis *v.* Esson, 50 Wis. 145, 36 Am. Rep. 830; Pogel *v.* Meilke, 60 Wis. 250.

Under the *Illinois* statute, making liable several persons for causing the intoxication of another, if the injured party release one of them, such release is a bar as to the others. Stanley *v.* Leahy, 87 Ill. App. 465. But it has been held under a similar *New York* statute (Civil Damages Act, Laws of 1873, c. 646), that since the law legalizes the sale of liquor, the seller is not a wrongdoer; nevertheless that as all participating in the act are made equally liable, satisfaction by one is satisfaction by all. Comstock *v.* Hopkins, 61 Hun (N. Y.) 189.

Where there is a suit pending against several tortfeasors, the dismissal of the suit against one will not bar the action against the others; such dismissal is not equivalent to an accord and satisfaction. Chicago *v.* Babcock, 143 Ill. 358; West Chicago St. R. Co. *v.* Piper, 165 Ill. 325.

Where the directors of one company were guilty of wrongdoing in using its funds in the purchase of an interest in another company from its directors, the directors of the two corporations were not joint tortfeasors; hence a settlement by the receiver with the directors of the selling corporation is no defense to the directors of the purchasing corporation. Gilbert *v.* Finch, 72 N. Y. App. Div. 38.

3. Applies to Quasi-joint Tortfeasors — *Colorado.* — Denver, etc., R. Co. *v.* Sullivan, 21 Colo. 302.

Illinois. — Wabash, etc., R. Co. *v.* Shacklet, 105 Ill. 364, 44 Am. Rep. 791; Chapin *v.* Chicago, etc., R. Co., 18 Ill. App. 50.

Indiana. — Valparaiso *v.* Moffitt, 12 Ind. App. 250, 54 Am. St. Rep. 522.

Iowa. — Miller *v.* Beck, 108 Iowa 575.

Massachusetts. — Brown *v.* Cambridge, 3 Allen (Mass.) 474; Stone *v.* Dickinson, 5 Allen (Mass.) 29, 81 Am. Dec. 727; Goss *v.* Ellison, 136 Mass. 503; Aldrich *v.* Parnell, 147 Mass. 409.

New York. — Knickerbacker *v.* Colver, 8 Cow. (N. Y.) 111; Breslin *v.* Peck, 38 Hun (N. Y.) 624.

Where the default of one was not the proximate cause of the accident occasioning the injuries, he is not jointly liable with the defendant whose negligence was the proximate cause of such injury, and a settlement with the former will not release the latter. Strabler *v.* Toledo Bridge Co., 11 Ohio Cir. Dec. 88.

Where the publication of the same libelous article in two different papers is a distinct tort a verdict against the one paper is not a bar to an action against the other. Woods *v.* Pangburn, 75 N. Y. 495. See also Owen *v.* Brockschmidt, 54 Mo. 285.

4. Release Under Seal — *California.* — Urton *v.* Price, 57 Cal. 270.

Release of One Not Liable. — In *Massachusetts* it has been held that the validity and effect of a release of a cause of action are independent of the validity of the cause of action; and if a claim is made against one and then released, all who may be liable are discharged, whether the one released was liable or not.[1] The same rule has been adopted in *California*,[2] in *Colorado*,[3] and in *Minnesota*.[4] The contrary rule seems to prevail in *New York*,[5] in *Pennsylvania*,[6] in *Kansas*,[7] in *Iowa*,[8] and in *Nebraska*.[9]

3. Release of Claims for Personal Injuries. — Where one receives injuries in a railroad or other accident, it is a general practice to procure from the injured person a release of damages, often while he is suffering from the effects of the accident, and usually upon payment of a small sum of money. The subsequent attempt of the releasor, when suing for the injury, to destroy the effect of such release upon grounds of mistake, fraud, mental incapacity and the like, has furnished occasion for the courts to formulate certain general principles applicable to such releases. Where the release of all claim for damages growing out of a personal injury caused by the negligence of the defendant is fairly obtained and understandingly executed by the plaintiff, it is an effectual bar to an action to recover for such injury.[10]

False Representation as to Character of Paper Signed. — Where the releasor signs a paper under the impression induced by the releasee that he is signing merely a receipt for money already paid, or a release of a part of his claim only, and the effect of the instrument as a general release is misstated and misrepresented, and the releasor is guilty of no negligence in accepting such statement, the release is of no effect; in other words, if the instrument signed is not what the releasor supposed he was signing, mental assent necessary to constitute a binding contract is absent.[11]

Maryland. — Gunther *v.* Lee, 45 Md. 67.

New York. — Mitchell *v.* Allen, 25 Hun (N. Y.) 543; Delong *v.* Curtis, 35 Hun (N. Y.) 94; Matthews *v.* Chicopee Mfg. Co., 3 Robt. (N. Y.) 712; Smith *v.* Consolidated Gas Co., (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 133; Brogan *v.* Hanan, 55 N. Y. App. Div. 92.

Ohio. — Ellis *v.* Bitzer, 2 Ohio 89, 15 Am. Dec. 534.

Pennsylvania. — Seither *v.* Philadelphia Traction Co., 125 Pa. St. 397, 11 Am. St. Rep. 905; Williams *v.* Le Bar, 141 Pa. St. 151.

Vermont. — Sloan *v.* Herrick, 49 Vt. 327.

Washington. — Abb *v.* Northern Pac. R. Co., 28 Wash. 428.

1. Release of One Not Liable. — Brown *v.* Cambridge, 3 Allen (Mass.) 474; Goss *v.* Ellison, 136 Mass. 503; Leddy *v.* Barney, 139 Mass. 394.

2. Tompkins *v.* Clay St. R. Co., 66 Cal. 166.

3. Denver, etc., R. Co. *v.* Sullivan, 21 Colo. 302.

4. Hartigan *v.* Dickson, 81 Minn. 284.

5. Wilson *v.* Reed, 3 Johns. (N. Y.) 175; Townsend *v.* Hoppock, 6 Duer (N. Y.) 499.

6. Thomas *v.* Central R. Co., 194 Pa. St. 512.

7. Missouri, etc., R. Co. *v.* McWherter, 59 Kan. 345.

8. Turner *v.* Hitchcock, 20 Iowa 310.

9. Wardell *v.* McConnell, 25 Neb. 558.

10. Effect of Such Release. — Chicago, etc., R. Co. *v.* Lewis, 109 Ill. 120; East St. Louis Packing, etc., Co. *v.* Hightower, 9 Ill. App. 297.

11. False Representation as to Character of Paper Signed — *United States.* — Great Northern R. Co. *v.* Kasischke, 43 C. C. A. 627; Union Pac. R. Co. *v.* Harris, (C. C. A.) 63 Fed. Rep. 800; Chicago, etc., R. Co. *v.* Wilcox, (C. C. A.) 116 Fed. Rep. 913.

California. — Smith *v.* Occidental, etc., Steamship Co., 99 Cal. 463; Meyer *v.* Haas, 126 Cal. 560.

District of Columbia. — Chesapeake, etc., R. Co. *v.* Howard, 14 App. Cas. (D. C.) 263.

Illinois. — Illinois Cent. R. Co. *v.* Welch, 52 Ill. 187, 4 Am. Rep. 593; Eagle Packet Co. *v.* Defries, 94 Ill. 602. 34 Am. Rep. 245; Chicago, etc., R. Co. *v.* Lewis, 109 Ill. 120; National Syrup Co. *v.* Carlson, 155 Ill. 210; Pioneer Cooperage Co. *v.* Romanowicz, 186 Ill. 9.

Iowa — O'Brien *v.* Chicago, etc., R. Co., 89 Iowa 644.

Kentucky. — Addyston Pipe, etc., Co. *v.* Copple, 94 Ky. 292.

Massachusetts. — Curley *v.* Harris, 11 Allen (Mass.) 122; Rice *v.* Dwight Mfg. Co., 2 Cush. (Mass.) 80; Mullen *v.* Old Colony R. Co., 127 Mass. 86, 34 Am. Rep. 349; Leddy *v.* Barney, 139 Mass. 394; Jackson *v.* Olney, 140 Mass. 195.

Michigan. — O'Neil *v.* Lake Superior Iron Co., 63 Mich. 690.

Minnesota. — Hinkle *v.* Minneapolis, etc., R. Co., 31 Minn. 434; Sobieski *v.* St. Paul, etc., R. Co., 41 Minn. 172; Christianson *v.* Chicago, etc., R. Co., 61 Minn. 249; Schus *v.* Powers-Simpson Co., 85 Minn. 447.

New York. — Shaw *v.* Webber, 79 Hun (N. Y.) 307; O'Meara *v.* Brooklyn City R. Co., 16 N. Y. App. Div. 204.

Washington. — Pederson *v.* Seattle Consol. St. R. Co., 6 Wash. 202.

Wisconsin. — Schultz *v.* Chicago, etc., R. Co., 44 Wis. 645; Lusted *v.* Chicago, etc., R. Co., 71 Wis. 391.

Must Exercise Reasonable Care. — On the other hand, the releasor is required to exercise reasonable care in acquainting himself with the contents of the paper, and he will not be allowed to show simply that he was ignorant of its contents when he signed it, and that it was different from what he supposed it to be.[1] Nor is it any defense that the releasor did not know what the full effect of such release would be.[2] In the absence of fraud, he is presumed to have known the contents of the instrument, and is estopped by his own negligence in refusing or failing to avail himself of an opportunity to ascertain what such contents were.[3]

Proof. — Whether the releasor was negligent, or exercised reasonable care, is a question of fact for the jury to decide, considering all the circumstances of the case.[4] Such proof must be clear and convincing, and the burden is upon the releasor to show the fraud.[5]

4. Release of Mortgage Interests. — In some states a mortgage is regarded as a mere security for the payment of a debt, and therefore may be released without affecting the validity of the debt.[6] But a release of the mortgage without the surrender of the note secured thereby is of no effect.[7] So the entering of a discharge of a mortgage by the mortgagee does not discharge the debt, but only the security.[8] Where a mortgage is released of record for the sole purpose of giving priority to a second mortgage the first mortgage still exists as between the parties thereto.[9]

Where the Debt Is Released the mortgage, of course, will be discharged also.[10] It has been held, however, that the lien of a mortgage is not necessarily discharged by the surrender or cancellation of the note, since the debt may remain after the note is surrendered or canceled. It is competent for the parties to release either the personal liability or the real security, and the release of the one does not affect the validity of the other.[11]

A Release Broad Enough in Its Terms to Include a Bond and Mortgage, but given for the sole purpose of qualifying the releasee as a witness, will be restricted to the purpose for which it was given, and will not release such bond and mortgage; and attempting to give it such effect is fraudulent.[12]

A Release from Liability on Covenants of Warranty contained in a deed of mortgaged

1. **Must Exercise Reasonable Care** — *United States.* — Vickers *v.* Chicago, etc., R. Co., 71 Fed. Rep. 139.
Georgia. — Jossey *v.* Georgia Southern, etc., R. Co., 109 Ga. 439.
Illinois. — Chicago, etc., Coal Co. *v.* Peterson, 39 Ill. App. 120.
Maryland. — Spitze *v.* Baltimore, etc., R. Co., 75 Md. 162, 32 Am. St. Rep. 378.
Massachusetts. — Squires *v.* Amherst, 145 Mass. 192; Freedley *v.* French, 154 Mass. 339.
Wisconsin. — Albrecht *v.* Milwaukee, etc., R. Co., 87 Wis. 105, 41 Am. St. Rep. 30.

2. Denver, etc., R. Co. *v.* Sullivan, 21 Colo. 302.

3. **Knowledge of Contents Presumed.** — Phares *v.* Lake Shore, etc., R. Co., 20 Ind. App. 54; Bell *v.* Byerson, 11 Iowa 233, 77 Am. Dec. 142; McCormack *v.* Molburg, 43 Iowa 561; McKinney *v.* Herrick, 66 Iowa 414; Wallace *v.* Chicago, etc., R. Co., 67 Iowa 551; Mateer *v.* Missouri Pac. R. Co., 105 Mo. 320.

4. **Proof.** — Illinois Cent. R. Co. *v.* Welch, 52 Ill. 187, 4 Am. Rep. 593; Ryan *v.* Gross, 68 Md. 377; Freedley *v.* French, 154 Mass. 339.

5. **Burden of Proof.** — Chicago, etc., R. Co. *v.* Wilcox, (C. C. A.) 116 Fed. Rep. 913; East St. Louis Packing, etc., Co. *v.* Hightower, 9 Ill. App. 297; De Douglas *v.* Union Traction Co., 198 Pa. St. 430.
Where there is an allegation of fraud without proof to support it, it is improper for the judge to submit the question of fraud to the jury. Wright *v.* Northampton, etc., R. Co., 125 N. Car. 1.

6. **Release of Mortgage Interests.** — Wallis *v.* Long, 16 Ala. 738; Walls *v.* Baird, 91 Ind. 434; Rich *v.* Lord, 18 Pick. (Mass.) 322. See also Parker *v.* Holmes, 4 N. H. 97.

7. Dickinson *v.* Worthington, 4 Hughes (U. S.) 430.

8. Sherwood *v.* Dunbar, 6 Cal. 53.

9. Wood *v.* Wood, 61 Iowa 256; Lee *v.* Wagner, 71 Wis. 191. See also Perkins *v.* Pitts, 11 Mass. 125.

10. **Mortgage Released by Release of Debt.** — Armitage *v.* Wickliffe, 12 B. Mon. (Ky.) 497; Smith *v.* Durell, 16 N. H. 344, 41 Am. Dec. 732; Jackson *v.* Stackhouse, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514.

11. Donnelly *v.* Simonton, 13 Minn. 301; Tripp *v.* Vincent, 3 Barb. Ch. (N. Y.) 613.
The attorney-general of the state has no power to release a debt and give up a bond and mortgage to the debtor without payment. Public Accounts Com'rs *v.* Rose, 1 Desaus. (S. Car.) 461.

12. **Restricting Such Release.** — Martin *v.* Righter, 10 N. J. Eq. 510 (by a divided court).

land, does not release the grantors from their liability to pay the mortgage.[1]

The Error of a County Clerk in Releasing the Part Intended to Be Retained, and retaining the part intended to be released, does not affect the rights of an owner of the mortgage who has agreed to release the portion erroneously retained.[2]

And a Release Fraudulently Recorded without the knowledge or consent of the mortgagee will not inure to the advantage of the mortgagor, nor any one else unless he be a *bona fide* purchaser without notice.[3]

Whether a Release of a Mortgage Will Constitute a Discharge or an Assignment depends not so much upon the form of the instrument as upon the relations of the parties to the estate and their presumed intent derived from the circumstances under which the conveyance was made. If the release is to the party whose duty it is to extinguish the mortgage for the benefit of another, it will be held to operate as a discharge.[4]

Parol Release. — In some jurisdictions the release of a mortgage may be effected by a parol agreement.[5] In other jurisdictions such release must be at least in writing; an oral agreement is not sufficient.[6]

Release by Mortgagee. — A mortgagee cannot arbitrarily release portions of mortgaged premises for less than their actual value without the consent of the mortgagor, and if he does so, he must, on foreclosure, credit the mortgage with the value of the portions released.[7] And a release of part of the mortgaged premises by the mortgagee, knowing that a subsequent mortgage has been executed upon another part, discharges the latter *pro tanto*.[8]

The Mortgagee May, However, Agree with the Purchaser from the mortgagor to release the lien upon a portion of the mortgaged premises,[9] but the mortgagee in such a case, upon receiving payment *pro tanto*, does not thereby release his right to sue for the amount of other notes secured by the same mortgage.[10]

Admission of Payment. — A release containing an admission that the mortgage indebtedness has been paid, but purporting to discharge the mortgage as to a portion of the property only, does not raise an estoppel in favor of the releasee who knows that the recital was false.[11]

Conversely, a release purporting to discharge all claim to premises covered by a mortgage will extend to all land described in the mortgage, and will not be restricted to a particular tract which alone was described in the recital. A distinct reference to the mortgage incorporates it in the release, and the language extending generally to the land covered thereby will be taken to refer to all such land, and not merely to the tract particularly described in such recital.[12]

1. Murray *v.* Fox, 104 N. Y. 382, *affirming* 39 Hun (N. Y.) 108.

2. Simonson *v.* Falihee, 25 Hun (N. Y.) 570.

3. Whipple *v.* Fowler, 41 Neb. 675; Whitney *v.* Lowe, 59 Neb. 87.

4. **Discharge or Assignment.** — Gibson *v.* Crehore, 3 Pick. (Mass.) 475; Brown *v.* Lapham, 3 Cush. (Mass.) 552; Wadsworth *v.* Williams, 100 Mass. 131.

5. **Parol Release.** — Deshazo *v.* Lewis, 5 Stew. & P. (Ala.) 91, 24 Am. Dec. 769; Wallis *v.* Long, 16 Ala. 738; Acker *v.* Bender, 33 Ala. 233; Howard *v.* Gresham, 27 Ga. 347; Stevenson *v.* Adams, 50 Mo. 475.

6. Porter *v.* Muller, 65 Cal. 512.

In Hayden *v.* Smith, 12 Met. (Mass.) 511, it was held that a recital of an agreement to release, not signed by the releasor, did not have the same effect as a release under his hand and seal, but would nevertheless be construed in the light of the apparent purpose of the parties, and would operate as a substitution of a mortgage of real estate for personal liability.

7. **Release by Mortgagee.** — Bartlett *v.* Cottle, 63 Cal. 366; Porter *v.* Muller, 65 Cal. 512; Bull *v.* Coe, 77 Cal. 54, 11 Am. St. Rep. 235; Barbieri *v.* Ramelli, 84 Cal. 154; Woodward *v.* Brown, 119 Cal. 283, 63 Am. St. Rep. 108; Benton *v.* Nicoll, 24 Minn. 221.

A mortgagee has such an estate in the mortgaged premises that a simple release of the right to redeem will operate so as to make an absolute and indefeasible estate. Hyde *v.* Baldwin, 17 Pick. (Mass.) 307.

8. **Release Pro Tanto.** — Birnie *v.* Main, 29 Ark. 591; Taylor *v.* Short, 27 Iowa 361, 1 Am. Rep. 280; Wolf *v.* Smith, 36 Iowa 454; Parkman *v.* Welch, 19 Pick. (Mass.) 231; Coyle *v.* Davis, 20 Wis. 564.

9. **Agreement with Vendee.** — Cowen *v.* Loomis, 91 Ill. 132.

10. Edgington *v.* Hefner, 81 Ill. 341.

11. **Admission of Payment.** — Anderson *v.* McCloud-Love Live Stock Commission Co., 58 Neb. 674. See also Knowles *v.* Carpenter, 8 R. I. 548.

12. Gadsden *v.* Latey, 42 Neb. 128.

If Third Parties Have Not Become Interested in mortgaged premises, the mortgagee may release a part thereof, and retain his lien for the whole debt upon the remainder.[1]

And a Mortgagee May, at the Request of the Mortgagor, release a part or the whole of the mortgaged premises without inquiring whether a junior incumbrancer has intervened. It is the duty of the latter, if he intends to claim an equity to the prior incumbrance, to give the holder notice so that he may act with his own understandingly; and if he fails to do so, the consequences of his neglect must be visited upon himself.[2] Where a mortgage provides that the mortgagee shall release parts of the mortgaged premises, on request of the mortgagor, for a certain price, the liability of the mortgagor is not affected by the fact that the mortgagee releases at the request of the mortgagor's grantee parts of the premises for less than the sum agreed upon.[3]

A Subsequent Mortgagee Having Notice of Contracts of Sale of part of the mortgaged premises cannot release other portions thereof and impose the burden of the mortgage upon the parcels contracted to be sold, and if he should release portions of sufficient value to pay the mortgage, his lien upon the parcels contracted for is thereby discharged.[4]

Releasing Portions Last Aliened. — Having regard to the rule that the portions of property aliened successively are liable in the inverse order of alienation, if an incumbrancer release from the lien of the incumbrance the portions last aliened, those first aliened are discharged from the lien of the incumbrance *pro tanto*.[5] But the equity which entitles a second mortgagee to the benefit of a release executed by the first mortgagee arises only where the first mortgagee gave the release without knowledge of the existence of the second incumbrance. If the release is executed without notice of existing equities on the part of the subsequent incumbrancer, he is not responsible for the consequence of the first act, nor is the lien on his mortgage in any wise impaired.[6]

After the Assignment of the Debt Secured by the Mortgage the mortgagee has no further power over it, and a release made by him is in fraud of the rights of his assignee, and will be canceled as a nullity.[7]

Priority by Consent. — An agreement by a mortgagee to allow the United States priority of claim upon the mortgaged premises is not a general release of the premises from a prior mortgage, but merely gives the government a priority of lien.[8]

Discharge by Abandonment. — The assent by the mortgagee to the abandonment of the insured property, with insurers, operates as a discharge of the mortgage.[9]

By Purchaser of Mortgaged Premises. — One who purchases mortgaged premises from the mortgagor, assuming payment of the mortgage debt, may not defeat

1. **When Mortgagee May Release.** — Hazle *v.* Bondy, 173 Ill. 302; Chapman *v.* Lester, 12 Kan. 592, *distinguished* in La Rue *v.* Gilbert, 18 Kan. 220; Johnson *v.* Rice, 8 Me. 157; Coutant *v.* Servoss, 3 Barb. (N. Y.) 128; Culp *v.* Fisher, 1 Watts (Pa.) 494; McAfee *v.* McAfee, 28 S. Car. 218. See also Durm *v.* Fish, 46 Mich. 312.

2. McIlvain *v.* Mutual Assur. Co., 93 Pa. St. 30.

3. Woodruff *v.* Stickle, 28 N. J. Eq. 549.

4. Union College *v.* Wheeler, 61 N. Y. 88.

5. **Releasing Portions Last Aliened.** — Hoy *v.* Bramhall, 19 N. J. Eq. 563, 97 Am. Dec. 687; Harrison *v.* Guerin, 27 N. J. Eq. 219; Guion *v* Knapp, 6 Paige (N. Y.) 35; Martin's Appeal, 97 Pa. St. 90. See also Hawhe *v.* Snydaker, 86 Ill. 198; Hall *v.* Edwards, 43 Mich. 473. But see Patty *v.* Pease, 8 Paige (N. Y.) 277. See the title MARSHALING ASSETS, vol. 19, p. 1255.

6. **Rule Qualified** — *Massachusetts.* — Parkman *v.* Welch, 19 Pick. (Mass.) 231.

Nebraska. — Anderson *v.* McCloud-Love Live Stock Commission Co., 58 Neb. 674.

New Jersey. — Cogswell *v.* Stout, 32 N. J. Eq. 240; Reilly *v.* Mayer, 12 N. J. Eq. 59.

New York. — Stevens *v.* Cooper, 1 Johns. Ch. (N. Y.) 425; Guion *v.* Knapp, 6 Paige (N. Y.) 43; Patty *v.* Pease, 8 Paige (N. Y.) 277.

Wisconsin. — Deuster *v.* McCamus, 14 Wis. 311.

7. Fassett *v.* Mulock, 5 Colo. 466.

8. **Priority by Consent.** — Flower *v.* Elwood, 66 Ill. 438.

9. **Discharge by Abandonment.** — Fulton Ins. Co. *v.* Goodman, 32 Ala. 132.

the mortgagee's right by procuring a release from the mortgagor.[1] Conversely, where a grantee has covenanted to pay the mortgage upon the premises conveyed, the grantor cannot, after such covenant of assumption has been assented to by the mortgagee, discharge such grantee without the mortgagee's assent.[2]

5. Release of Contingent Interests. — It is a general rule that a release does not operate upon a mere possibility.[3] But it has been held that the power to release an absolute debt necessarily includes the power to release a contingent liability;[4] and where there is an existing obligation or contract between parties, although executory and dependent upon contingencies that may never happen, the party in whose favor such obligation exists, or who is liable to suffer damage if it is not performed, may release such contingent liability by a discharge of all claims, demands, actions, etc.[5] And it has been laid down as a general rule that in every case where a party may take security to save him against loss from a future contingent liability, he may also bar himself by a release and covenant not to sue, operating by way of estoppel from recovering at a future time a claim growing out of such contingent liability.[6] An estate in expectancy liable to be defeated is alienable and may therefore be released.[7]

6. Release of Judgment. — A judgment may not be released at law by anything less than a specialty; but a parol release is sufficient in equity.[8] And a judgment may be satisfied by a release under seal, although the judgment creditor receives less than the amount of the judgment. This is recognized as an exception to the rule that the payment of a less sum does not satisfy the debt.[9]

The Discharge of a Judgment Debtor from Imprisonment, even without the assent of the creditor, discharges the judgment.[10]

A Release of the Original Cause of Action, after judgment, is without effect unless it amounts to a release of the judgment.[11]

Intention to Release Only Part of Judgment. — On the other hand, a release of the entire judgment has been given its full effect, although the releasor made affidavit to the fact that he intended to discharge only a portion thereof.[12]

A Promise to Release a Judgment Conditionally is not a release until the condition is performed; but if upon such promise made the plaintiff executes a technical release *in præsenti*, the failure to perform the condition will not reinstate the judgment.[13]

1. By Purchaser of Mortgaged Premises. — Starbird *v.* Cranston, 24 Colo. 20; Bay *v.* Williams, 112 Ill. 91, 54 Am. Rep. 209; Bentley *v.* Vanderheyden, 35 N. Y. 677.

2. Gifford *v.* Corrigan, 117 N. Y. 257.

3. Release of Contingent Interest. — Pierce *v.* Parker, 4 Met. (Mass.) 80; Reed *v.* Tarbell, 4 Met. (Mass.) 95; Murphey *v.* Avery, 1 Dev. & B. L. (18 N. Car.) 25; Cocke *v.* Stuart, Peck. (Tenn.) 137. See also Tuckerman *v.* Newhall, 17 Mass. 585.

4. Shaw *v.* Berry, 35 Me. 280.

5. Pierce *v.* Parker, 4 Met. (Mass.) 80.

6. Reed *v.* Tarbell, 4 Met. (Mass.) 95; Soper *v.* Atlantic Mut. F. & M. Ins. Co., 120 Mass. 267. See also Power's Appeal, 63 Pa. St. 443.

7. Ham *v.* Van Orden, 84 N. Y. 257.

8. Release of Judgment. — Whitehill *v.* Wilson, 3 P. & W. (Pa.) 412.

Where judgment was rendered for one amount, and upon a hearing in chancery a decree was made that execution be issued for a lesser sum, and the plaintiff released the judgment, the court was in doubt whether the release extended beyond the judgment or decree in chancery for the lesser sum. Adams *v.* Gould, 9 Me. 438.

9. Maclary *v.* Reznor, 3 Del. Ch. 445; Braden *v.* Ward, 42 N. J. L. 518.

A release, in a deed by creditors conveying the estate of a debtor to trustees for their benefit, of all manner of actions, suits, judgments, etc., has been held not to release a judgment previously obtained by one of the creditors executing the deed, so as to preclude such judgment creditor from enforcing the right which the judgment gave him as against the estate vesting in the trustees. Squire *v.* Ford, 9 Hare 47.

10. Discharge from Prison. — Bunker *v.* Hodgdon, 7 N. H. 263.

11. Burley *v.* Burley, 6 N. H. 205.

In Carr *v.* Mason, 44 Me. 78, it was held that an entry upon the margin of the record of an original judgment stating that one-half of the judgment was released by order of the court, could not operate to reverse the judgment, but operated only as a satisfaction and discharge of the moiety of the judgment. See also Fox *v.* Hale, etc., Silver Min. Co., 122 Cal. 222.

12. Atchison, etc., R. Co. *v.* Johnson, 29 Kan. 218 (Brewer, J., *dissenting*).

13. Davis *v.* Bowker, 1 Nev. 487.

7. Release of Insurance — **The Beneficiary** under a policy of insurance has a vested interest therein and in any money due therefrom, and the insured cannot bind such beneficiary by his release of the policy.[1]

Assignee. — Likewise, the right of an assignee of a mortgage of personal property who has a right of action upon a policy of insurance protecting such personal property is not affected by a settlement made and a release executed by the assignor to the one inflicting the injury against which the property was insured. After the assignment the obligation of the insurer runs to the plaintiff, and he cannot be deprived of his interest in the policy without his consent.[2]

Where the Insurer Pays the Policy After a Release is executed by the assured to the one by whose wrongful act the loss was occasioned, the insurer cannot interpose such release as a defense in an action by the assured upon the policy.[3]

Where Parties to a Policy of Marine Insurance Settle Their Mutual Demands, agreeing that the policy shall be canceled, such settlement and discharge are a bar to a claim for the total loss of the vessel which occurred before such settlement.[4]

The Payment and Acceptance of a Smaller Amount than the face of the policy, if untainted by fraud, may constitute an accord and satisfaction;[5] but a release professing to discharge a policy for a payment of about one-quarter of its face, not being under seal, has been held ineffectual for insufficiency of consideration and recovery of the balance allowed.[6]

8. Release of Witnesses. — A person who is interested in the issue of a suit may be rendered competent as a witness by executing a release or surrender of his interest.[7] The release given for this purpose must have all the essential elements of a release for any other purpose.[8]

Where It Is Impossible for the Release to Remove the Objection of Interest it will not qualify the witness to testify,[9] as where the disability is statutory and not removable by the execution of the release.[10]

Intention. — A release given in order to qualify a witness will release the claim whether such was the intention of releasor or not,[11] and although the releasee refused to accept the surrender or release,[12] and whether the witness was sworn on the trial or not.[13]

As the Object of the Release is to free the mind of the witness of any supposed bias which his interest might produce, it is clear that if he testifies in the absence of all knowledge of the release, it is the same as if it had never been executed;[14] but it is not necessary that there should be a delivery of the

1. Release of Insurance. — Duffy *v.* Metropolitan L. Ins. Co., 94 Me. 418.

2. Algase *v.* Horse Owners' Mut. Indemnity Assoc., 77 Hun (N. Y.) 472.

3. Connecticut F. Ins. Co. *v.* Erie R. Co., 73 N. Y. 399.

4. Release of Marine Policy. — Soper *v.* Atlantic Mut. F. & M. Ins. Co., 120 Mass. 267.

5. Paying Less than Amount of Policy. — Lesson *v.* Massachusetts Ben. Assoc., (N. Y. Super. Ct. Gen. T.) 3 Misc. (N. Y.) 415.

6. Redfield *v.* Holland Purchase Ins. Co., 56 N. Y. 354.

7. Release of Witnesses — *England.* — Bent *v.* Baker, 3 T. R. 27.

California. — Perlberg *v.* Gorham, 10 Cal. 121.

Delaware. — M'Lane *v.* Sharpe, 2 Harr. (Del.) 481.

Illinois. — Fash *v.* Blake, 38 Ill. 363.

Kentucky. — Duncan *v.* Pindell, 4 Bibb (Ky.) 330.

Massachusetts. — Dunham *v.* Branch, 5 Cush. (Mass.) 561.

New Jersey. — Martin *v.* Righter, 10 N. J. Eq. 510.

New York. — Curtis *v.* Monteith, 1 Hill (N. Y.) 356; Bulkley *v.* Dayton, 14 Johns. (N. Y.) 387.

North Carolina. — Burton *v.* Stamper, 6 Ired. Eq. (41 N. Car.) 16.

South Carolina. — Sheer *v.* Austin, 2 Rich. L. (S. Car.) 330.

8. See preceding sections of this title dealing with the elements of a release.

9. Release Must Be Effective. — Jacobson *v.* Fountain, 2 Johns. (N. Y.) 170.

10. Williams *v.* Carr, 4 Colo. App. 376.

11. Intention Immaterial. — Pierce *v.* Sweet, 33 Pa. St. 151.

A release delivered with the understanding that it is to be of no effect after the witness testifies, but that the obligation is to remain in full force is, notwithstanding such reservation or condition, valid or effective, and such an attempt to limit its operation is a fraud upon the court. Katz *v.* Schwab, (N. Y. City Ct. Gen. T.) 9 N. Y. St. Rep. 494; Walker *v.* Ferrin, 4 Vt. 523.

12. Goodtitle *v.* Welford, 1 Dougl. 139.

13. Pratt *v.* Crocker, 16 Johns. (N. Y.) 270.

14. Witness Must Know of Release. — Gray *v.* Brown, 22 Ala. 269.

release personally to the witness. It may be filed in court,[1] or formally offered to the releasee,[2] or delivered to his attorney.[3]

Signature. — It has been held, however, that a release merely entered on the minutes of the court and not signed by the witness is not sufficient to render him competent to testify.[4]

IX. Validity and Effect of Release — 1. Validity. — A release being one form of a contract depends for its validity, as do all contracts, upon the presence of the essential elements — proper parties, consideration, legal subject-matter, etc. — and the absence of fraud, mistake, duress, and any other element that would vitiate a contract of any other kind.[5]

Not Contrary to Public Policy. — A contract by which a company contributing to the funds of a relief association contracts with its employees that the acceptance of benefits from the relief fund shall operate as a release from all claims for damages against said company, is not contrary to public policy, and does not violate the rule that a common carrier cannot contract against his own negligence.[6] After having signed such an agreement, it is optional with the employee either to accept the benefits or to sue the company; and if he accepts the benefits he is estopped to sue, unless there be fraud or duress or something else to vitiate his agreement.[7]

Misrepresentation and Mistake as to Extent of Injuries. — A release is of no effect where it is executed upon the fraudulent representation of the releasee that the injuries received were of a slight or temporary character.[8] And it has been held that a release may be avoided on the ground of mistake, where it subsequently develops that there were other and more serious injuries that were not known at the time of the execution of the release.[9] But where there is no misrepresentation or fraud, a releasor cannot subsequently avoid his release on the ground that his injuries were more serious than he had anticipated,[10] even though the opinion of the releasor be based upon that of physicians employed by the releasee to examine him and report as to the extent of the injuries.[11] In such case, sickness which comes upon the releasor subsequently, although caused by the accident, must be held to have been in contemplation and included within the terms of the release.[12]

Innocent Misrepresentation as to the plaintiff's condition has, however, been held to be as effective in vitiating a release as intentional falsehood would have been.[13]

1. Delivery Unnecessary. — Gray *v.* Brown, 22 Ala. 262; Brown *v.* Brown, 5 Ala. 508.

2. Frow *v.* Downman, 11 Ala. 880.

3. Stevenson *v.* Mudgett, 10 N. H. 342.

4. Kennon *v.* M'Rea, 2 Port. (Ala.) 389.

5. Validity. — See such titles as Contracts, vol. 7, p. 88; Illegal Contracts, vol. 15, p. 927; Fraud and Deceit, vol. 14, p. 12; Consideration, vol. 6, p. 667; and the numerous other titles in point, and the sections of this title dealing with *Consideration; Form and Kinds; Rescinding and Setting Aside Release.*

6. Not Contrary to Public Policy — *United States.* — Owens *v.* Baltimore, etc., R. Co., 35 Fed. Rep. 715; Martin *v.* Baltimore, etc., R. Co., 41 Fed. Rep. 125; Vickers *v.* Chicago, etc., R. Co., 71 Fed. Rep. 139. *Contra*, Miller *v.* Chicago, etc., R. Co., 65 Fed. Rep. 305, *disapproved* in Otis *v.* Pennsylvania Co., 71 Fed. Rep. 136.

District of Columbia. — Brown *v.* Baltimore, etc., R. Co., 6 App. Cas. (D. C.) 237.

Indiana. — The Pennsylvania R. Co. *v.* Dolan, 6 Ind. App. 109, 51 Am. St. Rep. 289; Russell *v.* Pittsburgh, etc., R. Co., 157 Ind. 317.

Maryland. — Fuller *v.* Baltimore, etc., Employés' Relief Assoc., 67 Md. 433.

Nebraska. — Chicago, etc., R. Co. *v.* Bell, 44 Neb. 44.

Pennsylvania. — Johnson *v.* Philadelphia, etc., R. Co., 163 Pa. St. 127; Ringle *v.* Pennsylvania R. Co., 164 Pa. St. 529, 44 Am. St. Rep. 628; Graft *v.* Baltimore, etc., R. Co., (Pa. 1887) 8 Atl. Rep. 206.

7. Johnson *v.* Charleston, etc., R. Co., 55 S. Car. 152.

8. Misrepresentation and Mistake as to Extent of Injuries. — Hirschfeld *v.* London, etc., R. Co., 2 Q. B. D. 1; Missouri Pac. R. Co. *v.* Goodholm, 61 Kan. 758; Houston, etc., R. Co. *v.* Brown, (Tex. Civ. App. 1902) 69 S. W. Rep. 651.

9. McCarty *v.* Houston, etc., R. Co., 21 Tex. Civ. App. 568.

10. Roberts *v.* The Eastern Counties R. Co., 1 F. & F. 460; Homuth *v.* Metropolitan St. R. Co., 129 Mo. 629; Currier *v.* Bilger, 149 Pa. St. 111; Kane *v.* Chester Traction Co., 186 Pa. St. 145, 65 Am. St. Rep. 846.

11. Nelson *v.* Minneapolis St. R. Co., 61 Minn. 167.

12. Eccles *v.* Union Pac. R. Co., 7 Utah 335.

13. Houston, etc., R. Co. *v.* Brown, (Tex. Civ. App. 1902) 69 S. W. Rep. 651.

Taking Advantage of the Releasor's Mental Condition. — Where the releasor at the time of executing the release is incapacitated by physical or mental injuries, suffering, or drugs and opiates administered to him, so that he does not comprehend the effect of the release, such instrument is voidable and no defense to his cause of action; and if the releasee takes advantage of such condition, he is guilty of fraud.[1] The mental condition of the releasor, and the consequent validity or invalidity of the release, are questions for the jury.[2] In some cases, however, where the state of facts is overwhelming and convincing, the court is justified in instructing the jury to find that the release was not the voluntary act of the plaintiff.[3] A release executed by one temporarily *non compos mentis* is voidable merely, and not void; and if after restoration to sound mental condition the releasor fails to disaffirm his act within a reasonable time, or does other acts showing clearly a ratification of the release, it is of full force and effect.[4]

A Release upon Inadequate Consideration has been held invalid when given by an illiterate woman in a state of extreme distress and destitution caused by the killing of her husband and son, her only means of support.[5]

Release Fraudulently Obtained. — A release, like every other contract, is vitiated by fraud or imposition of one of the parties thereto.[6]

2. Effect — In General. — A valid release is binding upon the parties and is an absolute bar to any right of action growing out of the original obligation.[7]

Release of Damages to Land. — The effect of a release in certain special instances is set out in the following paragraphs:

Interest in Land. — Where a landowner sells to a railroad company a right of way across his land, he transfers at the same time his right to recover damages suffered by the construction of the road,[8] and a release executed at the same time of all claims for damages which may accrue by reason of the construction and maintenance of the road bars a recovery for injuries caused by improvements upon the right of way subsequently to the construction of the road,[9] such release being likewise a bar to an action by a subsequent lessee of the owners, brought to recover damages for injuries caused prior to the execution of the release.[10] But such release does not cover damages to other land of the grantor caused by the construction of the road over the premises of other persons,[11] nor injuries afterwards arising as a result of negligent construction, maintenance, or operation of the road,[12] and such a

1. **Taking Advantage of the Releasor's Mental Condition.** — Union Pac. R. Co. *v.* Harris, 158 U. S. 326; Chicago, etc., R. Co. *v.* Doyle, 18 Kan. 59; Atchison, etc., R. Co. *v.* Cunningham, 59 Kan. 722; Texas, etc., R. Co. *v.* Crow, 3 Tex. Civ. App. 266; Missouri, etc., R. Co. *v.* Brantley, (Tex. Civ. App. 1901) 62 S. W. Rep. 94.

2. **Questions for Jury** — *United States.* — Shook *v.* Illinois Cent. R. Co., (C. C. A.) 115 Fed. Rep. 58.

New York. — Cunningham *v.* Judson, 100 N. Y. 179.

Ohio. — Lake Shore, etc., R. Co. *v.* Vogelson, 23 Ohio Cir. Ct. 361.

Pennsylvania. — Julius *v.* Pittsburg, etc., Traction Co., 184 Pa. St. 19.

Texas. — Missouri Pac. R. Co. *v.* Brazzil, 72 Tex. 233.

Virginia. — But see Chesapeake, etc., R. Co. *v.* Mosby, 93 Va. 93.

3. Stone *v.* Chicago, etc., R. Co., 66 Mich. 76, 30 Am. & Eng. R. Cas. 600.

4. **Ratifying Release.** — Chicago, etc., R. Co. *v.* Pierce, (C. C. A.) 64 Fed. Rep. 296; Missouri Pac. R. Co. *v.* Brazzil, 72 Tex. 233; International, etc., R. Co. *v.* Brazzil, 78 Tex. 314. See also Courtney *v.* Blackwell, 150 Mo. 245.

5. Byers *v.* Nashville, etc., R. Co., 94 Tenn. 345.

6. **Fraud.** — See the title FRAUD AND DECEIT, vol. 14, p. 12. See also the section of this title, *Rescinding and Setting Aside Release.*

7. **Effect.** — Perkins *v.* Fourniquet, 14 How. (U. S.) 313; Chicago, etc., R. Co. *v.* Wilcox, (C. C. A.) 116 Fed. Rep. 913; Atchison, etc., R. Co. *v.* Higgins, 9 Kan. App. 672; Retzer *v.* Jacob Dold Packing Co., 58 Mo. App. 264; Strong *v.* Dean, 55 Barb. (N. Y.) 337; Meyers *v.* Stix, (N. Y. City Ct. Gen. T.) 7 Misc. (N. Y.) 574; Phelan *v.* New York, 119 N. Y. 86.

8. **Release of Damages to Land.** — Kemp *v.* Pennsylvania R. Co., 156 Pa. St. 430.

9. Denver, etc., R. Co. *v.* Toohey, 15 Colo. 297; Pennsylvania R. Co. *v.* Friday, 4 Penny. (Pa.) 158; Updegrove *v.* Pennsylvania Schuylkill Valley R. Co., 132 Pa. St. 540.

10. Hoffeditz *v.* Southern Pennsylvania, etc., R. Co., 129 Pa. St. 264.

11. Eaton *v.* Boston, etc., R. Co., 51 N. H. 504, 12 Am. Rep. 147.

12. Jungblum *v.* Minneapolis, etc., R. Co.,

release of damages alone does not convey any title to the land.[1]

Release of "All Actions and Demands." — A release of all actions and rights of action, given after suit is brought, is not an admission of indebtedness at the commencement of the suit;[2] but a release of all actions except a note specified will release a note for the interest due on the specified note.[3] Where there are several contracts, a release indorsed upon a portion of them discharging the defendant from all demands "either on within or any other contract" is not limited to the contracts indorsed, but discharges them all.[4] A discharge "in full of all book accounts and all other demands," etc., has been held to include a trespass.[5] A release executed to an executor "of all claims and demands of every sort," individually or officially, has been construed not to extend to matters having no connection with the estate;[6] and a release to assignees in insolvency from all debts, demands, etc., in any way connected with the proceedings in insolvency bars a demand against them for property assigned to them but not accounted for by them.[7] A release of all claims against a mortgagee will bar the right to recover the sum received from insurance companies as a return premium upon the expiration of policies of insurance upon the mortgaged property.[8]

Release of Executor or Administrator. — The release of a debtor by appointment as executor is elsewhere discussed in this work.[9] A settlement with one of two administrators, and a dismissal of an action as to him, constitutes no bar to an action against the other administrator.[10] Beneficiaries may execute to one administrator a valid release for everything but certain items, or parts of the estate in the hands of the other administrator; and in such a case the rule that the release of one joint and several obligor discharges all will not be applied in equity.[11] If an executor obtains a release in full from the guardian of a minor legatee for a sum less than is due to the minor, such release is inoperative except for the amount actually paid to the guardian.[12] A promise of an executor to pay to the beneficiaries money outside of the balances determined by the account is not discharged by a release of such balances.[13]

Release of Lease. — A release of all the obligations under a lease has been held to release taxes assessed during the term, but not due until after the release was executed;[14] and a discharge of rents provided for by a lease discharges only the rent accrued up to the time of the settlement, and does not release a subtenant from the payment of rent on property held by him under an assignment;[15] nor does a release in a will of rents not collected release liability for rental damages not collected.[16]

By Seaman. — A release by a seaman of all claims against the owners, master, and officers of a vessel has been construed as a release only of a claim actually settled, and not of claims for actual violence committed by the master.[17]

The Discharge of a Defendant in an Action brought for debt is a discharge from the debt as well as from the action,[18] and a settlement and release of a trespass operates as a transfer of the property to the trespasser.[19]

Release as Admission. — Obtaining a release by a defendant from a plaintiff of

70 Minn. 157; Fremont, etc., R. Co. *v.* Harlin, 50 Neb. 699.

1. Groh *v.* Eckert, 3 Brews. (Pa.) 116.

2. **Release of "All Actions and Demands."** — Crawford *v.* McLeod, 64 Ala. 240.

3. Howel *v.* Seaman, 1 Root (Conn.) 383.

4. Clark *v.* Roberts, 180 Mass. 259. See also Little Rock, etc., R. Co. *v.* Page, 35 Ark. 304.

5. Palmer *v.* Corbin, 1 Root (Conn.) 271.

6. Trow *v.* Shannon, 78 N. Y. 446.

7. Sawyer *v.* Haley, 6 Gray (Mass.) 243.

8. Merrifield *v.* Baker, 11 Allen (Mass.) 43.

9. See the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 787.

10. Piatt *v.* Longworth, 27 Ohio St. 159.

11. M'Lenachan *v.* Com., 1 Rawle (Pa.) 361.

12. Witman's Appeal, 28 Pa. St. 376.

13. Reilly *v.* Daly, 159 Pa. St. 605. See also Lyman *v.* Clark, 9 Mass. 235.

14. **Release of Lease.** — Henry *v.* Chrisinger, 76 Iowa 126.

15. Law *v.* Bentley, 25 Ill. 52.

16. Cogan *v.* McCabe, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 740.

17. **By Seaman.** — Payne *v.* Allen, 1 Sprague (U. S.) 304.

18. **Discharge of Defendant.**—Clark *v.* Everett, 2 Grant Cas. (Pa.) 417.

19. **Of Trespass.**—Bradley *v.* Boynton, 22 Me. 291.

all cause of action is not an admission of liability on the part of the defendant. At most, it is merely an admission that the plaintiff has made a claim that the defendant is liable.[1]

Release of Covenant. — Where an action was brought to recover damages for the breach of a covenant of warranty contained in a deed, and the action was settled and a release given to the defendant by which the plaintiff released all his cause of action on the covenant, the effect of the release was held to be that the covenant was taken from the deed, and the releasor was compelled thereafter to rely solely upon his alleged title;[2] and a release of the performance of a covenant within the time mentioned in the agreement is a bar to an action on the covenant in which the nonperformance of the act by the day mentioned is the breach assigned.[3]

Release to Agent. — A general release executed to an agent may discharge his obligations as agent or factor without transferring to him the title to property of the principal in his hands.[4]

Release of Damages. — A release of claims for damages, in consequence of one wrongful attachment of goods, will not bar a suit to recover damages caused by a prior wrongful attachment of the same goods.[5] Where the owner and tenants of a building are jointly liable for injuries inflicted through negligence and unlawful management of the property, a release to the owner discharges likewise the liability of the tenants, although there be a reservation in the release of a right of action against such tenants.[6]

Revocation of Release. — Where the effect of a letter is to release an existing contract, a second letter stating that such is not the intended effect of the first does not restore the original relations of the parties.[7]

State Not Bound by Release. — By virtue of a title paramount residing in the sovereign, the state will not be bound by a release which binds the releasor and those taking title from him. The right of eminent domain cannot be abridged or defeated by the contracts between prior owners or by a release executed by the owner.[8]

3. Privity of Release. — As a general thing, a defense of release, like a plea of infancy or of limitations, is purely personal.[9] A promisee may therefore release his promisor from a promise made for the benefit of the third person, at any rate until such third person makes himself privy to the promise by adoption.[10] It has been held, however, that a contract made by an employee of a railroad with the relief department, that acceptance of benefit from such department should operate as a release of his claim against the company for damages caused by injuries, was available to the company as a cause of action, or as a defense.[11] Payment of a debt will operate for the benefit of and as a release in favor of creditors having liens on the same fund bound by a judgment.[12] A corporation entering upon land may agree to be bound by a release given by the owner of the land to a third person, and may accept the risks involved in such release.[13]

X. RESCINDING AND SETTING ASIDE RELEASE — 1. For Fraud. — Wherever it is made clear to the court that the release has been obtained by fraud, the

1. **Release as Admission.** — Baldwin *v.* New York Cent., etc., R. Co., (N. Y. Super. Ct. Gen. T.) 2 N. Y. Supp. 482.
2. **Release of Covenant.** — Dawley *v.* Rugg, 35 Hun (N. Y.) 143.
3. Fitch *v.* Forman, 14 Johns. (N. Y.) 172.
4. **Release to Agent.** — Binsse *v.* Ohl, 51 N. J. L. 47.
5. Weston *v.* Dorr, 25 Me. 176, 43 Am. Dec. 259.
6. Brogan *v.* Hanan, 55 N. Y. App. Div. 92.
7. Martin *v.* New York L. Ins. Co., 73 Hun (N. Y.) 496.
8. **State Not Bound by Release.** — Penn. Gas Coal Co. *v.* Versailles Fuel Gas Co., 131 Pa. St. 522.
9. Thomas *v.* Mueller, 106 Ill. 36; Storer *v.* Gordon, 3 M. & S. 308.
10. Merrick *v.* Giddings, 1 Mackey (D. C.) 395.
11. Chicago, etc., R. Co. *v.* Bell, 44 Neb. 44. But see Farmer *v.* Grand Trunk R. Co., 21 Ont. 299.
12. Stout *v.* Vankirk, 10 N. J. Eq. 79. See also De Marco *v.* Williams, (Miss. 1893) 12 So. Rep. 552.
13. Penn Gas Coal Co. *v.* Versailles Fuel Gas Co., 131 Pa. St. 532.

court is warranted on summary application to interfere and set the release aside.[1] But it has been repeatedly determined that in order to set aside a plea of release the fraud must be clearly made out.[2]

Jurisdiction to Pass upon Fraud — In General. — In jurisdictions where the two separate systems of jurisprudence prevail the question has often arisen whether the fraud may be examined into in a court of law or whether it is necessary to go to a court of equity and ask that the release be first set aside and canceled.

Determined by Nature of Fraud — When Court of Law Will Hear the Evidence. — Whether a release tainted by fraud can be set aside and declared void in a court of law, or whether the assistance of a court of equity is necessary, depends upon the nature of the fraud. Where the fraud is practiced in the execution of the instrument — as where it is misread to the releasor, or where there is a surreptitious substitution of one paper for another, or where a party is tricked into signing an instrument which he did not intend to execute, or where advantage is taken of the mental or physical condition of the releasor — in all such cases a court of law may take cognizance of the fraud on the ground that the legal existence of the instrument is in question. The question is, whether the

1. Rescinding and Setting Aside Release — For Fraud — *England.* — Jones *v.* Herbert, 7 Taunt. 421, 2 E. C. L. 420; Arton *v.* Booth, 4 Moo. 192, 16 E. C. L. 373; Herbert *v.* Pigot, 4 Tyrw., 285; Crook *v.* Stephen, 5 Bing. N. Cas. 691, 35 E. C. L. 271; Johnson *v.* Holdsworth, 4 Dowl. 63; Salkeld *v.* Vernon, 1 Eden 64; Manning *v.* Cox, 7 Moo. 617, 17 E. C. L. 87; Broderick *v.* Broderick, 1 P. Wms. 239; Skilbeck *v.* Hilton, L. R. 2 Eq. 587; Urquhart *v.* Macpherson, 3 App. Cas. 831.

United States. — Phettiplace *v.* Sayles, 4 Mason (U. S.) 312.

District of Columbia. — Eldridge *v.* Connecticut Gen. L. Ins. Co., 3 MacArthur (D. C.) 301.

Illinois. — Gurley *v.* People, 31 Ill. App. 465.

Kansas. — Northwestern Mut. L. Ins. Co. *v.* Woods, 54 Kan. 663.

Massachusetts. — Barnard *v.* Crosby, 6 Allen (Mass.) 327; Rosenberg *v.* Doe, 148 Mass. 560.

Missouri. — Mellon *v.* Webster, 5 Mo. App. 449.

New Hampshire. — Beatson *v.* Harris, 60 N. H. 83.

New Jersey. — Henry *v.* Imperial Council, etc., 52 N. J. Eq. 770; Conner *v.* Dundee Chemical Works, (N. J. 1889) 17 Atl. Rep. 975.

New York. — Newell *v.* New York, 61 Hun (N. Y.) 356; Binney *v.* Delmar, (C. Pl. Gen. T.) 17 N. Y. Supp. 524.

North Carolina. — Barnes *v.* Ward, Busb. Eq. (45 N. Car.) 93, 57 Am. Dec. 590.

Pennsylvania. — Carter *v.* Connell, 1 Whart. (Pa) 396.

Rhode Island. — Hearn *v.* Hearn, 24 R. I. 328.

South Carolina. — Womack *v.* Austin, 1 S. Car. 421.

For a full discussion of agreements suppressing competition at letting of public contracts, see the title ILLEGAL CONTRACTS, vol. 15, p. 953.

For illegal agreements not to bid at auctions, see the title AUCTIONS AND AUCTIONEERS, vol. 3, p. 506.

2. Fraud Must Be Clearly Proved — *England.* — Pusey *v.* Desbouvrie, 3 P. Wms. 316; Wild *v.* Williams, 6 M. & W. 490; Rawstorne *v.* Gandell, 15 M. & W. 304; Barker *v.* Richardson, 1 Y. & J. 362; Herbert *v.* Pigott, 2 Crompt. & M. 384; Furnival *v.* Weston, 7 Moo. 356, 17 E. C. L. 81; Phillips *v.* Clagett, 11 M. & W. 94; Arton *v.* Booth, 4 Moo. 192, 16 E. C. L. 373; Jones *v.* Bonner, 2 Exch. 230; Parker *v.* Bloxam, 20 Beav. 295; Fowler *v.* Wyatt, 24 Beav. 232.

United States. — The Topsy, 44 Fed. Rep. 631.

Delaware. — Reznor *v.* Maclary, 4 Houst. (Del.) 241.

Illinois. — Kingsley *v.* Kingsley, 20 Ill. 208.

Iowa. — Meka *v.* Brown, 84 Iowa 711.

Maine. — Larrabee *v.* Sewall, 66 Me. 384.

Maryland. — Spitze *v.* Baltimore, etc., R. Co., 75 Md. 171, 32 Am. St. Rep. 378; Shaffer *v.* Cowden, 88 Md. 394.

Minnesota.—McCall *v.* Bushnell, 41 Minn. 37.

New Jersey. — Fivey *v.* Pennsylvania R. Co., 67 N. J. L. 627.

New York. — Wood *v.* Young, 5 Wend. (N. Y.) 620; Pugsley *v.* Sumner, 14 Daly (N. Y.) 427; Lesson *v.* Massachusetts Ben. Assoc., (N. Y. Super. Ct. Gen. T.) 3 Misc. (N. Y.) 415; Williams *v.* Wilson, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 42; Ferris *v.* Ferris, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 577; Stevens *v.* Reed, (Supm. Ct. Eq. T) 60 N. Y. Supp. 726.

Pennsylvania. — Rose *v.* West Philadelphia R. Co., (Pa. 1888) 12 Atl. Rep. 78.

Rhode Island. — Cooney *v.* Lincoln, 21 R. I. 246.

Texas. — Delaware Ins. Co. *v.* Harris, (Tex. Civ. App. 1901) 64 S. W. Rep. 871; Missouri, etc., R. Co. *v.* Smith, (Tex. Civ. App. 1902) 68 S. W. Rep. 545.

In a case where numerous and important errors in an account which had been discharged had been proved, the court set aside the release; but having regard to the lapse of time, and the loss of books and documents, it declined to open the account altogether, but gave liberty to surcharge and falsify. Millar *v.* Craig, 6 Beav. 433.

writing in the form of a release has acquired original validity as a contract, and is a legal question.[1]

Jurisdiction of Equity. — But where the releasor knows the character of the instrument he signs, and intends when he signs and delivers it that it shall have the effect and purpose which the law imputes to it, but there is fraud in the representations used to induce him to agree to a settlement of his claims — such as false statements as to the nature and value of the consideration, or as to the extent of his injuries — in all such cases the instrument must be held valid in a court of law, and relief from its effect must be sought in a court of equity.[2]

Modern Practice. — It has, however, been the practice of courts of law, especially in modern times, where they see that justice requires the intervention of a court of equity, and that such court would interfere, to save the parties the expense of proceedings in equity by giving them the aid of the equitable jurisdiction of a court of common law, and to enable them to effect the same purpose. Upon this principle courts of law have sometimes prevented a plea of release from being pleaded, and have set the release aside.[3]

2. For Mistake — *a.* OF LAW. — The court may likewise set aside a release executed through mistake or ignorance of the law,[4] or obtained through threats amounting to duress.[5]

Mistake Induced by Fraud. — If the mistake and ignorance of the releasor be due to the false representations of the releasee, the reason for setting aside the release becomes all the stronger.[6]

1. Jurisdiction of Law. — Papke *v.* G. H. Hammond Co., 192 Ill. 635 [*following* George *v.* Tate, 102 U. S. 564]; G. H. Hammond Co. *v.* Papke, 91 Ill. App. 565; McCall *v.* Bushnell, 41 Minn. 37; Girard *v.* St. Louis Car Wheel Co., 123 Mo. 358, 45 Am. St. Rep. 556, *overruling* 46 Mo. App. 79; Homuth *v.* Metropolitan St. R. Co., 129 Mo. 629. See the case *explained* in Och *v.* Missouri, etc., R. Co., 130 Mo. 27; Busch *v.* Busch, 12 Daly (N. Y.) 476.

2. Jurisdiction of Equity — *England.* — Lee *v.* Lancashire, etc., R. Co., L. R. 6 Ch. 527; Stewart *v.* Great Western R. Co., 2 Drew. & Sm. 438.

United States. — Messinger *v.* New England Mut. L. Ins. Co., 59 Fed. Rep. 529; Vandervelden *v.* Chicago, etc., R. Co., 61 Fed. Rep. 57 [*following* Hartshorn *v.* Day, 19 How. (U. S.) 211, and George *v.* Tate, 102 U. S. 564]; Barker *v.* Northern Pac. R. Co., 65 Fed. Rep. 460; Kosztelnik *v.* Bethlehem Iron Co., 91 Fed. Rep. 606; Hill *v.* Northern Pac. R. Co., 104 Fed. Rep. 754.

Massachusetts. — Gale *v.* Nickerson, 151 Mass. 432

Missouri. — Dwyer *v.* Wabash R. Co., 66 Mo. App. 335; Och *v.* Missouri, etc., R. Co., 130 Mo. 27.

New Jersey. — Hoboken Ferry Co. *v.* Baldwin, 58 N. J. Eq. 36.

Ohio. — Weakly *v.* Hall, 13 Ohio 167, 42 Am. Dec. 194.

Pennsylvania. — Ettinger *v.* Jones, 139 Pa. St. 218.

But see Sanford *v.* Royal Ins. Co., 11 Wash. 654. and Bussian *v.* Milwaukee, etc., R. Co., 56 Wis. 325.

3. Modern Practice. — Phillips *v.* Clagett, 11 M. & W. 84; Ferris *v.* Crawford, 2 Den. (N. Y.) 595.

In Wagner *v.* National L. Ins. Co., (C. C. A.) 90 Fed. Rep. 404, it was held that a plaintiff might, in a suit of law, meet a plea of release by a replication that the release was obtained by fraud, whether the fraud was in the execution or was in the misrepresentation as to material facts inducing the execution, *following* Lumley *v.* Wabash R. Co., 43 U. S. App. 476. But this case is recognized as standing alone, and does not represent the law. Hill *v.* Northern Pac. R. Co., 104 Fed. Rep. 754, (C. C. A.) 113 Fed. Rep. 914.

4. For Mistake — Of Law. — Hore *v.* Becher, 12 Sim. 465; *In re* Garnett, 31 Ch. D. 1; Collier *v.* Field, 2 Mont. 205; Schmidt *v.* Herfurth, 5 Robt. (N. Y.) 124; Kirchner *v.* New Home Sewing Mach. Co., 135 N. Y. 189; *In re* Fischer, 189 Pa. St. 179. But see Cann *v.* Cann, 1 P. Wms. 727; Denver, etc., R. Co. *v.* Sullivan, 21 Colo. 302; Squires *v.* Amherst, 145 Mass. 192.

The release of land from the lien of a judgment is not impaired by a mistake attributable to declarations made by counsel of the releasee, and without his authority or knowledge. Snyder *v.* Crawford, 98 Pa. St. 414.

For a discussion of release of error, see the title ERROR, WRIT OF, 7 ENCYCLOPÆDIA OF PLEADING AND PRACTICE 869.

5. Duress. — Peat *v.* Powell, Ambl. 387; San Antonio, etc., R. Co. *v.* Barnett, (Tex. Civ. App. 1898) 44 S. W. Rep. 20. But see Kruschke *v.* Stefan, 83 Wis. 373.

6. Mistake Induced by Fraud — *California.* — Richards *v.* Fraser, 122 Cal. 456.

Massachusetts. — Freedley *v.* French, 154 Mass. 339.

Minnesota. — Peterson *v.* Chicago, etc., R. Co., 38 Minn. 511.

Pennsylvania — Brooks *v.* Meadville First Presb. Church, 128 Pa. St. 408; Silk *v.* Mutual Reserve Fund L. Assoc., 159 Pa. St. 625.

Texas. — Houston, etc., R. Co. *v.* Burns, (Tex. Civ. App. 1901) 63 S. W. Rep. 1035.

b. OF FACT. — Ordinarily the court will not set aside a release on the ground of a mistake of fact.[1]

Laches. — A party wishing to rescind a release must do so as soon as circumstances permit, and a considerable lapse of time is strong evidence of a waiver of the right to rescind.[2]

3. Inadequacy of Consideration. — A release has likewise been set aside for inadequacy of consideration,[3] or has been restrained in its effect to the amount of consideration actually paid.[4]

4. Returning Money Paid upon Rescission of Release. — It is sometimes said to be a general rule that one who seeks to avoid or rescind a release must restore the consideration paid therefor, or otherwise put the other party *in statu quo*. The plaintiff cannot be allowed both to affirm and disaffirm according as the case may terminate; he cannot affirm for what he has received, and disaffirm and repudiate the release as to the difference between that amount and what he might expect to recover by the verdict of the jury; he must disaffirm and rescind the release *in toto*.[5] But the rule is not a general one. The true rule as gathered from the cases is that in those cases where a court of law would be authorized to declare a release void, as above set forth, a return of the consideration is not necessary; but where the releasor would go into a court of equity to have the release set aside or annulled, he must restore to the other party the consideration received therefor.[6] An actual return is not necessary. The rule is satisfied by a tender of the money when the suit is commenced, or by its final deduction from the judgment

Washington. — Sanford *v.* Royal Ins. Co., 11 Wash. 654.

But see Richards *v.* Turner, 1 F. & F. 1.

1. Mistake of Fact — *England.* — Millar *v.* Craig, 6 Beav. 433; Pritt *v.* Clay, 6 Beav. 503; Roberts *v.* The Eastern Counties R. Co., 1 F. & F. 460.

United States. — Messinger *v.* New England Mut. L. Ins. Co., 59 Fed. Rep. 529. But see Fire Ins. Assoc. *v.* Wickham, 141 U. S. 565.

Iowa. — Chicago, etc., R. Co. *v.* Wilcox, (C. C. A.) 116 Fed. Rep. 913.

Maryland. — Shaffer *v.* Cowden, 88 Md. 394.

Minnesota. — Christianson *v.* Chicago, etc., R. Co., 67 Minn. 98.

New York. — Walbourn *v.* Hingston, 86 Hun (N. Y.) 63; Schmidt *v.* Herfurth, 5 Robt. (N. Y.) 124; *In re* Haas, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 119.

Pennsylvania. — Currier *v.* Bilger, 149 Pa. St. 111; Kane *v.* Chester Traction Co., 186 Pa. St. 145, 65 Am. St. Rep. 846.

South Carolina. — Kennerty *v.* Etiwan Phosphate Co., 17 S. Car. 412.

Texas. — Houston, etc., R. Co. *v.* McCarty, 94 Tex. 298. But see McCarty *v.* Houston, etc., R. Co., 21 Tex. Civ. App. 568.

Vermont. — Blackmer *v.* Wright, 12 Vt. 377.

2. Laches. — Carroll *v.* People, 13 Ill. App. 206; Lumley *v.* Wabash R. Co., 71 Fed. Rep. 21.

As to presumption of a release from lapse of time, see the title PAYMENT, vol. 22, pp. 513, 591.

3. Inadequacy of Consideration. — Russell *v.* Dayton Coal, etc., Co., (Tenn. 1902) 70 S. W. Rep. 1.

4. Whitman's Appeal, 28 Pa. St. 376. See generally the title CONSIDERATION, vol. 6, p. 667.

5. Returning Money Paid upon Rescission of Release — *United States.* — Johnson *v.* Merry Mount Granite Co., 53 Fed. Rep. 569; Barker *v.* Northern Pac. R. Co., 65 Fed. Rep 460; Hill *v.* Northern Pac. R. Co., (C. C. A.) 113 Fed. Rep. 915.

District of Columbia. — Lyons *v.* Allen, 11 App. Cas. (D. C.) 543.

Illinois. — Carroll *v.* People, 13 Ill. App. 206.

Massachusetts. — Mullen *v.* Old Colony R. Co., 127 Mass. 89, 34 Am. Rep 349; Drohan *v.* Lake Shore, etc., R. Co., 162 Mass. 435.

Missouri. — Och *v.* Missouri, etc., R. Co., 130 Mo. 27.

New York. — McMichael *v.* Kilmer, 76 N. Y. 36; Gould *v.* Cayuga County Nat. Bank, 86 N. Y. 75, Kibbe *v.* Bowen, 50 N. Y. Super. Ct. 422; Davidson *v.* Sumner, 57 N. Y. Super. Ct. 35; Kreuzen *v.* Forty-second St., etc., R. Co., (N. Y. City Ct. Gen. T.) 13 N Y. Supp. 588.

South Carolina. — Levister *v.* Southern R. Co., 56 S. Car. 508, *distinguishing* Price *v.* Richmond, etc., R. Co., 38 S. Car. 199.

6. The True Rule — *England.* — Lyall *v.* Edwards, 6 H. & N. 337; Lindo *v.* Lindo, 1 Beav. 496; Turner *v.* Turner, 14 Ch. D. 829, 42 L. T. N. S. 495; Barclay *v.* Lucas, 1 T. R. 291, note.

Illinois. — Pawnee Coal Co. *v.* Royce, 184 Ill. 413; Chicago, etc., R. Co. *v.* Lewis, 13 Ill. App. 171.

Iowa. — O'Brien *v.* Chicago, etc., R. Co., 89 Iowa 644.

Massachusetts. — Mullen *v.* Old Colony R. Co , 127 Mass. 87, 34 Am. Rep. 349.

Missouri. — Girard *v.* St. Louis Car-Wheel Co., 46 Mo. App. 79.

New York. — Cleary *v.* Municipal Electric Light Co., 139 N. Y. 643; Kirchner *v.* New Home Sewing-Mach. Co., (Supm. Ct. Gen. T.) 16 N. Y. Supp. 762. And see Kley *v.* Healy, 127 N. Y. 555, as to costs.

Ohio. — Dayton Ins. Co. *v.* Kelly, 24 Ohio St. 345, 15 Am. Rep. 612.

Wisconsin. — Hollenback *v.* Shoyer, 16 Wis. 499.

obtained,[1] or where the payment is a gratuity or relates to a part only of the cause of action.[2]

XI. EVIDENCE. — Where a release is sealed or written, the general rules as to the admissibility of parol evidence to modify or contradict the legal import of such an instrument are applied. The cases cited in the note illustrate the application of those principles to cases of release.[3]

RELET. (See also the title LEASES, vol. 18, p. 684.) — See note 4.

RELEVANCY — RELEVANT. — See the title EVIDENCE, vol. 11, p. 501.

RELIABLE. — See RESPONSIBLE, *post*.

RELICT. — The term "relict" is applied to the survivor of a pair of married people, whether the survivor is the husband or the wife. It means the "relict" of the united pair, not the "relict" of the deceased individual.[5]

RELICTION. — See the title ACCRETION, vol. 1, p. 473.

RELIEF-FUND ASSOCIATION. — See the titles BENEVOLENT OR BENEFICIAL ASSOCIATIONS, vol. 3, p. 1041; INSURANCE, vol. 16, p. 830; MUTUAL INSURANCE, vol. 21, p. 250.

RELIGION — RELIGIOUS. (See also the titles CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 893; DISTURBING MEETINGS, vol. 9, p. 664; EXEMPTIONS (FROM TAXATION), vol. 12, p. 266; RELIGIOUS SOCIETIES, *post;* and see RELIGIOUS LIBERTY, *post*, and the references there given.) — In its broadest sense, "religion" comprehends all systems of belief in the existence of beings superior to and capable of exercising an influence for good or evil upon the human race, and all forms of worship or service intended to influence

1. Actual Return Unnecessary — *District of Columbia.* — Chesapeake, etc., R. Co. *v.* Howard, 14 App. Cas. (D. C.) 263.

Kansas. — Bemis *v.* Becker, 1 Kan. 226; American Bridge Co. *v.* Murphy, 13 Kan. 35; Wolf *v.* Foster, 13 Kan. 118; Chicago, etc., R. Co. *v.* Doyle, 18 Kan. 59; Solomon R. Co. *v.* Jones, 34 Kan. 455.

Mississippi. — Jones *v.* Alabama, etc., R. Co., 72 Miss. 22.

Missouri. — Hancock *v.* Blackwell, 139 Mo. 440; Dwyer *v.* Wabash R. Co., 66 Mo. App. 335; Jenkins *v.* Covenant L. Ins. Co., 79 Mo. App. 55.

South Dakota. — Hedlun *v.* Holy Terror Min. Co., (S. Dak. 1902) 92 N. W. Rep. 31.

Washington. — Sanford *v.* Royal Ins. Co., 11 Wash. 654.

2. Mullen *v.* Old Colony R. Co., 127 Mass. 86, 34 Am. Rep. 349; O'Donnell *v.* Clinton, 145 Mass. 461; Bliss *v.* New York Cent., etc., R. Co., 160 Mass. 447, 39 Am. St. Rep. 504; Girard *v.* St. Louis Car-Wheel Co., 46 Mo. App. 79; Shaw *v.* Webber, 79 Hun (N. Y.) 307.

3. Parol Evidence — *England.* — Wekett *v.* Raby, 3 Bro. P. C. 16; Eden *v.* Smyth, 5 Ves. Jr. 341.

Canada. — Coulson *v.* Macpherson, 23 U. C. Q. B. 129.

United States. — The Cayuga, (C. C. A.) 59 Fed. Rep. 485; Green *v.* Chicago, etc., R. Co., (C. C. A.) 92 Fed. Rep. 873.

Alabama. — Turnipseed *v.* McMath, 13 Ala. 44.

Indiana. — Rowe *v.* Rand, 111 Ind. 211.

Louisiana. — Jamison *v.* Ludlow, 3 La. Ann. 492.

Massachusetts. — West Boylston Mfg. Co. *v.* Searle, 15 Pick. (Mass.) 229; Battles *v.* Fobes, 21 Pick. (Mass.) 239; Tuckerman *v.* Newhall, 17 Mass. 584.

New Hampshire. — Sherburne *v.* Goodwin, 44 N. H. 271.

New Jersey. — Martin *v.* Righter, 10 N. J. Eq. 510.

New York. — Larkin *v.* Hardenbrook, 90 N. Y. 335.

Pennsylvania. — Albert *v.* Ziegler, 29 Pa. St. 50; Armstrong *v.* U. S. Express Co., 159 Pa. St. 640; Collins *v.* Busch, 191 Pa. St. 549.

Wisconsin. — Ellis *v.* Esson, 50 Wis. 147, 36 Am. Rep. 830; Brunn *v.* Schuett, 59 Wis. 260, 48 Am. Rep. 499.

As to the Burden of Proof, see the following cases:

Kentucky. — Addyston Pipe, etc., Co. *v.* Copple, 94 Ky. 292.

New York. — Davison *v.* Tams, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 156.

North Carolina. — Boutten *v.* Wellington, etc., R. Co., 128 N. Car. 337.

Texas. — Missouri, etc., R. Co. *v.* Pennington, (Tex. Civ. App. 1895) 32 S. W. Rep. 707.

Virginia. — Swecker *v.* Swecker, 87 Va. 305.

Washington. — Pederson *v.* Seattle Consol. St. R. Co., 6 Wash. 202.

4. Relet. — A lease contained a clause by which the lessor agreed to pay the lessee for improvements upon the premises, provided such premises should not be *relet* to the lessee. The court said: "We are of opinion that by the term *relet* the parties meant a new letting for a fixed and definite term, such as was the term created by the lease." Accordingly, it was held that occupation by the lessee for two years, paying monthly the same amount as the rent fixed in the lease, was not a *reletting*. Moseley *v.* Allen, 138 Mass. 83.

5. Relict. — Spitler *v.* Heeter, 42 Ohio St. 101.

or give honor to such superior powers. It is in this sense of the word that we speak of the religion of the North American Indians, the religion of the fire worshipers or the ancient Egyptians.[1]

RELIGIOUS CORPORATIONS. (See also the title RELIGIOUS SOCIETIES, *post.*) — See note 2.

RELIGIOUS LIBERTY. (See also the titles BIGAMY, vol. 4, p. 34; BLASPHEMY AND PROFANITY, vol. 4, p. 580; CONSTITUTIONAL LAW, vol. 6, p. 882; DISTURBING MEETINGS, vol. 9, p. 664; EXEMPTIONS (FROM TAXATION), vol. 12, p. 266; OATHS AND AFFIRMATIONS, vol. 21, p. 743; POLICE POWER, vol. 22, p. 914; PUBLIC OFFICERS, vol. 23, p. 314; RELIGIOUS SOCIETIES, *post;* SCHOOLS; SUNDAY AND HOLIDAYS; TAXATION; WITNESSES.) — The constitutions of the various states and that of the United States have secured religious liberty to the people.[3]

1. **Religion.** — Knight's Estate, 159 Pa. St. 502, in which case it was held that a bequest in aid of any such system would therefore be a bequest for a *religious* use. See also Hinckley's Estate, 58 Cal. 512.

Christian Religion. — Although "*religion* in its broadest sense may include all the different systems of faith and worship which can be found in the world," yet it has been held that the word *religious*, as used in a trust provision in a will, for "the purchase and distribution of such *religious* books or reading as they shall deem best," means "Christian." Simpson *v.* Welcome, 72 Me. 499, 39 Am. Rep. 349.

But in Board of Education *v.* Minor, 23 Ohio St. 250, it was held that, as used in the Constitution of *Ohio*, providing that "*religion*, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws to protect every *religious* denomination," etc., *religion* is not equivalent to "Christian *religion*," but means the *religion* of all mankind, and not the *religion* of any class of men.

Distinguished from Form of Worship. — "The term *religion* has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for His being and character, and of obedience to His will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter." Davis *v.* Beason, 133 U. S. 342.

Religious Purposes. — A building for the sessions of a Sunday-school and *religious* lectures is for a "*religious* purpose," although occasionally used for fairs and other benevolent purposes. Craig *v.* Pittsburgh First Presb. Church, 88 Pa. St. 48, 32 Am. Rep. 417.

Charitable Gift — "Any Other Religious Institution or Purposes." — See Wilkinson *v.* Lindgren, L. R. 5 Ch. 570.

Religious Teacher — Synonymous with Minister. — See Pfeiffer *v.* Board of Education, 118 Mich. 560.

Religious Worship — Public Entertainment or Amusement — Stat. 21 Geo. III., c. 49, § 1. — Baxter *v.* Langley, L. R. 4 C. P. 21, 38 L. J. M. C. 1.

Religious Worship — Not Technical Term. — See the title DISTURBING MEETINGS, vol. 9, p. 667 *et seq.*

Building for Religious Worship. — See the titles DISTURBING MEETINGS, vol. 9, pp. 668, 669; EXEMPTIONS (FROM TAXATION), vol. 12, p. 328 *et seq.*

2. **Young Men's Christian Association.** — Within an exemption law a young men's Christian association has been held not to be a *religious corporation*. Matter of Fay, (Surrogate Ct.) 37 Misc. (N. Y.) 532.

3. **Religious Liberty — Constitutional Provisions.** — "No religious test shall ever be required as a qualification to any office or public trust under the United States." Const. U. S., art. 6, cl. 3.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Const. U. S., Amendment 1.

"In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, is committed to the support of no dogma, the establishment of no sect." Watson *v.* Jones, 13 Wall. (U. S.) 728.

History of Amendment Securing Religious Liberty. — See Reynolds *v.* U. S., 98 U. S. 149.

Equality or Toleration. — "We sometimes hear it said that all religions are tolerated in *Ohio;* but the expression is not strictly accurate — much less accurate is it to say that one religion is a part of our law, and all others only tolerated. It is not by mere toleration that every individual here is protected in his belief or disbelief. He reposes not upon the leniency of government, or the liberality of any class or sect of men, but upon his natural, indefeasible rights of conscience, which, in the language of the constitution, are beyond the control or interference of any human authority. We have no union of church and state, nor has our government ever been vested with authority to enforce any religious observance simply because it is religious." Bloom *v.* Richards, 2 Ohio St. 392. See also, for the distinction between religious toleration and religious equality, Cooley's Const. Lim. (6th ed.) 574, note.

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CROSS-REFERENCES.

For matters of PROCEDURE *see the* ENCYCLOPÆDIA OF PLEADING AND PRACTICE, vol. 18, p. 99.

For other matters of SUBSTANTIVE LAW *and* EVIDENCE *related to this subject, see the following titles in this work:* *CEMETERIES*, vol. 5, p. 781; *CHARITIES*, vol. 5, p. 925 *et seq.*; *CHURCH*, vol. 6, p. 8; *COMMON LAW*, vol.

6, p. 273; *CONDITIONS*, vol. 6, p. 507; *CONSTITUTIONAL LAW*, vol. 6, p. 1004; *CORPORATIONS*, vol. 7, pp. 724, 741, 781; *DISFRANCHISEMENT*, vol. 9, p. 497; *DISTURBING MEETINGS*, vol. 9, p. 664; *EJECTMENT*, vol. 10, p. 476; *EXEMPTIONS (FROM TAXATION)*, vol. 12, p. 328 *et seq.*; *PEWS AND PEW RIGHTS*, vol. 22, p. 761; *SUNDAY AND HOLIDAYS; TRUSTS AND TRUSTEES.*

I. **DEFINITIONS** — **1. Religious Society.** — A religious society is a voluntary association of individuals or families united for the purpose of having a common place of worship and to provide a proper teacher to instruct them in religious doctrines and duties, and to administer the various ordinances of religion.[1]

2. Parish. — A parish is a local church or congregation and the geographical limits, generally imperfectly defined, within which its local work is mainly confined.[2] In *England*, in all acts of Parliament passed since 1866, the term signifies, as respects England and Wales, a place for which a separate poor rate is or can be made, or for which a separate overseer is or can be appointed.[3] In *New England* towns, religious societies are generally termed parishes, and the limits of the town and of the parish were often the same until a separate parish was formed within the town.[4] In *Massachusetts* the terms "precinct" and "parish" were frequently used interchangeably.[5]

3. Church. — What constitutes a church has been stated elsewhere in this work.[6] A clear distinction exists between the terms "religious society" and "church," the former usually including the latter. The body of communicants gathered into church order according to established usage in any town, parish, precinct, or religious society established according to law and actually connected and associated therewith for religious purposes for the time being, is to be regarded as the church of the society.[7] In *Massachusetts*, while churches may be distinct from the towns, parishes and congregations with

1. Religious Society Defined. — See generally Robertson *v.* Bullions, 11 N. Y. 243; Hartford First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 296; Lawyer *v.* Cipperly, 7 Paige (N. Y.) 281; Miller *v.* Gable, 2 Den. (N. Y.) 492. For further definitions, see Silsby *v.* Barlow, 16 Gray (Mass.) 329; Weld *v.* May, 9 Cush. (Mass.) 181; Jones *v.* State, 28 Neb. 495.

A Young Men's Christian Association and a Missionary Society of a Church are religious corporations within the exemption allowed by the *New York* Tax Law of 1896, § 221. Matter of Watson, (Surrogate Ct.) 36 Misc. (N. Y.) 504.

A Christian Science Church which has as one of its purposes an illegal method of healing disease cannot be chartered as a religious corporation. Application of First Church of Christ Scientist, 6 Pa. Dist. 745.

Temporalities.—St. Patrick's Roman Catholic Church *v.* Abst, 76 Ill. 252.

2. Parish Defined. — Cent. Dict. See also 1 Blackst. Comm., p. 111; Bird *v.* St. Mark's Church, 62 Iowa 567; Baker *v.* Fales, 16 Mass. 488. And see PARISH, vol. 21, p. 1064.

3. Use in England. — Interpretation Act of 1889, § 5; Preston *v.* Buckley, L. R. 5 Q. B. 391; Smith *v.* Redding, L. R. 1 Q. B. 489; Rice *v.* Slee, L. R. 7 C. P. 378. See also Plomesgate Union *v.* West Ham Union, 6 Q. B. D. 576; Reg. *v.* Vane, 51 L. J. M. C. 114.

Parishioner Defined. — See Atty.-Gen. *v.* Parker, 3 Atk. 577; Batten *v.* Gedye, 41 Ch. D. 507; Etherington *v.* Wilson, 1 Ch. D. 160, 45 L. J. Ch. 153.

4. In New England. — Jewett *v.* Thames Bank, 16 Conn. 511; First Parish *v.* Dunning, 7 Mass. 445; Milford *v.* Godfrey, 1 Pick. (Mass.) 91; Tobey *v.* Wareham Bank, 13 Met. (Mass.) 440; First Parish *v.* Cole, 8 Mass. 96; Dillingham *v.* Snow, 3 Mass. 276; Baker *v.* Fales, 16 Mass. 488; Minot *v.* Curtis, 7 Mass. 441; St. Luke's Church *v.* Slack, 7 Cush. (Mass.) 226.

5. Precinct and Parish. — Milford *v.* Godfrey, 1 Pick. (Mass.) 96; Cushing *v.* Newburyport, 10 Met. (Mass.) 508; First Parish *v.* Jones, 8 Cush. (Mass.) 188; Weld *v.* May, 9 Cush. (Mass.) 181.

Poll Parish in Massachusetts. — See Fisher *v.* Whitman, 13 Pick. (Mass.) 350; Minot *v.* Curtis, 7 Mass. 441.

6. Church Defined. — See CHURCH, vol. 6, p. 8. See also M. E. Church *v.* Clark, 41 Mich. 730; Hundley *v.* Collins, 131 Ala. 234.

Presbyterian Church Defined. — Louisville First Presb. Church *v.* Wilson, 14 Bush (Ky.) 252.

Church and Parish Distinguished. — Stebbins *v.* Jennings, 10 Pick. (Mass.) 172.

Congregational Church Defined. — Anderson *v.* Brock, 3 Me. 243.

Parish Church Defined. — Pawlet *v.* Clark, 9 Cranch (U. S.) 292.

7. Church and Religious Society Distinguished. — Stebbins *v.* Jennings, 10 Pick. (Mass.) 172; Parker *v.* May, 5 Cush. (Mass.) 336. See also Weld *v.* May, 9 Cush. (Mass.) 181; Jefts *v.* York, 10 Cush. (Mass.) 392; Silsby *v.* Barlow, 16 Gray (Mass.) 329; M. E. Church *v.* Clark, 41 Mich. 730; Hardin *v.* Detroit Second Baptist

which they are associated in the sense that they may have distinct powers, functions, rights, duties and obligations, they cannot exist independently of the parish or congregation in which they are gathered.[1]

4. Clergyman, Priest, Minister. — The person who has been regularly authorized to preach the Gospel and administer the ordinances of religion according to the rules of the particular denomination of Christians to which he is attached is designated clergyman, minister, rector, priest, or by such title as the usages of the denomination prescribe.[2] In *England* the title minister is commonly restricted to ministers of the Established church.[3]

II. FORMATION AND ORGANIZATION — 1. In General. — The manner in which churches of unincorporated religious societies are formed and organized and the qualifications prerequisite to membership therein are regulated by the laws of the various denominations and are matters of ecclesiastical jurisdiction. It would seem that the only condition imposed by civil authority is that public policy and the laws of the land shall not be contravened.[4]

2. Membership. — Public profession of the faith of a church and submission to its government and discipline are the usual requirements of membership in the church.[5] For membership in a religious society contribution to its support is generally essential.[6] The question whether one possesses the qualifications of an elector in a church is usually a mixed question of law and fact.[7]

3. Constitution — *a.* IN GENERAL. — As a general rule each denomination has adopted a constitution wherein is contained the articles of belief of the denomination, and the law for the government of the officers and members. Where there has been a continued acquiescence in, and action under, the constitution of a religious society by the several official bodies and the members of the denomination for a long lapse of time, the courts will not declare the constitution void, even upon the clearest and most satisfactory proof of illegality in its adoption, unless the principles of substantial justice, morality or public policy require that such action should be taken.[8]

b. POWER TO AMEND — (1) *In General.* — In the absence of any constitutional limitation, the constitution is subject to alteration or amendment by the same authority which sanctioned its original formulation.[9]

(2) *Method.* — An amendment of the constitution of such a society, in

Church, 51 Mich. 137, 47 Am. Rep. 555; Petty *v.* Tooker, 21 N. Y. 267; Hundley *v.* Collins, 131 Ala. 234.

A Congregation Is an Assembly or body of persons who usually meet in a stated place for the worship of God and religious instruction, and may or may not include a church or spiritual body. Robertson *v.* Bullions, 9 Barb. (N. Y.) 64.

Denomination Defined. — See the title DENOMINATION, vol. 9, p. 273.

1. Stebbins *v.* Jennings, 10 Pick. (Mass.) 172.

2. Minister Defined. — Cent. Dict. See also the title MINISTER, vol. 20, p. 793.

Bishop Defined. — See the title BISHOP, vol. 4, p. 576.

Settled Minister Defined. — Kibbe *v.* Antram, 4 Conn. 134.

Minister of Congregational Persuasion Defined. — Atty.-Gen. *v.* Dublin, 38 N. H. 459.

3. Ministers in English Church. — Foundling Hospital *v.* Garrett, 47 L. T. N. S. 230; Reg. *v.* Oldham, 10 B. & S. 193.

Catholic Priest Is a Clergyman. — Reg. *v.* Haslehurst, 53 L. J. M. C. 127, 13 Q. B. D. 253.

Clergyman of Baptist Church Not an Elder. — People *v.* Peck, 11 Wend. (N. Y.) 604.

Stated and Ordained Minister Defined. — Ligonia *v.* Buxton, 2 Me. 102.

Ordination, Institution, and Induction Defined. — Kibbe *v.* Antram, 4 Conn. 134.

Rector Defined. — Bird *v.* St. Marks Church, 62 Iowa 567.

4. See *infra*, *Legislative Interference*.

5. Requirements of Membership. — Den *v.* Bolton, 12 N. J. L. 206. See also Baker *v.* Fales, 16 Mass. 488, Oakes *v.* Hill, 10 Pick. (Mass.) 333.

Qualifications Required of Members of New England Parishes. — Sumner *v.* First Parish, 4 Pick. (Mass.) 361; Gage *v.* Currier, 4 Pick. (Mass.) 399; Holbrook *v.* Holbrook, 1 Pick. (Mass.) 248.

6. See State *v.* Crowell, 9 N. J. L. 391; Hartford First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 296.

Subscription in Arrears — Right to Vote. — Com. *v.* Cain, 5 S. & R. (Pa.) 510.

7. Membership Question of Law and Fact. — People *v.* Keese, 27 Hun (N. Y.) 483.

8. Validity of Constitution. — Kuns *v.* Robertson, 154 Ill. 394; Bear *v.* Heasley, 98 Mich. 279; Russie *v.* Brazzell, 128 Mo. 93, 49 Am. St. Rep. 542; Schlichter *v.* Keiter, 156 Pa. St. 119. See also Baker *v.* Ducker, 79 Cal. 365.

9. Power to Amend. — Brundage *v.* Deardorf, (C. C. A.) 92 Fed. Rep. 214.

order to be valid, must be adopted in accordance with the provisions of the constitution for amendment in force at the time the amendment is adopted.[1] The decision of the highest legislative and judicial body of the denomination, that the vote cast in favor of amendments to the constitution sufficiently complies with the requirements of the constitution in that respect, is expressive of the rules and customs of the church and is binding on the civil courts.[2] The fairness of the method in which the vote was taken on the question of an amendment to the constitution cannot be collaterally attacked in an action to determine the power of amending the constitution.[3]

(3) *Amendment of Articles of Belief.* — The prohibition in the constitution of a religious denomination against changes in the confession of faith contained therein is intended to prevent changes in the doctrines to which the church is committed, and does not prohibit such amendments as are merely changes of statement in the interest of clearness and completeness.[4] This does not, however, allow the introduction of substantial changes in and additions to the confession of faith.[5]

4. Religious Corporations — *a.* IN GENERAL. — While a religious organization may, without being a corporation, maintain regular worship and otherwise exercise the powers of a religious society,[6] in most, if not all, of the states provision is now made by statute for the incorporation of religious societies.[7]

Name. — A charter will be refused to a church with a name so like that of another church in the same place that confusion might arise between them.[8]

Change of Name. — Change or alteration in a church name will not affect its identity. The question of identity is one of intention.[9]

b. NATURE — (1) *In General.* — These religious corporations, as they are commonly called in the *United States*, are not to be regarded as ecclesiastical corporations in the sense of the *English* law, which were composed entirely of

1. Amendment of Constitution. — Bear *v.* Heasley, 98 Mich. 279; Russie *v.* Brazzell, 128 Mo. 93; Rottmann *v.* Bartling, 22 Neb. 375; Schlichter *v.* Keiter, 156 Pa. St. 119. See also Brundage *v.* Deardorf, 55 Fed. Rep. 839; Philomath College *v.* Wyatt, 27 Oregon 390.

In the Case of a Purely Voluntary Organization the constitution and by-laws may, at any time, be altered or abrogated by the power which created them, and a vote of any subsequent meeting abrogating or altering them, though passed by a majority only, is as sufficient as the previous vote establishing them. Smith *v.* Nelson, 18 Vt. 511.

2. Review by Civil Courts. — Brundage *v.* Deardorf, 55 Fed. Rep. 839, (C. C. A.) 92 Fed. Rep. 214; Kuns *v.* Robertson, 154 Ill. 394; Russie *v.* Brazzell, 128 Mo. 93, 49 Am. St. Rep. 542; Schlichter *v.* Keiter, 156 Pa. St. 119. See also Philomath College *v.* Wyatt, 27 Oregon 390. *Compare* Bear *v.* Heasley, 98 Mich. 279.

3. Collateral Attack. — Russie *v.* Brazzell, 128 Mo. 93, 49 Am. St. Rep. 542. See also Dubs *v.* Egli, 167 Ill. 514.

4. Articles of Belief. — Kuns *v.* Robertson, 154 Ill. 394; Russie *v.* Brazzell, 128 Mo. 93, 49 Am. St. Rep. 542; Schlichter *v.* Keiter, 156 Pa. St. 119.

5. Bear *v.* Heasley, 98 Mich. 279.

6. Incorporation. — M. E. Church *v.* Clark, 41 Mich. 730. See also Hundley *v.* Collins, 131 Ala. 234.

Incorporation in Accordance with Vote of Majority. — North St. Louis Christian Church *v.* McGowan, 62 Mo. 279.

7. Nature of Religious Corporation Created under New Hampshire Acts of 1819 and 1827. — Hale *v.* Everett, 53 N. H. 9, 16 Am. Rep. 82.

Royal Charter to Dutch Reformed Church Construed. — Atty.-Gen. *v.* Dutch Reformed Protestant Church, 36 N. Y. 452.

Charter Authorizing Secession of Society from Denomination upon Vote of Members Refused. — Zion Evangelical Church, 8 Kulp (Pa.) 238.

Incorporation Cannot Be Had Against Will of Society. — United Brethren Hebrew Congregation, 11 York Leg. Rec. (Pa.) 89.

Charter Need Not Provide for Admission or Expulsion of Members. — United Brethren Hebrew Congregation, 11 York Leg. Rec (Pa.) 89.

Effect of Incorporation on Parish Limits. — Merwin *v.* Camp, 3 Conn. 35.

Manner of Organizing Corporation in Connection with Church under Wisconsin Statute of 1898, § 1,990. — Franke *v.* Mann, 106 Wis. 118.

8. Harrisburg First Presb. Church, 2 Grant Cas. (Pa.) 240. See also Mother of God Church, 5 Lack. Leg. N. (Pa.) 128.

9. Trinity Church *v.* Hall, 22 Conn. 125; Meyer *v.* German Evangelical Lutheran Emmanuel Church, 37 Minn. 241; First Soc., etc. *v.* Brownell, 5 Hun (N. Y.) 464; Evenson *v.* Ellingson, 67 Wis. 634.

Application for Change by All of Corporators Not Necessary. — Watkins *v.* Wilcox, 4 Hun (N. Y.) 220.

In *Pennsylvania* notice of application to change the name of a corporation, religious or other, must be given to the auditor-general before proceedings for the purpose can be had. *In re* Bloomfield First Presb. Church, 107 Pa. St. 543.

ecclesiastical persons and subject to the ecclesiastical judicatories, but as belonging to the class of civil corporations which were controlled and managed according to the principles of the common law as administered by the ordinary tribunals of justice.[1] This is an important distinction in determining the powers and functions of the religious corporation. Although a religious corporation, in some of its objects, embraces matters of a public nature, it is nevertheless regarded in law as a private body, in contradistinction to corporations such as towns, counties, cities, and parishes existing for public purposes; and the religious corporation is governed by the same rules which control other private civil corporations.[2]

(2) *Component Parts.* — The church, as such, is not usually incorporated, but the corporation is an associated body composed of the congregation, who may or may not be religious persons and who take on corporate powers for convenience in holding and transferring property, entering into contracts, and otherwise administering the temporal affairs of the society.[3] There are, however, three distinct bodies within a religious corporation; first, the church, consisting of officers and communicants; second, the congregation, which includes the stated hearers and attendants on divine worship, and who are competent to vote for trustees; third, trustees of the society or corporation.[4] The corporation and the church are in no respect correlative, although one may exist within the pale of the other. The objects and interests of the one are moral and spiritual; the other deals exclusively with things temporal and material.[5] More than one church or religious society cannot be included within one corporation.[6]

c. COMPLIANCE WITH STATUTORY PROVISIONS. — To organize a church or society as a body corporate under statutory provisions authorizing such incorporation, the statute must at least be substantially complied with.[7] Where there has been a substantial compliance with the statute, the corporation will not be affected by the fact that there has been an omission to comply with its requirements as to minor details.[8]

1. Religious Corporations. — Calkins *v.* Cheney, 92 Ill. 463; Oakes *v.* Hill, 14 Pick. (Mass.) 442; Watkins *v.* Wilcox, 6 Thomp. & C. (N. Y.) 539; Robertson *v.* Bullions, 11 N. Y. 243; Petty *v.* Tooker, 21 N. Y. 267; Van Buren *v.* Reformed Church, 62 Barb. (N. Y.) 495. See also *infra*, this title, *Legislative Interference.*

Under the New York Statute the terms "religious society" and "religious corporation" are generally used interchangeably. St. Monica Church *v.* New York, 119 N. Y. 91.

Parish Organization in New England. — In former times in New England all ecclesiastical societies were, as has been seen, coextensive and identical with the several towns and were considered municipal and public corporations. For a discussion of parish organizations under these statutes, see the following cases: Jewett *v.* Thames Bank, 16 Conn. 511; Dillingham *v.* Snow, 3 Mass. 276, 5 Mass. 547; Milford *v.* Godfrey, 1 Pick. (Mass.) 91; First Parish *v.* Cole, 3 Pick. (Mass.) 232; Oakes *v.* Hill, 10 Pick. (Mass.) 333; Fisher *v.* Whitman, 13 Pick. (Mass.) 350; Oakes *v.* Hill, 14 Pick. (Mass.) 442; Ludlow *v.* Sikes, 19 Pick. (Mass.) 317; First Parish *v.* Stearns, 21 Pick. (Mass.) 148; St. Luke's Church *v.* Slack, 7 Cush. (Mass.) 226; Weld *v.* May, 9 Cush. (Mass.) 181; Tobey *v.* Wareham Bank, 13 Met. (Mass.) 440. See also First Parish *v.* Jones, 8 Cush. (Mass.) 184; Stebbins *v.* Jennings, 10 Pick. (Mass.) 172.

2. Robertson *v.* Bullions, 11 N. Y. 251; Fadness *v.* Braunborg, 73 Wis. 257. See also 2 Kent's Com. 274.

3. Church Not Incorporated. — M. E. Church *v.* Clark, 41 Mich. 730. See also Hardin *v.* Detroit Second Baptist Church, 51 Mich. 137, 47 Am. Rep. 555.

4. Component Parts. — Miller *v.* Baptist Church, 16 N. J. L. 251; Lawyer *v.* Cipperly, 7 Paige (N. Y.) 281; Baptist Congregation *v.* Scannel, 3 Grant. Cas. (Pa.) 48. See also Robertson *v.* Bullions, 11 N. Y. 243.

5. Church and Corporation Distinguished. — Sale *v.* Mason City First Regular Baptist Church, 62 Iowa 26, 49 Am. Rep. 136; Petty *v.* Tooker, 21 N. Y. 267. See also Lilly *v.* Tobbein, 103 Mo. 477, 23 Am. St. Rep. 887. See *supra*, this title, *Definitions — Church.*

6. Baker *v.* Fales, 16 Mass. 503; Stebbins *v.* Jennings, 10 Pick. (Mass.) 172; Evenson *v.* Ellingson, 67 Wis. 634. See also Ebaugh *v.* German Reformed Church, 3 E. D. Smith (N. Y.) 60; Sutter *v.* First Reformed Dutch Church, 42 Pa. St. 503; McGinnis *v.* Watson, 41 Pa. St. 9.

7. Compliance with Statute. — Ferraria *v.* Vasconcelles, 23 Ill. 456; Kulinski *v.* Dambrowski, 29 Wis. 109. See also Matter of Court St. M. E. Soc., 51 Hun (N. Y.) 104; Matter of Cong. Church, 131 N. Y. 1.

8. Substantial Compliance Sufficient. — See Matter of Arden, 1 Connoly (N. Y.) 159; Lynch *v.* Pfeiffer, 110 N. Y. 33; St. Jacob's

Certificate. — Where the statute requires a certificate of incorporation, such certificate is *prima facie* evidence of the truth of the recitals where a subsequent user of corporate rights is shown.[1]

d. ACCEPTANCE OF CHARTER. — The acceptance of a charter must be by an act of the society as a body at a regular meeting called for that purpose; the individual assent of the members is not sufficient.[2]

e. CONSOLIDATION. — At common law religious societies could not consolidate by simple agreement.[3] To effect consolidation under statutory authority there must be a compliance with the statutory provisions, and an agreement to consolidate entered into without authority is *ultra vires* and void, and does not transfer any of the property held by the individual societies to the consolidated society.[4] The fact that there was an unanimous vote of the members in favor of the consolidation does not render it valid.[5] Where such an unauthorized consolidation has been attempted, a majority of the vote of the members is not necessary to authorize the officers of either of the societies to bring an action to set aside the consolidation, but it may be brought without request on the part of the members.[6] Where a valid consolidation has been entered into by the union of several churches, on the incorporation of the united body, all of the united and consolidated property vests in the corporation.[7] An attempted consolidation which was void and which was at once repudiated does not dissolve a corporation which entered into it.[8]

f. DE FACTO CORPORATIONS. — That a religious corporation is a corporation *de facto* may be proved by showing the existence of a charter or some law under which it could have been created and a user of the rights claimed to have been conferred thereunder.[9] To give it legal rights and to impose on it legal obligations as a corporate body there must either be a special law declaring its existence or it must have been incorporated under the provisions of the general law relating to religious societies.[10] Where it

Lutheran Church *v.* Bly, 73 N. Y. 323; Stoker *v.* Schwab, 56 N. Y. Super. Ct. 122.

Form and Requisites of Certificate under New York Statute. — M. E. Union Church *v.* Picket, 23 Barb. (N. Y.) 436; Lynch *v.* Pfeiffer, 110 N. Y. 33.

Certificate Must Be Acknowledged Before Officer Specified in Statute. — First Baptist Soc. *v.* Rapalee, 16 Wend. (N. Y.) 605.

What Is Sufficient Proof of Incorporation. — M. E. Union Church *v.* Picket, 23 Barb. (N. Y.) 436.

Application Must Show Residence of Subscribers. — United Brethren Hebrew Congregation, 11 York Leg. Rec. (Pa.) 89.

Organization of Religious Society under Massachusetts Statute. — Christian Soc. *v.* Macomber, 5 Met. (Mass.) 155.

1. Certificate as Evidence. — Reformed Dutch Church *v.* Harder, 58 Hun (N. Y.) 605, 12 N. Y. Supp. 297; M. E. Union Church *v.* Picket, 23 Barb. (N. Y.) 436. See also Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 137 U. S. 568.

Record of Certificate Not Sufficient Proof of Corporate Organization. — Jackson *v.* Leggett, 7 Wend. (N. Y.) 377.

2. Shortz *v.* Unangst, 3 W. & S. (Pa.) 45.

3. Consolidation. — Davis *v.* Congregation Beth Tephila Israel, 40 N. Y. App. Div. 424.

4. Statutory Authority Necessary. — Davis *v.* Congregation Beth Tephila Israel, 40 N. Y. App. Div. 424; Erste Sokolower Congregation, etc. *v.* First United Royatiner Sokolower Verein, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 269; Chevra Bnai Israel *v.* Chevra Bikur Cholim, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 189.

Under the New York Religious Corporation Law, § 12, as amended by Laws of 1896, c. 56 (see also N. Y. Laws of 1897, c. 144), in order that religious corporations may be consolidated the assent of the Supreme Court must be obtained and the course indicated by the statute must be pursued. Chevra Bnai Israel *v.* Chevra Bikur Cholim, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 189.

5. Chevra Bnai Israel *v.* Chevra Bikur Cholim, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 189.

6. Action to Set Aside. — Chevra Medrash, etc. *v.* Makower Chevra, etc., (Supm. Ct. Spec. T.) 66 N. Y. Supp. 355.

7. Cammeyer *v.* United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186. See also Sutter *v.* First Reformed Dutch Church, 42 Pa. St. 503.

8. Chevra Bnai Israel *v.* Chevra Bikur Cholim, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 189.

9. De Facto Corporation. — Christian Soc. *v.* Macomber, 5 Met. (Mass.) 155; Whitmore *v.* Fourth Cong. Soc., 2 Gray (Mass.) 306; M. E. Union Church *v.* Pickett, 19 N. Y. 482.

10. What Constitutes. — Alden *v.* St. Peter's Parish, 158 Ill. 631; Petty *v.* Tooker, 21 N. Y. 267; Van Buren *v.* Reformed Church, 62 Barb. (N. Y.) 495.

has for a number of years exercised the privileges of a corporation, it will be presumed to have been legally incorporated.[1] If the statute which provides for the incorporation of such societies does not make incorporation obligatory upon all religious societies, but merely prescribes the mode of incorporation, and there is no evidence that a society ever took any of the steps prescribed by the statute or ever assumed to act as a corporation, it will not be presumed that it has become incorporated under the statute.[2] But a mere user limited to religious observances is not sufficient to establish a corporation *de facto*.[3]

III. Relation to Pastor — 1. In General. — There are various methods by which the pastoral relation is created and dissolved, depending upon the rules by which the several denominations are governed. The assignment to the charge of a congregation is, in some instances, made by the bishop or by the legislative body of the denomination. In others, the pastor is called by the vestry, or the governing body of the particular church, a ratification by the society being necessary in some denominations. His tenure is, in some denominations, for life. In others he is removable at the will of the bishop or of the governing body of the denomination.[4] The decisions of ecclesiastical tribunals in which such power is vested control the terms upon which the pastoral relation shall be formed and the salary accompanying it shall be demanded. The church judicatory having jurisdiction in this matter, under the rules and regulations prescribed by the chief governing body of the church, is the exclusive judge within the jurisdiction thus granted as to whether the pastoral relation shall or shall not be formed.[5]

2. Call — *a.* In General. — The terms "call" and "induction" appear to be substitutes for what is known in the common law as the right to advowson or presentation to an ecclesiastical benefice and of institution and induction. The call, when made, must necessarily contain an offer of salary and specify the views and wishes of those tendering it for the proposed incumbent's consideration. If the terms are accepted, the call becomes a contract between the church and the minister.[6]

b. By Whom Made. — Where the power of calling is in the local society, the pastor cannot be called and settled by the communicants only, if he is to receive his support or compensation from pew rents or from the subscriptions

1. **User.** — Dearborn First Evangelical Lutheran Church *v.* Rechlin, 49 Mich. 515; M. E. Society *v.* Lake, 51 Vt. 353.

2. **Incorporation Not Presumed.** — Alden *v.* St. Peter's Parish, 158 Ill. 631.

A Statutory Provision that Incorporation Shall Be Presumed after the lapse of a certain period does not of itself change a voluntary organization by lapse of time into a corporation. Fuchs *v.* Meisel, 102 Mich. 357.

3. Van Buren *v.* Reformed Church, 62 Barb. (N. Y.) 495.

4. **Usage as Affecting Law Governing Method of Selecting Pastor.** — Com. *v.* Cornish, 13 Pa. St. 288.

Tenure of Congregational Minister for Life. — Avery *v.* Tyringham, 3 Mass. 182, 3 Am. Dec. 105; Sheldon *v.* Congregational Parish, 24 Pick. (Mass.) 281; Whitney *v.* First Ecclesiastical Soc., 5 Conn. 405 See also Burr *v.* First Parish, 9 Mass. 277; Peckham *v.* North Parish, 16 Pick. (Mass.) 274.

Constitutional Provision Making Tenure for Life Not Retrospective. — Arthur *v.* Norfield Parish Cong. Church Soc., 73 Conn. 718.

5. Perry First Presb. Church *v.* Myers, 5 Okla. 809.

6. **Call.** — Humbert *v.* Protestant Episcopal Church, 1 Edw. (N. Y.) 308; Youngs *v.* Ransom, 31 Barb. (N. Y.) 49.

Induction and Institution Defined and Distinguished. — Youngs *v.* Ransom, 31 Barb. (N. Y.) 49.

"Institution" Not Essential. — Youngs *v.* Ransom, 31 Barb. (N. Y.) 49.

Presentation, Institution, and Induction in England. — In England the presentation was made by the patron, the founder of the parish, having the right of advowson, or by his heir or alienee. When the clergyman had been presented, if there was no objection to him he was instituted by the bishop, that is, put in the care of the souls of the parish. Then followed induction by the mandate of the bishop, which was a ceremonial act performed by the archdeacon and consisted in the delivery to the incumbent of the key of the church door and then the tolling of the bell or other like ceremony. When the clergyman had been inducted, he thereby acquired a freehold interest in the property of the parish, of which he could not be deprived except by ecclesiastical sentence. The Colonial church was not governed by the ecclesiastical law as regards presentation, appointment, and induction. Bartlett *v.* Hipkins, 76 Md. 5.

or contributions of the stated hearers in the congregation.[1]

In the Protestant Episcopal Church the church wardens and vestrymen have the exclusive power to call and induct the rector; the assent of the church or congregation need not necessarily be obtained. The power to call and induct carries with it as well the power to fix the salary of the rector and to deliver to him the possession of the church.[2]

According to the Usage and Discipline of the Presbyterian Church, the call of a congregation for the services of a regular pastor and the proceedings of the parties under it are subject to the decision of the presbytery having jurisdiction, and the regular pastoral relation is constituted by the presbytery after the due acceptance of the call by the candidate.[3]

c. RATIFICATION. — The call must be ratified by the congregation or society, and the ratification must be made at a regular meeting of the society, duly called for that purpose, according to custom and usage. Thus only can the revenues of the society be reached and applied to the support of the minister.[4]

If a Vestry Possess the Power to Settle a minister and fix his salary, a call made by the wardens and a majority of the vestry addressing a written invitation to an individual to become their rector, and fixing his salary, followed by acceptance, and by mutual action and acknowledgment of its validity and of the relation thus created, cannot afterwards be disregarded or denied, though the amount of salary was not fixed by a vote of the congregation.[5]

Assent of Trustees. — In some denominations the assent of the trustees to the call is necessary. Where the trustees refuse their assent to the employment of a pastor whom the church or congregation employ, no action lies against them as a corporation, but it would seem that they may be removed from office for a dereliction of duty.[6] It is the right, if not the duty, of the trustees to withhold their assent to the employment of a minister where there is reason to believe that the employment of the individual selected by the majority of the church will destroy the peace and harmony of the congregation or of the church.[7] Where the trustees do not expressly dissent to the employment of a minister and interpose no obstacle to his performance of the pastoral office in accordance with the invitation of the church or congregation, and with a promise, express or implied, of compensation therefor, it will be presumed that they have undertaken to pay him.[8]

d. ACCEPTANCE ESSENTIAL. — It is essential to the contract of employment that there shall be an acceptance of the call by the pastor. Until he has signified his acceptance it is competent for the congregation to withdraw their call, even though he has served them as a pastor for some time in pursuance of the call.[9]

1. **How Made.** — Lawyer *v.* Cipperly, 7 Paige (N. Y.) 281. See also Burr *v.* First Parish, 9 Mass. 297; Bisbee *v.* Evans, 4 Me. 375.

Power to Settle Ministers in New England Parishes. — Bisbee *v.* Evans, 4 Me. 374; Downs *v.* Bowdoin Square Baptist Soc., 149 Mass. 135.

2. **Rector Called by Vestry in Protestant Episcopal Church.** — Bartlett *v.* Hipkins, 76 Md. 5; Humbert *v.* Protestant Episcopal Church, 1 Edw. (N. Y.) 308; Youngs *v.* Ransom, 31 Barb. (N. Y.) 49.

3. **Method in Presbyterian Church.** — West *v.* St. Paul First Presb. Church, 41 Minn. 94; Perry First Presb. Church *v.* Myers, 5 Okla. 809; Myers *v.* Perry First Presb. Church, (Okla. 1902) 69 Pac. Rep. 874.

Power of Calling Vested in Trustees under New York Statute. — Petty *v.* Tooker, 21 N. Y. 267.

"Stated Supply" Appointed by Presbytery. — Myers *v.* Perry First Presb. Church, (Okla. 1902) 69 Pac. Rep. 874.

4. **Ratification.** — Robertson *v.* Bullions, 9 Barb. (N. Y.) 64.

5. Youngs *v.* Ransom, 31 Barb. (N. Y.) 49.

Illegality of Vestry's Election Does Not Affect Rights of Minister Having No Notice Thereof. — St. Luke's Church *v.* Mathews, 4 Desaus. (S. Car.) 578.

6. **Assent of Trustees.** — Miller *v.* Baptist Church, 16 N. J. L. 251.

7. Lawyer *v.* Cipperly, 7 Paige (N. Y.) 281; German Reformed Church *v.* Busche, 5 Sandf. (N. Y.) 666.

Call Need Not Fix Duration of Employment. — Bartlett *v.* Hipkins, 76 Md. 5.

8. **Assent Presumed.** — Miller *v.* Baptist Church, 16 N. J. L. 251.

9. **Acceptance.** — West *v.* St. Paul First Presb. Church, 41 Minn. 94. See also Jennings *v.* Scarborough, 56 N. J. L. 401.

3. Salary — *a.* How Fixed. — The call, as has been seen above, contains an offer of salary.[1] Where the society is, under the rules of the denomination, an independent organization in matters relating to its own government, the salary is generally fixed by a vote of the qualified electors of the society. It is usually required by statute that the resolution fixing the amount of salary shall be ratified by the trustees having control of the temporalities of the church.[2] Unless the salary be regularly and legally fixed in the manner indicated, the trustees should withhold their assent to the call.[3] Where the parish votes that the salary of the minister shall be increased in proportion to the price of the necessaries of life, the minister is bound by the increase fixed by the committee authorized to determine it, in the absence of a showing that their action in so doing is unfair, partial, or corrupt.[4]

b. Method Provided by Statute. — Where the manner in which the salary shall be ascertained is provided by statute, no contract obligation is imposed upon the church when the salary is fixed by a body other than that authorized by the statute, and an action cannot be maintained against it to recover an unpaid balance of the salary.[5] Although an exclusive method in which the salary shall be fixed is provided by statute, yet, where no form or mode of contract between the church and its pastor is prescribed, the church is capable of binding itself by contract, express or implied, to pay for services rendered, and under a contract so entered into the minister may not prove the value of his services on a *quantum meruit*.[6]

c. Right to Recover — (1) *In General.* — While the relation between the pastor and people is purely an ecclesiastical one of which ecclesiastical tribunals alone have cognizance, yet the courts have jurisdiction of the civil contract for the salary and will protect and enforce the pastor's right thereto.[7] This right is not, however, such as to warrant interference on the part of the civil courts to prevent his removal.[8] To give a pastor such a property right as will entitle him to the interposition of a court of equity, it is not necessary that he shall have had a contract providing for any fixed or definite salary as pastor, but it is sufficient if, under the rules of the church, it is clearly contemplated that he shall be entitled to an adequate support to be raised by voluntary contribution.[9] So, where the presbytery has appointed, according to the laws of the Presbyterian Church, a stated supply for a congregation, the church for which he is appointed becomes obligated to pay him a just compensation for his services.[10]

(2) *Who Liable* — (a) **Corporation.** — Where the trustees neglect to apply the revenues of the society to pay the minister's salary, he may recover it in an action against the corporation.[11] But where it is shown that the minister

1. See *supra*, this section, *Call — In General.*

2. **Manner of Fixing Salary.** — Lawyer *v.* Cipperly, 7 Paige (N. Y.) 281; Robertson *v.* Bullions, 9 Barb. (N. Y.) 64; Landers *v.* Frank St. M. E. Church, 97 N. Y. 119; Pendleton *v.* Waterloo Baptist Church, 49 Hun (N. Y.) 596.

Compensation of Missionaries — How Determined. — Nicholson *v.* Daniel, 152 Pa. St. 461.

Contract for Employment Construed. — Myers *v.* Baptist Soc., 38 Vt. 614.

3. German Reformed Church *v.* Busche, 5 Sandf. (N. Y.) 666; Lawyer *v.* Cipperly, 7 Paige (N. Y.) 281.

Under Minnesota General Statutes, 1878, c. 34, § 225, relating to religious corporations, the sole authority to ascertain and fix the salary to be paid a minister is vested in the society or congregation. West *v.* St. Paul First Presb. Church, 41 Minn. 94.

4. Burr *v.* First Parish, 9 Mass. 277.

5. Landers *v.* Frank St. M. E. Church, 97 N. Y. 119.

6. Pendleton *v.* Waterloo Baptist Church, 49 Hun (N. Y.) 596.

7. **Civil Jurisdiction of Action on Contract.** — Hatfield *v.* De Long, 156 Ind. 207; Jones *v.* Mt. Zion Congregation, 30 La. Ann. 711; Jennings *v.* Scarborough, 56 N. J. L. 401; Connitt *v.* Reformed Protestant Dutch Church, 4 Lans. (N. Y.) 339; Baxter *v.* McDonnell, 155 N. Y. 83; Travers *v.* Abbey, 104 Tenn. 665.

8. Travers *v.* Abbey, 104 Tenn. 665. See also Baxter *v.* McDonnell, 155 N. Y. 83; Stack *v.* O'Hara, 98 Pa. St. 213. See *infra*, this section, *Removal — Jurisdiction of Civil Courts.*

9. Schweiker *v.* Husser, 146 Ill. 399. *Compare* Travers *v.* Abbey, 104 Tenn. 665.

10. Myers *v.* Perry First Presb. Church, (Okla. 1902) 69 Pac. Rep. 874.

11. **Liability of Corporation.** — Ebaugh *v.* German Reformed Church, 3 E. D. Smith (N. Y.)

looked to the church rather than to the corporation, the corporation cannot be held liable.[1] A call from a Presbyterian congregation to a minister, made according to the forms and discipline of that church, and signed by three elders and a trustee, does not bind them individually to pay the minister's salary, but is the act of the congregation.[2]

(b) **Enforcement of Subscriptions.** — Where certain members of the society bind themselves by written agreement with the trustees to assume the payment of the minister's salary upon certain specified conditions, they make themselves liable as in any similar secular agreement and until the conditions are broken.[3] Persons who have thus contracted to pay a certain sum annually for the support of the minister cannot discharge themselves from the obligation by changing their religious sentiments, but can only be discharged by a vote of the society appearing of record.[4] This obligation remains even though the person settled as minister be tried for offenses which would disqualify him for discharging his ministerial duties.[5]

(c) **Bishop Not Liable.** — In the Roman Catholic Church the title to all of the property of the diocese is vested in the bishop.[6] While, under the organic law of this church, the church is bound to provide a decent support for its priests, this does not constitute an implied contract on the part of the bishop to support the priests of his diocese. In the absence of an express contract for support, a priest cannot bring assumpsit against the bishop,[7] as the bishop is not liable for the salary or support of the priest.[8] The relation between the bishop and the priest is in no sense that of master and servant, but that of an ecclesiastical superior and inferior.[9]

4. Use of Church. — The trustees cannot, without right and solely at the will of the members of the church, close the church against the duly appointed preacher.[10] Nor can this be done even when they are supported by a majority of the congregation.[11] Where he is prevented from entering the church building, he may bring an action at law for damages against those preventing him,[12] and may recover damages for his forcible eviction by the trustees from the parsonage of the church in charge of which he has been properly placed according to the laws of the denomination, even though at the time of the eviction he has been suspended by the proper authorities of the denomination.[13] When the governing authority of a denomination has deprived a pastor of his authority to officiate as such, he may be enjoined from making use of the church property in that capacity, or under color of the functions of which he has been deprived.[14] He may be excluded by the trustees of the society of which he is pastor from using the church edifice for the promulgation of views at variance with the belief of the society, and it is the duty of the trustees to exclude him.[15] A society seceding from the denomination with

60. See also Jewett *v.* Thames Bank, 16 Conn. 511; Jones *v.* Mt. Zion Congregation, 30 La. Ann. 711.

Action of Trustees as Corporation Need Not Be Shown. — Miller *v.* Baptist Church, 16 N. J. L. 251.

1. Downs *v.* Bowdoin Square Baptist Soc., 149 Mass. 135. See also the title MANDAMUS, vol. 19, p. 888.

2. Paddock *v.* Brown, 6 Hill (N. Y.) 532.

3. **Subscriptions.** — Whitestown First Religious Soc. *v.* Stone, 7 Johns. (N. Y.) 112. See also Thompson *v.* Garrison, 22 Kan. 765.

4. **How Released.** — First Cong. Soc. *v.* Swan, 2 Vt. 222.

5. Dieffendorf *v.* Reformed Calvinist Church, 20 Johns. (N. Y.) 12. See also Calkins *v.* Cheney, 92 Ill. 463.

6. **Bishop in Catholic Church Not Liable.** — Baxter *v.* McDonnell, 155 N. Y. 83.

7. Tuigg *v.* Sheehan, 101 Pa. St. 363, 47 Am. Rep. 727.

8. Rose *v.* Vertin, 46 Mich. 457, 41 Am. Rep. 174; Tuigg *v.* Sheehan, 101 Pa. St. 363, 47 Am. Rep. 727.

9. Rose *v.* Vertin, 46 Mich. 457, 41 Am. Rep. 174; Baxter *v.* McDonnell, 155 N. Y. 83; Tuigg *v.* Sheehan, 101 Pa. St. 363, 47 Am. Rep. 727.

10. Canadian Religious Assoc. *v.* Parmenter, 180 Mass. 415; Whitecar *v.* Michenor, 37 N. J. Eq. 6.

11. Fuchs *v.* Meisel, 102 Mich. 357.

12. Batterson *v.* Thompson, 8 Phila. (Pa.) 251.

13. Bristor *v.* Burr, 120 N. Y. 427. See also Conway *v.* Carpenter, 80 Hun (N. Y.) 428.

14. **Removal as Affecting Right to Use Church.** — Bonacum *v.* Harrington, (Neb. 1902) 91 N. W. Rep. 886.

15. Isham *v.* Dunkirk First Presb. Church, (Supm. Ct. Spec. T.) 63 How. Pr. (N. Y.) 465;

which it was originally allied may exclude a minister properly appointed by the ecclesiastical body of that denomination, and such action on their part will not be enjoined.[1] Even though a minister has been improperly discharged by the church of which he is the pastor, he has no right to enter the church against the will of the trustees to hold services there.[2]

5. Removal — *a.* IN GENERAL. —The profession of a pastor or minister of any denomination is held subject to its laws,[3] these laws becoming just as much a part of the contract of his employment as if they had been specifically referred to or written out therein,[4] and he is subject to removal in the manner and for the causes provided in these laws.[5]

b. GROUNDS FOR REMOVAL. — He can be dismissed only for good cause shown, and not arbitrarily or without his consent.[6] Where the employment is for a given time, he is entitled to be retained unless he loses his right by some fault of his own.[7] To authorize the removal of a pastor it is not necessary that the cause for which he is removed shall be set forth in the laws of the church as ground for dismissal, but it is sufficient if it can be gathered from the laws that the pastor may be removed for such cause.[8]

The Immoralities for which a parish may dismiss the minister are of the grosser sort, such as habitual intemperance, unchaste behavior, etc.; lesser offenses, such as imprudence, censoriousness, etc., are not good cause for dismissal.[9] If anterior immorality on his part is the ground of dismissal, it must be so recited in the vote which dismisses him; it cannot be brought in as a cause of dismissal after trial begins.[10]

Change of Religious Belief. — Where a Congregational minister changes his religious opinions and the parish retains those first held by the minister, a proper case exists for the calling of an ecclesiastical council.[11]

c. MANNER OF REMOVAL — (1) *In General.* — Where the church canons or rules provide the manner in which the relation between the pastor and the congregation is to be dissolved, in order that the relation may be terminated there must be a compliance with the procedure provided by the church rules.[12] So, where charges are heard against a pastor, the provisions of the laws of the church regulating the notice to be given in such cases must be complied

Isham *v.* Fullager, (Supm. Ct. Spec. T.) 14 Abb. N. Cas. (N. Y.) 363; People *v.* Runkle, 9 Johns. (N. Y.) 147.

1. Burrel *v.* Associate Reformed Church, 44 Barb. (N. Y.) 283. *Compare* Youngs *v.* Ransom, 31 Barb. (N. Y.) 49.

Indictment Will Lie for Forcible Entry by Pastor. — People *v.* Runkle, 9 Johns. (N. Y.) 147.

2. Conway *v.* Carpenter, 80 Hun (N. Y.) 428.

3. **Power to Remove.** — Helbig *v.* Rosenberg, 86 Iowa 159; Stack *v.* O'Hara, 98 Pa. St. 213. See also Connitt *v.* Reformed Protestant Dutch Church, 4 Lans. (N. Y.) 339.

4. Arthur *v.* Norfield Parish Cong. Church Soc., 73 Conn. 718; Bird *v.* St. Marks Church, 62 Iowa 567.

5. **Maryland Statute of 1798, c. 24, Gives Vestry Power of Removing Minister.** — Bartlett *v.* Hipkins, 76 Md. 5.

6. **Removal Must Not Be Arbitrary.** — Bird *v.* St. Marks Church, 62 Iowa 567; Avery *v.* Tyringham, 3 Mass. 160, 3 Am. Dec. 105; Burr *v.* First Parish, 9 Mass. 277; Batterson *v.* Thompson, 8 Phila. (Pa.) 251.

A Catholic Priest May Be Removed from his congregation at the pleasure of the bishop without trial. He cannot, however, be suspended from his priestly functions without specific accusation and trial. Stack *v.* O'Hara, 98 Pa. St. 213.

7. Congregation, etc. *v.* Peres, 2 Coldw. (Tenn.) 620.

8. Helbig *v.* Rosenberg, 86 Iowa 159, in which case it was held that the refusal of the synod to accept a minister as a member was sufficient ground for his dismissal by the congregation.

Essential Change of Doctrine. — Burr *v.* First Parish, 9 Mass. 247; Sheldon *v.* Congregational Parish, 24 Pick. (Mass.) 286. See also Avery *v.* Tyringham, 3 Mass. 160; Thompson *v.* Catholic Congregational Soc., 5 Pick. (Mass.) 469.

9. **Immorality.**— Thompson *v.* Catholic Cong. Soc., 5 Pick. (Mass.) 469; Sheldon *v.* Congregational Parish, 24 Pick. (Mass.) 281.

10. Thompson *v.* Catholic Cong. Soc., 5 Pick. (Mass.) 478; Whitmore *v.* Fourth Cong. Soc., 2 Gray (Mass.) 306.

11. Burr *v.* First Parish, 9 Mass. 277; Sheldon *v.* Congregational Parish, 24 Pick. (Mass.) 281.

12. **Canons Must Be Complied With.** — Bird *v.* St. Marks Church, 62 Iowa 567; Pounder *v.* Ashe, 36 Neb. 564; Jennings *v.* Scarborough, 56 N. J. L. 401; Batterson *v.* Thompson, 8 Phila. (Pa.) 251.

with,[1] but mandamus will not lie to compel his reinstatement on the ground that he had no proper notice of trial where it appears that he had actual notice of the time and place and was present with his counsel and participated in the trial.[2]

(2) *Ecclesiastical Council in Congregational Church.* — Under the laws of the Congregational Church charges against the minister are tried by an ecclesiastical council. The power of the council is limited to the trial of the charges, and it cannot remove the minister from office. The application made for such a council should state substantially the charges against which the minister must defend himself. If he declines to signify his assent or dissent to the application until unreasonable conditions imposed by him have been complied with, his conduct amounts to an unreasonable refusal to join in calling the council.[3] Where such a mutual council cannot be called, an *ex parte* council, composed of impartial persons, is summoned for the purposes of the trial.[4]

Effect of Decision of Mutual Council. — The result of a mutual council legally convoked will not bind either party rejecting it. The effect of the advice of a council is nothing more than a legal justification of the party adopting it.[5]

d. EFFECT OF REMOVAL. — Upon the severance of the pastoral relation by the proper ecclesiastical authority the contract of employment is dissolved.[6]

e. JURISDICTION OF CIVIL COURTS. — The civil courts have no jurisdiction of the ecclesiastical controversies involving the removal of the pastor of a church and the appointment of his successor under the color of ecclesiastical authority. The tribunals of the church have exclusive authority to determine all such controversies finally, without interference on the part of the civil courts.[7] A priest or minister of any church, by assuming that relation, necessarily subjects his conduct in that capacity to the laws and customs of the ecclesiastical body from which he derives his office and in whose name he exercises his functions, and when he submits questions concerning his rights, duties, and obligations as such priest or minister to the proper church judicatory, and they have been heard and decided according to the prescribed forms, such decision is binding upon him and will be respected by the civil courts.[8] What acts or omissions of the incumbent create a forfeiture of the pastoral office, and thereby incapacitate him for the performance of pastoral duties, is a question not within the province of a court of law to determine, it being exclusively within the cognizance of an ecclesiastical tribunal.[9] When

Roman Catholic Congregation Cannot Remove Pastor. — St. Mary's Church Case, 7 S. & R. (Pa.) 517.

Clergyman Cannot Be Indirectly Removed by Reduction of Salary. — Bird *v.* St. Marks Church, 62 Iowa 567.

1. Weber *v.* Zimmerman, 22 Md. 156.

Notice of Holding of Council in Congregational Church — What Necessary. — Arthur *v.* Norfield Parish Cong. Church Soc., 73 Conn. 718.

2. Dempsey *v.* North Michigan Conference, 98 Mich. 444.

3. **Ecclesiastical Councils.** — Thompson *v.* Catholic Cong. Soc., 7 Pick. (Mass.) 160. See also Peckham *v.* North Parish, 16 Pick. (Mass.) 288.

As to the Powers of Council in Congregational Churches to Dissolve Relation Between Pastor and Church, see Arthur *v.* Norfield Parish Cong. Church Soc., 73 Conn. 728.

4. Thompson *v.* Catholic Cong. Soc., 7 Pick. (Mass.) 160; Avery *v.* Tyringham, 3 Mass. 182, 3 Am. Dec. 105.

5. **Effect of Decision.** — Burr *v.* First Parish, 9 Mass. 277; Stearns *v.* First Parish, 21 Pick. (Mass.) 125.

6. **Removal Severs Contract.** — Connitt *v.* Reformed Protestant Dutch Church, 4 Lans. (N. Y.) 339; Robertson *v.* Bullions, 9 Barb. (N. Y.) 64. See also *supra*, this section, *Use of Church.*

Donation Party. — Where the contract of settlement provided for an annual donation party, the lawful dissolution of the pastoral relation before the end of the second year puts an end to the plaintiff's right to a "donation" for that year. Arthur *v.* Norfield Parish Cong. Church Soc., 73 Conn. 718.

7. **Jurisdiction of Civil Courts.** — Schweiker *v.* Husser, 146 Ill. 399; Watson *v.* Garvin, 54 Mo. 353; St. James Church *v.* Huntington, 82 Hun (N. Y.) 125; Isham *v.* Fullager, (Supm. Ct. Spec. T.) 14 Abb. N. Cas. (N. Y.) 363; Youngs *v.* Ransom, 31 Barb. (N. Y.) 49; Travers *v.* Abbey, 104 Tenn. 665; Ash *v.* Methodist Church, 27 Ont. App. 602. See also Buettner *v.* Frazer, 100 Mich. 179; Den *v.* Bolton, 12 N. J. L. 206.

Decision of Ecclesiastical Tribunal Bars Civil Action. — Baxter *v.* McDonnell, 155 N. Y. 83.

8. Baxter *v.* McDonnell, 155 N. Y. 83.

9. Whitney *v.* First Ecclesiastical Soc., 5 Conn. 405.

neither the pastor nor the congregation desires their relation to be dissolved, the court will not take such action at the instance of a third party.[1]

IV. Relation to Members — 1. Nature of Membership. — There is a marked distinction between the rights of a person as a member of a religious corporation and his rights as a member of the congregation worshiping in the building owned by the corporation. In the former case, his rights in the corporation and as a corporator depend solely upon the law creating the corporation. In the latter, no civil, social, or property right attaches to his membership; the relation is entirely spiritual, and has no contractual element.[2] The relation between the members of a voluntary religious society is one of contract, and the confession of faith and the constitution adopted by the society constitute the terms of such contract, which is binding upon all.[3]

2. Regulation of Membership. — Religious societies have the power to regulate the admission, expulsion, and dismission of members as incidental to the corporate existence, even though this power is not given them by express grant.[4] It is not compelled to receive a member against its will nor to retain one after it becomes dissatisfied with his conduct.[5] Upon joining the church and agreeing to its laws, the member is, as to all matters pertaining to the church, bound by them, unless they are clearly illegal,[6] and his rights as a member are to be determined by the provisions of the constitution of the society.[7] In the principal denominations there are also generally ecclesiastical judicatories which have jurisdiction over matters of doctrine and discipline and over the faith and conduct of the members of the denomination.[8]

3. Expulsion — *a.* In General. — Churches may discipline their members by vote of expulsion and by reading of the sentence in the presence of the congregation.[9]

b. Manner of Expulsion — (1) *Must Be in Accordance with By-laws.* — The expulsion of a member, to be valid, must have been done in the manner prescribed by the constitution and by-laws.[10] If the expulsion is done by the

Official Acts Cannot Be Questioned Collaterally. — State *v.* Winkley, 14 N. H. 480.

1. Smith *v.* Nelson, 18 Vt. 511.

2. Nature of Church Membership. — Nance *v.* Busby, 91 Tenn. 303. See also Hartford First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 296.

Excommunication Does Not Affect Civil Rights. — Fitzgerald *v.* Robinson, 112 Mass. 371.

Communicants in Episcopal Church. — Groesbeeck *v.* Dunscomb, (N. Y. Super. Ct. Spec. T.) 41 How. Pr. (N. Y.) 302.

3. Bear *v.* Heasley, 98 Mich. 279.

4. Powers as to Admission and Expulsion. — Oakes *v.* Hill, 14 Pick. (Mass.) 442; Richardson *v.* Union Cong. Soc., 58 N. H. 187. See also Shannon *v.* Frost, 3 B. Mon. (Ky.) 253; Iglehart *v.* Rowe, (Ky. 1898) 47 S. W. Rep. 575; Taylor *v.* Edson, 4 Cush. (Mass.) 522; Fisher *v.* Whitman, 13 Pick. (Mass.) 350; Nance *v.* Busby, 91 Tenn. 303.

Election of Members Not Held in Accordance with By-laws Is Invalid. — Gray *v.* Christian Soc., 137 Mass. 329, 50 Am. Rep. 310.

Membership in New England Parish. — Taylor *v.* Edson, 4 Cush. (Mass.) 522; Keith *v.* Howard, 24 Pick. (Mass.) 292; First Parish *v.* Stearns, 21 Pick. (Mass.) 148; Oakes *v.* Hill, 10 Pick. (Mass.) 333.

Method of Proving Membership in New England Parish. — Sumner *v.* First Parish, 4 Pick. (Mass.) 361; Holbrook *v.* Holbrook, 1 Pick. (Mass.) 248.

5. State *v.* Crowell, 9 N. J. L. 391.

6. Venable *v.* Ebenezer Baptist Church, 25 Kan. 177; Farnsworth *v.* Storrs, 5 Cush. (Mass.) 412; Dees *v.* Mors Point Baptist Church, (Miss. 1895) 17 So. Rep. 1; Louisville First Presb. Church *v.* Wilson, 14 Bush (Ky.) 252; Lucas *v.* Case, 9 Bush (Ky.) 297; German Evangelical Congregation *v.* Pressler, 17 La. Ann. 127.

7. Grosvenor *v.* United Soc. of Believers, 118 Mass. 78.

8. Ecclesiastical Judicatories. — Hartford First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 296; White Lick Quarterly Meeting of Friends *v.* White Lick Quarterly Meeting of Friends, 89 Ind. 163; Gibson *v.* Armstrong, 7 B. Mon. (Ky.) 481; Bouldin *v.* Alexander, 15 Wall. (U. S.) 131.

9. Expulsion. — See Berryman *v.* Reese, 11 B. Mon. (Ky.) 287; Iglehart *v.* Rowe, (Ky. 1898) 47 S. W. Rep. 575; Shannon *v.* Frost, 3 B. Mon. (Ky.) 253; Lucas *v.* Case, 9 Bush (Ky.) 297; Farnsworth *v.* Storrs, 5 Cush. (Mass.) 412; Grosvenor *v.* United Soc. of Believers, 118 Mass. 78; Fulbright *v.* Higginbotham, 133 Mo. 668; Nance *v.* Busby, 91 Tenn. 303.

Sufficiency of Ground for Refusing Sacrament under Canons of Church of England. — Jenkins *v.* Cook, 1 P. D. 80.

10. Manner of Expulsion. — Canadian Religious Assoc. *v.* Parmenter, 180 Mass. 415; Gray *v.* Christian Soc., 137 Mass. 329, 50 Am. Rep. 310.

Burden of Proving Expulsion. — Schweiker *v.* Husser, 146 Ill. 399.

church as a body at its regular time of meeting, it must be regarded as having been done in accordance with the rules and regulations of the church.[1] In the absence of rules made by the religious organization regulating the expulsion of members, those of the common law prevail. Before a member can be lawfully expelled, notice must be given him and an opportunity afforded to meet the charges made against him.[2]

(2) *Unincorporated Society.* — It has been stated that in the case of the expulsion of a member of an unincorporated religious association the fact that the proceedings were irregular and the expulsion made without giving notice or opportunity for a hearing was immaterial.[3] The expulsion of members of an unincorporated association is not vitiated by the fact that after the expulsion the members of the association, or a majority of them, departed from the religious principles of the denomination. It is otherwise, however, if they had done so before the expulsion and expelled the members as a means of diverting the property of the association from its original purpose.[4]

c. EFFECT OF EXPULSION. — That members have been excluded from the communion and fellowship of the church on account of some heresy does not prevent them from being legal voters as members of the congregation or society, nor from being elected trustees with the power of managing the temporal concerns of the congregation.[5]

Effect on Property Rights. — It is only as a constituent element of the church that any person can acquire or hold as *cestui que trust* any interest in the property dedicated to the church.[6] After a member has voluntarily withdrawn or has been expelled from an unincorporated religious society, he ceases to have any right or interest in its property and he cannot thereafter maintain suit for himself or for himself and other existing members of the association in sympathy with him against other members of the association on the ground that its property has been diverted.[7]

d. JURISDICTION OF CIVIL COURTS — (1) *In General.* — The question of church membership being entirely an ecclesiastical matter, the civil courts will not, as a general rule, interfere with or pass upon the act of the church or its officers in expelling a person from membership.[8] Nor will the courts, in the absence of special statutory provisions, pass upon the act of a religious society expelling a member, where the proceedings have been in conformity with the provisions of the constitution of the society and have been regular in form, including proper notice and a proper opportunity for a hearing.[9] But, though they must take the fact of excommunication as conclusive proof that the persons excommunicated are not members, they may inquire whether

1. Berryman *v.* Reese, 11 B. Mon. (Ky.) 287.

2. Jones *v.* State, 28 Neb. 495; McAuley's Appeal, 77 Pa. St. 397. See also Gray *v.* Christian Soc., 137 Mass. 329, 50 Am. Rep. 310.

3. Nance *v.* Busby, 91 Tenn. 303.

4. Nance *v.* Busby, 91 Tenn. 303.

5. Hartford First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 296. See also *infra*, this title, *Trustees*. *Compare* Shannon *v.* Frost, 3 B. Mon. (Ky.) 253.

6. Shannon *v.* Frost, 3 B. Mon. (Ky.) 253.

7. Nance *v.* Busby, 91 Tenn. 303.

8. **Civil Jurisdiction** — *United States.* — Bouldin *v.* Alexander, 15 Wall. (U. S.) 131.
Alabama. — Hundley *v.* Collins, 131 Ala. 234.
Delaware. — Tubbs *v.* Lynch, 4 Harr. (Del.) 521.
Illinois. — Chase *v.* Cheney, 58 Ill. 509, 11 Am. Rep. 95.
Indiana. — White Lick Quarterly Meeting of Friends *v.* White Lick Quarterly Meeting of Friends, 89 Ind. 136.
Iowa. — Helbig *v.* Rosenberg, 86 Iowa 159.
Kentucky. — Iglehart *v.* Rowe, (Ky. 1898) 47 S. W. Rep. 575; Shannon *v.* Frost, 3 B. Mon. (Ky.) 253.
Massachusetts. — Grosvenor *v.* United Soc. of Believers, 118 Mass. 78; Fitzgerald *v.* Robinson, 112 Mass. 371.
Mississippi. — Dees *v.* Moss Point Baptist Church, (Miss. 1895) 17 So. Rep. 1.
Missouri. — Watson *v.* Garvin, 54 Mo. 353; Fulbright *v.* Higginbotham, 133 Mo. 668.
New Hampshire. — Richardson *v.* Union Cong. Soc., 58 N. H. 187.
New York. — Waller *v.* Howell, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 236.
South Carolina. — Harmon *v.* Dreher, Spears Eq. (S. Car.) 87.
Tennessee. — Nance *v.* Busby, 91 Tenn. 303.
See also *infra*, this title, *Jurisdiction of Civil Courts*.

9. Canadian Religious Assoc. *v.* Parmenter, 180 Mass. 415.

the resolution of excommunication was the act of the church or of persons who were not members of the church and had consequently no right to excommunicate others.[1] A member who has acquired the right to sepulture cannot compel restoration to membership on the ground that by expulsion he has been deprived of his acquired right.[2]

(2) *Damages for Expulsion.* — An action in damages for expulsion from the church will not lie against the religious society connected therewith, even though the church be an integral part of the society.[3] Nor can one expelled from a religious society by the persons having that authority under the constitution of the society, recover damages for such expulsion.[4]

4. Withdrawal. — A member may voluntarily sever his connection with a religious society[5] and enter another more consonant with his views, but, where he does so, he must be considered as abandoning his rights to the property of the society which he leaves to the members who adhere to the original articles of belief.[6]

Manner. — Where the manner in which a member may withdraw is prescribed by statute, a withdrawal can be effected only in the prescribed manner.[7]

Conditional Withdrawal. — The rights of the member to the property of the church are not affected by a withdrawal which is conditional or limited until a change in the arrangement of the church service, but to destroy his property right the withdrawal must be absolute and entire.[8]

V. TRUSTEES — 1. Election — *a.* IN GENERAL. — The election of trustees is generally controlled by the society,[9] and, to be valid, must be held at the time and in the manner prescribed by the laws of the society.[10]

Sufficiency of Notice. — If, at an election of church trustees, the parties interested had actual notice of time and place, it may be valid, even though there

1. Bouldin *v.* Alexander, 15 Wall. (U. S.) 131; Smith *v.* Pedigo, 145 Ind. 361.

2. State *v.* Hebrew Congregation, 31 La. Ann. 205, 33 Am. Rep. 217.

3. **Damages Not Recoverable.** — Hardin *v.* Detroit Second Baptist Church, 51 Mich. 137, 47 Am. Rep. 555.

4. Grosvenor *v.* United Soc. of Believers, 118 Mass. 78, in which case it was further held that such person could not recover for the loss of support formerly given her as a member of the society.

5. **Voluntary Withdrawal.** — See Keith *v.* Howard, 24 Pick. (Mass.) 292; Oakes *v.* Hill, 14 Pick. (Mass.) 442; Jones *v.* Cary, 6 Me. 448; State *v.* Crowell, 9 N. J. L. 391; Cammeyer *v.* United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186.

Withdrawal through Failure to Comply with By-laws. — Taylor *v.* Edson, 4 Cush. (Mass.) 522.

6. **Effect on Property Rights.** — Bouldin *v.* Alexander, 15 Wall. (U. S.) 131; Isham *v.* Dunkirk First Presb. Church, (Supm. Ct. Spec. T.) 63 How. Pr. (N. Y.) 465; Manning *v.* Shoemaker, 7 Pa. Super. Ct. 375. See also Taylor *v.* Edson, 4 Cush. (Mass.) 522; Miller *v.* Gable, 2 Den. (N. Y.) 492; Manning *v.* Shoemaker, 7 Pa. Super. Ct. 375.

Withdrawal from Membership in Church Society Is Not Withdrawal from Church. — Peterson *v.* Samuelson, 42 Neb. 161.

7. **Method of Withdrawing.** — Jones *v.* Cary, 6 Me. 448; Keith *v.* Howard, 24 Pick. (Mass.) 292; Oakes *v.* Hill, 14 Pick. (Mass.) 442; Fisher *v.* Whitman, 13 Pick. (Mass.) 350; Gage *v.* Currier, 4 Pick. (Mass.) 399. *Compare* Oakes *v.* Hill, 10 Pick. (Mass.) 333.

8. Marks *v.* Congregation Daruch Amuno, 5 Daly (N. Y.) 8.

9. **Trustees.** — Calkins *v.* Cheney, 92 Ill. 463; Parker *v.* May, 5 Cush. (Mass.) 336; Simmons *v.* Allison, 118 N. Car. 763.

10. First African M. E. Church *v.* Hillery, 51 Cal. 155; Dahl *v.* Palache, 68 Cal. 248.

Court Cannot Summarily Inquire into Equity of Election. — *In re* Bethany Baptist Church, 60 N. J. L. 88.

Election of Trustees Must Be Held at Usual Place of Meeting. — Den *v.* Pilling, 24 N. J. L. 653.

Notice of Meeting Prerequisite to Holding of Election. — Congregational Soc. *v.* Sperry, 10 Conn. 200.

Sufficiency of Application for Calling of Meeting by Justice. — Ladd *v.* Clements, 4 Cush. (Mass.) 476.

Under Mass. Rev. Stat., c. 20, § 26, the meeting of members of a religious society could, in certain instances, be called by a justice of the peace upon the application of five members of the society. Christ Church *v.* Pope, 8 Gray (Mass.) 140; Reformed Methodist Soc. *v.* Draper, 97 Mass. 349; Ladd *v.* Clements, 4 Cush. (Mass.) 476.

The Kentucky Statute of 1814, authorizing churches to appoint trustees by a society or sect of Christians to hold church property, does not authorize the individual members not acting as a society to make such appointment. Scott *v.* Curle, 9 B. Mon. (Ky.) 17.

Method of Electing Trustees under New York Statute. — People *v.* Peck, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104.

Election of Trustees under Wisconsin Statute. — Kulinski *v.* Dambrowski, 29 Wis. 109.

was not a strict compliance with the statute.[1]

Effect of Illegal Votes. — The election of trustees is not to be set aside on the ground that illegal votes were cast if there was still a majority of legal votes for the ticket declared elected.[2]

b. BY-LAWS. — Where a charter of a religious society enjoins the duty of annual elections of trustees, fixing the time at which they shall be held, but is silent as to the mode of conducting them, the corporation may provide by a by-law for the mode of performance; but where no such by-law has been adopted, a long established usage will govern.[3] A by-law of a religious society adopted at its meeting prescribing the manner in which the vestrymen shall be elected is not binding on a subsequent annual meeting of the society.[4]

Inspectors. — Where inspectors, whose duty it is to pass upon the qualifications of electors, have received the vote of an elector, they cannot, after the election, throw it out on the ground that he was not qualified.[5]

2. Appointment by Court. — In some jurisdictions it is provided by statute that the trustees shall be appointed or removed at the instance of the proper authorities of the congregation upon motion after reasonable notice.[6] Under such a statute the court can only exercise the power upon the application of the proper persons and not upon that of any volunteer.[7]

3. Appointment under Statute. — Where by statute the rector, wardens, and vestrymen, or the minister, elders, and deacons, are made trustees of religious societies, they do not acquire their authority by virtue of any ecclesiastical office, but simply by reason of the provisions of the statute.[8]

4. Eligibility. — In the absence of a provision of the constitution of a religious society to the contrary, it is not necessary that the trustees of the society shall be members of the society, and the fact that trustees of the society have been expelled from membership therein does not of itself remove them from office.[9] Nor is it necessary that the trustee should be a resident of the state.[10]

5. Tenure of Office — *a. In General.* — Where the statute authorizes the society to appoint a specified number of members as trustees to take charge of the affairs of the society for the year ensuing, these trustees retain office until superseded by the appointment of others.[11] Their removal by the election of their successors cannot, however, take place in less than one year after their election.[12] In case the term of his office does not cease by limitation of time, the presumption is that the trustee remains in office until competent evidence of his due removal is given, and whoever claims on the ground that his office has ceased must establish that fact.[13] Where by decree the rights of certain persons as trustees have been established as against their claimants, the former retain their office until their successors are duly elected by the church according to its rules.[14]

In the Dutch Reformed Church, under the *New Jersey* statute, every minister, elder, or deacon, properly called and instituted, is *virtute officii* a trustee and remains such as long as his office continues or until removal or secession.[15]

1. People *v.* Peck, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104.
2. People *v.* Tuthill, 31 N. Y. 550.
3. Juker *v.* Com., 20 Pa. St. 484. See also St. Luke's Church *v.* Mathews, 4 Desaus. (S. Car.) 578, 6 Am. Dec. 619.
4. Christ Church *v.* Pope, 8 Gray (Mass.) 140.
5. Hartt *v.* Harvey, 32 Barb. (N. Y.) 55.
6. Venable *v.* Coffman, 2 W. Va. 310; Wade *v.* Hancock, 76 Va. 620.
7. Wade *v.* Hancock, 76 Va. 620.
8. Watkins *v.* Wilcox, 4 Hun (N .Y.) 220.
9. Canadian Religious Assoc. *v.* Parmenter, 180 Mass. 415; Fort *v.* Paris First Baptist Church, (Tex. Civ. App. 1899) 55 S. W. Rep. 402. See also Bouldin *v.* Alexander, 15 Wall. (U. S.) 131.
10. Fort *v.* Paris First Baptist Church, (Tex. Civ. App. 1899) 55 S. W. Rep. 402.

Appointment by Court upon Application. — Draper *v.* Minor, 36 Mo. 290.

11. Congregational Soc. *v.* Sperry, 10 Conn. 200.
12. Den *v.* Pilling, 24 N. J. L. 653.
13. Hendrickson *v.* Shotwell, 1 N. J. Eq. 577.
14. African Baptist Church *v.* White, (Ky. 1902) 69 S. W. Rep. 757.
15. Doremus *v.* Dutch Reformed Church, 3 N. J. Eq. 332.

The Election of New Trustees before the expiration of the term of office of the old does not affect their tenure of office.[1]

b. REMOVAL BY SOCIETY. — If any trustee fails in his duty or violates his trust the society may, by proper proceedings, remove him and fill his place with another, and the courts will recognize the validity of the act and enforce it.[2] The act of the church in deposing the officers must, however, be founded upon some semblance of legal process.[3] A meeting of members of the church convened without having given notice of their intention, and in the absence of the trustees, without complaint against them, or notice of complaint, cannot divest the trustees of their legal interest and substitute other persons.[4]

c. REMOVAL BY COURT. — The power of the court to remove trustees for perversion of their trust is treated elsewhere.[5]

6. Compensation. — In the absence of an express agreement or usage, the trustee is entitled to no compensation for his services. It would seem, however, that the trustees may enter into an agreement with one of their number to perform special services for them in return for an agreed compensation.[6] A resolution entered on the parish books voting the thanks of the wardens and vestry to its secretary and treasurer for their gratuitous services, operates as a bar to the recovery of compensation for such services.[7] No promise to pay for services will be implied where the circumstances not only fail to indicate that they were rendered or received for compensation, but clearly repel the idea that payment was to be made or asked for; and the allowance of a claim for services as sexton of one who at the time was a vestryman, and some of the time a senior warden and treasurer of the society, where the evidence clearly shows that the performance of the duty was voluntary, and that it was supposed on both sides that his service was something he was spontaneously giving from a desire to promote a cause he had at heart, and not in any extent to get money, is erroneous.[8]

7. Trustees De Facto — *a.* IN GENERAL. — If the trustees are irregularly elected, yet they are trustees *de facto*, and their proceedings as such are valid until ouster by judgment of a competent court, but they must be acting under color of election or appointment.[9] A vestry *de facto* may perform all of the duties of a vestry.[10] Where an election for officers of a corporation is had, and officers *de facto* are elected, and act, they are presumed to pursue the legal preparatory measures for an election for the next year; which, when had, makes the successors officers *de jure*.[11] Persons elected trustees on a different day and after different notice than the rules of the church require are not trustees *de jure* or *de facto*, and the previous trustees holding over may resist their taking possession of church property.[12]

b. WHO MAY QUESTION TITLE TO OFFICE — (1) *In General.* — The title of persons claiming to be *de jure* trustees of a religious corporation cannot be

1. Den *v.* Pilling, 24 N. J. L. 653. See also Nolde's Appeal, (Pa. 1888) 15 Atl. Rep. 777.

2. Watson *v.* Jones, 13 Wall. (U. S.) 679; Nash *v.* Sutton, 117 N. Car. 231; Fort *v.* Paris First Baptist Church, (Tex. Civ. App. 1899) 55 S. W. Rep. 402.

3. McAuley's Appeal, 77 Pa. St. 397. See also Calkins *v.* Cheney, 92 Ill. 463.

4. Bouldin *v.* Alexander, 15 Wall. (U. S.) 131; Long *v.* Harvey, 177 Pa. St. 473, 55 Am. St. Rep. 733; Fort *v.* Paris First Baptist Church, (Tex. Civ. App. 1899) 55 S. W. Rep. 402.

Removal by Voluntary Act of Trustee. — Matter of Court St. M. E. Soc., 51 Hun (N. Y.) 104.

5. See *infra*, this title, *Jurisdiction of Civil Court — Control over Trustees.*

6. Cicotte *v.* Catholic, etc., Church, 60 Mich. 552.

7. Episcopal Church *v.* Barksdale, 1 Strobh. Eq. (S. Car.) 197.

8. St. Jude's Church *v.* Van Denberg, 31 Mich. 287.

9. **De Facto Trustees.** — East Norway Lake Norwegian Evangelical Lutheran Church *v.* Halvorson, 42 Minn. 503; Den *v.* Pilling, 24 N. J. L. 653; Doremus *v.* Dutch Reformed Church, 3 N. J. Eq. 332; Vernon Soc. *v.* Hills, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429.

Submission and Award as to Title to Office — Effect. — Wyatt *v.* Benson, 23 Barb. (N. Y.) 327.

10. Batterson *v.* Thompson, 8 Phila. (Pa.) 251.

11. Smith *v.* Erb, 4 Gill (Md.) 437.

12. First African M. E. Church *v.* Hillery, 51 Cal. 155; Miller *v.* Eschbach, 43 Md. 1.

determined in a collateral proceeding, but only by a direct proceeding in the nature of a *quo warranto*.[1] Though there was an irregularity in the election of the trustees, where they have qualified and entered upon the duties of their office the court will not oust at the instance of one not shown to have any interest in the action complained of.[2] Persons must be peaceably admitted as trustees into possession of the temporalities or their title to office established by action of the attorney-general before they can restrain the trustees in possession, and who have been duly elected, from performing the duties of their office.[3]

(2) *Trustees Elected by Seceding Faction.* — Trustees in actual possession of the church property holding it for the corporation, and exercising the usual functions of the office under color of an election apparently regular, will not be ousted for the benefit of trustees elected by a portion of the society.[4]

c. EVIDENCE OF ELECTION. — The certificate of election required by statute to be given to trustees by the officers conducting the election is not conclusive, but is merely *prima facie* evidence. It constitutes the holder a trustee *de facto* and is evidence of his title; but an omission to furnish the certificate does not disqualify him, and his right to act as trustee may be shown by evidence *aliunde*.[5]

Burden of Proof. — Where the court has adjudged that certain persons were the trustees of the society, the burden is on others laying claim to the office to show that at an election regularly called and held according to the rules of the church they had been elected to succeed the trustees in office.[6]

8. Powers — *a.* IN GENERAL. — The powers of a religious society and of its officers and members are derived from the statute under which it is organized, and are limited only by the provisions of the statute and the constitution of the society.[7] There is one principle common to the trustees of all incorporated churches. They have the possession and custody of the temporalities of the church. They are considered by virtue of their office entitled to the possession and are lawfully seized of the grounds, buildings, and other property belonging to the church. Though they hold the church property in trust for the congregation, still it is in their possession, and the courts will protect them against every irregular and unlawful intrusion made against their will.[8]

Increase in Number. — A vote to increase the number of vestrymen does not affect the powers of the incumbents until the additional members have been chosen.[9]

In New York the relation of the trustees to the society is not that of private trustees to a *cestui que trust*, but they are the managing officers of the corporation and trustees in the same sense as officers of other corporations and are invested, in regard to the temporal affairs of the society, with the powers specifically conferred by statute and with the ordinary discretionary powers of similar corporate officers.[10]

1. First Presb. Soc. *v.* Smithers, 12 Ohio St. 248; Nolde's Appeal, (Pa. 1888) 15 Atl. Rep. 777. See also Nelson *v.* Benson, 69 Ill. 27.

2. Reformed Methodist Soc. *v.* Draper, 97 Mass. 349; People *v.* Nappa, 80 Mich. 484.

Laches in Questioning Validity. — Smith *v.* Erb, 4 Gill (Md.) 437.

3. North Baptist Church *v.* Parker, 36 Barb. (N. Y.) 171; Bundy *v.* Birdsall, 29 Barb. (N. Y.) 31.

4. First African M. E. Zion Church *v.* Hillery, 51 Cal. 155; Shannon *v.* Frost, 3 B. Mon. (Ky.) 253; East Norway Lake Norwegian Evangelical Lutheran Church *v.* Halvorson, 42 Minn. 503; Bellport *v.* Tooker, 29 Barb. (N. Y.) 256; People *v.* Farrington, (Supm. Ct. Spec. T.) 22 How. Pr. (N. Y.) 294; Fort *v.* Paris First Baptist Church, (Tex. Civ. App. 1899) 55 S. W. Rep. 402. See also Brundage *v.* Deardorf, (C. C. A.) 92 Fed. Rep. 214; Turpin *v.* Bagby, 138 Mo. 7. *Compare* Ferraria *v.* Vasconcellos, 31 Ill. 25.

5. North Baptist Church *v.* Parker, 36 Barb. (N. Y.) 171. *Compare* M. E. Church *v.* Clark, 41 Mich. 730.

Certificate of Appointment. — M. E. Church *v.* Clark, 41 Mich. 730.

6. African Baptist Church *v.* White, (Ky. 1902) 69 S. W. Rep. 757.

7. **Powers Conferred by Statute.** — Canadian Religious Assoc. *v.* Parmenter, 180 Mass. 415.

8. **Possession Vested in Trustees.** — German Evangelical Congregation *v.* Pressler, 17 La. Ann. 127.

9. Christ Church *v.* Pope, 8 Gray (Mass.) 140.

10. **New York Laws of 1813, c. 60.** — Robertson

Upon Secession, the trustees, though they adhere to the seceding body, must administer the property in the interests of the faction which remains with the regular organization.[1]

The Individual Corporators have no control over the temporalities vested in the trustees as legal representatives of the corporation.[2]

b. POWERS NOT ARBITRARY. — The power of trustees is not arbitrary; nor is it discretionary, but they hold the property according to the discipline, rules, and usages of the denomination.[3]

No Control Over Ecclesiastical Matters. —The church, or spiritual body, is regulated by its own particular rules as to its doctrine and form of worship, and with these the trustees cannot interfere, nor can they alter them without the consent of the church itself.[4]

c. TRUSTEES MUST ACT AS BOARD. — The trustees of a religious corporation are the only persons empowered to bind the corporate body, and in order to execute this power they must meet as a board, deliberate and decide. The separate and individual action of the trustees without meeting and consulting together as a board, even though a majority in number should agree upon a certain act, is not binding upon the corporation and cannot of itself create a corporate liability;[5] nor is their action in the meeting of the whole body of corporators, or of another and larger class in which they are but a component part, a valid corporate act.[6] It seems, however, that they may delegate power to one of their number, or to another person, or may ratify or approve the acts of one of the board acting for them.[7]

Absence of Wardens. — The vestry may transact business in the absence of both wardens if a majority of all their members, even if it has been voted at the annual meetings that "one warden and four vestrymen shall constitute a quorum."[8]

Special Meeting. — It has been held that a special meeting of the trustees of a religious corporation called without stating the business of the meeting and with at least two trustees absent can do no valid act.[9]

Legality of Meeting Presumed. — It will be presumed that the meetings of the trustees were regular and upon proper notice.[10]

d. CONTROL OF CHURCH EDIFICE — (1) *In General.* — The trustees, not the members of the church or congregation, have the control of the church edifice and can let it temporarily or make such similar disposition of it as will not interfere permanently with the rights of the members who use it.[11] This does not, however, authorize them to impress upon the estate by a union with

v. Bullions, 11 N. Y. 243; Attica First M. E. Church *v.* Filkins, 3 Thomp. & C. (N. Y.) 279; Matter of St. Ann's Church, (Supm. Ct. Spec. T.) 14 Abb. Pr. (N. Y.) 424.

1. Brewster *v.* Hendershot, 27 Ont. App. 232.

2. See Attica First M. E. Church *v.* Filkins, 3 Thomp. & C. (N. Y.) 279. See also Tartar *v.* Gibbs, 24 Md. 323.

3. Brunnenmeyer *v.* Buhre, 32 Ill. 183; Curd *v.* Wallace, 7 Dana (Ky.) 190, 32 Am. Dec. 85; Isham *v.* Dunkirk First Presb. Church, (Supm. Ct. Spec. T.) 63 How. Pr. (N. Y.) 465; York First Reformed Presb. Church *v.* Bowden, (Supm. Ct. Gen. T.) 14 Abb. N. Cas. (N. Y.) 356; Baptist Congregation *v.* Scannel, 3 Grant Cas. (Pa.) 48.

4. Tartar *v.* Gibbs, 24 Md. 323; Lawyer *v.* Cipperly, 7 Paige (N. Y.) 281; Morgan *v.* Jones, 9 Kulp (Pa.) 503.

5. Thomasson *v.* Grace M. E. Church, 113 Cal. 558; St. Patrick's Roman Catholic Church *v.* Gavalon, 82 Ill. 170, 25 Am. Rep. 305; Thompson *v.* West, 59 Neb. 677; People's Bank *v.* St. Anthony's Roman Catholic Church, 109 N. Y. 512; Constant *v.* St. Albans Church, 4 Daly (N. Y.) 305; Young, etc., Lumber Co. *v.* Taylor St. M. E. Church, 7 Ohio Dec. 449; United Brethren Church *v.* Vandusen, 37 Wis. 54.

6. Cammeyer *v.* United German Lutheran Churches, 2 Sandf. Ch. (N.Y.) 186.

7. Thomasson *v.* Grace M. E. Church, 113 Cal. 558; St. Patrick's Roman Catholic Church *v.* Gavalon, 82 Ill. 170, 25 Am. Rep. 305.

8. Christ Church *v.* Pope, 8 Gray (Mass.) 140.

9. St. Stephen Church Cases, (C. Pl. Gen. T.) 25 Abb. N. Cas. (N. Y.) 230.

10. Moore *v.* First Ruthven Circuit M. E. Church, (Iowa 1902) 90 N. W. Rep. 492.

11. Bates *v.* Houston, 66 Ga. 198; Wheaton *v.* Gates, 18 N. Y. 395; Matter of St. Ann's Church, (Supm. Ct. Spec. T.) 14 Abb. Pr. (N. Y.) 424. See also German Reformed Church *v.* Busche, 5 Sandf. (N. Y.) 666.

Seceding Minority Cannot Interfere with Management. — Sandis's Appeal, 102 Pa. St. 467.

other churches a new trust which might possibly defeat the object for which the original trust was established,[1] or to perform any act which obstructs the enjoyment of the property for the purposes and in the manner authorized by the usages of the church,[2] but their act in so doing may be ratified and confirmed by the *cestuis que trustent*.[3] The trustees may close up the Sabbath school and chapel whenever they think proper.[4]

(2) *Power to Erect Church.* — The power to erect the church building carries with it the power to raise the necessary means to accomplish the purpose, and to this end debts may be contracted.[5] Where, however, the authority conferred is merely to superintend the erection of the church, the power to contract debts against the parish is not necessarily implied.[6]

Contract with Trustee. — The members of a building committee, who are also trustees of the society, may bind the society by a contract with one of their number for the erection of the building.[7]

(3) *Power to Repair.* — Control of the church edifice by the trustees includes the power to repair or demolish it.[8] They may take down the old building and rebuild on the same space or elsewhere and may alter the form of the building for the purpose of making it more convenient,[9] or may sell the church property and apply the proceeds towards the purchase of another more suitable place for the congregation.[10]

A Bishop Holding Title to Realty as trustee for his congregation under the rules and regulations of the Roman Catholic Church, can maintain trespass against such of its members as tear down the church edifice against his protest even for the purpose of repairing and rebuilding it, even though funds and material for the building had been contributed by members of the congregation.[11]

e. POWER TO CONTRACT. — The power of making contracts and incurring indebtedness on account of the property is vested in the trustees controlling the temporalities of the church.[12] They may charge the trust property with the reasonable expense of its necessary preservation, improvement, and repair.[13]

f. POWER TO SUE. — The power of the trustees to sue on behalf of the society is treated elsewhere.[14]

g. POWER TO PROTECT PROPERTY AGAINST INTRUSION. — The courts will protect the trustees against intrusions on the property made against their will, whether by the pastor, members of the congregation, or strangers,[15] or by a seceding faction which has formed a separate organization and taken possession of the church edifice.[16]

Trustees De Facto of a religious society in possession of the meeting-house

1. Cammeyer *v.* United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186.
2. Brunnenmeyer *v.* Buhre, 32 Ill. 183.
3. Brown *v.* Lutheran Church, 23 Pa. St. 495.
4. Alexander Presb. Church *v.* Presbyterian Church, (Supm. Ct. Spec. T.) 46 How. Pr. (N. Y.) 312.
5. Cattron *v.* First Universalist Soc., 46 Iowa 106.
6. Kupfer *v.* South Parish, 12 Mass. 185.

Trustees Not Authorized to Incur Indebtedness for Erection of Church under Me. Rev. Stat., c. 12, § 19. — Bailey *v.* M. E. Church, 71 Me. 472.

7. Winship *v.* Smith, 61 Me. 118; Sawyer *v.* M. E. Society, 18 Vt. 409.
8. Van Houten *v.* McKelway, 17 N. J. Eq. 130; Heeney *v.* St. Peter's Church, 2 Edw. (N. Y.) 608.
9. Voorhees *v.* Presbyterian Church, 8 Barb. (N. Y.) 135.
10. African Baptist Church *v.* St. Louis Transfer Co., 98 Mo. 412. See also Matter of Second Baptist Soc., (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 324.
11. Heiss *v.* Vosburg, 59 Wis. 532.
12. St. Patrick's Roman Catholic Church *v.* Gavalon, 82 Ill. 170, 25 Am. Rep. 305; Cammeyer *v.* United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186; Baptist Congregation *v.* Scannel, 3 Grant. Cas. (Pa.) 48.
13. Mannix *v.* Purcell, 46 Ohio St. 102, 15 Am. St. Rep. 562.
14. See the title RELIGIOUS SOCIETIES, 18, ENCYC. OF PL. AND PR., 99.
15. German Evangelical Congregation *v.* Pressler, 17 La. Ann. 127.
16. Iglehart *v.* Rowe, (Ky. 1898) 47 S. W. Rep. 575; Fernstler *v.* Seibert, 114 Pa. St. 196. See also Kreglo *v.* Fulk, 3 W. Va. 74.

Injunction Proper Remedy to Prevent Trespass by Seceding Faction. — Fulbright *v.* Higginbotham, 133 Mo. 668.

Trustees Could Not Maintain Ejectment Against Majority under New York Statute of 1813. — Concord Soc. *v.* Stanton, 38 Hun (N. Y.) 1;

under color of right may bring suit against a trespasser upon the property of the society.[1]

h. EFFECT OF UNAUTHORIZED ACTS — (1) *In General.* — The trustees of the society cannot exceed the authority granted them, and the society or church will not be bound by their unauthorized acts in excess thereof.[2] The trustees cannot act for the corporation to bind it for an adverse interest of their own.[3]

The Secretary of the Board of trustees has no inherent power to enter into a contract in the name of the society and the society is not bound by a contract so made where it repudiates the contract and refuses to accept the work done thereunder.[4]

(2) *Ratification and Estoppel.* — When a corporation, formed for the control of property for religious purposes, engages in purely secular affairs, such as the building of churches, it becomes subject to the same principles of law and the same doctrines as to ratification, acquiescence, and estoppel as a private civil corporation.[5] The society cannot accept the benefits of a transaction and then refuse to pay on the ground that the contract was *ultra vires.*[6] One who has made a contract with the trustees may be estopped from denying their power to contract.[7]

(3) *Burden of Proving Lack of Authority.* — The burden of proving that the trustees were without authority to alter a contract entered into for the erection of a building is upon the one alleging such lack of authority.[8]

i. INDIVIDUAL LIABILITY. — Trustees are personally liable on contracts of the church signed by them in their individual capacity only.[9]

Trustees of Voluntary Association. — The members of a building committee of a church, an organization having no legal existence, who have charge of the work of constructing a church building, are personally liable for materials furnished to them for such purpose, although the account was charged in the name of the society, and although the seller was informed that the church intended to raise the necessary funds by a church fair and by individual subscriptions.[10] The trustees of a church are not, as such, liable for the price of lumber sold and delivered to the pastor on his individual account, when in making the purchase he neither acted as agent of the trustees nor had authority to do so; and this is so though the lumber was, with their knowledge, used in improving the property of the church.[11]

9. Treasurer. — By virtue of his office the treasurer of the parish has charge of the notes and other securities belonging to the parish; it is his duty to collect them, and he has the incidental power to sue when necessary and for this

Watkins *v.* Wilcox, 6 Thomp. & C. (N. Y.) 539, 4 Hun (N. Y.) 220.

1. Green *v.* Cady, 9 Wend. (N. Y.) 414.

2. **Unauthorized Acts of Trustees.** — Klopp *v.* Moore, 6 Kan. 27; Bailey *v.* M. E. Church, 71 Me. 472; Miller *v.* Church, 4 Phila. (Pa.) 48, 17 Leg. Int. (Pa.) 124; Langolf *v.* Seiberlitch, 2 Pars. Eq. Cas. (Pa.) 64. See also Child *v.* Christian Soc., 144 Mass. 473.

Individual Liability. — Matter of Orthodox Cong. Church, (Supm. Ct. Spec. T.) 6 Abb. N. Cas. (N. Y.) 398.

3. United Brethren Church *v.* Vandusen, 37 Wis. 54.

4. Thomasson *v.* Grace M. E. Church, 113 Cal. 558.

5. Moore *v.* First Ruthven Circuit M. E. Church, (Iowa 1902) 90 N. W. Rep. 492; Norwegian Evangelical, etc., Congregation *v.* U. S. Fidelity, etc., Co., 81 Minn. 32.

6. Moore *v.* First Ruthven Circuit M. E. Church, (Iowa 1902) 90 N. W. Rep. 492; Wilson *v.* Tabernacle Baptist Church, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 268.

7. Skinner *v.* Richardson, 76 Wis. 464.

8. Moore *v.* First Ruthven Circuit M. E. Church, (Iowa 1902) 90 N. W. Rep. 492.

9. Klopp *v.* Moore, 6 Kan. 27.

Personal Liability upon Notes. — Hills *v.* Bannister, 8 Cow. (N. Y.) 31; Brockway *v.* Allen, 17 Wend. (N. Y.) 41; Taft *v.* Brewster, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280.

President and Secretary Cannot Execute Note Without Authority. — Cattron *v.* First Universalist Soc., 46 Iowa 106.

Notes of Voluntary Association — Trustees Signing Individually Liable. — Phœnix Ins. Co. *v.* Burkett, 72 Mo. App. 1.

Individual Liability on Argument Released by Subsequent Agreement Signed Officially. — McGhee *v.* Lose, 22 Pa. Co. Ct. 371.

10. Clark *v.* O'Rourke, 111 Mich. 108, 66 Am. St. Rep. 389.

11. Montgomery *v.* Walton, 111 Ga. 840.

purpose to employ counsel.[1] He holds the funds as a trustee for the church and is subject as such to the jurisdiction of equity,[2] and is liable personally for a misappropriation of the funds in his hands. This is true even where in so doing he acted in accordance with a formal resolution of the trustees, if such resolution was not within their powers.[3] An incorporated church authorized to receive subscriptions to aid in carrying out its purposes may recover from its treasurer subscriptions received by him to aid an independent voluntary organization connected with the church, even though these subscriptions had not been raised by the authority of the church as a corporation, and though the original contributors had, in some instances, directed the treasurer not to pay over the subscriptions.[4]

10. Deacons. — The office of deacon in a church pertains alone to the church polity and is not an office existent or recognizable in the secular government.[5] As deacons, no persons have capacity either to acquire in themselves, or to transmit to successors in that ecclesiastical office, any rights amounting to title in easements. Nor has a deacon any right to sue in his official capacity. Where the office by the regulation of the religious society is made to carry with it an agency in the control and management of property, the legal relation of those occupying the office would be that of trustees and not that of church officials.[6]

VI. Legislative Interference — 1. In General. — The constitutions of the *United States* and the several states generally secure to every citizen the right to worship God in his own way and to give full expression to his religious views, and prohibit all forms of church establishment.[7] But, while the exercise of the rites of religion must be free and no restraint can be placed upon the expression of religious belief, religious liberty, as recognized and secured in these constitutions, does not give one a license to engage in acts having a tendency to disturb the peace, though under the form of religious worship; nor does it include the right to disregard those regulations which the legislature deems reasonably necessary for the security of public order. A reasonable measure of prevention enacted to prevent such disturbance is not an infringement of constitutional right.[8] Under the constitutional provisions a law giving to one religious sect a privilege not enjoyed by all equally is unconstitutional and void.[9]

2. Regulation of Civil Rights. — The prohibition of the constitutions does not prevent legislative interference with regard to civil or property rights.[10] The legislature may also interfere in cases where the public health or safety is concerned with the use which a religious society may make of its real estate, as by ordering the removal of a churchyard from its location to one more suitable.[11]

1. Wallace *v.* First Parish, 109 Mass. 263.
2. Weld *v.* May, 9 Cush. (Mass.) 181.
3. Immanuel Presb. Church *v.* Riedy, 104 La. 314.
4. Church of Redeemer *v.* Crawford, 43 N. Y. 476.
5. **Powers of Deacons.** — Atty.-Gen. *v.* Geerlings, 55 Mich. 562.
6. Stewart *v.* White, 128 Ala. 202. See also Parker *v.* May, 5 Cush. (Mass.) 336.
Power of Elders in Presbyterian Church. — Watson *v.* Jones, 13 Wall. (U. S.) 679.
Election of Moderator. — Jones *v.* Cary, 6 Me. 448.
7. **Religious Liberty.** — See the constitutions of the *United States* and of the several states.
The Prohibition in Article 1 of the Amendments to the Federal Constitution against the enactment of laws respecting an establishment of a religion does not prevent an appropriation by Congress in aid of a hospital to be conducted under the auspices of a particular denomination. Bradfield *v.* Roberts, 175 U. S. 291.
Provisions of New Hampshire Constitution Construed. — Hale *v.* Everett, 53 N. H. 9, 16 Am. Rep. 82.
8. **Worship Must Not Disturb Public Peace.** — Com. *v.* Davis, 140 Mass. 485; Matter of Frazee, 63 Mich. 396, 6 Am. St. Rep. 310; State *v.* White, 64 N. H. 48. See also People *v.* Rochester, 44 Hun (N. Y.) 166. *Compare* Anderson *v.* Wellington, 40 Kan. 173, 10 Am. St. Rep. 175.
9. **Legislature Cannot Grant Special Privileges.** — Shreveport *v.* Levy, 26 La. Ann. 671.
10. Chase *v.* Cheney, 58 Ill. 509, 11 Am. Rep. 95.
11. See the title Cemeteries, vol. 5, p. 781 *et seq.*

VII. Jurisdiction of Civil Courts — 1. In General. — The ecclesiastical courts have exclusive jurisdiction in matters of church government, church organization, religious tenets, the laws of religious adjudications, and all other matters pertaining solely to the church as such: with these the civil courts cannot interfere. The jurisdiction of the civil courts to interfere with ecclesiastical controversies is limited to those cases in which the rights of property or civil rights are involved.[1]

2. Review of Ecclesiastical Decisions — *a.* In General. — The civil courts will not, therefore, review the decisions of ecclesiastical tribunals upon questions relating solely to church government, discipline, and doctrine, and other matters of church polity.[2] The courts will not, however, recognize the unau-

1. General Rule as to Jurisdiction of Civil Courts — *United States.* — Bouldin *v.* Alexander, 15 Wall. (U. S.) 131; Watson *v.* Jones, 13 Wall. (U. S.) 679; Nachtrieb *v.* Harmony Settlement, 3 Wall. Jr. (C. C.) 66; Brundage *v.* Deardorf, (C. C. A.) 92 Fed. Rep. 214.

Alabama. — Hundley *v.* Collins, 131 Ala. 234.

Delaware. — Tubbs *v.* Lynch, 4 Harr. (Del.) 521.

Georgia. — Bates *v.* Houston, 66 Ga. 198.

Illinois. — Chase *v.* Cheney, 58 Ill. 509, 11 Am. Rep. 95; Happy *v.* Morton, 33 Ill. 398; Ferraria *v.* Vasconcellos, 31 Ill. 46.

Indiana. — Lamb *v.* Cain, 129 Ind. 486; White Lick Quarterly Meeting of Friends *v.* White Lick Quarterly Meeting of Friends, 89 Ind. 136; Grimes *v.* Harmon, 35 Ind. 213, 9 Am. Rep. 690; Hatfield *v.* De Long, 156 Ind. 210.

Iowa. — Moore *v.* First Ruthven Circuit M. E. Church, (Iowa 1902) 90 N. W. Rep. 492; Bird *v.* St. Mark's Church, 62 Iowa 567; Park *v.* Chaplin, 96 Iowa 55, 59 Am. St. Rep. 353.

Kentucky. — Louisville First Presb. Church *v.* Wilson, 14 Bush (Ky.) 252; Kinkead *v.* McKee, 9 Bush (Ky.) 535; Lucas *v.* Case, 9 Bush (Ky.) 297; Curd *v.* Wallace, 7 Dana (Ky.) 190, 32 Am. Dec. 85; Shannon *v.* Frost, 3 B. Mon. (Ky.) 253.

Louisiana. — State *v.* Hebrew Congregation, 31 La. Ann. 205, 33 Am. Rep. 217.

Massachusetts. — Fitzgerald *v.* Robinson, 112 Mass. 371.

Minnesota. — East Norway Lake Norwegian Evangelical Lutheran Church *v.* Halvorson, 42 Minn. 503.

Mississippi. — Mt. Helm Baptist Church *v.* Jones, 79 Miss. 488; Dees *v.* Moss Point Baptist Church, (Miss. 1895) 17 So. Rep. 1.

Missouri. — Prickett *v.* Wells, 117 Mo. 502; Fulbright *v.* Higginbotham, 133 Mo. 668.

Nebraska. — Bonacum *v.* Harrington, (Neb. 1902) 91 N. W. Rep. 886; Wehmer *v.* Fokenga, 57 Neb. 510; Moseman *v.* Heitshusen, 50 Neb. 420; Powers *v.* Budy, 45 Neb. 208; Pounder *v.* Ashe, 36 Neb. 564.

New Hampshire. — Hale *v.* Everett, 53 N. H. 9, 16 Am. Rep. 82.

New Jersey. — Livingston *v.* Trinity Church, 45 N. J. L. 230; Hendrickson *v.* Shotwell, 1 N. J. Eq. 577; Jennings *v.* Scarborough, 56 N. J. L. 401.

New York. — Smith *v.* Bowers, 171 N. Y. 669, 64 N. E. Rep. 1125; People *v.* Steele, 2 Barb. (N. Y.) 397; Miller *v.* Gable, 2 Den. (N. Y.) 492; Field *v.* Field, 9 Wend. (N. Y.) 394; Robertson *v.* Bullions, 11 N. Y. 243; Bowden *v.* McLeod, 1 Edw. (N. Y.) 588; Watkins *v.* Wilcox, 4 Hun (N. Y.) 220; Kniskern *v.* Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439; McGuire *v.* St. Patrick's Cathedral, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 781. See also Smith *v.* Bowers, 57 N. Y. App. Div. 252.

North Carolina. — Organ Meeting House *v.* Seaford, 1 Dev. Eq. (16 N. Car.) 457.

Ohio. — Harrison *v.* Hoyle, 24 Ohio St. 254; Rike *v.* Floyd, 3 Ohio Cir. Dec. 359, 6 Ohio Cir. Ct. 80.

Pennsylvania. — Tuigg *v.* Sheehan, 101 Pa. St. 363, 47 Am. Rep. 727; Henry *v.* Deitrich, 84 Pa. St. 286; Batterson *v.* Thompson, 8 Phila. (Pa.) 251; German Reformed Church *v.* Com., 3 Pa. St. 282; Cushman *v.* Church of Good Shepherd, 188 Pa. St. 438.

South Carolina. — Harmon *v* Dreher, Spears Eq. (S. Car.) 87.

Tennessee. — Travers *v.* Abbey, 104 Tenn. 665; Bridges *v.* Wilson, 11 Heisk. (Tenn.) 458; Nance *v.* Busby, 91 Tenn. 303.

Texas. — Fort *v.* Paris First Baptist Church, (Tex. Civ. App. 1899) 55 S. W. Rep. 402.

Wisconsin. — Fadness *v.* Braunborg, 73 Wis. 257; Lutheran Evangelical Church *v.* Gristgau, 34 Wis. 328.

Canada. — Brewster *v.* Hendershot, 27 Ont. App. 232.

Ecclesiastical Judicatories in the United States and England Distinguished. — Smith *v.* Nelson, 18 Vt. 511.

Civil Courts Will Not Order Specific Performance of a Canon of the church or supervise the action of the proper officers thereunder. Waller *v.* Howell, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 236; St. James Church *v.* Huntington, 82 Hun (N. Y.) 125. See also Powers *v.* Budy, 45 Neb. 208.

2. Matters of Church Government — *United States.* — Bouldin *v.* Alexander, 15 Wall. (U. S.) 139; Watson *v.* Jones, 13 Wall. (U. S.) 679; Brundage *v.* Deardorf, (C. C. A.) 92 Fed. Rep. 214.

California. — Wheelock *v.* Los Angeles First Presb. Church, 119 Cal. 477.

Connecticut. — Trinity M. E. Church *v.* Harris, 73 Conn. 216.

Illinois. — Kuns *v.* Robertson, 154 Ill. 394; Schweiker *v.* Husser, 146 Ill. 399.

Indiana. — Lamb *v.* Cain, 129 Ind. 486; Gaff *v.* Greer, 88 Ind. 122, 45 Am. Rep. 449.

Iowa. — Bird *v.* St. Mark's Church, 62 Iowa 567; Park *v.* Chaplin, 96 Iowa 55, 59 Am. St. Rep. 353; Mt. Zion Baptist Church *v.* Whitmore, 83 Iowa 138.

Kentucky. — Kinkead *v.* McKee, 9 Bush (Ky.) 535.

Michigan. — Bear *v.* Heasley, 98 Mich. 279.

thorized action of a committee of the governing body of a church reversing the action of such governing body.[1]

b. Upon Questions of Jurisdiction. — Nor will they review the judgments or acts of governing authorities of a religious organization with reference to its internal affairs for the purpose of ascertaining their regularity or accordance with the discipline or usages of such organization;[2] nor pass upon the jurisdiction of an ecclesiastical tribunal where no question of property right is involved.[3] Where the subject-matter of dispute is strictly and purely ecclesiastical in its character and concerns theological controversy, church discipline, or ecclesiastical government, the civil courts cannot inquire into the jurisdiction of the ecclesiastical court even though there is incidentally involved in the question property acquired for the general use of a religious congregation, but not devoted by the instrument under which it is held to the teaching of any particular doctrine or dogma.[4] For the purposes of this rule it can make no difference whether the governing authority is confided to one man or to a synod or conference, nor whether the mode of procedure permitted to such person is in accord with the ordinary course of investigations or trials. Each religious organization must be the judge of its own laws.[5]

Where Rights of Property Are in Question, however, the courts will inquire whether or not the organic rules and forms of proceedings have been followed.[6] When tested by such organic rules and forms it is found that the proceedings of the tribunal were without jurisdiction, these proceedings will be held void in so far as they necessarily and directly involve property rights,[7] ecclesiastical

Minnesota. — East Norway Lake Norwegian Evangelical Lutheran Church *v.* Halvorson, 42 Minn. 503.

Mississippi. — Mt. Helm Baptist Church *v.* Jones, 79 Miss. 488.

Missouri. — Prickett *v.* Wells, 117 Mo. 502; Fulbright *v.* Higginbotham, 133 Mo. 668.

Nebraska. — Bonacum *v.* Harrington, (Neb. 1902) 91 N. W. Rep. 886; Wehmer *v.* Fokenga, 57 Neb. 510; Pounder *v.* Ashe, 44 Neb. 672; Powers *v.* Budy, 45 Neb. 208; Moseman *v.* Heitshusen, 50 Neb. 420; Rottmann *v.* Bartling, 22 Neb. 375.

New Jersey. — Den *v.* Bolton, 12 N. J. L. 206.

New York. — Connitt *v.* Reformed Protestant Dutch Church, 54 N. Y. 551; Baxter *v.* McDonnell, 155 N. Y. 83; Isham *v.* Fullager, (Supm. Ct. Spec. T.) 14 Abb. N. Cas. (N. Y.) 363; Field *v.* Field, 9 Wend. (N. Y.) 394; Bowden *v.* McLeod, 1 Edw. (N. Y.) 588; Waller *v.* Howell, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 236; McGuire *v.* St. Patrick's Cathedral, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 781.

Ohio. — Harrison *v.* Hoyle, 24 Ohio St. 254; Rike *v.* Floyd, 3 Ohio Cir. Dec. 359, 6 Ohio Cir. Ct. 80.

Pennsylvania. — Krecker *v.* Shirey, 163 Pa. St. 534; McAuley's Appeal, 77 Pa. St. 397; German Reformed Church *v.* Com., 3 Pa. St. 282.

Tennessee. — Travers *v.* Abbey, 104 Tenn. 665; Nance *v.* Busby, 91 Tenn. 303.

Canada. — Ash *v.* Methodist Church, 27 Ont. App. 602.

The Contrary View, opposed to the weight of authority, has been taken in *Vermont.* Smith *v.* Nelson, 18 Vt. 511.

The True Grounds for the Noninterference of Civil Courts with the decrees of ecclesiastical courts where no property rights are involved has been stated to be that the civil authorities have, under the principles of religious liberty, no jurisdiction in matters purely religious or ecclesiastical; not because the decrees of the ecclesiastical courts are final and conclusive. Watson *v.* Garvin, 54 Mo. 353.

1. Rodgers *v.* Burnett, 108 Tenn. 173.

2. Pounder *v.* Ashe, 44 Neb. 672; Bonacum *v.* Harrington, (Neb. 1902) 91 N. W. Rep. 886; Connitt *v.* Reformed Protestant Dutch Church, 54 N. Y. 551; Sampsell *v.* Escher, 11 Ohio Dec. (Reprint) 351, 26 Cinc. L. Bul. 156; Nance *v.* Busby, 91 Tenn. 303; Travers *v.* Abbey, 104 Tenn. 665. See also Wallace *v.* United Presb. Church, 201 Pa. St. 292.

3. Chase *v.* Cheney, 58 Ill. 509, 11 Am. Rep. 95; Pounder *v.* Ashe, 36 Neb. 564; Waller *v.* Howell, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 236; Rike *v.* Floyd, 3 Ohio Cir. Dec. 359; O'Hara *v.* Stack, 90 Pa. St. 490; Nance *v.* Busby, 91 Tenn. 303. See also Schweiker *v.* Husser, 146 Ill. 399; Lamb *v.* Cain, 129 Ind. 486.

4. Watson *v.* Jones, 13 Wall. (U. S.) 679; Brundage *v.* Deardorf, (C. C. A.) 92 Fed. Rep. 214.

5. Bonacum *v.* Harrington, (Neb. 1902) 91 N. W. Rep. 886.

6. **Where Property Rights Are Involved.** — Kinkead *v.* McKee, 9 Bush (Ky.) 535; Bear *v.* Heasley, 98 Mich. 279; Pounder *v.* Ashe, 36 Neb. 564; O'Hara *v.* Stack, 90 Pa. St. 490; Batterson *v.* Thompson, 8 Phila. (Pa.) 251.

7. Schweiker *v.* Husser, 146 Ill 399; Bear *v.* Heasley, 98 Mich. 279; Pounder *v.* Ashe, 36 Neb. 564; Sampsell *v.* Escher, 11 Ohio Dec. (Reprint) 351, 26 Cinc. L. Bul. 156; Krecker *v.* Shirey, 163 Pa. St. 534.

Fraud in Procurement of Judgment Ground for Setting Aside. — Sampsell *v.* Escher, 11 Ohio Dec. (Reprint) 351, 26 Cinc. L. Bul. 156.

judicatories being as much bound by the constitution which is the supreme law of their church as the state and federal governments are by their respective constitutions.[1]

The English Doctrine is that it is the duty of the court in such cases to inquire and decide for itself not only what was the nature and power of the church judicatories, but also the true standard of faith in the church organization and which of the contending parties adheres thereto.[2]

3. Enforcement of Trust — *a.* IN GENERAL. — An individual or association of individuals may dedicate property by way of trust to the purpose of sustaining and propagating definite doctrines or principles, provided that in so doing they violate no law of morality and give to the instrument by which their purpose is evident the formalities required by law. It is the obvious duty of the court, in a case properly made, to see that the property so dedicated is not diverted from the trust thus attached to its use. The general doctrine of courts of equity as to charities is equally applicable to trusts created for religious purposes.[3]

Under Common Law Power. — If the trustees of a religious society which has the legal control of the temporalities of a congregation abuse the trust imposed in them and misapply the funds of the society, the court has power at common law to compel them to account for the misapplication notwithstanding statutory provisions excepting religious corporations from the visitorial power of the court.[4]

b. NATURE OF TRUST — (1) *How Determined* — (a) **Where Conveyance Is Explicit.** — The intention of the donors is the criterion by which to determine the purposes to which the property of a church has been dedicated, and if the conveyance expresses that intention clearly, that must govern.[5]

(b) **Conveyance to Particular Church.** — Where a conveyance is made to a religious society not for any specified purpose, the congregation may use it for any lawful purpose, and, in determining to what use it shall be appropriated, in the absence of any law or usage of the church to the contrary, the will of a majority of the congregation governs. But where the law and usage of the denomination prescribe and define what is required to constitute a particular church, and property is conveyed to the use of a particular church, the standards of the denomination furnish the criteria by which the identity of

1. Brundage *v.* Deardorf, 55 Fed. Rep. 839; Hatfield *v.* De Long, 156 Ind. 207; Watson *v.* Garvin, 54 Mo. 353. See also Wehmer *v.* Fokenga, 57 Neb. 510; Lemp *v.* Raven, 113 Mich. 375.

2. Atty.-Gen. *v.* Pearson, 3 Meriv. 353; Craigdallie *v.* Aikman, 2 Bligh 529; Watson *v.* Jones, 13 Wall. (U. S.) 679.

3. **Trusts** — *United States.* — Watson *v.* Jones, 13 Wall. (U. S.) 679; Brundage *v.* Deardorf, (C. C. A.) 92 Fed. Rep. 214, 55 Fed. Rep. 839.

Illinois. — Kuns *v.* Robertson, 154 Ill. 394; Happy *v.* Morton, 33 Ill. 398.

Iowa. — McBride *v.* Porter, 17 Iowa 203.

Massachusetts. — Canadian Religious Assoc. *v.* Parmenter, 180 Mass. 415.

Michigan. — Fuchs *v.* Meisel, 102 Mich. 357.

Missouri. — Fulbright *v.* Higginbotham, 133 Mo. 668; Schmidt *v.* Hess, 60 Mo. 591.

Nebraska. — Bonacum *v.* Harrington, (Neb. 1902) 91 N. W. Rep. 886; Pounder *v.* Ashe, 44 Neb. 672.

New Hampshire. — Hale *v.* Everett, 53 N. H. 9, 16 Am. Rep. 82.

New Jersey. — Hendrickson *v.* Shotwell, 1 N. J. Eq. 577.

New York. — York First Reformed Presb. Church *v.* Bowden, (Supm. Ct. Gen. T.) 14 Abb. N. Cas. (N. Y.) 356; Isham *v.* Fullager, (Supm. Ct. Spec. T.) 14 Abb. N. Cas. (N. Y.) 363; Field *v.* Field, 9 Wend. (N. Y.) 394; Miller *v.* Gable, 2 Den. (N. Y.) 492; Kniskern *v.* Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439.

Pennsylvania. — Roshi's Appeal, 69 Pa. St. 462, 8 Am. Rep. 275; Schlichter *v* Keiter, 156 Pa. St. 119; Schnorr's Appeal, 67 Pa. St. 138, 5 Am. Rep. 415.

South Carolina. — Presbyterian Church *v.* Donnom; 1 Desaus. (S. Car.) 154.

Tennessee. — Nance *v.* Busby, 91 Tenn. 303; Rodgers *v.* Burnett, 108 Tenn. 173.

West Virginia. — Kreglo *v.* Fulk, 3 W. Va. 74.

Wisconsin. — Fadness *v.* Braunborg, 73 Wis. 257; Franke *v.* Mann, 106 Wis. 118.

Canada. — Brewster *v.* Hendershot, 27 Ont. App. 232.

And see the title CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 925.

4. Hartford First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 296.

5. People *v.* Steele, 2 Barb. (N. Y.) 397.

the church is to be determined, and the decision of that question cannot be affected by mere numbers.[1]

(c) **Where Conveyance Is Indefinite.** — *aa.* In General. — If the language of the conveyance is indefinite, extrinsic evidence, such as the tenets held by the donor or the faith taught by the donees, and the circumstances under which the gift was made, and the denominational name of the donee at the time of the gift, may be resorted to to limit and define the trust in respect to doctrines usually considered fundamental, but not as to minor or less important shades of doctrine not deemed fundamental.[2] Thus, where a trust has been created for the benefit of a particular class of persons, and there is nothing in the deed expressly declaring the particular nationality or location of the society to which the advantages of the trust are to inure, the court will be governed by the circumstances surrounding the trust at its inception, and if there is sufficiently evinced an intention by the grantor to confine it to particular persons of a particular locality, the court will give effect to that intention and restrict the trust to those persons and to that locality most probably intended to be benefited.[3]

bb. Usage of Congregation. — Where a trust is created for religious worship and it cannot be discovered from the instrument creating the trust what was the nature of the religious worship intended by it, it will be deemed to have been intended to support the worship followed by the usage of the congregation.[4]

cc. Religious Books. — Where the conveyance refers expressly or by implication to the constitution, by-laws, or other written documents of the organization, courts will look to the declarations thereof to ascertain the trust and the purpose for which the property was conveyed.[5] The court may also resort to the books containing the creed or tenets of the religious faith of the grantor and to ecclesiastical history to ascertain his theological belief, even though there is no specific reference to them.[6]

c. When Court Will Interfere — (1) *Diversion Must Be Clearly Shown.* — Where the intervention of a civil court is sought, the trust and the abuse of it must be clearly established in accordance with the rules by which courts are governed in administering justice. To justify the interference of the court there must be a real and substantial departure from the purposes of the trust, such as amounts to a perversion of it;[7] or the alleged deviation

1. Louisville First Presb. Church *v.* Wilson, 14 Bush (Ky.) 252; Henry *v.* Deitrich, 84 Pa St. 286. See also Kniskern *v.* Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439; People *v.* Steele, 2 Barb. (N. Y.) 397.

2. **Extrinsic Evidence.**— Gibson *v.* Armstrong, 7 B. Mon. (Ky.) 481; Princeton *v.* Adams, 10 Cush. (Mass) 132; Hale *v.* Everett, 53 N. H. 71, 16 Am Rep. 82; People *v.* Steele, 2 Barb. (N Y.) 397; Lawyer *v.* Cipperly, 7 Paige (N. Y.) 281; Bowden *v.* McLeod, 1 Edw. (N. Y.) 588; Kniskern *v.* Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439; Presbyterian Congregation *v.* Johnston, 1 W. & S. (Pa.) 9.

Doctrines Presumed from Title of Organization. — Hale *v.* Everett, 53 N. H. 9, 16 Am. Rep. 82.

3. Ebbinghaus *v.* Killian, 1 Mackey (D. C.) 247.

4. Atty.-Gen. *v.* Pearson, 3 Meriv. 353; Greek Catholic Church *v.* Orthodox Greek Church, 195 Pa. St. 425; Roshi's Appeal, 69 Pa. St. 462, 8 Am. Rep. 275; Sutter *v.* First Reformed Dutch Church, 42 Pa. St. 503; McGinnis *v.* Watson, 41 Pa. St. 9; Presbyterian Congregation *v.* Johnston, 1 W. & S. (Pa.) 9. See also Kniskern *v.* Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439.

5. Fuchs *v.* Meisel, 102 Mich. 357.

6. Schmidt *v.* Hess, 60 Mo. 591; Kniskern *v.* Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439.

7. **Grounds for Interference** — *Georgia.* — Bates *v.* Houston, 66 Ga. 198.

Illinois. — Kuns *v.* Robertson, 154 Ill. 394; Lawson *v.* Kolbenson, 61 Ill. 405; Happy *v.* Morton, 33 Ill. 398.

Indiana. — Lamb *v.* Cain, 129 Ind. 486.

Iowa. — Mt. Zion Baptist Church *v.* Whitmore, 83 Iowa 138.

Massachusetts. — Atty.-Gen. *v.* Union Soc., 116 Mass. 167.

New York. — Burrel *v.* Associate Reformed Church, 44 Barb. (N. Y.) 282; Miller *v.* Gable, 2 Den. (N. Y.) 492; Kniskern *v.* Lutheran Churches, 1 Sandf. Ch. (N. Y.) 510; Hartford First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 304.

Wisconsin. — Fadness *v.* Braunborg, 73 Wis. 257.

Payment of Salary to Deposed Minister Enjoined. — Robertson *v.* Bullions, 11 N. Y. 243; Petty *v.* Tooker, 21 N. Y. 267; Isham *v.* Dunkirk First Presb. Church (Supm. Ct. Spec. T.) 63 How. Pr. (N. Y.) 465.

from the true standards of faith of the denomination should be so patent as to enable the court from an examination of the historical and doctrinal practices of the church to say that in respect to the doctrine in question there has been an essential change and departure.[1]

(2) *Court Will Not Control Discretion.* — If the society keeps within the limitations imposed upon it by its charter in executing the trust, it may exercise its discretion in the manner of its execution. Thus, there is no dereliction of duty where the society is authorized to sustain a church in a certain district, if, after having built a church thereon, it subsequently moves to another part of the district, and a minority which continues to worship at the former church cannot on that ground claim the property of the society.[2] Also, where there are two doctrines recognized by the denomination of which a church is a part, the adherence of the church to either of these two does not constitute a departure from the faith of the denomination so as to interfere with the title to property.[3]

Change of Minister. — It is competent for a majority of the voters in a religious society to discharge a minister and employ another, and this action does not operate in law as a perversion of the trust, nor as an exclusion of those members of the society who wish to retain the minister.[4]

(3) *Removal of Church.* — The cession or donation of property for church purposes by the local members of a community is, ordinarily, for securing religious privileges at the place where the building is situated, and the members of the church have no authority to divert the use of such property by voting it away to other persons at a different place.[5]

(4) *Sale of Church.* — Thus a church edifice erected by voluntary contributions, and under agreement that it shall be used only for certain specified purposes, cannot be sold without adequate reason therefor, and where the effect would be to divert the funds arising from the sale to different purposes.[6]

(5) *Diversion of Educational Fund.* — A fund created by a religious society for the instruction and education of children in the faith and doctrine of the society as professed at the time of the creation of the fund cannot be diverted from its original purpose, and if a diversion be made or attempted a court of equity will interpose and correct the procedure.[7]

(6) *Control Over Trustees* — (a) **In General.** — Statutory power in regard to the appointment, change, and removal of trustees gives the court no power to determine how the trust shall be administered, but only who shall administer it; a judgment going further than this is void and may be questioned collaterally.[8] To warrant the interference of the courts in a question of administering the trust there must be a palpable breach of the trust on the part of the trustee.[9]

An Attempted Diversion of the trust property by the trustees will warrant equitable interference.[10]

(b) **Trustees May Exercise Discretion.** — Courts cannot control the discretion of trustees in the management of church funds so long as they do not violate

1. Kuns *v.* Robertson, 154 Ill. 394.
2. Tibballs *v.* Bidwell, 1 Gray (Mass.) 399.
3. Bennett *v.* Morgan, (Ky. 1902) 66 S. W. Rep. 287.
4. Fadness *v.* Braunborg, 73 Wis. 257.
5. McRoberts *v.* Moudy, 19 Mo. App. 26; Cushman *v.* Church of Good Shepherd, 162 Pa. St. 280.
6. Baker *v.* Ducker, 79 Cal. 365; Avery *v.* Baker, 27 Neb. 388, 20 Am. St. Rep. 672. See also Hendrickson *v.* Shotwell, 1 N. J. Eq. 577.
7. Hendrickson *v.* Shotwell, 1 N. J. Eq. 577; Field *v.* Field, 9 Wend. (N. Y.) 395.
8. **Control Over Trustee.** — Wade *v.* Hancock, 76 Va. 620; Field *v.* Field, 9 Wend. (N. Y.) 394. **Court Cannot Remove Trustee Appointed under Statute.** — Robertson *v.* Bullions, 11 N. Y. 243. **Disposition to Violate Trust as Ground for Removal.** — Harper *v.* Straws, 14 B. Mon. (Ky.) 39. **Power of Court to Appoint Successor.** — Nash *v.* Sutton, 117 N. Car. 231.
9. Lawyer *v.* Cipperly, 7 Paige (N. Y.) 281; Weld *v.* May, 9 Cush. (Mass.) 181.
10. **Diversion.** — Christ Church *v.* Church of Holy Communion, 37 Leg. Int. (Pa.) 272, 14 Phila. (Pa.) 61; St. Mary's Church Case, 7 S. & R. (Pa.) 539. See also the cases cited in the notes, *supra*.

their charter; they are responsible to their constituents alone.[1] But where trustees apply to the court for aid and direction respecting the exchange of securities or investments of funds, the court has power to make the necessary decree in the premises.[2] And where church property is held in trust for religious purposes the legislature may authorize the trustees to convert the real estate into personal for the purpose of carrying out the object of the trust.[3]

(c) **Application of Funds to Trust Purposes Compelled.** — Where a fund is in the hands of a trustee for the benefit of a church, a bill will lie to compel the trustee to apply the fund to the purposes for which the trust was created.[4] A treasurer who has invested funds of the society for which he acts as such in his own name will be held to answer for them as trustee.[5]

(d) **Alienation of Legal Title.** — An alienation of the legal title by the trustee of a charitable trust will be considered *per se* as a breach of trust, unless he can show that his action was beneficial to the trust.[6]

(e) **Removal of Trustees.** — It must be shown positively that the property of the society will be impaired or the rights of beneficiaries imperiled before the removal of a trustee will be ordered at the instance of a few of the members.[7]

d. EFFECT OF LONG ACQUIESCENCE. — Where the original trustees appointed by the founder of a religious charity applied the fund to the support of certain religious doctrines, and that application has been long continued and acquiesced in, a court of equity will not interfere with the application on the ground that the founder intended to limit the benefit of his charity to the support of different doctrines, unless that intention was plainly expressed by the donor.[8]

e. WHO MAY SUE. — While there are persons qualified within the meaning of the original dedication of the trust property and they are willing to conform to the terms of the trust and are so interested in the execution as to have a standing in court, they can prevent the diversion of the property or fund to other and different uses.[9]

4. Property Rights in Case of Schism — *a.* IN GENERAL. — Where a church acquires property when it is connected with a denomination as a subordinate branch of such denomination, it loses title to the property so acquired by severing its connection with the denomination.[10] This rule is not to be interpreted, however, as meaning that no congregation can change any material part of its principles or practices without forfeiting its property.[11]

Upon Rights of Members. — Members who, dissenting from the use of the property for the denominational purposes for which it was acquired, voluntarily leave the society and enter into another more consonant with their views, must be regarded as abandoning the rights and privileges which they would

1. **Trustees' Discretion.** — Episcopal Church *v.* Barksdale, 1 Strobh. Eq. (S. Car.) 197; Field *v.* Field, 9 Wend. (N. Y.) 394.

2. M. E. Society *v.* Harriman, 54 N. H. 444.

3. Sohier *v.* Trinity Church, 109 Mass. 1.

4. Skilton *v.* Webster, Bright. (Pa.) 203; Wilson *v.* Presbyterian Church, 2 Rich. Eq. (S. Car.) 192. See also Holmes *v.* Wesley M. E. Church, 58 N. J. Eq. 327.

5. Reformed Protestant Dutch Church *v.* Mott, 7 Paige (N. Y.) 77.

6. Beckwith *v.* St. Philip's Parish, 69 Ga. 564.

7. Determann *v.* Luehrsmann, 74 Iowa 275.

8. Atty.-Gen. *v.* Dublin, 38 N. H. 459.

9. Watson *v.* Jones, 13 Wall. (U. S.) 679; Brundage *v.* Deardorf, (C. C. A.) 92 Fed. Rep. 214. See also Nash *v.* Sutton, 117 N. Car. 231.

10. **Church Leaving the Denomination.** — McBride *v.* Porter, 17 Iowa 203; Mt. Helm Baptist Church *v.* Jones, 79 Miss. 488; Bonacum *v.* Harrington, (Neb. 1902) 91 N. W. Rep. 886; Den *v.* Pilling, 24 N. J. L. 653; M. E. Church *v.* Wood, 5 Ohio 283; McAuley's Appeal, 77 Pa. St. 397; Roshi's Appeal, 69 Pa. St. 462, 8 Am. Rep. 275; Schnorr's Appeal, 67 Pa. St. 138, 5 Am. Rep. 415; Jones *v.* Wadsworth, 11 Phila. (Pa.) 227, 33 Leg. Int. (Pa.) 390; Harmon *v.* Dreher, Spears Eq. (S. Car.) 87; Rodgers *v.* Burnett, 108 Tenn. 173. See also Kinkead *v.* McKee, 9 Bush (Ky.) 535; Sutter *v.* First Reformed Dutch Church, 42 Pa. St. 503.

11. McGinnis *v.* Watson, 41 Pa. St. 9; Paris First Baptist Church *v.* Fort, 93 Tex. 215.

Mere Change of Name Does Not Affect Property Right. — Cahill *v.* Bigger, 8 B. Mon. (Ky.) 211.

Secession a Question of Fact. — Hale *v.* Everett, 53 N. H. 9, 16 Am. Rep. 82.

be entitled to enjoy if they had not withdrawn.[1] But a majority of a congregation excluded from the church building by a minority and holding its meetings in another place does not thereby secede where it forms no new congregation and maintains the same officers and is recognized as the original church by the council of the denomination.[2] Nor do the members of a faction withdraw from the church by keeping up a separate organization, supporting only their own organization, holding separate services at separate times under another pastor and attempting to discharge the original pastor.[3] The mere fact that the members withdrawing from the control of the supreme body of the denomination preserve identical theological belief and religious observances with those of the body from which they withdraw, does not prevent them from losing title to the property.[4]

A Mere Resolution to Secede from a religious society without any action by its higher authorities does not deprive any member of membership.[5]

b. IN CASE OF SUBORDINATE CHURCH — (1) *In General.* — In case of schism in a church which is in connection with and a constituent part of an ecclesiastical organization and which has a head invested by its constitution or recognized usage with supervisory and supreme control over the constituent parts to determine all questions producing schisms and division between the members and to recognize and decide what faction is in the right, it is the well settled law of the civil courts that the title to the property is in that part of the congregation which is acting in harmony with its own law, and the ecclesiastical laws, usages, customs and principles which were accepted among them before the dispute began are the standards for determining which party is in the right. In such cases it is the duty of the court to decide in favor of that faction, whether a majority or minority, which adheres to the doctrines maintained by the congregation.[6] It would seem that the only exception to this rule is the case of an usurpation of power in the governing body, so

1. Isham *v.* Dunkirk First Presb. Church, (Supm. Ct. Spec. T.) 63 How. Pr. (N. Y.) 465. See also *supra*, this title, *Relation to Members — Withdrawal.*

2. Bouldin *v.* Alexander, 15 Wall. (U. S.) 131.

3. West Koshkonong Congregation *v.* Ottesen, 80 Wis. 62; Holm *v.* Holm, 81 Wis. 374. See also Weckerly *v.* Geyer, 11 S. & R. (Pa.) 35.

4. Den *v.* Bolton, 12 N. J. L. 206; Schlichter *v.* Keiter, 156 Pa. St. 119.

5. Den *v.* Pilling, 24 N. J. L. 653.

6. **In Case of Schism — Subordinate Church** — *England.* — Atty.-Gen. *v.* Pearson, 3 Meriv. 400.

Canada. — Brewster *v.* Hendershot, 27 Ont. App. 232.

United States. — Bouldin *v.* Alexander, 15 Wall. (U. S.) 131; Watson *v.* Jones, 13 Wall. (U. S.) 679; Church of Jesus Christ, etc., *v.* Church of Christ, 60 Fed. Rep. 937; Brundage *v.* Deardorf, 55 Fed. Rep. 839.

California. — Horsman *v.* Allen, 129 Cal. 131; Baker *v.* Ducker, 79 Cal. 365.

Illinois. — Church of Christ *v.* Christian Church, 193 Ill. 144; Ferraria *v.* Vasconcelles, 23 Ill. 456. *Compare* Ferraria *v.* Vasconcellos, 31 Ill. 25.

Indiana. — Smith *v.* Pedigo, 145 Ind. 361; White Lick Quarterly Meeting of Friends *v.* White Lick Quarterly Meeting of Friends, 89 Ind. 136; Gaff *v.* Greer, 88 Ind. 122, 45 Am. Rep. 449.

Iowa. — McBride *v.* Porter, 17 Iowa 203; Mt. Zion Baptist Church *v.* Whitmore, 83 Iowa 138; Auracher *v.* Yerger, 90 Iowa 558. See also Dressen *v.* Brameier, 56 Iowa 756.

Kansas. — Venable *v.* Ebenezer Baptist Church, 25 Kan. 177.

Kentucky. — Brown *v.* Monroe, 80 Ky. 443; Louisville First Presb. Church *v.* Wilson, 14 Bush (Ky.) 252; Lewis *v.* Watson, 4 Bush (Ky.) 228; Berryman *v.* Reese, 11 B. Mon. (Ky.) 287; Gibson *v.* Armstrong, 7 B. Mon. (Ky.) 481.

Michigan. — Fuchs *v.* Meisel, 102 Mich. 357; Bear *v.* Heasley, 98 Mich. 279.

Mississippi. — Mt. Helm Baptist Church *v.* Jones, 79 Miss. 488.

Missouri. — McRoberts *v.* Moudy, 19 Mo. App. 26.

New Hampshire. — Hale *v.* Everett, 53 N. H. 9, 16 Am. Rep. 82; Atty.-Gen. *v.* Dublin, 38 N. H. 459.

New Jersey. — Associate Reformed Church *v.* Theological Seminary, 4 N. J. Eq. 77; True Reformed Dutch Church *v.* Iserman, 64 N. J. L. 506.

New York. — Isham *v.* Dunkirk First Presb. Church, (Supm. Ct. Spec. T.) 63 How. Pr. (N. Y.) 465; Field *v.* Field, 9 Wend. (N. Y.) 394.

Ohio. — Rike *v.* Floyd, 3 Ohio Cir. Dec. 359, 6 Ohio Cir. Ct. 80; M. E. Church *v.* Wood, Wright (Ohio) 12, 5 Ohio 283.

Oregon. — Philomath College *v.* Wyatt, 27 Oregon 461.

Pennsylvania. — Bose *v.* Christ, 193 Pa. St. 13; Krecker *v.* Shirey, 163 Pa. St. 534; Schlichter *v.* Keiter, 156 Pa. St. 119; Ramsey's Appeal, 88 Pa. St. 60; McAuley's Appeal, 77 Pa. St. 397; Roshi's Appeal, 69 Pa. St. 462, 8

revolutionary in its character as to result either in the creation of a new and essentially different organization or in such a radical change of the articles of faith as to constitute an essentially different religion from that previously followed by the church.[1]

(2) *Division under Ecclesiastical Authority.* — In case of a voluntary division in the denomination where the controlling ecclesiastical body of the denomination allows each congregation to decide for itself to which branch of the division it will adhere, this question is to be determined according to the vote of the majority, and the minority cannot thereafter retain control of the property on the ground that such action of the majority constitutes a diversion.[2] It seems also that the church may refuse to adhere to either denomination and will not thereby lose the title to property conveyed to it specifically.[3]

(3) *Dissolution of Voluntary Connection.* — Where the connection of the church with a subdivision of the denomination is purely voluntary, a dissolution of the connection is not a violation of the condition on which the congregation holds its property.[4]

(4) *Effect of Secession of Chapel.* — Chapels and other subordinate organizations founded in connection with a congregation or parish will not be allowed to secede from the church by which they were established and carry with them the property acquired in part or in whole by the contributions of the parent church or its members, or that which persons not connected with either organization may have given for its support as an adjunct to the parent church.[5]

(5) *Property Held Independent of Denomination.* — Where property is purchased by a congregation or society to be held for its benefit free from the interference and control of the denomination at large, the ownership of the property is in the congregation or society and will remain with the majority in case a minority secedes and sets up a separate organization.[6] The fact that persons not members of the church society contributed to the fund which was used by it in the payment of land sought to be impressed with a trust for charitable uses does not make them donors of the land itself, nor authorize them to impose restrictions on the right of alienation, the church not being a mere donee under a donor for charitable uses, though the grantor as to the balance of the price was a donor.[7]

(6) *Effect of Return to Denomination.* — A subsequent return of a church which has thus withdrawn from the denomination does not reinstate it in its property rights.[8]

Am. Rep. 275; Schnorr's Appeal, 67 Pa. St. 138, 5 Am. Rep. 415; Winebrenner *v.* Colder, 43 Pa. St. 244; Sutter *v.* First Reformed Dutch Church, 42 Pa. St. 503; McGinnis *v.* Watson, 41 Pa. St. 9; Trustees *v.* Sturgeon, 9 Pa. St. 321; App *v.* Lutheran Congregation, 6 Pa. St. 201; Greek Catholic Church *v.* Orthodox Greek Church, 195 Pa. St. 425.

South Carolina. — Wilson *v.* Presbyterian Church, 2 Rich. Eq. (S. Car.) 192.

Tennessee. — Rodgers *v.* Burnett, 108 Tenn. 173; Reeves *v.* Walker, 8 Baxt. (Tenn.) 277.

Texas. — Peace *v.* McGregor First Christian Church, 20 Tex. Civ. App. 85.

Virginia. — Hoskinson *v.* Pusey, 32 Gratt. (Va.) 428; Brooke *v.* Shacklett, 13 Gratt. (Va.) 301; Finley *v.* Brent, 87 Va. 103.

West Virginia. — Venable *v.* Coffman, 2 W. Va. 320.

Wisconsin. — Franke *v.* Mann, 106 Wis. 118.

And see the title CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 925, note.

Receiving Minister from Regular Appointing Power as Evidence of Regularity. — Gibson *v.* Armstrong, 7 B. Mon. (Ky.) 481; Isham *v.* Fullager, (Supm. Ct., Spec. T.) 14 Abb. N. Cas. (N. Y.) 363; Krecker *v.* Shirey, 163 Pa. St. 534; Brooke *v.* Shacklett, 13 Gratt. (Va.) 301.

1. Horsman *v.* Allen, 129 Cal. 131. See also Bear *v.* Heasley, 98 Mich. 279.

2. Gibson *v.* Armstrong, 7 B. Mon. (Ky.) 481; Brooke *v.* Shacklett, 13 Gratt. (Va.) 301.

3. Presbyterian Congregation *v.* Johnston, 1 W. & S. (Pa.) 9.

4. Lawson *v.* Kolbenson, 61 Ill. 405; Bartholomew *v.* Zion's English Evangelical Lutheran Congregation, 35 Ohio St. 567; Heckman *v.* Mees, 16 Ohio 583.

5. Christ Church *v.* Church of Holy Communion, 14 Phila. (Pa.) 61, 37 Leg. Int. (Pa.) 272; Alexander Presb. Church *v.* Presbyterian Church, (Supm. Ct. Spec. T.) 46 How. Pr. (N. Y.) 312.

6. Dubs *v.* Egli, 167 Ill. 514.

Land Purchased by a Religious Society as a Corporation Is Subject to Control of Majority. — Keyser *v.* Stansifer, 6 Ohio 364.

7. Holmes *v.* Wesley M. E. Church, 58 N. J. Eq. 327.

8. Schnorr's Appeal, 67 Pa. St. 138, 5 Am. Rep. 415.

c. In Case of Independent Church — (1) *In General.* — There are churches which are strictly congregational or independent organizations, each being governed solely within itself, either by a majority of its members or by such other local organization as it may have instituted for the purpose of ecclesiastical government, and its property being held either by way of purchase or donation with no specific trust attached. In such cases, where there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of such property must be determined by the ordinary principles which govern voluntary associations. If the majority rules, then the numerical majority of members must control the right to the use of the property. If the power and control is vested in officers of the congregation, then those who adhere to the acknowledged organization by which the body is governed are entitled to the use of the property. The minority, in choosing to separate themselves into a distinct body and refusing to recognize the authority of the governing body, can claim no rights in the property from the fact of their membership in the church or congregation. There being no trust imposed upon the property when purchased or given, the court will not imply one for the purpose of expelling from its use those who by regular order or succession constitute the church, merely because they have changed in some respect their views of religious truth.[1] Even though the denomination of which the church is a part has only advisory power as to questions that may arise in the individual churches comprising it, yet if two factions of one of such churches, each faction claiming to be the true church, present their claims to the denominational body, its decision, while not conclusive upon the court, is entitled to great weight.[2]

(2) *Property Charged with Trust.* — If the property charged with a trust for the support of particular views or opinions is confided to a religious congregation of the independent or congregational form of church government, it is not in the power of the majority of that congregation, however proportioned, to carry the property by reason of a change of views on religious subjects to the support of new and conflicting doctrines.[3] That an order of court was made allowing a change of name is no authority for such a diversion.[4] But if the terms on which the property is acquired are not such as to create a trust for the support of the particular denomination with which the church is affiliated at the time, a secession of the church from the organization thereafter does not affect its right to the trust property.[5]

1. Rule in Case of Independent Church — *United States.* — Watson *v.* Jones, 13 Wall. (U. S.) 679.

Kentucky. — Shannon *v.* Frost, 3 B. Mon. (Ky.) 253; Harper *v.* Straws, 14 B. Mon. (Ky.) 39.

Maryland. — Wehr *v.* German Evangelical Lutheran Congregation, 47 Md. 177.

Massachusetts. — Canadian Religious Assoc. *v.* Parmenter, 180 Mass. 415.

Minnesota. — East Norway Lake Norwegian Evangelical Lutheran Church *v.* Halvorson, 42 Minn. 503.

Texas. — Fort *v.* Paris First Baptist Church, (Tex. Civ. App. 1899) 55 S. W. Rep. 402; Gipson *v.* Morris, (Tex. Civ. App. 1902) 67 S. W. Rep. 433; Paris First Baptist Church *v.* Fort, 93 Tex. 215; Jarrell *v.* Sproles, 20 Tex. Civ. App. 387.

2. Bouldin *v.* Alexander, 15 Wall. (U. S.) 131; Smith *v.* Pedigo, 145 Ind. 361; Harrison *v.* Hoyle, 24 Ohio St. 254.

3. Where Property Charged with Trust — *United States.* — Watson *v.* Jones, 13 Wall. (U. S.) 679.

Illinois. — Nelson *v.* Benson, 69 Ill. 27.

Indiana. — Smith *v.* Pedigo, 145 Ind. 361.

Iowa. — Mt. Zion Baptist Church *v.* Whitmore, 83 Iowa 138; Christian Church *v.* Carpenter, 108 Iowa 647; Park *v.* Chaplin, 96 Iowa 55.

Kentucky. — Harper *v.* Straws, 14 B. Mon. (Ky.) 39; Curd *v.* Wallace, 7 Dana (Ky.) 190, 32 Am. Dec. 85.

Massachusetts. — Baker *v.* Fales, 16 Mass. 488; Stebbins *v.* Jennings, 10 Pick. (Mass.) 172. See also Sawyer *v.* Baldwin, 11 Pick. (Mass.) 492.

Mississippi. — Mt. Helm Baptist Church *v.* Jones, 79 Miss. 488.

New Hampshire. — Hale *v.* Everett, 53 N. H. 9, 16 Am. Rep. 82.

Tennessee. — Nance *v.* Busby, 91 Tenn. 303; Deaderick *v.* Lampson, 11 Heisk. (Tenn.) 523.

Texas. — Peace *v.* McGregor First Christian Church, 20 Tex. Civ. App. 85.

Wisconsin. — Franke *v.* Mann, 106 Wis. 118.

4. Baker *v.* Ducker, 79 Cal. 365.

5. Burrell *v.* Associate Reformed Church, 44 Barb. (N. Y.) 282; Schnorr's Appeal, 67 Pa. St. 138, 5 Am. Rep. 415; Smith *v.* Nelson, 18 Vt. 511.

Trust Property Forfeited by Attaching Church to Another Synod of Same Denomination. — Rodgers *v.* Burnett, 108 Tenn. 173.

In New York under a Former Statute[1] the members of the congregation of a religious corporation had power to divert the church property from the dissemination of the views of the persons acquiring it to the dissemination of any other view, whether religious or secular, which was sanctioned and adopted by a voting majority of the congregation.[2] The purpose of this enactment was not to interfere with the proper functions of ecclesiastical judicatories, but simply to confine them to their proper limits. It was the intention of the legislature to place the control of the temporal affairs of these societies in the hands of the majority of the corporators independent of priest, bishop, presbytery, synod, or other ecclesiastical judicatory.[3] This did not, however, allow the diversion of property conveyed to the church for the support of a particular faith.[4] By a subsequent enactment, instead of the property being so held subject to the disposition of the voting majority of the congregation, the trustees were required to hold and devote it to the uses and purposes of the denomination in which the society was included that obtained and required it.[5]

d. ALLOTMENT OF PROPERTY BETWEEN FACTIONS — (1) *Where Church Divides under Ecclesiastical Authority.* — Where the denomination or the church is divided in pursuance of the proper ecclesiastical authority, the common property of the organization is to be divided between the two new organizations thus created.[6]

Where the Constitution of the Society Provides for a Division of the Property in case of a schism, in order that a division may be had under this provision there must be a division or separation of the church into two religious bodies and a separate organization of the original church. A bill for the division of the property cannot be maintained by individual members of the congregation.[7] A schism, within the meaning of such provision, is a division or separation of the members on religious questions. It does not apply to a difficulty between them arising out of any legal election of church officers.[8]

Division of Devise. — So, too, where a devise is made to a diocese and the diocese is subsequently divided under proper ecclesiastical authority, the property so devised must be divided between the two dioceses thus created.[9]

(2) *Sale or Partition by Order of Court.* — Where the members of an independent incorporated church organization are nearly equally divided by irreconcilable differences in matters of faith and doctrine regarded vitally essential by each faction, and neither has forfeited any rights to the property under the constitution of the church, it is not error for a court of equity to decree a sale of the church property and a division of the proceeds arising therefrom among the members.[10] But where the property is lawfully applied to the common purpose to which it was devoted and none of the members are prevented from participation in its use for this purpose, the court will not, at the instance of a seceding faction of the congregation, order a partition and division of the property,[11] nor will it partition property purchased by two congregations for

1. **New York Statute.** — N. Y. Act of 1813.

2. Petty *v.* Tooker, 21 N. Y. 267; Watkins *v.* Wilcox, 66 N. Y. 654; Burrel *v.* Associate Reformed Church, 44 Barb. (N. Y.) 283; Gram *v.* Prussia Emigrated, etc., Soc., 36 N. Y. 161; Isham *v.* Dunkirk First Presb. Church, (Supm. Ct. Spec. T.) 63 How. Pr. (N. Y.) 465; Robertson *v.* Bullions, 11 N. Y. 243; Miller *v.* Gable, 2 Den. (N. Y.) 492.

3. Robertson *v.* Bullions, 11 N. Y. 243.

4. Petty *v.* Tooker, 21 N. Y. 267; Watkins *v.* Wilcox, 66 N. Y. 654; Kniskern *v.* Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439.

5. Isham *v.* Dunkirk First Presb. Church, (Supm. Ct. Spec. T.) 63 How. Pr. (N. Y.) 465.

6. Wheelock *v.* Los Angeles First Presb. Church, 119 Cal. 477; Smith *v.* Swormstedt, 16 How. (U. S.) 288; Reeves *v.* Walker, 8 Baxt. (Tenn.) 277; Weddell *v.* Collier, 26 Pittsb. Leg. J., N. S., (Pa.) 309.

The Division by the Legislature of a Territorial Ecclesiastical Society into two or more parts and the allotment of its funds among the parts is contrary to the provisions of the *Connecticut* constitution. Second Ecclesiastical Soc. *v.* First Ecclesiastical Soc., 23 Conn. 255.

7. Nelson *v.* Benson, 69 Ill. 27.

8. Nelson *v.* Benson, 69 Ill. 27.

9. East Carolina Diocese *v.* North Carolina Diocese, 102 N. Car. 442.

10. Immanuel's Gemeinde *v.* Keil, 61 Kan. 65. See also Niccolls *v.* Rugg, 47 Ill. 47; Hale *v.* Everett, 53 N. H. 9.

11. Schradi *v.* Dornfeld, 52 Minn. 465; Le Blanc *v.* Lemaire, 105 La. 539.

their joint use for church purposes as tenants in common.[1]

(3) *Alternate Occupation* — (a) **Pending Decree.** — The court will, pending a determination as to which of two factions is entitled to the exclusive possession of the property, grant an order requiring the faction in possession to allow the other alternative use of the property at stated times for religious worship.[2] And in a case of schism in a church the court has upheld a compromise between the factions whereby an undivided half of property is conveyed to each faction along with the right of alternative occupation of the building.[3]

(b) **Under Kentucky Statute.** — In Kentucky it is provided by statute[4] that in case a schism or division shall take place in a congregation or church, from any other cause than the immorality of its members, the trustees shall not be authorized to prevent either of the parties from using the house of worship for purposes of devotion a part of the time proportioned to the numbers of each party. This statute does not authorize a minority of the members who have seceded, or been excluded from the church, to claim the use of the church any portion of the time.[5] It was intended to prevent the trustees from excluding either party from the church or perhaps from expelling them even by an action at law, but does not prohibit the application of either party, being beneficiaries, for the establishment of an exclusive right to the property as against the other. In case of a division the rights of the parties must be decided by the rules of the church.[6] Where it is claimed that there is a division of the members of the church so as to entitle each faction to the use of the church property in accordance with this provision, the burden is on the faction claiming the right as against the regular organization to show that the case is one within the meaning of the statute.[7]

e. DENOMINATIONAL USAGE MUST BE PROVED. — Before the courts can take notice of the customs of a particular denomination or body of Christians, or their nature or effect, or of any rights or disabilities resulting from their osbservance or neglect, the existence of the customs must be properly averred and proved, as matter of fact.[8] If the abuse alleged is a departure from the tenets of the founders of a church, their particular tenets must be stated that it may appear in what manner the departure exists, and it must also be stated in what the alleged departure consists.[9] The burden of proving a deviation from the tenets of the denomination is upon those alleging it.[10]

5. Effect of Organization of New Church. — An organized church cannot be divested of its property even by a majority of its members who enter into a new organization, although they adopted the same name, provided the old organization still exists and persons seceding and entering into such new organization forfeit all claims to any interest in the former church and lose all identity with it.[11]

1. Swoyer *v.* Schaeffer, 13 Pa. Co. Ct. 346. See also Brown *v.* Lutheran Church, 23 Pa. St. 495.

2. Bowden *v.* McLeod, 1 Edw. (N. Y.) 588. *Contra*, Newhart *v.* Sampsel, 13 Pa. Co. Ct. 161.

3. Wicks *v.* Nedrow, 28 Neb. 386.

4. **Kentucky Statute.** — Ky. Stat., §§ 320 *et seq.*

5. Bennett *v.* Morgan, (Ky. 1902) 66 S. W. Rep. 287; Hadden *v.* Chorn, 8 B. Mon. (Ky.) 78; Gibson *v.* Armstrong, 7 B. Mon. (Ky.) 481; Curd *v.* Wallace, 7 Dana (Ky.) 190, 32 Am. Dec. 85; Shannon *v.* Frost, 3 B. Mon. (Ky.) 256.

The Term "Schism" as used in this statute is synonymous with separation or division or partition. McKinney *v.* Griggs, 5 Bush (Ky.) 401, 96 Am. Dec. 360.

6. Gibson *v.* Armstrong, 7 B. Mon. (Ky.) 481. See also Gartin *v.* Penick, 5 Bush (Ky.) 110.

7. Iglehart *v.* Rowe, (Ky. 1898) 47 S. W. Rep. 575.

8. Youngs *v.* Ransom, 31 Barb. (N. Y.) 49; Baxter *v.* McDonnell, 155 N. Y. 83. See also Hendrickson *v.* Shotwell, 1 N. J. Eq. 577.

9. Happy *v.* Morton, 33 Ill. 398.

10. Kniskern *v.* Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439.

Legacy for Support of Unitarian Doctrine Forfeited by Change to Trinitarian Doctrine. — Princeton *v.* Adams, 10 Cush. (Mass.) 129.

11. Venable *v.* Coffman, 2 W. Va. 310; Harper *v.* Straws, 14 B. Mon. (Ky.) 48. See also Dearborn First Evangelical Lutheran Church *v.* Rechlin, 49 Mich. 515.

6. Consolidation under Ecclesiastical Authority. — Upon a consolidation of several churches by the action of proper ecclesiastical authority and in accordance with ecclesiastical law and practice, the title to the property of the several constituent churches vests in the consolidated church.[1]

VIII. Meetings of Society — 1. How Called. — In order that the acts done at a meeting of the society may be valid the meeting must have been called, in the absence of statutory provision, in the manner and after giving the notice prescribed by the constitution or by-laws of the society.[2] Where the charter prescribes the mode of calling a corporate meeting, any variation from the mode renders the meeting illegal and its action invalid.[3]

2. Qualifications of Electors — *a.* In General. — As a general rule the legal qualifications of the electors depend upon the law or canon of the church upon that subject.[4] In some states, however, the qualifications are prescribed by statute.[5] Where the qualifications of the electors are prescribed by statute, they can neither be abridged nor extended by any act of the trustees or of the corporators, but every person thus qualified has an incontestable right to vote at the election of trustees.[6]

b. Right of Contributors to Vote. — The right of voting upon matters of church interest should not be confined to church members alone, but the right should be given also to persons belonging to the congregation who, though not members of the church, are contributors to the support of the church.[7]

Annual Subscribers. — A canon allowing annual subscribers to vote at the elections of the church applies only to those persons who subscribe an annual sum to the support of the minister of the church and does not include those who occasionally or otherwise contribute to his support.[8] Where one of the qualifications of an elector is the payment of an annual sum for the support of the church, a person paying the sum so stipulated a short time before the election is not qualified to vote.[9]

Subscription in Arrears. — Under a charter provision that no person shall have a vote except those who had been regularly admitted and had been members of the church for twelve months preceding the election, and further authorizing the enactment of by-laws for the good government of the church, a by-law enacted by the church prohibiting from voting any person whose pew rent is

1. Trinity M. E. Church *v.* Harris, 73 Conn. 216.

2. **Notice of Meeting Necessary** — *California.* — Dahl *v.* Palache, 68 Cal. 248.

Connecticut. — State *v.* Getty, 69 Conn. 286.

Delaware. — State *v.* Stewart, 6 Houst. (Del.) 359.

Illinois. — Jones *v.* Sacramento Ave. M. E. Church, 198 Ill. 626.

Massachusetts. — Canadian Religious Assoc. *v.* Parmenter, 180 Mass. 415; Wiggin *v.* Lowell First Freewill Baptist Church, 8 Met. (Mass.) 301.

New York. — Field *v.* Field, 9 Wend. (N. Y.) 394.

Pennsylvania. — Ehrenfeldt's Appeal, 101 Pa. St. 186; Shortz *v.* Unangst, 3 W. & S. (Pa.) 45; Langolf *v.* Seiberlitch, 2 Pars. Eq. Cas. (Pa.) 64.

Ratification of Acts of Meeting Not Duly Called. — Arthur *v.* Norfield Parish Cong. Church Soc., 73 Conn. 718.

Estoppel to Question Illegality of Meeting. — Helbig *v.* Rosenberg, 86 Iowa 159.

3. Congregational Soc. *v.* Sperry, 10 Conn. 200; Weber *v.* Zimmerman, 22 Md. 156. See also Wiggin *v.* Lowell First Freewill Baptist Church, 8 Met. (Mass.) 301; Ladd *v.* Clements, 4 Cush. (Mass.) 476.

4. **Qualifications of Electors.** — State *v.* Stewart, 6 Houst. (Del.) 359; East Norway Lake Norwegian Evangelical Lutheran Church *v.* Halvorson, 42 Minn. 503; Den *v.* Pilling, 24 N. J. L. 653. See also *supra*, this title, *Formation and Organization — Membership.*

5. **Qualifications of Electors in Episcopal Church under New York Statute.** — People *v.* Keese, 27 Hun (N. Y.) 483.

Qualifications of Members under Massachusetts Statute. — Keith *v.* Howard, 24 Pick. (Mass.) 292.

Qualifications of Members under New York Statute. — Watkins *v.* Wilcox, 4 Hun (N. Y.) 220.

6. People *v.* Phillips, 1 Den. (N. Y.) 388; Petty *v.* Tooker, 21 N. Y. 267; Robertson *v.* Bullions, 11 N. Y. 243.

7. **Church Membership Not Essential.** — Niccolls *v.* Rugg, 47 Ill. 47, 95 Am. Dec. 462. See also Hartford First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 296, 24 Am. Dec. 223; Sale *v.* Mason City First Regular Baptist Church, 62 Iowa 26, 49 Am. Rep. 136.

8. State *v.* Stewart, 6 Houst. (Del.) 359.

9. Juker *v.* Com., 20 Pa. St. 484.

more than two years in arrears is valid.[1]

c. EFFECT OF SECESSION. — The fact that persons have seceded from the religious doctrines of the church does not disfranchise them as electors where they have the qualifications prescribed by statute.[2]

d. VOLUNTARY WITHDRAWAL. — A member of a church may lose his right to vote by his voluntary act in disavowing his membership.[3]

e. EXPULSION. — As a general rule, where the qualifications of electors are regulated by church law, the expulsion of a member disfranchises him for voting.[4]

3. Quorum. — A majority of the members need not be present in order to constitute a corporate meeting of a religious society. Those present at a regular meeting constitute a quorum and a majority of them can act.[5]

4. Control of Majority. — In the regulation of their temporal concerns religious societies, acting as corporate bodies under the statute, must be governed by majorities acting within the scope of their authority and proceeding according to law.[6] The majority must, however, be a majority of the members appearing at a regular meeting of the society.[7]

A Meeting of the Church Members, as such, is not a meeting of the incorporated society, and it cannot instruct the trustees in their duties or assume any power over them.[8]

IX. POWERS IN RELATION TO PROPERTY — 1. In General. — The manner in which property may be acquired, the title by which it is held, and the powers of the societies or trustees over it, depend upon the statutory enactments in reference thereto and also upon the nature of the conveyance under which it is held and the character of the church organization holding it.[9]

At Common Law church wardens could not, as such, hold the title to real estate.[10]

In Massachusetts the property of the parish was held by the first-appointed minister and his successors, upon a regular settlement and ordination, as a sole corporation.[11]

2. Title — *a.* IN GENERAL. — A grant to the members of a religious society, where the purpose is to promote the object for which the society is organized,

1. **Pew Rent in Arrears.** — Com. *v.* Cain, 5 S. & R. (Pa.) 510.

2. Petty *v.* Tooker, 21 N. Y. 267. See also *supra*, this title, *Relation to Members — Regulation of Membership.*

3. Weckerly *v.* Geyer, 11 S. & R. (Pa.) 35. See also *supra*, this title, *Relation to Members — Withdrawal.*

4. **Effect of Expulsion.** — Shannon *v.* Frost, 3 B. Mon. (Ky.) 253; Sale *v.* Mason City First Regular Baptist Church, 62 Iowa 26, 49 Am. Rep. 136. See also *supra*, this title, *Relation to Members — Expulsion.*

5. **Quorum.** — Madison Ave. Baptist Church *v.* Baptist Church, (N. Y. Super. Ct. Spec. T.) 32 How. Pr. (N. Y.) 335.

6. **Power of Majority.** — Miller *v.* English, 21 N. J. L. 317; St. Jacob's Church *v.* Rly, 73 N. Y. 323; Sutter *v.* First Reformed Dutch Church, 42 Pa. St. 503; Long *v.* Harvey, 177 Pa. St. 473, 55 Am. St. Rep. 733.

7. Field *v.* Field, 9 Wend. (N. Y.) 394.

8. Baptist Congregation *v.* Scannel, 3 Grant Cas. (Pa.) 48.

9. See the statutes of the several states. See also the title TRUSTS AND TRUSTEES.

Perpetual Succession of Trustees. — Tartar *v.* Gibbs, 24 Md. 323; Morgan *v.* Leslie, Wright (Ohio) 144. See also Cahill *v.* Bigger, 8 B. Mon. (Ky.) 211.

Under the Maryland Act of 1802, c. 111, Trustees Constitute Corporation. — African Methodist Bethel Church *v.* Carmack, 2 Md. Ch. 143. See also Bartlett *v.* Hipkins, 76 Md. 5.

Members Constitute Corporation under New York Statute. — Wyatt *v.* Benson, 23 Barb. (N. Y.) 327; Robertson *v.* Bullions, 11 N. Y. 243.

Unincorporated Societies — Power to Hold Land in Pennsylvania. — Phipps *v.* Jones, 20 Pa. St. 260, 59 Am. Dec. 708.

Unincorporated Society — No Power to Take Title in Alabama. — Stewart *v.* White, 128 Ala. 202.

In Virginia, though churches can have no corporate existence, they are recognized by law as legal organizations capable of holding property, and are excluded from no right touching any property which they are permitted by law to acquire or hold that is enjoyed by individuals or associations of a different character with reference to their property. Perkins *v.* Seigfried, 97 Va. 444.

Dedication Must Regard Rights of Local Society. — Brooke *v.* Shacklett, 13 Gratt. (Va.) 301.

10. **Powers of Church Wardens.**—Terrett *v.* Taylor, 9 Cranch (U. S.) 43. See also Mason *v.* Muncaster, 9 Wheat. (U. S.) 445; People *v.* Trinity Church, 22 N. Y. 44.

11. **Minister a Sole Corporation.** — Brown *v.* Porter, 10 Mass. 93; First Parish *v.* Dunning, 7 Mass. 445; Weston *v.* Hunt, 2 Mass. 500. See also Cheever *v.* Pearson, 16 Pick. (Mass.) 266.

is a grant to the society itself and not to the individual members.[1] Nor does it create a tenancy in common among the individual members, whether or not the society is incorporated.[2]

b. CONVEYANCE TO TRUSTEES — (1) *In General.* — A conveyance in trust for the use of a certain church to certain trustees and their successors invests them merely with the legal title, not with any beneficial interests, and the trustees have no power to transfer the title of the property from the body for whose use they hold it.[3] The legal property must remain in them while they are in office, and when they resign or are displaced it will either remain in them or be in abeyance until their successors are chosen. In either case it is their duty to hold the property until some one is invested with authority to receive it.[4]

Under Statute. — Where the statute gives to a religious society capacity to take and hold land, a conveyance to the trustees for the use of such a society excludes a legal estate in the congregation itself.[5]

Trust Must Be for Benefit of All. — Trustees cannot take in trust for the sole benefit of the members of the church as distinguished from other members of the society, nor for the benefit of any portion of the corporators to the exclusion of others.[6]

Conveyance to Unnamed Trustees. — A conveyance made to trustees, without naming them or any of them, vests title in the corporation named in the deed.[7]

Conveyance to De Facto Trustees. — A deed of land to trustees *de facto* of an unincorporated religious society conveys no title to the society.[8]

In Roman Catholic Church. — The title to property taken by one "as bishop" is taken by the grantee in fee, but in trust also for the benefit of the members of his parish or diocese, and title passes to his successor in office.[9] And where a deed, absolute on its face, is made to a grantee who is in fact archbishop of the Roman Catholic Church, the property so acquired is taken in trust for purposes of public religious worship and other charitable uses.[10]

(2) *Effect of Incorporation.* — Where property is granted to individuals for the use of a society or church which at the time of the grant was not incorporated, the persons to whom the grant is made are seized to the use of the society or church, and after it has acquired legal capacity to take and hold real estate the statute executes the possession to the use and the estate vests.[11]

1. Title of Society. — Brown *v.* Lutheran Church, 23 Pa. St. 495. See also Mason *v.* Muncaster, 9 Wheat. (U. S.) 445.

2. Hamblett *v.* Bennett, 6 Allen (Mass.) 140.

3. Title of Trustees. — Bridges *v.* Wilson, 11 Heisk. (Tenn.) 458.

4. Page *v.* Crosby, 24 Pick. (Mass.) 211.

5. Brendle *v.* German Reformed Congregation, 33 Pa. St. 415.

6. Gram *v.* Prussia Emigrated Evangelical Lutheran German Soc., 36 N. Y. 161; Robertson *v.* Bullions, 11 N. Y. 243.

7. Trustee Not Named. — Keith, etc., Coal Co. *v.* Bingham, 97 Mo. 196.

8. De Facto Trustee. — Bundy *v.* Birdsall, 29 Barb. (N. Y.) 31.

9. Conveyance to Bishop. — Beckwith *v.* St. Philip's Parish, 69 Ga. 564. See also Heiss *v.* Vosburg, 59 Wis. 532.

10. Mannix *v.* Purcell, 46 Ohio St. 102, 15 Am. St. Rep. 562.

11. Vesting of Title upon Incorporation — *United States.* — Reorganized Church of Jesus Christ, etc. *v.* Church of Christ, 60 Fed. Rep. 937.

California. — De Sanchez *v.* Grace M. E. Church, 114 Cal. 295.

Illinois. — Happy *v.* Morton, 33 Ill. 398.

Iowa. — Miller *v.* Chittenden, 4 Iowa 252.

Massachusetts. — Milton *v.* First Cong. Parish, 10 Pick. (Mass.) 447; Lakin *v.* Ames, 10 Cush. (Mass.) 198; Stearns *v.* Woodbury, 10 Met. (Mass.) 27; Essex *v.* Low, 5 Allen (Mass.) 595.

Michigan. — Dearborn First Evangelical Lutheran Church *v.* Rechlin, 49 Mich. 515.

Missouri. — Keith, etc., Coal Co. *v.* Bingham, 97 Mo. 196; Schmidt *v.* Hess, 60 Mo. 591.

New Hampshire. — New Market *v.* Smart, 45 N. H. 87; Atty.-Gen. *v.* Dublin, 38 N. H. 459.

New Jersey. — Morgan *v.* Rose, 22 N. J. Eq. 583.

New York. — St. Jacob's Lutheran Church *v.* Bly, 73 N. Y. 323; Reformed Protestant Dutch Church *v.* Veeder, 4 Wend. (N. Y.) 494; Church of The Redemption *v.* Grace Church, 6 Hun (N. Y.) 166; Hartford First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 298, 24 Am. Dec. 223.

Oregon. — M. E. Protestant Church *v.* Adams, 4 Oregon 76.

User of Corporate Franchises Sufficient to Vest Title. — Dearborn First Evangelical Lutheran Church *v.* Rechlin, 49 Mich. 515.

Substantial Compliance with Statute Sufficient. — St. Jacob's Lutheran Church *v.* Bly, 73 N. Y. 323.

Where a religious society has been formed by some of the members of a congregation, the provisions of the statute authorizing such incorporation having been substantially complied with, the title to the property of the congregation vests in the corporation thus formed and the remaining members of the congregation cannot, by forming another corporation, secure possession of the property.[1]

Consent of Trustee to Incorporation. — The title to property held by a religious corporation for the use of an unincorporated society or congregation, does not vest upon incorporation unless the incorporation was consented to by the trustee.[2]

When Title Does Not Vest. — Where, however, the instrument creating the trust and the rules of the church to which the property is held subject require the property of the various churches of the denomination to be held by the trustees for the use and benefit of the members, the legal title of the property so conveyed does not vest in the church as a corporation.[3]

Conveyance Compelled by Trustees. — In case the title to property paid for by the members of a religious society was taken in the name of one of them, the trustees appointed upon the subsequent incorporation of the society have a right to call for a conveyance. The indorsement of the grantee that he held the title to be conveyed upon the assent of the members to an open communion, which was contrary to the tenets of a large proportion of their members, cannot be regarded, no assent having been proven.[4] But equity will not compel a conveyance by one having an equitable claim against the society for advances made, until his claim is either paid or secured.[5]

c. PROPERTY PURCHASED. — The title to property acquired by an incorporated religious society in its own name is in the corporation. The possession by the trustees of the society is possession by the society. The trustees do not hold the property in trust for the corporation, but their relation to the society is the same as that of directors.[6]

Improvements and Additions to the church structure, made by an unincorporated association, composed in part of members of the church, become the property of the church, and the members of the association have no estate in them by reason of its participation in raising the fund which supplied them.[7]

Special Funds. — In the Roman Catholic Church, money raised for a special purpose, and not for general church purposes, does not come under the absolute control of the bishop or priest, but of the contributing congregation, and trustees appointed by the congregation may recover it from the bishop or priest.[8]

d. TITLE ACQUIRED BY ADVERSE POSSESSION. — A religious corporation may acquire title to land by adverse possession, and a title thus acquired is not cumbered with any equitable trusts which may have been in force prior to the date on which the adverse possession began.[9]

1. Happy *v.* Morton, 33 Ill. 398; St. Jacob's Lutheran Church *v.* Bly, 73 N. Y. 323.

2. **Consent of Trustee Essential.** — Church of The Redemption *v.* Grace Church, 6 Hun (N. Y.) 166.

3. Methodist Soc. *v.* Bennett, 39 Conn. 293.

4. **Conveyance to Trustee Compelled.** — South Baptist Church *v.* Yates, Hoffm. (N. Y.) 142. See also Newmyer's Appeal, 72 Pa. St. 121.

5. **Where Trustee Has Equitable Claim.** — Canajoharie, etc., Church *v.* Leiber, 2 Paige (N. Y.) 43. See also Beatty *v.* Kurtz, 2 Pet. (U. S.) 566; Consociated Presb. Soc. *v.* Staples, 23 Conn. 544; Macon *v.* Sheppard, 2 Humph. (Tenn.) 335.

6. **Title to Purchased Property.** — People *v.* Fulton, 11 N. Y. 94; Bowen *v.* Irish Presb. Congregation, 6 Bosw. (N. Y.) 245; Van Deuzen *v.* Presbyterian Congregation, 4 Abb. App. Dec. (N. Y.) 465. See also Watson *v.* Jones, 13 Wall. (U. S.) 679; Miller *v.* Gable, 2 Den. (N. Y.) 492; Organ Meeting House *v.* Seaford, 1 Dev. Eq. (16 N. Car.) 457.

Under the Kansas Constitution, art. 12, § 3, the title to the property of religious corporations vests in the trustees. Klopp *v.* Moore, 6 Kan. 27.

7. **Improvements.** — Read *v.* St. Ambrose Church, 137 Pa. St. 320.

Improvements Made by Seceding Minority — Duty of Majority to Pay. — Hadden *v.* Chorn, 8 B. Mon. (Ky.) 70.

8. **Special Funds.** — Amish *v.* Gelhaus, 71 Iowa 170.

9. **Acquisition by Adverse Possession.** — Harpending *v.* Reformed Protestant Dutch Church, 16 Pet. (U. S.) 455; Zion Church *v.* Hilken, 84 Md. 170; Gump *v.* Sibley, 79 Md. 169; Second

3. Power to Take by Will — *a.* In General. — A general discussion of the principles governing the power of religious corporations and of unincorporated societies to take legacies and devises will be found elsewhere in this work.[1]

Wardens and Vestrymen of Episcopal Societies are the known and recognized representatives and committee of such societies, and any bequest to the wardens and vestry is a bequest to the society itself, or to them as trustees for its use.[2]

A Bequest to the Consistory of a Church composed of the ministers, elders, and deacons, is in effect a bequest to the church corporation itself.[3]

b. Bequest to Unincorporated Society. — In some jurisdictions unincorporated religious societies have power to take bequests.[4] Where unincorporated religious societies are authorized to take a bequest, the bequest may be given for any particular purpose within the corporate powers of the society. Though it is in terms to the trustees of the church, it is in legal effect to the corporation with which the church is connected.[5] A subsequent enactment repealing authority granted to such corporations to take by bequest does not apply to corporations previously chartered.[6]

Nonresidence of a Number of Its Members will not invalidate a charitable bequest to an unincorporated religious society.[7]

In Tennessee, while a bequest to the trustee of the church is valid where there are persons known as the trustees, though unincorporated, a bequest to unincorporated churches to be held by trustees to be appointed thereafter cannot be sustained.[8]

c. Bequest for Masses. — This subject has already been fully discussed.[9]

d. Devise in Excess of Amount Authorized to Be Held. — A devise to the corporation which will increase the property held by it beyond the prescribed limitation, will, where it is not void on its face, be held valid until it has been determined at the instance of the state that the limitation has been violated.[10]

4. Limitation on Amount of Land Which May Be Held. — By statute in some jurisdictions the amount of land which may be held by religious corporations is limited. Where the statute provides a limitation solely as to the quantity these bodies will not be limited as to the value of the property which they may hold.[11] It depends upon the terms of the statute whether this limitation extends to unincorporated as well as to incorporated societies.[12] The prohibition applies only to single religious societies and not to the whole denomination.[13] In case the charter of the corporation contains a reservation

Precinct *v.* Catholic Cong. Church, 23 Pick. (Mass.) 139; Pine St. Cong. Soc. *v.* Weld, 12 Gray (Mass.) 570. See also People *v.* Trinity Church, 22 (N. Y.) 44; Landis's Appeal, 102 Pa. St. 467.

1. See the title Charities and Trusts for Charitable Uses, vol. 5, p. 893. See also McGlade's Appeal, 99 Pa. St. 338; Mong *v.* Roush, 29 W. Va. 119; Fadness *v.* Braunborg, 73 Wis. 257.

2. **Effect of Bequest to Wardens and Vestry.** — Trinity Church *v.* Hall, 22 Conn. 125; Sohier *v.* St. Paul's Church, 12 Met. (Mass.) 250.

3. **Bequest to Consistory.** — Reformed Dutch Church *v.* Brandow, 52 Barb. (N. Y.) 228.

4. Chambers *v.* Higgins, (Ky. 1899) 49 S. W. Rep. 436; Silsby *v.* Barlow, 16 Gray (Mass.) 329; Dexter *v.* Gardner, 7 Allen (Mass.) 243; Jackson *v.* Phillips, 14 Allen (Mass.) 539; Congregational Unitarian Soc. *v.* Hale, 29 N. Y. App. Div. 396; Banks *v.* Phelan, 4 Barb. (N. Y.) 80; Evangelical Assoc's Appeal, 35 Pa. St. 316; Smith *v.* Nelson, 18 Vt. 511. See also the title Charities and Trusts for Charitable Uses, vol. 5, p. 916.

5. **Bequest to Unincorporated Society.** — Waterford First Presb. Church *v.* McKellor, 35 N. Y. App. Div. 98.

6. Eastman's Estate, 60 Cal. 308.

7. Evangelical Assoc's Appeal, 35 Pa. St. 316.

8. **Tennessee Doctrine.** — Sheets *v.* Hardin, (Tenn. Ch. 1898) 48 S. W. Rep. 267. See also Rhodes *v.* Rhodes, 88 Tenn. 637; Reeves *v.* Reeves, 5 Lea (Tenn.) 644.

9. See the title Charities and Trusts for Charitable Uses, vol. 5, p. 927.

10. Hanson *v.* Little Sisters of Poor, 79 Md. 434. See also Jones *v.* Habersham, 107 U. S. 174. See *infra*, this section, *Limitation on Amount of Land Which May Be Held.*

11. **Limitation on Amount.** — Andrews *v.* Andrews, 110 Ill. 223.

12. **Unincorporated Societies Not Included.** — Alden *v.* St. Peter's Parish, 158 Ill. 631.

Statute Applies to Unincorporated Society. — Nance *v.* Busby, 91 Tenn. 303.

13. **Denomination Not Limited.** — Morgan *v.* Leslie, Wright (Ohio) 144.

allowing amendment by the legislature modifying the amount of land which it may hold, a subsequent general law placing a limitation will be binding and the conveyance of an amount in excess thereof passes no title.[1] The legislature may also allow the society to acquire more land than without such permission it can take, and a subsequent legislative ratification of the purchase is equally effective to validate the title.[2]

Who May Question. — Inquiry into an excess in the amount held by a religious corporation can be made only by the state[3] or by a person who will be in a position to claim an interest in the property if it is adjudged that the corporation has exceeded the limitation.[4]

5. Purposes for Which Acquired. — An incorporated religious society has no power to acquire or hold real estate for any purpose other than that of promoting the object of its creation.[5] This includes any specific purpose comprehended in the general objects of its incorporation. The power to hold lands by purchase as trustees is also subject to the same limitation.[6]

6. Power of Alienation — *a.* AT COMMON LAW. — At common law religious corporations, like every corporation aggregate, had the power to alienate or dispose of their lands in fee or to create any lesser estate therein in the absence of church or statutory provision to the contrary.[7] Statutes restraining alienation of church property were, however, enacted in the reign of Elizabeth, and these statutes have generally been adopted as a part of the common law in the United States.[8]

b. UNDER STATUTORY PROVISIONS — (1) *In General.* — The alienation of the property of religious societies is also largely regulated by statute, and an alienation to be valid must be made in accordance with these provisions.[9] A conveyance made without compliance with the statute will not be allowed to stand, even though executed.[10]

A Canon of the Church prescribing the form necessary in order to dispose of the church edifice in a parish does not affect the legal right of a parish to dispose of the property according to statute and without regard to the requirements of the canon.[11]

Act of Legislature Essential. — Where church property is vested by its charter of incorporation in a board of trustees annually elected by the pew holders on whom devolves the duties of the trust, an act of the legislature is the only means whereby a transfer of the property and of its trusts can be made to

1. Effect of Conveyance in Excess of Amount. — St. Peter's Roman Catholic Congregation *v.* Germain, 104 Ill. 440.

2. Ratification by Legislature. — Catholic Cathedral Church *v.* Manning, 72 Md. 116.

3. Excess a Question for State. — Reorganized Church of Jesus Christ, etc., *v.* Church of Christ, 60 Fed. Rep. 937; Church of Redemption *v.* Grace Church, 68 N. Y. 570; People *v.* Trinity Church, 22 N. Y. 44; Bogardus *v.* Trinity Church, 4 Sandf. Ch. (N. Y.) 633; First English Evangelical Lutheran Church *v.* Arkle, 49 W. Va. 92. See also Jones *v.* Habersham, 107 U. S. 174.

4. Hanson *v.* Little Sisters of Poor, 79 Md. 434.

5. Must Be Held for Object of Creation. — Chicago First M. E. Church *v.* Dixon, 178 Ill. 260, Thompson *v.* West, 59 Neb. 677.

6. Tucker *v.* St. Clements Church, 3 Sandf. (N. Y.) 242. See also Ayers *v.* M. E. Church, 3 Sandf. (N. Y.) 351.

7. At Common Law. — Trelawny *v.* Winchester, 1 Burr. 221; Van Houten *v.* McKelway, 17 N. J. Eq. 130; Reformed Protestant Dutch Church *v.* Mott, 7 Paige (N. Y.) 77, 32 Am. Dec. 613; De Ruyter *v.* St. Peter's Church, 3 Barb. Ch. (N. Y.) 119; Langolf *v.* Seiberlitch, 2 Pars. Eq. Cas. (Pa.) 64.

8. Lynch *v.* Pfeiffer, 110 N. Y. 33; Madison Ave. Baptist Church *v.* Baptist Church, 73 N. Y. 82; Madison Ave. Baptist Church *v.* Baptist Church, 46 N. Y. 131; Wyatt *v.* Benson, 23 Barb. (N. Y.) 327; De Ruyter *v.* St. Peter's Church, 3 Barb. Ch. (N. Y.) 122.

Not in New Jersey, However. — Van Houten *v.* McKelway, 17 N. J. Eq. 130.

9. Statutes. — See the statutes of the several states. See also Devoss *v.* Gray, 22 Ohio St. 159; Manning *v.* Moscow Presb. Soc., 27 Barb. (N. Y.) 52.

Powers of Trustees of Protestant Episcopal Churches to Convey under Illinois Statutes. — Kennedy *v.* Le Moyne, 188 Ill. 255.

Legislature May Authorize Sale. — Sohier *v.* Trinity Church, 109 Mass. 1. See also Burton's Appeal, 57 Pa. St. 213.

10. Madison Ave. Baptist Church *v.* Baptist Church, 73 N. Y. 82.

Legislative Ratification of Prior Conveyance. — M. E. Church *v.* Jackson Square Evangelical Lutheran Church, 84 Md. 173.

11. Sohier *v.* Trinity Church, 109 Mass. 1.

third persons; and a majority of the corporators cannot make such a change in the absence of any authority to alter the charter.[1]

By Statute in New Jersey the power of holding, controlling, and disposing of the real or personal estate of a religious corporation is not in the congregation at large, but in the trustees by and in the corporate name.[2]

(2) *Under New York Statute.* — In New York a religious corporation can alienate its property only after leave granted by court upon application made by a majority of the trustees.[3] No meeting of the corporation, or any action by it as such, is necessary to authorize the trustees to make an application to the court for the sale of the real estate of the corporation: the court acquires jurisdiction upon the petition of the trustees and in the absence of any action by the corporators, if neither the good faith of the application nor the property of the proposed sale is questioned.[4]

The Powers of the Trustees with regard to the alienation of real estate of the society cannot be enlarged or extended by means of any order of court.[5]

Order Not Mandatory. — This statute does not empower the court to require the corporation to sell its property against its will.[6] The order authorizing the sale is permissive only and not mandatory.[7]

Sales of Personalty and of Cemetery Lots. — The statute does not apply to sales of personalty, such as a building detached from the freehold,[8] nor to sales of lots in a cemetery; but the permission is required only in case of such sales as will alienate the property from the usages to which it is to be held, and not to such as are designed to carry out the objects of the original grant.[9]

Executory Contract. — The corporation may make, without leave of court, an executory contract of sale preliminary to a conveyance, and may obtain the consent of the court after the contract and before the conveyance.[10]

Estoppel Not Created by Order. — An order allowing real property to be conveyed to a religious corporation constitutes no estoppel in favor of a grantee who has parted with no consideration.[11]

Control of Proceeds of Sale. — Upon alienation with leave of the court the proceeds of the sale take the place of the land and become the corporate property which the court, upon suitable direction, applies in place of the land.[12]

Setting Aside Order. — An order made on the petition of a majority of the members of a religious corporation, directing a sale of the corporate real estate and prescribing the application of the proceeds, will not be reversed on the ground that a good title cannot be given by reason of a trust imposed on the property arising from the general duty of the corporation to use its property for the purposes of its creation.[13]

1. Langolf *v.* Seiberlitch, 2 Pars. Eq. Cas. (Pa.) 64.

2. **New Jersey Statute.** — Van Houten *v.* McKelway, 17 N. J. Eq. 126.

3. **New York Statute.** — Madison Ave. Baptist Church *v.* Baptist Church, 73 N. Y. 82; Wyatt *v.* Benson, 23 Barb. (N. Y.) 327; Bowen *v.* Irish Presb. Congregation, 6 Bosw. (N. Y.) 245; Reformed Protestant Dutch Church *v.* Mott, 7 Paige (N. Y.) 77, 32 Am. Dec. 613; Reformed Church *v.* Schoolcraft, 5 Lans. (N. Y.) 206.

4. **Meeting of Society Not Essential.** — Madison Ave. Baptist Church *v.* Baptist Church, 46 N. Y. 131; Matter of St. Ann's Church, (Supm. Ct. Spec. T.) 23 How. Pr. (N. Y.) 285; Matter of Second Baptist Soc., (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 324. *Compare* Wyatt *v.* Benson, 23 Barb. (N. Y.) 327.

Arbitration of Question of Sale — Effect of Award. — Wyatt *v.* Benson, 23 Barb. (N. Y.) 327.

5. Wheaton *v.* Gates, 18 N. Y. 395.

6. **Order Permissive.** — Wyatt *v.* Benson, 23 Barb. (N. Y.) 327.

7. Bowen *v.* Irish Presb. Congregation, 6 Bosw. (N. Y.) 245.

Sale by Leave of Court Not a Judicial Sale. — Christie *v.* Gage, 71 N. Y. 189.

8. **Where Application Not Essential.** — Beach *v.* Allen, 7 Hun (N. Y.) 441.

9. Coppers' Case, (Supm. Ct. Spec. T.) 7 Abb. N. Cas. (N. Y.) 121.

Effect of Sales of Cemetery Lots upon Right to Alienate Property. — Matter of Brick Presb. Church, 3 Edw. (N. Y.) 155.

10. **Executory Contract.** — Congregation Beth Elohim *v.* Central Presb. Church, (Brooklyn City Ct. Spec. T.) 10 Abb. Pr. N. S. (N. Y.) 489; Bowen *v.* Irish Presb. Congregation, 6 Bosw. (N. Y.) 245.

11. **Effect of Order.** — St. James' Church *v.* Church of The Redeemer, 45 Barb. (N. Y.) 356, 31 How. Pr. (N. Y.) 381.

12. **Disposition of Proceeds.** — Matter of First Presb. Soc., 106 N. Y. 251; Reformed Protestant Dutch Church *v.* Mott, 7 Paige (N. Y.) 84, 32 Am. Dec. 613.

13. Matter of First Presb. Soc., 106 N. Y. 251.

c. NATURE OF TRUST AS AFFECTING. — Where a conveyance of land to a religious corporation is absolute and without condition, it creates no trust beyond the duty imposed by law upon the corporation of using the land for the purposes contemplated in its creation, and there is no restraint upon the corporation's right to alienate in accordance with the terms prescribed by statute.[1] But if the instrument conveying the trust property to the society prescribes the manner in which it may be alienated, a compliance with the terms of the conveyance is essential to a lawful sale of the property.[2]

Property Held Subject to Discipline of Church. — Property conveyed to a religious society to be used as a place of worship subject to the discipline of the denomination with which the society is connected, may be sold in accordance with the rules of the church and the laws of the state.[3] The proceeds of the sale will not be impressed with the trust of the same character as that under which the property was held.[4]

Contributors to a Fund for a church edifice to be used for certain specified purposes have a right to insist that the property be used for the purposes named and may enjoin a sale of the building where no adequate cause is shown and the effect would be to divert the funds from the intended use.[5]

d. POWER OF TRUSTEES. — The trustees of an independent church controlled by vote of the members have power to convey the property of the church when authorized to do so by vote of the congregation.[6]

The Funds of a Congregational Church derived from individual contributions not specifically appropriated by the donors, and from accumulations of interest, are held by the church in its own right, and not by the deacons in trust for the society, and may be appropriated by the church in its discretion both as to principal and interest.[7]

Where the Ownership Is in the Society, the trustees cannot convey the property without the consent of the owners, and a statute conferring such authority upon them is unconstitutional.[8]

As Against Trustees of Seceding Faction. — A conveyance by trustees in the manner authorized by the church will be sustained as against persons claiming to be trustees elected by a seceding faction.[9]

e. UNDER CHARTER PROVISIONS. — Where the charter of a religious society provides that all the real and personal estate held by the church shall be vested in the corporation and empowers the trustees to dispose of it and receive the proceeds for the benefit of the corporation, a conveyance made to the individual trustees instead of to the corporation is held in trust for the corporation, and where the property so conveyed is sold they receive the proceeds to the use of the corporation.[10]

In the Absence of a Charter of incorporation the individuals composing the congregation are, as natural persons, competent to convey the property, or if

1. Nature of Trust. — Matter of First Presb. Soc., 106 N. Y. 251; Hardy *v.* Wiley, 87 Va. 125. See also St. Paul's Evangelical Lutheran Church *v.* Gray, 198 Pa. St. 321; Blanc *v.* Alsbury, 63 Tex. 489, 51 Am. Rep. 666.

2. Nelson *v.* Solomon, 112 Ga. 188.

3. Jones *v.* Sacramento Ave. M. E. Church, 198 Ill. 626; Fair *v.* Bloomingdale First M. E. Church, 57 N. J. Eq. 496.

4. Jones *v.* Sacramento Ave. M. E. Church, 198 Ill. 626; Harper *v.* Straws, 14 B. Mon. (Ky.) 39.

5. Avery *v.* Baker, 27 Neb. 388, 20 Am. St. Rep. 672.

Property Donated in Payment of Subscription — Right of Alienation. — Enos *v.* Chesnut, 88 Ill. 590.

6. Macon *v.* Dasher, 90 Ga. 195.

Evidence of Consent of Members to Alienation. — Macon *v.* Dasher, 90 Ga. 195; Nelson *v.* Solomon, 112 Ga. 188.

7. Congregational Churches. — Parker *v.* May, 5 Cush. (Mass.) 336. See also Lowell First Freewill Baptist Church *v.* Bancroft, 4 Cush. (Mass.) 281.

8. South Kenton Union Sunday School Assoc. *v.* Espy, 9 Ohio Cir. Dec. 695.

Consent of Minister Necessary to Alienation of Parsonage. — Austin *v.* Thomas, 14 Mass. 333; Brown *v.* Porter, 10 Mass. 93; Weston *v.* Hunt, 2 Mass. 500.

9. Fair *v.* Bloomingdale First M. E. Church, (N. J. 1899) 44 Atl. Rep. 866.

10. Charter Provisions. — M. E. Church *v.* Wood, 5 Ohio 283.

there be trustees in whom it is vested the conveyance can be made by them and the individuals constituting the congregation.[1]

f. CONSIDERATION. — To constitute a valid sale of the real property of a religious corporation, there must be a valuable consideration inuring to the corporation as such; benefits resulting to the individual members are no consideration, and a deed made in dependence on them is void.[2]

Sale Must Be Bona Fide. — The power given by a charter to dispose of corporate property for the use of the corporation does not mean a power to convey to trustees to employ it under trusts purporting to be for the use of the corporation, but depriving them of all dominion and control over it. Such a power only means to give the trustees the authority to dispose of the corporate property by *bona fide* sale.[3] Thus, where several persons acting as trustees for one church apply to themselves for pecuniary aid and grant the application, causing to be conveyed to the applicant real estate of the other corporation without the payment of any price, the sale will be set aside as fraudulent and void.[4]

g. POWER OF COURT TO COMPEL. — Where trustees are authorized to sell or mortgage the church premises to pay for money loaned and refuse to do so, equity will enforce a sale.[5] So, when the discipline of the denomination authorizes sums advanced at the instance of trustees to be reimbursed by a mortgage or sale of the property, a court of equity, at the suit of the party advancing such sums, will subject the church property to sale for the purpose of satisfying the claim.[6]

An Injunction Will Not be Granted at the instance of a member of a religious society to prevent the society from selling its property in good faith to pay off its indebtedness.[7]

h. SETTING ASIDE SALE. — A society seeking to repudiate an unauthorized conveyance of real estate and to recover the possession, must restore to the purchaser all he has paid upon the faith of the supposed title and of the enjoyment of the property.[8]

7. Mortgages — *a.* REAL PROPERTY — (1) *In General.* — A statutory provision requiring an order of court to be obtained before a religious society can alienate its property does not require such an order to enable a religious corporation purchasing land to execute a mortgage for the purchase money,[9] or to enable it to give a mortgage for a preexisting debt.[10] Nor does a statute which provides that no sale or conveyance shall be made without the assent of two-thirds of those present at any meeting specially called for the purpose, require that an assenting vote of two-thirds shall be obtained as a condition to the giving of the mortgage.[11]

Effect of Covenant Against Incumbrance. — A covenant running with the land, prohibiting the grantee religious corporation from alienating, disposing of, or otherwise changing or incumbering the property, does not prevent the execution of a mortgage to secure a legitimate debt. The power to do so exists at

1. Burton's Appeal, 57 Pa. St. 213.

2. **Consideration.** — Madison Ave. Baptist Church *v.* Baptist Church, 46 N. Y. 131, 11 Abb. Pr., N. S. (N. Y.) 132.

3. Langolf *v.* Seiberlitch, 2 Pars. Eq. Cas. (Pa.) 64.

4. **Fraudulent Sale.** — St. James' Church *v.* Church of The Redeemer, 45 Barb. (N. Y.) 356.

5. **Court May Compel.** — Bushong *v.* Taylor, 82 Mo. 660.

6. Bushong *v.* Taylor, 82 Mo. 660; Linn *v.* Carson 32 Gratt. (Va.) 170.

7. Eggleston *v.* Doolittle, 33 Conn. 396.

8. Madison Ave. Baptist Church *v.* Baptist Church, 73 N. Y. 82.

9. **Mortgages.** — South Baptist Soc. *v.* Clapp, 18 Barb. (N. Y.) 35.

10. Manning *v.* Moscow Presb. Soc., 27 Barb. (N. Y.) 52.

Under N. Y. Laws of 1890, c. 424, § 1, authority must be obtained by religious corporations to mortgage the property, and the court will direct the manner in which the proceeds will be applied. Matter of Church of The Messiah, (Supm. Ct. Spec. T.) 25 Abb. N. Cas. (N. Y.) 354.

Under Mo. Rev. Stat., 1879, § 706, religious corporations have power to mortgage their real estate. Keith, etc., Coal Co. *v.* Bingham, 97 Mo. 196.

11. Scott *v.* Jackson First Free Methodist Church, 50 Mich. 528.

law, and equity will not refuse to enforce the mortgage for the payment of an honest debt of the corporation under color of protecting a charitable use.[1]

Extinguishment of Power. — Where the power to mortgage is given to enable the accomplishment of a particular act, the power ceases after it has been employed for this end.[2]

(2) *Execution by Trustees* — (a) **In General.** — As a general rule the power of mortgaging the property of the church is vested in the trustees who have control of its temporalities.[3] Power given the trustees to sell certain property to pay the indebtedness of the congregation does not, however, confer on them authority to execute a mortgage securing the various creditors.[4]

Real Property Conveyed to a Bishop in Trust and for the use of the wardens, vestry, and congregation of an unincorporated Protestant Episcopal Church cannot be incumbered by the vestrymen without the consent of the bishop.[5]

Application by Trustees. — Trustees causing application to be made to the court for leave to mortgage the property are special agents of the corporation, and to render their acts in that respect binding on the corporation an express authority is requisite.[6]

The Court Will Not Take Judicial Notice of the power of vestrymen to bind the wardens and congregation by the execution of a mortgage, but their power in this regard must be shown.[7]

(b) **Manner of Execution** — *aa.* Notice of Meeting. — Under a provision authorizing a majority of the trustees when lawfully convened to do anything which the trustees as a whole are authorized to do, a mortgage on the church property may be executed by two out of three trustees though they come together without notice to anyone else.[8]

bb. What Number May Execute. — Where the congregation has ordered the trustees to mortgage the property for a particular purpose, a court of equity may declare the mortgage binding according to the intent of the parties and decree a foreclosure even though the mortgage was not executed by all of the trustees.[9]

The Death of One of the Three Trustees of the church does not affect the power of the remaining two to give a deed of trust on the church property.[10]

cc. Formal Resolution Not Necessary. — If the mortgage is executed by all of the trustees, a majority being present a part of the time when it is executed, the act is obligatory upon the society, although no formal resolution of the board of trustees authorizing the mortgage was previously passed.[11]

(c) **Ratification.** — The society has power and capacity to ratify a mortgage given by the trustees without its prior direction or preliminary assent, and where there are no intervening rights the ratification inures to the date of the act ratified. It is not necessary that there should be a direct proceeding with an express intent to ratify, but it may be done indirectly and by acts of recognition or acquiescence, or by act inconsistent with repudiation or disapproval.[12] Thus a congregation, by taking possession of property under a

1. **Covenant Against Incumbrance.** — Magie *v.* German Evangelical Dutch Church, 13 N. J. Eq. 77.

2. Chicago First M. E. Church *v.* Dixon, 178 Ill. 260.

3. See *supra*, this title, *Trustees*.

4. Hubbard *v.* German Catholic Congregation, 34 Iowa 31.

5. Hill Estate Co. *v.* Whittlesey, 21 Wash. 142.

6. Moore *v.* St. Thomas' Church, (Supm. Ct. Spec. T.) 4 Abb. N. Cas. (N. Y.) 51.

7. Hill Estate Co. *v.* Whittlesey, 21 Wash. 142.

8. Scott *v.* Jackson First Free Methodist Church, 50 Mich. 528.

Meeting to Authorize Mortgage — Sufficiency of Notice. — Hubbard *v.* German Catholic Congregation, 34 Iowa 31.

9. Hubbard *v.* German Catholic Congregation, 34 Iowa 31.

10. McCallister *v.* Ross, 155 Mo. 87.

11. South Baptist Soc. *v.* Clapp, 18 Barb. (N. Y.) 35.

Mortgage Authorized by Vestry — What Constitutes Quorum. — Moore *v.* St. Thomas' Church, (Supm. Ct. Spec. T.) 4 Abb. N. Cas. (N. Y.) 51.

12. **Ratification.** — Scott *v.* Jackson First Free Methodist Church, 50 Mich. 528.

Parol Ratification of Unauthorized Mortgage Insufficient to Create an Estoppel. — Hubbard *v.* German Catholic Congregation, 34 Iowa 31.

purchase made by their trustees, ratify the purchase and cannot thereafter question the validity of a mortgage given to secure the purchase money on the sole ground that it was *ultra vires*.[1] Likewise the acquiescence of the society in the expenditure for its benefit of money secured by means of a mortgage and its retention of such benefits, having knowledge of the mortgage, without dissent, constitute such ratification.[2]

Proof of Ratification Admissible. — Proof that the action of the trustees of a religious society in giving a mortgage has been ratified by the society is admissible under a foreclosure bill alleging that the society gave the mortgage.[3]

(d) **Trustees Not Individually Liable.** — Though the mortgage is so signed as to be the personal obligation of the individual trustees signing it, equity will look at the substance and not at the form, and where the intention of the parties is shown to be that the liability should be that of the congregation and that the trustees were executing the mortgage in their capacity as trustees of the congregation, the congregation will be held liable therefor in its corporate capacity.[4]

Burden of Proving Lack of Authority. — Where the deed of trust contains a statement that it was executed by the authority and direction of the members of the church, it will be presumed that requisite assent was given, and the burden of proving the lack of such authority is upon those challenging the deed.[5]

Parol Evidence. — Where the trustees of a religious society have mortgaged its property without signing the mortgage in proper form, parol evidence is admissible to charge the society as the principal in the mortgage.[6]

(e) **Rights and Duties of Mortgagee** — *aa.* In General. — Where the statute provides that the trustees may, when directed by the congregation or church, mortgage any real estate of the corporation, it is the duty of the mortgagee to see to it that the trustees in mortgaging the property are acting in pursuance of a direction by the congregation to that effect. The mortgagee is not, however, bound to take notice of theological differences existing among the members of the church when the church property is controlled by an apparently well-organized congregation worshiping there. The mortgagee is not bound by an alleged usage of the denomination requiring the approval of a superior body of the mortgaging of the property of the congregation where no such usage is declared by the supreme body of the congregation and where it is not spread upon the records of the denomination itself.[7]

bb. Effect of Assignment. —Where a religious society, through its vestry duly authorized, borrowed money to purchase lots for church purposes, and gave its notes secured by mortgage upon the property, and the mortgagee subsequently assigned to a third person, having accepted from the vestry a new note, given without the knowledge of the society, equity will treat the transaction as an assignment of the original debt and security, and, upon foreclosure of the mortgage, will hold the society for a deficiency.[8]

b. Personal Property. — As a common-law incident of corporate existence, and in the absence of statutory prohibition, religious societies have the power to sell or mortgage their personal property, and to authorize the trustees to do this no meeting of or authority from the society is necessary.[9]

8. Assignment for Benefit of Creditors. — Under the common-law power of a religious corporation to alien its real estate it may, as a natural person may,

1. Rountree *v.* Blount, 129 N. Car. 25.
2. Scott *v.* Jackson First Free Methodist Church, 50 Mich. 528. McCallister *v.* Ross, 155 Mo. 87.
3. Scott *v.* Jackson First Free Methodist Church, 50 Mich. 528.
4. **Liability of Trustees.** — Zion Church *v.* Mensch, 178 Ill. 225.
5. McCallister *v.* Ross, 155 Mo. 87.
6. Scott *v.* Jackson First Free Methodist Church, 50 Mich. 528.
7. Zion Church *v.* Mensch, 178 Ill. 225, *affirming* 74 Ill. App. 115.
Misnomer of Corporation in Mortgage Immaterial. — M. E. Church *v.* Shulze, 61 Ind. 511; Walrath *v.* Campbell, 28 Mich. 111.
8. **Assignment of Mortgage.** — Miller *v.* Childs, 120 Mich. 639.
9. Walrath *v.* Campbell, 28 Mich. 111.

make an assignment thereof or of its personal property in trust for the benefit of creditors unless restrained by a charter or statute.[1]

9. Borrowing Money. — A treatment of the powers of all classes of corporations with regard to borrowing money is found elsewhere in this work.[2]

10. Holding in Trust. — A religious corporation cannot act as a trustee in relation to matters in which it has no interest,[3] but may act as such in order to carry out the purposes of its creation.[4]

X. Liability on Contracts — 1. In General. — With regard to their dealings as secular organizations religious corporations are governed by the same general rules of law and equity as are other corporations.[5] The presumptions of fact applicable to them are not, however, in all cases the same as those applicable to other corporations.[6]

2. Acts of Agents. — A corporation is not bound by acts of its agents done in excess of their authority unless it ratifies the acts so done.[7] After a corporation has taken advantage of the unauthorized acts it cannot repudiate the liability while receiving benefits.[8]

Burden of Proving Authority. — Where a religious corporation is sued on an agreement executed under the corporate seal and attested by the proper officers, a presumption of authority to make the contract arises and the burden of proof rests on those who denied the authority.[9]

3. Individual Liability of Members. — The members of an incorporated society are not individually liable for debts incurred by the society,[10] but if they neglect to appropriate their property to the payment of the debts of the society and permit it be wasted they may become liable.[11]

Members of Unincorporated Societies. — A member of an unincorporated religious society, not founded for the purpose of gain or pecuniary profit, is not individually liable for its debts, unless he authorized the incurring of the obligation or subsequently ratified the same.[12]

4. De Facto Corporation. — An organization under a charter and user of its powers proves the existence of a corporation *de facto* sufficient to bind it under a contract.[13]

1. Assignment for Benefit of Creditors. — De Ruyter *v.* St. Peter's Church, 3 N. Y. 242. See also the title Assignments for the Benefit of Creditors, vol. 3, p. 23 *et seq.*; title Corporations, vol. 7, p. 741.

2. Power to Borrow Money. — See the title Corporations, vol. 7, p. 779 *et seq.* See also Miller *v.* Childs, 120 Mich. 639.

3. Power to Act as Trustee. — Matter of Howe, 1 Paige (N. Y.) 214. See also the title Corporations, vol. 7, p. 726; Magie *v.* German Evangelical Dutch Church, 13 N. J. Eq. 77.

4. See the title Corporations, vol. 7, p. 731.

Property May Be Held in Trust for Support of Minister. — Tucker *v.* St. Clements Church, 3 Sandf. (N. Y.) 242.

Power to Hold as Trustee in Pennsylvania. — Miller *v.* Lerch, 1 Wall. Jr. (C. C.) 210.

5. Moore *v.* First Ruthven Circuit M. E. Church, (Iowa 1902) 90 N. W. Rep. 492; Wilson *v.* Tabernacle Baptist Church, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 268. See *infra*, this title, *Liability on Contracts; Actions By and Against.*

Churches Subject to Mechanics' Liens. — See the title Mechanics' Liens, vol. 20, p. 289.

Church Property May Be Subjected to Payment of Money Furnished. — Josey *v.* Union L. & T. Co., 106 Ga. 608.

Secession of Part of Members No Defense to Action on Note of Corporation. — Wanner *v.* Emanuel's Church, 174 Pa. St. 466.

Religious Corporation Bound by Contract of Synod. — McLaughlin *v.* Concordia College, 20 Mo. App. 42.

6. Wilson *v.* Tabernacle Baptist Church, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 268.

7. Roman Catholic Congregation *v.* O'Leary, 24 Colo. 229; Parshley *v.* Brooklyn Third M. E. Church, 147 N. Y. 583. See also Greene *v.* First Parish, 10 Pick. (Mass.) 500; Child *v.* Christian Soc., 144 Mass. 473; Sawyer *v.* M. E. Society, 18 Vt. 405.

8. Roman Catholic Congregation *v.* O'Leary, 24 Colo. 229; St. Patrick's Roman Catholic Church *v.* Abst, 76 Ill. 252. See also Wojciechowski *v.* Johnkowski, 16 Pa. Super. Ct. 444.

9. Burden of Proof. — Bowen *v.* Irish Presb. Congregation, 6 Bosw. (N. Y.) 245. See also Whitmore *v.* Fourth Cong. Soc., 2 Gray (Mass.) 306.

10. Jewett *v.* Thames Bank, 16 Conn. 511.

11. Bigelow *v.* Congregational Soc., 11 Vt. 283.

12. Plattsmouth First Nat. Bank *v.* Rector, 59 Neb. 77; Devoss *v.* Gray, 22 Ohio St. 159. See also Sheehy *v.* Blake, 72 Wis. 411; Meyer *v.* Lipski, 8 Ohio Dec. 584, 7 Ohio N. P. 366, 10 Ohio Dec. 95. *Compare* Wilkins *v.* St. Mark's Protestant Episcopal Church, 52 Ga. 351; Thurmond *v.* Cedar Spring Baptist Church, 110 Ga. 816.

Ratification as Sufficiency of. — Christian Church *v.* Cox, 78 Ill. App. 219.

13. Ebaugh *v.* German Reformed Church, 3

XI. Actions By and Against — 1. In General. — The same general rules apply as to actions by religious societies, whether incorporated or not, as apply to civil corporations or associations.[1]

Action for Damage to Property. — A religious corporation may maintain an action against a railroad corporation for nuisance in disturbing the use of a church; and damages may be given, not only for depreciation in the value of the property but for discomfort and inconvenience caused to the congregation and tending to destroy the use of the building for church purposes.[2]

2. Action by De Facto Corporation. — The organization of the corporation must be in substantial compliance with the statute, otherwise it will be incapable of suing as a corporation.[3]

3. Members Competent as Witnesses. — As a general rule members of religious societies are competent witnesses in actions to which the societies are parties.[4]

4. Enforcement of Subscriptions. — An engagement to subscribe for the benefit of an unincorporated association for the purpose of building a church is revocable until the association is formed, and is withdrawn by the death of the subscriber before its formation. If, however, the association has been formed and a contract entered into on the faith of the subscription in the lifetime of the subscriber and with his express or implied consent, he is bound by his subscription.[5] The borrowing of money by a church corporation to pay its existing indebtedness in reliance upon a subscription to pay the borrowed money constitutes a sufficient consideration to support the contract of subscription.[6] So, too, there is a sufficient consideration where the custom of the society requires all the indebtedness to be paid or provided for before the dedication of the building and the trustees have individually assumed the debt relying upon the subscription which had been made.[7]

5. Statute of Limitations. — The statute of limitations runs against the vestry and wardens of a church, as such, as against any other persons.[8]

6. Injunctions. — The same general principles obtain in regard to the granting of injunctions in cases in which religious corporations are involved as obtain with regard to the issuance of injunctions in other matters generally.[9] A trustee who has ceased to be a member of the church, congregation, or society, by removal or otherwise, and has thereby, under a statute, rendered his office vacant, may be enjoined from acting as trustee.[10]

7. Mandamus. — A treatment of the issuance of mandamus against private corporations, their officers and agents, and individuals is found elsewhere in this work.[11]

E. D. Smith (N. Y.) 60. See also *supra*, this title, *Formation and Organization — De Facto Corporations*.

1. See Encyc. of Pl. and Pr., vol. 18, p. 99.

Parish May Maintain Replevin for Records. — First Parish *v.* Stearns, 21 Pick. (Mass.) 148.

Parish May Maintain Trespass. — First Parish *v.* Smith, 14 Pick. (Mass.) 297.

2. Injuries to Property. — Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317.

3. Tunstall *v.* Wormley, 54 Tex. 476. See also *supra*, this title, *Formation and Organization — De Facto Corporations*.

4. Hadden *v.* Chorn, 8 B. Mon. (Ky.) 70; Christian Soc. *v.* Macomber, 5 Met. (Mass.) 155; M. E. Church *v.* Wood, 5 Ohio 283. See also Anderson *v.* Brock, 3 Me. 243.

5. Enforcement of Subscription. — Phipps *v.* Jones, 20 Pa. St. 260, 59 Am. Dec. 708. See also Willard *v.* M. E. Church, 66 Ill. 55.

6. Sufficiency of Consideration.—United Presb. Church *v.* Baird, 60 Iowa 237.

7. Ft. Madison First M. E. Church *v.* Donnell, 110 Iowa 5.

8. St. Bartholomews *v.* Cantey, 3 McCord L. (S. Car.) 317.

9. See the title Injunctions, vol. 16, p. 337 *et seq.* And see *supra*, this title, *Jurisdiction of Civil Courts*. See also Mac Laury *v.* Hart, 121 N. Y. 636.

Expulsion of Officer — Injunction Will Not Lie. — Tartar *v.* Gibbs, 24 Md. 323.

Injunction Against Sale of Pews — Powers of Trustee to Defend. — Harbison *v.* First Presb. Soc., 46 Conn. 529, 33 Am. Rep. 34.

Interference with Officer's Performance of Duties Enjoined. — Richter *v.* Kabat, 114 Mich. 575; Lutheran Evangelical Church *v.* Gristgau, 34 Wis. 328.

Injunction Will Not Lie to Prevent Officers from Excluding Seceding Majority. — Long *v.* Harvey, 177 Pa. St. 473, 55 Am. St. Rep. 733.

10. York First Reformed Presb. Church *v.* Bowden, (Supm. Ct. Spec. T.) 10 Abb. N. Cas. (N. Y.) 1.

11. See the title Mandamus, vol 19, p. 867 *et seq.*

8. Quo Warranto. — A person's right to act as trustee of a religious corporation is determinable by proceedings in *quo warranto;* equity will not entertain a bill for that purpose.[1] If the relator took part in the election of the trustees, he cannot have leave to file an information in the nature of a *quo warranto* charging them with unlawfully acting as trustees.[2] Irregularities in the charter of a church corporation can be reached in the same way only, and at the suit of the attorney-general.[3]

XII. Dissolution. — The dissolution of religious corporations may be had in the same manner and on the same grounds as the dissolution of corporations generally.[4]

Dissolution of Church. — Where the church is an independent organization and not subject to the control of any governing body or denomination, it is in the power of the majority of the members to disband and put an end to the church organization. While the minority may meet and reorganize as a new organization, it succeeds to none of the rights and incidents of the old organization.[5]

RELOAN. — See note 6.

RELOCATE — RELOCATION. — See the titles Highways, vol. 15, p. 395; Mines and Mining Claims, vol. 20, p. 740; Railroads, vol. 23, p. 690; Stations (Railroad).

RELUCTANT. — Reluctant means striving against; opposed in desire; unwilling; disinclined; disinclined to yield to some demand or requirement.[7]

REM. — See Rem, Proceedings in, *post.*

REMAIN, REMAINING, ETC. — See note 8.

Mandamus to Compel Attendance of Vestryman. — People *v.* Winans, (Supm. Ct. Spec. T.) 9 N. Y. Supp. 249.

Mandamus Will Not Lie to Compel Consummation of Unauthorized Consolidation. — St. Stephen Church Case, (C. Pl. Gen. T.) 25 Abb. N. Cas. (N. Y.) 230.

Mandamus to Compel Issuance of Notice of Election of Vestrymen. — St. Stephen Church Case, (C. Pl. Gen. T.) 25 Abb. N. Cas. (N. Y.) 230.

Mandamus by Clergyman to Compel Admission to Office. — See the title Mandamus, vol. 19, p. 888.

1. Lawson *v.* Kolbenson, 61 Ill. 405; Nolde's Appeal, (Pa. 1888) 15 Atl. Rep. 777. See also the title Quo Warranto, vol. 23, p. 641.

2. People *v.* Moore, 73 Ill. 132.

Quo Warranto Not Proper Where Possession of Church Property Is Sought. — Gaff *v.* Greer, 88 Ind. 122, 45 Am. Rep. 449.

3. Christ's Church Charter, 8 Pa. Co. Ct. 28.

4. See the title Dissolution of Corporations, vol. 9, p. 544.

Agreement of Members. — Easterbrooks *v.* Tillinghast, 5 Gray (Mass.) 17.

Application of Members for Dissolution — When Court Will Refuse. — Matter of New South Meeting-House, 13 Allen (Mass.) 504; Wheaton *v.* Gates, 18 N. Y. 395.

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Expiration of Charter. — Roman Catholic Church *v.* Texas, etc., R. Co., 41 Fed. Rep. 564.

Division of Property Between Members. — Burke *v.* Wall, 29 La. Ann. 38, 29 Am. Rep. 316.

Property Reverts to Donors. — Calkins *v.* Cheney, 92 Ill. 463.

5. McRoberts *v.* Moudy, 19 Mo. App. 26.

6. **Reloan.** — In Spurgeon *v.* Smitha, 114 Ind. 454, it was held that the averment that money was ***reloaned*** for a definite time was an averment of fact, and not a mere conclusion.

7. **Reluctant.** — Central of Georgia R. Co. *v.* Harden, 113 Ga. 453, *quoting* Webst. Dict. and Stand. Dict.

8. **Remain in Sense of Is.** — A statute required that a deed of trust of chattels should be registered in the county where the goods ***remain.*** In construing this statute in Mitchell *v.* Smith, 3 Strobh. L. (S. Car.) 244, the court assumed that the word ***remain*** meant "is;" "in other words, the recording is required to

REMAINDER. — See RESIDUE, *post*.

be made where the property is at the time of registry." See also the titles CHATTEL MORTGAGES, vol. 5, p. 945; CONDITIONAL SALES, vol. 6, p. 436; RECORDING ACTS, *ante*.

Remain With. — Where a testator devised land to two servants on condition that they *remain* with his widow and nephew during the life of the widow, it was held that "the testator used the word *remain* in its commonplace meaning, that is, to continue unchanged; to abide in the place where they were when he wrote the will;" and that on the removal of the widow and nephew from the land, the devise to the servants did not lapse because of their refusal to remove with her. Harris *v.* Wright, 118 N. Car. 422.

Remain Unredeemed. — A statute provided that if land sold under execution should *remain* unredeemed for a certain time, a deed should be made. In construing this provision the court said: "The word *remains* presupposes and implies something that exists or continues after some other time or event — *remains* unredeemed after the expiration of the time of redemption. It means this, or means nothing." Baldwin *v.* Ely, 66 Wis. 198. See also Lombard *v.* White, 76 Wis. 447, and see the title SHERIFFS' SALES.

Remain Inviolate. — By the *Mississippi* Bill of Rights it is provided that "the right of trial by jury shall *remain* inviolate." In construing this the court said: "It is to '*remain* inviolate.' This implies that under some system previously in force, this right of trial by jury was 'inviolate;' and to this system we must have reference to ascertain the extent and meaning of this prohibition against encroachment on 'the principles of liberty and free government.'" Isom *v.* Mississippi Cent. R. Co., 36 Miss. 308.

Admission to Bar. — A statute admitted to the bar candidates who were licensed in other states and had *remained* therein as practicing attorneys for at least one year. In construing this statute in Matter of Simpson, 167 N. Y. 403, the court said: "The petitioner does not come within the rule, because he has not, according to any reasonable construction, *remained* in the state of New Jersey as a practicing attorney for the requisite period. The words '*remained* therein,' as used in the rule, imply residence in the state where the candidate was admitted during the year that he is required to practice therein."

Insurance. (See also the title FIRE INSURANCE, vol. 13, pp. 269, 275.) — A policy of insurance was conditioned that it should become void if the dwelling house should become vacant or unoccupied and so *remain*. It was held that a temporary cessation to occupy the dwelling house which did not continue until it was destroyed by fire did not avoid the contract. Laselle *v.* Hoboken F. Ins. Co., 43 N. J. L. 469.

Whatever Remains. — A testator bequeathed to his wife the farm on which he then resided and also all his personal property of every description "so long as she remains my widow; at the expiration of that time the whole, or whatever *remains*, to descend to my daughter." It was held that the words "whatever *remains*" applied only to the personalty, which might be consumed or lost. Green *v.* Hewitt, 97 Ill. 113.

Remaining Children. — A testator devised his real and personal estate to his wife and five children, with remainder over upon the death of any of the children to "the *remaining* children for life." In construing this provision in Turner *v.* Withers, 23 Md. 41, the court said: "We are of opinion that by the words '*remaining* children' the testator intended those children who might *remain* alive at the death of the first devisee for life — surviving children. This is the natural and ordinary meaning of the words, and we find nothing in the will to warrant any other interpretation."

Remaining Due. — A mortgage contained a covenant to pay a certain sum in eight equal instalments, with interest on the principal sum *remaining* due at each payment. It was held that interest must be paid with each instalment on the whole principal money unpaid, though it might not be then payable — not on the instalment only. Hall *v.* Brown, 15 U. C. Q. B. 419.

Received or Realized. — The by-laws of a relief association provided that funds to pay the beneficiary of a deceased member should be raised by the voluntary contributions by the members of the society of such dues as the by-laws provided, "said sum * * * in no case to exceed the total sum of such dues *remaining* in the treasury of said society." In construing this provision in Lake *v.* Minnesota Masonic Relief Assoc., 61 Minn. 99, the court said: "The word *remaining*, used in the articles of association, must be construed as meaning 'received' or 'realized.'"

REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS.

By Lucius P. McGehee and Charles Porterfield.

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CROSS-REFERENCES.

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I. Remainders — 1. Definition. — A remainder is defined in the law of real property as an estate limited to commence after the determination of a particular estate previously limited by the same deed or instrument out of the same subject of property.[1] Various other definitions have been given by different writers, comprising with more or less completeness and accuracy the

1. **Remainder Defined.** — 1 Prest. Est. 90; Challis Real Prop. 60.
The Term "Remainder" Is a Relative Expression implying that some part of the estate is previously disposed of. Hudson *v.* Wadsworth, 8 Conn. 359.

several elements of such an estate,[1] and in some jurisdictions remainders are defined by statute.[2] As is generally the case, however, with definitions, none of them can be said to be entirely satisfactory, but a complete understanding of what a remainder is may best be obtained by consideration of its elements and characteristics.[3]

2. General Principles Applicable to Remainders — *a.* PRECEDENT PARTICULAR ESTATE — (1) *Necessity to Support Remainder.* — In order that an estate in expectancy may technically constitute a remainder it must be limited after a preceding estate called the particular estate, or *particula*, as being only a small part theoretically, though not always such in fact, of the entire interest disposed of.[4] This necessarily follows from the definition of a remainder, because an estate which is to commence *in futuro* without any intervening estate is not of a residuary character, that is, it is not a remnant of the entire interest disposed of by the grantor or testator, but is, itself, the entire interest so disposed of.[5] The consequence of this principle is that an attempt to create a remainder is ineffectual if the particular estate cannot take effect.[6]

Livery of Seizin Essential to Creation of Freehold Remainder at Common Law. — Furthermore, an estate of freehold could not be made to commence *in futuro* at common law, but it must take effect presently, either in possession or in right, because a freehold could be transferred only by livery of seizin which must operate immediately or not at all. Hence, in order to create a remainder of freehold it was necessary that there should be a preceding particular estate to the grantee of which livery of seizin might be made, thus investing the remainderman with the seizin, though his enjoyment of the possession must await the determination of the particular estate.[7]

Livery of Seizin Dispensed with by Statute. — It is now generally provided by statute that a freehold estate may be created by deed or will, to commence either with or without the intervention of a precedent estate.[8]

1. Coke's Definition. — Lord Coke defines a remainder as a "remnant of an estate in lands or tenements expectant upon a particular estate created together with the same at one time." Co. Litt. 143*a*, *quoted* in Gardner *v.* Sheldon, Vaugh. 269. See also Fearne Cont. Rem. 11, 12; Sayward *v.* Sayward, 7 Me. 210, 22 Am. Dec. 191.

Blackstone defines a remainder as " an estate limited to take effect and be enjoyed after another estate is determined." 2 Bl. Com. 163, *quoted* in Loyless *v.* Blackshear, 43 Ga. 330. This definition is manifestly incomplete, in that it fails to bring out the fact that the remainder and the particular estate are but different parts of the same estate.

Kent's Definition. — "A remainder is a remnant of an estate in land depending upon a particular prior estate created at the same time and by the same instrument, and limited to arise immediately on the determination of that estate and not in abridgment of it." 4 Kent Com. 197.

Smith's Definition. — The definition given in Smith on Executory Interests is as follows: "A limitation of a remainder, strictly so called, is a clause creating or transferring an estate or interest in lands or tenements, which is limited, either directly or indirectly, to take effect in possession or in enjoyment or in both, subject only to any term of years or contingent interest that may intervene, immediately after the regular expiration of a particular estate of freehold previously created together with it, by the same instrument, out of the same subject of property." Smith Exec. Ints., § 159.

2. Remainders Defined by Statute. — See, for instance, the *New York* statute which defines a remainder as "An estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate, created at the same time." 1 Rev. Stat. N. Y., p. 723, § 10. As to the *Minnesota* statute, see Sabledowsky *v.* Arbuckle, 50 Minn. 475. *Compare* the statutes in other states.

3. See *infra*, this section, *General Principles Applicable to Remainders*.

4. Necessity of Particular Estate. — Colthirst *v.* Bejushin, Plowd. 35; Gardner *v.* Sheldon, Vaugh. 269; Wilkes *v.* Lion, 2 Cow. (N. Y.) 389.

5. See *supra*, this section, *Remainders — Definition*.

6. Particular Estate Incapable of Taking Effect. — Cholmley's Case, 2 Coke 51.

Thus, if the grantee of the particular estate has no capacity to take, the remainder will fail. Colthirst *v.* Bejushin, Plowd. 35.

7. Buckler *v.* Hardy, Cro. Eliz. 585; 2 Bl. Com. 165. And see FEOFFMENT, vol. 12, p. 1085; LIVERY OF SEIZIN, vol 19, p. 428.

8. Statutes Authorizing Creation of Freehold to Commence in Futuro. — Loyless *v.* Blackshear, 43 Ga. 330. See also Stimson Am. Stat. Law, § 1421, and the statutes of the several states. See also Bunch *v.* Nicks, 50 Ark. 367; Gorham *v.* Daniels, 23 Vt. 600.

(2) *Quantity of Particular Estate* — In General. — It follows from the definition of a remainder that such an estate may be limited only after a preceding estate which is less than the entire interest disposed of, whether that entire interest is the inheritance, or is measured by lives, or is merely a term of years.[1] In other words, the particular estate must be of such quantity as would leave a reversion in the grantor, had the particular estate been the only interest conveyed.[2]

Term of Years. — It is generally laid down that the particular estate may be for a term of years, *e. g.*, a grant to A for twenty-one years and after the determination of the said term to B and his heirs forever.[3] But, strictly speaking, there can be no such thing as a remainder of freehold expectant on a term of years, because the existence of a prior term of years does not prevent the first vested estate of freehold from being an estate of freehold in possession. During the continuance of the term the estate of freehold is properly described not as being a remainder of freehold on a term of years, but as being the freehold in possession subject to the term. Since, however, the possession of the freeholder is, in such a case, subject to the rights of the termor, and since these rights may, and in practice usually do, deprive the freeholder of the immediate use and occupation of the land during the term, the result is for many practicable purposes the same as if the freehold subsisted only as a veritable remainder. In this sense, the word "remainder" is often applied to estates of freehold limited after a term of years.[4]

Life Estate. — A remainder may at common law be limited after a life estate,[5] and this estate may be measured by the life of a third person as well as by the life of the person to whom the particular estate is given.[6] By statute, however, in some jurisdictions it is provided that a remainder cannot be limited on an estate for the life of any other person or persons than the first grantee or devisee of such estate unless such remainder be in fee; nor on such an estate in a term of years unless it be for the whole residue of the term.[7]

Estates Tail. — Remainders may also be limited after an estate tail. This class of estates was not known to the common law, but was created by the operation of the statute *de donis*, which provides in effect that in the case of a grant to any person and the heirs of his or her body, such person should not have the power to alien the land on the birth of issue, as had theretofore been the rule in regard to conditional fees, but that the reversion should remain in the grantor, expectant on an indefinite failure of the heirs of the body of the grantor.[8] In the *United States* the doctrine in regard to remainders limited after estates tail has been greatly changed by statute. This change has, for the most part, been effected by statutes which abolish this class of estates entirely, or which merely operate to convert an estate tail, at

1. See *supra*, this section, *Remainders — Definition.*

2. **Remainder After Any Interest Which Would Leave Reversion.** — Gardner *v.* Sheldon, Vaugh. 269.

3. **Remainder After Term of Years.** — Fearne Cont. Rem. 3, note c by Butler; 2 Bl. Com. 164.

According to Mr. Butler, there were only two classes of estates after which a remainder could be limited at common law, viz., a term of years and an estate for life, a third class (estates tail) being added by the operation of the statute *De Donis*. See Fearne Cont. Rem. 3, note c.

4. **Freehold After Term of Years Not Regarded as Strict Remainder.** — Challis Real Prop. 77.

The principle enunciated in the text is made further apparent by the rule that a contingent remainder cannot be limited for a term of years. See *infra*, this section, *Contingent Remainders — Nature of Particular Estate.*

5. **Remainder Limited After Life Estate.** — Fearne Cont. Rem. 3, note c, by Butler.

6. **Remainder After Estate pur Autre Vie.** — Kenyon's Petition, 17 R. I. 149.

7. **Statutes Affecting Remainders After Estate pur Autre Vie.** — See the statutes of *Michigan*, *Minnesota*, *New York*, and *Wisconsin*. *Compare* the statutes in other states.

8. **Remainder Limited After Estate Tail.** — Webb *v.* Hearing, Cro. Jac. 415; Doe *v.* Ellis, 9 East 382; Willis *v.* Bucher, 3 Wash. (N. S.) 369; Richardson *v.* Richardson, 80 Me. 585; Allen *v.* Ashley School Fund, 102 Mass. 263; Dorr *v.* Johnson, 170 Mass. 540; Taylor *v.* Taylor, 63 Pa. St. 481, 3 Am. Rep. 565.

As to the origin, history, and mode of creation of estates tail, see the title ESTATES, vol. 11, p. 371 *et seq.*

the moment of its creation, into either a fee simple or an estate for life in the donee in tail with remainder to his issue.[1] In the case of statutes which merely abolish estates tail, the effect is the same as if the statute *de donis* had been repealed, thus restoring conditional fees as they existed at common law,[2] and, therefore, in such jurisdictions no remainder can be limited after what would have been a fee tail under the statute *de donis* because, as has already been seen, a remainder cannot be limited on a conditional fee.[3] As to the statutes which convert estates tail into estates in fee simple, their effect also is to prevent the limitation of a remainder on estate tail, because such estate becomes, immediately on its creation, a fee simple on which no remainder can be effectually limited,[4] and, consequently, any remainder that may be so limited is defeated by the operation of the statute,[5] though a future limitation after such an estate may operate as an executory interest.[6] In those jurisdictions where the statutes convert a fee tail into a life estate in the donee in tail with remainder in fee to his issue, it is obvious that any remainder over must fail unless it can be sustained either as a contingency with a double aspect,[7] or an executory interest.[8] In *Massachusetts*, and perhaps in a few other states also, the fee tail is still a subsisting estate,[9] and, consequently, in those jurisdictions a remainder may still be effectually limited on such an estate.[10]

No Remainder After Fee Simple. — It is obvious from the nature of things that a remainder cannot be limited on a fee simple, because that is the entire inheritance, and after a grant or devise of the fee nothing can be left to limit over,[11] but this, of course, does not preclude the creation of alternative or substitutional fees.[12]

A Qualified or Base Fee, sometimes called a determinable fee, though not of the dignity of a fee simple, because of its dependence on collateral circumstances, carries with it, during its continuance, the same rights and privileges as a fee simple,[13] and is so far regarded as the entire inheritance that a remainder cannot be limited on it.[14]

Conditional Fee. — There is some diversity of opinion as to whether a remainder can be limited after a conditional fee. An eminent writer insists that such limitations were proper at common law, and he shows that they were in common use before the passage of the statute *de donis.*[15] But however it may

1. See the title ESTATES, vol. 11, p. 376.

2. **Operation of Statutes Abolishing Estates Tail — Conditional Fees Restored.** — Rowland *v.* Warren, 10 Oregon 129.

3. See *infra*, this subdivision of this section, paragraph *Conditional Fee.*

4. See the next following paragraph of this division of this section, *No Remainder After Fee Simple.*

5. **Estates Tail Converted into Fee Simple — Remainders Defeated.** — Wilson *v.* Wilson, 32 Barb. (N. Y.) 332; Lott *v.* Wykoff, 2 N. Y. 355, *affirming* 1 Barb. (N. Y.) 565; Carter *v.* Tyler, 1 Call (Va.) 165; Burfoot *v.* Burfoot, 2 Leigh (Va) 131.

6. See *infra*, this title, *Executory Interests.*

7. See *infra*, this section, *Double Contingencies or Contingency with Double Aspect.*

8. See *infra*, this title, *Executory Interests.*

9. **Estates Tail Existent in Some States.** — See Stimson Am. Stat. Law, § 1313. See also the title ESTATES, vol. 11, p. 371 *et seq.*

10. Allen *v.* Ashley School Fund, 102 Mass. 263; Dorr *v.* Johnson, 170 Mass. 540.

11. **No Remainder After Fee Simple.** — Willion *v.* Berkley, Plowd. 248; Gardner *v.* Sheldon, Vaugh. 269; Doe *v.* Holme, 3 Wils. C. Pl. 237; Whiting *v.* Whiting, 42 Minn. 548; Burleigh *v.* Clough, 52 N. H. 273, 13 Am. Rep. 23; Allen *v.* Fogler, 6 Rich. L. (S. Car.) 54; 2 Bl. Com. 164.

But a devise to a trustee and his heirs for and during the natural life of the *cestui que trust* creates merely an estate *pur auter vie* in the trustees, after which a remainder may be limited. Kenyon's Petition, 17 R. I. 149.

As to the modification of this doctrine by statute, see *infra*, this title, *Statutory Future Estates.*

12. **Alternative or Substitutional Fees.** — See *infra*, this section, *Double Contingencies or Contingency with Double Aspect.*

13. See the title ESTATES, vol. 11, p. 368.

Existence of Determinable Fee Denied. — It is said that since the statute *quia emptores* no such estate as a determinable fee is possible. See Gray on Perpetuities, § 34. See also Collier *v.* Walters, L. R. 17 Eq. 252, in which the master of the rolls says, at page 261, that he thinks no case can be found which is authority for a determinable fee.

14. **No Remainder After Base Fee.** — Fearne Cont. Rem. 12, 372, 373; Hennessy *v.* Patterson, 85 N. Y. 98.

15. See the article "Remainders After Conditional Fees," by F. W Maitland, 6 Law Quar. Rev. 22; 2 Poll. & Mait. Hist. Eng. Law 23.

have been at that time, it seems to be well settled by the decisions since the enactment of the statute *de donis* that no remainder can be limited after a conditional fee.[1]

Estate at Will or by Sufferance. — No remainder can be limited after an estate at will or by sufferance, because such an estate is of a nature so slender and precarious that it is not regarded as a portion of the inheritance.[2]

(3) *Regular Determination of Particular Estate.* — It is essentially characteristic of a remainder that it must await the regular determination of the particular estate, and that it cannot be so limited as to take effect in possession in derogation or defeasance of the particular estate.[3] In this connection a distinction is to be observed between the case of a subsequent estate at common law, limited to take effect on a condition which is to defeat the preceding estate, and a case where the preceding estate is subject to a condition, but the remainder has no relation to or dependence on the condition. In the first case the remainder could take effect only in derogation of the preceding estate, and is therefore void, while in the other case the condition is destroyed by the limitation of the remainder, which then awaits the regular determination of the preceding estate and is consequently valid.[4]

By Statute, however, in some jurisdictions, it is now provided that the contingency on which a remainder is limited may operate to abridge the precedent estate.[5]

b. Simultaneous Creation of Remainder and Particular Estate. — Another characteristic of a remainder is that it must commence or pass out of the grantor at the time of the creation of the particular estate,[6] and by the same instrument.[7]

As supporting Mr. Maitland's view, see Bract., lib. 2, c. 6, fol. 18*b*; Fleta, lib. 3, c. 9, § 9. See also Gardner *v.* Sheldon, Vaugh. 269.

1. No Remainder After Conditional Fee. — Willion *v.* Berkley, Plowd. 239; Stafford *v.* Buckley, 2 Ves. 180; Mazyck *v.* Vanderhorst, Bailey Eq. (S. Car.) 48; Bedon *v* Bedon, 2 Bailey L. (S. Car.) 231; Adams *v.* Chaplin, 1 Hill Eq. (S. Car.) 265; Edwards *v.* Barksdale, 2 Hill Eq. (S. Car.) 184; Deas *v.* Horry, 2 Hill Eq. (S. Car.) 244; Bailey *v.* Seabrook, Rich. Eq. Cas. (S. Car.) 419; Williams *v.* Caston, 1 Strobh. L. (S. Car.) 130; Buist *v.* Dawes, 4 Strobh. Eq. (S. Car.) 37.

The case of Cruger *v.* Heyward, 2 Desaus. (S. Car.) 94, so far as it is opposed to the rule stated in the text, is in effect overruled by the later *South Carolina* cases cited *supra*, this note.

2. No Remainder After Estate at Will or by Sufferance. — 2 Bl. Com. 166.

3. Remainder Must Await Regular Determination of Particular Estate. — Hennessy *v.* Patterson, 85 N. Y. 91; Watson *v.* Dodd, 68 N. Car. 528; 1 Prest. Est. 91.

This is one of the points of distinction between a remainder and an executory limitation. See *infra*, this section, *Remainders Distinguished from Other Future Interests.*

4. Relation of Subsequent Estate to Condition Annexed to Precedent Estate. — Fearne Cont. Rem. 270.

The statement in the text that a subsequent estate limited to take effect in derogation of the precedent estate is void applies only to the creation of future estates at common law. Such limitations, whether by grant or devise, are now valid and effectual as conditional or executory limitations. See *infra*, this title, *Executory Interests,*

Thus a limitation over, after a devise to "A so long as she remains testator's widow, or till marriage," is good by way of remainder; but a limitation over to the widow for life, provided that if she marry her interest shall at once cease, and the land immediately vest in B and his heirs, gives to B an executory interest. Fearne Cont. Rem. 10, Butler's note.

5. See the statutes of *California*, *Dakota*, *Idaho*, *Michigan*, *Minnesota*, *New York*, and *Wisconsin*. *Compare* the statutes in other states.

6. Simultaneous Creation of Remainder and Particular Estate. — Kingsley *v.* Broward, 19 Fla. 743.

"It is this which induces the necessity at common law of livery of seizin being made on the particular estate, whenever a freehold remainder is created. For if it be limited even on an estate for years, it is necessary that the lessee for years should have livery of seizin in order to convey the freehold from and out of the grantor, otherwise the remainder is void. Not that the livery is necessary to strengthen the estate for years; but as livery of the land is requisite to convey the freehold, and yet cannot be given to him in remainder without infringing the possession of the lessee for years, therefore the law allows such livery, made to the tenant of the particular estate, to relate and inure to him in remainder, as both are but one estate in law." 2 Bl. Com. 167.

7. Particular Estate and Remainder Created by Same Instrument. — This characteristic is expressed in the definition. See *supra*, this section, *Remainders — Definition.*

Necessity of Deed. — It is to be observed that the definition given in the text refers to a deed or other instrument as necessary to create a remainder, but this was not necessary at com-

A Conveyance by the Grantor of His Reversion after he has conveyed a life estate or other particular estate does not convert the reversion into a remainder; it still remains a reversion, though vested in the transferee.[1]

Conveyance of Fee Reserving Life Estate. — In some jurisdictions a conveyance of a fee reserving a life estate in the grantor has been sustained as a remainder.[2]

c. TIME OF VESTING IN RIGHT — (1) *In General.* — A remainder must vest in right during the continuance of the particular estate or *eo instanti* that it determines,[3] otherwise it will not take effect in possession immediately on the determination of the particular estate,[4] and the freehold will be in abeyance.[5]

(2) *Remainders to Class* — **Some of Class in Esse.** — The general rule is that in the absence of a contrary intent, a remainder limited to a class vests in such of the objects as are *in esse*, and answer the description at the death of the testator or the delivery of the deed, subject to open and let in any that may be afterwards born before the determination of the particular estate.[6] As to the unborn members of the class, the remainder is contingent until they are *in esse*, but then it immediately vests and thenceforth is attended by all the

mon law. By the common law, before the statute of frauds, a particular estate followed by a remainder might have been created by feoffment without any writing; and a deed was first made necessary by 8 & 9 Vict. It also seems that the expression "same deed" must be taken to include several deeds delivered at the same time. Challis Real Prop. 60. This last proposition, however, has been questioned. See 1 Prest. Est. 90, note q.

In the *United States*, under the statute of frauds which is generally in force, a writing is necessary. See the title STATUTE OF FRAUDS.

1. Conveyance of Reversion. — Smith Exec. Ints., §§ 375–382.

2. Conveyance of Fee Reserving Life Estate. — Fish *v.* Sawyer, 11 Conn. 550; Bissell *v.* Grant, 35 Conn. 296; Abbott *v.* Holway, 72 Me. 298; Watson *v.* Cressey, 79 Me. 383. *Compare* 2 Code Ga. (1895), §§ 3082, 3601. See also Bell *v.* Scammon, 15 N. H. 381, 41 Am. Dec. 706; Simmons *v.* Augustin, 3 Port. (Ala.) 69. *Compare* White *v.* Hopkins, 80 Ga. 154.

In *England* it seems that such a limitation by way of conveyance to uses would be good, since in such conveyances a freehold may be well limited to commence *in futuro*, but that if limited by common-law conveyance, it could be sustained only where the premises convey the fee and the reservation is stated in the *habendum*, in which case the fee is regarded as vesting immediately although restrained in its enjoyment by the *habendum*. Goodtitle *v.* Gibbs, 5 B. & C. 716, 12 E. C. L. 361.

3. Time of Vesting in Right. — 2 Bl. Com. 168.

4. As to the principle that a remainder must take effect in possession immediately on the determination of the particular estate, see *infra*, this section, *Time of Taking Effect in Possession*.

5. Freehold in Abeyance. — By the feudal law the freehold could not be vacant, or, as it was termed, in abeyance. There must have been a tenant to fulfil the feudal duties or returns, and against whom the rights of others might be maintained. If the tenancy once became vacant, though but for one instant, the lord was warranted in entering on the lands; and the moment the particular estate ended by the cession of the tenancy, all limitations of that estate were also at an end. From these principles are deduced the rules that no freehold remainder can be well created unless it is supported by an immediate estate of freehold, vested in some person actually in existence, who may answer the *præcipe* of strangers, and also that it is necessary that the remainder should take effect during the existence of such particular estate, or *eo instanti* that it determines. Watk. on Conv. 94.

6. Remainder to Class — *England.* — Doe *v.* Ward, 9 Ad. & El. 582, 36 E. C. L. 204; Doe *v.* Nowell, 1 M. & S. 334; Right *v.* Creber, 5 B. & C. 866, 12 E. C. L. 392; Doe *v.* Prigg, 8 B. & C. 235, 15 E. C. L. 207; Bromfield *v.* Crowder, B. & P. N. R. 326; Baldwin *v.* Karver, 1 Cowp. 309; Doe *v.* Perryn, 3 T. R. 484; Doe *v.* Dorvell, 5 T. R. 518.

United States. — Doer *v.* Considine, 6 Wall. (U. S.) 458.

Indiana. — Goodwin *v.* Goodwin, 48 Ind. 584.

Kentucky. — Turner *v.* Patterson, 5 Dana (Ky.) 296; Walters *v.* Crutcher, 15 B. Mon. (Ky.) 2.

Massachusetts. — Denny *v.* Allen, 1 Pick. (Mass.) 147; Annable *v.* Patch, 3 Pick. (Mass.) 360; Ballard *v.* Ballard, 18 Pick. (Mass.) 41; Gibbens *v.* Gibbens, 140 Mass. 102, 54 Am. Rep. 453; Hills *v.* Simonds, 125 Mass. 536; Dole *v.* Keyes, 143 Mass. 237.

Mississippi. — Nichols *v.* Denny, 37 Miss. 60.

New Hampshire. — Yeaton *v.* Roberts, 28 N. H. 459.

New Jersey. — Graham *v.* Houghtalin, 30 N. J. L. 552.

New York. — Doe *v.* Provoost, 4 Johns. (N. Y.) 61, 4 Am. Dec. 249; Lane *v.* Brown, 20 Hun (N. Y.) 382; Johnson *v.* Valentine, 4 Sandf. (N. Y.) 45.

North Carolina. — Walker *v.* Johnston, 70 N. Car. 576.

Ohio. — Richey *v.* Johnson, 30 Ohio St. 288.

Pennsylvania. — Minnig *v.* Batdorff, 5 Pa. St. 503; Haskins *v.* Tate, 25 Pa. St. 249; Chew's Appeal, 37 Pa. St. 28; Ross *v* Drake, 37 Pa. St. 375; Rudebaugh *v.* Rudebaugh, 72 Pa. St. 271.

Rhode Island. — Moore *v.* Dimond, 5 R. I. 129.

properties incidental to vested estates.[1] The will, however, may disclose an intent not to give a vested interest. This is effected by words of contingency as to the persons who shall take, *e. g.*, a devise to A, remainder to his children living at the time of his death.[2]

If None of the Class Are in Esse the remainder vests in the objects as they come *in esse* during the continuance of the particular estate.[3]

Persons Born After Determination of Particular Estate. — But in either case those born after the determination of the particular estate will be excluded.[4]

To What Classes Rule Applies. — The principle is equally applicable to gifts to children or more remote relatives, as grandchildren, brothers, sisters, nephews, nieces, and cousins;[5] but in regard to bequests to other classes or objects, as, for instance, the next of kin, the tendency of the decisions seems to be to confine the gift to such persons as answer the description at the death of the testator.[6]

Contingency as to Amount of Interest. — While the interest of each member of the class who is in existence during the continuance of the particular estate is vested in right, the amount of such interest cannot be ascertained as long as there is a possibility of the birth of other members of the class before the determination of the particular estate, because, so long as there is such a possibility the estate in remainder, as already stated, is subject to open and let in such after-born member.[7]

Transmissibility of Interest. — Since a remainder limited to a class gives a vested interest to each member thereof, the interest of a member of the class does not determine by his death during the continuance of the particular estate, but is transmissible like any other vested estate,[8] unless the gift in remainder

South Carolina. — Bentley *v.* Long, 1 Strobh. Eq. (S. Car.) 43, 47 Am. Dec. 523; Bankhead *v.* Carlisle, 1 Hill Eq. (S. Car.) 357; Crim *v.* Knotts, 4 Rich. Eq. (S. Car.) 340; Wessenger *v.* Hunt, 9 Rich. Eq. (S. Car.) 459; Wilson *v.* McJunkin, 11 Rich. Eq. (S. Car.) 527; Haynsworth *v.* Haynsworth, 12 Rich. Eq. (S. Car.) 114; Gourdin *v.* Deas, 27 S. Car. 479.

Tennessee. — Harris *v.* Alderson, 4 Sneed (Tenn.) 250.

In *Tennessee* the rule seems to be reversed, and in the absence of a contrary intent the class is not ascertained till the death of the life tenant. Parrish *v.* Groomes, 1 Tenn. Ch. 581.

1. Doe *v.* Perryn, 3 T. R. 493; Right *v.* Creber, 5 B. & C. 872, 12 E. C. L. 394; Minnig *v.* Batdorff, 5 Pa. St. 503.

2. Contingency as to Class. — Olney *v.* Hull, 21 Pick. (Mass.) 311; Thomson *v.* Ludington, 104 Mass. 193; Smith *v.* Rice, 130 Mass. 441; Swinton *v.* Legare, 2 McCord Eq. (S. Car.) 440; Conner *v.* Johnson, 2 Hill Eq. (S. Car.) 41.

3. None of Class in Esse at Time of Limitation. — Ayton *v.* Ayton, 1 Cox Ch. 327; Baldwin *v.* Karver, 1 Cowp. 309; Doe *v.* Perryn, 3 T. R. 484; Doe *v.* Dorveli, 5 T. R. 518; Meredith *v.* Meredith, 10 East 503; Right *v.* Creber, 5 B. & C. 866, 12 E. C. L. 392; Doe *v.* Prigg, 8 B. & C. 235, 15 E. C. L. 207; Holcombe *v.* Tuffts, 7 Ga. 538; Olmstead *v.* Dunn, 72 Ga 850; Phillips *v.* Johnson, 14 B. Mon. (Ky) 140; Mercantile Bank *v.* Ballard, 83 Ky. 492, 4 Am. St. Rep. 160; Ross *v.* Adams, 28 N. J. L. 160; Cote *v.* Von Bonnhorst, 41 Pa. St. 243; Gourley *v.* Woodbury, 42 Vt. 395; Cooper *v.* Hepburn, 15 Gratt. (Va.) 559.

In Rutledge *v.* Rutledge, Dudley Eq. (S. Car.) 201, there was a marriage settlement for the joint use of husband and wife and the survivor of them for life, and after the death of both, to the issue of the marriage, to be divided among them, share and share alike. Seven children were born of the marriage, all of whom died in their parents' lifetime. Five of these died unmarried, and without issue, one left a widow but no children, and the other left six children. It was held that the estate in remainder vested in each child at birth and descended to his or her representatives. *Compare* Cole *v.* Creyon, 1 Hill Eq. (S. Car.) 311, 26 Am. Dec. 208; Conner *v.* Johnson, 2 Hill Eq. (S. Car.) 41.

4. Persons Born After Determination of Particular Estate. — Smith Exec. Ints., § 704; Ayton *v.* Ayton, 1 Cox Ch. 327.

5. To What Classes Rule Applies — Designated Relatives. — Baldwin *v.* Rogers, 3 De G. M. & G. 656; Balm *v.* Balm, 3 Sim. 492; Devisme *v.* Mello, 1 Bro. C. C. 537; Doe *v.* Sheffield, 13 East 526. See Shuttleworth *v.* Graves, 4 Myl. & C. 35; Cort *v.* Windser, 1 Coll. Ch. Cas. 320; *Re* The Trustee Relief Act, 3 Giff. 378; Leake *v.* Robinson, 2 Meriv. 363. See also Hawkins Wills 72; 2 Jarman Wills (5th ed.) 160.

6. To What Classes Rule Does Not Apply. — 2 Jarman Wills (5th ed.) 160; Theobald Wills, 264, 280; Brown *v.* Lawrence, 3 Cush. (Mass.) 390; Childs *v.* Russell, 11 Met. (Mass.) 16. But see Baldwin *v.* Rogers, 3 De G. M. & G. 657, in which Turner, L. J., expressed the opinion that gifts to next of kin were subject to open up.

7. Contingency as to Amount of Interest. — Doe *v.* Perryn, 3 T. R. 493. In this case the devise was to D for life, remainder to her children. D had no children at the death of the testator. It was held that on the birth of D's first child the estate in remainder vested in such child, subject, however, to be diminished in quantity as other children of D should be born.

8. Transmissibility of Interest. — Doe *v.* Prigg,

is on a condition subsequent which will operate to divest the estate in remainder, if the condition is not fulfilled.[1]

d. TIME OF TAKING EFFECT IN POSSESSION. — A remainder must be limited to take effect in possession immediately on the determination of the preceding estate. If any interval of time is interposed between the two estates, the subsequent estate cannot take effect as a remainder at common law,[2] though it may be good as an executory limitation.[3]

e. REMAINDERS DISTINGUISHED FROM OTHER FUTURE INTERESTS — (1) *Distinguished from Reversions.* — As distinguished from a reversion, it is an estate created by act of parties, and not by operation of law, that is, a remainderman always takes by purchase and never by descent.[4] It is also characteristic of a remainder in this connection that it passes from the grantor at the time the particular estate is created, while a reversion is that which remains in a grantor when he disposes of a part only of his entire estate.[5]

Privity of Estate but No Tenure. — Though privity of estate exists between the remainderman and the life tenant, no tenure exists, but both, under the statute of *quia emptores*, hold under the chief lord of the fee.[6]

(2) *Distinguished from Executory Interests.* — As distinguished from an executory interest limited on an estate less than a fee, whether by way of use or devise, a remainder is a future estate which is so limited as to await the regular determination of the estates which precede it, and to take effect in possession immediately on their regular determination, whereas an executory interest is so limited as to take effect in possession, either in derogation of the preceding estate, or on the expiration of an interval of time after its regular determination.[7]

Destructibility of Remainders. — Another point of difference is that a remainder may be destroyed, while an executory interest is generally protected.[8]

Distinction as Affected by Statute. — These distinctions are now of comparatively little importance except from a theoretical point of view, since modern statutes generally prevent the failure or destruction of remainders and provide that freehold estates may be created by deed or will, to commence *in futuro* without the intervention of a precedent estate.[9]

8 B. & C. 231, 15 E. C. L. 206; Meredith *v.* Meredith, 10 East 503; Atty.-Gen. *v.* Crispin, 1 Bro. C. C. 386; Devisme *v.* Mello, 1 Bro. C. C. 537; Middleton *v.* Messenger, 5 Ves. Jr. 136; Denny *v.* Allen, 1 Pick. (Mass.) 147; Harris *v.* Alderson, 4 Sneed (Tenn.) 250.

1. Remainder Divested by Condition Subsequent. — Thus, in Mercantile Bank *v.* Ballard, 83 Ky. 481, 4 Am. St. Rep. 160, the devise was to the testator's daughter B for life and after her death to her children and their descendants, in the same proportion as if it had descended from her. It was held that B's children took a vested remainder which, by the terms of the will, would be divested as to any who should die without issue in the lifetime of B. See also L'Etourneau *v.* Henquenet, 89 Mich. 428, 28 Am. St. Rep. 310.

2. Time of Taking Effect in Possession. — Colthirst *v.* Bejushin, Plowd. 21; Chudleigh's Case, 1 Coke 135*a;* Cholmley's Case, 2 Coke 51*a;* Boraston's Case, 3 Coke 21*a*. See also Challis Real Prop.; Prest. Est. 93; Williams Real Prop. 197.

3. See *infra*, this title, *Executory Interests*.

4. Remainders Distinguished from Reversions. — 2 Bl. Com. 175. See also *infra*, this title, *Reversions;* Dennett *v.* Dennett, 40 N. H. 504.

5. Throckmerton *v.* Tracy, Plowd. 154. See also *supra*, this section, *Simultaneous Creation of Remainder and Particular Estate*, and *infra*, this title, *Reversions*.

6. Privity of Estate but No Tenure. — This constitutes the chief difference between a remainder and a reversion. Of course, as no tenure exists, no rent service is incident to a remainder. Williams Real Prop. 250. Hence, also, the remainderman is not bound by the life-tenant's leases. Coakley *v.* Chamberlain, (N. Y. Super. Ct. Gen. T.) 8 Abb. Pr. N. S. (N. Y.) 37, 38 How. Pr. (N. Y.) 483.

7. Remainders Distinguished from Executory Interests — Time of Taking Effect in Possession. — Williams Real Prop. 222, 241; Challis Real Prop. 61, 62; Smith Exec. Ints., § 149 *et seq.;* Phillips *v.* Wood, 16 R. I. 274. And see *infra*, this title, *Executory Interests*.

8. Destructibility of Remainders. — Wilkes *v.* Lion, 2 Cow. (N. Y.) 390; Bouknight *v.* Brown, 16 S. Car. 170.

For the doctrine as to executory interests in this respect, see *infra*, this title, *Executory Interests*.

9. Modern Statutes. — See Stimson Am. Stat. Law, § 1421 *et seq.*, and the statutes of the various states. See also *infra*, this section, *Destruction of Contingent Remainders — How Destruction Is Prevented*, and *infra*, this title, *Statutory Future Estates*.

f. SUCCESSIVE REMAINDERS. — Any number of particular estates, each less than the fee, may precede the remainder, in which case each estate in the series will be a remainder to all the estates which precede it, and a particular estate to those which follow. Thus, if land be limited to A for life, remainder to B in tail, remainder to C in fee, B's estate tail both supports C's remainder and is itself supported by A's life estate upon which it depends. In such case the particular estate and all the remainders expectant thereon constitute but one fee simple.[1] In some jurisdictions, however, it is provided by statute that successive estates for life can be limited only to persons in being at their creation.[2]

3. Construction of Future Estates as Remainders Favored. — It is a well-settled rule of law that no limitation shall be construed as an executory interest which would have been good in its inception as a remainder, or in other words, every gift which can possibly take effect as a remainder is absolutely excluded from being construed as an executory limitation.[3] It is the possibility at the time of the creation of the interest of its taking effect as a remainder (not the actual facts) that governs in applying the principle; and therefore it is immaterial that by construing a gift as a remainder it will fail to take effect in consequence of the happening or the nonhappening of any event.[4] In

1. Successive Remainders. — Fearne Cont. Rem. 4, Butler's note; 2 Bl. Com. 164; 2 Wash. Real Prop. 222.

2. Statutes Affecting Successive Life Estates. — See Stimson Am. Stat. Law, § 1422.

3. Construction as Remainder Favored — *England.* — Walter *v.* Drew, 1 Comyns 372; Hopkins *v.* Hopkins, Cas. t. Talb. 44; Wealthy *v.* Bosville, Lee t. Hardw. 258; Carwardine *v.* Carwardine 1 Eden 34; Goodtitle *v.* Billington, 2 Dougl. 753; Purefoy *v.* Rogers, 2 Saund. 380; Doe *v.* Morgan, 3 T. R. 765. See also Spalding *v.* Spalding, Cro. Car. 185.

United States. — Willis *v.* Bucher, 3 Wash. (U. S.) 369; Doe *v.* Considine, 6 Wall. (U. S.) 458.

District of Columbia.—Richardson *v.* Penicks, 1 App. Cas. (D. C.) 261.

Indiana. — Bruce *v.* Bissell, 119 Ind. 530.

Maryland. — Hoxton *v.* Archer, 3 Gill & J. (Md.) 199; Demill *v.* Reid, 71 Md. 175.

Massachusetts. — Hawley *v.* Northampton, 8 Mass. 3, 5 Am. Dec. 66; Nightingale *v.* Burrell, 15 Pick. (Mass.) 111; Hall *v.* Priest, 6 Gray (Mass.) 20; Parker *v.* Parker, 5 Met. (Mass.) 138; Terry *v.* Briggs, 12 Met. (Mass.) 22; Blanchard *v.* Blanchard, 1 Allen (Mass.) 223.

New Hampshire. — Burleigh *v.* Clough, 52 N. H. 267, 13 Am. Rep. 23.

New York. — Wolfe *v.* Van Nostrand, 2 N. Y. 436; Johnson *v.* Valentine, 4 Sandf. (N. Y.) 36; Wilkes *v.* Lion, 2 Cow. (N. Y.) 389.

Oregon. — Shadden *v.* Hembree, 17 Oregon 14.

Pennsylvania. — Manderson *v.* Lukens, 23 Pa. St. 31, 62 Am. Dec 312; Stehman *v.* Stehman, 1 Watts (Pa.) 466. *Compare* Wells *v.* Ritter, 3 Whart. (Pa.) 227.

South Carolina. — Bouknight *v.* Brown, 16 S. Car. 170.

The Objection to This Doctrine is that it may often defeat the intention of a testator, because if, in a series of contingent devises of the same land, all which succeed the first are considered as becoming remainders when the first vests in possession, then the succeeding remainders may be destroyed, and the intention of the testator in making the more remote dispositions may be frustrated. But these remainders can be defeated only by the owner of the preceding estate in possession, and when this is done the interest of a distant devisee is extinguished for the benefit of a prior devisee. Such an extinguishment cannot, in general, take place until a considerable time after the death of the testator, when the characters, situations, or necessities of the devisees may be very different from those which the testator regarded as probable; and though the intention of the testator may be sometimes defeated, yet they are contravened only in favor of a nearer object of his affections, and for the purpose of unfettering the land from future interests long postponed. Wilkes *v.* Lion, 2 Cow. (N. Y.) 389.

See Thompson *v.* Hoop, 6 Ohio St. 480, where the widow renounced, and contingent remainders thereupon were held to take effect as executory interests.

4. Possibility of Taking Effect as Remainder. — Festing *v.* Allen, 12 M. & W. 279. This was the case of a devise to M. (an unmarried woman) for life, "and from and after her decease" to her child or children "who shall attain the age of twenty-one years." After the testator's death M. married and died, leaving three children, all infants. It was held that the gift to the children of M. was a remainder which was contingent on their attaining the age of twenty-one years before their mother's death. It is to be observed that, at the time this will took effect, it was possible for one or more children of M. to reach the age of twenty-one years before the death of M., which would bring the limitation within the rule stated in the text.

In Symes *v.* Symes, (1896) 1 Ch. 272, the limitation was by deed to S., and A., his wife, for their joint lives, and after the death of the survivor to their three children, J., W., and M., and all other, the child or children of S. who should happen to be living at the decease of the survivor of S. and A. and to the heirs

some of the earlier cases this principle was applied very strictly and without regard to the testator's intention, where the limitation was created by will.[1] On the other hand, a future limitation will be construed as an executory interest if there is no precedent estate to support it,[2] or if it cannot by any possibility take effect in possession immediately on the determination of the precedent estate and at the same time (according to the weight of modern authority) carry out the testator's intention as to the persons who shall take.[3]

Reason of Rule. — Several reasons have been assigned for the rule, but they are more or less conjectural, and it may also be said that it is now a matter of comparatively little importance.[4]

and assigns of such of them as should attain the age of twenty-five years, equally as tenants in common and not as joint tenants. But in case either of them, the said J., W., and M., and any such other child or children as aforesaid should depart this life under the age of twenty-five years, then immediately after such his or her decease, to the use of the survivors or other of them, their, his, or her heirs or assigns. After this limitation was made, four other children were born to S. and A. A. survived S. and at her death, J., W., and M. were all over twenty-five years of age. The other four children were under that age. It was held that each of the seven children took a life estate in remainder after the death of A., with a contingent remainder in fee to such of the seven children as should have attained the age of twenty-five years at the death of A., so that at the death of A., J., W., and M. each had one-seventh of the property for life with remainder in fee simple, and that the life estate merged in the fee simple; and that as to the other four-sevenths, J., W., and M. had a remainder in fee simple after the life estates of the other four children.

1. Strict Application of Rule. — Thus, in Brackenbury *v.* Gibbons, 2 Ch. D. 417, the devise was to N. for life and after her decease to her child or children who, either before or after her death, should attain the age of twenty-one or die under that age, leaving issue, and in case there should be no child then who should attain twenty-one or die under that age leaving issue, to the child or children of G. who, either before or after her death, should attain twenty-one or die under that age leaving issue. It was held that the devise created a contingent remainder, and accordingly, N. having died without issue, and G. having died leaving several children, two of whom were twenty-one years old at her death, and the others under that age, the two who were twenty-one years old took the whole estate to the exclusion of the others. See also Festing *v.* Allen, 12 M. & W. 279, cited in the next preceding note.

2. Want of Precedent Estate. — Hopkins *v.* Hopkins, Cas. t. Talb. 44. See also *supra*, this section, *Precedent Particular Estate — Necessity to Support Remainder*, and *infra*, this title, *Executory Interests*.

3. Incapacity to Take Effect in Possession on Determination of Precedent Estate. — A devise to A for life, and after her death to such of her children in fee as shall attain a certain age, " either before or after her death," is an executory devise, because it expressly includes all the children that A might have, but could not possibly take effect as a remainder in respect to any children not attaining the prescribed age during the lifetime of A. Lechmere *v.* Lloyd, 18 Ch. D. 524, *criticising* Brackenbury *v.* Gibbons, 2 Ch. D. 417. See also Blackman *v.* Fysh, (1892) 3 Ch. 209. So, too, a devise to A for life, and after her death to all the children of B living at A's death, and thereafter to be born, is an executory devise, because the class of children " thereafter to be born " could not possibly take by way of contingent remainder. Miles *v.* Jarvis, 24 Ch. D. 633. See also Dean *v.* Dean, (1891) 3 Ch. 155, in which Chitty, J., said: " Where the limitation is to children who either before or after the death of the tenant for life attain the age of twenty-one, the testator expressly attaches the qualification of membership of the class to those children who attain the age after the tenant-for-life's death, and, in order to give effect to the express and lawful limitation in favor of such children, the court is bound to hold that the limitation taken in its entirety is an executory devise."

The Conditions Existing at the Time of the Testator's Death, and not those existing when the will was made, will govern in determining whether the limitation is a remainder or an executory devise. Thus, in case of a devise to A for life, remainder in tail to the sons of B, who has no son born to him until after the testator's death, the limitation in tail will take effect as an executory devise, just as if there had been no limitation to A in the first place, if A dies in the testator's lifetime. But if A survives the testator so that his estate for life becomes vested in possession and he then dies before a son is born to B, the limitation to the unborn sons of B will take effect at the death of the testator as a contingent remainder, and it cannot afterwards be construed as an executory devise to save it from destruction by the death of A before the birth of a son to B. Fearne Cont. Rem. 525. See also Doe *v.* Roach, 5 M. & S. 491.

4. Reason of Rule — Prevention of Perpetuities. — The most satisfactory reason that has been assigned is that executory devises prevent an alienation of the property until the contingency happens on which the limitations are to take effect, and thus tend to create perpetuities. Vedder *v.* Evertson, 3 Paige (N. Y.) 290. See also Smith Exec. Ints., §§ 198, 199.

Executory Devises Not Favored in Law. — Another reason that has been assigned is that executory devises were not favored in law and were originally created and upheld only for the purpose of carrying out the intention of testators, so that devises should not fail of

Limitation to Class. — If the limitation is in favor of a class, as to some of whom it will be good in its inception if construed as a contingent remainder, while as to others it fails in its inception if construed as a contingent remainder, and can take effect, if at all, only as an executory limitation, this will not generally suffice to exempt the limitation from the above-stated rule; and the limitation will take effect as a contingent remainder in favor of those members of the class as to whom it is good in its inception, and will fail as to others.[1] But in a will, if it is the clearly expressed intention of the testator that all the members of the class shall take, the limitation may be construed as an executory devise in order to let in those members of the class as to whom it would necessarily have failed in its inception if construed as a contingent remainder.[2]

Executory Interest Converted into Remainder. — Where a limitation has taken effect as an executory interest a change of circumstances may operate to convert it into a remainder.[3] But when a limitation has once taken effect as a remainder no subsequent accident or change of circumstances will make it inure as an executory interest. This is a direct consequence of the rule that whenever a limitation may be construed as a contingent remainder it shall never be considered as an executory interest.[4]

Nature of Limitation Determined by Future Event. — A limitation may also be so framed as to take effect in one event as a springing interest or conditional limitation, and in another as a contingent remainder; in such case, until the event occur, it is impossible to determine the nature of the ulterior interest.[5]

4. Several Kinds of Remainders — *a.* VESTED REMAINDERS — (1) *Definition.*— A remainder is vested whenever the preceding estate is limited so as to determine on an event which certainly must happen, and the remainder is so limited to a person *in esse* and ascertained that the preceding estate may be, by any means, determined before the expiration of the estate limited in remainder.[6]

effect which consistently with the rules of law could not take effect as remainders. Hall *v.* Priest, 6 Gray (Mass.) 20. See also Doe *v.* Morgan, 3 T. R. 765; Hawley *v.* Northampton, 8 Mass. 38, 5 Am. Dec. 66.

1. Rule Applicable to Limitation to Class. — Testing *v.* Allen, 12 M. & W. 301; Rhodes *v.* Whitehead, 2 Drew & Sm. 532; Brackenbury *v.* Gibbons, 2 Ch. D. 417.

2. Devise to Class — Intention of Testator. — Lechmere *v.* Lloyd, 18 Ch. D. 524; Hallett *v.* Martin, 24 Ch. D. 624; Challis Real Prop. 97.

3. Executory Interest Converted into Remainder. — Stephens *v.* Stephens, Cas. t. Talb. 228; Doe *v.* Howell, 10 B. & C. 191, 21 E. C. L. 54; Gulliver *v.* Wickett, 1 Wils. C. Pl. 105; Brownsword *v.* Edwards, 2 Ves. 243.

Illustrations. — Thus, under a limitation to A from and after Christmas for life, remainder to his first and other sons in tail, the sons, until Christmas, take an executory interest; after Christmas, a contingent remainder. 2 Prest. Abst. 173; Wilson Uses 149.

So, where a remainder in fee is subject to a conditional limitation, to take effect on an event which must happen, if at all, before the regular expiration of the particular estate; in such case, though the conditional limitation has no connection with the particular estate in the first instance, yet if the event happens on which the conditional limitation is to take effect, it then becomes a remainder expectant on the particular estate, in the place of the original remainder in fee; and if contingent, subject to destruction and incapable of taking effect again as a conditional limitation. Smith Exec. Ints., § 673.

4. Remainder After Taking Effect Cannot Become Executory Interest. — Mogg *v.* Mogg, 1 Meriv. 703; Hopkins *v.* Hopkins, 1 Atk. 581; Fearne Cont. Rem. 526.

5. Nature of Limitation Determined by Future Event. — Doe *v.* Selby, 4 Dowl. & R. 608, 2 B. & C. 926, 9 E. C. L. 277; Doe *v.* Challis, 18 Q. B. 224, 83 E. C. L. 224. And see *infra*, this title, *Executory Interests*.

6. Vested Remainder Defined. — Fearne Cont. Rem. 2, 217. See also Williamson *v.* Field, 2 Sandf. Ch. (N. Y.) 553; Hennessy *v.* Patterson, 85 N. Y. 104.

Blackstone's Definition. — "Vested remainders (or remainders executed, whereby a present interest passes to the party, though to be enjoyed *in futuro*) are where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent. As, if A be tenant for twenty years, remainder to B in fee; here B's is a vested remainder, which nothing can defeat or set aside." 2 Bl. Com. 168.

Other Definitions substantially the same as that given in the text are contained in the following cases: Doe *v.* Considine, 6 Wall. (U. S.) 474; Peoria *v.* Darst, 101 Ill. 609; Scofield *v.* Olcott, 120 Ill. 371; Bunting *v.* Speek, 41 Kan. 428; Bowling *v.* Dobyns, 5 Dana (Ky.) 441; Jackson *v.* Sublett, 10 B. Mon. (Ky.) 470.

A Familiar Illustration of a vested remainder is a gift to A for life, remainder in fee to B. Here the estate in remainder takes effect

In New York, a vested remainder is defined by statute as follows: When there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate. The effect of this statute is that it makes vested remainders of some limitations which according to the common-law conception of the subject were contingent remainders, *e. g.*, a remainder to such of several designated persons as should be living at the determination of the particular estate.[1]

(2) *General Principles Applicable to Vested Remainders* — (a) **Distinguishing Characteristic.** — Fearne states that the distinguishing characteristic of a vested remainder is a present capacity to take effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines,[2] and this has generally been accepted by the courts and text writers.[3] It is plain, however, that Fearne's criterion will not always distinguish a vested remainder from a contingent remainder, as where the limitation is to an ascertained person, but on such a contingency that, if it happens at all, the particular estate will determine and the remainder will vest both in interest and in possession at the same instant of time;[4] or where the limitation is on an event which is

simultaneously with the life estate, a present interest passes to B and the enjoyment of the estate is postponed until the death of A. There is no uncertainty as to the person, for he is named; nor as to the event, for that is fixed, to wit, the death of A, the tenant for life. Holcombe *v.* Tuffts, 7 Ga. 544.

1. Vested Remainder under New York Statute. — Thus, in the case of a grant or devise to A for life, remainder to the children of A living at his death, any child or children of A in existence at the time of such grant or devise take, under the statute, a vested remainder, subject to be divested by a remainderman's death before the life tenant. If, however, there were no children of A in existence at the time of the grant or devise, the remainder would be contingent, because, according to the terms of the statute, there would be no person in whom the possession would vest on the death of the life tenant; but the remainder would become vested as soon as a child should be born to A. Jackson *v.* Littell, 56 N. Y. 111; House *v.* McCormick, 57 N. Y. 316; Smith *v.* Scholtz, 68 N. Y. 61; Embury *v.* Sheldon, 68 N. Y. 227; Hennessy *v.* Patterson, 85 N. Y. 102; Kelso *v.* Lorillard, 85 N. Y. 184; Kent *v.* Church of St. Michael, 136 N. Y. 10, 32 Am. St. Rep. 693; Moore *v.* Lyons, 25 Wend. (N. Y.) 119; Nodine *v.* Greenfield, 7 Paige (N. Y.) 544, 34 Am. Dec. 363; Leslie *v.* Marshall, 31 Barb. (N. Y.) 564; Bennett *v.* Garlock, 10 Hun (N. Y.) 339.

The Operation of this Statute has been lucidly stated as follows: "'When there is a person in being' means when you can point to a human being, man, woman, or child; and 'who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate' means that if you can point to a man, woman, or child who, if the life estate should now cease, would *eo instanti et ipso facto* have an immediate right of possession, then the remainder is vested, and, by necessary consequence, all the contingencies which may operate to defeat the right of possession are to operate, and only to operate, as conditions subsequent." Moore *v.* Littel, 41 N. Y. 80. But see *contra*, Dana *v.* Murray, 122 N. Y. 617, which, however, does not refer to any of the foregoing cases.

2. Fearne's Criterion — Present Capacity to Take Effect in Possession. — Fearne Cont. Rem. 216.

3. Fearne's Criterion Approved — *United States.* — Croxall *v.* Shererd, 5 Wall. (U. S.) 268.

Connecticut. — Hudson *v.* Wadsworth, 8 Conn. 348.

District of Columbia. — Thaw *v.* Ritchie, 5 Mackey (D. C.) 200; Myers *v.* Adler, 6 Mackey (D. C.) 515.

Florida. — Kingsley *v.* Broward, 19 Fla. 743.

Indiana. — Bruce *v.* Bissell, 119 Ind. 530.

Kansas. — Bunting *v.* Speek, 41 Kan. 428.

Kentucky. — Bowling *v.* Dobyns, 5 Dana (Ky.) 442; Mercantile Bank *v.* Ballard, 83 Ky. 487; Walters *v.* Crutcher, 15 B. Mon. (Ky.) 10; Moore *v.* Sleet, (Ky. 1902) 68 S. W. Rep. 642.

Massachusetts. — Brown *v.* Lawrence, 3 Cush. (Mass.) 390.

Nebraska. — Schuyler *v.* Hanna, 31 Neb. 311.

New Jersey. — Price *v.* Sisson, 13 N. J. Eq. 176.

New York. — Williamson *v.* Field, 2 Sandf. Ch. (N. Y.) 533; Hennessy *v.* Patterson, 85 N. Y. 104; Hawley *v.* James, 16 Wend. (N. Y.) 137; Williams *v.* Peabody, 8 Hun (N. Y.) 272. This seems to be the absolute criterion in *New York* in consequence of the statute which declares a remainder vested in any case where there is a person in being who would have an immediate right to the possession on the ceasing of the precedent estate. See the next preceding subdivision of this section, *Vested Remainders — Definition.*

South Carolina. — Bentley *v.* Long, 1 Strobh. Eq. (S. Car.) 43, 47 Am. Dec. 523.

Texas. — Bufford *v.* Halliman, 10 Tex. 572, 60 Am. Dec. 223.

4. Present Capacity to Take Effect in Possession Not Universal Test. — Thus, if land be given to A for life, and in case B survives A, then to B in fee simple, the remainder to B is contingent, because it depends on an uncertain event, namely, the death of A in the lifetime of B (see *infra*, this section, *Contingent Remainders*); but all the while that A and B are both alive, B's remainder has a present capacity to take effect in possession should the

certain to happen, but to a person or persons in existence who will answer a certain description at the time the event happens, in which case also the determination of the particular estate and the vesting of the remainder are simultaneous.[1]

The True Criterion of a vested remainder is the existence in an ascertained person of a present fixed right of future enjoyment of the estate limited in remainder, which right will take effect in possession immediately on the determination of the precedent estate, irrespective of any collateral event, provided the estate in remainder does not determine before the precedent estate.[2] This does not imply a certainty that the estate in remainder ever will actually take effect in possession, because every remainder of a life estate or a fee tail is subject to uncertainty in this respect, consequent on the possibility that the precedent estate may outlast the estate in remainder by reason of the death of the remainderman, or his death without issue, before the determination of the precedent estate.[3] Neither does it imply any certainty as to the quantity and value of the remainderman's interest. A remainder may be vested though the amount of the estate remaining undisposed of at the expiration of the particular estate is uncertain, as in the case of a remainder to a class,[4] or where the life tenant is given power to sell land and apply the proceeds to his own use or otherwise dispose of them,[5] or where the life

possession become vacant by the death of A. Austin Jur. 895.

1. Thus, in Cheney *v.* Teese, 108 Ill. 482, it was held that where an estate in remainder is granted to a class of persons described as survivors, such estate does not usually vest until the time designated for the beginning of the enjoyment of the estate by that class of persons. In such a case the persons who are to take in remainder will be ascertained *eo instanti* that the particular estate determines, and therefore as long as any of the class are living, the remainder has a present capacity to take effect in possession as soon as possession becomes vacant by the determination of the particular estate.

There are very numerous instances of contingent remainders of this sort. See Doe *v.* Reason, *cited* in Doe *v.* Holmes, 3 Wils C. Pl. 242; Plunket *v.* Homes, Sid. (pt. i.) 47, 1 Lev. 11; McCartney *v.* Osburn, 118 Ill. 421; Temple *v.* Scott, 143 Ill. 290; Chapin *v.* Crow, 147 Ill. 219, 37 Am. St. Rep. 213; Loring *v.* Eliot, 16 Gray (Mass.) 574; Olney *v.* Hull, 21 Pick. (Mass.) 311; Thomson *v.* Ludington, 104 Mass. 193; Smith *v.* Rice, 130 Mass. 441; Matter of Ryder, 11 Paige (N. Y.) 185, 42 Am. Dec. 109; Bailey *v.* Hoppin, 12 R. I. 560. And see *infra*, this section, *Contingent Remainders*.

Another Illustration of a contingent remainder of the kind referred to in the text and which has a present capacity to take effect in possession is in the case of a gift to A for life, remainder in fee to the oldest son of B living at the death of A, where B, at the time of the gift, has several sons. In this case the remainder is contingent, because, until the death of A, it cannot be ascertained which of the sons of B is to take in remainder, or whether either of them will take. (See *infra*, this section, *Contingent Remainders*.) But, nevertheless, as long as the life tenant A and one or more of B's sons are living, the remainder is capable of presently vesting in possession on the possession becoming vacant by the death of A, living such son or sons of B.

2. Present Interest to Be Enjoyed in Future — *United States*. — Doe *v.* Considine, 6 Wall. (U. S.) 474; Cuyler *v.* Ferrill, 1 Abb. (U. S.) 169, 6 Fed. Cas. No. 3,523.

Connecticut. — Angus *v.* Noble, 73 Conn. 56.

Florida. — Kingsley *v.* Broward, 19 Fla. 743.

Indiana. — Bruce *v.* Bissell, 119 Ind. 530.

Maine. — Woodman *v.* Woodman, 89 Me. 128.

Nebraska. — Schuyler *v.* Hanna, 31 Neb. 311.

New Hampshire. — Kennard *v.* Kennard, 63 N. H. 303.

New York. — Grout *v.* Townsend, 2 Den. (N. Y.) 338.

Pennsylvania. — Sager *v.* Galloway, 113 Pa. St. 509.

Where the remainderman's right to an estate in possession cannot be defeated by third persons or contingent events, or by the failure of a condition precedent, if he lives, the remainder is vested in interest. Hawley *v.* James, 5 Paige (N. Y.) 466.

3. Uncertainty of Taking Effect in Possession. — McArthur *v.* Scott, 113 U. S. 340; Hudson *v.* Wadsworth, 8 Conn. 348; Price *v.* Sisson, 13 N. J. Eq. 177; Weehawken Ferry Co. *v.* Sisson, 17 N. J. Eq. 479; Williamson *v.* Field, 2 Sandf. Ch. (N. Y.) 533; Pechin's Estate, 13 Phila. (Pa.) 323, 37 Leg. Int. (Pa.) 104; Fearne Cont. Rem. 216.

The Enjoyment Is Uncertain, in the case of a vested remainder, but the right is absolute. Schuyler *v.* Hanna, 31 Neb. 311.

4. See *supra*, this section, *Time of Vesting in Right — Remainders to Class*.

5. Life Tenant with Power to Consume Entire Estate. — Railsback *v.* Lovejoy, 116 Ill. 442; Ducker *v.* Burnham, 146 Ill. 20, 37 Am. St. Rep. 135; Heilman *v.* Heilman, 129 Ind. 59; Woodman *v.* Woodman, 89 Me. 128; Burleigh *v.* Clough, 52 N. H. 267, 13 Am. Rep. 23; Mitchell *v.* Knapp, 54 Hun (N. Y.) 500; Musser's Estate, 12 York Leg. Rec. (Pa.) 145. See also Bamforth *v.* Bamforth, 123 Mass. 280, in which a devise over to two persons was held to be contingent because of the use of the

tenant is given a power of appointment, with remainder limited over in default of the exercise of such power.[1]

(b) **Nature of Particular Estate** — *aa.* In General. — A vested remainder may be supported by any estate which is less in quantity than the fee simple, except an estate by sufferance or at will.[2]

bb. Estates Tail. — A remainder limited on an estate tail without reference to a failure of issue at any particular time, and without requiring the concurrence of any collateral contingency, is strictly and properly a vested remainder because, though the failure of issue may not happen till a very distant period, and though it is entirely uncertain when it will happen, yet a failure at some time or other is considered sure to happen.[3] It is true that an estate tail may be barred by a common recovery or by deed, as is provided by statute in some jurisdictions,[4] and when an entail is thus barred all remainders dependent on it are destroyed,[5] but it is evident that this principle merely operates to destroy the remainder after it has vested, and does not, in any way, relate to its vesting.

(c) **Nature and Incidents of Remainderman's Interest — In General.** — In the case of a vested remainder the interest of the remainderman rises to the dignity of an estate in the land, and invests him with a portion of the seizin, property, or ownership.[6] He may, therefore, devise it,[7] mortgage it,[8] or convey it by deed;[9] and if he dies intestate, it will pass to his legal representatives, provided, of course, it is not limited in duration to his own life.[10]

Subject to Execution and Attachment. — A vested remainder may also be levied on under an attachment or execution against the remainderman, and may be

words "should either of them be living," but uncertainty as to the amount of estate was not given as a reason for not vesting.

Power of Sale. — Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144.

1. Remainder in Default of Appointment. — Ducker *v.* Burnham, 146 Ill. 9. See also *infra*, this subsection, *Limitations in Default of Appointment.*

2. For a Full Discussion as to the several estates which may support a remainder, see *supra*, this section, *General Principles Applicable to Remainders — Precedent Particular Estate — Quantity of Particular Estate.*

3. Vested Remainder After Estate Tail. — Boraston's Case, 3 Coke 19; Doe *v.* Lea, 3 T. R. 41; Goodtitle *v.* Whitby, 1 Burr. 228; Doe *v.* Underdown, Willes 293; Croxall *v.* Shererd, 5 Wall. (U. S.) 288; Wendell *v.* Crandall, 1 N. Y. 491; Vanderheyden *v.* Crandall, 2 Den. (N. Y.) 19; Moore *v.* Lyons, 25 Wend. (N. Y.) 119; Passmore's Appeal, 23 Pa. St. 381.

4. See the title Estates, vol. 11, p. 374.

5. Barring Entail Destroys Vested Remainder Dependent on It. — Doe *v.* Savile, 3 Ad. & El. 2, 30 E. C. L. 19. See also Page *v.* Hayward, 2 Salk. 570.

6. Vested Remainder an Estate. — Kingsley *v.* Broward, 19 Fla. 743; Jackson *v.* Sublett, 10 B. Mon. (Ky.) 467. See also Smith Exec. Ints., § 171; 1 Prest. Est. 65.

The possession of the tenant of the particular estate is construed to be the possession of him in remainder, so that the remainderman is held to be seized of his remainder. Den *v.* Hillman, 7 N. J. L. 180.

Insurance by Life Tenant. — Since the life tenant is not bound to keep the premises insured for the benefit of the remainderman, but each may insure his own interest, neither, in the absence of any stipulation or agreement, has any claim on the proceeds of the other's insurance. Harrison *v.* Pepper, 166 Mass. 288.

Sale of Remainder under Order of Court. — Fox's Estate, 18 Pa. Co. Ct. 115.

7. Vested Remainder Devisable. — Loring *v.* Carnes, 148 Mass. 223; Glidden *v.* Blodgett, 38 N. H. 74; Davis *v.* Bawcum, 10 Heisk. (Tenn.) 406. See also Britton *v.* Miller, 63 N. Car. 268. See also the title Legacies and Devises, vol. 18, p. 734.

8. Vested Remainder May Be Mortgaged. — Flanders *v.* Greely, 64 N. H. 357; Redstrake *v.* Townsend, 39 N. J. L. 379.

A mortgage of a vested remainder is good, though the will by which the remainder was limited operates to effect an equitable conversion of the realty into personalty. Andress's Estate, 14 Phila. (Pa.) 240, 38 Leg. Int. (Pa.) 5, *reversed* on another point 99 Pa. St. 421.

9. Vested Remainder Transferable by Deed. — Acree *v.* Dabney, 133 Ala. 437; Kingsley *v.* Broward, 19 Fla. 743; Ward *v.* Edge, 100 Ky. 757; Pearce *v.* Savage, 45 Me. 90; O'Donnell *v.* Smith, 142 Mass. 505; Loring *v.* Carnes, 148 Mass. 223; Swett *v.* Thompson, 149 Mass. 302; Glidden *v.* Blodgett, 38 N. H. 74; Grout *v.* Townsend, 2 Hill (N. Y.) 554.

Remainderman May Sell and Convey to Life Tenant. — Ware *v.* Fronk, (Ky. 1897) 38 S. W. Rep. 1061.

Condition Against Assignment by Remainderman in Fee Held Void. — Hall *v.* Tufts, 18 Pick. (Mass.) 455.

10. Vested Remainder Transmissible to Remainderman's Representatives. — Lyons *v.* Weeks, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 714, 53 N. Y. App. Div. 212; Tees's Estate, 5 Pa. Dist. 361; Farrow *v.* Farrow, 12 S. Car. 168; Green *v.* Davidson, 4 Baxt. (Tenn.) 488. And see the title Succession.

sold subject to the rights of the owner of the precedent estate.[1]

Dower and Curtesy. — In the case of a fee simple in remainder expectant on a preceding estate of freehold, the widow of the remainderman who dies before the determination of the particular estate is not entitled to dower, because the remainderman did not have immediate seizin at the time of his death; and the rule is the same if the husband has an estate for life with remainder in fee, and there is an intervening vested freehold estate in some other person.[2] But if the remainder is expectant on a term of years, the immediate seizin is in the husband and his widow is entitled to dower.[3] On the same principle a husband cannot be tenant by the curtesy of a remainder expectant on an estate of freehold, though it is otherwise if the wife's remainder is expectant on a term of years.[4]

Rights and Remedies of Remaindermen. — Since a vested remainder is a present right to be enjoyed at a future time,[5] and the owner has the right at his pleasure to dispose of it or otherwise make it available for his needs,[6] he is entitled to all the remedies which may be necessary to protect and enforce such right,[7] and therefore he may, during the continuance of the precedent estate, maintain a suit against the life tenant or any other person to remove a cloud from his title,[8] may sue for waste,[9] and may sue for a tort affecting his estate, though it also affects the estate of the tenant in possession.[10] So, too, where real estate limited in remainder is taken, either wholly or in part, for a public use, the remainderman is entitled to compensation.[11]

Possessory Actions. — But since he has only the right of property and not the right of possession, he cannot maintain any action which depends on the right of possession, and therefore he cannot, during the continuance of the precedent estate, maintain an action of ejectment.[12]

1. Vested Remainders Subject to Attachment. — See the title ATTACHMENT, vol. 3, p. 210.

Vested Remainder Subject to Execution. — Ellwood *v.* Plummer, 78 N. Car. 392. See also the title EXECUTIONS, vol. 11, p. 631, note 12.

Even though the remainder be subject to a divesting contingency it may be sold under execution against the remainderman. Lufburrow *v.* Koch, 75 Ga. 448.

2. No Dower in Vested Remainder Expectant on Freehold. — See the title DOWER, vol. 10, p. 134.

3. Dower in Remainder After Term of Years. — See the title DOWER, vol. 10, p. 134. It is said that a freehold estate expectant on a term of years is not technically a remainder, but is a freehold in possession, subject to the term. See *supra*, this section, *General Principles Applicable to Remainders — Precedent Particular Estate — Quantity of Particular Estate*, paragraph *Term of Years*.

4. No Curtesy in Remainder After Estate of Freehold. — See the title CURTESY, vol. 8, pp. 511, 512.

5. See *supra*, this division of this section, *Vested Remainders — Definition*.

6. See *supra*, this subdivision of this section, *Nature and Incidents of Remainderman's Interest*, paragraph *In General*.

7. Protection of Interests in General. — Thus, a remainderman may sue to enjoin a sale under a mortgage executed by the life tenant. New South Bld., etc., Assoc. *v.* Gann, 97 Ga. 367.

Right to Charge Life Tenant's Estate for Failure to Repair. — Rowe *v.* Thomas, 8 Kulp (Pa.) 449.

Right of Remainderman under Will to Sue to Set Aside Deed by Testator on Ground of Mental Incapacity. — Chase *v.* Chase, 20 R. I. 202.

Protection of Remainder Against Failure of Life Tenant to Pay Taxes. — It is a well-settled principle that a remainderman has a right to have a receiver appointed to collect the rents and profits of the land with which to discharge the taxes, and to have his title preserved thereby, in case the life tenant shall fail to pay them for such a time as is liable to forfeit the entire estate. Goodman *v.* Malcolm, 5 Kan. App. 285.

8. Removal of Cloud on Title. — Holmes *v.* Wintler, 47 Fed. Rep. 257; Shortle *v.* Terre Haute, etc., R. Co., 131 Ind. 338; Simmons *v.* McKay, 5 Bush (Ky.) 25; Adkins *v.* Adkins, 7 Ky. L. Rep. 686; Kellar *v.* Stanley, 86 Ky. 240; Aiken *v.* Suttle, 4 Lea (Tenn.) 105.

9. Action for Waste. — Learned *v.* Ogden, 80 Misc. 769; Todd *v.* Jackson, 26 N. J. L. 540.

At Common Law an action for waste could be maintained only where there was privity of estate between the parties, and therefore a remainderman could not sue a stranger for waste. Wilford *v.* Rose, 2 Root (Conn.) 20.

But the Modern Remedy of an action on the case in the nature of waste may be maintained by the remainderman against a stranger. Privity of estate is not necessary to such action. Williams *v.* Lanier, Busb. L. (44 N. Car.) 30. And see the title WASTE.

10. Recovery of Damages for Tort. — Jordan *v.* Benwood, 42 W. Va. 312, 57 Am. St. Rep. 859.

11. See the titles ELEVATED RAILROADS, vol. 10, p. 918, note 3; EMINENT DOMAIN, vol. 10, p. 1194, note 5.

12. Possessory Actions by Remainderman.—Laster *v.* Blackwell, 133 Ala. 337; Sand *v.* Church, 152 N. Y. 174. See also the title EJECTMENT, vol. 10, p. 517.

Statute of Limitations. — Since a remainderman is not entitled to the possssion of the premises during the continuance of the particular estate, the statute of limitations does not run against him until that estate is determined.[1]

Partition Among Remaindermen. — During the continuance of the precedent estate remaindermen having undivided interests in the remainder cannot obtain partition either at law or in equity unless such a proceeding is authorized by statute, as is the case in some jurisdictions.[2]

A Remainderman Is Not Bound by the Covenants of the Life Tenant, though he is the heir of the life tenant, because a remainderman takes his title by purchase and not by descent.[3]

(d) **Construction as Vested Remainder Favored.** — The courts have always regarded contingent estates with disfavor, and from the earliest times have inclined towards that construction which holds a remainder vested rather than that which considers it contingent, when the question is doubtful.[4] It has even been said that if there is the least doubt, advantage is to be taken of the circumstance occasioning that doubt to hold that the remainder is vested and not contingent.[5]

Intention Governs. — But it is in all cases the intention, as expressed in the instrument creating the expectant estate, that is to govern, and therefore, if the language employed shows an intention to postpone the vesting until the happening of a certain event, it is contingent. If, on the other hand, the language shows an intention that such interest shall vest at once, subject to a divesting contingency, then the remainder is vested.[6]

1. Statute of Limitations. — Findley *v.* Hill, 133 Ala. 229; Peterson *v.* Jackson, 196 Ill. 40; Jeffires *v.* Butler, (Ky. 1900) 56 S. W. Rep. 979; Hallyburton *v.* Slagle, 130 N. Car. 482. See also the title ADVERSE POSSESSION, vol. 1, p. 807 *et seq.*

2. Partition Among Remaindermen. — See the title PARTITION, vol. 21, p. 1152. See also Phillips *v.* Johnson, 14 B. Mon. (Ky.) 140.

3. See the title COVENANTS, vol. 8, p. 164.

4. Construction as Vested Remainder Favored — *England.* — Doe *v.* Perryn, 3 T. R. 484; Duffield *v.* Duffield, 3 Bligh N. S. 331.

United States. — Croxall *v.* Shererd, 5 Wall. (U. S.) 289; Doe *v.* Considine, 6 Wall. (U. S.) 458.

Alabama. — Bethea *v.* Bethea, 116 Ala. 265.

District of Columbia. — Richardson *v.* Penicks, 1 App. Cas. (D. C.) 261.

Georgia. — Olmstead *v.* Dunn, 72 Ga. 859.

Illinois. — Scofield *v.* Olcott, 120 Ill. 362; Chapin *v.* Crow, 147 Ill. 219, 37 Am. St. Rep. 213.

Indiana. — Harris *v.* Carpenter, 109 Ind. 540; Hoover *v.* Hoover, 116 Ind. 498; Amos *v.* Amos, 117 Ind. 19, 37; Bruce *v.* Bissell, 119 Ind. 530; Heilman *v.* Heilman, 129 Ind. 59.

Kansas. — Bunting *v.* Speek, 41 Kan. 429.

Kentucky. — Mercantile Bank *v.* Ballard, 83 Ky. 488; Moore *v.* Slee, (Ky. 1902) 68 S. W. Rep. 642.

Maine. — Woodman *v.* Woodman, 89 Me. 128.

Massachusetts. — Dingley *v.* Dingley, 5 Mass. 537; Brown *v.* Lawrence, 3 Cush. (Mass.) 390; Shattuck *v.* Stedman, 2 Pick. (Mass.) 468; Blanchard *v.* Brooks, 12 Pick. (Mass.) 63; Olney *v.* Hull, 21 Pick. (Mass.) 311.

Michigan. — Rood *v.* Hovey, 50 Mich. 399; Union Mut. Assoc. *v.* Montgomery, 70 Mich. 595, 14 Am. St. Rep. 519.

New Jersey. — Price *v.* Sisson, 13 N. J. Eq. 176.

New York. — Moore *v.* Lyons, 25 Wend. (N. Y.) 143; Leslie *v.* Marshall, 31 Barb. (N. Y.) 566; Livingston *v.* Greene, 52 N. Y. 118.

Pennsylvania. — Manderson *v.* Lukens, 23 Pa. St. 31, 62 Am. Dec. 312; Coggin's Appeal, 124 Pa. St. 10, 10 Am. St. Rep. 565; Hubbert's Estate, 6 Pa. Dict. 96.

South Carolina. — Bentley *v.* Long, 1 Strobh. Eq (S. Car.) 43, 47 Am. Dec. 523.

Texas. — Bufford *v.* Holliman, 10 Tex. 572, 60 Am. Dec. 223.

Vermont. — Jones *v.* Knappen, 63 Vt. 391.

Reason of Rule. — The rule stated in the text was adopted in favor of the validity of future limitations, because it was in the power of the life tenant to defeat a contingent remainder by a fine or feoffment, which he could not do in the case of a vested remainder. Ives *v.* Legge, 3 T. R. 488, note; Livingston *v.* Greene, 52 N. Y. 118.

Though the rule still obtains, the reason for it does not now generally exist in the *United States*, because fines are abolished and conveyances cannot operate to pass any greater estate than the grantor has. Livingston *v.* Greene, 52 N. Y. 811.

5. Advantage to Be Taken of Least Doubt. — Duffield *v.* Duffield, 3 Bligh N. S. 331

6. Intention Governs. — Travis *v.* Morrison, 28 Ala. 498; Olmstead *v.* Dunn, 72 Ga. 859; Chapin *v.* Crow, 147 Ill. 219, 37 Am. St. Rep. 213; Olney *v.* Hull, 21 Pick. (Mass.) 311; Price *v.* Sisson, 13 N. J. Eq. 176; Moore *v.* Lyons, 25 Wend. (N. Y.) 143.

Illustrations. — In Blanchard *v.* Blanchard, 1 Allen (Mass.) 223, the testator gave to his wife the income of all his property for life, and then devised to five of his children by name all the property that should be left at the death of the wife, to be divided equally among them. The will further provided that if any of the five children named should die before the testator's wife, then the property should be

Words of Postponement are presumed to relate to the enjoyment of the remainder rather than to the vesting thereof, and this presumption will always be indulged unless there is a clear and manifest intent to postpone the vesting.[1] Even where there is no gift contained in the will other than a direction to divide the estate in the future, yet if such division appear to be postponed for the convenience of the estate which embraces the life estate of another, the remainder is vested.[2]

Conditions as Affecting Nature of Remainder. — In determining whether a remainder is vested or contingent it sometimes becomes necessary to distinguish between conditions precedent and conditions subsequent. If there is a condition precedent to the vesting of the estate, the remainder is necessarily contingent, but if there is a condition subsequent, the remainder is vested, subject to be divested by the condition.[3]

Doctrine of Survivorship. — In case of a devise to a person, if living, or to the survivor or survivors of a class after a life estate, it is necessary to determine whether the period referred to is the time of the testator's death or the time of the death of the life tenant, because the remainder will be vested in the one case and contingent in the other. The rule in such cases is that the time of the testator's death will be taken as the period referred to, unless the will, by its terms, clearly shows a contrary intention,[4] and in some states this doctrine has been enacted by statute.[5] The fact that the remainder after the life estate is given "at" or "from and after" the death of the life tenant does not limit the gift to such of the remaindermen as should survive the life tenant. These words are construed to refer to the time of possession and do not postpone the moment when the gift shall vest.[6]

divided equally among the survivors and the issue, if any, of such as should be dead. It was held that it was the testator's intention that the five children should take vested interests, subject to the divesting contingency of the death of any of them without issue during the lifetime of the testator's widow.

In Campbell *v.* Stokes, 142 N. Y. 23, there was a devise of one share of the testator's estate to his children for life, and on the death of any child, to the lawful issue of such child, should any survive the parent. It was held that the issue of any child of the testator living at the testator's death took a vested remainder in the share of the parent, subject to open and let in afterborn children, and to be divested by their death before the death of the parent. See also Nodine *v.* Greenfield, 7 Paige (N. Y.) 544, 34 Am. Dec. 363.

1. Presumption as to Words of Postponement. — McArthur *v.* Scott, 113 U. S. 340; Ducker *v.* Burnham, 146 Ill. 9, 37 Am. St. Rep. 135.

2. Direction to Divide Estate at Future Time. — Heilman *v.* Heilman, 129 Ind. 59.

3. Conditions as Affecting Nature of Remainder. — Thorington *v.* Thorington, 111 Ala. 237; Blanchard *v.* Blanchard, 1 Allen (Mass.) 223; Dana *v.* Sanborn, 70 N. H. 152; Patterson *v.* Madden, 54 N. J. Eq. 714; Shreve *v.* MacCrellish, 60 N. J. Eq. 198; Tompkins *v.* Verplanck, 10 N. Y. App. Div. 572; Cochrane *v.* Kip, 19 N. Y. App. Div. 272; Moore *v.* Herancourt, 6 Ohio Cir. Dec. 826, 10 Ohio Cir. Ct. 420; *In re* Hubbert's Estate, 6 Pa. Dist. 96; Louck's Estate, 203 Pa. St. 278.

Test as to Nature of Condition. — Whether the condition is really precedent or subsequent will depend upon whether it is incorporated into the gift to or description of the remainderman, or is added as a separate clause, after words which have already given a vested interest. When it is doubtful whether words of contingency or condition apply to the gift itself, or to the time of payment, they will be construed as applying to the latter. Ducker *v.* Burnham, 146 Ill. 11, 37 Am. St. Rep. 135.

For a Full Discussion in regard to conditions and the effect thereof, see the title CONDITIONS, vol. 6, p. 499.

4. Doctrine of Survivorship. — Rogers *v.* Fowsey, 9 Jur. 575; Olmstead *v.* Dunn, 72 Ga. 859; Clanton *v.* Estes, 77 Ga. 359; Nicoll *v.* Scott, 99 Ill. 529; Harris *v.* Carpenter, 109 Ind. 540; Heilman *v.* Heilman, 129 Ind. 59; Tindall *v.* Miller, 143 Ind. 337; Savings Bank *v.* Hayes, 18 R. I. 464.

5. Yocum *v.* Siler, 160 Mo. 281. *Compare* the statutes in other jurisdictions.

6. Words Importing Time of Possession. — Shattuck *v.* Stedman, 2 Pick. (Mass.) 468; Childs *v.* Russell, 11 Met. (Mass.) 16; Wight *v.* Shaw, 5 Cush. (Mass.) 56; Fay *v.* Sylvester, 2 Gray (Mass.) 171; Bowditch *v.* Andrew, 8 Allen (Mass.) 339; Pike *v.* Stephenson, 99 Mass. 188; Lombard *v.* Willis, 147 Mass. 13.

Thus, in Moore *v.* Lyons, 25 Wend. (N. Y.) 119, there was a devise to A for life, and from and after his death to three others, or to the survivor or survivors of those others, and his heirs and assigns forever. It was held that the remaindermen took a vested interest at the death of the testator, the words of the survivorship being construed to refer to the death of the testator, and not to the death of the life tenants.

But in case of a gift to A for life and if B survives A, then to B in fee simple, the gift over to B is subject to the condition that he shall survive A, or in other words, his right is contingent on such survivorship. Hawley *v.*

Remainder to Class. — Where a remainder is given to a class, as, for instance, the children of a designated person, it will be held a vested remainder unless the terms of the instrument creating it clearly show that the ascertainment of the individuals composing the class is to be postponed until the determination of the precedent estate.[1] But such a remainder, though vested, will open to let in members of the class who may be born during the continuance of the precedent estate.[2]

Remainder to Testator's Heirs or Next of Kin. — Where a devise in remainder is to the heirs of the testator or to his next of kin, the nature of the limitation as vested or contingent depends on the question whether the persons answering such description are to be ascertained at the death of the testator or at the determination of the particular estate respectively. Ordinarily no difficulty is occasioned by such a devise, because the rule is well settled that the ascertainment of the persons answering the description of heirs or next of kin of the testator will be referred to the time of his death, unless a contrary intent appears.[3] The testator may, by express words, refer to the period of the determination of the particular estate for the ascertainment of the persons who are to take, *e. g.*, a devise to A for life, and after his death to such persons in fee as should then be his right heirs, and even less definite expressions have been given this effect.[4] The fact that the devisee of the particular estate is one of several persons who at the death of the testator answer the description of heirs or next of kin does not prevent the application of the rule. He would take jointly with the others a vested remainder.[5] But a devise for life to the sole heir of the testator and after his death to the testator's heirs has occasioned some difficulty. The earlier cases hold that this effect was sufficient to exclude the devisee of the life estate from taking in remainder and to carry the estate given in remainder after his death to persons then answering the description of the testator's right heirs.[6] The later cases, however, state as the correct rule that where a testator gives property to a tenant for life and on the death of the tenant for life to the testator's next of kin, and there is nothing in the context to qualify, or in the circumstances of the case to exclude, the natural meaning of the testator's words, the next of kin of the testator living at his death will take; and if the tenant for life be such next of kin, either solely or jointly with other persons, he will not on that account be excluded.[7]

James, 16 Wend. (N. Y.) 137. And see generally the title Wills.

1. Remainder to Class — Time of Ascertaining Members. — *In re* Haslett, 116 Fed. Rep. 680; Acree *v.* Dabney, 133 Ala. 437; Moores *v.* Hare, 144 Ind. 573; Lombard *v.* Willis, 147 Mass. 13; Matter of Seaman, 147 N. Y. 69; Smith *v.* Allen, 161 N. Y. 478; Anthracite Sav. Bank *v.* Lees, 176 Pa. St. 402, 38 W. N. C. 411; Diehl *v.* Cotts, 48 W. Va. 255; Hill *v.* True, 104 Wis. 294. See also *supra*, this section, *General Principles Applicable to Remainders — Time of Vesting in Right — Remainders to Class;* and *supra*, this subdivision of this section, paragraph *Doctrine of Survivorship*.

2. See *supra*, this section, *General Principles Applicable to Remainders — Time of Vesting in Right — Remainders to Class*.

3. Remainder to Testator's Heir or Next of Kin. — Say *v.* Creed, 5 Hare 587; Kenyon's Petition, 17 R. I. 149. See also *supra*, this section, *General Principles Applicable to Remainders — Time of Vesting in Right — Remainders to Class;* and *supra*, this subdivision of this section, paragraph *Doctrine of Survivorship*.

4. Persons Ascertained at Determination of Particular Estate. — Thus, in Butler *v.* Bushnell, 3 Myl. & K. 232, the devise in remainder after a life estate was "to such persons as shall happen to be my next of kin, according to the statute of distributions," and these words were regarded as looking to the future and as indicating that the gift over was intended to take effect in right as well as in possession at the expiration of the prior estate. And see to the same effect, Briden *v.* Hewlett, 2 Myl. & K. 90. But these cases have been doubted and criticised, and probably would not now be followed. Jarman Wills (6th Am. ed.) 987.

5. Devise of Particular Estate to One of Heirs. — Kenyon's Petition, 17 R. I. 149.

6. Devise of Particular Estate to Sole Heir — Former Rule. — Miller *v.* Eaton, Coop. t. Eld. 272. See also Jones *v.* Colbeck, 8 Ves. Jr. 38; Butler *v.* Bushnell, 3 Myl. & K. 232; Briden *v.* Hewlett, 2 Myl. & K. 90.

7. Present Rule in Case of Devise of Particular Estate to Sole Heir. — Say *v.* Creed, 5 Hare 587. See also Cusack *v.* Rood, 24 W. R. 391; Rand *v.* Butler, 48 Conn. 293; Harris *v.* McLaran, 30 Miss. 533; Stokes *v.* Van Wyck, 83 Va. 724.

Equitable Conversion. — The fact that there is, by the terms of the will, an equitable conversion of the real estate into personalty does not affect the operation of the rule under consideration.[1]

Conflict as to Application of Rule. — Though the decisions sometimes appear to be conflicting as to whether a particular limitation creates a vested remainder or a contingent remainder, yet they are all founded on the well-defined theory stated above, and the conflict does not arise out of any difference of opinion as to what constitutes those estates respectively, but merely shows a variance of opinion as to what intention is expressed in regard to the time of vesting of the estate.[2]

(e) **Words Importing Time as Distinguished from Contingency — Words Denoting Time.** — In applying the rule which favors the construction of remainders as vested, a distinction has been made between certain words as importing time and contingency respectively. Accordingly the adverbs " when," " then," " after," " until," " from," etc., in a devise of a remainder after a precedent estate determinable on an event which must necessarily happen, are construed to relate merely to the time of the enjoyment of the estate, and not to the time of the vesting in interest.[3]

Words Denoting Contingency, on the other hand, are " if," " in the event," and the like.[4]

(f) **Limitations in Default of Appointment.** — A remainder is not contingent merely because a power of appointment is given to the donee of the particular estate in respect to the property limited in remainder, *e. g.*, a devise to A for life, and thereafter to such persons as A should appoint, and in default of such appointment to B in fee simple. The only effect of the power of appointment is that its exercise will divest the estate in remainder, if it is vested, and will prevent its vesting, if it is contingent.[5]

b. CONTINGENT REMAINDERS — (1) *Definition.* — A contingent remainder has been defined as " a remainder limited so as to depend on an event or condition which may never happen or be performed, or which may not happen

1. Rule Not Affected by Equitable Conversion under Will. — Rumsey *v.* Durham, 5 Ind. 71; Bowen *v.* Swander, 121 Ind. 164; Heilman *v.* Heilman, 129 Ind. 59. But see Teed *v.* Morton, 60 N. Y. 503.

2. Conflict Merely as to Application of Rule. — Blanchard *v.* Blanchard, 1 Allen (Mass.) 223.

3. Words Importing Time and Not Contingency — *England.* — Boraston's Case, 3 Coke 20; Doe *v.* Lea, 3 T. R. 41; Bromfield *v.* Crowder, 1 B. & P. N. R. 313; Duffield *v.* Duffield, 3 Bligh N. S. 331; Goodtitle *v.* Whitby, 1 Burr. 228; Doe *v.* Nowell, 1 M. & S. 334; Goodright *v.* Parker, 1 M. & S. 695.

United States. — Doe *v.* Considine, 6 Wall. (U. S.) 458.

District of Columbia. — Richardson *v.* Penicks, 1 App. Cas. (D. C.) 264.

Kentucky. — Bowling *v.* Dobyns, 5 Dana (Ky.) 434; Evans *v.* Henderson, (Ky. 1902) 68 S. W. Rep. 640.

Missouri. — Byrne *v.* France, 131 Mo. 639.

New York. — Livingston *v.* Greene, 52 N. Y. 118; Johnson *v.* Valentine, 4 Sandf. (N. Y.) 45; Moore *v.* Lyons, 25 Wend. (N. Y.) 119.

North Carolina. — Rives *v.* Frizzle, 8 Ired. Eq. (43 N. Car.) 237.

Pennsylvania. — Minnig *v.* Batdorff, 5 Pa. St. 506.

Virginia. — Sellers *v.* Reed, 88 Va. 377.

Thus a devise to A for life and after her decease to all and every her children as and when they shall respectively attain the age of twenty-one years gives a vested remainder to the children of the life tenant. The possession only is postponed. King *v.* Isaacson, 1 Smale & G. 371.

4. Words Denoting Contingency. — Williams *v.* Joy, 165 Mass. 181. See also the cases cited in the next preceding note, and *infra*, this section, *Contingent Remainders.*

5. Remainder Over in Default of Appointment — *England.* — Doe *v.* Martin, 4 T. R. 39; Doe *v.* Dorvell, 5 T. R. 518; Cunningham *v.* Moody, 1 Ves. 177; Smith *v.* Camelford, 2 Ves. Jr. 698; Osbrey *v.* Bury, 1 Ball. & B. 58; Heron *v.* Stokes, 2 Dr. & War. 89; Walpole *v.* Conway, Barn. Ch. 153.

Illinois. — Scofield *v.* Olcott, 120 Ill. 362.

Massachusetts. — White *v.* Curtis, 12 Gray (Mass.) 54.

New Hampshire. — Burleigh *v.* Clough, 52 N. H. 267, 13 Am. Rep. 23.

New Jersey. — Rhodes *v.* Shaw, 43 N. J. Eq. 430; Sandford *v.* Blake, 45 N. J. Eq. 247.

New York. — Hawley *v.* James, 5 Paige (N. Y.) 318, *reversed* on another point, 16 Wend. (N. Y.) 61.

Rhode Island. — Kenyon's Petition, 17 R. I. 149; Grosvenor *v.* Bowen, 15 R. I. 549.

South Carolina. — Williman *v.* Holmes, 4 Rich Eq. (S. Car.) 475.

A Power of Appointment May Be Extinguished by a conveyance in which the remainderman and the devisee of the power join. Grosvenor *v.* Bowen, 15 R. I. 549.

or be performed till after the determination of the preceding estate." [1]

(2) *Classes of Contingent Remainders* — (a) Enumeration of Classes — *aa.* First Class. — The first of the four classes into which Fearne has divided contingent remainders is where the remainder depends entirely on a contingent determination of the particular estate, that is, where the particular estate is limited to determine on either of several events, one of which may never happen, and the remainder is to take effect only in case the particular estate is determined by the happening of such uncertain event.[2]

bb. Second Class. — The second class of contingent remainders is where some uncertain event unconnected with or collateral to the determination of the preceding estate is by the nature of the limitation to precede the remainder.[3]

1. Contingent Remainder Defined. — Fearne Cont. Rem. 3. See also Throop *v.* Williams, 5 Conn. 100; Griswold *v.* Greer, 18 Ga. 549; Peoria *v.* Darst, 101 Ill. 609; Ducker *v.* Burnham, 146 Ill. 9, 37 Am. St. Rep. 135; Leppes *v.* Lee, 92 Ky. 19; Matter of Oertle, 34 Minn. 177, 57 Am. Rep. 48; Armstrong *v.* Armstrong, 54 Minn. 248.

2. First Class of Contingent Remainders. — Fearne Cont. Rem. 5.

Instances. — A feoffment to the use of B until C shall return from Rome to England, and after the return of C, remainder to D in fee, creates a remainder dependent on the contingency of C's return from Rome in the lifetime of B. Here the particular estate is only for the life of B, because there are no words of inheritance, and it is therefore determinable either by the death of B (a certain event) or by the return of C from Rome in B's lifetime (an uncertain event), but the remainder can take effect only on the latter event. Boraston's Case, 3 Coke 20.

So, where a fine was levied to the use of M. and the heirs male of his body till the said M. should attempt to alien the land, or should suffer a recovery, or levy a fine thereof, or make any discontinuance, etc., and after any such act remainder over. Here the particular estate was determinable, either on the failure of heirs of M.'s body or on his doing any of the acts mentioned, and it was held that the remainder was contingent on the determination of the particular estate by any such act of M., and therefore did not take effect on the death of M. without issue, and without having aliened or suffered a recovery, etc. Arton *v.* Hare, Popham 97. See also Brown *v.* Lawrence, 3 Cush. (Mass.) 397; Thomson *v.* Ludington, 104 Mass. 193; Smith *v.* Rice, 130 Mass. 441; Williamson *v.* Field, 2 Sandf. Ch. (N. Y.) 552; Leslie *v.* Marshall, 31 Barb. (N. Y.) 564; Moore *v.* Lyons, 25 Wend. (N. Y.) 141.

Classification Criticised. — Preston severely criticises Fearne's first class of contingent remainders, on the ground that though the event on which the preceding estate is to determine be the same event as that on which the remainder is to commence, still the remainder is contingent, not because the preceding estate is to determine on a contingency, but because the remainder is to commence on that event. 1 Prest. Est. 71. See also Parkhurst *v.* Smith, Willes 327, in which it was said that there were but two sorts of contingent remainders: (1) Where the person to whom the remainder was limited was not *in esse*, (2) where the commencement of the remainder depended upon some matter collateral to the determination of the particular estate, thereby omitting Fearne's first class.

It is to be observed, however, that not only is it uncertain whether the event on which the remainder depends will determine the preceding estate, but whether that event will ever happen, and in the existence of this double contingency it differs from remainders of the other classes. It therefore seems rather captious to treat the two distinct contingencies as identical. The controversy is perhaps not of much practical interest, since the classification is so firmly imbedded in the literature of the profession that it cannot be ignored

Distinguished from Conditional Limitations. — Remainders of the first class differ from conditional limitations after a life estate, to which they bear a superficial resemblance, in that the former are limited to commence where the first estate is, by the very nature and extent of its original limitation, to expire or determine, whereas the latter are limited so as to be independent of the measure or extent originally given to the first estate, and to take effect in possession, on an event, which may happen before the regular determination, to which that first estate is liable from the nature of its original limitation, and so as to rescind it. Fearne Cont. Rem. 14.

3. Second Class of Contingent Remainders. — Fearne Cont. Rem. 6.

An Instance of a contingent remainder of the second class is as follows: A lease to A for life, remainder to B for life, and if B die before A, remainder to C. Here the event of B's dying before A does not in the least affect the determination of the particular estate, yet it must precede and give effect to C's remainder; but such event may or may not happen, and the remainder depending on it is therefore contingent. Fearne Cont. Rem. 7. And see Boraston's Case, 3 Coke 20; Lovie's Case, 10 Coke 85.

So, if lands be given to A in tail and if B come to Westminster Hall on a certain day to B in fee. Here B's coming to Westminster Hall has no connection with the determination of A's estate, but as it is an uncertain event, and the remainder to B is not to take place unless it should happen, the remainder is contingent. Case No. CCCLXXIV. Leon. (pt. iv.) 236; St. John *v.* Dann, 66 Conn. 401; Hafner *v.* Hafner, 171 N. Y. 633, *affirming* 62 N. Y. App. Div. 316; Chace *v.* Gregg, 88 Tex. 552.

cc. Third Class. — A contingent remainder of the third class is one limited to take effect on an event which, though it certainly must happen some time or other, yet may not happen till after the determination of the particular estate.[1]

dd. Fourth Class. — The fourth and last of the classes into which Fearne divides contingent remainders is where a remainder is limited to a person not ascertained or not in being at the time when such limitation is made.[2]

(b) **Exceptions** — *aa.* Exceptions to First Class. — There are two forms of limitation which constitute apparent exceptions to the first class of contingent remainders. These are *first*, limitations to trustees to preserve contingent remainders,[3] and *second*, where the devise is to the testator's wife for her life if she shall so long continue his widow, and in case she marry, to A for life.[4]

1. Third Class of Contingent Remainders. — Fearne Cont. Rem. 8.

Instances. — A lease to J. S. for life, and after the death of J. D. the land to remain to another in fee, is a contingent remainder of the third class. It is certain that J. D. must die some time, but his death may not happen till after the determination of the particular estate by the death of J. S., and therefore the remainder is contingent. Boraston's Case, 3 Coke 20.

So, in the case of a lease to R. for life, and after the death of R. and P. remainder to T. and his heirs; though it is certain that R. and P. will die, yet the death of P. may not occur until after the determination of the particular estate by the death of R. Weale *v.* Lower, Pollex 57.

The Distinction between the third class of contingent remainders and the two preceding classes is this: In the first and second class the contingency lies in the uncertainty that the event on which the remainder is limited to take effect will ever happen, while in the third class, it is certain that the event will happen some time, but it is uncertain whether it will happen before the determination of the preceding estate, and it is this uncertainty that makes the remainder contingent. Fearne Cont. Rem. 9, Butler's note (*f*).

2. Fourth Class of Contingent Remainders. — Fearne Cont. Rem. 9.

Instances. — A lease to A for life, remainder to the right heir of B (a living person), is a contingent remainder, because there can be no such person as the right heir of B until B's death, which may not happen till after the determination of the particular estate by the death of A. Boraston's Case, 3 Coke 20; Kent *v.* Harpool, 1 Vent. 306, Pollex 199.

Though there may be persons living who would answer the description of the right heirs of B should B presently die, yet it is obvious that this condition may be changed by the death of such persons during B's lifetime. The class of persons who would answer such description may be constantly changing, so that of living persons who would answer such description, the particular individuals cannot be ascertained until the death of B. And in case B has only collateral relatives and no issue, the condition may be changed by the birth of issue during the lifetime of the life tenant, so that persons not in existence may eventually come into the remainder.

For the same reason a limitation to one for life and at his death to his children then living creates a contingent remainder. Stephens *v.* Evans, 30 Ind. 39; Hunt *v.* Hall, 37 Me. 363; Spear *v.* Fogg, 87 Me. 132; Hopkins *v.* Keazer, 89 Me. 347; Olney *v.* Hull, 21 Pick. (Mass.) 311; Young *v.* Young, 97 N. Car. 132; Harris *v.* McElroy, 45 Pa. St. 216; Rudy's Estate, 6 Pa. Dist. 246; Nicholson *v.* Cousar, 50 S. Car. 206; Jackson *v.* Everett, (Tenn. 1894) 58 S. W. Rep. 340.

3. Limitation to Trustees to Preserve Contingent Remainders. — The form of this limitation is to the use of A for life and after the determination of that estate by forfeiture or otherwise in the lifetime of A to the use of B and his heirs during the life of A in trust for A, and to preserve contingent remainders; and after the decease of A to the use of the first and other sons of A successively in tail male. Here the preceding estate may determine by either one of two modes, viz.: A's forfeiture of his life estate or A's decease, and the estate of the trustees is to take effect in the first event and not in the second. The remainder to the trustees may, therefore, appear to be of that sort which is contingent from its depending on the determination of the preceding estate in a particular manner. Fearne Cont. Rem. 5, Butler's note.

It has been held, however, that the remainder to the trustees is vested and not contingent. The theory of this decision is that in every case where an estate is given to one for life, the grantor has an interest remaining in him to enter on the estate if it should determine by any act of the tenant amounting to a forfeiture; that this right is inherent in the grantor from the nature of the estate itself, and may be conveyed to the trustees; and that when it is conveyed to them, it becomes a legal estate in remainder and vests in them as such. Parkhurst *v.* Smith, 4 Bro. P. C. 405, 18 Vin. Abr. 416, 3 Atk. 135.

4. Devise to Widow for Life, and in Case She Marry, to Another. — In case of the limitation recited in the text, which has several times occurred, there is, apparently, ground for contending that the remainder is contingent, because the estate of the wife may terminate either by her death or her marriage, and the remainder is expressed to take effect only on her marriage; but the courts have determined that it is merely an inaccuracy of expression and that the intention of the testator is that the remainder shall take effect in either event. Luxford *v.* Cheeke, 3 Lev. 125; Fry's Case, 1

bb. Exceptions to Third Class. — An exception to the third class of contingent remainders is where there is a practical certainty that the event on which the remainder is to take effect will happen before the determination of the particular estate.[1]

cc. Exceptions to Fourth Class — **Gift to Person for Life and After His Death to His Heirs.** — A limitation to a person for his life or other estate of freehold and after his death to his heirs or the heirs of his body is in form a contingent remainder of the fourth class, because his heirs cannot be ascertained until his death. But according to the rule in Shelley's Case, the words "heirs" or "heirs of body" are construed as words of limitation and not of purchase, and the inheritance is immediately executed in the person named. Hence, such a limitation does not create a remainder at all, and is, therefore, an exception to the fourth class.[2]

Gift to Heir Special of Living Person. — Another exception to the fourth class of contingent remainders is the case of a devise in remainder to the heir of a living person, qualified by the words "now living" or some other circumstance appearing in the will to manifest the testator's intention that the estate should vest. In such case the person designated takes a vested remainder.[3]

Remainder to Grantor's Heirs. — Another exception is where the remainder is limited to the heirs of the grantor. This exception rests on the principle that while such a limitation is designated as a remainder it is not a remainder at all, but is an estate which continues in the grantor as the reversion in fee.[4]

(3) *Principles Relating to Contingent Remainders Generally* — (a) **Distinguishing Characteristic** — *aa.* Contingent Remainders at Common Law — **Present Incapacity to Take Effect in Possession.** — Several attempts have been made to formulate a cri-

Vent. 199; Gordon *v.* Adolphus, 3 Bro. P. C. (Toml. ed.) 306; Brown *v.* Cutter, T. Raym. 428; Jordan *v.* Holkham, Ambl. 209; Farmers' Bank *v.* Hooff, 4 Cranch (C. C.) 323; Gibson *v.* Land, 27 Ala. 117; Bates *v.* Webb, 8 Mass. 458.

Analogous Cases. — But a remainder which is expressly to take effect on a contingent determination of the preceding estate will not be allowed to take effect on the certain expiration of the preceding estate, unless it is morally certain that such was the intention of the testator. Smith Exec. Ints., § 261.

Thus, where the devise was to A for life, remainder to his first and other sons in tail, on condition that he and his issue male should assume a particular name; and in case he or they refused, then that devise to be void; and, in such case, the testator devised the lands over. A survived the testator, complied with the condition, and then died without issue; and it was held that the limitation over did not arise. In this case the contingent determination of the estate — namely, by the nonassumption of the name — was so improbable that the existence of an express limitation over in that event could afford but a slight ground for supposing that the person to whom it was made was also intended to take on the certain expiration of the estate by failure of issue. Amhurst *v.* Darnelly, 8 Vin. Abr. 222, *affirmed* Dom. Proc., 5 Bro. P. C. (Toml. ed.) 254.

1. Exception to Third Class. — Thus, in the case of a limitation to A for one hundred years if he shall so long live, and after his death to B in fee, the remainder is in form a contingent remainder of the third class, but in such case it is practically certain that A will die within the term, and therefore the limitation is regarded as giving a life estate to A, remainder to B. Napper *v.* Sanders, Hutton 118; Weale *v.* Lower, Pollex. 67; Lord Derbie's Case, *cited* in Keeble's Case, Lit. C. Pl. 370.

If, however, the term is of such length as to make it uncertain whether or not the first taker will outlive it, the remainder is contingent, and being a freehold limited on a term of years, it is void. Fearne Cont. Rem. 20. See also *infra*, this division of this section, *Nature of Particular Estate — Remainders of Freehold.*

2. Exceptions to Fourth Class — Rule in Shelley's Case. — See *post*, Shelley's Case, Rule in.

3. Devise to Heir Special of Living Person. — Thus, a devise to A and his heirs during the life of B in trust to permit B during his life to receive the profits and after the death of B then to the heirs male of the body of B now living, and to such other heirs, male or female, as he thereafter should happen to have of his body. B had a son C then living. It was held that B took a trust estate for life and that C took a vested remainder in tail. Burchett *v.* Durdant, 2 Vent. 311, 2 Lev. 232; Fearne Cont. Rem. 210.

4. Limitation to Grantor's Heirs. — Thus, where a fine was levied to the use of the wife of the conusor for life, remainder to the use of B in tail, remainder to the use of the right heirs of the conusor, it was held that the limitation to the use of the right heirs of the conusor was void because the old use of the fee continued in him as a reversion. Fenwick *v.* Mitforth, Moo. K. B. 284; Chudleigh's Case, 1 Coke 130*a*; Bingham's Case, 2 Coke 91; Counden *v.* Clerke, Hob. 30; Godolphin *v.* Abingdon, 2 Atk. 57; Read *v.* Erington, Cro. Eliz. 321; Fearne Cont. Rem. 51.

terion by which a contingent remainder might always be distinguished from one that is vested. Thus, it has been said that the distinguishing characteristic of contingent remainders is a present incapacity to take effect in possession should the possession presently become vacant,[1] and in some jurisdictions this criterion is strictly applied, with the result that some limitations which clearly fall within the common-law classification of contingent remainders are construed as vested remainders.[2]

Present Incapacity, etc., Not True Criterion. — It is true that this present incapacity to take effect in possession is a quality of remainders which are limited on an uncertain event collateral to the determination of the particular estate, that is, contingent remainders of the *second* class, and it is also a quality of some remainders of the *fourth* class, namely, those limited to persons not in being.[3] The criterion fails, however, in all other cases of contingent remainders according to the common-law conception of the subject. Thus, remainders of the *first* and *third* class very clearly are capable of presently taking effect in possession, in the one case, on the possession becoming vacant by the happening of the contingent event on which the remainder depends, and, in the other case, by the death at the same instant of both the persons whose lives are involved in the limitation.[4] And so, too, a present capacity to take effect in possession exists in any case falling within the *fourth* class, where the person who is to take in remainder, though he is in being, can be ascertained only at the instant the particular estate determines, as where there is a devise to two or more persons for their joint lives, remainder to the survivor in fee,[5] or where the limitation is to a person for life, remainder to such members of a class "as shall be living at his decease," or shall otherwise answer a certain description at that time, which makes the remainder contingent because it is impossible to tell which of the remaindermen will answer the description.[6]

1. Present Incapacity to Take Effect in Possession. — 1 Prest. Est. 79.

2. See the next following subdivision of this section, *Contingent Remainders as Defined by Statute*.

3. Thus, in the case of a lease to A for life, and if B die before A remainder to C, which is a remainder of the *second* class, the possession may become vacant at any time by the death of A, and C's remainder cannot take effect in possession if B is then living. It is also plain that a remainder limited to a person not in being is incapable of taking effect in possession on the determination of the particular estate, because there is no person in whom it can vest. See *supra*, this division of this section, *Classes of Contingent Remainders*.

4. First and Third Classes — Capacity to Take Effect in Possession. — See *supra*, this division of this section, *Classes of Contingent Remainders*.

Illustrations. — Thus, a remainder of the *first* class, *e. g.*, a limitation to B until C shall return from Rome, remainder over, obviously has a present capacity to take effect in possession should the possession become vacant by the return of C from Rome in the lifetime of B.

And so as to the *third* class, an instance of which is a lease to J. S. for life, and after the death of J. D. to another in fee. Here it is possible, though perhaps not probable, that J. S. and J. D. may die at the same moment, and therefore a contingent remainder of this class cannot be said to be incapable of taking effect in possession should the possession presently become vacant.

5. Remainder to Survivor of Life Tenants — Fee. — A remainder so limited is contingent because it is uncertain which of the life tenants will be the survivor, but it has a present capacity to take effect in possession should the possession become vacant. See *infra*, this section, *Cross-remainders*.

6. Remainder to Persons Answering Certain Description at Determination of Particular Estate — *England.* — Price *v.* Hall, L. R. 5 Eq. 402; Rhodes *v.* Whitehead, 2 Drew. & Sm. 532; Holmes *v.* Prescott, 10 Jur. N. S. 507.

Florida. — Paul *v.* Frierson, 21 Fla. 529.

Kentucky. — Augustus *v.* Seabolt, 3 Met. (Ky.) 155; Allsmiller *v.* Freutchenicht, 86 Ky. 198; White *v.* White, 86 Ky. 602.

Maine. — Hunt *v.* Hall, 37 Me. 363.

Maryland. — Mercantile Trust, etc., Co. *v.* Brown, 71 Md. 166.

Massachusetts. — Richardson *v.* Wheatland, 7 Met. (Mass.) 169; Olney *v.* Hull, 21 Pick. (Mass.) 311; Thomson *v.* Ludington, 104 Mass. 193; Colby *v.* Duncan, 139 Mass. 398.

New Hampshire. — Robertson *v.* Wilson, 38 N. H. 48.

New Jersey. — Teets *v.* Weise, 47 N. J. L. 154.

North Carolina. — Grier *v.* McAfee, 82 N. Car. 187.

Ohio. — Dean *v.* Nicholas, 25 Cinc. L. Bul. 278, 11 Ohio Dec. (Reprint) 215.

Pennsylvania. — Harris *v.* McElroy, 45 Pa. St. 216; Craige's Appeal, 126 Pa. St. 223; Woelpper's Appeal, 126 Pa. St. 562; Callahan's Estate, 13 Phila. (Pa.) 230, 36 Leg. Int. (Pa.) 184.

The Existence of a Contingency Irrespective of the Duration of the remainder, on which contingency the possession or enjoyment strictly depends, is the fundamental characteristic of a contingent remainder and forms a true, tangible, and practical criterion by which the contingent character of a remainder may always be tested,[1] and such a contingency exists whenever the remainder is limited on an uncertain event, that is, an event which may never happen, or on an event which may not happen till after the determination of the particular estate, though it is certain to happen at some time, or when the remainder is limited to a person not in being or not ascertained.[2]

bb. Contingent Remainders as Defined by Statute. — In *New York* it is declared by statute that a remainder is vested " when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate," and under this statute a remainder is construed as contingent only when it has not a present capacity to take effect in possession, should the possession become vacant. The consequence of this is that if a remainder is limited to one or more of several living persons who shall answer a certain description at the determination of the particular estate, *e. g.*, the heirs of the life tenant, or the survivors of two joint life tenants, the remainder must be construed not as contingent but as vested.[3] Provisions similar to the *New York* statute are to be found in other states.[4]

Intent of Statute. — It may well be doubted whether this piece of legislative definition was intended to change the common law. The probability is that its framers considered it a peculiarly happy instance of the codification of the existing law on the subject, for even Chancellor Kent says that it " appears to be accurately and fully expressed." [5]

cc. Contingent Remainders in Jurisdictions Adopting Statutory Definition. — In several jurisdictions where there has been no statutory modification of the common-law conception of a contingent remainder, the courts, relying on Kent's statement that the definition contained in the *New York* statute accurately expressed the common-law theory, follow the New York decisions and hold that in any case where there is a person in existence who would be

South Carolina. — Roundtree *v.* Roundtree, 26 S. Car. 450.

According to the principle of the foregoing cases, a devise to A for life, and at his decease to his eldest male heir, gives to A's heir apparent only a contingent remainder, as, till A's decease, he does not answer the description. Alverson *v.* Randall, 13 R. I. 71.

So where the gift over is to the eldest surviving son in fee. Robertson *v.* Wilson, 38 N. H. 48.

A devise to A for life and at her death to her heirs in fee was held to be a contingent remainder, because the heirs of the life tenant could not be ascertained until her death. Williamson *v.* Williamson, 18 B. Mon. (Ky.) 329; Johnson *v.* Jacob, 11 Bush (Ky.) 646.

1. Smith's Criterion. — Smith Exec. Ints., § 177. This seems to be the criterion adopted in the cases cited in the next preceding note.

2. See *supra*, this division of this section, *Classes of Contingent Remainders*, where the various contingencies which may affect a remainder are enumerated and illustrated.

3. Effect of New York Statute. — Moore *v.* Littel, 41 N. Y. 76. See also Sheridan *v.* House, 4 Keyes (N. Y.) 569, 4 Abb. App. Dec. (N. Y.) 218; House *v.* Jackson, 50 N. Y. 161; Matter of Brown, 29 Hun (N. Y.) 412; Lockman *v.* Reilley, 29 Hun (N. Y.) 434; Hennessy *v.* Patterson, 85 N. Y. 104; Purdy *v.* Hayt, 92 N. Y. 456; Losey *v.* Stanley, 147 N. Y. 560; Matter of Davis, 91 Hun (N. Y.) 53; Matter of Merriman, 91 Hun (N. Y.) 120; Bunyan *v.* Pearson, 8 N. Y. App. Div. 84; Matter of Embree, 9 N. Y. App. Div. 602; McGillis *v.* McGillis, 11 N. Y. App. Div. 359; Minot *v.* Minot, 17 N. Y. App. Div. 521; Adams *v.* Beekman, 1 Paige (N. Y.) 631; Hawley *v.* James, 5 Paige (N. Y.) 318, 16 Wend. (N. Y.) 61; Matter of Ryder, 11 Paige (N. Y.) 185, 42 Am. Dec. 109; Campbell *v.* Rawdon, 18 N. Y. 418; Williamson *v.* Field, 2 Sandf. Ch. (N. Y.) 533; Doe *v.* Provoost, 4 Johns. (N. Y.) 61, 4 Am. Dec. 249; Wendell *v.* Crandall, 1 N. Y. 491.

If there are words of present gift to a class of persons in existence, the remainder is vested under the *New York* statute, though it cannot be ascertained until the determination of the particular estate which, if any, members of the class will ultimately take; but if futurity attaches to the gift so that it is not intended to take effect until the determination of the particular estate, the remainder is contingent. *In re* Hoadley, 101 Fed. Rep. 233.

4. Minnesota Debenture Co. *v.* Dean, 85 Minn. 473. See also the statutes of *California*, *Idaho*, *Michigan*, *Minnesota*, *and Wisconsin*. *Compare* the statutes in other states.

5. 4 Kent Com. 202. But see the remarks of McClellan, J., in Smaw *v.* Young, 109 Ala. 534.

entitled to the estate in remainder should the particular estate presently determine, the remainder is not contingent, but vested.[1] This has naturally caused much confusion in the United States case law on the subject, by giving rise to conflicting decisions as to whether a contingent remainder or a vested remainder is created by a limitation to persons who will answer a certain description at the time of the determination of the particular estate when there are persons in existence at the time who would answer such description, were the particular estate presently to determine, but much of the perplexity incident to this conflict may be avoided by bearing in mind that the cases may be divided into two classes, one of which is based on the common law,[2] while the other class is based on the criterion enunciated in the New York decisions, which the courts seem to have followed on the supposition that such decisions were founded on common-law principles.[3]

(b) **Nature of Particular Estate** — *aa* REMAINDERS OF FREEHOLD — (*aa*) *Rule at Common Law.* — A contingent remainder of the measure of freehold must, unless the legal estate is in trustees, be supported by a previous vested estate of freehold, and such previous estate must be capable, in its original limitation, of enduring till the vesting of the remainder,[4] because otherwise the freehold would either be in abeyance, which the common law did not permit, or it would constitute a present interest in some person other than the contingent remainderman, that is, the grantor, or the heirs of the testator, or an ulterior vested remainderman, so that the contingent remainder could take effect only in defeasance of such present interest in the other person.[5] Therefore, a contingent remainder is void *ab initio* as a remainder if it is preceded only by a term of years,[6] or by a particular estate which, by the very words of its original limitation, cannot endure until the remainder vests,[7] though in either case it may be good as an executory devise or springing use.[8]

A Contingent Remainder Preceded by a Vested Remainder is not affected by the destruction of the particular estate preceding the vested remainder, because the vested remainder thereupon immediately takes effect in possession, and is itself sufficient to support it.[9]

When the Legal Estate Is in Trustees there is no necessity for any preceding particular estate of freehold to support contingent limitations in trust, because

1. Decisions Adopting New York Rule. — Croxall *v.* Shererd, 5 Wall. (U. S.) 288; Smith *v.* West, 103 Ill. 332; Davidson *v.* Roebler, 76 Ind. 398; Wood *v.* Robertson, 113 Ind. 323. *Compare* Cheney *v.* Teese, 108 Ill. 479; Scofield *v.* Olcott, 120 Ill. 362; Lehndorf *v.* Cope, 122 Ill. 318; Haward *v.* Peavey, 128 Ill. 430, 15 Am. St. Rep. 120; Siddons *v.* Cockrell, 131 Ill. 653.

The *New York* rule has been followed by the decisions in *Alabama.* Kumpe *v.* Coons, 63 Ala. 448; Gindrat *v.* Western R. Co., 96 Ala. 162. But in a later case the fundamental error of these decisions is pointed out, and the propriety of overruling them is suggested. Smaw *v.* Young, 109 Ala. 528.

2. See *supra*, this division of this section, *Principles Relating to Contingent Remainders Generally — Distinguishing Characteristic — Contingent Remainders at Common Law.*

3. See the cases cited in the next preceding note but one.

4. Freehold Particular Estate Necessary to Support Contingent Remainder of Freehold. — Goodright *v.* Cornish, 1 Salk. 226; Scatterwood *v.* Edge, 1 Salk. 229; Davis *v.* Speed, 4 Mod. 153, 2 Salk. 675.

5. Reason of Rule. — Smith Exec. Ints., § 762.

6. Contingent Remainder Preceded by Term of Years. — Smith Exec. Ints., §§ 761, 762.

A contingent remainder preceded by a term of years, and followed by a vested remainder, is bad; for the freehold must pass out of the grantor at the same time the remainder is created, and in this case it cannot pass to the contingent remainderman, because such remainder, at the time of its creation, vests in no one, and if it be held to pass to the succeeding vested remainderman the contingent remainder is precluded from ever taking effect in possession, for the freehold which it was limited to precede thereby becomes itself vested in possession. Fearne Cont. Rem. 281.

Effect as to Subsequent Limitations. — The failure of a contingent remainder because it is limited after a term of years does not invalidate a subsequent vested remainder. The vested remainder is thereby accelerated. See *infra*, this section, *Acceleration of Remainders.*

7. Particular Estate Incapable of Enduring until Vesting of Remainder. — Smith Exec. Ints., § 764.

8. See *infra*, this title, *Executory Interests.*

9. Contingent Remainder Preceded by Vested Remainder. — Corbet *v.* Tichborn, 2 Salk. 576. But see Palmer's Case, Moo. K. B. 815, and comments thereon in Fearne Cont. Rem. 282

the legal estate in the trustees will be sufficient for the purpose; nor in such case is it necessary that the contingent remainder should vest by the time the preceding trust limitation expires.[1]

Remainders Limited Out of Equity of Redemption. — For the same reason contingent remainders limited out of an equity of redemption need no particular estate to support them, and are unaffected by the failure or destruction of the preceding limitations, since the outstanding legal estate in the mortgagee is sufficient to sustain them.[2]

Actual Possession by the Tenant of the Particular Estate is not necessary; it is sufficient if the tenant has, at the time the remainder vests, such an interest as would give to him, at common law, a present right of entry as distinguished from a mere right of action.[3]

(*bb*) *Statutory Rule.* — By statutory enactment in some jurisdictions a term of years is sufficient to support a contingent remainder of freehold,[4] provided the contingency is such that it must occur within the period of the rule against perpetuities.[5] In some states it is also provided that no estate for life can be limited as a remainder on a term of years except to a person in being at the creation of such estate.[6]

bb. Remainders Less than Freehold. — A contingent remainder for years does not require a preceding freehold to support it; for though it is a remainder in a lax sense as regards the possession, it is not a remainder, strictly so called, as regards the seizin, property, or ownership.[7]

(c) **Nature of Contingency** — *aa.* Legality of Act Involving Contingency. — A future limitation of real property may be in form a valid contingent remainder and yet fail to take effect in consequence of the nature of the contingency on which such limitation depends. Thus, if the contingency involves the expectation of a thing which is against the law, the remainder is void.[8]

bb. Remoteness of Contingency — (*aa*) *Rule Stated.* — **At Common Law** the possibility of the happening of the event on which a contingent remainder depends must be a common possibility, and *potentia propinqua*, as death, or death without issue, or the like. If it is such a remote possibility " as shall not be intended by common intendment to happen," the remainder will fail. Thus, a remainder limited to a corporation not in existence at the time is void, though it

1. Legal Estate in Trustees. — Fearne Cont. Rem. 303; Chapman *v.* Blissett, Cas. t. Talb. 145; Hopkins *v.* Hopkins, Cas. t. Talb. 44. See Berry *v.* Berry, 7 Ch. D. 657; Abbiss *v.* Burney, 17 Ch. D. 229; Marshall *v.* Gingell, 21 Ch. D. 790. See also *infra*, this section, *Destruction of Contingent Remainders — How Destruction Is Prevented — At Common Law.*

2. Remainders Limited Out of Equity of Redemption. — Astley *v.* Micklethwait, 15 Ch. D. 59; Fearne Cont. Rem. 320, note (e), *per* Butler.

3. Actual Possession by Tenant of Particular Estate Not Necessary. — Fearne Cont. Rem. 285 *et seq.*; Smith Exec. Ints., § 765*b*.

A Present Right of Entry will support a contingent remainder, but a future right of entry will not. Thompson *v.* Leach, 1 Ld. Raym. 314, 2 Salk. 576; Lloyd *v.* Brooking, 1 Vent. 188; Zouch *v.* Clare, 1 Mod. 92.

4. Statutes Permitting Contingent Remainders After Terms of Years. — Stimson Am. Stat. Law, § 1424.

5. See the title Perpetuities and Trusts for Accumulation, vol. 22, p. 701.

6. See the statutes in *California*, *Michigan*, *Minnesota*, *New York*, *North Dakota*, *South Dakota*, and *Wisconsin*. *Compare* the statutes in other states.

7. Remainders Less than Freehold. — Smith Exec. Ints., § 765*a*; Fearne Cont. Rem. 284.

8. Illegal Contingency — Unbegotten Bastard. — Within this principle is a remainder to a bastard thereafter to be begotten, " because the law doth not favor such a generation, nor expect that such should be, nor will suffer such a limitation for the inconvenience which might arise thereupon." Blodwell *v.* Edwards, Cro. Eliz. 509.

A settlement by deed limiting a remainder to expected illegitimate children is void, because it would manifestly encourage illicit intercourse, and the same is true in the case of a limitation by will to the future illegitimate children of a person other than the testator; but it is otherwise if a testator gives a remainder to illegitimate children that he may have by a certain woman, because it is impossible that such a provision can encourage an immoral intercourse after the testator's death. *In re* Hastie, 35 Ch. D. 735. See also Occleston *v.* Fullalove, L. R. 9 Ch. 151.

Entering Religion. — Of this nature, too, it has been said, is the possibility of a man's entering religion by becoming professed. Fearne Cont. Rem. 249.

comes into existence during the particular estate;[1] and the rule is the same where the limitation is to the right heirs of a person not *in esse* as purchasers,[2] or to the child of an unborn person after a life estate to its parent,[3] or to any unborn person described by a particular name.[4]

By Statute, however, in some jurisdictions, it is provided that no future estate shall be invalid on account of the improbability of the contingency on which it is to take effect.[5]

(*bb*) *What Constitutes Remoteness* — **Possibility on Possibility.** — There are two distinct theories as to what constitutes the remoteness which will vitiate a contingent remainder. One theory involves the possibility of the event on which the remainder is limited, irrespective of any question of time. According to this theory, a contingency is remote if it involves a "possibility on a possibility" or a "double possibility," that is, if the vesting of the remainder requires the concurrence of two several contingencies, not independent and collateral, but the one requiring the previous existence of the other, and yet not necessarily arising out of it.[6] The rule of a possibility on a possibility is of ancient origin,[7] and is recognized as still in existence,[8] though its meaning is obscure,[9] and its application is difficult and uncertain.[10] On a consideration of all the

1. Remainder to Corporation Not in Existence. — Cholmley's Case, 2 Coke 51*b*; Zeisweiss *v.* James, 63 Pa. St. 465, 3 Am. Rep. 558.

A Charitable Corporation not *in esse* at the time of the testator's death, but to be formed thereafter, may take by devise, if the corporation is created within a period not too remote. See the titles CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, pp. 905, 918; LEGACIES AND DEVISES, vol. 18, p. 741.

2. Remainder to Right Heirs of Person Not in Esse. — Cholmley's Case, 2 Coke 51*b*; 2 Black. Com. 170; Counden *v.* Clerke, Hob. 33; Dennett *v.* Dennett, 40 N. H. 503.

3. Remainder to Child of Unborn Person. — Hay *v.* Coventry, 3 T. R. 86; Brudenell *v.* Elwes, 1 East 452; Monypenny *v.* Dering, 2 De G M. & G. 145, 16 M. & W. 428; Cole *v.* Sewell, 2 H. L. Cas 186, 4 Dr. & War. 27; Jackson *v.* Brown, 13 Wend. (N. Y.) 442.

But a remainder to an unborn person, either for life, in tail, or in fee will be good, unless it is preceded by a gift for life or in tail to the unborn parent of that person. Brudenell *v.* Elwes, 1 East 453; Jackson *v.* Brown, 13 Wend. (N. Y.) 437; Smith Exec. Ints., §§ 711, 713.

Cy Pres Doctrine. — If in a deed there are two limitations, one to an unborn person and the other (by purchase) to any issue of such unborn person, the second limitation is void. And all limitations subsequent to such void limitation are also void. If in a will there are two such limitations, the prior limitation (whether it be executed or executory) may be construed as a limitation in tail provided that such a limitation would, if not barred, carry the estate by descent to the issue specified in the second limitation. Challis Real Prop. 90, 91.

In the case of a will this is done with a view to carrying out the general intent to benefit the issue of the unborn child, so far as the rules of law will permit. See Allyn *v.* Mather, 9 Conn. 114; Mourse *v.* Merriam, 8 Cush. (Mass.) 11; Jackson *v.* Brown, 13 Wend. (N. Y.) 437; Doebler's Appeal, 64 Pa. St. 15.

4. Remainder to Unborn Person by Particular Name. — Thus, a remainder to G., son of J., after a life estate to J., is void when J. had at the time no son named G., though he afterwards has a son of that name. Here is to be noted the difference between a remainder limited to an unborn person by a particular name and by a general name, in this, that the law regards as remote the possibility that a child will be born to a certain person and that such child will have a particular name, while it is regarded as a common possibility that children will be born to any person. Cholmley's Case, 2 Coke 51*b*. *Compare In re* Roberts, 19 Ch. D. 520.

5. See the statutes of the several states.

6. What Constitutes Remoteness — Possibility on Possibility. — Fearne Cont. Rem. 250.

Statutory Provisions. — In several states it is now provided by statute that no future estate shall be invalid on account of the improbability of the contingency on which it is to take effect. See the statutes of *California*, *Michigan*, *Minnesota*, *New York*, *North Dakota*, *South Dakota*, *Wisconsin*.

7. See Chedington's Case, 1 Coke 156*b*. But see the remark of Lord Nottingham in Howard *v.* Norfolk, Ch. Cas (pt. iii.) 29.

8. Existence of Rule Recognized. — Hay *v.* Coventry, 3 T. R. 83; Monypenny *v.* Dering, 2 De G. M. & G. 170; Whitby *v.* Mitchell, 42 Ch. D. 494, 44 Ch. D. 85; Cole *v.* Sewell, 2 H. L. Cas. 230, 4 Dr. & War. 27; Chaman *v.* Brown, 3 Burr. 1626; Zeisweiss *v.* James, 63 Pa. St 465, 3 Am. Rep. 558. See also Abbiss *v.* Burney, 17 Ch. D. 211.

9. Uncertainty as to Meaning of Rule. — Speaking of the meaning of this rule, Lindley, L. J., while recognizing its existence, said: "I do not know * * * the exact meaning of the old rule as to a possibility on a possibility. * * * I confess I do not understand it now, and never did. But at all events, it gave rise to the rule which every one can understand, * * * that if land is limited to an unborn person during his life, a remainder cannot be limited so as to confer an estate by purchase on that person's issue." Whitby *v.* Mitchell, 44 Ch. D. 92.

10. Uncertainty in Application of Rule. — Thus, it is said that a remainder limited to G., the son of J., when J. had no son of that name, is

authorities, however, it seems that the rule is applied only to the case of an attempt to give a life estate to an unborn person, with a remainder to a child of such unborn person.[1]

Rule Against Perpetuities. — The other theory is that the rule as to a possibility on a possibility has become entirely obsolete, and that the question of the remoteness of contingent remainders is now governed wholly by the rule against perpetuities. The doctrine that the rule against perpetuities does not apply to contingent remainders, but that such limitations are governed as to remoteness by rules of their own, which is still strenuously maintained,[2] may owe its origin to the fact that the rule in such cases was not applied because contingent remainders could be barred by the tenant of the particular estate, but now that contingent remainders are indestructible both in *England* and in the *United States*,[3] they clearly come within the rule against perpetuities which is held to apply to future interests of every kind, including remainders.[4]

cc. CONTINGENCY OPERATING TO DETERMINE PARTICULAR ESTATE — (*aa*) *Repugnancy, Contrariety, or Inconsistency of Condition.* — A condition or limitation by which the particular estate is to be determined is not effectual if it is repugnant to any rule of law,[5] or if it is contrariant in itself,[6] or is inconsistent with the quality or nature of the preceding estate.[7]

void, though he afterwards had a son named G., because the law will not suppose that a man will have a son of a particular name. Cholmley's Case, 2 Coke 51*b*.

On the other hand, it is said that if lands be given to a man and a woman both married to different persons, and to the heirs of their two bodies begotten, it is a good estate tail, for it is of necessity that death will follow, and it is a common possibility that one will die before the other so that marriage between such man and woman will follow. Lampet's Case, 10 Coke 50*a*.

1. Limited Application of Rule. — Cole *v.* Sewell, 2 H. L. Cas. 230, 4 Dr. & War. 27; Whitby *v.* Mitchell, 42 Ch. D. 494, 44 Ch. D. 85; Williams Real Prop. 274.

Challis thinks that the rule is still in force in the three instances of the limitation of a remainder to a corporation not *in esse*, to the right heirs of a person not *in esse*, and to the child of an unborn person after a life estate to such unborn person. Challis Real Prop. 90.

2. Doctrine that Rule Against Perpetuities Does Not Apply to Contingent Remainders. — See Williams Real Prop. 274; Challis Real Prop. 90. See also the authorities cited in the notes to the next preceding paragraph of this subdivision of this section; and the title PERPETUITIES AND TRUSTS FOR ACCUMULATION, vol. 22, p. 706, where the common-law rule as to remainders is stated.

3. See *infra*, this section, *Destruction of Contingent Remainders*.

4. Rule Against Perpetuities Applicable to Remainders. — See the title PERPETUITIES AND TRUSTS FOR ACCUMULATION, vol. 22, pp. 704, 705. See also Gray Perp., § 284 *et seq.*; Stuart *v.* Cockerell, L. R. 7 Eq. 363; Matter of Walkerly, 108 Cal. 627, 49 Am. St. Rep. 97; Fowler *v.* Ingersoll, 127 N. Y. 472, *affirming* (Supm. Ct. Gen. T.) 2 N. Y. Supp. 833; Bowers *v.* Beekman, 16 Hun (N. Y.) 268; Sanford *v.* Goodell, 82 Hun (N. Y.) 369.

5. Condition or Limitation Repugnant to Rule of Law. — Of this nature is a provision that an estate tail should cease during the life of the tenant in tail, in the event of his doing a certain act, because it is repugnant to law that an estate should determine in part only. Chomley *v.* Humble, Cro. Eliz. 379, Moo. K. B. 592; Corbet's Case, 1 Coke 83*b*; Jermine *v.* Arscot, Leon. (pt. iv.) 83; Gulliver *v.* Ashby, 4 Burr. 1929.

6. Contrariant Condition. — Thus, a proviso for determining an estate tail as if the tenant in tail were dead is contrariant in itself, because an estate tail is not determined by the death of the tenant in tail, but by his death without issue; that is, without issue to himself, if he was the first taker, otherwise, without issue to the first taker. Corbet's Case, 1 Coke 86*a*.

The expression, therefore, should provide that in the happening of the contingency, the estate tail should cease in the same manner as though the tenant in tail were dead and there were a general failure of issue inheritable under the entail. Fearne Cont. Rem. 254, note (e), *per* Butler.

In Mildmay's Case, 6 Coke 40, there was a limitation in tail with a proviso that if the tenant in tail should advisedly or effectually attempt, procure, and go about, or assent to do any act, etc., touching any bargain, sale, discontinuance, alteration, etc., of the lands, whereby any estate might be discontinued, then, after the time of such attempting, procuring, etc., his estate should cease as if he were dead. It was held that the words "attempt, go about," etc., were uncertain and void at law, and that inheritance ought not to depend on such uncertainties. See also Foy *v.* Hynde, Cro. Jac. 697.

7. Inconsistency with Nature or Quality of Particular Estate — Estates of Inheritance. — It is to be observed that there are certain incidents and qualities so annexed to and inherent in estates of inheritance as to be incapable of being restrained or prohibited by any proviso, condition, or limitation. An estate in fee simple is subject to dower, curtesy, and to alienation by the owner. An estate tail is also subject to dower and curtesy, the tenant in

(*bb*) *Condition Defeating or Abridging Particular Estate.* — If a condition operates to defeat or abridge the particular estate no subsequent limitation can take effect as a remainder, because it is of the essence of a remainder that it must be limited to take effect on the regular determination of the particular estate, and not in derogation of it.[1]

(d) **Nature of Remainderman's Interest** — *aa.* General Principles — **Contingent Remainder Not an Estate.** — A contingent remainder does not rise to the dignity of an estate in the land and confers no interest in the seizin. Strictly speaking, it is not an estate at all, but a mere chance of having one, if the contingency turn out favorably to the remainderman;[2] and therefore, pending the contingency, he has no standing in a court of law to recover damages for waste committed on the premises limited in remainder, though the remainder is in fee.[3] But a contingent remainderman may maintain a bill in equity to restrain waste.[4] It has also been held that a court of equity has no power to order a sale of land limited in remainder to persons not *in esse*.[5]

tail is dispunishable for waste, and he may suffer a common recovery and thereby bar the entail and the reversion or remainder also. Mildmay's Case, 6 Coke 41.

Therefore, if to an estate tail is annexed a condition or limitation that in the event of the tenant in tail levying a fine or suffering a common recovery, his estate should cease as if he had died without inheritable issue, and the estate thereupon go to him in remainder, such condition or limitation is void because it is inconsistent with the nature of the estate given. Mildmay's Case, 6 Coke 41; Portington's Case, 10 Coke 38; Fry's Case, 1 Vent. 202; Pierce *v.* Win, 1 Vent. 321; Bateman *v.* Allen, Cro. Eliz. 437.

But a wrongful alienation by the tenant in tail, as by feoffment or fine at common law, may be so restrained, for that is a discontinuance of the entail and wrong. Mildmay's Case, 6 Coke 41. And see Newis *v.* Lark, Plowd. 403, where it was held that the levying of a fine by the tenant in tail in violation of such a restriction determined an entail and gave a title of entry to the next in remainder. It did not appear, however, that this was a fine at common law which might be restrained by a condition. See also Rudhall *v.* Milward, Moo. K. B. 212; Croker *v.* Trevithin, Cro. Eliz. 35, Leon. (pt. i.) 292.

Life Estates. — The power of alienation and liability for the owner's debts are incident to a life estate as well as to an estate of inheritance, and cannot be defeated by a mere prohibition in the instrument creating such estate. As long as the life tenant is the owner of the estate, he may alien it or his creditors may subject it to their claims. But an estate may be given to a man with a provision that it shall cease if he attempts to alien, or if he becomes bankrupt, etc. The distinction is between a gift to a man until he attempts to alien, etc., and a gift on condition that he should not alien, but without any provision for the cessation of his interest. *Re* Trustees Relief Act, 3 Drew. 202; Barnett *v.* Blake, 2 Drew. & Sm. 117; Craven *v.* Brady, L. R. 4 Eq. 209; Nichols *v.* Eaton, 91 U. S. 716; Emery *v.* Van Syckel, 17 N. J. Eq. 564; Camp *v.* Cleary, 76 Va. 140.

As to dispositions of personalty involving this principle, see the following cases: Shee *v.* Hale, 13 Ves. Jr. 404; Brandon *v.* Robinson, 18 Ves. Jr. 429; Cooper *v.* Wyatt, 5 Madd. 482; Martin *v.* Maugham, 14 Sim. 230; Rochford *v.* Hackman, 9 Hare 475; Carter *v.* Carter, 3 Kay & J. 617; Sharp *v.* Cosserat, 20 Beav. 470; Haswell *v.* Haswell, 28 Beav. 26; Dorsett *v.* Dorsett, 30 Beav. 256; Townsend *v.* Early, 34 Beav. 23; Freeman *v.* Bowen, 35 Beav. 17; Montefiore *v.* Behrens, 35 Beav. 95; Oldham *v.* Oldham, L. R. 3 Eq. 404; Roffey *v.* Bent, L. R. 3 Eq. 759; *In re* Amherst, L. R. 13 Eq. 464; Billson *v.* Crofts, L. R. 15 Eq. 314; *Ex p.* Eyston, 7 Ch. D. 145; Bramhall *v.* Ferris, 14 N. Y. 41, 67 Am. Dec. 113; Tillinghast *v.* Bradford, 5 R. I. 205.

1. Condition Defeating or Abridging Particular Estate. — See *supra*, this section, *General Principles Applicable to Remainders — Precedent Particular Estate — Regular Determination of Particular Estate.*

2. Contingent Remainder Not an Estate. — Young *v.* Young, 89 Va. 675; Smith Exec. Ints., § 172; Williams Real Prop. 23, 233; 2 Cruise Dig. 333. See also Paul *v.* Frierson, 21 Fla. 529.

The New York Statute declares a contingent remainder to be an estate. The provision of the statute is that estates in respect to the time of their enjoyment are divided into estates in possession and estates in expectancy. Estates in expectancy are divided into future estates and reversions. A future estate dependent on a precedent estate is termed a remainder and may be either vested or contingent. Hennessy *v.* Patterson, 85 N. Y. 100. See also Moore *v.* Littel, 41 N. Y. 66.

3. Damages for Waste. — Hunt *v.* Hall, 37 Me. 363; Sager *v.* Galloway, 113 Pa. St. 500. See also the title Waste.

After his interest has vested he may maintain a bill in equity to recover for waste done pending the contingency. Garth *v.* Cotton, 1 Ves. 524.

4. Injunction Against Waste. — Williams *v.* Bolton, 3 P. Wms. 268, note; Robinson *v.* Litton, 3 Atk. 209; Brashear *v.* Macey, 3 J. J. Marsh. (Ky.) 93; Cannon *v.* Barry, 59 Miss. 289; Miles *v.* Miles, 32 N. H. 147, 64 Am. Dec. 362; Gordon *v.* Lowther, 75 N. Car. 193; Cowand *v.* Meyers, 99 N. Car. 198; University *v.* Tucker, 31 W. Va. 621. See also the title Waste.

5. Judicial Sale of Contingent Remainder. — Watson *v.* Watson, 3 Jones Eq. (56 N. Car.)

Not Subject to Attachment or Execution. — It follows from the nature of a contingent remainder that it is not subject to attachment [1] or execution against the remainderman.[2]

Bankruptcy of Remainderman. — A contingent remainder is, however, such an interest in property as will pass to his assignee in bankruptcy in the event of his becoming bankrupt.[3]

bb. DEVOLUTION AND TRANSFER — (*aa*) *Transfers Inter Vivos* — aaa. **Rule at Common Law — Alienability in General.** — The authorities all seem to be agreed that a contingent remainder is alienable when the remainderman is ascertained and the uncertainty which makes it contingent is in the event on which it is limited to take effect, because in such case the possibility is coupled with an interest.[4] If the remainderman is not ascertained, then, according to some authorities, there is not a possibility coupled with an interest, but only a bare possibility, which is not subject to sale or transfer.[5] These decisions do not appear to be sound in principle, because in almost every conceivable case of a contingent remainder of this sort, as distinguished from limitations to persons not in being, there is some ascertained person in whom the remainder will vest, if the existing conditions remain unchanged until the happening of the contingency or the determination of the particular estate, as, for instance, a limitation to the children of the life tenant living at his death, or to the right heirs of a living person, etc. Under such circumstances it seems very clear that a person so situated with respect to the remainder has just as much of an interest as if the remainder had been specifically limited to him on a contingency. The only difference is that in the one case a change of circumstances may vest the remainder in another person, while in the other case the contingency may prevent the remainder from vesting in the person named, without vesting it in any one else. On reason, therefore, in any case where the remainderman is not ascertained, but where there is a person in existence in whom the remainder would immediately vest on the present happening of the contingency or the present determination of the particular estate, such person has a possibility coupled with an interest which he may transfer to another, subject, of course, to the same contingency by which it is affected in his hands. And this view is amply supported by authority as well as reason.[6]

400. *Compare* Young *v.* Young, 97 N. Car. 132.

1. Contingent Remainders Not Subject to Attachment. — Young *v.* Young, 89 Va. 675. See the title ATTACHMENT, vol. 3, p. 210.

2. Contingent Remainder Not Subject to Execution. — See the title EXECUTIONS, vol. 11, p. 632, notes 1, 2. See also Baker *v.* Copenbarger, 15 Ill. 106.

3. Contingent Remainder Passes to Assignee in Bankruptcy. — Gardner *v.* Hooper, 3 Gray (Mass.) 398; Nash *v.* Nash, 12 Allen (Mass.) 345; Minot *v.* Tappan, 122 Mass. 535; Belcher *v.* Burnett, 126 Mass. 230. See also the title INSOLVENCY AND BANKRUPTCY, vol. 16, p. 727.

4. Contingent Remainders Alienable — Ascertained Remainderman. — Putnam *v.* Story, 132 Mass. 205; Whipple *v.* Fairchild, 139 Mass. 263, Moore *v.* Littel, 41 N. Y. 83; Kenyon *v.* See, 94 N. Y. 563.

The interest transferred is, of course, subject to the same contingencies in the hands of the transferee as it would have been had it not been transferred. Dunn *v.* Sargent, 101 Mass 338.

5. Remainderman Not Ascertained — Possibility. — Thus, where a testator devised one portion of his real estate to his son J., and another portion to his son M., and directed that if either should die without lawful issue, the part of the one dying should go to the survivor, it was held that the right of one son in the portion devised to the other was, during the lifetime of such other, a mere naked possibility, and was not assignable or releasable. Jackson *v.* Waldron, 13 Wend. (N. Y.) 178. To the same effect, see Edwards *v.* Varick, 5 Den. (N. Y.) 664, *reversing* 11 Paige (N. Y.) 289.

6. Possibility Coupled with Interest. — Putnam *v.* Story, 132 Mass. 205; Whipple *v.* Fairchild, 139 Mass. 263.

Illustrations. — Thus, in Grayson *v.* Tyler, 80 Ky. 358, an estate in remainder was devised to such of the nephews and nieces of the testator as should be living at the death of the life tenant. It was held that though the remainder was contingent in that it was not ascertained who would eventually take the estate in remainder, yet a nephew of the testator who was living at the time of the testator's death took an interest under the will and not a bare possibility, and that he could effectually transfer such interest during the lifetime of the life tenant. There is a manifest distinction, the court said, between this case and a mere possibility, such as the expectation that an heir will inherit from his ancestor. In the

Mode of Transfer — By Estoppel. — The rule is well settled that a contingent remainder could not be transferred by a conveyance at law,[1] because in every conveyance there must be a grantor, a grantee, and a thing granted, that is, an estate, and a contingent remainder is not an estate, but at the most merely a possibility coupled with an interest.[2] At common law it was only by estoppel that a contingent remainderman could transfer his interest, and this was the effect of a deed purporting to convey the contingent interest,[3] though the mode usually employed was a fine (or common recovery).[4] The operation of a fine in such case was only by estoppel against the parties until the contingency should happen, but after the happening of the contingency it operated on the estate as though it had been vested at the time the fine was levied, and for all practical purposes, vested a complete legal title in the conusee.[5]

Release by Remainderman — A contingent remainder, though not the subject of a conveyance operating as such, could at common law be released by the remainderman to the reversioner.[6]

bbb. **Rule in Equity.** — It is a rule in equity that a deed which purports to convey property that is in expectancy or is of such a nature as not to be grantable at law, though inoperative as a grant or conveyance, will be upheld as an executory agreement and enforced according to its intent, if supported by a valid consideration, whenever the grantor is in a condition to give it effect.[7]

ccc. **Statutory Rule.** — It is now expressly provided by statute in many jurisdictions that contingent remainders may be conveyed by deed.[8]

(*bb*) *Transfer by Will.* — It seems to have been formerly held that a contin-

case of an heir, his expectation may be defeated by the act of the ancestor in making a will, or in disposing of his estate during his lifetime, while in the case in hand, the nephew has an interest that cannot be defeated by the act of any person, but depends solely on his surviving the life tenant.

In Harris *v.* McElroy, 45 Pa. St. 216, an estate was limited in remainder to such of the children of the life tenant as should be living at his death and the issue of any child that should have predeceased. In this case it was held that though it was uncertain during the life estate whether any of the children of the life tenant would survive or whether the remainder would not ultimately vest in persons none of whom were then born, yet the children of the life tenant took a contingent interest which was capable of sale and transfer by them.

A Bare Possibility, as regards the matter of transferability, is a mere chance of an interest which may be defeated by an act or omission of a third person, as the chance of succession which an heir has in his ancestor's estate, or which a next of kin has of receiving a distributive share, or which a legatee has during the testator's lifetime of receiving a legacy, and therefore does not include any case of a chance of an interest which, though dependent on a contingency, cannot be affected by the act or omission of any person. Fortescue *v.* Satterthwaite, 1 Ired. L. (23 N. Car.) 566. See also POSSIBILITY, vol. 22, p. 1034.

1. **Contingent Remainder Not Transferrable by Conveyance Operating at Common Law.** — Williams Real Prop. 277; Fearne Cont. Rem. 366.

2. **Reason of Rule.** — Watson *v.* Dodd, 68 N. Car. 528.

3. **Deed Operating by Way of Estoppel.** — Robertson *v.* Wilson, 38 N. H. 48; Hannon *v.* Christopher, 34 N. J. Eq. 459; Young *v.* Young, 89 Va. 675.

4. **Fine or Recovery Operating as Estoppel.** — Pells *v.* Brown, Cro. Jac. 592; Weale *v.* Lower, Pollex 57; Vick *v.* Edwards, 3 P. Wms. 372; Helps *v.* Hereford, 2 B. & Ald. 242; Doe *v.* Oliver, 10 B. & C. 181, 21 E. C. L. 50; Doe *v.* Savile, 3 Ad. & El. 2, 30 E. C. L. 12.

5. **Operation of Fine Before and After Contingency Happens.** — Doe *v.* Oliver, 10 B. & C. 181, 21 E. C. L. 50, *explaining* Doe *v.* Martyn, 8 B. & C. 497, 15 E. C. L. 276. See also Trevivan *v.* Lawrence, 6 Mod. 258, 2 Ld. Raym. 1051, in which Lord Holt cited 39 Ass. 18, and spoke of an estoppel as running upon the land and altering the interest of it — as creating an interest in or working upon the estate of the land, and as running with the land to whoever takes it.

And in Vick *v.* Edwards, 2 P. Wms. 372, Lord Talbot seems to have considered a fine by a contingent remainderman as having the double operation of estopping the conusors till the contingency happened, and then of passing the estate.

6. **Release of Contingent Remainder.** — Lampet's Case, 10 Coke 48*b*.

7. **Contingent Remainder Assignable in Equity.** — King *v.* Withers, Cas. t. Talb. 117; Robertson *v.* Wilson, 38 N. H. 48; Edwards *v.* Varick, 5 Den. (N. Y.) 664; Fortescue *v.* Satterthwaite, 1 Ired. L. (23 N. Car.) 570; Bailey *v.* Hoppin, 12 R. I. 560.

8. **Statutes Authorizing Conveyance of Contingent Remainder by Deed.** — Nutter *v.* Russell, 3 Met. (Ky.) 163; Taylor *v.* Stewart, (N. J. 1889) 18 Atl. Rep. 456; Moore *v.* Littel, 41 N. Y. 84; Young *v.* Young, 89 Va. 675. See also the statutes of the several states.

gent remainder was not such an interest as could be devised by the remainderman,[1] but later decisions have held the contrary, and it is now well settled that such interests may be devised.[2] In some jurisdictions it is expressly provided by statute that contingent remainders are devisable.[3]

(*cc*) *Descent to Heir of Remainderman.* — The rule is well settled that a contingent remainder of inheritance is transmissible to the heirs of the person to whom it is limited, if such person dies before the contingency happens,[4] unless the remainder is so limited as to depend on the life of the remainderman.[5]

(e) **Time of Vesting in Interest.** — Every contingent remainder must vest during the continuance of the particular estate or at the very instant of its determination,[6] as well when a remainder is limited by way of use as when it is created by a conveyance at common law.[7] Hence, whenever the particular estate is in several persons, in common or in severalty, the remainder may fail as to one part and take effect as to another; for the particular tenant of one part may die before the contingency, and the particular tenant of another part may survive it.[8] So, likewise, a contingent remainder may take effect in some and not in all the persons to whom it is limited, according as some may come *in esse* before the determination of the preceding estate and others not.[9]

Posthumous Children. — Formerly it seems to have been a disputed question whether the rule that a remainder must vest at the latest at the very instant of the determination of the particular estate applied to the case of a remainder to a post-humous child,[10] but whatever may have been the rule formerly, all doubts on the subject have been removed by statute both in *England*[11]

1. Contingent Remainder Formerly Held Not Devisable. — Bishop *v.* Fountaine, 3 Lev. 427.

"The opinion of contingent remainders not being devisable seems to have arisen from too narrow a construction of the word 'having' in the statute of wills, by understanding that word as 'seized of,' as well as from the usual form of pleading, that the testator died seized of, etc.; which predicament not being applicable to estates, before they are vested, would, if requisite to the power of testamentary disposition, have ranked them, in that respect, with estates not acquired till after the time of the will. And therefore we find that contingent interests of chattel, or personal interests, were allowed to pass by testamentary dispositions, though inheritable interests were not so." Fearne Cont. Rem. 368.

2. Contingent Remainders Held Devisable. — Roe *v.* Jones, 1 H. Bl. 30, *affirmed* 3 T. R. 88; Ingilby *v.* Amcotts, 21 Beav. 585; Hennessy *v.* Patterson, 85 N. Y. 99; Loring *v.* Arnold, 15 R. I. 428.

3. Contingent Remainders Devisable by Statute. — Nutter *v.* Russell, 3 Met. (Ky.) 163; Kenyon *v.* See, 94 N. Y. 563; Young *v.* Young, 89 Va. 675. And see the statutes of the several states.

4. Contingent Remainder Transmissible by Descent. — Weale *v.* Lower, Pollex 57; Vick *v.* Edwards, 3 P. Wms. 372; Roe *v.* Griffiths, 1 W. Bl. 606; Barnitz *v.* Casey, 7 Cranch (U. S.) 469; Selna's Estate, Myr. Prob. (Cal.) 233; Nutter *v.* Russell, 3 Met. (Ky.) 163; Snively *v.* Beavens, 1 Md. 222; Spence *v.* Robins, 6 Gill & J. (Md.) 512; Buck *v.* Lantz, 49 Md. 439; Hennessy *v.* Patterson, 85 N. Y. 99; Watson *v.* Dodd, 68 N. Car. 528; Chess's Appeal, 87 Pa. St. 362, 30 Am. Rep. 361; Brown *v.* Williams, 5 R. I. 309; Bailey *v.* Hoppin, 12 R. I. 560; Loring *v.* Arnold, 15 R. I. 429; Young *v.* Young, 89 Va. 675.

5. Remainder Dependent on Life of Remainderman. — Thus, in the case of a devise to the widow of the testator for life or widowhood, and at her death or marriage, to such of the testator's children as shall then be living, the remainder as to each child is contingent on his surviving the widow and therefore, in the case of the death of a child in the lifetime of the widow, his interest in the estate terminates and there is nothing which can descend to his heir. De Lassus *v.* Gatewood, 71 Mo. 371.

6. Time of Vesting in Interest. — Archer's Case, 1 Coke 66*b;* Fearne Cont. Rem. 305; 2 Bl. Com. 168. See also *supra*, this section, *General Principles Applicable to Remainders — Time of Vesting in Right.*

7. Remainders Limited by Way of Use. — Chudleigh's Case, 1 Coke 138*a*.

8. Failure of Remainder as to Part of Estate. — Fearne Cont. Rem. 309.

9. Failure of Remainder as to Part of Remaindermen. — Fearne Cont. Rem. 312.

10. Posthumous Children — Doctrine at Common Law. — In Reeve *v.* Long, 1 Salk. 227, an estate was limited to A for life, remainder to his eldest son in tail. A died leaving his wife enceinte, and she afterwards had a son. It was held that the son, not being *in esse* at the time of the determination of the particular estate, could not take under the limitation, but this decision was reversed by the House of Lords against the opinions of all the judges.

11. The English Statute provides that where any estate is settled in remainder to children with the remainder over, any posthumous child may take in the same manner as if born in the father's lifetime. Stat. 10 & 11 Wm. III., c. 16.

It is to be observed that this statute does not, in terms, include devises, the words

and in the *United States*.[1]

(f) **Ownership of Inheritance Pending Contingency** — *aa.* Remainder Limited by Way of Use, Devise, or Grant. — Where a remainder of inheritance is limited in contingency by way of use, devise, or grant, the inheritance in the meantime, if not otherwise disposed of, remains in the grantor or his heirs or in the heirs of the testator, until the contingency happens to take it out of them.[2]

bb. Remainder Limited by Common-law Conveyance — **Inheritance in Abeyance.** — Some authorities hold that where a contingent remainder is limited by a conveyance operating at common law, the estate in remainder immediately passes out of the grantor, though it cannot vest in any one pending the contingency. According to this theory, the inheritance, when the remainder is of the inheritance, having passed from the grantor and not having vested in any other person, is in abeyance (sometimes expressed as *in nubibus* or *in gremio legis*), where it awaits the contingency and, if that results favorably, vests in the remainderman. But if the remainder fails to vest at or before the determination of the particular estate, the grantor or his heirs may re-enter.[3]

Inheritance in Grantor. — On the other hand, it is insisted that in such a case the inheritance remains in the grantor or his heirs, and this theory is as logical as the other and more reasonable, because it is a much more simple matter to regard the inheritance as remaining in the grantor than as passing into the clouds, and afterwards returning to the grantor or his heirs in the event of the failure of the remainder.[4]

(g) **Contingent Remainder Preceding Remainder Over** — *aa.* In General — (*aa*) *Contingent Remainder in Fee Simple.* — A contingent remainder may be followed by a remainder over, as often happens in practice, and in such a case the remainder over is necessarily contingent, if the preceding limitation is in fee simple absolute,[5] because a remainder cannot be limited to take effect after a fee simple,[6] but only as a substitute for a contingent limitation in fee which fails to vest.[7]

Determinable Fee. — It would seem that a contingent determinable fee as well as a contingent fee simple absolute would prevent a subsequent limitation from being vested, because it is an ancient rule of law, and one that has been often recognized, that a remainder cannot be limited after a determinable fee.[8] It has been said, however, that a contingent determinable fee devised in trust for some special purposes only will not prevent a subsequent limitation to a person *in esse* from being vested.[9]

being "where an estate is by any marriage settlement limited," etc., and no direct decision has held that it applies to wills, though in one case this was assumed by the court. See Roe *v.* Quartley, 1 T. R. 634. See also Bull. N. P. 105.

Mr. Butler, in a note to Coke Litt. 298*a*, says: "There is a tradition that as the case of Reeve *v.* Long (1 Salk. 227) arose upon a will, the lords considered the law to be settled by their determination in that case, and were unwilling to make any express mention of limitations or devises made in wills, lest it should appear to call in question the authority or propriety of their determination."

1. Statutes in United States. — See the statutes of the several states.

2. Inheritance in Grantor or His Heirs or in Heirs of Testator. — Clere's Case, 6 Coke 17*b*; Lovie's Case, 10 Coke 85*b*; Davis *v.* Speed, Carth. 262; Plunket *v.* Holmes, 1 Lev. 11; Purefoy *v.* Rogers, 2 Saund. 380; Peterson *v.* Jackson, 196 Ill. 40.

3. Inheritance in Abeyance. — Colthirst *v.* Bejushin, Plowd. 35; Coke Litt. 378*a*; Beck's Case, Lit. C. Pl. 255.

4. Inheritance in Grantor.—Fearne Cont. Rem. 360 *et seq.*

5. Contingent Remainder in Fee — Subsequent Remainder Necessarily Contingent. — Doe *v.* Elvey, 4 East 313; Doe *v.* Holme, 3 Wils. C. Pl. 237; Goodright *v.* Dunham, 1 Dougl. 264; Doe *v.* Perryn, 3 T. R. 484.

6. Remainder Cannot Be Limited on Fee Simple. — See *supra*, this section, *General Principles Applicable to Remainders — Precedent Particular Estate — Quantity of Particular Estate.*

7. Substitute for Prior Limitation in Fee. — See *infra*, this section, *Double Contingencies or Contingency with Double Aspect.*

8. See *supra*, this section, *General Principles Applicable to Remainders — Precedent Particular Estate — Quantity of Particular Estate.*

9. Vested Remainder After Determinable Fee in Trust.—Fearne Cont. Rem. 225, *citing* Lethieullier *v.* Tracy, 3 Atk. 774, Ambl. 204. In this case the testator devised lands to his daughter for life, remainder to trustees to support contingent remainders, remainder to her first and other sons successively in tail; and if the daughter should die without issue living at her death, then the testator devised the lands

(*bb*) *Contingent Remainder Not in Fee Simple.* — A remainder limited after a contingent remainder is not necessarily contingent where the preceding limitation is not in fee simple, but the subsequent limitation may be a vested remainder, and this depends on the form of the limitation, irrespective of the contingency affecting the preceding interest. If the preceding contingent remainder vests in interest and takes effect in possession, the remainder over must await its regular determination; otherwise, the remainder over, being already vested in interest, will vest in possession on the determination of the particular estate, just as if there had been no intermediate limitation at all.[1]

bb. Remainder Over Dependent on Contingent Determination of Preceding Estate — (*aa*) *Where Preceding Estate Never Takes Effect.* — Where a remainder over is limited on a contingent determination of a preceding estate, and such preceding estate never takes effect, it is out of the case altogether, and the remainder over is not defeated thereby, but will take effect as if it had been originally limited on the particular estate.[2]

(*bb*) *Where Preceding Estate Takes Effect and Contingency Never Happens.* — Where a remainder is limited to take effect on the contingent determination of a preceding remainder, and the preceding remainder takes effect but the contingency does not happen, the remainder over will fail.[3]

(h) **Destruction of Contingent Remainders** — *aa.* How Destruction Is Effected — (*aa*) *Determination of Particular Estate in General.* — At common law contingent remainders, except where the legal estate is vested in trustees or mortgagees, will fail or be destroyed in any case where the particular estate determines before the remainder is ready to vest in interest, because it is an absolute requisite that a contingent remainder must vest in interest during the particular estate or *eo instanti* that it determines,[4] and it is immaterial for this purpose whether the remainder was limited by way of use or devise or by way of conveyance at common law.[5] Some acts of the tenant operate immediately to determine

to trustees and their heirs until the testator's cousin N. should have attained the age of twenty-one years, for the term of his life, remainder to trustees to support contingent remainders, remainder to the first and other sons of N. successively in tail; and in default of such issue, or in case N. should die before twenty-one, without issue, remainder over. According to the report of this case, Lord Hardwicke held that the contingency of the testator's daughter dying without issue living at her death affected only the estate limited to trustees until N. should attain the age of twenty-one; that this limitation to trustees was not an absolute fee but a determinable fee; that the estate limited to N. was only contingent until he should attain twenty-one; and that this contingency extended to none of the subsequent estates and therefore the remainders over to persons *in esse* were vested.

Mr. Butler, however, questions the accuracy of the report of this case and says that it is highly improbable that Lord Hardwicke should have let fall any expression at variance with the rule that a remainder cannot be limited after a determinable fee. Fearne Cont. Rem. 226, note (d).

1. Vested Remainder After Contingent Remainder. — Chudleigh's Case, 1 Coke 137; Bowle's Case, 11 Coke 80; Whitfield *v.* Bewit, 2 P. Wms. 240; Lewis *v.* Waters, 6 East 337.

In Ives *v.* Legge, 3 T. R. 488, note, there was a devise to the testator's daughter M. "during the term of her natural life and after her decease" to her children "and their heirs, and in default thereof" to the testator's son W., his heirs and assigns. It was held that W. took under the will a vested remainder in fee simple expectant on a life estate in M., and a contingent remainder in tail in M.'s children, if she should have any. The provision as to M.'s children operated to create only a fee tail, though the limitation was to them "and their heirs," because it was impossible for them to die without heirs in the lifetime of their uncle W. or any of his children.

2. Contingent Determination of Preceding Estate Which Never Took Effect. — Scatterwood *v.* Edge, 1 Salk. 229; Holmes *v.* Cradock, 3 Ves. Jr. 320; Jones *v.* Westcomb, 1 Eq. Cas. Abr. 245, par. 10; Statham *v.* Bell, 1 Cowp. 40.

3. Amherst *v.* Lytton, 3 Bro. P. C. 486; Sheffield *v.* Orrery, 3 Atk. 282; Brown *v.* Cutter, T. Raym. 427.

4. Destructibility of Contingent Remainders. — Fearne Cont. Rem. 316; Smith Exec. Ints., § 769. See also *supra*, this section, *Principles Relating to Contingent Remainders Generally — Time of Vesting in Interest.*

Equity Will Not Interfere, in the Absence of Fraud, to protect contingent remaindermen against the destruction of the remainder by the particular tenant, because, since he is not a trustee, his act is not a breach of trust, though it is a plain wrong. Mansell *v.* Mansell, 2 P. Wms. 681.

But if the Conveyance Was Obtained by Fraud, equity will relieve against it at the suit of the remainderman. Englefield *v.* Englefield, 1 Vern. 443.

5. Destructibility Not Affected by Mode of Creation. — Fearne Cont. Rem. 324; Bould *v.* Wyn-

or destroy the particular estate and thereby *ipso facto* destroy the remainder.[1] Other acts of the tenant of the particular estate amount to a forfeiture, but an entry by the person prejudiced by such act is necessary to determine the estate, and therefore, until an entry by the person entitled to take advantage of the forfeiture, the particular estate continues to subsist and to support the contingent remainders dependent on it.[2]

Contingent Remainders Limited Out of an Equitable Fee or an Equity of Redemption, where the legal estate is vested in trustees or mortgagees, are not subject to destruction by reason of the determination of the equitable estate preceding the contingent remainder.[3]

Revival of Particular Estate. — Generally speaking, a contingent remainder once destroyed cannot afterwards be revived.[4] Accordingly, if a tenant for life with a contingent remainder makes a feoffment in fee on condition and the contingency happens before re-entry for condition broken, the contingent remainder is destroyed, because there must be a particular estate or a present right to enter when the contingency happens; but if the tenant for life enters for a breach before the contingency happens, the contingent remainder is revived and may vest.[5] In case a contingent remainder is destroyed by levying a fine which is afterwards annulled by act of Parliament, the remainder will revive, though it is otherwise in case the fine is reversed for error.[6]

Copyhold. — A contingent remainder in copyhold is destroyed if the particular estate regularly determines pending the contingency, but it is not destroyed in case of a forfeiture of the particular estate, where the contingency afterwards happens before the time for the regular determination of the particular estate.[7]

(*bb*) *Modes of Determining Particular Estate* — aaa. Regular Determination. — According to this principle the regular determination of the particular estate before a contingent remainder limited thereon is ready to vest in interest will destroy the remainder.[8]

bbb. Attainder of Tenant. — If the tenant of the particular estate is attainted his estate is forfeited to the crown and any contingent remainder limited immediately thereon is destroyed.[9]

ston, Cro. Jac. 168. See also Smith *v.* Belay, Cro. Eliz. 630; Mansell *v.* Mansell, 2 P. Wms. 678; Cunliffe *v.* Brancker, 3 Ch. D. 393.

1. See *infra*, this subdivision of this section, *Modes of Determining Particular Estate — Alienation by Tenant.*

2. **Necessity of Entry to Defeat Particular Estate.** — Thus, where a tenant for life accepts a fine from a stranger, thereby affirming on record the reversion to be in a stranger, it is a forfeiture, but it does not divest the estate of him in reversion or remainder, and until an entry by a vested remainderman or the reversioner, the particular estate continues to support the contingent remainders dependent on it. Podger's Case, 9 Coke 106*b*; Lloyd *v.* Brooking, 1 Vent. 188; Fearne Cont. Rem. 323; Smith Exec. Ints., § 776.

Breach of Condition by Tenant of Particular Estate. — So, too, if the reversioner re-enters for breach of the condition by the tenant of the particular estate, subsequent contingent remainders are destroyed, but such remainders are not affected by a breach of condition without such re-entry. Williams *v.* Angell, 7 R. I. 152; Fearne Cont. Rem. 349.

3. See *supra*, this section, *Principles Relating to Contingent Remainders Generally — Nature of Particular Estate.*

4. **Contingent Remainder Not Generally Revivable After Destruction.** — Thompson *v.* Leach, 1 Ld. Raym. 314.

5. **Remainder Revived by Revival of Particular Estate.** — Fearne Cont. Rem. 349; Thompson *v.* Leach, 1 Ld. Raym. 314, 2 Salk. 576; Anonymous, Freem. K. B. 508.

6. **Annulment or Reversal of Fine Levied by Tenant.** — Cole *v.* Levingston, 3 Keb. 83, *cited* in Thompson *v.* Leach, 1 Ld. Raym. 314.

7. **Destruction of Contingent Remainder in Copyhold.** — Thus, if an estate be given to a copyholder for life, remainder to the right heirs of J., and the tenant for life die, living J., the remainder is destroyed because it cannot take effect as by the limitation it ought; but if the tenant for life had committed a forfeiture or made a surrender and afterwards J. had died in his lifetime, the remainder to J.'s heirs would take effect. Fearne Cont. Rem. 320.

8. **Determination of Particular Estate Before Remainder Can Vest.** — Fearne Cont. Rem. 316; Smith Exec. Ints., § 768; Chudleigh's Case, 1 Coke 138; Irvine *v.* Newlin, 63 Miss. 192.

9. **Destruction of Remainder — Forfeiture by Attainder.** — Palmer's Case, Moo. K. B. 815. See also Corbet *v.* Tichborn, 2 Salk. 576. In this case, however, the contingent remainder was saved from destruction by the fact that interposed between it and the particular estate was a vested remainder.

ccc. **Alienation by Tenant — Tortious Alienation.** — If the particular estate on which a contingent remainder depends is destroyed by the tenant thereof and a new estate is created, the remainder is destroyed;[1] but the alteration of the particular estate which will destroy a contingent remainder must amount to an alteration in its quantity and not merely in its quality.[2] Therefore, contingent remainders are destroyed by a tortious alienation by the tenant of the particular estate, that is, a conveyance by such tenant of a greater estate than he has in the land, and such is the effect of a feoffment,[3] a fine or recovery,[4] or a surrender.[5]

Conveyances Not Tortious. — If the conveyance by the tenant of the particular estate is not tortious, that is, if it does not operate to pass more than the tenant's interest, as where he conveys by bargain and sale, there is no destruction of the remainder;[6] and on the same principle a contingent remainder is not destroyed where the tenant of the particular estate conveys by lease or release, because that is also an innocent conveyance, and disturbs no estate, but passes only what the releasor may lawfully pass.[7] But the general rule that a bargain and sale, or lease and release, by the tenant of the particular estate does not destroy the contingent remainder must be understood with these exceptions, that if such conveyance be made to or joined in by the person who has the immediate vested reversion or remainder, or if the tenant for life who makes the conveyance has the remainder or reversion, the remainder will be destroyed, because in each of such cases there is a union or consolidation of the two estates.[8]

A Cestui Que Trust for life cannot by feoffment or other conveyance destroy a contingent remainder, because whatever conveyance he makes, as he has not the legal estate in him, passes only what he can lawfully grant, that is, his trust estate for life, and a right of entry resides in the trustees in whom the legal estate is vested,[9] but a recovery suffered by a tenant in tail of a trust will bar the remainder, because he is master of the estate and may call in the legal estate at his pleasure.[10]

ddd. **Disseizin of Tenant.** — Disseizin of the tenant of the particular estate does not destroy his right. The estate continues in right and may be revested by a re-entry. Therefore, when the time appointed by the limitation for the determination of the particular estate arrives, the remainder will take effect

1. **Destruction of Particular Estate.** — Smith Exec. Ints., § 770; Fearne Cont. Rem. 315, 349.

2. **Alteration of Quality of Particular Estate.** — Lane *v.* Pannell, 1 Rolle 238, 317, 438; Harrison *v.* Belsey, T. Raym. 413, T. Jones 136; Pollex 573. But see the report of this case, 1 Vent. 345, 3 Salk. 299. And see Fearne Cont. Rem. 339.

3. **Forfeiture by Feoffment.** — Archer's Case, 1 Coke 66*b*; Chudleigh's Case, 1 Coke 135*b*; Powle *v.* Veere, Moo. K. B. 554; McElwee *v.* Wheeler, 10 S. Car. 392.

4. **Forfeiture by Fine or Recovery.** — Burnsall *v* Davy, 1 B. & P. 215; Doe *v.* Scudamore, 2 B. & P. 289; Purefoy *v.* Rogers, 2 Lev. 39, 2 Saund. 380; Plunket *v.* Holmes, 1 Lev. 11; Waddell *v.* Rattew, 5 Rawle (Pa.) 231; Lyle *v.* Richards, 9 S. & R. (Pa.) 322; Abbott *v.* Jenkins, 10 S. & R. (Pa.) 296.

5. **Surrender by Tenant of Particular Estate.** — Carter *v.* Barnadiston, 1 P. Wms. 505; Doe *v.* Holme, 3 Wils. C. Pl. 237; Loddington *v.* Kime, 1 Salk. 224; Fisher *v.* Edington, 12 Lea (Tenn.) 189.

In Thompson *v.* Leach, 2 Salk. 427, 576, 1 Ld. Raym. 313, 3 Mod. 296, 301, the tenant of the particular estate made a surrender, but he was *non compos mentis* at the time, and for that reason the surrender was held void so that no forfeiture of the estate in remainder resulted.

Surrender by Copyholder. — If there be a tenant for life of a copyhold estate with a contingent remainder over, a surrender of the estate by tenant for life, before the contingency happens, will not destroy the contingent remainder, because the freehold and inheritance is in the lord. 2 Roll. Abr. 794, pl. 6; Bawsy *v.* Lowdall, Style 249, 273; Mildmay *v.* Hungerford, 2 Vern. 243. See also Fearne Cont. Rem. 319.

6. **Conveyance by Bargain and Sale.** — Fearne Cont. Rem. 322; McKee *v.* Pfout, 3 Dall. (Pa.) 489.

7. **Conveyance by Lease or Release.** — Smith *v.* Clyfford, 1 T. R. 738; Fearne Cont. Rem. 322.

8. **Bargain and Sale or Lease and Release Operating to Destroy Remainder in Some Cases.** — Fearne Cont. Rem. 321, Butler's note (*f*). And see *infra*, this subdivision of this section, *Merger of Particular Estate in Inheritance.*

9. **Conveyance by Cestui Que Trust for Life.** — Penhey *v.* Hurrell, Freem. Ch. 213; Fearne Cont. Rem. 321.

10. **Alienation by Tenant in Tail of Trust.** — Boteler *v.* Allington, 1 Bro. C. C. 72; Fearne Cont. Rem. 321.

notwithstanding the disseizin,[1] unless in the meantime the disseized tenant's right of entry has been tolled.[2]

eee. Merger of Particular Estate in Inheritance. — Where the particular estate merges in inheritance either by the act of the particular tenant or by the descent to him of the inheritance after the particular estate has taken effect, intermediate contingent remainders are destroyed.[3] But where a testator limits a particular estate to the heir with a contingent remainder over, without any ulterior vested remainder carrying the fee, so that the inheritance descends to the heir until the contingency happens, at the very time that the particular estate first takes effect, the particular estate is merged only *sub modo*, so as to open for the interposition of the remainder when the contingency happens.[4] So where a limitation either by devise or settlement *inter vivos* is to one for life, with contingent remainder to another, followed by a remainder to the heirs or heirs of the body of the first taker, the fee or fee tail taken by the first taker, under the rule in Shelley's Case, is subject to open and let in the contingent remainder, provided it vest during what would have been the subsistence of the particular estate if it had not been merged.[5]

bb. How Destruction Is Prevented — (*aa*) *At Common Law.* — The legal subjection of contingent remainders to the power of the tenant of the preceding particular estate of freehold was overcome at common law by the device of trust estates to preserve contingent remainders. This device consisted of interposing between the particular estate and the contingent remainder a vested remainder of freehold to trustees, so that, even should there be a forfeiture of the particular estate, there would still be a vested estate of freehold, preceding and supporting the contingent remainder.[6]

1. Disseizin of Tenant. — Archer's Case, 1 Coke 67; Chudleigh's Case, 1 Coke 135*b*.

2. Right of Entry Tolled. — Thompson *v.* Leach, 2 Salk. 576, 1 Ld. Raym. 316, 12 Mod. 174; Smith Exec. Ints., § 769.

3. Merger of Particular Estate in Inheritance. — Smith Exec. Ints., § 777; Challis Real Prop. 108; Craig *v.* Warner, 5 Mackey (D. C.) 460, 60 Am. Rep. 381; Mangun *v.* Piester, 16 S. Car. 316; Redfern *v.* Middleton, 1 Rice L. (S. Car.) 459.

Acts Occasioning Merger. — A merger is occasioned by the act of the particular tenant where he accepts a reversion in fee before the contingent remainders vest; or where he surenders, bargains and sells, or leases and releases to the immediate vested remainderman in tail or in fee, or to the reversioner; or where he (the particular tenant), having the immediate vested remainder or reversion, bargains and sells or leases and releases. Fearne Cont. Rem. 340; Smith Exec. Ints., § 778; Purefoy *v.* Rogers, 2 Saund. 380; Thompson *v.* Leach, 2 Vent. 198.

As to the doctrine of merger generally, see the title Merger, vol. 20, p. 587.

As to the effect of merger on the running of the statute of limitations, see Mangum *v.* Piester, 16 S. Car. 316; Moore *v.* Luce, 29 Pa. St. 260, 72 Am. Dec. 629.

4. Merger Sub Modo. — Smith Exec. Ints., § 780; Challis Real Prop. 108, 109; Archer's Case, 1 Coke 66*b*; Plunket *v.* Holmes, 1 Lev. 11; Boothby *v* Vernon, 9 Mod. 147. *Compare* Craig *v.* Warner, 5 Mackey (D. C.) 460, 60 Am. Rep. 381.

But it seems that the merger becomes complete in the alienee on conveyance being made by the life tenant, and the intermediate remainder is destroyed. Bennett *v.* Morris, 5 Rawle (Pa.) 15; Fearne Cont. Rem. 320, 321, note (f), *per* Butler; Smith Exec. Ints., § 778.

5. Challis Real Prop. 108, 109; Smith Exec. Ints., § 780*b*.

6. Trust Estates to Preserve Contingent Remainders. — Fearne Cont. Rem. 326.

The Form of the limitation referred to in the text is to A for life, remainder from and after the determination of the life estate, by forfeiture or otherwise in the lifetime of A to trustees and their heirs during the lifetime of A in trust to preserve contingent remainders and to permit A and his assigns to receive the rents and profits of the land during his life, remainder after the death of A to persons not in being or not ascertained, or otherwise in contingency. Williams Real Prop. 284.

But this is not the only form in which these settlements are made, for sometimes the estate is conveyed directly to the trustees and their heirs, in trust for the person who is to have its beneficial use and enjoyment for his life, and upon a further trust to preserve the contingent limitations, and with remainders over. These different forms are thus stated and illustrated by Lord Chancellor Eldon, in the case of Moody *v.* Walters, 16 Ves. Jr. 294.

Origin of Device. — The device of trust estates to preserve contingent remainders is generally attributed to Sir Orlando Bridgman and Sir Geoffrey Palmer, who retired from the bar during the civil wars in England and confined themselves to conveyancing. And when, after the restoration, these persons came to fill the first offices of the law, they supported their invention within reasonable and proper bounds, and introduced it into general use. 2 Bl. Com. 172; 2 Th. Co. Litt. 137, n. (K).

Destruction of Remainder by Concurrence of Trustees. — The trustees appointed to preserve contingent remainders may unite with the particular tenant in a tortious alienation and thereby destroy the remainders, but equity will hold them liable as for a breach of trust, or will declare the land subject to the original limitations in the hands of the purchaser.[1] Sometimes, however, equity will refuse relief,[2] and under special circumstances may, in its discretion, even direct the trustees to join in barring the contingent remainders.[3]

(*bb*) *By Statute.* — **In England,** a statute enacted in 1844 provided that contingent remainders shall not fail or be destroyed or barred merely by reason of the destruction or merger of any preceding estate or its determination by any other means than the natural effluxion of the time of such preceding estate, or some event on which it was in its creation limited to determine.[4] But this statute did not preserve contingent remainders from destruction in any case where the particular estate determined in the natural course of events by virtue of the limitation before the remainder was ready to vest.[5] By a later statute, however, contingent remainders were declared not subject to destruction by the regular determination of the particular estate pending the contingency.[6]

In the United States there are various statutes designed to prevent the destruc-

1. Trustees Liable in Equity for Breach of Trust. — Pye *v.* George, 2 Salk. 680, *affirmed* 1 Bro. P. C. 366; Fearne Cont. Rem. 326 *et seq.* See Harris *v.* McElroy, 45 Pa. St. 216.

Respective Liabilities of Trustees and Purchaser. — A purchaser under a conveyance by the particular tenant and the trustees, if for value and without notice, takes the land discharged of the trust, and the only remedy of the person claiming under the contingent remainders is against the trustees, who shall be decreed to purchase lands with their own money, equal in value to the lands sold by them, and to hold them on the same trusts and limitations as they held those sold by them. But if the conveyance was with notice of the trust, whether with or without consideration, in that case the purchaser shall hold the lands subject to the former trusts. Mansell *v.* Mansell, 2 P. Wms. 681.

2. Relief in Equity Refused. — In Elie *v.* Osborne, 2 Vern. 754, the limitation in remainder was to the heirs of the body of the particular tenant. The particular tenant, having two sons, joined with the elder son and the trustees in a fine, and the court held that this was not a breach of trust in the trustees because of the joinder of the eldest son.

But in Mansell *v.* Mansell, 2 P. Wms. 683, the court, referring to the case of Elie *v.* Osborne, 2 Vern. 754, cited *supra*, this note, seemed to doubt its correctness because it assumed that the eldest son, during his father's lifetime, was in equity the tenant in tail, and said that the report of the case was not satisfactory. See also Else *v.* Osborn, 1 P. Wms. 386, where the report of the case is somewhat different from that in 2 Vern. 754.

3. Trustees Decreed to Join in Conveyance. — Basset *v.* Clapham, 1 P. Wms. 358 (where the purpose of the sale was the payment of the debts of the particular tenant, to whom the remainder had been limited in a marriage settlement); Platt *v.* Sprigg, 2 Vern. 303 (where the trustees were directed to join in a sale to pay off a mortgage prior to the settlement); Winnington *v.* Foley, 1 P. Wms. 536 (where it was regarded as beneficial to the family to bar the contingent remainders). See also Frewin *v.* Charleton, 1 Eq. Cas. Abr. 386, par. 4.

But equity will never direct the trustees to join for the purpose of enabling any of the parties to sell the estate, and disturb the original intention of the settler or devisor. Davies *v.* Weld, 1 Vern. 181, 1 Eq. Cas. Abr. 386, par. 5; Townsend *v.* Lawton, 2 P. Wms. 379; Symance *v.* Tattam, 1 Atk. 613; Woodhouse *v.* Hoskins, 3 Atk. 22; Barnard *v.* Large, 2 P. Wms. 684, note, 1 Bro. C. C. 534, Ambl. 774. And see Tippen's Case, 1 P. Wms. 359, note; Tipping *v.* Piggot, 1 Eq. Cas. Abr. 385, par. 2.

4. English Statute Preventing Destruction of Contingent Remainders. — 7 & 8 Vict., c. 76, § 8.

5. Regular Determination of Particular Estate Pending Contingency. — Conliffe *v.* Brancker, 3 Ch. D. 393.

6. Contingent Remainders Declared Not Subject to Destruction by Regular Determination of Particular Estate. — Statute 40 & 41 Vict., c. 33. This act, which was passed in the year following the decision in the case of Cunliffe *v.* Brancker, 3 Ch. D. 393, cited in the next preceding note, and probably as the result of the remarks of the judges in that case, provides that every contingent remainder created by any instrument executed after August 2, 1877, or by any will or codicil reviving or republishing any will or codicil executed after that date, which would have been valid as a springing or shifting use, or executory devise, or other limitation, had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation. But it is to be observed that the act by its terms does not apply to any contingent remainder created by a deed executed before August 2, 1877, or by a will or codicil executed before that date and not subsequently republished, nor does it apply to any con-

tion of contingent remainders. In some states the statutes provide that no expectant estate can be defeated or barred by any alienation or other act of the tenant of the precedent estate, nor by the destruction of the precedent estate by disseizin, forfeiture, surrender, or merger.[1] There are also provisions that conveyances by tenants for life shall not have any tortious operation, but shall pass only such interest as the grantor or feoffor can lawfully convey,[2] and that no remainder, valid in its creation, shall be defeated by the determination of the precedent estate before the happening of the contingency on which the remainder is limited to take effect, but should such contingency afterwards happen, the remainder shall take effect in the same manner and to the same extent as if the precedent estate had continued to the same period.[3] A more comprehensive provision found in other states is that a contingent remainder shall in no case fail for want of a particular estate to support it.[4] And yet another provision is that any contingent remainder is valid if it would be valid as a conditional limitation.[5]

Effect of Statutes as to Rule Against Perpetuities. — There seems to be no doubt but that contingent remainders made indestructible by statute are subject to the rule against perpetuities.[6] The doctrine in this respect at common law has been considered in another part of this article.[7]

(4) *Cross-remainders* — **Definition.** — Cross-remainders may be defined as remainders limited after particular estates to two or more persons, in several parcels of land, or in several undivided shares in the same parcel of land in such way that on the determination of the particular estates in any of the several parcels or undivided shares, they remain over to the other grantees, and the reversioner or ulterior remainderman is not let in till the determination of all the particular estates.[8]

Nature of Precedent Estate. — Though usual, it is not necessary, in order to create cross-remainders, that the estates should originally have been granted to the several persons in common. The term seems equally applicable where the particular estates are held in severalty, as where one lot is granted to A and another to B, with remainder over of A's lot to B on failure of issue of A, and B's lot to A on failure of issue of B.[9]

Creation — Express Limitation Necessary in Deed. — In a deed, whether operating at common law or under the statute of uses, cross-remainders are never to be implied, however plainly the intention of the grantor may appear, but can be created only by words of express limitation, that is, the deed must, by express words, give the share or parcel of each grantee to the other or others on the happening of the contingency;[10] and in case of a limitation to more

tingent remainder, whenever created, which does not conform to the rules regulating the creation of executory interests.

1. Statutes in United States. — Stimson Am. Stat. Law, § 1403

It seems, however, that this provision does not prevent the destruction of the remainder by natural expiration of the particular estate. Irvine *v.* Newlin, 63 Miss 192.

In *Alabama* contingent remainders have been abolished, and every future estate created in land by way of contingent remainder or executory devise has the same properties as the latter estate. Code Ala. (1876), § 2180.

In several states it is expressly provided, however, that such expectant estate may be defeated in any manner or by any means which the party creating the estate shall in the creation thereof have provided or authorized, and is not on that account to be adjudged void in its creation. See generally the statutes of the several states.

As to construction of the *New York* provision, see Greyston *v.* Clark, 41 Hun (N. Y.) 125; Simpson *v.* French, 6 Dem. (N. Y.) 108.

2. Stimson Am. Stat. Law, § 1402. And see the statutes of the several states.

3. Stimson Am. Stat. Law, § 1426 (B).

4. Necessity of Particular Estate Dispensed With. — See the statutes of *Kentucky*, *Virginia*, and *West Virginia*. *Compare* the statutes in other jurisdictions.

5. Stimson Am. Stat. Law, § 1426.

6. Challis Real Prop. 112.

7. See *supra*, this section, *Nature of Contingency — Remoteness of Contingency*.

8. Cross-remainders Defined. — 1 Prest. Est. 94.

9. Nature of Precedent Estate. — 1 Prest. Est. 94 *et seq.*; 4 Kent Com. 201.

10. Cross-remainders Not Implied in Deed. — Cole *v.* Levingston, 1 Vent. 224; Doe *v.* Worsley, 1 East 416; Doe *v.* Dorvell, 5 T. R. 518; Edwards *v.* Alliston, 4 Russ. 78; Meyrick

than two persons, the words of gift over must be sufficient to include not only the share or parcel originally given to each, but also any share that may accrue from the gift over of such original shares or parcels.[1] No technical or precise form of words, however, is necessary to create cross-remainders; it is sufficient to say that there shall be cross-remainders or to use any other form of words that will operate as a gift over.[2]

Executory Articles of Settlement. — The rule in regard to cross-remainders in a deed, though it applies to completed or executed marriage settlements as well as to other deeds, does not apply to executory articles for a settlement. In such articles cross-remainders may be raised by implication.[3]

Cross-remainders Implied in Will. — In accordance with the general rule of testamentary construction that effect must always be given to the testator's intention, there need not be express words of limitation in a will to create cross-remainders, though they will be implied whenever it is necessary to do so in order to carry out the testator's plainly expressed intention;[4] but no such implication can arise in any case where there is an express or special limitation by the will.[5] At one time cross-remainders by implication seem not to

v. Whishaw, 2 B. & Ald. 810; Levin *v.* Weatherall, 1 Brod. & B. 401, 5 E. C. L. 131; Smith *v.* Usher, 108 Ga. 231; Bohon *v.* Bohon, 78 Ky. 408.

1. Sufficiency of Deed to Create Cross-remainders. — In Edwards *v.* Alliston, 4 Russ. 78, land was conveyed to the use of the children of C. and the heirs of their bodies as tenants in common, and on the failure of issue of any child, its share to be to the use of the other children of C. and the heirs of their bodies, share and share alike. The deed further provided that in case there should be a failure of issue of all such children but one, or there should be but one such child, then the lands to be to the use of such only child of C. and the heirs of his or her body, and for default of such issue, to the use of the right heirs of the grantor. It was held that the deed limited cross-remainders as to the original share of each child, but contained no limitation over of the shares which might accrue to the surviving children by the deaths of the others.

But in Doe *v.* Wainewright, 5 T. R. 427, it was held that there were words sufficient to create cross-remainders. In this case land was conveyed to the use of A. for life, remainder to the use of such child or children as A. should thereafter have, as tenants in common (if more than one) and the heirs of their bodies; or in case any such child should die without issue, then the part or parts of him, her, or them so dying without issue should be to the use of the surviving child or children of A. and the heirs of his, her, or their respective bodies, " and so *toties quoties* as any of the said children should die without issue until there should be only one child left," and in case all the said children should die without issue, or if A. should have no children, then to R. in fee simple.

2. No Precise Form of Words Necessary. — Doe *v.* Wainewright, 5 T. R. 431.

3. Executory Articles of Settlement. — Twisden *v.* Lock, Ambl. 666; Papillon *v.* Voice, 2 P. Wms. 471.

4. Cross-remainders Implied in Will — *England.* — Atherton *v.* Pye, 4 T. R. 710; Doe *v.* Cooper, 1 East 229; Watson *v.* Foxon, 2 East 36; Roe *v.* Clayton, 6 East 628; Comber *v.* Hill, 2 Stra. 969; Williams *v.* Browne, 2 Stra. 996: Doe *v.* Webb, 1 Taunt. 234; Taaffe *v.* Conmee, 10 H. L. Cas. 64; Hannaford *v.* Hannaford, L. R. 7 Q. B. 116; Bamford *v.* Lord, 14 C. B. 708, 78 E. C. L. 708, 26 Eng. L. & Eq. 302.

United States. — Lillibridge *v.* Adie, 1 Mason (U. S.) 224.

Connecticut. — Hungerford *v.* Anderson, 4 Day (Conn.) 368.

Georgia. — Smith *v.* Usher, 108 Ga. 231.

Kentucky. — Bohon *v.* Bohon, 78 Ky. 408.

Maryland. — Hoxton *v.* Archer, 3 Gill & J. (Md.) 199.

Massachusetts. — Hall *v.* Priest, 6 Gray (Mass.) 18; Parker *v.* Parker, 5 Met. (Mass.) 134; Allen *v.* Ashley School Fund, 102 Mass. 262.

Mississippi. — Reber *v.* Dowling, 65 Miss. 259, 7 Am. St. Rep. 651.

Pennsylvania. — Pierce *v.* Hakes, 23 Pa. St. 231; Wall *v.* Maguire, 24 Pa. St. 248; Kerr *v.* Verner, 66 Pa. St. 326.

South Carolina. — Baldrick *v.* White, 2 Bailey L. (S. Car.) 442; Seabrook *v.* Mikell, Cheves Eq. (S Car.) 80.

Illustrations. — Thus, a devise to A. and B. and their heirs, equally to be divided between them, and, in case they should happen to die without issue, then to F. and the heirs male of his body, with remainder over, was held to create cross-remainders in tail between A. and B. Holmes *v.* Meynel, T. Jones 172, T. Raym. 452, Pollex. 425, Skin. 17.

So, where a testator having two sons devised part of his lands to his elder son in tail, and the other part of his lands to his younger son in tail, and directed that if any of his sons should die without issue, then the whole land should remain to a stranger in fee, it was held that the sons took cross-remainders in tail. Case LI., Leon. (pt. iv.) 14.

5. Implication Precluded by Express Limitation. — Baldrick *v.* White, 2 Bailey L. (S. Car.) 442.

In Clache's Case, 3 Dyer 330*b*, the testator devised land to B and her heirs forever, and other lands to C and her heirs, and if C die before sixteen, living B, her part to B and her heirs, and if B die, living C, her part to C and her heirs, but if both die, having no

have been regarded with favor in any case,[1] and it was said that they could not be implied between more than two,[2] though this never seems to have been a settled rule.[3] Afterwards the attitude of the courts changed, and the rule was laid down that wherever cross-remainders are to be raised by implication between two and no more, the presumption is in favor of cross-remainders, but where they are to be raised between more than two, then the presumption is against them, though such presumption may be answered by circumstances of plain and manifest intention, either way.[4]

(5) *Double Contingencies or Contingency with Double Aspect.* — The rule that a remainder cannot be limited after a fee simple [5] does not forbid the limitation of two or more remainders in fee simple as substitutes or alternatives the one for the other, that is, on such contingencies that only one of the remainders can possibly vest.[6] Such limitations are variously called contingencies with a double aspect, or gifts on a double contingency, or gifts or devises on two alternative contingencies.[7] Each of such fees is a remainder in regard to the particular estate, but none is a remainder in regard to any other of them.[8]

A Distinction is to be noted between the case of substitutional fees, or double contingencies, and the case of a vested remainder subject to a condition subsequent with a limitation over. In the latter case the limitation over is not a remainder, but an executory interest.[9] The failure to note this dis-

issue, then to D. It was held that B and C did not take cross-remainders by implication, because of the special limitation in the will. See also Picot *v.* Armistead, 2 Ired. Eq. (37 N. Car.) 226, *disapproving* Davis *v.* Shanks, 2 Hawks (9 N. Car.) 117.

1. Cross-remainders Formerly Not Favored. — Davenport *v.* Oldis, 1 Atk. 579.

2. Implication of Cross-remainders Between More than Two Denied. — Marryat *v.* Townly, 1 Ves. 104, in which Lord Hardwicke said the technical reason was that the law avoids the splitting of tenures.

3. Cross-remainders Implied Between More than Two. — Wright *v.* Holford, 1 Cowp. 31.

In Cole *v.* Levingston, 1 Vent. 224, it was said that " cross-remainders shall not rise between three unless the words do very plainly express the intent of the devisor to be so."

And in Twisden *v.* Lock, Ambl. 665, Lord Camden said that he believed that it had never been solemnly determined that cross-remainders cannot be by implication between more than two.

4. Presumption as to Cross-remainders. — Pery *v.* White, 2 Cowp. 777; Phipard *v.* Mansfield, 2 Cowp. 797; Atherton *v.* Pye, 4 T. R. 710.

In Hall *v.* Priest, 6 Gray (Mass.) 18, cross-remainders were sustained between eight persons.

5. See *supra*, this section, *General Principles Applicable to Remainders— Precedent Particular Estate — Quantity of Particular Estate.*

6. Contingency with Double Aspect —*England.* — Luddington *v.* Kime, 1 Ld. Raym. 203, 1 Salk. 224; Doe *v.* Holme, 2 W. Bl. 777, 3 Wils. C. Pl. 237; Doe *v.* Burnsall, 6 T. R. 30; Doe *v.* Elvey, 4 East 313; Goodright *v.* Dunham, 1 Dougl. 264; *In re* White, 7 Ch. D. 201.

Maryland. — Demill *v.* Reid, 71 Md. 175.

New York. — Hennessy *v.* Patterson, 85 N. Y. 99.

Pennsylvania. — Stump *v.* Findlay, 2 Rawle (Pa.) 168, 19 Am. Dec. 632; Waddell *v.* Rattew, 5 Rawle (Pa.) 231; Dunwoodie *v.* Reed, 3 S. & R. (Pa.) 452.

South Carolina. — McElwee *v.* Wheeler, 10 S. Car. 392.

Virginia. — Cooper *v.* Hepburn, 15 Gratt. (Va.) 558.

Illustrations. — Thus, a grant to A for life, remainder in fee to her children, B and C, or to the survivor of them, but if they die in the lifetime of A, then to the city of P, is an instance of substitutional fees or double contingencies, or a contingency with a double aspect, as this form of limitation is variously designated. Peoria *v.* Darst, 101 Ill. 610.

So, too, a devise to A for life, and after his decease leaving lawful issue, to his heirs as tenants in common in fee simple, but in case of A's death without issue, then to B in fee simple. In such case the remainder in fee may vest in the issue of either A or B, but not in both. Stump *v.* Findlay, 2 Rawle (Pa.) 168, 19 Am. Dec. 632. To the same effect see Taylor *v.* Taylor, 63 Pa. St. 481, 3 Am. Rep. 565.

Any Number of alternative fees may be limited in succession. Smith Exec. Ints., § 136*a*. See Laffer *v.* Edwards, 3 Madd. 210.

Legislation. — In several states, a contingent remainder in fee limited on a prior remainder in fee, to take effect if the first remainderman die under twenty-one, or otherwise lose his estate before arriving at full age, is expressly authorized by statute. See Stimson Am. Stat. Law, § 1440.

7. Nomenclature. — Smith Exec. Ints., § 129.

8. Challis Real Prop. 62.

9. Substitutional Fees Distinguished from Defeasible Vested Remainder with Limitation Over. — In Avery *v.* Everett, 110 N. Y. 317, 6 Am. St. Rep. 368, the testator devised land to his widow for life, remainder to his son C., and in case C. die without children, then to the testator's nephew. It was held that the limitation over to the testator's nephew was an

tinction has resulted in some remarkable decisions.[1]

5. Acceleration of Remainders — *a.* REMAINDERS PRECEDED BY VESTED INTERESTS — Vested Remainder. — A gift of real property to one for life, and from and after his decease to another, means from and after the determination of the preceding estate, and therefore, where the preceding estate is determined otherwise than by its regular expiration, the gift over, if vested at the time of such determination of the preceding estate, is accelerated and takes effect in possession immediately, having only been postponed for the benefit of the life tenant.[2] The common instances in which a remainder is thus accelerated is where the devisee of the life estate refuses to accept it,[3] or where he has not capacity to take,[4] or where the devise of the preceding estate has been revoked by the testator or has been forfeited by some act or omission of the devisee.[5] And so, too, the death of the devisee of the preceding estate in the testator's lifetime is held to be an acceleration of the remainder, since it extinguishes the life estate and lets the remainderman in to the immediate right to the gift the moment the will takes effect.[6] This doctrine of acceleration, however, is not an arbitrary one, but it is founded, in the case of a will, on the presumed intention of the testator that the remainderman should take on the failure of the previous estate, notwithstanding the prior donee may be still alive, and is applied in promotion of the presumed intention of the testator and not in defeat of his intention. And when it is the evident intention of the testator that the remainder should not take effect till the expiration of the life of the prior donee, the remainder will not be accelerated.[7]

executory devise and not a fee substituted for the devise to the testator's son. See also *infra*, this title, *Executory Interests*.

1. Incorrect Decisions Noted. — Thus, Beckley *v.* Leffingwell, 57 Conn. 163, was a devise to the testator's son E. for life, "and if he should have any children to them and their heirs forever, but if he should have no children then at his decease to go equally to my grandchildren, their heirs and assigns forever." The court held here that the grandchildren took as a class a "vested contingent" remainder at the death of the testator, subject to be divested by the birth of a child to E.

And in Boatman *v.* Boatman, 198 Ill. 414, a devise to E. for life and "at his death, if he leaves any child or children surviving him, such land is to go to such child or children, but if he dies leaving no child or children surviving him, then said land to go to his brothers and sisters." It was held that this devise gave to E.'s brothers and sisters a vested remainder, subject to be divested by the birth of a child to E.

It is necessary only to observe as to these cases that they are in direct conflict with all the authorities involving similar limitations. See the cases cited in the next preceding notes of this subdivision of this section.

2. Acceleration — Remainders Preceded by Vested Interests. — Jull *v.* Jacobs, 3 Ch. D. 712. See also 1 Jarman Wills (5th ed.) 574; Perkins Treatise Conv., §§ 567, 569; Shep. Touch. 435, 451; Theobald on Wills (2d ed). 609.

3. Renunciation by Devisee of Life Estate. — Yeaton *v.* Roberts, 28 N. H. 462.

Renunciation of Devise in Lieu of Dower. — Where a testator devises a life estate to his widow in lieu of dower, and she renounces the provisions of the will in her favor, a remainder limited after such life estate is accelerated and takes effect immediately on the testator's death. Marvin *v.* Ledwith, 111 Ill. 144; Matter of Rawlings, 81 Iowa 701; Fox *v.* Rumery, 68 Me. 121; Macknet *v.* Macknet, 24 N. J. Eq. 277; Matter of Lawrence, (Surrogate Ct.) 37 Misc. (N. Y.) 702; Taylor *v.* Wendel, 4 Bradf. (N. Y.) 324; Sauter *v.* Muller, 4 Dem. (N. Y.) 389; Sarles *v.* Sarles, (Supm. Ct. Spec. T.) 19 Abb. N. Cas. (N. Y.) 322. See also the title EQUITABLE ELECTION, vol. 11, p. 119. But in such case the accelerated remainder is subject to an equity in favor of devisees who have been disappointed by the widow's election. Timberlake *v.* Parish, 5 Dana (Ky.) 352; Sarles *v.* Sarles, (Supm. Ct. Spec. T.) 19 Abb. N. Cas. (N. Y.) 322; Jennings *v.* Jennings, 21 Ohio St. 56; Sandoe's Appeal, 65 Pa. St. 316; McReynolds *v.* Counts, 9 Grati. (Va.) 242. See also Gallagher's Appeal, 87 Pa. St. 200; Staigg *v.* Atkinson, 144 Mass. 564.

4. Incapacity of Devisee of Preceding Estate. — Jull *v.* Jacobs, 3 Ch. D. 709, (attesting witness); Darcus *v.* Crump, 6 B. Mon. (Ky.) 365, (slave).

5. Revocation or Forfeiture. — Lainson *v.* Lainson, 18 Beav. 6; Green *v.* Tribe, 9 Ch. D. 231.

Civil Death does not divest the estate of the life tenant, either at common law or under the *New York* statute. Avery *v.* Everett, 110 N. Y. 317, 6 Am. St. Rep. 368, 36 Hun (N. Y.) 6. And see CIVIL DEATH, vol. 6, p. 64.

6. Death of Devisee for Life Before Testator. — Mowatt *v.* Carow, 7 Paige (N. Y.) 328, 32 Am. Dec. 641; Taylor *v.* Wendel, 4 Bradf. (N. Y.) 324; Huber *v.* Mohn, 37 N. J. Eq. 432; Bell *v.* Towell, 18 S. Car. 94.

7. Acceleration as Matter of Testamentary Intent. — Blatchford *v.* Newberry, 99 Ill. 48; Dale *v.* Bartley, 58 Ind. 105; Augustus *v.* Sea-

Contingent Remainder. — Where the devisee of the particular estate preceding a contingent remainder dies in the lifetime of the testator, the limitation over will be construed an executory devise, and the land, until the contingency happens, will descend to the heir at law; if, however, the particular estate has once vested in the life tenant, and afterwards fails for any cause, it seems the limitation over will be construed a contingent remainder and will fail for want of support.[1] In states in which the freehold may be in abeyance without detriment to subsequent contingent remainders, it is immaterial whether the precedent estate ever vested or not, and in either case the remainder will pass to the heirs at law until the contingency happens on which it is to vest.[2]

If the Gift Over Is Limited to Take Effect on a Particular Event and the very opposite or alternative of that event actually happens, the subsequent gift fails altogether, though the prior gift be out of the way.[3]

Impossible Conditions. — So if the performance of a condition on which the remainder depends is impossible, the remainder fails.[4]

Powers. — In the same way powers of sale will be accelerated, but not powers to charge.[5]

Power of Appointment. — No distinction exists as regards acceleration between appointments and devises, though if the object of an appointment which is void is to benefit the persons who would take in default of appointment, and a remainder is well appointed, the remainder will not be accelerated.[6]

b. REMAINDERS PRECEDED BY CONTINGENT INTERESTS. — The failure of a contingent interest preceding a remainder over will cause the remainder over to fail, if it is affected by the contingency;[7] but if the remainder over is not contingent, it is accelerated by the failure of the preceding contingent interest.[8] In states in which the freehold may be in abeyance without detriment to subsequent remainders, or where the freehold is in trustees, and the interests are carved out of the equitable fee, it would seem on principle that if the contingent interest is void in its creation from any cause, or the contingency on which it depends afterwards becomes impossible, or the donee dies before the testator, the next vested interest would be accelerated;[9] but that if the contingent interest were valid in its creation, and the event on which it depends undetermined, the limitation over would not take effect until it was ascertained whether the contingent interest would vest, and in the meantime, the property would devolve upon the heirs or next of kin of the testator or settlor.[10]

bolt, 3 Met. (Ky.) 155. See also Matter of Delaney, 49 Cal. 76; Holt *v.* Lamb, 17 Ohio St. 374; Huber *v.* Mohn, 37 N. J. Eq. 432.

1. Failure of Interest Preceding Contingent Remainder. — Fearne Cont. Rem. 525, 526. But *compare* Thompson *v.* Hoop, 6 Ohio St. 480. See Marvin *v.* Ledwith, 111 Ill. 145. See also *supra*, this section, *Construction of Future Estates as Remainders Favored*, and *infra*, this title, *Executory Interests*.

2. Statutes Permitting Abeyance of Freehold. — Dale *v.* Bartley, 58 Ind. 101; Augustus *v.* Seabolt, 3 Met. (Ky.) 155.

3. Limitation Over on Particular Events. — Jarman Wills (5th ed.) 577; Lomas *v.* Wright, 2 Myl & K. 775.

4. Remainder Dependent on Impossible Conditions. — Williams Exrs. 1263, 1264; Humberstone *v.* Stanton, 1 Ves. & B. 385; Burleyson *v.* Whitley, 97 N. Car. 295.

5. Acceleration of Powers. — Theobald Wills (2d ed.) 610, *citing* Truell *v.* Tysson, 21 Beav. 437.

6. Power of Appointment. — Theobald Wills (2d ed.) 610, *citing* Craven *v.* Brady, L. R. 4 Eq. 209, L. R. 4 Ch. 296; Crozier *v.* Crozier, 3 Dr. & War. 353. Jarman, however, says that the doctrine of acceleration does not extend to estates limited under powers of appointment. 1 Jarman Wills (5th ed.) 580. *Compare* Reid *v.* Reid, 25 Beav. 469.

7. Remainders Preceded by Contingent Interests. — 2 Jarman Wills (5th ed.) 830; Theobald Wills (2d ed.) 477; Davis *v.* Norton, 2 P. Wms. 390; Moody *v.* Walters, 16 Ves. Jr. 283; Toldervy *v.* Colt, 1 M. & W. 250. And see *supra*, this section, *Contingent Remainder Preceding Remainder Over*.

8. Challis Real Prop. 94; Goodright *v.* Cornish, 1 Salk. 226.

9. Willing *v.* Baine, 3 P. Wms. 113; Robison *v.* Female Orphan Asylum, 123 U. S. 702; Miller *v.* Fleming, 6 Mackey (D. C.) 397; Wager *v.* Wager, 96 N. Y. 164; Smith *v.* Block, 29 Ohio St. 496.

10. Wade-Gery *v.* Handley, 1 Ch. D. 653, 3 Ch. D. 374; Sidney *v.* Wilmer, 25 Beav. 266; Hopkins *v.* Hopkins, 1 Atk. 597. See further Theobald Wills (2d ed.) 610; Chambers *v.* Brailsford, 18 Ves. Jr. 368; Andrew *v.* Andrew, 1 Ch. D. 410.

As to implication of shifting clauses with a

II. REVERSIONS — 1. Definition and General Principles — *a.* REVERSION DEFINED. — A reversion is the residue of an estate left in the grantor and his heirs to commence in possession after the determination of some particular estate granted out by him.[1] Reversion is, like remainder, a relative term, and is contrasted in the same way with the particular estate which must precede it.[2]

Loose Use of Term "Revert." — In deeds or wills the term "revert" or "reversion" is sometimes loosely used to describe an interest differing from a technical reversion. Illustrations may be seen in the note.[3]

b. REVERSIONARY INTEREST IN PERSONALTY. — The terms "reversion" and "remainder" are properly limited to interests in real property and have no application to personalty. Interests in personalty, however, which are analogous to remainders or reversions in realty are sometimes called "reversionary interests," and take effect in analogy to such interests in realty,[4]

view to aiding the intent to avoid intestacy, see D'Eyncourt *v.* Gregory, 34 Beav. 36.

1. Reversion Defined. — 2 Bl. Com. 175; Spalding *v.* Grigg, 4 Ga. 80; Todd *v.* Jackson, 26 N. J. L. 540; Payn *v.* Beal, 4 Den. (N. Y.) 411; People *v.* Lawrence, 54 Barb. (N. Y.) 619; Powell *v.* Dayton, etc., R. Co., 16 Oregon 33.

Kent, translating the Latin of Coke (Co. Litt. 142*b*), says: "A reversion is the return of land to the grantor and his heirs after the grant is over." 4 Kent Com. 353.

In another place Lord Coke defines a reversion thus: "A reversion is where the residue of the estate always doth continue in him that made the particular estate, or where the particular estate is derived out of his estate." Co. Litt. 22*b*. See also Alexander *v.* de Kermel, 81 Ky. 350.

Reversion Has Two Meanings: The one is an estate left, which continues during a particular estate in being; and the other is the returning of the land after the particular estate is ended. Powell *v.* Dayton, etc., R. Co., 16 Oregon 38; Throckmerton *v.* Tracy, Plow. 158.

Reverter and Reversion Are Synonymous Terms denoting an estate vested in interest, though not in possession; but the word "reverter" is sometimes loosely used to denote what is properly styled "possibility of reverter." Challis Real Prop. 63.

Origin. — "The doctrine of reversions is plainly derived from the feudal constitution. For when a feud was granted to a man for life, or to him and his issue male, rendering either rent or other services, then, on his death or the failure of issue male, the feud was determined and resulted back to the lord or proprietor to be again disposed of at his pleasure." 2 Bl. Com. 175.

But in Alexander *v.* de Kermal, 81 Ky. 351, the court observed (*citing* 4 Kent Com. 389) that the nature and purpose of reversions are not inimical to an allodial system of titles to land.

Reversions in Various Subject-matters — *Dedication.* — See DEDICATION, vol. 9, pp. 73, 85.

Easements. — See the title EASEMENTS, vol. 10, pp. 431, 434, and cross-references, p. 398.

Lands Taken in Eminent Domain. — See EMINENT DOMAIN, vol. 10, p. 1198.

Reversion After a Lease. — See the title LANDLORD AND TENANT, vol. 18, p. 149, *passim.*

Reversionary Interest After Assignment for Creditors or After Bankruptcy Proceedings. — See Atwater *v.* Manchester Sav. Bank, 45 Minn. 344; Wintringham *v.* Lafoy, 7 Cow. (N. Y.) 735; Curtis *v.* Leavitt, 15 N. Y. 144, *per* Brown, J. See also the titles ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 3, p. 153; INSOLVENCY AND BANKRUPTCY, vol. 16, pp. 699, 741.

Right of Way of Railroad.—See the title RAILROADS, vol. 23, pp. 705, 706. See also Roanoke Inv. Co. *v.* Kansas City, etc., R. Co., 108 Mo. 50.

2. Reversion Relative Term. — Challis Real Prop. 59. From the entire fee is cut off by the grant or settlement a particular estate (Latin *particula*, a little bit, a particle) and the residue by operation of law reverts (Latin *revertor*, return again) to the grantor.

3. Deed Expressing that Property Shall "Revert." — See Spalding *v.* Grigg, 4 Ga. 75; Dalrymple *v.* Leach, 192 Ill. 52; Wallace *v.* Denig, 152 Pa. St. 251; Wilson *v.* Denig, 166 Pa. St. 29.

Deed to Wife — Land to "Revert" When She "Shall Cease to Live" as Grantor's Wife. — Under such a deed reversion does not take place upon the adultery of the wife. Razor *v.* Razor, 142 Ill. 375, *affirming* 39 Ill. App. 527.

Conveyance of Life Estate in Undivided Interest — Provision that Said Lot Shall Revert. — When one joint owner conveys to the other joint owner a life estate in the premises held by them, by an instrument containing a clause that "said lot and premises shall revert to the grantor" on the termination of the life estate, only his undivided interest will return to him under this clause, and the interest of the grantee will not pass. Lewis *v.* Lewis, 114 Iowa 399.

4. In Personalty. — *Thus, in Chattel Mortgages* the mortgagor retains a reversionary interest in the chattel. Hill *v.* Hill, Dudley Eq. (S. Car.) 76, *per* Johnston, Ch. See the title CHATTEL MORTGAGES, vol. 5, p. 947 *et seq.*

On a Grant of a Chattel for Life, a reversionary interest remains in the grantor. Vanneson *v.* Culbertson, 10 Smed. & M. (Miss.) 150; Harris *v.* McLaran, 30 Miss. 569; Andrews *v.* Brumfield, 32 Miss. 107; Hoes *v.* Van Hoesen, 1 N. Y. 120; Anonymous, 2 Hayw. (3 N. Car.) 161; James *v.* Masters, 3 Murph. (7 N. Car.) 110; Black *v.* Ray, 1 Dev. & B. L. (18 N.

though these words are used, especially in equity, to refer to any interest in property, whether real or personal, the enjoyment of which is deferred.[1]

c. REVERSION AND REMAINDER CONTRASTED. — A remainder always arises from the act of the grantor or settler, who creates it at the very time when the particular estate is created. A reversion arises by operation of law, when a grantor merely parts with less than his whole estate, and the portion undisposed of shall be his when the grant is terminated.[2]

Remainder to Heirs. — According to the doctrine of the common law, a limitation of a remainder to the grantor and his heirs was void,[3] and the grantor or his heirs had the reversion in them.[4] In *England* this rule has been changed by statute, and the heir takes as remainderman.[5] By reason of the radical change in the law of descent and statutes rendering all of a decedent's real estate subject to sale for his debts, this question can rarely if ever become of practical importance in the *United States*, the heir being in the same position whether he takes by descent or under the will.[6]

d. NATURE OF REVERSION — **Incorporeal Hereditament.** — A reversion is a hereditament, and until the termination of the particular estate it is an incorporeal hereditament.[7]

Car.) 334; Cresswell *v.* Emberson, 6 Ired. Eq. (41 N. Car.) 151; Geiger *v.* Brown, 4 McCord L. (S. Car.) 427, *affirming* 2 Strobh. Eq. (S. Car.) 359, note. See also Booth *v.* Terrell, 16 Ga. 20; Dunwoodie *v.* Carrington, 2 Law Repos. (4 N. Car.) 469. *Compare* State *v.* Warrington, 4 Harr. (Del.) 55; State *v.* Savin, 4 Harr. (Del.) 56, note; Derickson *v.* Garden, 5 Del. Ch. 326.

So where a gift over after a life estate in personalty is void for uncertainty. Brown *v.* Kelsey, 2 Cush. (Mass.) 243.

A remainder in personalty to the heirs of the testator, in case the first legatee has no heirs, will be effectuated. Higgenbotham *v.* Rucker, 2 Call (Va.) 314.

Quasi Reversion is the term sometimes applied to such interests. See Harris *v.* McLaran, 30 Miss. 569.

1. Reversionary Interest in Broad Use. — Sweet Law Dict. 719; Schouler Pers. Prop., § 150. See also the titles SEPARATE PROPERTY OF MARRIED WOMEN; TRUSTS.

Term "Reversionary Interest" in a Contract — Meaning. — Harrison *v.* Tate, 100 Ga. 383.

2. Remainder and Reversion Distinguished. — 2 Bl. Com. 163, 175; Williams Real Prop. (6th Am. ed.) 242; Challis Real Prop. 59; 4 Kent Com. 354; Spalding *v.* Grigg, 4 Ga. 80; Wingate *v.* James, 121 Ind. 72; Alexander *v.* de Kermal, 81 Ky. 350. See also *supra*, this title, *Remainders*, p. 384.

3. Remainder to Heirs. — See *supra*, this title, *Remainders*, p. 398. See, as to wills, the title LEGACIES AND DEVISES, vol. 18, p. 740.

4. Remainder to Heirs a Reversion. — Coke Litt. 22*b*; Bingham's Case, 2 Coke 91*a*.

Reversion Expressly Limited to Heirs on Creation of Particular Estate. — A provision in a grant for life or *pur autre vie* that upon the termination of the estate the land shall "revert" to the heirs of the grantor does not give such heirs a title by purchase, and the grantor may devise or by deed convey such reversion, notwithstanding the provisions of the first deed. Alexander *v.* de Kermal, 81 Ky. 345; Whayne *v.* Davis, (Ky. 1902) 66 S. W. Rep. 827.

In Robinson *v.* Ostendorff, 38 S. Car. 66, where a testator gave his estate, real and personal, to his wife during her widowhood, "and at her decease or marriage, to revert to my children according to the laws" of *South Carolina*, it was held that the word "revert" was used either in its technical sense or in the sense of "go to," "give," or "leave." In the former case the effect was the same as if the testator had made no further will after he had disposed of the life estate, and hence the children would take, not under the will, but independently of the will by statute, and all subsequent limitations over would have failed, because they took under the statute and not under the will, *citing* Seabrook *v.* Seabrook, McMull. Eq. (S. Car.) 206; Rochelle *v.* Tompkins, 1 Strobh. Eq. (S. Car.) 114; Brooks *v.* Brooks, 12 S. Car. 457; Andrews *v.* Loeb, 22 S. Car. 274. If used in the sense of "go to" or "leave," the provision would create a life estate in the wife, with contingent remainders in fee either to the children or to the grandchildren as the case might be, *citing* Dehon *v.* Redfern, Dud. Eq. (S. Car.) 115; Rice Eq. (S. Car.) 464; Faber *v.* Police, 10 S. Car. 388; McElwee *v.* Wheeler, 10 S. Car. 404.

5. English Statute. — Stat. 3 & 4 Wm. IV., c. 106, § 3. See also the title LEGACIES AND DEVISES, vol. 18, p. 740.

Mr. Hayes says that the statute makes the grantor or his heir a remainderman "for the purposes of descent at least." 1 Hayes Conveyancing (5th ed.) 317. See also Challis Real Prop. 185.

If the statute changed the reversion to a remainder "for all purposes the tenure of the particular estate to the reversioner would be destroyed, and the incidents of the reversion, such as rent and services, would be lost." 1 Leake Land Laws 315.

6. See Matter of Tienken, 131 N. Y. 391, *affirming* 60 Hun (N. Y.) 417; Miller *v.* Gilbert, 144 N. Y. 68, *affirming* 3 Misc. (N. Y.) 43; Clark *v.* Hillis, 134 Ind. 421.

7. Incorporeal Hereditament. — Williams Real Prop. (6th Am. ed.) 241, 243; 4 Kent Com. 354; 1 Washburn Real Prop. (5th ed.) 37.

Of a reversion and vested remainder, Mr. Williams observes that they constitute incorporeal hereditaments of a somewhat "mixed

Vested Right. — A reversion is a vested interest or estate, inasmuch as the person entitled to it has a fixed right of future enjoyment.[1]

e. PARTICULAR ESTATE. — The particular estate which precedes and supports the reversion may be either a freehold estate or a term for years.[2] Thus, a reversion exists on the grant of an estate tail,[3] an estate for life, or a lease for years.[4] There cannot in strictness be a reversion after a fee of any description.[5]

f. SEIZIN OF REVERSIONER. — The grant by a tenant in fee of a term for years in no way affects the seizin of the grantor, whose interest is then a freehold in possession subject to the term.[6] When, however, the particular estate is an estate of freehold, the particular tenant and not the reversioner has the seizin, and the reversioner has a reversion of freehold expectant upon the estate granted,[7] although, with less propriety, he is said to be " seized of a reversion on a freehold estate." [8]

2. Incidents and Properties — *a.* FEALTY AND RENT. — Fealty and rent are usually said to be incident to the reversion.[9] Fealty, an incident of all tenures except frankalmoigne,[10] is now wholly obsolete.[11] Formerly it was

nature, being at one time incorporeal, at another not;" but he continues: "As this hereditament partakes, during its existence, very strongly of the nature and attributes of other incorporeal hereditaments, particularly in its always permitting, and generally requiring, a deed of grant for its transfer, it is here classed with such hereditaments." Williams Real Prop. (6th Am. ed.) 241.

1. Vested Right. — 4 Kent Com. 354, 355; 2 Washburn Real Prop. (5th ed.) 801; Gray Perp., § 113; Woodstock Iron Co. *v.* Fullenwider, 87 Ala. 588; Wingate *v.* James, 121 Ind. 72; Ward *v.* Edge, 100 Ky. 771; Baker *v.* Baker, 167 Mass. 576; Payn *v.* Beal, 4 Den. (N. Y.) 411. It thus belongs to the class of rights which are vested in right but not in possession.

2. A Gratuitous Permission to Use Personal Property for a specified time does not create a reversionary interest in the owner, because there is no preceding grant of an estate. Booth *v.* Terrell, 16 Ga. 20.

3. Reversion After Estate Tail. — A fee conditional was by the statute *de donis conditionalibus* converted into a fee tail, an estate *taillé*, cut off, from the fee. The effect was to divide the fee into two parts, the estate tail, a legally defined particular estate, and the fee remaining in the grantor, instead of a mere possibility as before, — the grantor was left with an estate in reversion. See the title ESTATES, vol. 11, p. 371. See also Stafford *v.* Buckley, 2 Ves. 180; Digby Hist. Real Prop. (5th ed.) 225; Litt., §§ 18, 19; Coke Litt. 22*b*.

4. Reversions on Terms for Years have been treated in the title LANDLORD AND TENANT, vol. 18, p. 149, *passim*. See especially pp. 212, 280 *et seq.*, 339.

Reversion on Grant by Life Tenant. — Since a reversion remains in every grantor of a less estate than he has, a reversion arises on the grant by a life tenant of a lease for years, and this without reference to the length of the term, for " in the eye of the law any estate for life * * * is an higher and greater estate than a lease for years, though it be for a thousand or more." Co. Litt. 46*a*; 1 Leake Land Laws 316. See also *infra*, this title, *Executory Interests*, 4. *c.* (2) (*b*) *In Terms for Years*. For illustration, see Derby *v.* Taylor, 1 East 502 (conventional life estate). The death of the life tenant terminates the lease. Stockwell *v.* Sargent, 37 Vt. 16 (lease of dower lands). See also the title LEASES, vol. 18, p. 683.

Reversion on Sublease by Tenant for Years. — See the title LEASES, vol. 18, p. 658.

5. No Reversion After Fee. — When there is a failure of the heirs of a grantee in fee, the estate escheats. See the title ESCHEAT, vol. 11, p. 317, and the quotation in note 2 from the judgment of Lord Selborne, in Atty.-Gen. *v.* Mercer, L. R. 8 App. 767. After a qualified fee no reversion, but a mere possibility of reverter, remains in the grantor. See *infra*, this section, *Possibility of Reverter*.

6. Seizin of Reversioner After Term. — Coke Litt. 15*a*, 48*b*; Williams Real Prop. (6th Am. ed.) 242; Challis Real Prop. 77. See also the titles CURTESY, vol. 8, p. 512; DOWER, vol. 10, p. 134.

7. No Seizin in Reversion After Freehold. — Williams Real Prop. (6th Am. ed.) 243. See also Challis Real Prop. 77, and the titles CURTESY, vol. 8, p. 511; DOWER, vol. 10, p. 134.

" **The Law Termeth a Reversion to Be Expectant upon the Particular Estate**, because the donor or lessor or their heirs, after every determination of any particular estate, doth expect or look for to enjoy the lands or tenements again." Coke Litt. 183*b*.

8. "Seizin" of Reversion After Freehold. — Cook *v.* Hammond, 4 Mason (U. S.) 489. See also Vanderheyden *v.* Crandall, 2 Den. (N. Y.) 23.

For a discussion of the propriety of the word " seizin " as applied to a reversioner after a freehold estate, see Burton *v.* Smith, 13 Pet. (U. S.) 481; Real Estate Bank *v.* Watson, 13 Ark. 82.

9. Fealty and Rent. — 2 Bl. Com. 176; Williams Real Prop. (6th Am. ed.) 243; 4 Kent Com. 355.

10. Fealty Incident to All Tenures.—Litt., § 131; 1 Leake Land Laws 26.

11. Fealty Obsolete. — Williams Real Prop. (6th Am. ed.) 243.

Fealty " in the feudal sense, does not exist any longer in this country." 4 Kent Com. 353.

an inseparable incident of the reversion.[1] Rent is a separable incident of the reversion, since it may be severed from the reversion.[2] The relations of rent to the reversion have been fully treated elsewhere.[3]

b. DOWER AND CURTESY. — Only lands of which the husband or wife was seized are subject to dower or curtesy. Consequently estates in reversion after a freehold are not subject to dower or curtesy, while a reversion after a term for years is subject to these incidents.[4]

c. DEVOLUTION AND ALIENATION — **Descent and Devise.** — It has never been doubted that a reversion is subject to the law of descent,[5] and may be devised.[6]

Alienation inter Vivos. — A reversion, during the continuance of the particular estate, is a purely incorporeal right,[7] and as such may be conveyed by deed of grant,[8] whether the reversion be subject to a mere term of years, or be expectant on a freehold estate.[9] But when the reversion is subject to a term

1. Formerly Fealty and Reversion Inseparable. — Coke Litt. 93*a*, 143*a*; 2 Bl. Com. 176.

2. Rent a Separable Incident. — Coke Litt. 93*a*; 2 Bl. Com. 176. See also the title LANDLORD AND TENANT, vol. 18, p. 285.

3. See the title LANDLORD AND TENANT, vol. 18, p. 280 *et seq.*

4. Dower and Curtesy in Reversion. — See the titles CURTESY, vol. 8, p. 511 *et seq.*; DOWER, vol. 10, p. 134.

5. Descent. — In Cook *v.* Hammond, 4 Mason (U. S.) 485, Story, J., states the common-law rule thus: "The rule, therefore, as to reversions * * * expectant upon estates in freehold is that, unless something is done to intercept the descent, they pass, when the particular estate falls in, to the person who can then make himself heir of the original donor, who was seized in fee and created the particular estate, or if it be an estate by purchase, the heir of him who was the first purchaser of such reversion." But while the estate is in expectancy, "the mesne heir, in whom the reversion * * * vests, may do acts which the law deems equivalent to an actual seizin and which will change the course of the descent." See also Doe *v.* Hutton, 3 B. & P. 648.

By the Massachusetts Statute of Descents, a reversion descends to the heir of him in whom title was vested by descent, without any regard to the ancestor from whom it was inherited, in like manner as an estate in possession. Cook *v.* Hammond, 4 Mason (U. S.) 467. See also Russell *v.* Hoar, 3 Met. (Mass.) 187; Miller *v.* Miller, 10 Met. (Mass.) 393. See generally the title SUCCESSION.

6. Devisable. — The Statute of Wills (32 Hen. VIII., c. 1; 34 and 35 Hen. VIII., c. 5), which restricted the preceding freedom of devise by custom, was held to include fees in reversion and remainder, as well as fees in possession. Powell on Devises (1st Am. ed. 1822) 154–156. See also Lovies's Case, 10 Coke 78*a*; Bedingfield's Case, *cited* in 10 Coke 81*b*; Cook *v.* Hammond, 4 Mason (U. S.) 485. But not a reversion discontinued, that is, turned into a mere right. Powell on Devises (1st Am. ed. 1822) 24; Baker *v.* Hacking, Cro. Car. 387, 405. See also DISCONTINUANCE, vol. 9, p. 467.

Under the present *English* Statute of Wills (1 Vict., c. 26, § 3), generally any interest which is descendible is devisable, and the texts of the later English text-books, being built on this statute, are inapplicable to the *United States*. But many more or less similar statutes have been enacted in the United States. See the title LEGACIES AND DEVISES, vol. 18, p. 734; 1 Stimson's Am. St. Law, § 2630.

Devise of "Reversion" Carries Fee. — Bailis *v.* Gale, 2 Ves. 48.

Reversion Included in Residuary Devise. — Craig *v.* Rowland, 10 App. D. C. 402.

7. See *supra*, this section, *Nature of Reversion*.

8. Lies in Grant. — See the titles DEEDS, vol. 9, p. 99; GRANT, vol. 14, p. 1113.

9. Whether After Term or Freehold. — Perkins, §§ 61, 221; Shep. Touch. 230; Co. Litt. 493; Birch *v.* Wright, 1 T. R. 378; Doe *v.* Cole, 7 B. & C. 243, 14 E. C. L. 36; Vaughn *v.* Stuzaker, 16 Ind. 338, Burden *v.* Thayer, 3 Met. (Mass.) 76, 37 Am. Dec. 117; Baker *v.* Baker, 167 Mass. 575.

"Reversions may be granted or transferred by grant (Litt., § 568), bargain and sale (Vaugh. 51), lease and release (Butl. Co. Litt. 270*a*, note 2), covenant to stand seized (5 Co. 8*b*, 11 Coke 46*b*, 47*a*), fine (see Sheph. Touch. 13), or a release to the particular tenant (Litt., § 575); but not by a recovery (2 Cru. 30, 31), nor feoffment." 2 Sanders Uses and Trusts (4th ed.) 29.

Where the Reversion Was Expectant on a Freehold, livery of seizin not being possible, the reversion lay in grant only. Williams Real Prop. (6th Am. ed.) 243. And see *supra*, this section, *Seizin of Reversioner*.

Before Entry by the Lessee, the Owner of the Fee Has No Reversion and cannot grant by the name of reversion. See the title LANDLORD AND TENANT, vol. 18, p. 212.

Aliter where the estate for years is created by a conveyance under the Statute of Uses, as by bargain and sale. Lutwich *v.* Mitton, Cro. Jac. 604.

Attornment of the Tenant of the particular estate was formerly necessary to perfect such a conveyance by grant, whether the particular estate was in tail, for life or for years, but the necessity has been abolished by statute. Perkins, § 114; Digby Hist. Real Prop. (5th ed.) 262; the title LANDLORD AND TENANT, vol. 18, pp. 281, 287. See also ATTORNMENT, vol. 3, p. 485.

Rights of Assignees of Reversion After Lease. — At common law the assignee of the reversion of a lease was not entitled to the benefits of covenants therein, to the right of re-entry for

merely, the seizin is in the reversioner,[1] and the reversion might, at common law, be conveyed by feoffment and livery of seizin made with the consent of the tenant for years.[2]

Grant to Begin in Futuro. — An existing reversion could not at common law be granted so that the grant should operate *in futuro*.[3]

Grant of Reversion Carries Rent. — A grant of a reversion subject to a term carries to the grantee the rent to accrue on the lease.[4]

d. SUBJECT TO EXECUTION. — A reversion is liable for the owner's debts and may be sold therefor under execution.[5]

e. NOT WITHIN RULE AGAINST PERPETUITIES. — A reversion, being a vested right,[6] is not within the rule against perpetuities.[7]

3. Remedies of Reversioner — Injuries to Inheritance. — For an injury to the inheritance, the reversioner may maintain an action, and he may, under proper circumstances, have an injunction in a court of equity.[8]

After the Right of Possession Has Vested. — Upon the termination of the particular estate, the reversioner may recover the property by action of ejectment,[9] and

nonpayment of rent, for waste, or other forfeitures. But this was changed by statute 32 Hen. VIII., c. 34, which placed such assignees in the position of the lessor. See the titles EJECTMENT, vol. 10, p. 467; LANDLORD AND TENANT, vol. 18, pp. 392, 393.

Statutes. — See 1 Stimson's Am. St. Law, § 1420, and the cases and statutes of the various states.

Sometimes statutes specially provide that reversions may be sold or conveyed. Stat. Ky. (1894), § 2359.

1. See *supra*, this section, *Seizin of Reversioner*.

2. Conveyance by Feoffment and Livery of Reversion After Term. — Co. Litt. 48*b*, and Hale's notes (7) and (8); Williams Real Prop. (6th Am. ed.) 242.

3. No Grant of Reversion to Begin in Futuro. — Throckmerton *v.* Tracy, Plowd. 155; Wrotesley *v.* Adams, Plowd. 197; Anonymous, Gouldsb. 39; Buckler *v.* Harvy, Cro. Eliz. 450; Swyft *v.* Eyres, Cro. Car. 546. Such cases are within the rule that a freehold shall not be granted to begin *in futuro*.

A Conveyance to Uses under the statute of uses may, of course, accomplish this result.

4. Grant of Reversion Carries Rent. — See the title LANDLORD AND TENANT, vol. 18, p. 280 *et seq*.

5 Liable to Execution. — Burton *v.* Smith, 13 Pet. (U. S.) 464; Clark *v.* Hillis, 134 Ind. 421; Whitney *v.* Whitney, 14 Mass. 88. See also the title EXECUTIONS, vol. 11, p. 631.

Even though the interest which the reversioner is to receive is uncertain. Woodgate *v.* Fleet, 44 N. Y. 1.

In Hands of Assignee. — A reversion is liable in the hands of a purchaser thereof for his debts. Real Estate Bank *v.* Watson, 13 Ark. 74.

Assets in Hands of Heir. — Under the rule that an heir can be charged for his ancestor's debts only to the value of lands descended (see the title DEBTS OF DECEDENTS, vol. 8, p. 1098), an heir who inherited a reversion subject to a lease for years was held to have immediate assets subject to present execution. Smith *v.* Angel, 1 Salk. 354, 2 Ld. Raym. 783, 7 Mod. 40; Villers *v.* Handley, 2 Wils. C. Pl. 49.

And the same rule applied to a reversion expectant on an estate for life, which was *quasi* assets, and the creditor had judgment *quando acciderint*. Rook *v.* Clealand, 1 Ld. Raym. 53, 1 Lutw. 503; Kellow *v.* Rowden, Carth. 126.

After an estate tail, a reversion is not assets during the continuance of the particular estate, since it may be docked by the tenant in tail; but when the estate tail is extinct and the reversion vests it becomes assets. Kellow *v.* Rowden, Carth. 126, 3 Mod. 253; Rolle Abr. 269. See also Smith *v.* Parker, 2 W. Bl. 1230.

The doctrine as to reversions is stated fully in Tyndale *v.* Warre, Jac. 212, the old cases cited above as to a reversion after an estate tail are considerably shaken, and it is held that in equity such a reversion may be sold for the reversioner's specialty debts. See also Jefferson *v.* Morton, 2 Saund. 7, note 4, by Williams; Kinaston *v.* Clark, 2 Atk. 204; Anonymous, 3 Dyer 373*b*; Fortrey *v.* Fortrey, 2 Vern. 134.

Indiana Statutes. — Under Rev. Stat. Ind. 1881, § 2473, which declares that "an estate which shall have come to the intestate by gift or by conveyance in consideration of love and affection, shall, if the intestate die without children or their descendants, revert to the donor if living at the intestate's death, saving to the widow or widower, however, his or her rights therein," the donor, upon the death of the donee, takes an estate by inheritance as heir and not as reversioner or remainderman, and, taking it by descent, takes it charged with the debts of the ancestor. Wingate *v.* James, 121 Ind. 69.

6. A Vested Right. — See *supra*, this section, *Nature of Reversion*.

7. Not Within Rule Against Perpetuities. — Gray Perp., § 293. See title PERPETUITIES, vol. 22, p. 705.

8. Injury to Inheritance. — See the titles EASEMENTS, vol. 10, p. 431; LANDLORD AND TENANT, vol. 18, p. 450 *et seq.*; NUISANCES, vol. 21, p. 722; TRESPASS; WASTE.

Injury to Both Particular Estate and Reversion — Apportionment of Damages. — Jordan *v.* Benwood, 42 W. Va. 312.

9. Ejectment. — See the title EJECTMENT, vol. 10, p. 516. See also Woodstock Iron Co. *v.* Fullenwider, 87 Ala. 586.

where there are several reversioners they will be entitled to partition.[1]

4. Loss or Extinction — Statute of Limitations and Adverse Possession. — The right to a reversion may be lost by adverse possession or by the running of the statute of limitations.[2]

Merger. — A reversion may by act of law cease to exist as a separate estate by merger, which takes place where the particular estate and the immediate reversion meet in the same person and in the same right.[3]

Surrender and Release. — The union of the particular estate and the reversion in the hands of the particular tenant by release,[4] or in the hands of the reversioner by surrender,[5] extinguishes these estates as distinct entities.

5. Possibility of Reverter. — A possibility of reverter arises, according to modern technical notions, upon a grant so limited that it may last forever or may terminate on a contingency; it is the possibility of having the fee again which exists in a grantor after the grant of a determinable or qualified fee.[6] It has been contended that the statute of *quia emptores*, by putting an end to tenure between the grantor and grantee, put an end to all determinable fees and to all possibilities of reverter expectant thereon.[7] But this is a disputed point, even on theory,[8] and determinable fees and consequently

1. Partition. — In some jurisdictions partition may be had during the continuance of the particular estate. See the title PARTITION, vol. 21, p. 1152.

2. Statute of Limitations — When Begins to Run. — The statute does not begin to run until the termination of the estate on which the reversion is expectant, which gives the reversioner a right of entry. Doe *v.* Gregory, 2 Ad. & El. 14, 29 E. C. L. 14; Wallingford *v.* Hearl, 15 Mass. 471; Jackson *v.* Schoonmaker, 4 Johns. (N. Y.) 390. See also Newark *v.* Watson, 56 N. J. L. 667.

And a disseizin of the life tenant of the particular estate, although it gives the reversioner an immediate right of entry if he chooses, does not affect this rule. Wells *v.* Prince, 9 Mass. 508; Wallingford *v.* Hearl, 15 Mass. 471; Mixter *v.* Woodcock, 154 Mass. 535.

Possession Is Not Adverse to the Reversioner during the continuance of the particular estate. Doe *v.* Gregory, 2 Ad. & El. 14, 29 E. C. L. 14; Woodstock Iron Co. *v.* Fullenwider, 87 Ala. 586. See on the subject of this note the titles ADVERSE POSSESSION, vol. 1, p. 808 *et seq.*; LIMITATION OF ACTIONS, vol. 19, p. 136.

3. Merger. — See the title MERGER, vol. 20, pp. 588–595.

4. Release. — 2 Bl. Com. 324. See also the titles DEEDS, vol. 9, p. 100; LANDLORD AND TENANT, vol. 18, p. 284.

5. Surrender. — See the titles DEEDS, vol. 9, p. 100; MERGER, vol. 20, p. 590.

6. Possibility of Reverter " denotes no estate, but as the name implies, only a possibility to have an estate at a future time. Of such possibilities there are several kinds: * * * First, the possibility that a common-law fee may return to the grantor by a breach of a condition subject to which it was granted, and, second, the possibility that a common-law fee, other than a fee simple, may revert to the grantor by the natural determination of the fee." Challis Real Prop. 63. It will be observed that Mr. Challis's definition thus includes rights of entry for breach of a condiion attached to a grant of a fee. See also Challis Real Prop. 153. And by common usage such rights are frequently spoken of as possibilities of reverter. See Nicoll *v.* New York, etc., R. Co., 12 N. Y. 133.

Mr. Gray (Perp., § 13) confines possibilities of reverter to fees terminable on a special or collateral limitation (see *infra*, this title, *Executory Interests*, 2. *g. Collateral Limitation*), and says of a right of entry for condition broken that it " is not a reversionary right." Gray Perp., § 30.

For Illustrations of Limitations on Condition, see the title CONDITIONS, vol. 6, p. 499, especially p. 506 *et seq.* See also Spalding *v.* Grigg, 4 Ga. 75; Woods *v.* Woods, 87 Ga. 562 (limitation by deed in trust to wife in fee, provided that in the event she should predecease grantor, said property to revert back to the grantor).

History of the Term. — " Whether this right of the [feudal] grantor [to have the land again on the expiration of the feud] depended on an estate for life or in fee, it was of the same nature and indifferently called his ' reverter ' or ' escheat; ' but from the remoter probability of the return, when the fee was granted, it became customary to call it after a grant of the fee, his ' possibility of reverter.' By degrees that expression was applied to those cases only where a limited fee had been granted, and the word ' escheat ' was applied to those where the grant had conferred an absolute estate in fee simple." Fearne Cont. Rem. 382, note (a) by Butler.

The differentiation of the words " escheat " and " reversion " seems to have been due to the statute *quia emptores;* whether " reversion " and " possibility of reverter " were distinguished so early is doubtful. 2 Pollock and M. Hist. Eng. Law, pp. 22, 23.

7. Gray Perp., § 31. See also article by same writer, 3 Law Quart. Rev. 399.

In *South Carolina* the statute of *quia emptores* is not in force, being omitted from the enumeration of the Act of 1712. See Gray Perp., § 27.

8. See article by Challis, 3 Law Quart. Rev. 403.

possibilities of reverter have been frequently recognized, especially in the *United States.*[1]

Incidents. — A possibility of reverter is, at common law, inalienable,[2] but it may be released to him in possession.[3] It has been held that this possibility is not subject to merger.[4] The cases are not in accord whether a possibility of reverter is or is not within the rule against perpetuities.[5]

Statutes have rendered such interests very generally transferable and devisable.[6]

III. Executory Interests — 1. Origin and History. — Whatever the origin of uses — whether derived by the ecclesiastical chancellors from the Roman *fidei commissum,*[7] or a native English growth[8] — the system of uses was firmly established in *England* in the fifteenth century.[9] Uses, however, were not enforced in the courts of law, and a feoffment to one to the use of another was enforceable in chancery alone.[10] In the courts of law the feofee to uses was considered as the legal owner and the *cestui que use* was recognized, if at all, as a mere tenant at sufferance.[11] In chancery the *cestui que use* was recognized as the real owner, and by the writ of subpœna the feoffee to uses could be compelled to deal with the estate as the *cestui que use* should direct.[12] This equitable estate of the *cestui que use* was free from the technical rules governing the transfer of estates at common law.[13] After a feoffment to uses, the use of a freehold estate might be transferred without livery of seizin,[14] and a feoffment of land to one to such uses as the feoffor might declare by his will was enforceable.[15] Thus the liberty to devise lands which did not exist at common law came into being under the system of uses. The abuses of the system led Parliament, in 1535, to attempt to abolish all uses, and by the

1. See the title Estates, vol. 11, p. 368. See also Pettit *v.* Stuttgart Normal Institute, 67 Ark. 430; Atlanta Consolidated St. R. *v.* Jackson, 108 Ga. 634; Crosier *v.* Cundell, (Ky.) 35 S. W. Rep. 566; First Universalist Soc. *v.* Boland, 155 Mass. 171; Green *v.* Gresham, 21 Tex. Civ. App. 601.

As to the Reverter of Corporation Lands, see the titles Dissolution of Corporations, vol. 9, p. 603; Eminent Domain, vol. 10, p. 1198, and cross-reference.

A Sale of the Grantee's Interest in property so conveyed does not affect the grantor's right to have the property when the fee has terminated. Pettit *v.* Stuttgart Normal Institute, 67 Ark. 430.

2. Inalienable. — Digby Hist. Law Real Prop. (5th ed.) 225, 226; Gray Perp., §§ 13, 14.

A possibility of reverter is not an estate, it is a mere possibility. Adams *v.* Chaplin, 1 Hill Eq. (S. Car.) 277; Deas *v.* Horry, 2 Hill Eq. (S. Car.) 248. A mere possibility is not assignable. See the title Assignments, vol. 2, p. 1026.

Not Devisable. — Adams *v.* Chaplin, 1 Hill Eq. (S. Car.) 277; Deas *v.* Horry, 2 Hill Eq. (S. Car.) 244.

A Right of Entry for Condition Broken at common law can neither be assigned nor devised. Challis Real Prop. 153, *citing* Shep. Touchstone by Preston 120.

3. May Be Released. — Adams *v.* Chaplin, 1 Hill Eq. (S. Car.) 278. As to release and waiver of rights of entry, see the title Conditions, vol. 6, p. 508.

4. No Merger. — The union of the possibility of reverter with the fee conditional in the heir at law does not effect a merger. Adams *v.* Chaplin, 1 Hill Eq. (S. Car.) 265.

5. Rule Against Perpetuities. — See the title Perpetuities, vol. 22, p. 706.

6. Statute. — These rights are made devisable and alienable in *England* by statutes 1 Vict., c. 26, § 3 (Wills Act), and 8 & 9 Vict., c. 106, § 60. See also the statutes of the several states; 1 Stimson's Am. St. Law, §§ 1420, 2630; Green *v.* Irvine, (Ky. 1902) 66 S. W. Rep. 278.

7. 2 Bl. Com. 327 *et seq.;* 4 Kent Com. 290; Cruise Dig. Real Prop., title Use, c. 1, § 5; 1 Spence Eq. Jur. 436; Digby Hist. Real Prop. (5th ed.) 316.

8. Early English Equity, by Judge O. W. Holmes, 1 Law Quar. Rev. 162; The Origin of Uses, by Professor F. W. Maitland, 8 Harv. L. Rev. 127; 2 Pollock & M. Hist. Eng. Law (2d ed.) 228 *et seq.*

9. 2 Bl. Com. 329; 1 Spence Eq. Jur. 441; Digby Hist. Real Prop. (5th ed.) 325. And see the title Uses, Statute of.

10. 1 Sanders Uses and Trusts 20.

11. Co. Litt. 271*b*, Butler's note; 2 Bl. Com. 328; 4 Kent Com. 292; Cruise Dig. Real Prop., title Use, c. 2, §§ 2, 4, 6; Digby Hist. Real Prop. (5th ed.) 325.

12. Co. Litt. 271*b*, Butler's note; 2 Bl. Com. 328 *et seq.;* 1 Spence Eq. Jur. 444; Digby Hist. Real Prop. (5th ed.) 326.

13. Cruise Dig. Real Prop., title Use, c. 2, § 26; 4 Kent Com. 291, 293.

14. 2 Crabb Real Prop., § 1670; 4 Kent Com. 291; Digby Hist. Real Prop. (5th ed.) 330.

15. Co. Litt. 111*b*, note 1, by Hargrave; 2 Bl. Com. 375; 4 Kent Com. 293, 504; Cruise Dig. Real Prop., title Use, c. 2, § 34; Digby Hist. Real Prop. (5th ed.) 377, 378; Pollock Land Laws (3d ed.) 95; Wright *v.* M. E. Church, Hoffm. (N. Y.) 253.

statute of uses, 27 Hen. VIII., c. 10, it was declared that the estate of the *cestui que use* was transferred into a legal estate, so that its owner became complete owner in law as well as in equity.[1] The transmutation by this statute of the use into a legal estate put a stop to wills of uses,[2] but in 1540, by the statute of wills, 32 Hen. VIII., c. 1, a general liberty to devise real estate was established. The transfer of lands under these statutes retained many of the doctrines established in the courts of equity before the statutes,[3] and hence arose those "executory limitations" by which future estates in lands may be created without the satisfaction of the technicalities required in the creation of remainders; a fee may be limited after or in derogation of a prior fee, and an estate may be limited to begin *in futuro*, without the interposition of a precedent estate.[4] And, further, it is possible to limit a *quasi* remainder in a chattel real or personal after a prior life estate therein.[5]

Construction of the Statute of Uses. — Three points established by the courts in the construction of the statute of uses are of the utmost consequence in the doctrine of executory trusts. First, it was decided that the statute executed only one use, so that when a use was limited upon a use the second use was void,[6] but in process of time the second use was supported in equity as a trust.[7] Second, as the statute requires a person "seized" of the land in order to transfer the legal estate to the *cestui que use*, the statute was interpreted not to apply to terms for years or to interests in chattels of which the owner was merely "possessed."[8] Third, an active trust was not executed by the statute.[9]

2. Definitions — *a.* EXECUTORY LIMITATIONS AND EXECUTORY INTERESTS. — An executory limitation is a limitation of a future estate in lands or of a future interest in chattels or chattels real which would be invalid if made in an assurance at the common law, but which so far as regards lands is valid either in a will or in a conveyance to uses, and so far as regards chattels real or personal is valid in *England* in a will and in the *United States* generally in a deed as well.[10] Interests in realty created by such limitations are called

1. Stat. 27 Hen. VIII., c. 10, § 1; 2 Bl. Com. 333; 4 Kent Com. 294; Digby Hist. Real Prop. (5th ed.) 354.

2. Co. Litt. 111*b*, note 1, by Hargrave; 2 Bl. Com. 375; 4 Kent Com. 504; Digby Hist. Real Prop. (5th ed.) 346, 378.

3. 4 Kent Com. 294 *et seq.*; Digby Hist. Real Prop. (5th ed.) 354.

4. 2 Bl. Com. 173, 334; 4 Kent Com. 269; Williams Real Prop. (6th Am. ed.) 289; Challis Real Prop. 137; Doe *v.* Considine, 6 Wall. (U. S.) 475.

5. See *infra*, this section, *Executory Limitations of Chattel Interests*.

6. **Use on a Use Void.** — Tyrrel's Case, 2 Dyer 155*a*, A. Bendl. 28; 1 And. 37. See also Yelverton *v.* Yelverton, Cro. Eliz. 401; Symson *v.* Turner, 1 Eq. Cas. Abr. 383, par. 1; 2 Bl. Com. 335.

Notwithstanding much criticism, the reason for this holding of the courts, first made in 1557, appears intelligible, viz., that it is a contradiction in terms to give to the first *cestui que use* the beneficial enjoyment of the property and then to say that he holds the beneficial enjoyment for the benefit of another. See "Tyrrel's Case and Modern Trusts," by Prof. James B. Ames, 4 Green Bag 81.

7. The earliest case in which the second use, declared void in law seventy-five years before, was recognized in equity as a valid trust is said by Prof. Ames to be one decided in 1634. Sambach *v.* Dalston, Tothill 188. See 4 Green Bag 83.

8. **Uses of Terms and Chattel Interests Not Executed.** — Symson *v.* Turner, 1 Eq. Cas. Abr. 383, par. 1; Glover *v.* Condell, 163 Ill. 566; 2 Bl. Com. 336; 1 Sanders Uses and Trusts 263; 1 Spence Eq. Jur. 466, 467; Wms. Settlements 223; Williams Personal Prop. (7th Eng. ed.) 262; Challis Real Prop. 138.

9. **Active Trusts Not Executed.** — Symson *v.* Turner, 1 Eq. Cas. Abr. 383, par. 1; 2 Bl. Com. 336. See also the title TRUSTS AND TRUSTEES.

10. See Challis Real Prop. 139, and *infra*, this section, *Executory Limitations of Chattel Interests*.

The Term "Limitation" is used in conveyancing as opposed to "condition." A condition ends an estate before the time fixed for its extreme duration; a limitation marks out the extreme time during which it is to continue. Sweet Law Dict.

"A condition determines an estate after breach, upon entry or claim by the grantor or his heirs, or the heirs of the devisor. A limitation marks the period which determines the estate, without any act on the part of him who has the next expectant interest." Bigelow, J., in Brattle Square Church *v.* Grant, 3 Gray Mass.) 147, 63 Am. Dec. 725. See also in this work LIMITATION, vol. 19, p. 134; LIMITATION, WORDS OF, vol. 19, p. 334. And see the title CONDITIONS, vol. 6, p. 504.

executory interests, and may be divided into springing and shifting uses and executory devises.[1]

b. SPRINGING USE. — A springing use is a use limited to arise *in futuro*, either upon a contingency or at a time certain, which is independent of and does not take effect in derogation of any preceding interest.[2]

c. SHIFTING USE. — A shifting use is a use limited to take effect in derogation of some other estate[3] previously limited by the same instrument.[4] Such a use is also called a secondary use.[5]

d. CONTINGENT USE. — A contingent use is a use which is limited to take effect as a remainder, though the term is sometimes loosely used to refer to future uses generally.[6]

e. EXECUTORY DEVISE. — An executory devise is such a limitation of a future estate or interest in lands or chattels as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law.[7] Though the term "executory devise" is used to include as well interests in chattels as in lands, a limitation of a future interest in chattels, which takes effect by the application of a doctrine similar to that of executory devises of lands, is sometimes called with greater exactness an "executory bequest."[8] Executory devises are not ordinarily designated as springing and shifting devises, although these terms are sometimes used as denoting executory devises which take effect in the same manner respectively as springing and shifting uses.[9]

Executory Devises as Affected by the Statute of Uses. — Before the statute of uses a will operated as a declaration of uses, and future interests might be created by a will with the same freedom as by a shifting or springing use. After the statute of wills an executory devise was allowed, according to the prevalent conception of a will and in furtherance of the testator's intention, to have the same effect in the creation of interests *in futuro* as a conveyance *inter vivos* to uses under the statute of uses.[10] An executory devise, however, generally transfers the freehold directly to the devisee in a manner analogous to the operation of uses, but without any reference to the statute,[11] and yet a devise

1. Challis Real Prop. 141.

2. **An Interest to Take Effect on the Regular Determination of a Determinable Fee** is a springing interest. Smith Executory Interests, § 126.

"**Springing Uses** are limited to arise on a future event, where no preceding estate is limited, and they do not take effect in derogation of any preceding interest." 4 Kent Com. 297, 298. See also 1 Steph. Com. (13th ed.) 384.

A springing use is a use which, as the word denotes, springs up or rises on a future event, where no preceding use is limited. Crabb Real Prop., § 1676. See also 1 Leake Dig. Land Laws 350.

3. **Shifting Use.** — 1 Steph. Com. (13th ed.) 385. See also 4 Kent Com. 296; Crabb Real Prop., § 1676.

4. Challis Real Prop. 141.

The shifting use must be either limited by the deed creating the preceding estate or authorized to be created by some person named in it. 4 Kent Com. 296. See also the title POWERS, vol. 22, p. 1125, and note, pp. 1125, 1126.

5. 2 Bl. Com. 335; 4 Kent Com. 296.

6. **Contingent Use.** — Sweet Law Dict. 857; 4 Kent Com. 298; Crabb Real Prop., § 1676. As to construing a limitation as a remainder rather than as an executory devise, etc., see *infra*, this section, *Remainders Favored in Construction.*

7. **Executory Devise.** — Fearne Cont. Rem. 385; Smith Exec. Ints., § 111*a*. See also 1 Jarman Wills (6th ed.) 822; 4 Kent Com. 264; Ryan *v.* Monaghan, 99 Tenn. 338.

An Executory Devise Has Also Been Defined as a devise of a future interest in lands, not to take effect at the testator's decease, but limited to arise and vest upon some future contingency. 1 Eq. Cas. Abr. 186; 2 Bl. Com. 172. See also Doe *v.* Considine, 6 Wall. (U. S.) 474. But this has been criticised by Fearne and Butler as too broad and including other contingent interests in lands given by devise in addition to executory devises. See Fearne Cont. Rem. 384, 385, and Butler's note.

8. **Executory Bequest.** — Williams Personal Prop. (7th ed.) 260; Fearne Cont. Rem. 402, and Butler's note 385; 1 Jarman Wills (6th ed.) 837.

9. Challis Real Prop. 141.

10. Digby Hist. Real Prop. (5th ed.) 381 *et seq.* See also Challis Real Prop. 137.

11. 1 Spence Eq. Jur. 470, 471; 2 Bl. Com. 334.

Thus, an executory bequest of a chattel interest is valid, although the statute of uses did not apply to chattels or chattels real. Manning's Case, 8 Coke 94*b*; Lampet's Case, 10 Coke 46*b*. And see *supra*, this section, *Origin and History*, paragraph *Construction of the Statute of Uses.*

to one to the use of another will be interpreted just as a similar settlement of uses in a conveyance *inter vivos*.[1]

f. CONDITIONAL LIMITATION. — A conditional limitation is properly a limitation cutting short an estate already granted and substituting another in its stead. In includes, therefore, both shifting uses and shifting executory devises.[2] The term "conditional limitation" is also used less happily in the sense of a collateral limitation.[3]

g. COLLATERAL LIMITATION. — A collateral or special limitation is one which marks the extreme duration of an estate and at the same time indicates an uncertain event, the happening of which will put an end to it before the expiration of that period.[4]

h. WORDS DENOTING EXECUTORY LIMITATIONS USED FOR INTERESTS THEREUNDER. —Terms which properly refer to the mode of limiting executory interests are sometimes used for the nature of the interest taken under such limitations.[5]

3. Remainders Favored in Construction — *a.* GENERAL RULE. — It is a well-settled rule of law that where a gift is so limited that it can by any possibility take effect as a remainder it shall not be construed as an executory limitation.[6] But where a devise is to a class, some of the members of which cannot possibly be ascertained at the determination of the preceding estate, such devise can take effect in accordance with the intent of the devisor only as an executory devise, and it will be construed as such to effectuate the intent.[7] Similarly, where a devise over is limited to take effect at the regular termination of a prior life estate, or, in certain events, in derogation thereof,

1. 1 Sanders Uses and Trusts 241; 2 Jarman Wills (6th ed.) 1137; Digby Hist. Real Prop. (5th ed.) 383.

"It is said that though the law will not force the operation of the statute of uses upon devises to which it is the testator's intention it should not extend, yet it will apply it to those cases to which it is his intention it should extend." Coke Litt. 271*b*, note (1) by Butler, div. VIII. 1.

2. **Conditional Limitation.** — Gray Restraints on Alienation, § 22, note; Gray Perp., § 54. Other definitions are given emphasizing various elements in the conception of a conditional limitation.

A conditional limitation is where an estate is limited to commence in defeasance of a preceding estate, as opposed to a contingent remainder which awaits the regular determination of the preceding estate. Sweet Law Dict.

If a condition subsequent be followed by a limitation over to a third person, in case the condition be not fulfilled, that is termed a conditional limitation. 4 Kent. Com. 126.

A conditional limitation, in the specific sense, is a proviso, by way of use or devise, for the annihilation of an interest of the measure of freehold under a preceding limitation, in a particular event which is unconnected with the original quantity of that interest, and which may not happen till after such interest has become vested; and for the creation of a new interest in its stead, in favor of another person. Smith Exec. Ints., § 149.

A conditional limitation is of a mixed nature, partaking both of a condition and a limitation; of a condition, because it defeats the estate previously limited; and of a limitation, because, upon the happening of the contingency, the estate passes to the person having the next expectant interest, without entry or claim. Brattle Square Church *v.* Grant, 3 Gray (Mass.) 147, 63 Am. Dec. 725, *per* Bigelow, J.; Coke Litt. 203*b*, Butler's note; 4 Kent Com. 127. See also Marks *v.* Marks, 10 Mod. 423, *per* Parker, L. C. See also the title CONDITIONS, vol. 6, pp. 504, 514.

3. Gray Restraints on Alienation, § 22, note. See also Smith Exec. Ints., § 148.

4. **Collateral Limitation.** — Sweet's Law Dict.; 4 Kent Com. 129; Smith Exec. Ints. § 34. Such is a limitation to a woman during widowhood, because it gives a life estate, determinable on her remarrying.

5. Challis Real Prop. 57. Thus, especially, "executory devise" is used for an executory interest arising by executory devise.

6. **Construed Remainder if Possible.** — Fearne Cont. Rem. 386; 1 Jarman Wills (6th ed.) 822; Dean *v.* Dean, (1891) 3 Ch. 150. *Compare* Thompson *v.* Hoop, 6 Ohio St. 480. For full treatment, see *supra*, this title, *Remainders*, p. 385.

For some time after the introduction of executory interests, the courts were jealous of admitting such limitations, except as executory devises. Consequently, old cases are found holding such limitations by way of shifting or springing use bad when the rules of technical remainders were infringed; for to hold these limitations good "would render the law and men's conveyances as doubtful and uncertain as last wills and testaments." Davis *v.* Speed, Show. P. C. 107. And this gave rise to some mistaken applications of the rule of the text. See *infra*, this section, *Estate to Arise on Contingency After Term*, note.

7. *In re* Lechmere, 18 Ch. D. 524; Miles *v.* Jarvis, 24 Ch. D. 633; Dean *v.* Dean, (1891) 3 Ch. 150.

it will be construed as an executory devise, since as a remainder it cannot take effect in derogation thereof.[1]

b. REMAINDERS BECOMING EXECUTORY DEVISES OR VICE VERSA. — **The Time When the Question of Remainder or Executory Devise** is to be determined is the death of the testator.[2]

Contingent Remainder Becoming Executory Devise. — Consequently a contingent gift which, had things remained as at the making of the will, would have operated as a contingent remainder may take effect as an executory devise, if at the time of the testator's death the contingency has not happened to vest such gift, and its operation as a remainder has become impossible by the failure of the particular estate during his life.[3]

Executory Interest Becoming Remainder. — But while a limitation which has taken effect as a remainder shall under no change of circumstances be construed as an executory devise,[4] yet an executory devise may by change of circumstances either in the testator's lifetime or after his death become a remainder.[5]

4. Classes of Executory Limitations Considered — *a.* GENERAL CLASSIFICATION. — Executory limitations are ordinarily classified into three classes, according to the method suggested by Justice Powell and adopted by Fearne and other authorities, as follows: First, where the devisor or settlor parts with his whole fee simple, but upon some contingency qualifies that disposition and limits an estate on that contingency; second, where the devisor or settlor, without parting with the immediate fee, gives a future estate to rise either upon a contingency or at a period certain, unpreceded by or not having the requisite connection with any immediate freehold to give it effect as a remainder; third, executory limitations of chattels real and personal.[6] A much more elaborate classification of executory devises and executory bequests has been formulated by Preston.[7]

1. Blackman *v.* Fysh, (1892) 3 Ch. 209.

2. 1 Jarman Wills (5th ed.) 864.

3. Failure of Particular Estate in Testator's Life — Gift Over Executory Devise. — Fearne Cont. Rem. 525; Hopkins *v.* Hopkins, Cas. t. Talb. 44; Doe *v.* Roach, 5 M. & S. 482; Thompson *v.* Hoop, 6 Ohio St. 481.

4. Contingent Remainder Cannot After Testator's Death Become Executory Devise. — 1 Jarman Wills (5th ed.) 877. But see Ryan *v.* Monaghan, 99 Tenn. 338.

5. Circumstances Changing Executory Devise to Remainder. — 1 Jarman Wills (5th ed.) 877; Hopkins *v.* Hopkins, Cas. t. Talb. 44; Stephens *v.* Stephens, Cas. t. Talb. 228; Brownsword *v.* Edwards, 2 Ves. 243; Doe *v.* Fonnereau, 2 Dougl. 487; Doe *v.* Howell, 10 B. & C. 191, 21 E. C. L. 54.

Wells *v.* Ritter, 3 Whart. (Pa.) 208, is no exception, for the taker of the preceding fee was actually *in esse*, being *en ventre sa mere*, at the testator's death, and therefore the interest over never vested as a remainder.

6. Classes of Executory Limitations. — Scatterwood *v.* Edge, 1 Salk. 229, *per* Powell, J.; Purefoy *v.* Rogers, 3 Saund. 388, note 9, by Williams; Fearne Cont. Rem. 299 *et seq.*; 4 Kent Com. 268; Challis Real Prop. 140.

Estate Not Having Requisite Connection with Preceding Freehold. — Thus, when a testator, after settling an estate for life on A, by his will reciting the settlement gives an estate tail to A's children, the estate to the children can enure only as an executory devise, for the life estate and the estate over are not created by the same instrument and therefore the life estate cannot support the estate over as a remainder. Doe *v.* Fonnereau, 2 Dougl. 487. See Fearne Cont. Rem. 303.

7. 2 Prest. Abstracts 123 *et seq.*

Six Classes of Executory Devises are distinguished by Mr. Preston, viz.:

First: This is the same as Fearne's first class.

Second: When the testator gives a future interest of freehold, to arise either on a contingency, or at a time certain, but does not depart with the fee at present, or limit any immediate freehold.

Third: Where the testator gives a future interest of freehold, to take effect in possession after, and in subordination to, a particular estate of freehold; but the estate of freehold must necessarily determine before the more remote interest can come into its place, thus leaving an intermediate space between the actual determination of one estate and the commencement of the other estate.

Fourth: Where a particular estate, as distinguished from the fee, either with or without a disposition of the fee, is given by will, and there is a devise in the same will to take effect in derogation and abridgement of that estate before the period of its regular and proper continuance is accomplished; or where an estate tail or an estate for life is limited to one person, and on an event that estate is to cease and be defeated and another estate is to arise, or a remainder is to be accelerated and take its place.

Fifth: Where an estate tail, or an estate in fee, is on some event reduced to an estate for life. See Wright *v.* Wright, 1 Ves. 409; 1 Jarman Wills (6th ed.) 825.

b. EXECUTORY LIMITATIONS OF REAL PROPERTY — (1) *After a Fee* — (a) **General Principles.** — Limitations after a fee simple[1] or determinable fee must be executory, since such limitation could not take effect at common law as a remainder.[2] Executory limitations of this character may take effect in defeasance of a fee simple or a fee tail, or may await the regular determination of a determinable fee provided it does not offend the rule against perpetuities.[3] After a conditional fee an executory devise may be valid,[4] although it appears that a different rule has prevailed in *South Carolina*.[5]

(b) **Limitations on Failure of Issue.** — A devise after a failure of issue, where the preceding limitation is held to create a fee simple, creates a defeasible fee with an executory devise over, and will take effect or not according as the failure is to happen on a contingency within the period allowed by the rule against perpetuities or is upon an indefinite failure of issue.[6] If the

Sixth: Where there is a devise of an estate of inheritance, or any other estate, and on some event a particular estate to a stranger is introduced to take place in derogation of the estate of inheritance, and to a partial though not total exclusion of the same. See *infra*, this section, *Executory Limitations of Real Property — Limitation in Partial Derogation of Fee*.

For the Classification of Executory Bequests by Mr. Preston, see *infra*, this section, *Executory Limitations of Chattel Interests*.

1. It might, with more propriety, be said that an executory limitation may have place after an estate limited in words which at the common law would make it a fee simple, for the very fact that the estate is to cease and shift upon a contingency prevents it being an absolute fee simple. See *infra*, this section, *Incidents and Characteristics — Limitation on Repugnant Contingency — In General*.

2. **Limitation After Fee Must Be Executory.** — Bristol *v.* Atwater, 50 Conn. 402; Siegwald *v.* Siegwald, 37 Ill. 430; Dallam *v.* Dallam, 7 Har. & J. (Md.) 220; Chew *v.* Keller, 100 Mo. 368. See *supra*, this title, *Remainders*, p. 380. Under some statutes in the *United States* this rule no longer obtains. See *infra*, this title, *Statutory Future Estates*.

3. Challis Real Prop. 140.

A Limitation in Derogation of an Estate Tail may be good as a shifting use or shifting executory devise. So where an estate tail is granted to A with the proviso that if certain estates come to A or to the heirs of his body, the estate tail is to shift to B. Nicolls *v.* Sheffield, 2 Bro. C. C. 215; Harrison *v.* Round, 2 De G. M. & G. 190.

So when the estate tail is to shift in case the tenant in tail fails to take the name and arms of the testator, Doe *v.* Savile, 3 Ad. & El. 2, 897, 30 E. C. L. 261, 42 Rev. Rep. 293 (see also Scatterwood *v.* Edge, 1 Salk. 229); or in case the tenant in tail succeeds to a certain peerage, Carr *v.* Erroll, 6 East 58; Harrison *v.* Round, 2 De G. M. & G. 190. See also Norfolk's Case, Ch. Cas. (pt. iii.) 1; Taylor *v.* Taylor, 63 Pa. St. 485, 3 Am. Rep. 565, *per* Sharswood, J.

Executory Devise Limited After Fee Defeasible on Failure to Pay Money. — Winchelsea *v.* Wentworth, 1 Vern. 402.

Or Defeasible on the Payment of Money to the Devisee. — Marks *v.* Marks, 10 Mod. 419.

Fee After Double Contingency. — A testator left a fee to his two sons, A and B, "but if either of my said sons should die without issue living at the time of his death," his interest to go to the survivor, "and if the survivor should die without leaving issue at the time of his death, then" over to C. A died leaving issue and afterwards B died without issue. It was held that the fee given to B went to his heirs and not to C, for that for the limitation over to C to vest two contingencies must concur — (1) B must die without issue and (2) living A. Gordon *v.* Gordon, 32 S. Car. 563.

4. **Limitation After Fee Conditional.** — Smith *v.* Hunter, 23 Ind. 580; Groves *v.* Cox, 40 N. J. L. 40; Rowland *v.* Warren, 10 Oregon 129. See also Gardner *v.* Sheldon, Vaugh. 270; Mazyck *v.* Vanderhorst, Bailey Eq. (S. Car.) 53, note.

5. Buist *v.* Dawes, 4 Strobh. Eq. (S. Car.) 37 [*following* but *criticising* Bedon *v.* Bedon, 2 Bailey L. (S. Car.) 231]; Bailey *v.* Seabrook, Rich. Eq. Cas. (S. Car.) 419; Mazyck *v.* Vanderhorst, Bailey Eq. (S. Car.) 48; Adams *v.* Chaplin, 1 Hill Eq. (S. Car.) 268; Whitworth *v.* Stuckey, 1 Rich. Eq. (S. Car.) 404; Williams *v.* Caston, 1 Strobh. L. (S. Car.) 130. But *compare* Mazyck *v.* Vanderhorst, Bailey Eq. (S. Car.) 48, note.

6. **Devise After Fee and on Failure of Issue Over** — *England.* — Pells *v.* Brown, Cro. Jac. 590; Walsh *v.* Peterson, 3 Atk. 193; Porter *v.* Bradley, 3 T. R. 143; Roe *v.* Jeffery, 7 T. R. 589; Doe *v.* Webber, 1 B. & Ald. 713.

United States. — Barnitz *v.* Casey, 7 Cranch (U. S.) 456; Abbott *v.* Essex Co., 18 How. (U. S.) 202.

Connecticut. — Morgan *v.* Morgan, 5 Day (Conn.) 78.

District of Columbia. — Thaw *v.* Ritchie, 5 Mackey (D. C.) 200.

Georgia. — Gibson *v.* Hardaway, 68 Ga. 370; Matthews *v.* Hudson, 81 Ga. 120, 12 Am. St. Rep. 305. But see Hertz *v.* Abrahams, 110 Ga. 725.

Illinois. — Post *v.* Rohrback, 142 Ill. 600; Smith *v.* Kimbell, 153 Ill. 368; Strain *v.* Sweeny, 163 Ill. 603.

Indiana. — Jones *v.* Miller, 13 Ind. 337.

Kentucky. — Hart *v.* Thompson, 3 B. Mon. (Ky.) 482.

Maryland. — Dallam *v.* Dallam, 7 Har. & J. (Md.) 220; Hilleary *v.* Hilleary, 26 Md. 274; Devecmon *v.* Shaw, 70 Md. 219; Godwin *v.* Banks, 87 Md. 425.

devise on failure of issue is held to create an estate tail by implication,[1] it seems that the limitation over will be good where the common law still prevails without regard to whether the failure of issue is definite or indefinite and without regard to the distinction between remainders and executory devises.[2] Under statutes which have abolished estates tail the validity of such limitations, if construed as executory devises, will, in general, depend on whether the limitation is on a definite or indefinite failure of issue.[3]

(c) **Alternative Limitations.** — A future interest may be limited in the alternative so as to take effect either after a fee which is to arise in a certain contingency and which is then to be determinable upon a contingency (when the subsequent gift operates as an executory devise); or, in case the fee so limited never vests, the future interest may take effect immediately after the termination of the first estate as a contingent remainder.[4]

Massachusetts. — Richardson *v.* Noyes, 2 Mass. 56, 3 Am. Dec. 24; Hooper *v.* Bradbury, 133 Mass. 303.

Missouri.— See Chew *v.* Keller, 100 Mo. 362; Naylor *v.* Godman, 109 Mo. 550; Patrick *v.* Blair, 119 Mo. 114.

New Hampshire. — Hall *v.* Chaffee, 14 N. H. 215; Eaton *v.* Straw, 18 N. H. 320; Pinkham *v.* Blair, 57 N. H. 226.

New Jersey. — Den *v.* Taylor, 5 N. J. L. 413; Wilson *v.* Wilson, 46 N. J. Eq. 322.

New York. — Sherman *v.* Sherman, 3 Barb. (N. Y.) 385; Wilson *v.* Wilson, 32 Barb. (N. Y.) 328; Vedder *v.* Evertson, 3 Paige (N. Y.) 281; Fosdick *v.* Cornell, 1 Johns. (N. Y.) 440, 3 Am. Dec. 340; Jackson *v.* Blanshan, 3 Johns. (N. Y.) 292, 3 Am. Dec. 485; Anderson *v.* Jackson, 16 Johns. (N. Y.) 382, 8 Am. Dec. 330; Jackson *v.* Billinger, 18 Johns. (N. Y.) 368; Lion *v.* Burtiss, 20 Johns. (N. Y.) 483, *affirmed sub nom.* Wilkes *v.* Lion, 2 Cow. (N. Y.) 333.

North Carolina. — Den *v.* Pendleton, 2 Murph. (6 N. Car.) 82; Dunning *v.* Burden, 114 N. Car. 33; Wright *v.* Brown, 116 N. Car. 26.

Ohio. — Niles *v.* Gray, 12 Ohio St. 320.

Pennsylvania. — Wells *v.* Ritter, 3 Whart. (Pa.) 208.

Rhode Island. — Boutelle *v.* City Sav. Bank, 18 R. I. 177; Barney *v.* Arnold, 15 R. I. 78.

Tennessee. — Booker *v.* Booker, 5 Humph. (Tenn.) 505.

Virginia. — Burfoot *v.* Burfoot, 2 Leigh (Va.) 119.

Marriage Settlement. — A disposition of this type may be made by marriage settlement operating under the statute of uses. Lloyd *v.* Carew, Show. P. C. 137; Carver *v.* Jackson, 4 Pet. (U. S.) 1.

By Deed a fee cannot be limited after a fee, but this may be done by executory devise. Glover *v.* Condell, 163 Ill. 566 [*overruling* Ewing *v.* Barnes, 156 Ill. 61, and *limiting* Silva *v.* Hopkinson, 158 Ill. 386]; Strain *v.* Sweeny, 163 Ill. 603; Kron *v.* Kron, 195 Ill. 181.

By Statute this may be done in many jurisdictions. See Shealy *v.* Wammock, 115 Ga. 913, and *infra*, this title, *Statutory Future Estates*.

The Fact that the Failure of Issue Is Definite has been held to render the prior estate a fee simple defeasible, and the limitation over an executory devise. Dallam *v.* Dallam, 7 Har. & J. (Md.) 220; Hilleary *v.* Hilleary, 26 Md. 274; Richardson *v.* Noyes, 2 Mass. 56, 3 Am. Dec. 24; Den *v* Allaire, 20 N. J. L. 6; Wilson *v.* Wilson, 46 N. J. Eq. 321; Wilson *v.* Wilson, 32 Barb. (N. Y.) 335; Randall *v.* Josselyn, 59 Vt. 564. And see the title ESTATES, vol. 11, p. 373.

1. See the titles ESTATES, vol. 11, p. 372; ISSUE, vol. 17, p. 558 *et seq.*

2. **Limitation After Fee Tail Good.** — Taylor *v.* Taylor, 63 Pa. St. 485, 3 Am. Rep. 565. See also Ivins *v.* Scott, 26 Pa. St. 215; Gray Perp., § 212. Such limitations, being barrable by the tenant in tail (see *supra*, this title, *Remainders*, p. 390, and *infra*, this section, *Incidents and Characteristics — Effect of Power in First Taker to Defeat Executory Limitation*), are not within the rule against perpetuities. See *infra*, this section, *Remoteness — Rule Against Perpetuities*.

But that an executory limitation on an indefinite failure of issue after an estate tail is not barrable, and is therefore bad, see Bells *v.* Gillespie, 5 Rand. (Va.) 276. See further Hall *v.* Chaffee, 14 N. H. 215.

3. **Statutes Abolishing Estates Tail** — *Georgia.* — For the construction of former Georgia statutes, see Forman *v.* Troup, 30 Ga. 496; Hertz *v.* Abrahams, 110 Ga. 707. See also 2 Code Ga. (1895), §§ 3085, 3086.

Mississippi. — See Jordan *v.* Roach, 32 Miss. 481.

New York. — The present law (1 Rev. Stat. N. Y. 722; N. Y. Real Prop. Law, § 22), saves remainders in fee limited after estates tail. The former law of 1787 rendered void all limitations after an estate tail, and the courts strove to construe the prior limitation as a defeasible fee rather than an estate tail. Wilson *v.* Wilson, 32 Barb. (N. Y.) 335.

Virginia. — Elys *v.* Wynne, 22 Gratt. (Va.) 224; Randolph *v.* Wright, 81 Va. 608. These cases were decided under the law of 1819. As to the prior statute abolishing entails, see Bells *v.* Gillespie, 5 Rand. (Va.) 273; Carter *v.* Tyler, 1 Call (Va.) 165.

See, for fuller details as to these statutes, the title ESTATES, vol. 11, p. 376.

And for statutes requiring limitations on failure of issue to be construed as definite, see the title ISSUE, vol. 17, p. 572.

4. **Limitation in Alternative According as Fee in Contingency Arises or Not.** — Gulliver *v.* Wickett, 1 Wils. C. Pl. 105; Doe *v.* Fonnereau, 2 Dougl. 508; Doe *v.* Selby, 2 B. & C. 930, 9 E. C. L. 278; Evers *v.* Challis, 7 H. L. Cas. 531 [*reversing* Challis *v.* Doe, 18 Q. B. 231, 83 E. C. L. 231, 10 Eng. L. & Eq. 429, and *affirming* Doe *v.* Challis, 18 Q. B. 224, 83 E. C. L.

(d) **Limitation in Partial Derogation of Fee.** — When an executory interest is limited upon a contingency in derogation of a preceding fee, it has been held that the fee will be completely destroyed by the vesting of such executory interest, though it is but a life estate.[1] But the better doctrine is that the fee is divested only so far as is necessary to give effect to such executory interest, and subject thereto remains in the heirs of the prior devisee in fee.[2]

(2) *In Derogation of Life Estate.* — A gift to take effect in derogation of a preceding life estate is an executory devise or shifting use.[3]

(3) *Of Estates in Futuro* — (a) **Theory of Such Limitations.** — A freehold *in futuro* would arise whenever by a deed operating at common law a freehold estate was limited to begin after the expiration of a definite interval of time or upon the happening of a specified event or contingency, other than the natural expiration of a precedent estate of freehold.[4] In consequence of the abeyance of the freehold which would result if such a conveyance were allowed to take effect, all conveyances purporting to create a freehold *in futuro* are void at common law.[5] But by the operation of the statute of uses which transfers the seizin to the use, a freehold *in futuro* may be created, because by conveyances to use the seizin is never in abeyance; for so much of the seizin as does not coalesce with the use of the *cestui que use* remains with the grantor or results back with the resulting use to him,[6] and remains in him, subject to be divested and transferred to the *cestui que use* when the contingency happens upon which the use in him is to arise.[7] So in devises, upon the doctrine that whatever interest remains undisposed of by the will passes

224, 2 Eng. L. & Eq. 215]. See also Watson *v.* Young, 28 Ch. D. 436; Maddell *v.* Rattew, 5 Rawle (Pa.) 231; Wells *v.* Ritter, 3 Whart. (Pa.) 208. See also *supra*, this section, *Remainders Becoming Executory Devises or Vice Versa*.

1. Limitation in Partial Derogation of Fee. — Doe *v.* Roe, 1 Houst. (Del.) 398, following Fearne Cont. Rem. 251, which says: "A condition or limitation must determine or avoid the whole of the estate to which it is annexed, and not determine it in part only and leave it good for the residue."

2. Gatenby *v.* Morgan, 1 Q. B. D. 685; Hopkins *v.* Pease, 8 Ohio Civ. Ct. 246, 4 Ohio Dec. 435. In accord with this decision were the views set forth in standard text books. See 2 Preston Abst. 140, 142; 2 Powell Devises (3d ed. by Jarman) 240; 1 Jarman Wills (6th ed.) 825. See also Jackson *v.* Noble, 2 Keen 590.

3. Limitations in Derogation of Preceding Life Estate. — Blackman *v.* Fysh, (1892) 3 Ch. 209. This was a case of a devise of property for life or until he should attempt to alien his interest or become bankrupt, then over. See also, for similar limitations held good, Nichols *v.* Eaton, 91 U. S. 716; Emery *v.* Van Syckel, 17 N. J. Eq. 564; Bramhall *v.* Ferris, 14 N. Y. 41, 67 Am. Dec. 113, and further Rochford *v.* Hackman, 9 Hare 475.

The same limitations may be made by deed, the gift over being a conditional limitation or shifting use. Camp *v.* Cleary, 76 Va. 140. See also *Re* Muggeridge, Johns. Ch. (Eng.) 625. And see the titles INSOLVENCY AND BANKRUPTCY, vol. 16, pp. 728, 730; RESTRAINTS ON ALIENATION, *post*.

Where there is a devise of a life estate to A provided he lives on and occupies the land, with a devise over, the devise over is valid. Conger *v.* Lowe, 124 Ind. 368.

So a limitation to A so long as he shall pay taxes on the property and in default over. Hoselton *v.* Hoselton, 166 Mo. 182.

So a limitation to A for life, subject to be defeated on her marriage. Furbee *v.* Furbee, 49 W. Va. 191.

A Limitation to a Widow for Life or During Widowhood and then over creates a remainder. See *supra*, this title, *Remainders*, p. 397.

4. H. W. Challis, "On a Point in the Law of Executory Limitations," 1 Law Quar. Rev. 413.

5. Freeholds in Futuro Void at Common Law. — Barwick's Case, 5 Coke 94*b*; Roe *v.* Tranmer, 2 Wils. C. Pl. 75, Willes 682; Sanders Uses (4th ed.) 109; 4 Kent Com. 234. See also *supra*, this title, *Remainders*, p. 378, and see ABEYANCE, vol. 1, p. 182.

6. Resulting Uses and Uses by Implication. — See the title IMPLIED TRUSTS, vol. 15, p. 1124.

A use which remains in the grantor is called a use by implication, in contradistinction from a resulting use. A use by implication arises on conveyances which operate without transmutation of possession, a resulting use on conveyance which operates, at the common law, as feoffment and fine. Cruise Dig., tit. Use, c. 4, §§ 17, 28.

It has been declared that the whole use results to the grantor, on which the springing use operates as does a shifting use upon the preceding limitation, and that by no possibility can a use result for a particular estate only. 1 Leake Dig. Land Laws 352, 353, *citing* Hayes Conveyancing, App. II, 2. But *compare* H. W. Challis, 1 Law Quar. Rev. 414, who says: "This doctrine of the resulting of the use was applied as well to particular estates carved out of the use as to the complete use in fee."

7. Coke Litt. 23*a*; Fearne Cont. Rem. 40 *et seq.*; Cruise Dig., tit. Use, c. 4, § 16 *et seq.*; 1 Spence Eq. Jur. 488; H. W. Challis, 1 Law

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to the heir at law,[1] that portion of the estate left undisposed of by a devise *in futuro* passes to the heirs of the testator.[2] It follows from these principles that a freehold to begin *in futuro* can take effect by way of executory devise or springing use.[3] These include future freeholds limited to arise either without any precedent estate,[4] or a contingent estate limited after a term for years,[5] or an estate limited after a freehold estate and a further interval of time.[6]

(b) **To Persons Not in Esse — By Words in Præsenti or de Futuro.** — A limitation of realty to a person not *in esse* may be affected by executory devise or by springing use.[7] It seems that even where a devise is so worded as to appear

Quar. Rev. 414; Pybus *v.* Mitford, 2 Lev. 75, 1 Vent. 372; Penhay *v.* Hurrell, Freem. Ch. 258.

A Resulting Use Must Result to the Settlor or Grantor Only. Therefore, where husband and wife covenanted to levy a fine of the wife's lands to the use of the heirs of the body of the husband on the wife begotten, remainder to the right heirs of the husband, and they had issue, and the wife died first, then the issue, and then the husband, it was held that the resulting use would not support the remainder over, because it could result to the wife alone and she died during her husband's life. Davis *v.* Speed, Show. P. C. 104, 4 Mod. 153, 12 Mod. 38, 2 Salk. 675, Carth. 262, Holt K. B. 730, Skin. 351. See on this case, the reports of which "are at variance and full of errors." 1 Leake Dig. Land Laws 353; 1 Sanders Uses (4th ed.) 139; Cruise Dig., tit. Use, c. 4, § 44; H. W. Challis, 1 Law Quar. Rev. 417.

1. Executory Devises. — Chambers *v.* Brailsford, 18 Ves. Jr. 375; H. W. Challis, 1 Law Quar. Rev. 413. See also the titles LEGACIES AND DEVISES, vol. 18, p. 763 *et seq.*; WILLS.

2. Pay's Case, Cro. Eliz. 878; Harris *v.* Barnes, 4 Burr. 2157; Miller *v.* Chittenden, 4 Iowa 270; Nightingale *v.* Burrell, 15 Pick. (Mass.) 111; Chambers *v.* Wilson, 2 Watts (Pa.) 495; Rupp *v.* Eberly, 79 Pa. St. 145; 4 Kent Com. 257.

3. Smith Exec. Ints., § 127*a*.

4. Freeholds Without Any Preceding Estate — *Limitations by Devise.* — A devise to A to begin six months or ten years after the testator's decease. Clarke *v.* Smith, Lutw. 798; Blanchard *v.* Maynard, 103 Ill. 60.

A devise to A from Michaelmas following for five years, remainder to B and his heirs. The testator dies before Michaelmas. The remainder as a remainder cannot take effect, but B may take by way of executory devise. Pay's Case, Cro. Eliz. 878; Fearne Cont. Rem. 400.

A devise of lands in the United States to A on his becoming a citizen thereof or being "otherwise qualified by law to take and hold real estate within the same." Beard *v.* Rowan, 1 McLean (U. S.) 135, 9 Pet. (U. S.) 301.

A devise to any member of a certain class who shall "come from Ireland first," "if so be they shall or do come within the term of six years after they shall get lawful word hereof by writing," creates a valid executory devise, and there being no disposition of the freehold pending compliance with the condition specified, it descends *ad interim* to the heirs at law of the testator. Chambers *v.* Wilson, 2 Watts (Pa.) 495.

Limitations by Deed. — A covenant to stand seized to the grantor's son after the death of the grantor. Wallis *v.* Wallis, 4 Mass. 135, 3 Am. Dec. 210. See also Roe *v.* Tranmarr, Willes 682, 2 Wils. C. Pl. 75; Doe *v.* Whittingham, 4 Taunt. 20; Osman *v.* Sheafe, 3 Lev. 370, Carth. 307.

A deed or bargain and sale to take effect in possession at the "marriage or death" of the grantor. Bell *v.* Scammon, 15 N. H. 381, 41 Am. Dec. 706.

A feoffment to the use of the feoffer and wife after marriage. Woodliff *v.* Drury, Cro. Eliz. 439.

A covenant to stand seized to the use of the heirs male of the body of the covenantor. Pybus *v.* Mitford, 2 Lev. 75, 1 Vent. 372.

5. See *infra*, this subsection, *Estate to Arise on Contingency After Term.*

6. Gap Between Preceding Estate and Future Estate. — A devise on the contingency of B having more children after the testator's death. Rupp *v.* Eberly, 79 Pa. St. 141.

A devise to the children of A living at B's decease or thereafter to be born takes effect as to the afterborn children as an executory devise. *In re* Lechmere, 18 Ch. D. 524; Miles *v.* Jarvis, 24 Ch. D. 633; Dean *v.* Dean, (1891) 3 Ch. 150. And see *supra*, this title, *Remainders — Construction of Future Estates as Remainders Favored.*

7. 2 Prest. Conveyancing (3d ed.) 153.

A Devise to a Corporation Not in Esse may be valid as an executory devise. McIntire Poor School *v.* Zanesville Canal, etc., Co., 9 Ohio 203, 34 Am. Dec. 436. See the title CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 918; LEGACIES AND DEVISES, vol. 18, p. 741.

So a Gift by Deed to a Charitable Corporation Not in Esse may be good. Miller *v.* Chittenden, 4 Iowa 252, 2 Iowa 315. See also Reformed Protestant Dutch Church *v.* Veeder, 4 Wend. (N. Y.) 494, and the title CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 917. These decisions proceed on the ground of the charitable nature of the gift.

By Deed of Bargain and Sale a fee may be limited upon a contingency to vest in a person not *in esse* at the date of the deed. Ocheltree *v.* McClung, 7 W. Va. 232. See also Gray Perp., § 64. *Contra*, Heyns *v.* Villars, Sid. (pt. ii.) 158 (dictum of Newdigate, J.); Sugden's Gilbert on Uses 398. Sugden places this view on the ground that a consideration is necessary for a bargain and sale, and such consideration cannot be paid by a person unborn, nor can the consideration moving from the life tenant enure to his benefit (see the title CONTRACTS, vol. 7, p. 104; and *compare* same

to be an immediate present devise, it will be effectuated if there exists the least circumstance from which to collect the testator's intention that the gift is anything else than an immediate devise to take effect *in præsenti.*[1]

(c) **Estate to Arise on Contingency After Term.** — A limitation to arise on a contingency after a term of years may take effect as an executory devise or springing use.[2]

(d) **Covenant to Stand Seized and Deed of Bargain and Sale.** — Under the statute of uses, freeholds to begin *in futuro* may be created by covenant to stand seized,[3] or by deed of bargain and sale,[4] according as the consideration is a consideration of blood or marriage or a valuable consideration. A deed drawn as and intended to operate as a common-law conveyance, but ineffectual because it purports to convey an estate *in futuro*, will be construed, *ut res*

title, p. 110, *Doctrine in Equity*). Chancellor Kent disapproves Sugden's view, planting himself on the *New York* doctrine that one may sue on a promise made to another for his benefit. (See the title CONTRACTS, vol. 7, p. 105, and note 1, p. 107.) 4 Kent Com. 244, note (*a*). As to the operation of a deed of bargain and sale to convey contingent interests by estoppel, see the title ESTOPPEL, vol. 11, p. 410.

1. Words de Præsenti or de Futuro. — Inglis *v.* Sailor's Snug Harbour, 3 Pet. (U. S.) 144; Miller *v.* Chittenden, 4 Iowa 270. And see Powell Devises (3d Am ed.) 219.

It has been held that when an executory devise is limited *per verba de præsenti*, that is, where the devisee is mentioned as a person in present existence and the commencement of the estate devised is not expressly referred to a future period, then the devisee must be a person capable at the death of the devisor, or otherwise the devise will be void. Fearne Cont. Rem. 532, *citing* Goodright *v.* Cornish, 1 Salk. 226, 4 Mod. 256; Scatterwood *v.* Edge, 1 Salk. 229, 12 Mod. 278. See also Lamb *v.* Archer, 1 Salk. 225; Davis *v.* Speed, Show. P. C. 104, as *explained* 1 Leake Dig. Land Laws 354. This rule seems now exploded, and the question is merely of the testator's intent. Fearne Cont. Rem. 535; Doe *v.* Carleton, 1 Wils. C. Pl. 225; Harris *v.* Barnes, 4 Burr. 2157, 1 W. Bl. 643, Ambl. 666. See also Doe *v.* Fonnereau, 2 Dougl. 487. As to children *en ventre sa mere*, see the title LEGACIES AND DEVISES, vol. 18, p. 735, note and references.

2. Executory Devise of Estate Tail After Term. — Gore *v.* Gore, 2 P. Wms. 28; Doe *v.* Carleton, 1 Wils. C. Pl. 225; Harris *v.* Barnes, 4 Burr. 2157, 1 W. Bl. 643, Ambl. 666.

Springing Use After Term. — Two old cases hold that a limitation in a deed of a freehold by way of use to a person not *in esse* after a term of years is void. Adams *v.* Savage, 2 Salk. 679, 2 Ld. Raym. 854 (a conveyance by lease and release to trustees); Rawley *v.* Holland, 22 Vin. Abr. 189, pl. 11, 3 Eq. Cas. Abr. 753, par. 1 (a marriage settlement).

These decisions proceed, according to eminent authorities, on the ground that the term for years given in express words to the ancestor is inconsistent with the idea of a resulting or implied life estate in him, Fearne Cont. Rem. 42; Cruise Dig., tit. Uses, c. 4, § 33 *et seq.*; Note to Penhay *v.* Hurrell, 2 Freem. Ch. 258, so that until the future freehold arises the seizin is in abeyance. It has been said that the court's decision in these cases treats the limitations as if they were bad remainders instead of good limitations of springing uses. Gray Perp., §§ 59, 60; Sugden's note to Gilbert on Uses 167; Sanders Uses (4th ed.) 142, 143. But Mr. Challis's analysis makes the cases depend on the supposition that here there can be no room for an implied or resulting use, and that the presence of such uses is all that validates ordinary executory devises and springing uses. See 1 Law Quar. Rev. 412 *et seq.* According to the last authority the courts were in error in the assumption that a life estate would not result or remain in the grantor or settlor in these cases, because it was an interest undisposed of by the settlement or deed, and there seems no difference in this respect between the operation of a deed and a will (in which such a limitation is admittedly good as an executory devise). Mr. Challis reasons further that if there could have been no resulting use, yet the limitation might be supported out of the seizin of the feoffees. (See Goodtitle *v.* Burtenshaw, 1 Fearne Cont. Rem. 571, case beiore Lord Mansfield), for the statute "doth not divest any estate out of the feoffees but when it can be executed in the *cestui que use.*" Chudleigh's Case, 1 Coke 136. At any rate all the authorities cited and others agree in regarding these cases as no longer of authority.

3. Covenant to Stand Seized. — See the title DEEDS, vol. 9, p. 101, note 7.

In *Massachusetts*, where the peculiar doctrine obtains that a pecuniary consideration as well as a consideration of natural love and affection will support a covenant to stand seized, a deed conveying a freehold *in futuro* supported by pecuniary consideration will be construed as such covenant, and therefore valid. Trafton *v.* Hawes, 102 Mass. 533, 3 Am. Rep. 494; Hall *v.* Bliss, 118 Mass. 560, 19 Am. Rep. 476; West *v.* West, 155 Mass. 320.

4. Bargain and Sale. — See the title DEEDS, vol. 9, p. 103.

In *Massachusetts* the anomalous doctrine obtains that an estate *in futuro* cannot be created by deed or bargain and sale. See the title DEEDS, vol. 9, p. 104, note 1.

In *Maine*, where the like doctrine seems at one time to have gained a foothold, it has been authoritatively *overruled* in Wyman *v.* Brown, 50 Me. 150, extensively *quoted* under the title DEEDS, vol. 9, p. 103, note 3.

In *Massachusetts* inconvenient consequences of this anomaly are obviated by the peculiar doctrine as to covenants to stand seized stated in the preceding note.

magis valeat quam pereat, to operate as a covenant to stand seized or a deed of bargain and sale.[1]

c. EXECUTORY LIMITATIONS OF CHATTEL INTERESTS — (1) *Limitations Necessarily Executory.* — The third class of executory limitations or interests includes all future limitations of chattels real or personal.[2] In the view of the older common law, the ownership of personal property was absolute and incapable of division into succession interests, and there could be no remainder in a chattel.[3] All future interests in chattels real or personal are therefore governed not by the technicalities of common-law remainders, but in analogy to those more liberal rules which control executory devises of real property.[4] Consequently a future interest in chattels real or personal may take effect in analogy to a remainder after a life estate limited therein and is then called a *quasi* remainder or simply a remainder; it may take effect in defeasance of a complete disposition of the property, such an interest being analogous to a shifting use or devise of realty; or it may take effect on some future contingency in analogy to a springing use or devise.[5]

1. See the title INTERPRETATION AND CONSTRUCTION, vol. 17, pp. 17, 18, and the title DEEDS, vol. 9, pp. 101, 103.

2. All Future Chattel Interests Executory. — "No remainders can be limited in real or personal chattels, every future bequest of which, therefore, whether preceded by a partial gift or not, is in its nature executory." 1 Jarman Wills (6th ed.) 837. See also Fearne Cont. Rem. 401, note by Butler; Glover *v.* Condell, 163 Ill. 586.

3. Ownership of Chattels Anciently Indivisible. — Williams Pers. Prop. (7th Eng. ed.) 259; 2 Kent Com. 352; Anonymous, March 106; Woodcock *v.* Woodcock, Cro. Eliz. 795; Warner *v.* Borsley, 2 Ch. Rep. 151.

Of course, this difficulty is not felt in executory bequests, where the whole chattel can be disposed of and the gift made to shift on an event *ex post facto*. See the last note to this paragraph.

Gift for an Hour Is Forever. — The remark in Brooke's Abr. Devise 13 (8 Viner's Abr. 447), that a "gift or devise of a chattel for one hour is forever," has been frequently repeated. See Br. New Cas., pl. 334 (March's Translation, p. 61); Manning's Case, 8 Coke 95*a*, *per* Walmsley, J.; Wright *v.* Cartwright, 1 Burr. 284, where Lord Mansfield said: "The gift of a term (like any other chattel) for an hour was good forever."

In Delaware this rule seems to be so far observed that a bequest of a personal chattel for life is absolute, unless there is a limitation over. State *v.* Warrington, 4 Harr. (Del.) 55. See also Derickson *v.* Garden, 5 Del. Ch. 323. But by the general doctrine such chattels revert when the life estate expires. See *supra*, this title, *Reversions — Reversionary Interest in Personalty.*

4. See Waldo *v.* Cummings, 45 Ill. 428.

5. Three Classes of Executory Bequests are distinguished by Mr. Preston, embodying the distinctions of the text (2 Prest. Abst. 142–144)

First: Bequest to One with Limitation Over, Chattel Remainder. — Where a term of years or other personal estate is devised to one with a limitation over.

Where a limitation was to A for life, and, if A die before B, then to A's children, the children take a vested remainder, defeasible on A's outliving B. Security Co. *v.* Hardenburgh, 53 Conn. 169.

Second: Bequest After Absolute Disposition. — Where there is a complete disposition of the property, and there is a substitution of another person to take in some event which is to defeat or abridge the former gift. Such are remainders in personalty subject to shift over on the death of the first taker under twenty-one and without issue, Martin *v.* Long, 2 Vern. 151; Jones *v.* Sothoron, 10 Gill & J. (Md.) 187; or simply without issue, Edelen *v.* Middleton, 9 Gill (Md.) 161; Eichelberger *v.* Barnetz, 17 S. & R. (Pa.) 293. So in the *United States*, a deed to A "to her and her issue forever," but if A die without issue, then over. Powell *v.* Brown, 1 Bailey L. (S. Car.) 100.

Chief Justice Shaw, in Albee *v.* Carpenter, 12 Cush. (Mass.) 382, stated the belief that no case had decided a limitation over of chattels good where the first interest was greater than a life estate. This error is exposed in Hooper *v.* Bradbury, 133 Mass. 306.

Some cases have announced that in case of a chattel "if the absolute right of property is given to the first taker," an executory limitation over is void. Moody *v.* Walker, 3 Ark. 147, *followed* in Slaughter *v.* Slaughter, 23 Ark. 358, and Robinson *v.* Bishop, 23 Ark. 378.

This view is founded on an expression in Patterson *v.* Ellis, 11 Wend. (N. Y.) 259, which, if it was ever law, is not so now. Norris *v.* Beyea, 13 N. Y. 273; Wager *v.* Wager, 96 N. Y. 164. See also Kelley *v.* Hogan, 71 N. Y. App. Div. 344; Marshall *v.* Rives, 8 Rich. L. (S. Car.) 85.

The question of the intent of the instrument must govern. See also *infra*, this section, *Validity of Executory Limitations — Limitation on Repugnant Contingency.*

Third: Where There Is a Substantive and Independent Limitation to Wait for Effect till the termination of a life or lives in being, or till a contingency in some manner connected with that event simply or with that event attended with a failure of issue at that time or any given period. See *infra*, this subsection, *After Life Estate in Chattels Real or Personal — In Terms for Years*, note 1.

Statute of Uses — Chattel Remainders as Vested. — Chattel interests are not within the statute of uses, which controlled springing or shifting uses and perhaps to some extent executory devises,[1] and therefore some authorities have hesitated to class them as executory limitations.[2] But for almost every practical purpose dispositions of such interests fall in this category, their validity being, like executory interests in realty, subject only to the rule against perpetuities, and they are therefore conveniently placed here. But it is to be noted that future interests in personalty are not as such executory in the sense that they must vest in possession at the same time as they vest in interest. Thus, where the persons to whom chattels are limited in *quasi* remainder are ascertained persons, capable of taking immediately, they have a right vested in interest although the enjoyment is postponed until the termination of a life estate in another, and consequently a limitation of this kind is not within the rule against perpetuities.[3] And for the purposes of succession such interests are freely construed as vested, the rules which control them being taken from the civil laws.[4]

(2) *After Life Estate in Chattels Real or Personal* — (a) **In Chattels Personal** — *aa.* In General. — The reasons, founded on feudal principles, which prevented an estate of freehold from beginning *in futuro* had no application to things personal,[5] and there is no reason in the nature of things why a gift of chattel interests should not begin at a future time, provided no preceding inconsistent disposition is made.[6] Consequently, it was early held in wills that the use or occupation of a chattel might be given to one for life and a *quasi* remainder over would be valid.[7] Later the courts held that in a will a gift of the life estate to one followed by a remainder to another would be construed, in order to effectuate the testator's intent, as a gift of the enjoyment for life with remainder over.[8]

1. See *supra*, this section, *Origin and History*.
But see Roane *v.* Rives, 15 Ark. 328, where, upon a gift of a chattel in trust, the use was held executed in the *cestui que use*.

Future Trusts of Chattels Personal or Real Inter Vivos, or settlements by will through the medium of trustees, where the trust is active, will, of course, be administered in equity (see the title Trusts and Trustees), their validity being subject to the rule against perpetuities. See the title Perpetuities, Etc., vol. 22, p. 704. Dry trusts of chattel interests are cognizable in equity as trusts, not being executed by the statute. 1 Leake Land Laws 118; Challis Real Prop. 138, 139. See also Betty *v.* Moore, 1 Dana (Ky.) 235.

2. Min. Inst. (1st ed.) 370.

3. **Future Interest in Personalty Vested.** — Thus, personal property may be limited to an unborn person for life and a remainder over will be good provided it is limited to a person capable of taking immediately, for the remainderman has an "immediate vested interest." Evans *v.* Walker, 3 Ch. D. 211. See also the title Perpetuities, Etc., vol. 22, pp. 711, 721 *et seq.*

4. For the rules governing the construction of wills with respect to the vesting of legacies see the title Wills.

The Law Favors the Vesting of Estates in personalty as in realty. Carr *v.* Smith, 25 N. Y. App. Div. 217, Carstensen's Estate, 196 Pa. St. 325; Seller *v.* Reed, 88 Va. 377.

Remainders in chattels are frequently treated as vested remainders subject to a precedent life estate. See Smith *v.* Bell, 6 Pet. (U. S.) 68; Thrasher *v.* Ingram, 32 Ala. 645; Edelen *v.* Middleton, 9 Gill (Md.) 161; Burnett *v.* Roberts, 4 Dev. L. (15 N. Car.) 81; Evans's Estate, 155 Pa. St. 646.

5. **The Reason Why Estates in Futuro in Land Are Not Allowed** is the common law's abhorrence of an abeyance of the freehold, and the necessity of immediate seizin.

6. **Parol Gift Without Delivery Void.** — Provided the gift is by deed (see the title Gifts, vol. 14, p. 1045), for a parol gift without delivery is void. See the title Gifts, vol. 14, pp. 1015, 1017.

7. **Gift of Use or Occupation of Chattel.** — Thus, the use may be given for life with remainder, Fitz-James's Case, Owen 33, 5 Gray Cas. Prop. 130; Hastings *v.* Douglass, Cro. Car. 343; Anonymous, March N. Cas. 106, pl. 183; Vachel *v.* Vachel, Ch. Cas. (pt. i.) 129, 1 Eq. Cas. Abr. 361, par. 7; Smith *v.* Clever, 2 Vern. 38, 59; Trafford *v.* Trafford, 3 Atk. 347; or the use may be for years with remainder, Jolly *v.* Wills, 2 Ch. Rep. 137.

Protection for Remainderman. — Such a *quasi* remainder was at first without remedy where the owner of the life interest aliened his term, or gave or sold the chattel limited to another, or suffered a forfeiture in his life. Anonymous, 1 Dyer 74*b*.

But, as will be subsequently seen, it was held that no act of the possessor for life could affect the interest of him in remainder. Manning's Case, 8 Coke 94*b*, and *infra*, this section, *First Taker Cannot Prevent Vesting When Contingency Happens*.

8. **Remainder After Life Interest in Chattel Good.**— Vachel *v.* Vachel, Ch. Cas. (pt. i.) 129; Catchmay *v.* Nicholas, Finch 116, 1 P. Wms.

bb. METHOD OF LIMITATION — WHETHER BY DEED. — The principle upon which rests a grant of the enjoyment of such period of enjoyment to another seems equally applicable to dispositions *inter vivos* as to bequests in a will.[1] The *English* authorities, however, hold generally that a disposition of a remainder in a chattel is good only in a will (and perhaps then only in a court of equity)[2] or when given by the medium of a trust.[3] In jurisdictions in the *United States*, on the other hand, such dispositions by deed are generally held equally valid as when made by will,[4] but the English rule is followed in *North Caro-*

5, note; Hyde *v.* Parratt, 1 P. Wms. 1, 2 Vern. 331; Tissen *v.* Tissen, 1 P. Wms. 500; Randall *v.* Russell, 3 Meriv. 195. See also Clarges *v.* Albemarle, 2 Vern. 245; Gibbs *v.* Barnadiston, Prec. Ch. 323.

Gifts of remainders in chattels have been held valid without discussion of the theory on which effect may be given to them.

United States. — Smith *v.* Bell, 6 Pet. (U. S.) 68.

Arkansas. — Maulding *v.* Scott, 13 Ark. 88, 56 Am. Dec. 298.

Connecticut. — Griggs *v.* Dodge, 2 Day (Conn.) 28, 2 Am. Dec. 82; Taber *v.* Packwood, 2 Day (Conn.) 52; Hudson *v.* Wadsworth, 8 Conn. 348; Security Co. *v.* Hardenburgh, 53 Conn. 169; Harrison *v.* Moore, 64 Conn. 344.

Florida. — Lott *v.* Meacham, 4 Fla. 144.

Georgia. — Thornton *v.* Burch, 20 Ga. 791.

Illinois. — Waldo *v.* Cummings, 45 Ill. 421; Trogdon *v.* Murphy, 85 Ill. 119; Glover *v.* Condell, 163 Ill. 589.

Indiana. — Owen *v.* Cooper, 46 Ind. 524.

Kansas. — Chase *v.* Howie, 64 Kan. 324.

Kentucky. — Betty *v.* Moore, 1 Dana (Ky.) 235.

Maine. — Sampson *v.* Randall, 72 Me. 109; Fuller *v.* Fuller, 84 Me. 481.

New York. — Jaudon *v.* Hayes, 79 Hun (N. Y.) 453.

See also *infra*, this subsection, *Future Interests as Dependent on Nature of Chattels* — par. *A Remainder in Money.*

1. Future Interests by Deed Not Objectionable on Principle. — "When they [limitations of terms] came to be allowed by will or by declaration of trust, the substantial reason was the same for allowing them by deed." Lord Mansfield in Wright *v.* Cartwright, 1 Burr. 282. See also Sergeant Williams' note to Purefoy *v.* Rogers, 3 Saund. 388*h*.

"If a man either by deed or will limits his books or furniture to A for life with remainder over to B, this remainder is good." 2 Bl. Com. 398.

2. England — Executory Bequests of Chattels Perhaps Only in Equity. — Mr. Joshua Williams doubts "whether the doctrine of executory bequests is applicable in law to any other chattels than chattels real." Williams Pers. Prop. (7th Eng. ed.) 261.

In equity, however, the doctrine has always been recognized as applicable, on the ground, perhaps, that the life tenant's interest was considered a use merely. See cases cited next note but one *supra*. Mr. Gray has pointed out that the common-law judges were consulted in the first two cases there cited. Gray Perp., § 84.

In the United States the courts of law as well as courts of equity recognize such rights (see Harris *v.* McLaran, 30 Miss. 569), and this distinction seems not to have been acted on. See Poindexter *v.* Davis, 6 Gratt. (Va.) 501 *et seq.*, and *infra*, this subsection, *Nature of Remainderman's Interest and Remedies.* But see Welsch *v.* Belleville Sav. Bank, 94 Ill. 205; Glover *v.* Condell, 163 Ill. 589.

3. Personal Property Given in Trust for A for Life, Remainder to B. — Coke Litt. 20*a*, note 5, by Hargrave; Williams Pers. Prop. (7th ed.) 262; Challis Real Prop. 138, 139. See also *supra*, this subsection, *In General.*

The Direct Limitation of a Term by Deed to A for life, remainder to B, without the intervention of trustees, has been upheld. (See the two first notes to the subsection *In Terms for Years, infra.*) On these cases and the remark of Blackstone, quoted in the last note but one *supra*, the cases in the *United States* upholding limitations by deed of remainders in chattels are based. See Keen *v.* Macey, 3 Bibb (Ky.) 39; Bradley *v.* Mosley, 3 Call (Va.) 50.

4. Future Estates in Chattels Limited by Deed — *Alabama.* — Price *v.* Price, 5 Ala. 578; Catterlin *v.* Hardy, 10 Ala. 511; Price *v.* Talley, 10 Ala. 946; Adams *v.* Broughton, 13 Ala. 731; Lyde *v.* Taylor, 17 Ala. 270; Price *v.* Talley, 18 Ala. 21; Jones *v.* Hoskins, 18 Ala. 489; Williamson *v.* Mason, 23 Ala. 488.

Connecticut. — See Langworthy *v.* Chadwick, 13 Conn. 42.

Florida. — Horn *v.* Gartman, 1 Fla. 63.

Georgia. — See Kirkpatrick *v.* Davidson, 2 Ga. 297.

Illinois. — McCall *v.* Lee, 120 Ill. 261. But see Welsch *v.* Belleville Sav. Bank, 94 Ill. 205.

Kansas. — See Chase *v.* Howie, 64 Kan. 323.

Kentucky. — Keen *v.* Macey, 3 Bibb (Ky.) 39; Banks *v.* Marksberry, 3 Litt. (Ky.) 275; Garland *v.* Denny, 3 B. Mon. (Ky.) 131.

Maryland. — See Culbreth *v.* Smith, 69 Md. 450.

Mississippi. — See Harris *v.* McLaran, 30 Miss. 533 (the actual decision was under the *Alabama* law).

South Carolina. — Tucker *v.* Stevens, 4 Desaus. (S. Car.) 532; M'Call *v.* Lewis, 1 Strobh. L. (S. Car.) 442; Powell *v.* Brown 1 Bailey L. (S. Car.) 100 [*overruling* Cooper *v.* Cooper, 2 Brev. (S. Car.) 355]; Hill *v.* Hill, Dudley Eq. (S. Car.) 77; Nix *v.* Ray, 5 Rich. L. (S. Car.) 423.

Tennessee. — Caines *v.* Marley, 2 Yerg. (Tenn.) 584; Johnson *v.* Mitchell, 1 Humph. (Tenn.) 173; Hughes *v.* Cannon, 2 Humph. (Tenn.) 589; Green *v.* Goodall, 1 Coldw. (Tenn.) 404.

Virginia. — See Higgenbotham *v.* Rucker, 2 Call (Va.) 313; Bradley *v.* Mosby, 3 Call (Va.) 50; London *v.* Turner, 11 Leigh (Va.) 429; Poindexter *v.* Davis, 6 Gratt. (Va.) 501.

Some *South Carolina* cases declare the rule

lina,[1] and perhaps in a few other states.[2] Settlements of personal property are, of course, often made in the United States, as in England, by the medium of trustees.[3]

cc. Future Interests as Dependent on Nature of Chattels. — A specific bequest for life of chattels whose use consists in their consumption carries the absolute property therein, and a remainder over is of necessity void.[4] It is, however, otherwise where the bequest is of personalty which, though impaired and worn out in the course of being used, is not useful merely as it is consumed.[5] Where the bequest is not specific but is residuary, the rule is

to be that in personalty "a present vested interest to be enjoyed *in futuro* can be directly conveyed by deed." Dawson *v.* Dawson, Rice Eq. (S. Car.) 243; Jaggers *v.* Estes, 2 Strobh. Eq. (S. Car.) 343, 49 Am. Dec. 674, *overruling* Vernon *v.* Inabnit, 2 Brev. (S. Car.) 411, and Ingram *v.* Porter, 4 McCord L. (S. Car.) 198.

By Deed a Life Interest May Be Reserved upon the conveyance of a chattel, and on principle the convevance of a remainder and a life interest to another is the same.

Arkansas. — Gullett *v.* Lamberton, 6 Ark. 109.

Georgia. — Robinson *v.* Schly, 6 Ga. 515; McGlawn *v.* McGlawn, 17 Ga. 234; Watson *v.* Watson, 22 Ga. 460.

South Carolina. — Jaggers *v.* Estes, 2 Strobh. Eq. (S. Car.) 343, 49 Am. Dec. 674; Duke *v.* Dyches, 2 Strobh. Eq. (S. Car.) 353; Harris *v.* Saunders, 2 Strobh. Eq. (S. Car.) 370.

See also Hope *v.* Hutchins, 9 Gill & J. (Md.) 77. Young *v.* Young, 80 N. Y. 440, 36 Am. Rep. 634, leaves the question undetermined.

Writing Not under Seal has been held sufficient to create such a remainder. Brummet *v.* Barber, 2 Hill L. (S. Car.) 543, where it was intimated that a parol agreement would have this effect. But see the title Gifts, vol. 14, pp. 1017, 1045.

1. North Carolina — Remainder of Chattels by Deed Void. — In North Carolina a remainder in personal chattels cannot be created by deed, and such a remainder is void. Cutlar *v.* Spiller, 2 Hayw. (3 N. Car.) 130; Gilbert *v.* Murdock, 2 Hayw. (3 N. Car.) 182; Dowd *v.* Montgomery, 2 Law Repos. (4 N. Car.) 100; Graham *v.* Graham, 2 Hawks (9 N. Car.) 322; Foscue *v.* Foscue, 3 Hawks (10 N. Car.) 538; Smith *v.* Tucker, 2 Dev. L. (13 N. Car.) 541; Sutton *v.* Hollowell, 2 Dev. L. (13 N. Car.) 185; Morrow *v.* Williams, 3 Dev. L. (14 N. Car.) 263; Foscue *v.* Foscue, 2 Ired. Eq. (37 N. Car.) 321; Harrell *v.* Harrell, 5 Jones Eq. (58 N. Car.) 229; Harrell *v.* Davis, 8 Jones L. (53 N. Car.) 359. See also Black *v.* Beattie, 2 Murph. (6 N. Car.) 240, and *compare* Tims *v.* Potter, 1 Mart. (1 N. Car.) 22; Duncan *v.* Self, 1 Murph. (5 N. Car.) 466; Vass *v.* Hicks, 3 Murph. (7 N. Car.) 493. The law was changed as to slaves by statute in 1823. See Foscue *v.* Foscue, 3 Hawks (10 N. Car.) 538. But is still controlling as to all other chattels. Dail *v.* Jones, 85 N. Car. 221; Lance *v.* Lance, 5 Jones L. (50 N. Car.) 413, 72 Am. Dec. 555.

The principle does not, it seems, apply to money, which is not a chattel requiring identification, and may be limited over by deed. Taylor *v.* Wilson, 5 Ired. L. (27 N. Car.) 214.

2. See State *v.* Warrington, 4 Harr. (Del) 55; Wilson *v.* Cockrill, 8 Mo. 1.

3. Settlement by Deed of Trust. — See the title Trusts and Trustees. For instances, see Phillips *v.* Grayson, 23 Ark. 769; Terry *v.* Allen, 60 Conn. 530; Owen *v.* Cooper, 46 Ind. 524; Hooper *v.* Bradbury, 133 Mass. 306; Lewis *v.* Lewis, 1 Jones L. (46 N. Car.) 444; Aikin *v.* Smith, 1 Sneed (Tenn.) 304.

4. A Specific Bequest of Consumable Chattels for Life, such as wine, spirits, corn, or hay, carries the absolute property. Porter *v.* Tournay, 3 Ves. Jr. 311; Randall *v.* Russell, 3 Meriv. 190; Andrew *v.* Andrew, 1 Coll. Ch. Cas. 686; Phillips *v.* Beal, 32 Beav. 25; Bryant *v.* Easterson, 5 Jur. N. S. 166; State *v.* Warrington, 4 Harr. (Del.) 55; Burnett *v.* Lester, 53 Ill. 325; Welsch *v.* Belleville Sav. Bank, 94 Ill. 191; Whittemore *v.* Russell, 80 Me. 297, 6 Am. St. Rep. 200; Gillespie *v.* Miller, 5 Johns. Ch. (N. Y.) 21; Westcott *v.* Cady, 5 Johns. Ch. (N. Y.) 346, 9 Am. Dec. 306; Horry *v.* Glover, 2 Hill Eq. (S. Car.) 515; Henderson *v.* Vaulx, 10 Yerg. (Tenn.) 30.

In an early case where there was a devise of corn, hay, cattle, etc., in remainder, the remainder was held good, but if any cattle were worn out in using, the life legatee was not to be answerable, and if any were sold as useless he was to be accountable only for their value when sold. Hayle *v.* Burrodale, 1 Eq. Cas. Abr. 361, par. 8.

If the First Taker Dies Leaving Such Property Partly Unconsumed, the remainder over has been held to take effect, to the exclusion of the first taker's representatives. Healey *v.* Toppan, 45 N. H. 243, 86 Am. Dec. 159.

5. Things Deteriorating in Use are distinguishable from things whose use consists in their consumption. Whittemore *v.* Russell, 80 Me. 297, 6 Am. St. Rep. 200; Sarle *v.* Scituate, 7 R. I. 270; Robertson *v.* Collier, 1 Hill Eq. (S. Car.) 370; Henderson *v.* Vaulx, 10 Yerg. (Tenn.) 35.

Farming Stock is property of this character, Groves *v.* Wright, 2 Kay & J. 347; Burnett *v.* Lester, 53 Ill. 325; and the remainderman must take it, or such of it as remains, as it is at the termination of the life estate, Robertson *v.* Collier, 1 Hill Eq. (S. Car.) 370.

Wearing Apparel is subject to these rules. *In re* Hall, 1 Jur. N. S. 974.

So Furniture. — Fuller *v.* Fuller, 84 Me. 482; Marston *v.* Carter, 12 N. H. 159.

The Increase of Live Stock belongs to the life tenant. Robertson *v.* Collier, 1 Hill Eq. (S. Car.) 373; Horry *v.* Glover, 2 Hill Eq. (S. Car.) 521. See also the title Animals, vol. 2, p. 340.

Farm Stock Given in Connection with Farm or Business. — When farming stock, implements, cattle, etc., are bequeathed for life in connection with a business or plantation, and there is a remainder over, the life tenant is entitled

then that it must be sold, the interest only of the proceeds given to the first taker, and the principal preserved for him in remainder.[1] But an intention indicated in the will that the life tenant under the residuary clause is to have the enjoyment *in specie* will be carried out though it renders the bequest to the remainderman null.[2]

A Remainder in Money after a life interest therein is good, the life interest being a gift of the income only, and the principal being reserved for the remainderman.[3]

dd. NATURE OF REMAINDERMAN'S INTEREST AND REMEDIES. — The view that a gift of a chattel for life with remainder over would be considered a gift of the use for life, with a gift of the property in remainder, grew up in courts of equity, and it has been held that equity still retains its ancient jurisdiction merely because the gift is an executory gift of a chattel,[4] and because it regards the tenant for life as a trustee for the remainderman. The nature of the remainderman's right, however, as a legal vested right has frequently been recognized, and he is entitled to legal remedies.[5] Where the delivery of specific chattels

to the use of the stock, whether consumable in use or liable to wear out, but he must keep up the stock — cattle, horses, provisions, and instruments of husbandry — in the condition in which he received it, and at the termination of the estate deficiencies must be made good. Cockayne *v.* Harrison, L. R. 13 Eq. 432; Robertson *v.* Collier, 1 Hill Eq. (S. Car.) 373; Horry *v.* Glover, 2 Hill Eq. (S. Car.) 521. *Compare* Bryant *v.* Easterson, 5 Jur. N. S. 166.

Property Kept for Sale, though consumable, as wine, passes to the remainderman. Phillips *v.* Beal, 32 Beav. 25.

1. Residuary Bequest. — Gibson *v.* Bott, 7 Ves. Jr. 89; Howe *v.* Dartmouth, 7 Ves. Jr. 137; Fearns *v.* Young, 9 Ves. Jr. 549; Randall *v.* Russell, 3 Meriv. 190; Dimes *v.* Scott, 4 Russ. 195; Lichfield *v.* Baker, 2 Beav. 481; Burnett *v.* Lester, 53 Ill. 325; Welsch *v.* Belleville Sav. Bank, 94 Ill. 191; Healey *v.* Toppan, 45 N. H. 243, 86 Am. Dec. 159; Rowe *v.* White, 16 N. J. Eq. 411, 84 Am. Dec. 169; Corle *v.* Monkhouse, 47 N. J. Eq. 73. See also Henderson *v.* Vaulx, 10 Yerg. (Tenn.) 30.

It is said that the meaning of "perishable property" in this connection has been enlarged so as to include securities of a wasting nature, or any form of investment of an uncertain kind or attended with a risk. Buckingham *v.* Morrison, 136 Ill. 448.

2. Intent that First Taker Enjoy General Bequest in Specie. — Lichfield *v.* Baker, 2 Beav. 481; Healey *v.* Toppan, 45 N. H. 243, 86 Am. Dec. 159; Corle *v.* Monkhouse, 47 N. J. Eq. 73; Harris *v.* Dawley, 22 R. I. 633. So a direction that the property in the residuary clause shall not be sold. Henderson *v.* Vaulx, 10 Yerg. (Tenn.) 30

Slight Indications of the Intention of the Testator that the first taker is to enjoy the property *in specie* are controlling. Morgan *v.* Morgan, 14 Beav. 72; Macdonald *v.* Irvine, 8 Ch. D. 101; Buckingham *v.* Morrison, 136 Ill. 437; Matter of James, 146 N. Y. 101; Harris *v.* Dawley, 22 R. I. 633.

3. Remainder in Bequest of Money — *England.* — Smith *v.* Clever, 2 Vern. 59, *sub nom.* Smith *v.* Fisher, 2 Ch. Rep. 410.

Connecticut. — Taber *v.* Packwood, 2 Day (Conn.) 52; Hudson *v.* Wadsworth, 8 Conn. 348.

Georgia. — Thornton *v.* Burch, 20 Ga. 791; Philips *v.* Crew, 65 Ga. 274; Crawford *v.* Clark, 110 Ga. 729.

Illinois. — Boyd *v.* Strahan, 36 Ill. 355.

Kansas. — Chase *v.* Howie, 64 Kan. 320.

Maine. — Fuller *v.* Fuller, 84 Me. 481.

Massachusetts. — Field *v.* Hitchcock, 17 Pick. (Mass.) 182, 28 Am. Dec. 288.

New Jersey. — Rowe *v.* White, 16 N. J. Eq. 411, 84 Am. Dec. 169.

New York. — Westcott *v.* Cady, 5 Johns. Ch. (N. Y.) 346, 9 Am. Dec. 306; *In re* Mapes's Estate, 2 Connoly (N. Y.) 350, 20 N. Y. Supp. 69.

Pennsylvania. — Scott *v.* Price, 2 S. & R. (Pa.) 59, 7 Am. Dec. 629.

4. Jurisdiction in Equity. — Horry *v.* Glover, 2 Hill Eq. (S. Car.) 515, where it appears to have been considered that the life tenant was a trustee for the remainderman. See also Homer *v.* Shelton, 2 Met. (Mass.) 207, *per* Wilde, J.; Hooper *v.* Bradbury, 133 Mass. 307.

In Clapp *v.* Fogleman, 1 Dev. & B. Eq. (21 N. Car.) 466, the executory legatee brought a bill for an accounting and payment, the contingency having happened on which the bequest over vested. The court said that whether or not an assumpsit was maintainable at law, "this court has always held the first taker in a case like this to be a trustee for the executory devisees, when the contingency happened which caused these legacies to vest; and a court of equity, once having the jurisdiction, does not lose it by its being also assumed by a court of law." A decree granting the prayer of the bill was affirmed.

In *England* also the doctrine seems to have been generally received that jurisdiction of chattel remainders lay in equity. Williams Pers. Prop. (7th ed.) 261.

5. Interest of Remainderman in Chattels Protected by Legal Remedies. — Hastings *v.* Douglass, Cro. Car. 343; Hoare *v.* Parker, 2 T. R. 376; Foley *v.* Burnell, 1 Bro. C. C. 278; Smith *v.* Bell, 6 Pet. (U. S.) 68; Taber *v.* Packwood, 2 Day (Conn.) 52; Philips *v.* Crews, 65 Ga. 274; Crawford *v.* Clark, 110 Ga. 729; Edelen *v.* Middleton, 9 Gill (Md.) 161; Duncan *v.* Self, 1 Murph. (5 N. Car.) 466; Ingrams *v.* Terry, 2 Hawks (9 N. Car.) 122; Rogers *v.* Randall, 2 Spears L. (S. Car.) 38. See also Chase *v.* Howie, 64 Kan. 324; Moffat *v.* Strong, 10 Johns. (N. Y.) 12; Poindexter *v.* Davis, 6 Gratt. (Va.) 501.

is desired and the circumstances are such that the legal remedy by damages would be inadequate, equity may decree specific delivery.[1]

Executor's Assent. — It is essential to the right of the remainderman to recover the chattel or chattel real that the executor shall have assented to the bequest, but assent given to the life tenant inures to the benefit of him in remainder.[2]

Inventory or Security from Life Tenant. — Formerly the person entitled in remainder might call for security from the life tenant that the property should be forthcoming at his decease, but now an inventory given by the life tenant, acknowledging receipt of the property, is all that is required in the absence of special danger that the property will be wasted or secreted. If such circumstances are shown, however, a court of equity will compel the giving of security.[3]

The Statute of Limitations does not run against *quasi* remaindermen in a chattel interest until the termination of the prior estate.[4]

(b) **In Terms for Years.** — There is no objection to the creation of a term of years to begin *in futuro*, because the necessity for livery of seizin does not exist,[5] and an estate in a term might be conveyed to begin after the termination of a life interest reserved to the grantor.[6] The limitation of a remainder, however, to begin after a life estate granted in a term was met by certain technical difficulties. The idea of the indivisible nature of the term and consequently that in law the first gift exhausts the whole has always been prominent in *English* law,[7] but the admission of this theory presents difficul-

In Burnett *v.* Roberts, 4 Dev. L. (15 N. Car.) 81, an action of trover by the remainderman for a slave, Ruffin, C. J., said: "The ulterior limitation has never been considered as creating a mere equity, which would be defeated by a sale without notice, but as a vested legal interest which could not be destroyed by any act of the first taker."

In *Alabama* some cases decide that the vendee from the life tenant under a sale which purports to convey the entire property holds adversely to the remainderman, the latter's vested remainder being changed to a mere *chose in action* by such sale. Broome *v.* King, 10 Ala. 819; Price *v.* Talley, 18 Ala. 21; Walker *v.* Fenner, 28 Ala. 367. But see Pickett *v.* Doe, 74 Ala. 129.

While the Life Tenant Is Alive trover will not lie. Nations *v.* Hawkins, 11 Ala. 859.

A Purchaser Without Notice from the Life Tenant gets nothing as against the remaindermen. Smith *v.* Bell, 6 Pet. (U. S.) 68; Adams *v.* Broughton, 13 Ala. 745; Lyde *v.* Taylor, 17 Ala. 270; Jones *v.* Hoskins, 18 Ala. 489; Russell *v.* Kearney, 27 Ga. 96; Jones *v.* Zollicoffer, Term (4 N. Car.) 212, 7 Am. Dec. 708; Burnett *v.* Roberts, 4 Dev. L. (15 N. Car.) 83; M'Call *v.* Lewis, 1 Strobh. L. (S. Car.) 442. See also Myar *v.* Snow, 49 Ark. 125; Moffat *v.* Strong, 10 Johns. (N. Y.) 12. But see Horry *v.* Glover, 2 Hill Eq. (S. Car.) 523, *per* Harper, C.

A Pawnee from the Life Tenant of chattels to which another is entitled in remainder cannot hold them as against the remainderman and the latter may recover in trover. Hoare *v.* Parker, 2 T. R. 376.

As to Rights of Remaindermen in Stock Dividends, see the title DIVIDENDS, vol. 9, p. 710 *et seq.*

1. Specific Delivery Decreed. — 1 Jarman Wills (5th ed.) 779.

Heirlooms. — Delivery of chattels bequeathed as heirlooms, such as plate, jewels, and paintings, has been decreed. Macclesfield *v.* Davis, 3 Ves. & B. 16.

Slaves were held within the same principle. Horry *v.* Glover, 2 Hill Eq. (S. Car.) 515. And see Summers *v.* Bean, 13 Gratt. (Va.) 404. But *compare* Mallery *v.* Dudley, 4 Ga. 52.

2. Executor's Assent. — See the titles EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1162, note; LEGACIES AND DEVISES, vol. 18, p. 787.

3. When Security Required from Life Legatee. — See the titles EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1162; LEGACIES AND DEVISES, vol. 18, p. 789 *et seq.* See also in ENCYC. OF PL. AND PR. the title BILLS QUIA TIMET, vol. 3, p. 599, and the following cases: Lyde *v.* Taylor, 17 Ala. 270; Jones *v.* Hoskins, 18 Ala. 489; Ramey *v.* Green, 18 Ala. 771; 'Bethea *v.* Bethea, 116 Ala. 265; Terry *v.* Allen, 60 Com. 530.

4. Statute of Limitations Running Against Quasi Remainderman. — Findley *v.* Hill, (Ala. 1902) 32 So. Rep. 497. See also the title ADVERSE POSSESSION, vol. 1, p. 808 *et seq.*, and *supra*, this title, *Remainders — Nature and Incidents of Remainderman's Interest.*

5. Estates for Years to Begin in Futuro. — See the titles LANDLORD AND TENANT, vol. 18, pp. 209, 211; LEASES, vol. 18, p. 605.

Thus, the owner of an estate may lease it to A for ninety-nine years, if A shall so long live, and a remainder to B in the term will be construed as a separate substantive lease to B for so many years as are left unexpired at the death of A. Wright *v.* Cartwright, 1 Burr. 282. And see 1 Taylor Landlord and Tenant, § 75; 1 Leake Land Laws 320, 321.

6. Conveyance of Future Interest After Life Estate Reserved. — Doe *v.* Polgrean, 1 H. Bl. 535, the deed being construed as a present gift of the future enjoyment in case the grantee survived the grantor; Gree *v.* Studley, *cited* in Stomfil *v.* Hicks, 2 Salk. 413. See also Culbreth *v.* Smith, 69 Md. 450.

7. Term Considered Indivisible. — See Wright *v.* Cartwright, 1 Burr. 282; 2 Bl. Com. 174; 4 Kent Com. 270; Williams Real Prop. (6th Am. ed.) 291; Williams Personal Prop. (7th Eng. ed.) 259.

ties,[1] and a reason adequate for the prevention of future estates in terms may be found in the doctrine of merger. A life estate is considered of higher dignity than an estate for years, however long, and when the two meet in the same person without any intervening interest, the term is merged or drowned in the life estate, and becomes extinct.[2] Therefore, when the possessor of a term had created a life estate therein, the whole term was merged in the life estate, and there was nothing left to be taken by a person to whom a remainder was limited.[3] But, as shown above, where there was no preceding life estate to merge the remainder, the gift of a term might be limited to take effect *in futuro*, even after a period marked by a life.[4] In the case of wills, where the possessor of a term bequeathed a life estate therein to A with a remainder over to B, the courts, always anxious to effectuate the testator's intent, early held that the clauses might be reversed, the gift in remainder put first as a gift to begin *in futuro* on the collateral contingency of A's death, and the life estate considered as a subsequent disposition of the portion left in the testator until the happening of the contingency,[5] and this without regard to whether the gift for life was an absolute gift of the term or a gift of the use and occupation thereof.[6] Thus, as Lord Mansfield observed, the old legal objections to the limitations of future interests in terms "were removed by changing the name from remainders to executory devises."[7]

(3) *After Limitations Which in Realty Would Create Estates Tail.* — Words which, if used of real estate, would create an estate tail, if used of chattels give an absolute interest and a remainder over is void.[8] But remainders of chattel

1. See "Future Interests in Personal Property," by Prof. J. C. Gray, 14 Harv. L. Rev. 397.

If the first gift of a term is absolute, a lessee could not sublease and retain a reversion. But this has never been doubted. See the title LEASES, vol. 18, pp. 658, 679; 14 Harv. L. Rev. 402.

2. See the title MERGER, vol. 20, p. 593.

3. **Remainder of Term Merged in Life Estate.** — Woodcock *v.* Woodcock, Cro. Eliz. 795. That the doctrine of merger is not applicable to terms which are chattels and in which a life interest cannot be a freehold is argued in Culbreth *v.* Smith, 69 Md. 450.

As to Rights of Remaindermen in Stock Dividends, see the title DIVIDENDS.

4. In Rayman *v.* Gold, Moo. 635, it was agreed that while a termor may not devise to one for life with remainder to another, "yet the termor may demise the land for certain years, if the lessee shall so long live, and he may demise the land itself to another to commence after the death of the first lessee, and good." And this illustration was put of a good devise where "the termor devised that after the death of a stranger, J. S. should have the land for so many years as there were to come." *Compare* Anderson, J., in Woodcock *v.* Woodcock, Cro. Eliz. 795.

5. **Construction of Bequests — Clauses Reversed.** — Manning's Case, 8 Coke 94*b*. See also 14 Harv. L. Rev. 404.

6. **Executory Devises Established.** — Manning's Case, 8 Coke 94*b*; Lampet's Case, 10 Coke 46*b*.

The person to whom the remainder is limited need not be ascertained during the life estate, Amner *v.* Luddington, Leon. (pt. iii.) 89; nor need he be *in esse*, Sackvile *v.* Dobson, Ch. Cas. (pt. i.) 33.

Perhaps any distinction as to the gift of the term and the gift of the enjoyment thereof was unavailable because of the holding in Paramour *v.* Yardley, Plowd. 542, that while in chattels personal "the use, occupation, or function is distinct from the property," it is otherwise in the case of land and chattels real, "for there he who has the occupation and use of it has the property of it for the time."

Distinction Between "Term" and "Time." — Formerly, after a lease to A for eighty years, if A shall so long live, it was held that a remainder "during the residue of the term" was void, but a remainder "during the residue of the eighty years" was valid. Rector of Chedington's Case, 1 Coke 153; Sheppard's Touchstone 274.

But now this distinction is exploded, and "term" is taken according to intent to signify either interest or time. Wright *v.* Cartwright, 1 Burr. 282; Keen *v.* Macey, 3 Bibb (Ky.) 39.

7. Lord Mansfield in Wright *v.* Cartwright, 1 Burr. 282.

Historically the reasoning seems to have been that the interest of a remainderman in a term was but the "possibility" that he would survive the life tenant, and the early doctrine was that "a possibility cannot be limited by way of remainder," yet a possibility might be limited by devise, which was then executory. Manning's Case, 8 Coke 94*b*. See also Hart *v.* Hart, 1 Ch. Rep. 260.

8. **Remainder of Personalty After Limitation Which in Realty Would Create Estate Tail Void** — *England.* — Williams *v.* Lewis, 6 H. L. Cas. 1013; Whitmore *v.* Weld, 1 Vern. 326, 347; Ch. Cas. (pt. ii.) 167; 2 Vent. 367; Deering *v.* Hanbury, 1 Vern. 478; Foley *v.* Burnell, 1 Bro. C. C. 274; Butterfield *v.* Butterfield, 1 Ves. 133, 154; Theebridge *v.* Kilburne, 2 Ves. 233; Garth *v.* Baldwin, 2 Ves. 646; Seale *v.* Seale, 1 P. Wms. 290; Beauclerk *v.* Dormer, 2 Atk. 308; Trafford *v.* Trafford, 3 Atk. 347.

interests may be limited over a failure of issue at the death of the first taker, for such a remainder is after a life estate only, and a chattel remainder may take effect within the period allowed by the rule against perpetuities,[1] the courts,

Alabama. — Powell *v.* Glenn, 21 Ala. 458; Young *v.* Kinnebrew, 36 Ala. 97; Smith *v.* Greer, 88 Ala. 414; Findley *v.* Hill, (Ala. 1902) 32 So. Rep. 497.

Arkansas. — Moody *v.* Walker, 3 Ark. 147; Maulding *v.* Scott, 13 Ark. 88, 56 Am. Dec. 298; Roane *v.* Rives, 15 Ark. 328; Denson *v.* Thompson, 19 Ark. 66; Slaughter *v.* Slaughter, 23 Ark. 358; Myar *v.* Snow, 49 Ark. 129.

Connecticut. — Hudson *v.* Wadsworth, 8 Conn. 348. See also St. John *v.* Dann, 66 Conn. 401.

Georgia. — Gray *v.* Gray, 20 Ga. 804; Crawford *v.* Clark, 110 Ga. 729.

Massachusetts. — Albee *v.* Carpenter, 12 Cush. (Mass.) 382; Hall *v.* Priest, 6 Gray (Mass.) 18.

Mississippi. — Powell *v.* Brandon, 24 Miss. 343; Caldwell *v.* Willis, 57 Miss. 555.

Missouri. — Chism *v.* Williams, 29 Mo. 288; Vaughn *v.* Guy, 17 Mo. 429.

New York. — Moffat *v.* Strong, 10 Johns. (N. Y.) 14.

North Carolina. — Nichols *v.* Cartwright, 2 Murph. (6 N. Car.) 137; Floyd *v.* Thompson, 4 Dev. & B. L. (20 N. Car.) 478.

Ohio. — King *v.* Beck, 12 Ohio 390.

Pennsylvania. — Eichelberger *v.* Barnetz, 17 S. & R. (Pa.) 293.

Rhode Island. — Cook *v* Bucklin, 18 R. I. 666. See also Tingley *v.* Harris, 20 R. I. 517.

South Carolina. — Cudworth *v.* Thompson, 3 Desaus. (S. Car.) 259, 4 Am. Dec. 617, Buist *v.* Dawes, 4 Strobh. Eq. (S. Car.) 37; Dott *v.* Cunnington, 1 Bay (S. Car.) 453, 1 Am. Dec. 624.

Virginia. — Bradley *v.* Mosby, 3 Call (Va.) 50; Moore *v.* Brooks, 12 Gratt. (Va.) 135.

See also the titles Issue (Descendants), vol. 17, pp. 549, 550, and *passim;* Perpetuities, Etc., vol. 22, p. 710.

Even Though the Estate Tail Is Created by Implication the Rule Applies. — Brouncker *v.* Bagot, 1 Meriv. 281; Matter of Wynch, 5 De G. M. & G. 188. See also the title Issue (Descendants), vol. 17, p. 576.

Where the Word "Lend" Is Used to create a life estate with remainder to heirs of the body, the rule applies. Watts *v.* Clardy, 2 Fla. 369. And see Loan — Lend, Etc., vol. 19, p. 457, note 1. But *compare* Prescott *v.* Prescott, 10 B Mon (Ky.) 56.

Objection Is Not Repugnancy but Remoteness. — The gift is not rendered void by the fact that the first taker's interest is absolute, for the very nature of an executory bequest is to divest a gift out of one and vest it in another on a contingency (Stone *v.* Maule, 2 Sim. 490; Marshall *v.* Rives, 8 Rich. L. (S. Car.) 85; and see *supra*, this section, *In General*, p. 436, note 5, and *infra*, this section, *Validity of Executory Limitations — Limitation on Repugnant Contingency*), but by the fact that the vesting is postponed beyond the period of perpetuities, *i. e.*, the objection is not repugnancy but remoteness. See Albee *v.* Carpenter, 12 Cush. (Mass.) 382; Hooper *v.* Bradbury, 133 Mass. 305; Moffat *v.* Strong, 10 Johns. (N. Y.) 14. Opinions, however, sometimes treat the invalidity of such remainders on the antiquated ground of repugnancy. Hudson *v.* Wadsworth, 8 Conn. 361; Betty *v.* Moore, 1 Dana (Ky.) 235. And see Caldwell *v.* Willis, 57 Miss. 575.

Where Succession Estates Tail in Chattels Are Limited to Unborn Persons, each succeeding estate to be valid only in case the preceding estate fails to vest, a succeeding estate may take effect as a substitutional or alternative limitation where the preceding estates fail to vest. For example, a limitation in tail to the unborn sons of A, B, and C, successively; the estate vests in C's son, provided that A and B die without sons, so that the absolute estate never vested. Higgins *v.* Dowler, 1 P. Wms. 98, 2 Vern. 600; Stanley *v.* Leigh, 2 P. Wms. 686; Williams *v.* Lewis, 6 H. L. Cas. 1013. See also Doe *v.* Lyde, 1 T. R. 593; Burbank *v.* Whitney, 24 Pick. (Mass.) 146, 35 Am. Dec. 312. As to such alternative limitations, see *supra*, this title, *Remainders*.

Rule Not Applied to Defeat Intent. — It has been said that this rule is not an inflexible one, and will not be applied when its application would defeat the manifest intention of the testator. Matter of Wynch, 5 De G. M. & G. 188. Consequently the words "issue," Knight *v.* Ellis, 2 Bro. C. C. 570, and even "heirs of the body," Hodgeson *v.* Bussey, 2 Atk. 89, have been sometimes construed words of purchase and not words of limitation. See also the title Issue (Descendants), vol. 17, pp. 549, 550.

In Marriage Articles "Heirs" or "Issue" Are Construed as Words of Purchase. — Seale *v.* Seale, 1 P. Wms. 290. And see the title Issue (Descendants), vol. 17, p. 548.

1. Where Remainder Is Limited Within Rule Against Perpetuities It Is Valid — *England.* — Norfolk's Case, Ch. Cas. (pt. iii.) 1; Beauclerk *v.* Dormer, 2 Atk. 308; Pinbury *v.* Elkin, 1 P. Wms. 563.

Alabama. — Williams *v.* Graves, 17 Ala. 62; Powell *v.* Glenn, 21 Ala. 458; Findley *v.* Hill, (Ala. 1902) 32 So. Rep. 497.

Arkansas. — Delony *v.* Delony, 24 Ark. 7. See Cox *v.* Britt, 22 Ark. 567.

Connecticut. — Hudson *v.* Wadsworth, 8 Conn. 348.

Georgia. — Crawford *v.* Clark, 110 Ga. 729.

Illinois. — See Waldo *v.* Cummings, 45 Ill. 421.

Maryland. — Jones *v.* Sothoron, 10 Gill & J. (Md.) 187.

Massachusetts. — Hooper *v.* Bradbury, 133 Mass. 306.

New Jersey. — Rowe *v.* White, 16 N. J. Eq. 411, 84 Am. Dec. 169.

New York. — Rathbone *v.* Dyckman, 3 Paige (N. Y.) 9; Tyson *v.* Blake, 22 N. Y. 558.

North Carolina. — Gregory *v.* Beasley, 1 Ired. Eq. (36 N. Car.) 25; Threadgill *v.* Ingram, 1 Ired. L. (23 N. Car.) 577.

Pennsylvania. — Deihl *v.* King, 6 S. & R. (Pa.) 29, 9 Am. Dec. 407; Scott *v.* Price, 2 S. & R. (Pa.) 59, 7 Am. Dec. 629.

where possible, giving this construction to the words.[1]

5. Incidents and Characteristics — *a.* VALIDITY OF EXECUTORY LIMITATIONS —(1) *Effect of Power in First Taker to Defeat Executory Limitation.* — It has been laid down that executory limitations differ from contingent remainders in that contingent remainders are defeasible upon the destruction of the particular estate, while executory limitations are independent of the particular estate, and no act which the first taker may do can defeat the legal consequence of the contingency happening, that is, can defeat the vesting of the estate if the contingency happens.[2] Upon this principle has been grounded the rule discussed below, that where the gift to the first taker is accompanied with the absolute power of disposal, the gift over fails.[3] But the principle as stated is not universal in its application, for it has been decided that an executory limitation after an estate tail may always be barred by the tenant in tail.[4] In any case it forms no ground for the inference drawn in cases where the first taker has an absolute power of disposal, for whether the contingency shall happen or not is frequently made dependent on his will.[5]

(2) *Limitation on Repugnant Contingency* — (a) **In General.** — It is a broad rule that neither by deed nor will can an estate be settled upon a contingency repugnant to the essential nature of that estate, and, therefore, a gift limited over on such a repugnant contingency fails.[6] It has been said that any limitation over after a gift of the fee simple or an absolute property is void, such a limitation being in its very nature repugnant to the prior absolute gift, and this principle has occasionally been made the ground of decision in adjudicated cases.[7] But it is clearly false reasoning, for a fee may be limited after a fee

Rhode Island. — Tingley *v.* Harris, 20 R. I. 346.

South Carolina. — Henderson *v.* Kinard, 29 S. Car. 15; Rogers *v.* Randall, 2 Spears L. (S. Car.) 38; Keating *v.* Reynolds, 1 Bay (S. Car.) 80; Cudworth *v.* Thompson, 3 Desaus (S. Car.) 256, 4 Am. Dec. 617; Mazyck *v.* Vanderhorst, Bailey Eq. (S. Car.) 48; Buist *v.* Dawes, 4 Strobh. Eq. (S. Car.) 37.

Tennessee. — Booker *v.* Booker, 5 Humph. (Tenn.) 505.

Virginia. — Royall *v.* Eppes, 2 Munf. (Va.) 479.

See also *supra*, this section, the note *Three Classes of Executory Bequests*, p. 436, and the titles ISSUE (DESCENDANTS), vol. 17 p. 542, *passim;* PERPETUITIES, ETC., vol. 22, p. 710.

1. Failure of Issue Construed to Be Definite if Possible. — Fearne Cont. Rem. 471; Kirkpatrick *v.* Kilpatrick, 13 Ves. Jr. 484; Edelen *v.* Middleton, 9 Gill (Md.) 161; Dashiell *v.* Dashiell, 2 Har. & G. (Md.) 127; Moffat *v.* Strong, 10 Johns. (N. Y.) 15; Eichelberger *v.* Barnetz, 17 S. & R. (Pa.) 293. And see the title ISSUE (DESCENDANTS), vol. 17, pp. 560, 561.

2. See Fearne Cont. Rem. 418, and *infra*, this section, *First Taker Cannot Prevent Vesting When Contingency Happens.*

3. This principle, as sustaining these decisions, was first stated by Kent in Jackson *v.* Bull, 10 Johns. (N. Y.) 19, and repeated in Jackson *v.* Robins, 16 Johns. (N. Y.) 537, and carried into his Commentaries, 4 Kent Com. 270. See also McRee *v.* Means, 34 Ala. 369; Cook *v.* Walker, 15 Ga. 462; Wolfer *v.* Hemmer, 144 Ill. 554; Burleigh *v.* Clough, 52 N. H. 267, 13 Am. Rep. 23; Fisher *v.* Wister, 154 Pa. St. 76; Smith *v.* Bell, Mart. & Y. (Tenn.) 305, 17 Am. Dec. 798; Bean *v.* Myers, 1 Coldw. (Tenn.) 226; Randall *v.* Josselyn, 59 Vt. 566.

In *New York* the principle seems to be negatived by statute. Leggett *v.* Firth, 132 N. Y. 7.

Fearne, in the passage cited in the last note, upon which the cases in the *United States* are founded, is referring to the first taker's power to bar by common recovery or fine only; *i. e.*, the first taker's preventing the regular effect of the contingency when it happens, not to his power to decide whether the contingency shall happen or not. Randolph, J., in Kent *v.* Armstrong, 6 N. J. Eq. 647; Wardlaw, J., in Andrews *v.* Roye, 12 Rich. L. (S. Car.) 541; Gray Restr. on Alien., § 69; Edward Brooks, Jr., 32 Am. L. Reg. N. S. 1041.

4. See *infra*, this section, *First Taker Cannot Prevent Vesting When Contingency Happens.*

5. A limitation over is often made to depend on the first taker adopting the name of the grantor (see *supra*, this section, *Executory Limitations of Real Property — After a Fee*, note); if a life tenant, not becoming bankrupt or seeking to alien (see *supra*, this section, *Executory Limitations of Real Property — In Derogation of Life Estate*, note); not marrying a particular person, see Kent in Jackson *v.* Robins, 16 Johns. (N. Y.) 590, where the chancellor says, however, that such cases "have nothing to do with the simplicity and good sense of the general rule." But *compare* Andrews *v.* Roye, 12 Rich. L. (S. Car.) 544.

6. Repugnant Contingency. — Theo. Wills (4th ed.) 503; *In re* Stringer, 6 Ch. D. 1; Shaw *v.* Ford, 7 Ch. D. 669; *In re* Dugdale, 38 Ch. D. 176. See also the titles CONDITIONS, vol. 6, p. 506; RESTRAINTS ON ALIENATION, *post.*

7. Limitations Over After Absolute Property Void. — This doctrine has been announced in cases of chattels where an absolute interest is given to the first taker See *supra*, this title, *Executory Limitations of Chattel Interests*, note

by executory limitation, and then in the very nature of the case the first fee is not absolute and the gift over is not repugnant.[1] In such cases the question is generally one of intent — whether upon the whole instrument the intent is clear that the property should go over upon a contingency.[2]

(b) **Limitation on Contingency Involving Restraint on Alienation or Intestacy.** — It may be stated generally that by executory limitation an interest may be limited after a fee in realty or the absolute property in personalty, to arise within the period allowed by the rule against perpetuities, except where it is to take effect on the exercise or nonexercise of rights incident to the first estate granted.[3] The practical application of this rule is that an interest to arise by executory devise is void if it is contingent upon the exercise of the right of alienation by the first taker or upon his failure to exercise that right.[4] Thus, a limitation over after a fee upon alienation or attempt at alienation,[5] or a gift in tail defeasible upon the tenant's barring the entail, is void.[6] So, too, a gift over after a gift of an absolute interest in property real or personal, if the first taker does not dispose of his interest or dies intestate, or a gift over of what remains at his death, is void.[7]

5, p. 436. In cases of chattels where the limitation is such as in realty would create an estate tail, in which case, however, the real objection is not repugnancy, but remoteness, see *supra*, this section, *After Limitations Which in Realty Would Create Estates Tail.* Other cases announcing this doctrine are those wherein the limitation over is void as being grounded on the very contingency of alienation or non-alienation. See McRee *v.* Means, 34 Ala. 349, and the next paragraph of text *infra*.

The doctrine was applied in the case of a devise of realty in Fisher *v.* Wister, 154 Pa. St. 65.

1. Prior Gift Where There Is Limitation Over Cannot Be Absolute. — Peckham, J., in Greyston *v.* Clark, 41 Hun (N. Y.) 129. See also Homer *v.* Shelton, 2 Met. (Mass.) 194; Kent *v.* Morrison, 153 Mass. 139, 25 Am. St. Rep. 616; Shattuck *v.* Balcom, 170 Mass. 251; Robinson *v.* Finch, 116 Mich. 180; Norris *v.* Beyea, 13 N. Y. 284.

2. Intent to Be Gathered from Whole Will. — *In re* Stringer, 6 Ch. D. 15, *per* James, L. J.; Smith *v.* Bell, 6 Pet. (U. S.) 68; Robinson *v.* Finch, 116 Mich. 180; Norris *v.* Beyea, 13 N. Y. 274.

Where Clauses in a Will Are Absolutely Repugnant, the general rule is that the second prevails. Homer *v.* Shelton, 2 Met. (Mass.) 202; Shattuck *v.* Balcom, 170 Mass. 251. See also the title INTERPRETATION, vol. 17, p. 8.

3. Contingency the Exercise or Nonexercise of Rights Incident to Estate. — Shaw *v.* Ford, 7 Ch. D. 669.

4. Limitation Contingent on Alienation or Non-alienation. — See the notes below.

In Shaw *v.* Ford, 7 Ch. D. 669, the contingency was the failure of tenants in common to make partition during their joint lives, and the limitation was held void.

5. Limitation Over on Alienation. — Ware *v.* Cann, 10 B. & C. 433, 21 E. C. L. 104; Bradley *v.* Peixoto, 3 Ves. Jr. 324; Potter *v.* Couch, 141 U. S. 315.

So a limitation over after a gift in fee on the bankruptcy of the first taker is void. *In re* Machu, 21 Ch. D. 838. And see the title RESTRAINTS ON ALIENATION, *post*.

Where a Devise Over Is to the Heir at Law of the First Taker in a certain contingency and an estate in fee is given to the first taker, the devise over is nugatory and void, since its only effect is to fetter the power of alienation during the lifetime of the first taker. *In re* Parry, 31 Ch. D. 130. See also Kaufman *v.* Burgert, 195 Pa. St. 274, 78 Am. St. Rep. 813; Jauretche *v.* Proctor, 48 Pa. St. 466.

6. Estate in Tail Limited Over on Tenant's Common Recovery. — Mildmay's Case, 6 Coke 41*a*; Dawkins *v.* Penrhyn, 4 App. Cas. 51; Coke Litt. 22*b*, and Butler's note; 4 Kent Com. 131.

7. Limitation of Real or Personal Property Undisposed of by First Taker. — Gulliver *v.* Vaux, 8 De G. M. & G. 167; Lighlburne *v.* Gill, 3 Bro. P. C. (Toml. ed.) 250; Ross *v.* Ross, 1 Jac. & W. 154; Bourn *v.* Gibbs, 1 Russ. & M. 614; Watkins *v.* Williams, 3 Macn. & G. 622; Matter of Yalden, 1 De G. M. & G. 53; Holmes *v.* Godson, 8 De G. M. & G. 152, 2 Jur. N. S. 383; *In re* Maxwell, 24 Beav. 246; *In re* Mortlock, 3 Kay & J. 456; Barton *v.* Barton, 3 Kay & J. 512; Henderson *v.* Cross, 29 Beav. 216; Perry *v.* Merritt, L. R. 18 Eq. 152; *In re* Wilcock, 1 Ch. D. 229. See also Kent *v.* Morrison, 153 Mass. 137, 25 Am. St. Rep. 616; Foster *v.* Smith, 156 Mass. 379, and *infra*, the next note; Upwell *v.* Halsey, 1 P. Wms. 651, which is opposed to the above authorities, must be considered as overruled. See Gray Rest. Alien., § 58.

Disposition in Lifetime, but Not by Will. — It was formerly held that a limitation over of property undisposed of during the first taker's life might be valid. Doe *v.* Glover, 1 C. B. 448, 50 E. C. L. 448. But this case was distinguished or disapproved by the court in holding that a limitation over on intestacy was void, Holmes *v.* Godson, 8 De G. M. & G. 152, 2 Jur. N. S. 383, and is now considered overruled. 2 Jarman Wills (5th ed.) 15, note; Kelley *v.* Meins, 135 Mass. 235.

Precatory Trust. — A Gift of "What Remains" or other like expression has been held to create an uncertainty in the subject-matter which prevents a precatory trust. See Sprange *v.* Barnard, 2 Bro. C. C. 585, and the title PRECATORY TRUSTS, vol. 22, p. 1168.

Other Reasons for This Doctrine — *Changes*

(c) **Limitation After Gift with Absolute Power of Disposal.** — Many cases in the *United States* hold that an executory limitation is void after a gift with an absolute power of disposal, either express or implied, in the first taker; for the addition of such a power makes an absolute interest of the first gift, and the limitation over of what remains, whether expressly or by implication, cannot take effect.[1]

Course of Devolution Established by Law. — A reason given for the invalidity of such limitations, in addition to the general one noticed in Shaw *v.* Ford, 7 Ch. D. 669, is that, according to law, on intestacy the real estate goes to the heir, the personalty to the next of kin, "and any disposition which tends to contravene that disposition which the law would make is against the policy of the law and therefore void." Holmes *v.* Godson, 8 De G. M. & G. 165, *quoted* in *In re* Wilcock, 1 Ch. D. 231.

In Shaw *v.* Ford, 7 Ch. D. 669, Fry, J., limits this reason and said: "Any executory devise defeating or abridging an estate in fee by altering the course of its devolution which is to take effect at the moment of devolution and at no other time is bad." But numerous valid executory limitations take effect at the moment of devolution and at no other time. See Gray Rest. on Alien., § 63.

With Respect to Personalty to which this rule was first applied, a satisfactory reason is found in the fact that "in many cases it might be very difficult, and even impossible, to ascertain whether any part of the fund remained undisposed of or not; since, if the person to whom the absolute interest is given left any personalty it might be wholly uncertain whether it were a part of the precise fund which was the subject of the condition or not." Lord Chancellor Truro in Watkins *v.* Williams, 3 Macn. & G. 622.

1. Limitation Over Inconsistent with Prior Absolute Gift. — The earlier cases in *Massachusetts* and *New York* held such gifts over void as inconsistent with the prior absolute gift implied in the absolute power of disposal given to the first taker (apparently without respect to the character of the contingency on which the limitation was to take effect), expressly basing their rulings on Atty.-Gen. *v.* Hall, Fitz. 314, W. Kel. 13, 2 Eq. Cas. Abr. 293, par. 21 (supposed to have been approved in this sense by Lord Hardwicke, Flanders *v.* Clark, 1 Ves. 9, 3 Atk. 509), which was in fact decided on the long-exploded doctrine that no remainder of chattels after an absolute gift thereof can be valid. Ide *v.* Ide, 5 Mass. 500; Jackson *v.* Bull, 10 Johns. (N. Y.) 19; Jackson *v.* Robins, 16 Johns. (N. Y.) 537. For comment on this ground of decision as untenable, see Gray Rest. on Alienation, § 63; Edward Brooks, Jr., in 32 Am. L. Reg. N. S. 1039 *et seq.*; B. M. Thompson, in 1 Mich. L. Rev. 435. See also 16 Harvard L. Rev. 458.

The doctrine of the early Massachusetts and New York cases has been stated in 4 Kent Com. 270, and is now a settled principle of law in the *United States*. See

United States. — Howard *v.* Carusi, 109 U. S. 725; Potter *v.* Couch, 141 U. S. 316 [*distinguishing* Smith *v.* Bell, 6 Pet. (U. S.) 68; Williams *v.* Ash, 1 How. (U. S.) 1]. See also Roberts *v.* Lewis, 153 U. S. 367, *following* Little *v.* Giles, 25 Neb. 313, and *overruling* Giles *v.* Little, 104 U. S. 291, which *reversed* 2 McCrary (U. S.) 370.

Alabama. — Flinn *v.* Davis, 18 Ala. 132; McRee *v.* Means, 34 Ala. 349; Alford *v.* Alford, 56 Ala. 356; Adams *v.* Mason, 85 Ala. 452; Hood *v.* Bramlett, 105 Ala. 660; Smith *v.* Phillips, 131 Ala. 632.

Arkansas. — Byrne *v.* Weller, 61 Ark. 366.

Connecticut. — McKenzie's Appeal, 41 Conn. 607, 19 Am. Rep. 525; Mansfield *v.* Shelton, 67 Conn. 394, 52 Am. St. Rep. 285.

Georgia. — Cook *v.* Walker, 15 Ga. 457. But see Brown *v.* Brown, 97 Ga. 541.

Illinois. — Welsch *v.* Belleville Sav. Bank, 94 Ill. 191; Wolfer *v.* Hemmer, 144 Ill. 554; Ewing *v.* Barnes, 156 Ill. 61; Wilson *v.* Turner, 164 Ill. 398; Dalrymple *v.* Leach, 192 Ill. 52.

Indiana. — Fullenwider *v.* Watson, 113 Ind. 18; Mulvane *v.* Rude, 146 Ind. 476; Lumpkin *v.* Rodgers, 155 Ind. 285; Cameron *v.* Parish, 155 Ind. 336; Logan *v.* Sills, 28 Ind. App. 170; Benninghoff *v.* Evangelical Asso., 28 Ind. App. 374; Hammond *v.* Croxton, (Ind. App. 1901) 61 N. E. Rep. 596.

Iowa. — Rone *v.* Meier, 47 Iowa 607, 29 Am. Rep. 493; *In re* Burbank's Will, 69 Iowa 378; Halliday *v.* Stickler, 78 Iowa 388; Law *v.* Douglass, 107 Iowa 606. See also Bills *v.* Bills, 80 Iowa 269, 20 Am. St. Rep. 418; Hambel *v.* Hambel, 109 Iowa 459; Shaw *v.* Shaw, 115 Iowa 193.

Kentucky. — See Ball *v.* Hancock, 82 Ky. 107.

Maine. — Ramsdell *v.* Ramsdell, 21 Me. 288; Pickering *v.* Langdon, 22 Me. 413; Jones *v.* Bacon, 68 Me. 34, 28 Am. Rep. 1; Stuart *v.* Walker, 72 Me. 145, 39 Am. Rep. 311. But see Fuller *v.* Fuller, 84 Me. 475.

Maryland. — Combs *v.* Combs, 67 Md. 11, 1 Am. St. Rep. 359; Bentz *v.* Maryland Bible Soc., 86 Md. 115. See also Godwin *v.* Banks, 87 Md. 425.

Massachusetts. — Merrill *v.* Emery, 10 Pick. (Mass.) 507; Gifford *v.* Choate, 100 Mass. 343; Kelley *v.* Meins, 135 Mass. 234; Joslin *v.* Rhoades, 150 Mass. 301; Foster *v.* Smith, 156 Mass. 379; Knight *v.* Knight, 162 Mass. 460. See Burbank *v.* Whitney, 24 Pick. (Mass.) 146, 35 Am. Dec. 312; Hale *v.* Marsh, 100 Mass. 468; Hooper *v.* Bradbury, 133 Mass. 306; Collins *v.* Wickwire, 162 Mass. 144.

Michigan. — See Jones *v.* Jones, 25 Mich. 401; Gadd *v.* Stoner, 113 Mich. 689.

Missouri. — State *v.* Tolson, 73 Mo. 320; Wead *v.* Gray, 78 Mo. 59; Cornwell *v.* Orton, 126 Mo. 355; Cornwell *v.* Wulff, 148 Mo. 542; Walton *v.* Drumtra, 152 Mo. 489.

Nebraska. — See Little *v.* Giles, 25 Neb. 313. But *compare* Schimpf *v.* Rhodewald, 62 Neb. 110.

New Jersey. — Armstrong *v.* Kent, 21 N. J. L. 509, (*reversed* 6 N. J. Eq. 637); Annin *v.* Vandoren, 14 N. J. Eq. 135; Hoxsey *v.* Hoxsey, 37 N. J. Eq. 21; McClellan *v.* Larchar, 45 N. J. Eq. 17; Rodenfels *v.* Schumann, 45 N. J.

But the power of disposal must be absolute, and if the first taker's power of

Eq. 383; Wilson *v.* Wilson, 46 N. J. Eq. 321; Dodson *v.* Sevars, 52 N. J. Eq. 611.

New York. — Helmer *v.* Shoemaker, 22 Wend. (N. Y.) 137; Campbell *v.* Beaumont, 91 N. Y. 464; Van Horne *v.* Campbell, 100 N. Y. 287, 53 Am. Rep. 166; Banzer *v.* Banzer, 156 N. Y. 429, *affirming* 11 Misc. (N. Y.) 310, which *affirmed* 10 Misc. (N. Y.) 24; M'Donald *v.* Walgrove, 1 Sandf. Ch. (N. Y.) 274; Ferris *v.* Gibson, 4 Edw. (N. Y.) 710; Hill *v.* Hill, 4 Barb. (N. Y.) 419; Kelley *v.* Hogan, 71 N. Y. App. Div. 343. See also Trask *v.* Sturges, 170 N. Y. 482; Pinckney *v.* Pinckney, 1 Bradf. (N. Y.) 271; Gross *v.* Matthewson, 34 Misc. (N. Y.) 370.

North Carolina. — Newland *v.* Newland, 1 Jones L. (46 N. Car.) 463; Hall *v.* Robinson, 3 Jones Eq. (56 N. Car.) 348; McDaniel *v.* McDaniel, 5 Jones Eq. (58 N. Car.) 351; Billups *v.* Riddick, 8 Jones L. (53 N. Car.) 163; Bass *v.* Bass, 78 N. Car. 374.

Pennsylvania. — Smith *v.* Starr, 3 Whart. (Pa.) 62, 31 Am. Dec. 498; Second Reformed Presb. Church *v.* Disbrow, 52 Pa. St. 219; Karker's Appeal, 60 Pa. St. 141; Gillmer *v.* Daix, 141 Pa. St. 505; Fisher *v.* Wister, 154 Pa. St. 65; *In re* Heck's Estate, 170 Pa. St. 232. See also Jauretche *v.* Proctor, 48 Pa. St. 466.

Rhode Island. — Kimball's Will, 20 R. I. 619.

Tennessee. — Smith *v.* Bell, Mart. & Y. (Tenn.) 302, 17 Am. Dec. 798 [*overruling* Smith *v.* Bell, Peck. (Tenn.) 102]; David *v.* Bridgman, 2 Yerg (Tenn.) 557; Davis *v.* Richardson, 10 Yerg. (Tenn.) 290, 31 Am. Dec. 581; Thompson *v.* McKisick, 3 Humph. (Tenn.) 631; Booker *v.* Booker, 5 Humph. (Tenn.) 505; Williams *v.* Jones, 2 Swan (Tenn.) 620; Bean *v.* Myers, 1 Coldw. (Tenn.) 226; Troup *v.* Hart, 7 Baxt. (Tenn.) 188; Turner *v.* Durham, 12 Lea (Tenn.) 316; Bradley *v.* Carnes, 94 Tenn. 27, 45 Am. St. Rep. 696; Meacham *v.* Graham, 98 Tenn. 190. See also Hamilton *v.* Mound City Mut. L. Ins. Co., 3 Tenn. Ch. 124.

Vermont. — Stowell *v.* Hastings, 59 Vt. 497 (*stated* and *quoted* under BENEFIT, vol. 3, p. 1036); Chaplin *v.* Doty, 60 Vt. 712; Judevine *v.* Judevine, 61 Vt. 587.

Virginia. — Riddick *v.* Cohoon, 4 Rand. (Va.) 547; Madden *v.* Madden, 2 Leigh (Va.) 377; Melson *v.* Doe, 4 Leigh (Va.) 408; May *v.* Joynes, 20 Gratt. (Va.) 692; Missionary Soc. *v.* Calvert, 32 Gratt. (Va.) 357; Carr *v.* Effinger, 78 Va. 197; Cole *v.* Cole, 79 Va. 251; Hall *v.* Palmer, 87 Va. 354, 24 Am. St. Rep. 653; Bowen *v.* Bowen, 87 Va. 438, 24 Am. St. Rep. 664; Farish *v.* Wayman, 91 Va. 430; Davis *v.* Heppert, 96 Va. 775.

West Virginia. — Milhollen *v.* Rice, 13 W. Va. 510; Wilmoth *v.* Wilmoth, 34 W. Va. 426.

In some cases a mere devise of a fee simple by implication, that is, without words of inheritance, has been held to make void a limitation over, where the limitation was "of the remainder thereof," without more definite words indicating a power of disposal. Mitchell *v.* Morse, 77 Me. 423, 52 Am. Rep. 781.

So a bequest of money absolutely has been held to cut off a remainder thereon, the court saying that a fee simple in real or an absolute gift of personal property renders a gift over void. Loring *v.* Hayes, 86 Me. 351.

Equitable Estates in a Deed Through the Medium of Trustees are subject to this rule. Cornwell *v.* Wulff, 148 Mo. 542, *criticising* Straat *v.* Uhrig, 56 Me. 482. See also Fairfax *v.* Brown, 60 Md. 50; Walton *v.* Drumtra, 152 Mo. 489.

A Difference Between Personalty and Realty has sometimes been recognized. Patty *v.* Goolsby, 51 Ark. 61; Alford *v.* Alford, 56 Ala. 356. But see Van Horne *v.* Campbell, 100 N. Y. 306, and the preceding cases generally.

By Statute in Alabama the effect of such a devise is now established, where the limitation over is express; but where the limitation is implied the case is governed by the former rule and the first taker has an absolute estate. Hood *v.* Bramlett, 105 Ala. 660, *quoting* Code Ala. (1886), § 1850 (Civ. Code Ala. 1896, § 1046); Alford *v.* Alford, 56 Ala. 350; Adams *v.* Mason, 85 Ala. 452; Smith *v.* Phillips, 131 Ala. 632.

New York Statute. — The New York statute (Real Prop. Law 1896, c. 547, § 47; 1 Rev. Stat. N. Y. 725, § 32) which provides that "an expectant estate thus liable to be defeated shall not, on that ground, be adjudged void in its creation" has been held to change this rule. Greyston *v.* Clark, 41 Hun (N. Y.) 125. But it has been since held that the rule still exists where the power of disposal in the first taker is absolute, and that it is always so where that power may be exercised by will and the first estate is not expressly limited for life. Kelley *v.* Hogan, 71 N. Y. App. Div. 343.

In South Carolina the American rule seems never to have been adopted. In Andrews *v.* Roye, 12 Rich. L. (S. Car.) 536, the will, after a devise in general terms to the testator's two sons, proceeded: "Should either of my sons die unmarried and without issue, then whatever may remain of his moiety of my estate, I give and devise to the survivor. But should both of my said sons die unmarried and intestate," then over. It was held that the devise over took effect, the court considering first, that there was no absolute power of disposition in the sons implied from the phrase "whatever may remain;" and second, that the word "intestate" in the second devise, "may be well interpreted as conferring the power to dispose of the estate by will, but not of disposing of it by deed or otherwise," which was a mere partial restraint on alienation and therefore valid. In Moore *v.* Sanders, 15 S. Car. 440, 40 Am. Rep. 703, a limitation over after intestacy was held void on the specific ground of repugnancy, the executory estate being conditioned on an event whose happening subtracted from the preceding gift its very substance. See also Howze *v.* Barber, 29 S. Car. 470.

In Texas, it seems, this doctrine does not prevail. Lockridge *v.* McCommon, 90 Tex. 234.

Some Authorities Seem to Conflict with the generality of this rule and to establish a more logical construction of such wills, holding that even where the first estate cannot be reduced to one for life, the remainder over may be good, provided the intention to make the first taker's estate a conditional fee is clear. Wright *v.* Holcomb, 5 App. D. C. 76; Rogers

disposal is limited or conditional, it will not defeat a disposition over.[1]

Rule of Construction. — The rule of construction by which such seemingly contradictory clauses are to be tried is the familiar one that a clear gift will not be cut down or altered by any subsequent words, unless they show an equally clear intent;[2] but in many of these cases the courts have created the very repugnancy which the testator has been careful to avoid.[3]

v. Cobb, 89 Md. 165; Homer *v.* Shelton, 2 Met. (Mass.) 194; Hubbard *v.* Rawson, 4 Gray (Mass.) 242; Randolph *v.* Wright, 81 Va. 608; Johnson *v.* Citizens Bank, 83 Va. 63. See also *In re* Banks, 87 Md. 425; Shattuck *v.* Balcom, 170 Mass. 251; McDaniel *v.* McDaniel, 5 Jones Eq. (58 N. Car.) 353.

1. Power of Disposal Must Be Absolute or General. — Healy *v.* Eastlake, 152 Ill. 424, Ford *v.* Ticknor, 169 Mass. 276; Eaton *v.* Straw, 18 N. H. 320; Shapleigh *v.* Shapleigh, 69 N. H. 577; Theological Seminary *v.* Kellogg, 16 N. Y. 83; Hill *v.* Hill, 4 Barb. (N. Y.) 419; Hall *v.* Robinson, 3 Jones Eq. (56 N. Car.) 348; McDaniel *v.* McDaniel, 5 Jones Eq. (58 N. Car.) 351; Deadrick *v.* Armour, 10 Humph. (Tenn.) 588; Richardson *v.* Paige, 54 Vt. 373.

The Power of Disposal May Be Implied, but it cannot arise as a mere incident to the estate granted. Brown *v.* Hunt, 12 Heisk. (Tenn.) 404; Read *v.* Watkins, 11 Lea (Tenn.) 158; Bradley *v.* Carnes, 94 Tenn. 27, 45 Am. St. Rep. 696. *Compare* Lambe *v.* Drayton, 182 Ill. 310; Fenstermaker *v.* Holman (Ind. App. 1901) 61 N. E. Rep. 599; Fisher *v.* Weston, 154 Pa. St. 65, which hold that it may be implied from the estate granted.

Where the Power of Disposal Is Conditioned upon some event or purpose, as for the support of the first taker, it will not enlarge into a fee the estate to which it is attached and which is given in general words, and the limitation over of what remains is valid.

Maine. — Ramsdell *v.* Ramsdell, 21 Me. 288; Stuart *v.* Walker, 72 Me. 145, 39 Am. Rep. 311; Copeland *v.* Barron, 72 Me. 206; Woodman *v.* Woodman, 89 Me. 128.

Massachusetts. — Stevens *v.* Winship, 1 Pick. (Mass.) 318, 11 Am. Dec. 178; Larned *v.* Bridge, 17 Pick. (Mass.) 339; Paine *v.* Barnes, 100 Mass. 470.

Michigan. — Gadd *v.* Stoner, 113 Mich. 689.

New York. — Terry *v.* Wiggins, 47 N. Y. 512, *affirming* 2 Lans. (N. Y.) 272; Smith *v.* Van Ostrand, 64 N. Y. 278.

Pennsylvania. — See *In re* Geist's Estate, 193 Pa. St. 398.

Tennessee. — Pillow *v.* Rye, 1 Swan (Tenn.) 185; Harris *v.* Alderson, 4 Sneed (Tenn.) 250; Downing *v.* Johnson, 5 Coldw. (Tenn.) 229; McGavock *v.* Pugsley, 1 Tenn. Ch. 410, 12 Heisk. (Tenn.) 689; Pool *v.* Pool, 10 Lea (Tenn.) 486.

Vermont. — See Chaplin *v.* Doty, 60 Vt. 712; Judevine *v.* Judevine, 61 Vt. 595.

West Virginia. — See Cresap *v.* Cresap, 34 W. Va. 310.

Wisconsin. — Larsen *v.* Johnson, 78 Wis. 300, 23 Am. St. Rep. 404; Post *v.* Campbell, 110 Wis. 378.

A Devise Over of Lands Undisposed of by the First Taker During Life has been held void. Melson *v.* Doe, 4 Leigh (Va.) 408. But *compare* Rogers *v.* Cobb, 89 Md. 165; Hatfield *v.* Sohier, 114 Mass. 48; Hinkle's Appeal, 116 Pa. St. 490; Henninger *v.* Henninger, 202 Pa. St. 207.

A Power to Dispose by Will of Property Given has been held to nullify a devise over. Cook *v.* Couch, 100 Mo. 29; Karker's Appeal, 60 Pa. St. 141. But *compare* Hall *v.* Robinson, 3 Jones Eq. (56 N. Car.) 348.

Where the Power of Disposal Is Limited to the Disposal of a Life Estate, a disposition over is effective Patty *v.* Goolsby, 51 Ark. 61; Douglass *v.* Sharp, 52 Ark. 113. See also Smith *v.* Bell, 6 Pet. (U. S.) 68; Brant *v.* Virginia Coal, etc., Co., 93 U. S. 326; Englerth *v.* Kellar, 50 W. Va. 266.

Where the First Taker May Dispose of Property Not Only for His Own Benefit but for Another or others, such power is not absolute, and a limitation over of what remains may take effect. Bowen *v.* Bowen, 87 Va. 438, 24 Am. St. Rep. 664, *explaining* Johns *v.* Johns, 86 Va. 333, and Miller *v.* Potterfield, 86 Va. 876, 19 Am. St. Rep. 919. See also Davis *v.* Heppert, 96 Va. 777.

Alabama Statute — When Power of Disposal Absolute. — Hood *v.* Bramlett, 105 Ala. 660, *citing* Code Ala. (1886), § 1853 (Civ. Code Ala. 1896, § 1049).

2. Rule of Construction. — Randfield *v.* Randfield, 8 H. L. Cas. 225, *modifying* 2 De G. & J. 57; Thornhill *v.* Hall, 2 Cl. & F. 22; Washbon *v.* Cope, 144 N. Y. 287; Thompson *v.* Hill, 87 Hun (N. Y.) 111, *affirmed* 155 N. Y. 677; Matter of Peters, 69 N. Y. App. Div. 465; Collins *v.* Collins, 40 Ohio St. 364; *In re* Heck's Estate, 170 Pa. St. 232. See also Trustees Cent. M. E. Church *v.* Harris, 62 Conn. 93. See generally the title WILLS.

A Clause in Precatory Language following an absolute gift will not cut down such gift. Bills *v.* Bills, 80 Iowa 270, 20 Am. St. Rep. 418. See also the title PRECATORY TRUSTS, vol. 22, p. 1167.

3. Construction Harmonizing Provisions Adopted if Possible. — The intent of the testator is to be collected from the whole will, and effect given to every provision if possible. Where there is an apparent repugnancy, such construction will be adopted, if possible, as will harmonize and give effect to the apparently repugnant condition, and to do this the court may, if necessary, restrict or decrease the prior devise. Healy *v.* Eastlake, 152 Ill. 424, where this passage from 2 Jarman Wills 44 *et seq.* is approved: "It is obvious that a will can seldom be rendered absolutely void for mere repugnancy. For instance, if a testator in one part of his will gives to a person an estate of inheritance in lands, * * * and in subsequent passages shows that he means the devisee or legatee to take a life interest only, the prior gift is restricted accordingly." See also Smith *v.* Bell, 6 Pet. (U. S.) 68.

See generally the title WILLS.

(d) **Limitation After Life Estate with Power of Disposal.** — A limitation after a life estate contingent upon alienation by the life tenant is valid,[1] and a life estate may be given with the power of disposal or appointment superadded, and an executory limitation in default thereof will be good.[2] But while the principle here announced is theoretically distinct from that which operates where the whole estate is given to the first taker, the cases turn on the wording of the particular will, and no clear distinction between the two classes seems deducible.[3]

1. See *supra*, this section, *Classes of Executory Limitations Considered — Executory Limitations of Real Property — In Derogation of Life Estate*, note, and the title RESTRAINTS ON ALIENATION, *post*.

2. Gift for Life with Power of Appointment or Disposal — *England.* — Reid *v.* Shergold, 10 Ves. Jr. 370; Crossling *v.* Crossling, 2 Cox Ch. 396; *In re* Stringer, 6 Ch. D. 1.

United States. — Ward *v.* Amory, 1 Curt. (U. S.) 419.

Alabama. — Denson *v.* Mitchell. 26 Ala. 360.

Connecticut. — Peckham *v.* Lego, 57 Conn. 553, 14 Am. St. Rep. 130.

Georgia. — Cook *v.* Walker, 15 Ga. 457; Wetter *v.* Walker, 62 Ga. 142. See also Brown *v.* Brown, 97 Ga. 541.

Illinois. — Fairman *v.* Beal, 14 Ill. 244; Markillie *v.* Ragland, 77 Ill. 98; Welsch *v.* Belleville Sav. Bank, 94 Ill. 191; Skinner *v.* McDowell, 169 Ill. 365, 61 Am. St. Rep. 185; Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144; Turner *v.* Hause, 199 Ill. 464.

Indiana. — Dunning *v.* Vandusen, 47 Ind. 423, 17 Am. Rep. 709; Mulvane *v.* Rude, 146 Ind. 483; Rusk *v.* Zuck, 147 Ind. 388.

Iowa. — Jordan *v.* Woodin, 93 Iowa 453; Iimas *v.* Neidt, 101 Iowa 348. See also Stivers *v.* Gardner, 88 Iowa 307.

Kentucky. — McCullough *v.* Anderson, 90 Ky. 126.

Maine — Pickering *v.* Langdon, 22 Me. 413; Fox *v.* Rumery, 68 Me. 121; Hall *v.* Preble, 68 Me. 100; Hall *v.* Otis, 71 Me. 326.

Maryland. — Benesch *v.* Clark, 49 Md. 497; *In re* Banks, 87 Md. 425; Chew *v.* Tome, 93 Md. 255.

Massachusetts. — Kelley *v.* Meins, 135 Mass. 234; Collins *v.* Wickwire, 162 Mass. 143.

Michigan — Matter of Reid, 80 Mich. 228; Brendel *v.* Hansen, 127 Mich. 396.

Minnesota. — Matter of Oertle, 34 Minn. 173, 57 Am. Rep. 48.

Mississippi. — Rail *v.* Dotson, 14 Smed. & M. (Miss.) 176; Andrews *v.* Brumfield, 32 Miss. 107.

Nebraska. — Schimpf *v.* Rhodewald, 62 Neb. 105, *explaining* Little *v.* Giles, 25 Neb. 313.

New Hampshire. — Burleigh *v.* Clough, 52 N. H. 267, 13 Am. Rep. 23; Shapleigh *v.* Shapleigh, 69 N. H. 577. See also Eaton *v.* Straw, 18 N. H. 320.

New Jersey. — Borden *v.* Downey, 35 N. J. L. 74, 36 N. J. L. 460; Kent *v.* Armstrong, 6 N. J. Eq. 637, *reversing* 21 N. J. L. 509; Pratt *v.* Douglas, 38 N. J. Eq. 516; Logue *v.* Bateman, 43 N. J. Eq. 434; Wooster *v.* Cooper, 53 N. J. Eq. 682; Dubois *v.* Van Valen, 61 N. J. Eq. 331. See also Wooster *v.* Fitzgerald, 61 N. J. L. 368.

North Carolina. — Patrick *v.* Morehead, 85 N. Car. 62, 39 Am. Rep. 684; Long *v.* Waldraven, 113 N. Car. 337. See also Crawford *v.* Wearn, 115 N. Car. 540.

Pennsylvania. — Trout *v.* Rominger, 198 Pa. St. 91.

South Carolina. — Bentham *v.* Smith, Cheves Eq. (S. Car.) 33, 34 Am. Dec. 599; Pulliam *v.* Byrd, 2 Strobh. Eq. (S. Car.) 134.

Tennessee, —Waller *v.* Martin, 106 Tenn. 341.

Vermont. — McCloskey *v.* Gleason, 56 Vt. 264.

West Virginia. — Milhollen *v.* Rice, 13 W. Va. 524; Cresap *v.* Cresap, 34 W. Va. 310.

See also the title POWERS, vol. 22, pp. 1096, 1144.

3. Difficulty in Applying Rules. — Kelley *v.* Meins, 135 Mass. 234.

Estate for Life in Express Terms. — Where the first estate is for life in express terms, a general or absolute power of disposition will not enlarge it into a fee, and a limitation over is effective, though it is only of what remains undisposed of, and this applies to both real and personal property.

Illinois. — Henderson *v.* Blackburn, 104 Ill. 227, 44 Am. Rep. 780.

Indiana. — Jenkins *v.* Compton, 123 Ind. 117; Mulvane *v.* Rude, 146 Ind. 476.

Maine. — Stuart *v.* Walker, 72 Me. 145, 39 Am. Rep. 311; Birmingham *v.* Lesan, 76 Me. 482, 77 Me. 494; Gorham *v.* Billings, 77 Me. 386; Whittemore *v.* Russell, 80 Me. 297, 6 Am. St. Rep. 200; Richardson *v.* Richardson, 80 Me. 585; Hatch *v.* Caine, 86 Me. 282; Cushman *v.* Goodwin, 95 Me. 353.

Missouri. — Gregory *v.* Cowgill, 19 Mo. 415; Bryant *v.* Christian, 58 Mo. 98; Reinders *v.* Koppelmann, 68 Mo. 482, 30 Am. Rep. 802; Evans *v.* Folks, 135 Mo. 397.

Pennsylvania. — Trout *v.* Rominger, 198 Pa. St. 91.

See also Lewis *v.* Palmer, 46 Conn. 454; Glover *v.* Stillson, 56 Conn. 316; Security Co. *v.* Pratt, 65 Conn. 161; Mansfield *v.* Shelton, 67 Conn. 390, 52 Am. St. Rep. 285; *In re* Banks, 87 Md. 425.

But Limitations Have Been Held Void After Express Life Estates, where the limitation over has been of what remained at the death of the testator. Second Reformed Presb. Church *v.* Disbrow, 52 Pa. St. 219; David *v.* Bridgman, 2 Yerg. (Tenn.) 557; May *v.* Joynes, 20 Gratt. (Va.) 692; Bowen *v.* Bowen, 87 Va. 438, 24 Am. St. Rep. 664; Farish *v.* Wayman, 91 Va. 430; Davis *v.* Heppert, 96 Va. 775. But where after a life estate there is a limitation over in remainder of the property, "if any there be," these words will not enlarge the life estate, if, construing the whole will, any other meaning can be given to them. Owens *v.* Owens, 64 N. Y. App. Div. 212.

The following cases seem to hold that an express life estate cannot be enlarged to a fee by

(3) *Remoteness — Rule Against Perpetuities.* — The rule against perpetuities applies with full force to executory limitations,[1] with the exception of certain executory interests not within the evil against which the rule is directed.[2]

b. First Taker Cannot Prevent Vesting When Contingency Happens. — Subject to an exception in the case of executory limitations after an estate tail,[3] no act on the part of the person after whose estate an executory interest is limited on a contingency can so change the nature of the estate as to prevent the executory limitation taking effect on the happening of the contingency.[4] This rule should be sharply distinguished from cases where

a power of disposal so as to defeat a gift over. Denson *v.* Mitchell, 26 Ala. 360; Welsch *v.* Belleville Sav. Bank, 94 Ill. 191; Rhode Island Hospital Trust Co. *v.* Commercial Nat. Bank, 14 R. I. 625.

But the Life Estate May Be Implied, where such an intent may be gathered from the whole instrument, and the limitation over will take effect. Stuart *v.* Walker, 72 Me. 145, 39 Am. Rep. 311; Chiles *v.* Bartleson, 21 Mo. 344; Carr *v.* Dings, 58 Mo. 400; Harbison *v.* James, 90 Mo. 411; Munro *v.* Collins, 95 Mo. 33; Lewis *v.* Pitman, 101 Mo. 281; Walton *v.* Drumtra, 152 Mo. 489, *overruling* Cornwell *v.* Wulff, 148 Mo. 542. See also Miller *v.* Potterfield, 86 Va. 876, 19 Am St Rep. 919.

A Devise Over of What May Remain or be left in a will of personalty and realty has been applied to the personalty only, defining the remainder and interpreted as not enlarging a preceding life estate in the realty. Fox's Appeal, 99 Pa. St. 382; Follweiler's Appeal, 102 Pa. St 581; Cox *v.* Sims, 125 Pa. St. 522.

A Statute in Alabama settles the present law. Hood *v.* Bramlett, 105 Ala. 660, *quoting* Code Ala. (1836), §§ 1851, 1852 (Civ. Code Ala. 1896, §§ 1047, 1048).

1. See the title Perpetuities, etc., vol. 22, p. 704, and *passim*. See also *supra*, this section, *Classes of Executory Limitations Considered — Executory Limitations of Real Property — After a Fee*, note; *After Limitations Which in Realty Would Create Estates Tail*, note.

Possibility on Possibility. — The rule against limiting a possibility on a possibility, which applies in the case of contingent remainders (see *supra*, this title, *Remainders — Contingent Remainders — Nature of Contingency*), has no application to personal property. *In re* Bowles, (1902) 2 Ch. 650.

2. Limitations After an Estate Tail by Shifting Use or executory devise are not subject to the rule against perpetuities, since they may at any time be barred by a tenant in tail by common recovery or its statutory equivalent. Taylor *v.* Taylor, 63 Pa. St. 481, 3 Am. Rep. 565. See also the next paragraph of text *infra*, and the title Perpetuities, etc., vol. 22, p. 705.

3. Tenant in Tail May Bar Executory Limitations Over. — Page *v.* Hayward, 2 Salk. 570; Doe *v.* Savile, 3 Ad. & El. 2, 899, 30 E. C. L. 12, 261, 42 Rev. Rep. 293; Milbank *v.* Vane, (1893) 3 Ch. 79; Kent *v.* Armstrong, 6 N. J. Eq. 647; Taylor *v.* Taylor, 63 Pa. St. 481, 3 Am. Rep. 565; Seibert *v.* Wise, 70 Pa. St. 147; Fearne Cont. Rem. 424, 428, and Butler's note (m) 522. *Contra*, Bells *v.* Gillespie, 5 Rand. (Va.) 276.

Where an estate is limited to the use of A in fee simple, subject to a springing use, no act of A can destroy it; but where an estate tail is limited and a secondary or shifting use is limited upon it, the tenant in tail may by recovery bar the limitation over. 1 Sanders Uses and Trusts (4th ed.) 153.

4. Alienation of First Taker Cannot Defeat Estate Over. — Kent *v.* Armstrong, 6 N J. Eq. 647, pointing out the distinction sometimes overlooked between the cases stated in this and the subsequent sentence of the text.

The general rule is that an executory devise cannot be prevented or destroyed by any alteration whatever in the estate out of which or after which it is limited. Southerland *v.* Cox, 3 Dev. L. (14 N. Car.) 397.

Executory Limitation After Fee Simple in Realty or Complete Ownership in Personalty. — The holder of an estate in fee in realty or of the entire property in personalty cannot defeat a limitation over by any species of alienation. Pells *v.* Brown, Cro. Jac. 590; Holcomb *v.* Wright, 5 App. D. C. 76; Couch *v.* Gorham, 1 Conn. 36; St. John *v.* Dann, 66 Conn. 402; May *v.* Hill, 5 Litt. (Ky.) 307; Nunnally *v.* White, 3 Met. (Ky.) 584; Hilleary *v.* Hilleary, 26 Md. 274; Kent *v.* Armstrong, 6 N. J. Eq. 647; Moffat *v.* Strong, 10 Johns. (N. Y.) 12; McDaniel *v.* McDaniel, 5 Jones Eq. (58 N. Car.) 353; Myers *v.* Craig, Busb. L. (44 N. Car.) 169 [*overruling* Spruill *v.* Leary, 13 Ired. L. (35 N. Car.) 225, 408, and *distinguishing* Flynn *v.* Williams, 1 Ired. L. (23 N. Car.) 509]; Andrews *v.* Roye, 12 Rich. L. (S. Car.) 541; Randall *v.* Josselyn, 59 Vt. 565; Purefoy *v.* Rogers, 3 Saund. 388*d*; Fearne Cont. Rem. 428; Sanders Uses and Trusts (4th ed.) 153. See also Smith *v.* Hunter, 23 Ind. 580; Brattle Square Church *v.* Grant, 3 Gray (Mass.) 152, 63 Am. Dec. 725.

Instances of the Application of this rule may be found *supra*, this section, *Executory Limitations of Chattel Interests — Nature of Remainderman's Interest and Remedies.*

A Sale on Execution will not defeat an executory limitation over. Southerland *v.* Cox, 3 Dev. L. (14 N. Car.) 394.

Subsequent Executory Interests Carved Out of an Estate pur Autre Vie cannot be defeated by the conveyance of the prior taker of a *quasi* estate in fee simple therein. *In re* Barber, 18 Ch. D 624.

The Alienee of the First Taker takes an estate subject to be defeated on the happening of the contingency on which the estate would have ceased had it remained in the first taker. Parker *v.* Parker, 5 Met. (Mass.) 134; Downing *v.* Wherrin, 19 N. H. 9, 49 Am. Dec. 139.

the estate is so limited that it is in the power of the first taker to prevent the contingency happening and thus, in a sense, to defeat the gift over.[1]

c. NOT AFFECTED BY MERGER OR SURRENDER. — Where an executory fee descends to the person to whom a prior defeasible fee is limited, the former estate is not merged.[2] If, however, the doctrine of merger is applied, it is not allowed to affect the executory interest over; so, where a life estate is carved out of a term for years, with a limitation over to another, a subsequent union of the freehold or inheritance with the interest of the first devisee will not extinguish the interest of the ulterior devisee, although merger may operate during the estate of the first taker.[3] Again, in the case of the surrender by the trustee of a term in trust to the reversioner, the interest of persons to whose use the term was limited will not be affected, for equity will keep the interests apart and not permit the merger which takes place at law.[4]

d. EFFECT OF FAILURE OF PRIOR GIFT ON GIFT OVER — (1) *General Principles.* — Where property is limited to A for life with remainder over to B, and the only contingency on which the gift over depends is B outliving A, the remainder takes effect though A dies in the lifetime of the testator, for by A's death only his life estate lapses.[5] But where the gift over is to take effect upon a conditional limitation, so that upon the happening or not happening of some event the first gift is effective and the subsequent gift can never take effect, the question arises whether the gift over is defeated by failure of the prior gift to a person or class, either by the failure of such a person or class to come into being or by his or their death in the testator's lifetime. Whether the subsequent gift fails or not is to be determined by the intent which appears in the instrument creating the limitation.[6] If the actual

So a purchaser on execution sale. Stone *v.* Franklin, 89 Ga. 196. See also the title EXECUTIONS, vol. 11, p. 631.

The Statute of Limitations does not begin to run against an executory devise until the happening of the contingency which vests the estate in him, although the alienee of the first taker may have been in possession before. Nunnally *v.* White, 3 Met. (Ky.) 584.

Consent of All Parties Who May Be Interested. — Where all persons who may be interested in the executory devise are ascertainable and consent to and join in the conveyance, the conveyance will give a good title. Pells *v.* Brown, Cro. Jac. 590; Randall *v.* Josselyn, 59 Vt. 566. See also Stokes *v.* Van Wyck, 83 Va. 724.

1. See *supra*, this subsection, *Validity of Executory Limitations — Effect of Power in First Taker to Defeat Executory Limitation.*

For a case failing to observe this distinction, see Fisher *v.* Wister, 154 Pa. St. 65.

2. Executory Devise Not Merged in Prior Fee. — Goodtitle *v.* White, 15 East 174; Goodtitle *v.* White, 2 B. & P. N. R. 383; Doe *v.* Hutton, 3 B. & P. 656; Goodright *v.* Searle, 2 Wils. C. Pl. 29; Barnitz *v.* Casey, 7 Cranch (U. S.) 456. *Compare* Kean *v.* Roe, 2 Harr. (Del.) 103, 29 Am. Dec. 336.

In the *English* cases the testator limited an estate to his child A, and on the event of the death of A before twenty-one, to his wife, the child's parent. The mother died first, then the child died under twenty-one, and it was held that the estate went to the child's heirs *ex parte materna* to the exclusion of heirs *ex parte paterna*, who in the event of merger would have succeeded.

Of these cases, Mr. Preston observes: "Although the estate and the executory interest are distinct in the same person, yet any alienation by the owner of these two interests, either by demise for years or in fee, would, beyond all doubt, be binding on both these interests." 3 Prest. Convey. (3d ed.) 496.

3. Remainder in Term of Years After Life Estate Not Extinguished. — Fearne Cont. Rem. 421; 3 Prest. Convey. (3d ed.) 497, *citing* and *commenting* on Lee *v.* Lee, Moo. K. B. 269, *sub nom.* Lowe *v.* Lowe, Cro. Eliz. 128, *sub nom.* Alford *v.* Lea, Leon. (pt. ii.) 110; Hammington *v.* Rudyard, *cited* in Lampet's Case, 10 Coke 52*a*; Cotton *v.* Heath, Pollex 26.

4. Surrender Does Not Affect Executory Devise. — Howard *v.* Norfolk, Ch. Cas. (pt. iii.) 15, (*per* Montague, C. B.), and 48 (*per* Lord Nottingham). See also 3 Prest. Convey. (3d ed.) 326, 493.

5. See Sauter *v.* Muller, 4 Dem. (N. Y.) 389, and the title LEGACIES AND DEVISES, vol. 18, p. 752.

Where an Intermediate Gift Fails by Lapse gifts over take effect. Glover *v.* Condell, 163 Ill. 566.

6. The Problem in These Cases Is whether, when the testator has provided for certain contingencies only and contingencies omitted from the testator's view have actually happened, the contingencies which have happened can be regarded as provided for in the will. In other words, whether a plain intent can be implied covering the case which has happened. See Mackinnon *v.* Sewell, 2 Myl. & K. 202. But if the testator has expressly provided for the various contingencies, the dispositions of the will must govern and the cases concerning implied intent do not apply. Swane *v.* Smith, 1 Sim. & St. 56.

Where the Event on Which the Gift Over Is Limited Is Made a Condition of such gift taking

events which have happened include not only the very contingency in which the limitation over was to take effect, but something more as well, *a fortiori* the gift over will take effect [1] But if all the events have happened upon which the first taker's estate is contingent, so that his estate is absolute and indefeasible in case he survives the testator, and he dies in the testator's lifetime, the gift over fails solely by lapse or something analogous to lapse.[2] So if a prior gift, upon the determination of which on a particular contingency a

effect, it fails if the condition becomes impossible in the testator's lifetime. So where a will contained a devise to a daughter for life and, in case she survived her husband, remainder over, her death before her husband was held to defeat the remainder, the remainder being held to be on condition that she survived her husband. Doe *v.* Shipphard, 1 Dougl. 75. See also Davis *v.* Norton, 2 P. Wms. 390; Wing *v.* Angrave, 8 H. L. Cas. 183.

1. Theo. Wills (4th ed.) 526 *et seq.*; Warren *v.* Rudall. 4 Kay & J. 603.

Where the Prior Gift Fails ab Initio such failure includes the particular failure on which the subsequent gift is contingent, and so the latter gift takes effect. Frogmorton *v.* Holyday, 3 Burr. 1623; Bullock *v.* Bennett, 7 De G. M. & G. 285, 31 Eng. L. & Eq. 463; Pennington *v.* Pennington, 70 Md. 418; Pinkham *v.* Blair, 57 N. H. 226; McLean *v.* Freeman, 70 N. Y. 81, *affirming* 9 Hun (N. Y.) 246; Mathis *v.* Hammond, 6 Rich. Eq. (S. Car.) 121. And see Sauter *v.* Muller, 4 Dem. (N. Y.) 389. See also *supra*, this section, *After Limitations Which in Realty Would Create Estates Tail*, par. *Where Succession Estates Tail in Chattels Are Limited to Unborn Persons*, note, p. 443.

So where the gift is to A, a person not in being, and if A dies under twenty-one then over, and A (not only does not reach twenty-one but) never comes into being, the gift over takes effect *a fortiori*. Jones *v.* Westcomb, Prec. Ch. 316, 1 Eq. Cas. Abr. 245, par. 10, Gilb. Eq. 74; Fonereau *v.* Fonereau, 3 Atk. 315; Meadows *v.* Parry, 1 Ves. & B. 124. See also Foster *v.* Cook, 3 Bro. C. C. 347; Statham *v.* Bell, 1 Cowp. 40. The same will in question in Jones *v.* Westcomb, Gilb. Eq. 74, was before the King's Bench, which twice decided the question as above. Andrews *v.* Fulham, 2 Stra. 1092; Gulliver *v.* Wickett, 1 Wils. C. Pl. 105. A contrary decision was reached in the Common Pleas. Roe *v.* Wickett, Willes 303.

Where the devise or bequest is to A and if he does not attain twenty-one over, if A dies in the testator's lifetime under twenty-one the gift over takes effect. Darrel *v.* Molesworth, 2 Vern. 378; Haughton *v.* Harrison, 2 Atk. 329.

Where the devise was to A and, if he does not do certain acts in a given time, then over, and A dies, living the testator, the gift over takes effect. Avelyn *v.* Ward, 1 Ves. 420; Doe *v.* Scott, 3 M. & S. 300; Den *v.* Hance, 11 N. J. L. 244.

If property is given to one but if he die without issue, then over, upon the death of the first taker in the testator's lifetime without children, the gift over takes effect. Downing *v.* Marshall, 23 N. Y. 366, 80 Am. Dec. 290; McLean *v.* Freeman, 70 N. Y. 81; Wager *v.* Wager, 96 N. Y. 164; Matter of Miller, 161 N. Y. 71. See also Williams *v.* Jones, 166 N.Y. 522.

Where the property was to go over in case the testator should have "but one child," the clause was read to mean "not more than one," and the testator not having had any child, the gift over took effect. Murray *v.* Jones, 2 Ves. & B. 313.

Where the ulterior gift is contingent on one among the children of A who survive her attaining twenty-one, and A has one child who attains twenty-one and dies in A's lifetime, the gift takes effect, for the prior gift has failed *ab initio* by the failure of the class on which it was contingent to come into being. Mackinnon *v.* Sewell, 2 Myl. & K. 202; Wilson *v.* Mount, 2 Beav. 397.

If a Gift Be to Several with Survivorship in case of the death of one under twenty-one, the survivors shall have the portion of one who dies under twenty-one in the testator's lifetime. Willing *v.* Baine, 3 P. Wms. 113; Humphreys *v.* Howes, 1 Russ. & M. 639; Walker *v.* Main, 1 Jac. & W. 1; Rackham *v.* De La Mare, 2 De G. J. & S. 74; Norris *v.* Beyea, 13 N. Y. 273. See also *Re* Green, 1 Drew. & Sm. 68, and the title LEGACIES AND DEVISES, vol. 18, pp. 751, 752.

Election — Dissent of Widow. — Generally the dissent of a widow from provisions in her husband's will in lieu of dower accelerates ulterior limitations of the property devised or bequeathed to her. See the title EQUITABLE ELECTION, vol. 11, p. 118.

2. Where All Contingencies Have Happened in Testator's Lifetime. — Brookman *v.* Smith, L. R. 6 Exch. 291, L. R. 7 Exch. 271.

Thus, in case of a gift to A on some contingency, where the contingency happens or is performed during the testator's lifetime and A then dies before the testator, the gift over fails; for the circumstances which have happened cannot be said to include the contingency on which the gift over was to vest, and the court will not undertake to guess at the testator's intent in the actual case. Doo *v.* Brabant, 4 T. R 706, 3 Bro. C. C. 393; Humberstone *v.* Stanton, 1 Ves. & B. 385; Mathis *v.* Hammond, 9 Rich. Eq. (S. Car.) 137. See also Calthorpe *v.* Gough, 4 T. R. 707, note, 3 Bro. C. C. 395, note; Miller *v.* Faure, 1 Ves. 85; Williams *v.* Chitty, 3 Ves. Jr. 545.

In Tarbuck *v.* Tarbuck, 4 L. J. Ch. N. S. 129, 41 Rev. Rep. 204, a testator devised to his son an estate for life with remainder to his children in fee, remainders over in the event of his leaving no children living at his death. The son had a child which outlived his father, but died in the testator's lifetime. It was held that the remainders over failed, and that there was an intestacy. If the son had survived the testator the devise over could not have taken effect, under the circumstances which happened, and the situation of the parties was not altered by his death in the testator's lifetime.

gift over is limited, once vests, its determination in any other mode than upon the contingency indicated will not give effect to the gift over, and such gift fails.[1]

The Principle on Which the Gift Over Takes Effect Has Been Thus Stated: Where a devise is made after a preceding executory or conditional limitation, or is limited to take effect on a condition annexed to any preceding estate, if that precedent or contingent estate should never arise or take effect, the remainder over will nevertheless take place, the first estate being considered only as a preceding limitation, and not as a preceding condition to give effect to a subsequent limitation.[2]

(2) *Prior Interest Illegal.* — The same rule applies and a contingent devise over takes effect where the first devise is void as against the statutes of mortmain, though the contingency did not happen literally as provided.[3]

(3) *Prior Interest Revoked or Renounced.* — Where the previous gift is revoked or renounced the same rule applies and the gift is accelerated.[4]

(4) *Failure by Death of First Taker When Gift Over Would Be Void for Repugnancy.* — Where the gift over would be void because a limitation after an absolute gift on not making a particular disposition of the property, if the first taker dies in the testator's lifetime, it appears unsettled whether the gift over takes effect or not.[5]

(5) *Alternative Limitation When Gift Over Void for Remoteness.* — Where the gift over is upon a contingency obnoxious to the rule against perpetuities, and it would therefore be void if the contingency provided for should happen, it makes no difference though the contingency does not happen and the prior estate fails *ab initio* — the gift over does not take effect.[6] But where the testator expresses the gift over to be on two contingencies which are in their nature divisible, one of them void for remoteness and the other the entire failure of the preceding estate *ab initio*, the gift over will take effect in case the latter contingency happens, the court separating the two events in accordance with the expressions of the will.[7]

1. Failure of Prior Gift After Vesting. — Amherst *v.* Lytton, 5 Bro. P. C. (Toml. ed.) 254, *sub nom.* Amhurst *v.* Darnelly, 8 Vin. Abr. 221; 1 Jarman Wills (5th ed.) 802.

An Apparent Exception is pointed out by Mr. Jarman (*ubi supra*) where a devise is made to a widow for life if she shall so long continue a widow, and if she should marry, then over. Here, though the estate terminates by her death the gift over takes effect.

2. Fearne's Statement of Rule. — Fearne Cont. Rem. 508; Scatterwood *v.* Edge, 1 Salk. 229; Pennington *v.* Pennington, 70 Md. 436; Den *v.* Hance, 11 N. J. L. 244; Norris *v.* Beyea, 13 N. Y. 287; Williams *v.* Jones, 166 N. Y. 537. See also Andrews *v.* Fulham, 2 Stra. 1092; Gulliver *v.* Wickett, 1 Wils. C. Pl. 105.

3. Prior Gift Void under Statute of Mortmain. — Warren *v.* Rudall, 4 Kay & J. 603, *affirmed sub nom.* Hall *v.* Warren, 9 H. L. Cas. 420. In this case Atty.-Gen. *v.* Hodgson, 15 Sim. 146, and Philpott *v.* St. George's Hospital, 21 Beav. 134, *contra*, were *distinguished* or *overruled*.

Prior Gift to Unborn Illegitimate Child. — But where a gift is limited to arise only in case the person to whom the prior estate is limited dies under twenty-one and the prior estate fails for illegality (being to an illegitimate unborn son), but the person to whom it was limited has attained the age of twenty-one, the gift over fails and the estate reverts, the gift over being to take effect only upon a contingency which has not arisen. Lomas *v.* Wright, 2 Myl. & K. 769.

4. Revoked Devise or Bequest. — Lainson *v.* Lainson, 18 Beav. 1; Eavestaff *v.* Austin, 19 Beav. 591. See also 1 Jarman Wills (5th ed.) 575, 576.

Prior Gift Renounced. — See the titles EQUITABLE ELECTION, vol. 11, p. 118; LEGACIES AND DEVISES, vol. 18, p. 766.

5. Gift Over Held to Be Void. — Hughes *v.* Ellis, 20 Beav. 193; Greated *v.* Greated, 26 Beav. 621. In *In re* Stringer, 6 Ch. D. 15, James, L. J., doubted these cases, saying that he was not sure that the doctrine of repugnancy ought to be applied where there was simply the death of the person creating a lapse.

Gift Over Held to Be Valid. — In Burbank *v.* Whitney, 24 Pick. (Mass.) 146, 35 Am. Dec. 312, such a gift over was held to be valid, and the court said that while, if the first taker had outlived the testator it could not have taken effect, yet "as she did not survive the testator, the estate never vested in her; and this circumstance, we think, lets in the ulterior bequest." See also Eaton *v.* Straw, 18 N. H. 320.

6. Gift Over Void for Remoteness. — Leake *v.* Robinson, 2 Meriv. 363. See also the title PERPETUITIES, etc., vol. 22, p. 723.

7. Gift Over on Separable Contingencies. — Evers *v.* Challis, 7 H. L. Cas. 531, *reversing* Challis *v.* Doe, 18 Q. B. 231, 83 E. C. L. 231,

(6) *Acceleration.* — Where the prior gift fails by reason of the death of the prior devisee before the period of vesting, the gift over in general takes effect, if at all, at the time when the preceding estate would have taken effect if it had not been out of the way.[1] But the language of the will may point out some future time for the vesting, and when this is clearly the case, such a direction will be observed.[2]

Quasi Remainders Accelerated. — The technical doctrine of acceleration applies in cases of *quasi* remainders in personalty as well as in cases of remainders.[3]

e. EFFECT OF FAILURE OF GIFT OVER ON PRIOR GIFT. — Where a fee or absolute interest is liable to be defeated on a contingency upon which a gift over is to take effect, the general rule is that if the contingency is illegal or becomes impossible, so that the gift over can never arise, the prior interest becomes absolute and indefeasible, the intent being that the prior interest is to be defeated only for the benefit of the ulterior interest.[4] But there is a

10 Eng. L. & Eq. 429, and *affirming* Doe *v.* Challis, 18 Q. B. 224, 83 E. C. L. 224, 2 Eng. L. & Eq. 215; Jackson *v.* Phillips, 14 Allen (Mass.) 572. See also the title PERPETUITIES, etc., vol. 22, pp. 708, 723, 726, and *supra*, this section, *Classes of Executory Limitations Considered — Executory Limitations of Real Property — After a Fee — Alternative Limitations.*

1. See Avelyn *v.* Ward, 1 Ves. 419, and generally the cases cited *supra*, this subsection, *Effect of Failure of Prior Gift on Gift Over*, first paragraph. See also Bullock *v.* Bennett, 7 De G. M. & G. 283, 31 Eng. L. & Eq. 463.

2. Blatchford *v.* Newberry, 99 Ill. 11 (the bequest meantime reverting to the estate).

3. Acceleration of Quasi Remainders in Personalty. — Lainson *v.* Lainson, 18 Beav. 1, 5 De G. M. & G. 754 (prior gift in will revoked by codicil); Jull *v.* Jacobs, 3 Ch. D. 703 (prior legatee attesting witness to will); *In re* Clark, 31 Ch. D. 72 (husband of prior legatee attesting witness); Timberlake *v.* Parish, 5 Dana (Ky.) 345 (renunciation of benefit under will by prior legatee). See also Darcus *v.* Crump, 6 B. Mon. (Ky.) 363; Thompson *v.* Hoop, 6 Ohio St. 480; *supra*, this title, *Remainders — Acceleration of Remainders*, and the title EQUITABLE ELECTION, vol. 11, p. 118.

When the ulterior legatee is not yet *in esse*, and the prior gift fails because the prior legatee is a witness of the will, the gift reverts to the estate until an ulterior legatee is in being. *In re* Townsend, 34 Ch. D. 357.

4. Failure of Ulterior Interest Renders Prior Gift Absolute. — Jackson *v.* Noble, 2 Keen 590; Drummond *v.* Drummond, 26 N. J. Eq. 234; Groves *v.* Cox, 40 N. J. L. 40; Dusenberry *v.* Johnson, 59 N. J. Eq. 336. See also Ridgway *v.* Woodhouse, 7 Beav. 437; Illinois Land, etc., Co. *v.* Bonner, 75 Ill. 315; Shadden *v.* Hembree, 17 Oregon 14; *infra*, this section, *Devolution and Alienation;* and see the title CONDITIONS, vol. 6, p. 506.

In Drummond *v.* Drummond, 26 N. J. Eq. 234, the gift over was contingent on the first taker dying without issue, but it was held to be absolute where the gift over had become impossible by reason of the person to whom that gift was limited having died in the testator's lifetime.

Where an estate is devised to several with survivorship in case of the death of any one without issue, each takes a fee defeasible on death without issue, and the last survivor a fee simple, the contingency (considered to be death in the lifetime of another of the class) having become impossible. Gorham *v.* Betts, 86 Ky. 164; Brightman *v.* Brightman, 100 Mass. 238; Den *v.* Schenck, 8 N. J. L. 29. See also Taylor *v.* Langford, 3 Ves. Jr. 119; Jackson *v.* Staats, 11 Johns. (N. Y.) 337, 6 Am. Dec. 376.

When the Prior Gift Is Absolute by its terms, and the contingency becomes impossible on which the gift over is to take effect (as by the death of the executory taker during the life of the first taker, where the contingency was his outliving the first taker), the first gift is of course indefeasible. Jacoby *v.* Nichols, 23 Ky. Law Rep. 205, 62 S. W. Rep. 734.

A Limitation Over After a Fee Tail or Fee Simple on an Illegal Condition Subsequent is void, and the prior estate is absolute. Egerton *v.* Brownlow, 4 H. L. Cas. 1; Den *v.* Gibbons, 22 N. J. L. 117, 51 Am. Dec. 253.

Primary Gift Failing and Ulterior Gift Impossible. — When the primary gift fails by the death of the devisee during the testator's lifetime, and the gifts over cannot take effect because of the alienage of the ulterior devisee, the estate descends to the testator's heirs and does not pass to the residuary legatees under the will. Downing *v.* Marshall, 23 N. Y. 366, 80 Am. Dec. 290.

If an Interest Is Subject to Be Divested by the Execution of a Power, and the power is extinguished, the interest becomes absolute. Keates *v.* Burton, 14 Ves. Jr. 434.

Divesting Clause Strictly Construed. — A vested interest previously given is incapable of being destroyed except upon the clearest terms to that effect contained in the limitation over. Maddison *v.* Chapman, 4 Kay & J. 721. See also Clavering *v.* Ellison, 7 H. L. Cas. 707; Ridgway *v.* Woodhouse, 7 Beav. 437; Illinois Land, etc., Co. *v.* Bonner, 75 Ill. 327.

The Construction of the Will by which the limitations are created, as to the character of the prior gift as vested or contingent, the time in which the contingency must occur, the interpretation to be given to a clause of defeasance, the existence of further limitations over, whether the events which have occurred were contemplated by the testator, and the like, must control in these cases. See the titles ISSUE (DESCENDANTS), vol. 17, p. 558 *et seq.*; WILLS.

line of *English* cases which hold that if the gift over is void by reason of its illegality, or is or becomes impossible, and yet the contingency upon which it is to arise can and does happen, it determines the prior estate although the ulterior interest cannot arise, the intent being construed to be that the contingency is to determine the prior gift in any event.[1] Of course, where the intent is clear that in no event shall the first taker have more than a life estate, although the gift to him is indefinite, the prior interest is not enlarged by the failure of the gift over.[2]

Where the Gift Over Is Void for Remoteness, all authorities hold that the prior estate is absolute.[3]

Where a Bequest Is Given for the Accomplishment of Certain Objects, it is necessary to determine whether the testator meant the failure of the objects provided for to defeat the bequest. The bequest will not be destroyed, if it is absolute and its enjoyment is restricted only to secure the objects which have failed; but the bequest itself fails if the objects specified were the sole purpose of the gift, and the gift was not intended to take effect in the event of their failure.[4] The application of these rules in particular cases turns on the construction of the will, which will be treated elsewhere.[5]

f. TAKING EFFECT OF PRIOR EXECUTORY INTEREST — (1) *When Subsequent Limitations Become Remainders.* — Where, in a series of limitations, one is an executory limitation, all subsequent limitations are likewise executory, and when the first limitation vests in possession, the whole series of subsequent limitations are changed into remainders provided they are capable of taking effect as remainders.[6] But if the limitation immediately after the executory limitation which has vested is not so connected with it as to be supported by it as a remainder, but can be valid as an executory devise, its nature and that of the limitation following it are not changed.[7]

(2) *Indefeasible Vesting of Prior Interest.* — Where several executory interests, each carrying the whole fee in realty or an absolute interest in personalty, are limited in succession, so that any subsequent limitation may take effect if the preceding limitations fail, upon the vesting of any one of the series indefeasibly the subsequent limitations become void and inoperative.[8]

g. DEVOLUTION AND ALIENATION. — At common law executory interests are but possibilities, and therefore not assignable by act *inter vivos*.[9] In

1. Happening of Contingency Where Future Gift Is Void — English Cases. — Doe *v.* Eyre, 5 C. B. 713, 57 E. C. L. 713; Robinson *v.* Wood, 4 Jur. N. S. 625, 27 L. J. Ch. 726; Hurst *v.* Hurst, 21 Ch. D. 278. The last two cases follow the first on the principle of *stare decisis*, although the judges expressed dissatisfaction with the principle established by it. These cases are discussed in Dusenberry *v.* Johnson, 59 N. J. Eq. 336.

Where a bequest over fails by the death of the devisee during the testator's lifetime, the prior taker's estate is still defeated by the happening of the contingency upon which it was to cease, and the bequest goes to the residuary legatee or next of kin. O'Mahoney *v.* Burdett, L. R. 7 H. L. 407.

2. Indefinite Gift Clearly Limited to Life Estate. — Joslin *v.* Hammond, 3 Myl. & K. 110.

3. See the title PERPETUITIES, vol. 22, p. 723, and the following cases: Post *v.* Rohrback, 142 Ill. 600; Theological Education Soc. *v.* Atty.-Gen., 135 Mass. 285; Saxton *v.* Webber, 83 Wis. 613. See also Manice *v.* Manice, 43 N. Y. 383; Dana *v.* Murray, 122 N. Y. 604.

4. Bequest Prescribing Method of Enjoyment. — Lassence *v.* Tierney, 1 Macn. & G. 551; Burleyson *v.* Whitley, 97 N. Car. 295. See also the title LEGACIES AND DEVISES, vol. 18, p. 734.

5. See the title WILLS. See also LEGACIES AND DEVISES, vol. 18, p. 704.

6. Subsequent Limitations Becoming Remainders. — Lion *v.* Burtiss, 20 Johns. (N. Y.) 483, *affirmed sub nom.* Wilkes *v.* Lion, 2 Cow. (N. Y.) 333; Purefoy *v.* Rogers, 3 Saund. 388, Williams's note 9; Fearne Cont. Rem. 503.

7. Vedder *v.* Evertson, 3 Paige (N. Y.) 281, *per* Walworth, C., commenting on Lion *v.* Burtiss, 20 Johns. (N. Y.) 483.

8. Prior Executory Limitations Vesting Indefeasibly. — 1 Leake Land Laws 364; Fearne Cont. Rem. 517, Butler's note (l) 514, and Smith's note (4), App. IX., p. 634. Leake states the proposition, following Smith's note to Fearne, as if it was true only of alternative limitations including the whole interest. But in Stephens *v.* Stephens, Cas. temp. Talbot 228, the limitations were to A, and if he die before twenty-one, then to B, and if he die before twenty-one, then to C, which does not seem to be an alternative limitation in the strict sense (Milbank *v.* Vane, (1893) 3 Ch. 89, *per* Lord Lindley), although this case is cited by Smith (Executory Interests § 128) as an illustration of an alternative limitation.

9. At Common Law Not Assignable. — Carter's Case, *cited* in Lampet's Case, 10 Coke 47*b*, and more fully in Fulwood's Case, 4 Coke 66*b*.

equity such interests are assignable upon the ground that the assignment is a contract whose specific performance will be decreed.[1] In process of time the courts of law took a more liberal view of such interests, and held them to be possibilities coupled with an interest, and as such devisable and descendible to the heir or transmissible to the personal representative of him to whom the executory interest was limited before the happening of the contingency on which they depend.[2] An executory interest may likewise be released,[3] or the person entitled may be estopped by his warranty deed.[4]

Person to Take Not Ascertainable. — The preceding principles do not apply where the object of the limitation over is not ascertained nor ascertainable until the contingency happens, for then the executory devise is a possibility not coupled with an interest, and it cannot be either devised or aliened.[5]

See also the title ASSIGNMENTS, vol. 2, pp. 1010, 1026.

1. Assignable in Equity. — Chauncy *v.* Graydon, 2 Atk. 616; Fortescue *v.* Satterthwaite, 1 Ired. L. (23 N. Car.) 566; Wright *v.* Brown, 116 N. Car. 28; Thompson *v.* Hoop, 6 Ohio St. 480; Bayler *v.* Com., 40 Pa. St. 37, 80 Am. Dec. 551. See also *supra*, this title, *Remainders*, and the title ASSIGNMENTS, vol. 2, p. 1031.

Executory Devisees May Convey and Release absolutely their contingent interests. Little *v.* Brown, 126 N. Car. 752.

Settlement in Trust. — Where the limitation is to trustees for the life of A, and upon his death to be conveyed to designated persons, if one of the latter dies during A's life, his heirs or representatives are entitled. Hook *v.* Taylor, 2 Vern. 561; Peck *v.* Parrot, 1 Ves. 236.

2. Executory or Contingent Future Interest Devisable and Subject to Devolution. — 4 Kent Com. 261; Purefoy *v.* Rogers, 3 Saund. 388*k*, note by Williams. See also *supra*, this title, *Remainders*.

An executory devise and a mere possibility are distinguished in Fortescue *v.* Satterthwaite, 1 Ired. L. (23 N. Car.) 570.

Executory Interests Devisable. — Selwin *v.* Selwin, 1 W. Bl. 222, 251, 2 Burr. 1131; Roe *v.* Griffiths, 1 W. Bl. 605; Roe *v.* Jones, 1 H. Bl. 30; Jones *v.* Roe, 3 T. R. 88; Moor *v.* Hawkins, 2 Eden 342; Collins *v.* Smith, 105 Ga. 525; Thompson *v.* Hoop, 6 Ohio St. 480.

Executory Interests Descendible. — Goodtitle *v.* Wood, Willes 211, *sub nom.* Gurnett *v.* Wood, 7 Mod. 302, *sub nom.* Gurnel *v.* Wood, 8 Vin. Abr. 112; Wilson *v.* Bayly, 3 Bro. P. C. (Toml. ed.) 195 Kean *v.* Roe, 2 Harr. (Del.) 103, 29 Am. Dec. 336; Payne *v.* Rosser, 53 Ga. 662; Ackless *v.* Seekright, 1 Ill. 76; Smith *v.* Hunter, 23 Ind. 580; Den *v.* Manners, 20 N. J. L. 142; Kornegay *v.* Morris, 122 N. Car. 199; Medley *v.* Medley, 81 Va. 265.

Heirs Must Be Such When Contingency Happens. — Payne *v.* Rosser, 53 Ga. 662. See also *supra*, this section, *Not Affected by Merger or Surrender*, note 2, and see generally the title SUCCESSION.

Chattel Interest Passes to Representative. — Pinbury *v.* Elkin, 1 P. Wms. 563, 2 Vern. 758, 766; King *v.* Withers, 3 P. Wms. 414, Cas. t. Talb. 117, 3 Bro. P. C. (Toml. ed.) 135; Chauncy *v.* Graydon, 2 Atk. 616; Barnes *v.* Allen, 1 Bro. C. C. 181; Lewis *v.* Smith, 1 Ired. L. (23 N. Car.) 145; Hall *v.* Robinson, 3 Jones Eq. (56 N. Car.) 348. See also *supra*, this section, *Executory Limitations of Chattel Interests — Limitations Necessarily Executory*, the paragraph *Statute of Uses — Chattel Remainders as Vested*.

3. An Executory Interest May Be Released to One in Possession. Fearne Cont. Rem. 423, Butler's note (d) 421; Miller *v.* Emans, 19 N. Y. 384 (stated in the title ASSIGNMENTS, vol. 2, p. 1031, note). See also Fortescue *v.* Satterthwaite, 1 Ired. L. (23 N. Car.) 566.

A naked possibility may be released to one having a prior estate or interest in land. Wright *v.* Wright, 1 Ves. 411; Stover *v.* Eycleshimer, 46 Barb. (N. Y.) 87.

4. Estoppel. — Helps *v.* Hereford, 2 B. & Ald. 242; Hall *v.* Chaffee, 14 N. H. 215; Robertson *v.* Wilson, 38 N. H. 48; Stover *v.* Eycleshimer, 46 Barb. (N. Y.) 87; Fortescue *v.* Satterthwaite, 1 Ired. L. (23 N. Car.) 566; Foster *v.* Hackett, 112 N. Car. 555; Wright *v.* Brown, 116 N. Car. 26. See also the title ESTOPPEL, vol. 11, p. 405 *et seq.*

5. Person Not Ascertainable. — 4 Kent Com. 261. See Kean *v.* Roe, 2 Harr. (Del.) 112, 29 Am. Dec. 336; Stover *v.* Eycleshimer, 46 Barb. (N. Y.) 87.

Executory Limitations Which Carry No Interest until Contingency Happens. — Executory limitations which are so worded as to convey no interest unless the executory devisee survives the happening of the contingency have been held to carry no interest either devisable, descendible, or alienable, prior to the contingency happening. Pope *v.* Whitcombe, 3 Russ. 124; Bythesea *v.* Bythesea, 27 Eng. L. & Eq. 402, 23 L. J. Ch. 1004; Sheffield *v.* Kennett, 4 De G. & J. 593, 27 Beav. 207; *In re* Watson, L. R. 10 Eq. 36; Bristol *v.* Atwater, 50 Conn. 402; Medley *v.* Medley, 81 Va. 268. See also Moorhouse *v.* Wainhouse, 1 W. Bl. 638; Brattle Square Church *v.* Grant, 3 Gray (Mass.) 161, 63 Am. Dec. 725. *Compare* Beckley *v.* Leffingwell, 57 Conn. 163.

Designation of Person. — "The question in most cases is whether the person who may have the estate upon a designated contingency is designated. If so, it matters not what the contingency may be, whether of survivorship or of any other circumstance, there is a right in the person named" which renders the estate assignable or a subject of release. Strong, J., in Miller *v.* Emans, 19 N. Y. 398. See also Higden *v.* Williamson, 3 P. Wms. 132; Taylor *v.* Stewart, (N. J. 1899) 18 Atl. Rep. 456; Foster *v.* Hackett, 112 N. Car. 555.

Limitation to Persons Not in Esse. — Perhaps

Statutes Have Declared Such Interests Devisable and Alienable in most jurisdictions at the present day.[1]

h. DOWER AND CURTESY NOT AFFECTED BY EXECUTORY DEVISE. — The liability to dower and curtesy of a fee subject to an executory devise seems to be settled. This question has already been discussed.[2]

i. PROTECTION OF EXECUTORY INTERESTS. — In the case of executory limitations of chattels it has been seen that the interests of the executory legatee will be protected.[3] Where the executory interest is in realty, it has been held that the person to whom the executory interest is limited may maintain a bill in equity to restrain waste by the tenant of the prior estate.[4]

IV. STATUTORY FUTURE ESTATES. — Great changes in the law as to remainders and to a less extent in that as to executory interests have been made by statutes in many of the *United States.*

The Revised Statutes of New York inaugurated sweeping and systematic changes in the whole law of real estate, and these enactments have been adopted in a more or less modified form or have served as a model for statutory changes in a large number of the Western and Pacific states. Legislation of this type has created "future estates" (including remainders and executory interests), which do not depend on a particular preceding estate. Such estates may be created to begin in future with or without the intervention of a preceding estate,[5] and apparently by deed as well as by devise.[6] When such estates are limited after a precedent estate, they cannot be destroyed by any act of the first taker except in accordance with the instrument limiting them.[7] A

this principle applies only to the cases where the limitation is to persons not *in esse.* See *supra*, this title, *Remainders.*

1. Statutes — *England.* — Wills Act, 1 Vict., c. 26, § 3, "whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested"; Act to Amend Law of Real Prop., 8 & 9 Vict., c. 106, § 6.

New Jersey. — See Wilkinson *v.* Sherman, 45 N. J. Eq. 413; Taylor *v.* Stewart, (N. J. 1889) 18 Atl. Rep. 456.

New York. — 1 Rev. Stat. N. Y. 725, § 35. See Griffin *v.* Shepard, 40 Hun (N. Y.) 355, *affirmed* 124 N. Y. 70; Kingsland *v.* Leonard, (Supm. Ct. Spec. T.) 65 How. Pr. (N. Y.) 7.

See also the statutes of the several states and 1 Stimson Am. St. Law, §§ 1420, 2630.

2. See the titles CURTESY, vol. 8, p. 519; DOWER, vol. 10, p. 161.

If the children of the marriage must under the limitation take as purchasers and not by descent, it has been held that the estate is not subject to dower and curtesy, for they cannot by possibility inherit. Adams *v.* Beekman, 1 Paige (N. Y.) 631 (dower). See also the title CURTESY, vol. 8, p. 518, and note.

3. See *supra*, this section, *Executory Limitations of Chattel Interests — Nature of Remainderman's Interest and Remedies.*

4. Waste Restrained. — Robinson *v.* Litton, 3 Atk. 209, in which case the first taker had a fee defeasible in the event of his not attaining twenty-one and dying without issue.

Contra. — Where an estate was devised to the testator's son A, but if he died without leaving a child or children, the estate should be sold and the proceeds divided among the testator's other children, and A being in possession and having a son who was living, the court denied an injunction to restrain waste upon the ground that A had a qualified fee, and that a fee of any sort was free from the supervision of chancery in respect to waste. Matthews *v.* Hudson, 81 Ga. 120, 12 Am. St. Rep 305.

5. Future Estates May Be Created With or Without Preceding Estate — *California.* — Civ. Code Cal., § 767. See Hawes *v.* Stebbins, 49 Cal. 369.

Idaho. — Civ. Code Idaho 1901, § 2366.

Michigan. — 3 Comp. Laws Mich. 1897, § 8792. See L'Etourneau *v.* Henquenet, 89 Mich. 432, 28 Am. St. Rep. 310.

Minnesota. — Stat. Minn. 1894, § 4371. See Sabledowsky *v.* Arbuckle, 50 Minn. 481.

Montana. — Civ. Code Mont. 1895, § 1216.

New York. — 1 Rev. Stat. N. Y. 723, § 10; Real Prop. Law N. Y. 1896, § 27. See Moore *v.* Littel, 41 N. Y. 75.

North Dakota. — Rev. Codes N. Dak. 1895, § 3331.

South Dakota. — Annot. Stat. S. Dak. 1901, § 3652.

Wisconsin. — Stat. Wis. 1898, § 2034. See Ferguson *v.* Mason, 60 Wis 383.

6. By Deed as Well as by Devise. — This statute recognizes and impliedly authorizes the creation of a freehold *in futuro* by deed. Sabledowsky *v.* Arbuckle, 50 Minn. 475. See also Ferguson *v.* Mason, 60 Wis. 377; Code Commissioner's note to Civ. Code Cal., § 741.

7. Beyond Power of First Taker — *California.* — Civ. Code Cal., § 739 *et seq.*

Idaho. — Civ. Code Idaho 1901, § 236 *et seq.*

Michigan. — 3 Comp. Laws Mich. 1897, §§ 8814, 8815. See Case *v.* Green, 78 Mich. 545, 18 Am. St. Rep. 458; L'Etourneau *v.* Henquenet, 89 Mich. 437, 28 Am. St. Rep. 310; Hovey *v.* Nellis, 98 Mich. 374.

Minnesota. — Stat. Minn. 1894, §§ 4393, 4394.

Montana. — Civ. Code Mont. 1895, § 1180 *et seq.*

New York. — 1 Rev. Stat. N. Y. 725, §§ 32, 33;

remainder (a future estate limited after a preceding estate) is not affected, if valid in its creation, by the termination of the preceding estate before the happening of the contingency on which the remainder is limited to take effect,[1] and it may be limited to take effect in derogation of the preceding estate.[2] Many statutes of this class also provide that a freehold estate as well as a chattel real may be created to commence at a future day; an estate for life may be created in a term of years and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created expectant on the determination of a term of years, and a fee may be limited on a fee upon a contingency, with the rule against perpetuities.[3]

Devolution and Alienation of Expectant Estates. — The Revised Statutes of *New York* and the statutes of the states founded on its legislation declare that expectant estates (*i. e.*, estates not in possession) are descendible, devisable, and alienable in the same manner as estates in possession.[4]

Statutory Changes Less Radical in Scope. — In other states, while such sweeping changes have been avoided, the common law of remainders has been modified and remainders brought nearer to executory devises, by declaring that remainders have the properties of executory devises; that they are independent of the preceding estate, or that estates may be created to begin *in futuro* equally by deed as by will.[5]

Caution. — It is perhaps needless to observe that the statutes referred to in

Real Prop. Law N. Y. 1896, § 47. See Moore *v.* Littel, 41 N. Y. 78.

North Dakota. — Rev. Codes N. Dak. 1895, § 3318 *et seq.*

South Dakota. — Annot. Stat. S. Dak. 1901, § 3639 *et seq.*

Wisconsin. — Stat. Wis 1898, §§ 2056, 2057.

1. Determination of Particular Estate Before Happening of Contingency — *California.* — Civ. Code Cal., § 742.

Idaho. — Civ. Code Idaho 1901, § 2363.

Michigan. — 3 Comp. Laws Mich. 1897, § 8816.

Minnesota. — Stat. Minn. 1894, § 4395.

Montana. — Civ. Code Mont. 1895, § 1183.

New York. — 1 Rev. Stat. N. Y. 725, § 34; Real Prop. Law N. Y. 1896, § 48. See Moore *v.* Littel, 41 N. Y. 79; Hennessy *v.* Patterson, 85 N. Y. 100.

North Dakota. — Rev. Codes N. Dak. 1895, § 3321.

South Dakota. — Annot. Stat. S. Dak. 1901, § 3642.

Wisconsin. — Stat. Wis. 1898, § 2058.

2. Remainder in Derogation of Prior Estate — *California.* — Civ. Code Cal., § 778.

Idaho. — Civ. Code Idaho 1901, § 2370.

Indiana. — Horner's Annot. Stat. Ind. 1901, § 2960; McIlhinny *v.* McIlhinny, 137 Ind. 147.

Michigan. — 3 Comp. Laws Mich. 1897, § 8809.

Minnesota. — Stat. Minn. 1894, § 4388.

Montana. — Civ. Code Mont. 1895, § 1227.

New York. — 1 Rev. Stat. N. Y. 725, § 27; Real Prop. Law N. Y. 1896, § 43

North Dakota. — Rev. Codes N. Dak. 1895, § 3342.

South Dakota. — Annot. Stat. S. Dak. 1901, § 3663.

Wisconsin. — Stat. Wis. 1898, § 2051.

3. Like Executory Devises in Various Particulars — *California.* — Civ. Code Cal., § 772 *et seq.*

Indiana. — The Indiana statute omits the last clause, allowing a fee on a fee. 1 Horner's Annot. Stat. Ind. 1901, § 2959. See also Adams *v.* Alexander, (Ind. 1902) 64 N. E. Rep. 597 (freehold *in futuro*).

Michigan. — 3 Comp. Laws Mich. 1897, § 8806, contains the first two clauses of the text; Id., § 8805, extends to provisions as to chattels real; Id., §§ 8802, 8803, 8811, deal with remainders after terms.

Minnesota. — Stat. Minn. 1894, §§ 4385, 4384, 4381, 4382, 4390. These sections are the same and in the same order as the Michigan statutes above.

Montana. — Civ. Code Mont. 1895, § 1222.

New York. — 1 Rev. Stat. N. Y. 724, § 24; Real Prop. Law N. Y. 1896, § 40.

North Dakota. — Rev. Codes N. Dak. 1895, § 3337.

South Dakota. — Annot. Stat. S. Dak. 1901, § 3658.

Wisconsin. — Stat. Wis. 1898, §§ 2048, 2047, 2044, 2045, 2053. The sections are the same and in the same order as the Michigan statutes above.

Fee Limited on Fee. — Jewell *v.* Pierce, 120 Cal. 79.

4. Devolution and Alienation. — Civ. Code Cal., § 699; 1 N. Y. Rev. Stat. 725, § 35 (Real Prop. Law 1896, § 49); Hovey *v.* Nellis, 98 Mich. 374. See also 1 Stimson Am. St. Law, § 1420, and the codes and statutes of the various states. See also *supra*, this title, *Remainders*, 4. *b.* (3) (*d*) *bb. Devolution and Transfer.*

Alienability of Contingent Remainders. — Godman *v.* Simmons, 113 Mo. 122 (construing *Missouri* statutes).

5. Less Extensive Statutory Changes — *Alabama.* — Contingent remainders are abolished; limitations in deeds or wills which would have been contingent remainders are given the properties and effect of executory devises. Civ. Code Ala. 1896, § 1022. See Smaw *v.* Young, 109 Ala. 545.

Georgia. — Absolute estates may begin in future, the abeyance of the fee being no objec-

this section do not exhaust the subject of statutory change in this matter, and the reader should consult the statutes of states cited for other provisions and the statutes of states not cited for legislation dealing with this topic.

REMAND. — See ENCYC. OF PL. AND PR., titles MANDATE AND PROCEEDINGS THEREON, vol. 13, p. 835; REMOVAL OF CAUSES, vol. 18, p. 150. See also COMMITMENT, vol. 6, p. 229.

REMATE. — See note 1.

REMEDIAL. — See note 2.

REMEDIAL STATUTES. — See the title STATUTES.

REMEDY. (See also the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 1052.) — In a large sense, a remedy is the means employed to enforce a right or redress an injury.[3] In a narrower and more technical sense, a remedy is a "judicial means of enforcing a right or redressing a wrong."[4]

tion, and a fee may be limited on a fee. 2 Code Ga. 1895, § 3082. See Greer *v.* Pate, 85 Ga. 554; Shealy *v.* Wammock, 115 Ga. 913.

Illinois. — 1 Starr & C. Annot. Stat. Ill. 1896, p. 925 (c. 30, § 15). This section is the same in effect as Annot. Code Miss. 1892, § 2447. See *infra*, this note.

Iowa. — Estates may be created to commence at a future day. Code Iowa 1897, § 2917. See Leaver *v.* Gauss, 62 Iowa 314; Saunders *v.* Saunders, 115 Iowa 275.

Kentucky. — Any estate may be made to commence in future by deed or will, and any estate which would be good as an executory devise or bequest shall be good if created by deed. Barb. & C. Stat. Ky. 1894, § 2341. A contingent remainder does not fail for want of a particular estate to support it. Id., § 2346. Nor does a remainder fail by the alienation of the particular estate, nor by the union of the particular estate with the inheritance by purchase or descent. Id., § 2347.

Mississippi. — Estates may be conveyed to vest immediately or in future by writing signed and delivered, and such transfer has the effect of feoffment with livery. Annot. Code Miss. 1892, § 2433. See Cassedy *v.* Jackson, 45 Miss. 407. A remainder to the son or daughter, not *in esse*, of any person, does not fail by the death of the father before the birth of such child, although there is no estate to support the remainder after his death. Id., § 2447.

Missouri. — Rev. Stat. Mo. 1899, § 4596, is the same in effect as Annot. Code Miss. 1892, § 2447 (see *supra*, this note), but it contains this important addition: "And hereafter an estate of freehold or of inheritance may be made to commence in future by deed, in like manner as by will."

Nebraska. — Estates may be created to begin at a future day. Comp. Stat. Neb. 1899, § 4146.

Tennessee. — A contingent remainder does not require a preceding freehold to support it, but may be supported by an estate for years. Code Tenn. 1896, § 3767.

Texas. — Any estate of freehold or inheritance may be made to commence *in futuro*, by deed or conveyance, in like manner as by will. Rev. Stat. Tex. 1895, art. 632. See Lockridge *v.* McCommon, 90 Tex. 234.

Virginia. — Code Va. 1887, §§ 2418, 2424, 2425, are the same and in the same order as the Kentucky statutes cited above.

West Virginia. — Code W. Va. 1899, c. 71, §§ 5, 12, 13 (pp. 680, 681), are the same and in the same order as the Kentucky statutes cited above. See Lauck *v.* Logan, 45 W. Va. 253; Carney *v.* Kain, 40 W. Va. 815; McDodrill *v.* Pardee, etc., Lumber Co., 40 W. Va. 581.

1. Remate Judgment. — In Spanish law, a *remate* judgment is an order for execution to issue for a sum of money and costs. It has been held that a *remate* judgment, as it does not, according to the law of Spain, decide the rights of parties, is not a final and conclusive judgment which can be sued upon in England. *In re* Henderson, 37 Ch. D. 244.

2. Remedial Rights. — See Tiffin Glass Co. *v.* Stoehr, 54 Ohio St. 157.

Remedial Cases. — The Constitution of *Minnesota* prescribes that the Supreme Court "shall have original jurisdiction in such *remedial* cases as may be prescribed by law." In construing this provision in State *v.* St. Paul, etc., R. Co., 35 Minn. 223, the court said: "The cases intended by the term '*remedial* cases' are those where the remedy is afforded summarily, through certain extraordinary writs, such as prohibition, mandamus, certiorari, and quo warranto. Any greater or less extensive meaning could hardly be given to the term without making it so indefinite as to make it difficult to say what it means." See also Warren *v.* First Div. St. Paul, etc., R. Co., 18 Minn 384.

3. Remedy. — Bouv. L. Dict., *quoted* in Warren *v.* First Div. St. Paul, etc., R. Co., 18 Minn. 384, and Matter of Cooper, 22 N. Y. 87.

Thus, the term has been held to include the power and duty of the legislature to provide means to pay and to pay the state debts. State *v.* Young, 29 Minn. 537.

Remedy in Sense of Redress. — See Sullivan *v.* Sullivan, 20 S. Car. 509; Vance *v.* W. A. Vandercook Co., 170 U. S. 468.

4. Technical Meaning.—Stratton *v.* European, etc., R Co., 74 Me. 428; Abb. L. Dict.

In Wildman *v.* Wildman, 70 Conn. 707, it was said: "Every action is brought in order to obtain some particular result which is termed the *remedy*."

"The *remedy* for every species of wrong is, says Judge Blackstone, 'the being put in possession of that right whereof the party injured is deprived.' 'The instruments whereby this *remedy* is obtained are a diversity of suits and

REMEDY AT LAW. — See the title REMEDY AT LAW, 18 ENCYC. OF PL. AND PR. 108.

REMEMBRANCE. — See note 1.

REMIND. — See note 2.

REMISE — REMISSION. — See the titles FINES AND PENALTIES, vol. 13, p. 70; RELEASE AND DISCHARGE, *ante;* REPRIEVE, PARDON, AND AMNESTY, *post.*

REMISSNESS. — See note 3.

actions.'" Cohen *v.* Virginia, 6 Wheat. (U. S.) 407.

Application for Admission to Bar. — By Code Pro. N. Y., § 1, ***remedies*** in courts of justice were divided into actions and special proceedings. In Matter of Cooper, 22 N. Y. 87, which was an appeal from an order of the Supreme Court denying the application of the appellant for admission to the bar, Selden, J., said: "What then is a ***remedy***? The only judicial exposition of the subject appears to be that contained in a remark of Johnson, J., in Belknap *v.* Waters, 11 N. Y. 477. He says: 'The code unfortunately has not furnished us a definition of a ***remedy***, except in so far as one can be drawn from its distribution of all ***remedies*** into actions and special proceedings. It seems to regard every original application to a court of justice for a judgment or an order as a ***remedy***.' According to this interpretation, which I deem just, the application of the appellant to the Supreme Court was clearly a ***remedy***."

Obligation to Guarantee Right or Indemnify Against Wrong Not "Remedy." — U. S. *v.* Lyman, 1 Mason (U. S.) 500. See also State *v.* Poulterer, 16 Cal. 528

Appointment of Receiver. — In Barrowman *v.* Fader, 32 Nova Scotia 284, it was held that the appointment of a receiver by way of equitable execution was a ***remedy***.

Mechanic's Lien Not "Remedy." — "A mechanic's lien is a statutory security to which the term ***remedy*** would be as misapplied as it would be in respect to a mortgage." Atkins *v.* Little, 17 Minn. 342.

Adequate Remedy. — In U. S. *v.* New Orleans, 17 Fed. Rep. 491, the words "adequate ***remedy***," as used in Const. La., art. 11 (Const. 1898, art. 6), providing that "all courts shall be open, and every person for injury done him in his rights, lands, goods, person, or reputation shall have adequate ***remedy*** by due process of law," were held to mean "complete satisfaction of the judgment without restriction." See also the title EQUITY, vol. 11, p. 200, and see the title REMEDY AT LAW, 18 ENCYC OF PL. AND PR. 108.

Remedy and Penalty Distinguished. — In Porter Tp. *v.* Jersey Shore, 82 Pa. St. 278, it was said: "A ***remedy*** is that which is used to enforce a right or the performance of a duty, and unless it reaches the end intended, and actually compels performance of the duty, it is not adequate. * * * A penalty may punish the wrong of the officer, but does not enforce the duty of the township to receive and maintain." And in this case it was held that an act which prescribed a penalty for the refusal to receive a pauper under an order of removal did not provide a ***remedy*** to enforce the performance of the duty, but a punishment for its nonperformance.

Specific and Cumulative Remedies. — See CUMULATIVE REMEDY, vol. 8, p. 493; SPECIFIC REMEDY.

Deprivation of Remedy. — The Constitution of *New Jersey* forbids the legislature to pass any law depriving a party of any ***remedy*** for enforcing a contract which existed when the contract was made. This provision was held to apply to ***remedies*** against municipal corporations. The court said: "By the term ***remedy*** is here meant, not the form, nor perhaps the forum (Newark Sav. Inst. *v.* Forman, 33 N. J. Eq. 436), in which the creditor is to seek redress, but the substance of his right to resort to the person or any property of his debtor for satisfaction." Munday *v.* Rahway, 43 N. J. L. 344. See also Rader *v.* Southeasterly Road Dist., 36 N. J. L. 273.

Sheriff's Bond. — A statute provided that a ***remedy*** upon a sheriff's bond should thereafter be joint and several and also that in any action on such bond against the surety only, the liability should be first fixed In construing this statute the court said: "The term ***remedy*** is broad, and comprehends every legal proceeding that can be instituted upon a sheriff's bond." McCrosky *v.* Riggs, 12 Smed. & M. (Miss.) 714.

When Limited to Remedy by Way of Damages. — In Western Union Tel. Co. *v.* Ferguson, 157 Ind. 69, in construing the maxim that for every wrong there should be a ***remedy***, the court said: "By ***remedy*** (limiting it in this case to a ***remedy*** by the way of damages) they [the fathers of the common law] intended damages that courts, dealing practically with the practical affairs of life, can find to be certain and measurable from evidence the source of which is open to both parties, and the nature not transcendental."

1. Remembrance. — A testator appointed his "friend" P. as executor, and gave to him a legacy "as a ***remembrance***." It was held that the words "as a ***remembrance***" imported that the legacy was given to P. in his character as the testator's friend, and not in his character as executor; and that he was entitled to the legacy notwithstanding the fact that he did not act as executor. Bubb *v.* Yelverton, L. R. 13 Eq. 131, 1 Moak 619.

2. Remind. (See also the title WITNESSES.) — See Putnam *v.* U. S., 162 U. S. 687.

3. *Remissness* in sending or delivering a message implies that it was actually sent or delivered, but in a tardy, negligent, and careless manner. Baldwin *v.* U. S. Telegraph Co., (Supm. Ct. Gen. T.) 6 Abb. Pr. N. S. (N. Y.) 423, in which case it was held that the failure to deliver a message by a telegraph company

REMIT, REMITTING, ETC. — To remit means to transmit; forward; send.[1] The term is sometimes used in the sense of release,[2] and also in the sense of return.[3]

REMITTER. — Remitter is defined to be "where he who hath the true property or *jus proprietatis* in lands, but is out of possession thereof, and hath no right to enter without recovering possession in an action, hath afterwards the freehold cast upon him by some subsequent, and of course defective, title; in this case he is remitted, or sent back by operation of law, to his ancient and more certain title."[4]

REMITTITUR. — See the title REMITTITUR, 18 ENCYC. OF PL. AND PR. 123.

REMONSTRATE — REMONSTRANCE. — To remonstrate is to present and urge reasons in opposition to an act, measure, or any course of proceeding.[5] A remonstrance is defined to be a petition to a court or deliberative body in which those who have signed it request that something contemplated shall not be done.[6]

REMOTE. — See note 7.

did not fall within the clause of a contract exempting the company from liability for "delay, error, or *remissness*." This case was reversed on appeal (45 N. Y. 744, 6 Am. Rep. 165), but without reference to the particular point.

1. Remit. — Hollowell *v.* Life Ins. Co., 126 N. Car. 402, *quoting* Soule's Synonyms.

Mail. — The defendant abroad contracted to sell goods sent to him and *remit* the proceeds to England by bills. In construing this contract Herschell, J., said: "I cannot doubt that the word *remit* there means this and nothing beyond this — that the bank-post bills, when obtained in favor of the plaintiffs, should be sent in the ordinary course and the ordinary manner in which such documents are sent by commercial men, namely, by mail, and that as soon as that had been done all obligation and all liability of the defendant ceased." Comber *v.* Leyland, (1898) A. C. 530. And see Fanning *v.* Consequa, 17 Johns (N. Y.) 520.

In Townsend *v.* Henry, 9 Rich. L. (S. Car.) 323, it was said: "The term *remit* does not of itself mean *remit* by mail. But when it is remembered that Cook's Law Office, the place of defendant's residence, was remote from any bank, that a safe private conveyance thence to Charleston was not likely to be obtained in reasonable time, and that remittance by mail was there usually adopted and had proved safe, it will be perceived that in using the term *remit* the defendant had reference to the mail."

Same — Insurance Policy. — Where an accident-insurance policy had lapsed, the company wrote to the insured a letter stating that if he would *remit* his check for a certain amount the company would reinstate his policy and carry it for a certain period. It was held that the word *remit* in the company's letter implied, in the absence of any specific direction as to the mode of sending the check, a direction to send it by mail; that the deposit of the check in the mail, in pursuance of that direction, was an acceptance by the insured of the condition of reinstatement stated by the company, and the contract of reinstatement was then complete. Colvin *v.* U. S. Mutual Acc. Assoc., 66 Hun (N. Y.) 543.

Received and Remitted. — In Holmes *v.* Gayle, 1 Ala. 520, it was said: "In the one [copy of an account] the plaintiff is credited by a sum of money 'received from' him; while in the other he is credited by the same sum *remitted* by him. The legal effect of the entries in each copy of the account is precisely the same."

2. Remit, Release, Etc. — The Constitution of *Montana* provides that "no obligation or liability of any person, association, or corporation held or owned by the state, or any municipal corporation therein, shall ever be exchanged, transferred, *remitted*, released, or postponed, or in any way diminished by the legislative assembly; nor shall such liability or obligation be extinguished except by the payment thereof into the proper treasury." In Custer County *v.* Story, 26 Mont. 517, the court said that the words *remitted*, "released," and "extinguished," as thus used, were convertible terms prohibiting a cancellation of obligations of the class embraced in the constitution.

Remit in Sense of Forego, Pardon, or Release. — See the titles FINES AND PENALTIES, vol. 13, p. 70; REPRIEVE, PARDON, AND AMNESTY, *post*.

3. Remit in Sense of Return or Restore. — In Cook *v.* Chosen Freeholders, 26 N. J. L. 328, it was said: "There is no doubt that the word *remit* is sometimes used in the sense of return or restoration, though in this sense Dr. Johnson says that the word is obsolete."

4. Remitter. — 3 Black. Com. 19, *quoted* in Draughon *v.* French, 4 Port. (Ala.) 364.

5. Remonstrate and Appeal Distinguished. — Girvin *v.* Simon, 127 Cal. 494, *quoting* Webst. Dict. In this case the court said further: "The distinction between a *remonstrance* and an appeal is clear. The former is made to the acts or proceedings of the council, and is made before the assessment. The latter is made after the assessment, and relates to the acts of the superintendent of streets in accepting work not done as required by the contract, or other acts of his specified in the statute."

6. Remonstrance. — Noble *v.* Vincennes, 42 Ind. 130, *quoting* Bouv. L. Dict.

7. Remote — Selection of Jurors. — See Craft *v.* Com., 24 Gratt. (Va.) 615; Lawrence *v.* Com., 81 Va. 485. See also the title JURY AND JURY TRIAL, vol. 17, p. 1086.

Merino Blood, Near or Remote. — See U. S *v.* Midgley, 42 Fed. Rep. 668, and see the title REVENUE LAWS.

REMOTE CAUSE. — See the titles CONTRIBUTORY NEGLIGENCE, vol. 7, p. 368; DAMAGES, vol. 8, p. 537, and the cross-references there given; NEGLIGENCE, vol. 21, p. 455. As used in insurance law, see the titles ACCIDENT INSURANCE, vol. 1, p. 284; FIRE INSURANCE, vol. 13, p. 86; MARINE INSURANCE, vol. 19, p. 930.

REMOTE DAMAGES. — See the references given above under REMOTE CAUSE.

REMOVAL OF CAUSES. — See the title REMOVAL OF CAUSES, 18 ENCYC. OF PL. AND PR. 150.

REMOVAL OF CLOUD. — See the titles CLOUD ON TITLE, vol. 6, p. 149; QUIETING TITLE — REMOVAL OF CLOUD, 17 ENCYC. OF PL. AND PR. 274.

REMOVE — REMOVAL. (See also ERECT — ERECTION, vol. 11, p. 253; TEMPORARY; and see the title ATTACHMENT, vol. 3, p. 181.) — To remove is to move away from the position occupied; to displace; as, to remove a building;[1] to deprive of office by the act of a competent officer or of the legislature;[2]

1. Remove. — Webst. Dict., *followed* in South *v.* Sinking Fund Com'rs, 86 Ky. 190.

Remove and Transfer. (See also the title REMOVAL OF CAUSES, 18 ENCYC. OF PL. AND PR. 150.) — In Scherrer *v.* Caneza, 33 La. Ann. 316, it was said: "The word *remove* has a technical meaning, fixed by legislation, jurisprudence, and practice, state and federal. It is synonymous with 'transfer,' possibly more comprehensive."

Revenue Laws. — See Franks *v.* Robards Tobacco Co., (C. C. A.) 112 Fed. Rep. 786.

Same — Destruction by Fire. — In U. S. *v.* Farrell, 8 Biss. (U. S.) 259, it was held that a destruction by fire was a *removal* within a revenue act. See also U. S. *v.* Peace, (C. C. A.) 53 Fed. Rep. 999, *reversing* 48 Fed. Rep. 714.

Run and Remove. — In Williams *v.* State, 27 Tex. App. 260, which was a prosecution for *removing* mortgaged property, it was said: "Instead of alleging in the language of the statute that the defendant did *remove* the property out of the state, the indictment alleges that he did 'run' it out of the state. The word 'run' in the connection in which it is used in the indictment is, we think, equivalent to the statutory word *remove*, and we therefore hold that the use of 'run' instead of *remove* does not render the indictment bad."

Sold, but Not Removed. — See Waring *v.* Indemnity F. Ins. Co., 45 N. Y. 606, set out in the title FIRE INSURANCE, vol. 13, p. 117. See also Trade Ins. Co. *v.* Barracliff, 45 N. J. L. 552; Lockhart *v.* Cooper, 87 N. Car. 149; Lucas *v.* Liverpool, etc., Ins. Co., 23 W. Va. 275.

Remove From. — The words "*remove* from," in an indictment upon a statute declaring it to be a criminal trespass to cut down or *remove* from land belonging to another, without license therefor, "any tree, stone, timber, or other valuable article," have no technical meaning restricting them to articles forming a part of the realty. The statute itself may and should be restricted by construction to cases of *removing* from land something which pertains to it, and would pass by a sale of it. But the language of an indictment cannot be thus modified. Bates *v.* State, 31 Ind. 74.

Figurative Sense. — In Nugent *v.* Goldsmith, 59 Mich. 595, which was an action of replevin, the trial court instructed the jury that a finding of fact that there was actually a purpose to *remove* the property beyond the reach of creditors would have a bearing upon the motive of the transaction. This instruction was objected to, it being argued that the word *remove* meant a manual transportation of the property, and that there was no evidence that there was any such *removal*. It was held that the word *remove*, in the sense in which it was used by the trial court, "evidently meant the placing or putting of the property out of the reach of the creditors by this pretended transfer, and the jury must have so understood it. In that view of the meaning of the word, the evidence warranted this portion of the charge"

2. Removal of Public Officer. — See the titles IMPEACHMENT, vol. 15, p. 1061; PUBLIC OFFICERS, vol. 23, p. 428 *et seq.* As to the *removal* of particular officers, see such specific titles as CORONERS, vol. 7, p. 598; FIRE DEPARTMENT, vol. 13, p. 73; SHERIFFS, MARSHALS, AND CONSTABLES, etc.

Removal Distinguished from Suspension. — "Suspension" is in no proper sense the same thing as *removal*, and constitutional provisions with regard to *removals* do not apply to suspensions from office, although the suspension may be in effect a permanent deprivation of the office. Poe *v.* State, 72 Tex. 629. See also State *v.* Meeker, 19 Neb. 444.

In State *v.* Richmond, 29 La. Ann. 706, it was said: "What is a *removal?* It is the act of permanently displacing one from an office or post. What is a suspension? It is, exclusively, an interruption in the exercise of the officer's duties, of his authority."

But in Kelley *v.* Cincinnati, 9 Ohio Dec. 612, it was held that a suspension from office for an indefinite time, and lasting for a period of six months, lost its temporary character, ceased to be a suspension, and became a *removal*.

Retirement on Pension. — In People *v.* Scannell, 53 N. Y. App. Div. 161, 164 N. Y. 572, it was held, within a statute providing that a veteran employed in the civil service should not be *removed* except for incompetency or misconduct shown after a hearing, that the retirement on a pension of a member of the uniformed force of the fire department of the city of New York for permanent disability was not a *removal*.

Priest. — See Stack *v.* O'Hara, 98 Pa. St. 232. See also the title RELIGIOUS SOCIETIES, *ante*.

to go from one place to another; to change the place of residence.[1]

REM, PROCEEDINGS IN. (See also the titles ADMIRALTY JURISDICTION, vol. 1, p. 645; FOREIGN JUDGMENTS, vol. 13, p. 974; JURISDICTION, vol. 17, p. 1039; and see such titles as ATTACHMENT, vol. 3, p. 181; FORECLOSURE OF MORTGAGES, vol. 13, p. 776; LIENS, vol. 19, p. 3; PRIVATE INTERNATIONAL LAW, vol. 22, p. 1314. See further the title PUBLICATION, 17 ENCYC. OF PL. AND PR. 40.) — In a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but in a larger and more general sense, the term is applied to actions between parties where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state they are substantially proceedings *in rem* in the broader sense above mentioned.[2]

Legal Appointment. — The words "incompetency," ***removed***, and "appointment," as used in the *New York* Civil Service Act of 1896, import a prior legal appointment. People *v.* Board of Health, 153 N. Y. 513.

Removal for Cause. — McCully *v.* State, 102 Tenn. 509. See also the title PUBLIC OFFICERS, vol. 23, p. 428 *et seq.*

1. Change of Residence. — Waterbury First Soc. *v.* Platt, 12 Conn. 186; Parker *v.* State, 18 Tex. App. 90. See also Prather *v.* Hart, 17 Neb. 600.

Remove Without Certain Limits — Annexation of Territory. — Waterbury First Soc. *v.* Platt, 12 Conn. 186.

Permanent Absence. — ***Removal*** signifies a permanent absence; a change of domicil. Ware *v.* Schintz, 190 Ill. 192.

Where a deed of trust provided that in case of death, resignation, or ***removal*** from the country, or failure to act, or other inability on the part of the trustee, the title and powers of the trustee should vest in his successor in trust therein named, it was held that the term "***removal*** from the county" as used did not mean a temporary absence, but a permanent ***removal*** of the domicil of the trustee. Barstow *v.* Stone, 10 Colo. App. 405.

Leave and Remove. — See LEAVE, vol. 18, p. 702, note.

Sheriff's Bond — Death. — A statute provided that suit might be directly brought against the sheriff's sureties whenever service could not be had upon the sheriff by reason of such person's ***removal*** from the state leaving no known attachable property therein. It was held that the word ***removal*** was used in its ordinary acceptation and meant a change of the domicil of the sheriff, while living, from one state to another, and that death was not such a ***removal***. White *v.* Miller, 46 Vt. 65.

2. Proceedings in Rem. — Pennoyer *v.* Neff, 95 U. S. 734. See also Williams *v.* Lowe, 4 Neb. 397; Lantry *v.* Parker, 37 Neb. 358.

In Mankin *v.* Chandler, 2 Brock. (U. S.) 127, Marshall, C. J., said: "I have always understood that where the process is to be served on the thing itself, and where the mere possession of the thing itself, by the service of the process and making proclamation, authorizes the court to decide upon it without notice to any individual whatever, it is a ***proceeding in rem***, to which all the world are parties. * * * The claimant is a party whether he speaks or is silent; whether he asserts his claim or abandons it."

Status. — In Bartero *v.* Real Estate Sav. Bank, 10 Mo. App. 78, it was said that a ***proceeding in rem*** "is generally said to be a judgment declaratory of the status of some subject-matter, whether this be a person or a thing. Thus, the probate of a will fixes the status of the document as a will. The personal rights and interests which follow are mere incidental results of the status or character of the paper, and do not appear on the face of the judgment. So a decree establishing or dissolving a marriage is a judgment ***in rem***, because it fixes the status of the person. A judgment of forfeiture, by the proper tribunal, against specific articles or goods, for a violation of the revenue laws, is a judgment ***in rem***."

Action for Money Not Action in Rem. — McKinney *v.* Collins, 88 N. Y. 224.

Alimony. — Within a statute providing for service by publication in actions ***in rem***, it has been held that an action for alimony was a ***proceeding in rem***. Hanscom *v.* Hanscom, 6 Colo. App. 97.

Arbitration. — As to whether a ***proceeding in rem*** may be submitted to arbitration, see Carpenter *v.* Bailey, 127 Cal. 582.

Debts of Decedent. — In McClay *v.* Foxworthy, 18 Neb. 298, it was held that a proceeding under statute to sell the real estate of a deceased person for the payment of debts against the estate was purely a ***proceeding in rem***.

Divorce. — An action for divorce has been said to be in the nature of a ***proceeding in rem***. Atkins *v.* Atkins, 9 Neb. 202. And see the title DIVORCE, vol. 9, p. 745.

Suit for Foreclosure of Mortgage Held to Be Action in Rem. — Peters *v.* Dunnells, 5 Neb. 460. And see the title FORECLOSURE OF MORTGAGES, 9 ENCYC. OF PL. AND PR. 249 *et seq.*

Forfeiture. — Proceedings to obtain a forfeiture have been held to be ***proceedings in rem***. Hine *v.* Belden, 27 Conn. 391.

Probate Proceedings Held to Be in Rem. — See the title PROBATE AND LETTERS OF ADMINISTRATION, vol. 23, p. 112.

Quieting Title. — In Perkins *v.* Wakeham, 86 Cal. 580, it was said: "While a decree quieting title is not ***in rem***, strictly speaking, it fixes and settles the title to real estate, and to

REMUNERATION. — See note 1.

RENDER, RENDITION, ETC. — To render is to furnish; to make up; to state; to deliver; as to render an account, to render judgment.[2]

REND-ROCK. — See note 3.

RENEW — RENEWAL. (See also the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, pp. 149, 339; LEASES, vol. 18, p. 684; and see REPAIRS, *post.*) — 1. A common meaning of the word "renew" is to make again; as, to renew a treaty or a covenant.[4] 2. To "renew," in its popular

that extent certainly partakes of the nature of a judgment *in rem.*" See also Lantry *v.* Parker, 37 Neb. 357; Essig *v.* Lower, 120 Ind. 244; Watson *v.* Ulbrich, 18 Neb. 186; Arndt *v.* Griggs, 134 U. S. 316.

Specific Property. — In Vischer *v.* Vischer, 12 Barb. (N. Y.) 647, it was said: "***Proceedings in rem***, that is, when they strictly pursue the specific property, may be sustained; but it is doubtful whether the courts can do more."

Specific Performance. — In Boswell *v.* Otis, 9 How. (U. S.) 348, it was said: "A bill for the specific execution of a contract to convey real estate is not strictly a ***proceeding in rem***, in ordinary cases; but where such a procedure is authorized by statute, on publication, without personal service of process, it is substantially of that character."

1. Remuneration. — In Reg. *v.* Postmaster-Gen., 1 Q. B. D. 663, counsel argued that ***remuneration***, in a statute providing for the ***remuneration*** of public officers, was contrasted with the term "yearly salary," used in the same statute. Blackburn, J., said: "I think the word ***remuneration*** is a wider term, and means a *quid pro quo.* If a man gives his services, whatever consideration he gets for giving his services seems to me a ***remuneration*** for them. Consequently, I think if a person was in the receipt of a payment, or in the receipt of a percentage, or any kind of payment which would not be an actual money payment, the amount he would receive annually in respect of this would be ***remuneration.***"

2. Render. — Manufacturers, etc., Mut. Ins. Co. *v.* Zeitinger, 168 Ill. 292; Ætna L. Ins. Co. *v.* Hesser, 77 Iowa 387; Peabody *v.* Satterlee, 166 N. Y. 178.

Judgment. (See also the titles JUDGMENTS AND DECREES, vol. 17, p. 756; RECORDS, *ante;* and see the title RENDITION AND ENTRY OF JUDGMENTS, 18 ENCYC. OF PL. AND PR. 427.) — In Wood *v.* Wood, 137 Cal. 133, it was said: "The meaning of the word ***rendered*** as applied to decrees and judgments is well settled, and when a decree or judgment is ***rendered*** it has full force and effect. Even the entry of it does not go to its validity. It has full force and effect regardless of the mere ministerial act of entering it upon the judgment book." See also Ryals *v.* McArthur, 92 Ga. 378.

In Gulf, etc., R. Co. *v.* Cunnigan, (Tex. 1902) 67 S. W. Rep. 889, it was held that the word "judgment" and the words "judgment ***rendered***" have the same meaning.

"A judgment is ***rendered*** when the court makes an order therefor." State *v.* Biesman, 12 Mont. 16.

"***Rendered*** means the time the judgment was in fact pronounced." Farmers' State Bank *v.* Bales, (Neb. 1902) 90 N. W. Rep. 946.

But in Ætna L. Ins. Co. *v.* Hesser, 77 Iowa 387, which case turned upon a question of priority between a mortgage and a judgment creditor, it was held that a judgment was not ***rendered*** so as to be capable of enforcement as a lien until entered of record in the books prescribed by statute. See also the titles RECORDING ACTS, *ante;* RECORDS, *ante.*

Judgment Already Entered. — A statute provided that no judgment ***rendered*** or to be ***rendered*** should bear interest after the passage of the act. It was held that the use of the word ***rendered*** was a demonstration of the intention of the legislature to make this proviso applicable to judgments which had then been entered. Pauley Jail Building, etc., Co. *v.* Crawford County, (C. C. A.) 84 Fed. Rep. 943.

Kind of Judgment. — It has been held that the term ***rendered***, used in connection with the designation of the courts from the judgments of which appeals might be taken, indicated the kind of judgment subject to review in the appellate court. See California State Tel. Co. *v.* Patterson, 1 Nev. 159.

Rendered in Sense of to Be Rendered. — Barker *v.* McLeod, 14 Nev. 151.

In What Court. — A judgment given in a justices' court, but a transcript of which is filed and the judgment docketed in the County Court, cannot be said to have been ***rendered*** in the latter court so as to take it out of the operation of Code Civ. Pro. N. Y., § 382, providing that an action upon a judgment ***rendered*** in a court not of record shall be commenced within six years, etc. Dieffenbach *v.* Roch, 112 N. Y. 626.

Rendition and Entry Distinguished. — See ENTER — ENTRY, vol. 11, p. 44, and see the title RENDITION AND ENTRY OF JUDGMENTS, 18 ENCYC. OF PL. AND PR. 427. See also Wood *v.* Etiwanda Water Co., 122 Cal. 152.

Referee. — In Craig *v.* Craig, 66 Hun (N. Y.) 452, it was held that where a referee had signed a report and given notice to the parties, his decision was ***rendered.***

Allowed. — A statute required that the accounts of an assignee be ***rendered*** to the judge of probate within six months. It was held that this did not require that they should be allowed within that time. Thomas *v.* Clark, 65 Me. 296.

Duly Made and Given Equivalent to Rendered. — See Roys *v.* Lull, 9 Wis. 326.

Insurance Policy. — See the title FIRE INSURANCE, vol. 13, p. 330. *Compare* Peabody *v.* Satterlee, 166 N. Y. 174.

3. Rend-rock. — "Rend-rock is a kind of dynamite." Stewart *v.* New York, etc., R. Co., 5 Silv. Sup. (N. Y.) 203.

4. Renew. — Daggett *v.* Daggett, 124 Mass. 151.

Renew Charter. — In Moers *v.* Reading, 21 Pa. St. 201, it was said: "To ***renew*** a charter

sense, is to refresh, revive, or rehabilitate an expiring or declining subject. The term is not appropriate to describe the making of a new contract or the creation of a new existence.[1]

Renewal is defined as the substitution of a new right or obligation for another of the same nature. It is not a word of art, and has no legal or technical signification. It has also been defined as a change of something old for something new.[2]

is to give a new existence to one which has been forfeited, or which has lost its vitality by lapse of time."

1. Carter *v.* Brooklyn L. Ins. Co., 110 N. Y. 22.

In Greene *v.* Lowry, 46 Ga. 78, it was held that a new contract, though based partly upon an old consideration, could not be called the *renewal* of a contract.

2. Renewal. — Sponhaur *v.* Malloy, 21 Ind. App. 287, *quoting* And. L. Dict.; Bouv. L. Dict.

Renewal Has No Technical Signification. — Russell *v.* Phillips, 14 Q. B. 892, 68 E. C. L. 892; Flanagin *v.* Hambleton, 54 Md. 227.

Renew and Extend. — See EXTEND, vol. 12, p. 572.

Renewed as Synonym of Repaired. — See People *v.* Highway Com'rs, 158 Ill. 197, and see REPAIRS, *post.*

Bills and Notes. — In Daggett *v.* Daggett, 124 Mass. 149, it was held that the words "I hereby *renew* the within note," indorsed upon the back of a promissory note, meant something more than an admission that the old note was unpaid; they imported a promise anew to pay the amount of the note. See also Central Bank *v.* Willard, 17 Pick. (Mass.) 150, 28 Am. Dec. 284, and see the titles BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, pp. 149, 339; LIMITATION OF ACTIONS, vol. 19, p. 288 *et seq.*

A bill of exchange drawn Nov. 28, 1836, payable forty-two months after date, was accepted thus: "Accepted on the condition of its being *renewed* until Nov. 28th, 1844." It was held in an action by an indorsee against the acceptor that this was a good conditional acceptance. Patteson, J., said: "It [*renewed*] is not a word of art; it has no legal or technical signification; and though in common parlance it might appear, *prima facie*, to apply to something new, yet there is nothing forced or absurd in giving it a different meaning." Russell *v.* Phillips, 14 Q. B. 892, 68 E. C. L. 892.

Same — Substitution of New Obligation for Old. — In Kedey *v.* Petty, 153 Ind. 184, it was said: "*Renewed* or *renewal*, as applied to promissory notes, in commercial and legal parlance, means something more than the substitution of another obligation for the old one. It means to re-establish a particular contract for another period of time. It means to restore to its former conditions."

But in Sponhaur *v.* Malloy, 21 Ind. App. 287, the court refused to sustain the contention of counsel that a person could not, by giving his own note, *renew* the note of another person, because "to *renew* is to make new again," "to re-establish," "to restore to vigor," etc.

Same — Received, Renewed. — A note had upon it several successive indorsements of the words "received," *renewed.* To each of these indorsements was prefixed a date, each date being a day subsequent to the pay day of the note. It was held that each of the indorsements was equivalent to the words "received the interest for a *renewal*," and that the word *renewed* might be properly regarded as an agreement to consider the note to be the same as if made in the same terms anew from that date. Lime Rock Bank *v.* Mallett, 34 Me. 550.

Same — Renewals. — Where a mortgage was given to secure the payment of certain promissory notes, made by the mortgagee for the accommodation of the mortgagor, and the *renewals* thereof until the whole sum should be paid, it was held that it was not necessary, in order to constitute notes subsequently used *renewals* of such original notes, that they should have been issued for the same amounts, at the same periods, and that each successive note should have been applied to take up its immediate predecessor. Gault *v.* McGrath, 32 Pa. St. 392.

Renewal Note. — In Flanagin *v.* Hambleton, 54 Md. 227, it was said: "The word *renewal* has no legal or strictly technical signification. Whether a note is a *renewal* of another note, adjudged cases say depends entirely upon the intention of the parties."

Insurance. (See also the titles INSURANCE, vol. 16, p. 868; LIFE INSURANCE, vol. 19, p. 53.) — The case of Carter *v.* Brooklyn L. Ins. Co., 110 N. Y. 20, turned upon the construction of a *New York* statute providing that "no life insurance company doing business in the city of New York shall have power to declare forfeited or lapsed any policy thereafter issued or *renewed*, by reason of nonpayment of any annual premiums, or interest, or any portion thereof," without notice in writing to the insured. It was held that the payment of each annual premium constituted a *renewal* of the policy within the meaning of the term *renewed* as used in the act. The court said: "It is contended by the appellant that the act applies only to policies 'issued or *renewed*,' after its passage, and that a policy cannot be said to have been *renewed* unless it has become forfeited or lapsed, and has been afterward restored or reinstated by the company. * * * It is not according to the popular notion of the meaning of the word *renewal* that it can take place only after the death or expiration of the subject to which it is applied. Thus, to *renew* a note, a lease, or a contract, it is not essential to wait until they have respectively expired, for after that time it would be practically impossible to *renew* them. A new note or lease may be made or contract created, but they would have force and effect from the new creation, and not from the original agreement."

In State *v.* Connecticut Mut. L. Ins. Co.,

RENOVATED BUTTER. — See note 1.

RENT. (See also the titles COVENANTS, vol. 8, p. 43; DISTRESS, vol. 9, p. 617; GROUND RENTS, vol. 14, p. 1121; LANDLORD AND TENANT, vol. 18, p. 149; LEASES, vol. 18, p. 593.) — A rent is a right to a certain profit issuing annually (or, rather, periodically) out of lands and tenements corporeal, or out of them and their furniture, in retribution (*reditus*) for the land that passes.[2]

106 Tenn. 286, it was said: "It was the right and privilege of the policy holder to *renew* the policy for another year by paying another premium. Such premium is known as a '*renewal* premium.' It is optional with the assured to pay it, but obligatory upon the company to receive it. The company cannot compel the assured to pay a *renewal* premium, but he can compel the company to receive it, or, what is equivalent, keep the policy alive by tendering it."

Renewal of Conspiracy. — In Com. *v.* Bartilson, 85 Pa. St. 487, it was said: "The *renewal* of a conspiracy means to begin it again; to recommence it; to repeat it. From this it is apparent that each *renewal* is a new offense; a repetition, it is true, of a former one, but still an offense for which an indictment would lie." See also the title CONSPIRACY, vol. 6, p. 830.

1. Renovated Butter. — See Hathaway *v.* McDonald, 27 Wash. 659, and see the title ADULTERATION, vol. 1, p. 738, and the references there given.

2. See the title LANDLORD AND TENANT, vol. 18, p. 260.

Other Definitions. — "*Rent* is a return or compensation for the possession of some corporeal inheritance, and is a certain profit, either in money, provisions, or labor, issuing out of the lands in return for their use." Smoot *v.* Strauss, 21 Fla. 620. See also Van Wicklen *v.* Paulson, 14 Barb. (N. Y.) 655.

"A certain profit in money, provisions, chattels, or labor issuing out of lands and tenements in retribution for the use." Macdonell *v.* International, etc., R. Co., 60 Tex. 595, *citing* Bouv. L. Dict.

"The word *rent* generally means what is paid by a tenant to his landlord for the occupation of the property of the latter, and carries with it the right of distress upon what is let." London, etc., R. Co. *v.* Buckmaster, L. R. 10 Q. B. 451.

"*Rent* is defined as being a definite compensation or return reserved by a lease, to be made periodically or fixed with reference to a period of time, payable in money, produce, other chattels, or labor, for the possession and use of land and buildings. Cent. Dict." Lake Erie, etc., R. Co. *v.* Griffin, 25 Ind. App. 155, *per* Henley, J., *dissenting*.

For Further Definitions, see Lacey *v.* Newcomb, 95 Iowa 287; Brown *v.* Cairns, 107 Iowa 727; Dolph *v.* White, 12 N. Y. 300; Damainville *v.* Mann, 32 N. Y. 206; Payn *v.* Beal, 4 Den. (N. Y.) 412; Stephens *v.* Reynolds, 6 N. Y. 458; Rouse *v.* Catskill, etc., Steamboat Co., 59 Hun (N. Y.) 83; Whithed *v.* St. Anthony, etc., Elevator Co., 9 N. Dak. 224; Mickle *v.* Miles, 1 Grant Cas. (Pa.) 328; Fisk *v.* Brayman, 21 R. I. 201; Coogan *v.* Parker, 2 S. Car. 266; Newton *v.* Wilson, 3 Hen. & M. (Va.) 483.

Consideration. — As to whether the word *rent ex vi termini* implies that something was to be paid or done by the lessee, see State *v.* Smith, 106 N. Car. 657.

Feudal Law. — In De Lancey *v.* Piepgras, 138 N. Y. 39, it was said: "In the feudal economy, *rent* had a twofold quality. It was regarded as something issuing out of the land as a compensation for the possession, and also as an acknowledgment by the tenant to the lord of his fealty or tenure."

Rent and Income. (See also INCOME, vol. 16, p. 150, note.) — In State *v.* McBride, 5 Neb. 104, it was said: "*Rent* is said to be a certain yearly profit arising out of lands and tenements as a compensation for the use thereof, and therefore is properly termed an income."

Bonus. — Where one agreed to "take" a certain lease from its owner and to pay to him a certain sum as bonus for the privilege, it was held that this bonus was *rent*. The court said: "There was essentially a contract to lease and a reservation of rent; and the substantial nature of the recompense stipulated for the use and possession of the land cannot be changed by calling it a 'bonus.'" Constantine *v.* Wake, 1 Sweeny (N. Y.) 244.

Rent and Hire Distinguished. — See HIRE, HIRER, ETC., vol. 15, p. 508. See also Rouse *v.* Catskill, etc., Steamboat Co., 59 Hun (N. Y.) 83.

Succession of Sums of Money. — In Zouche *v.* Dalbiac, L. R. 10 Exch. 177, Kelly, C. B., said: "*Rent* is a noun of multitude, meaning not one single sum due at some one moment, which may be recovered by action, and may be lost if not, but meaning a succession of sums of money payable in general yearly or at shorter intervals during the whole term specified."

Rent Equivalent to Annual Value. — See Sheffield Waterworks Co. *v.* Bennett, L. R. 8 Exch. 196.

Administrator's Bond. — In Wilson *v.* Unselt, 12 Bush (Ky.) 216, it was held that the word *rent* in the bond of an administrator was intended to embrace only such *rent* as, at the death of the intestate, passed to his personal representative and not to his heirs.

Pew Rent. (See also the title PEWS AND PEW RIGHTS, vol. 22, p. 761.) — In Church *v.* Wells, 24 Pa. St. 251, it was said: "A pew *rent* is not a *rent* in the usual legal application of the term, for it does not issue out of a corporeal hereditament, and it is therefore no charge upon the property, except by virtue of the very ordinary provision made by congregations in such cases, and made in this instance, that the pew may be sold for arrears of *rent*."

Rent Payable. — An English statute provided that all actions of ejectment where neither the value of the tenement nor the *rent* payable in respect thereof should exceed a certain amount should be brought in the County Court. It was held that by *rent* payable was meant the

The several elements and characteristics of a rent embodied in this definition are considered more fully in the notes.[1] Rents are commonly divided into

rent payable as between the litigant parties, and not any *rent* that might be payable by a sublessee. Brown *v.* Cocking, L. R. 3 Q. B. 672.

Execution Sales. — In Payn *v.* Beal, 4 Den. (N. Y.) 405, *overruling* People *v.* Haskins, 7 Wend. (N. Y.) 463, it was held that a *rent* reserved upon a conveyance in fee of land was not subject to the lien of a judgment, nor liable to be sold on execution, though the conveyance contained a clause of distress and a provision for re-entry. See also the title SHERIFFS' SALES.

Joint Tenants and Tenants in Common. — The term *rent* is not technically applicable to arrangements between two tenants in common by which one pays the other for the sole use of the land. Kites *v.* Church, 142 Mass. 586.

Tenants at Will or at Sufferance. — In Rice *v.* Loomis, 139 Mass. 303, it was said: "According to the usage in this commonwealth, the word *rent* applies as well to payments made by a tenant at will or at sufferance as to those made by a tenant for years."

"By statute, as well as by usage in this commonwealth, the word *rent* may include the compensation to be paid for the occupation of land by a tenant, whether he holds under a written lease, or at will, or at sufferance, and whether the amount to be paid has been defined by the agreement of the parties or has been left indefinite." Kites *v.* Church, 142 Mass. 589.

Rackrent. — See Truman *v.* Kerslake, (1894) 2 Q. B. 778.

Rent Unpaid. — *Rent* unpaid means arrears of *rent*. Weiss *v.* Jahn, 37 N. J. L. 96.

Royalty Held to Be Rent. — Lacey *v.* Newcomb, 95 Iowa 287. See also the title LANDLORD AND TENANT, vol. 18, p. 261, and see ROYALTY, *post*.

Rent to Become Due. — See BECOME, vol. 3, p. 905, note.

1. Right. — "Let it be observed that a *rent* is a right of which the arrears, periodically accruing, are merely the fruits. In consequence of omitting to note this obvious distinction between the incorporeal right and the fruits or profits which periodically arise from it, we have it laid down that for a freehold *rent* reserved on a lease for life, or in fee simple, no action of debt lay by the common law during the continuance of the freehold out of which it issued, for that the law would not suffer a real injury to be remedied by an action merely personal. 1 Rol. Abr. 595; 3 Th. Co. Litt. 270, n. (U). And provision had to be made for the case by Stat. 8 Anne, c. 14, which has been, in substance, enacted with us. V. C. 1873, c. 134, § 7. And under the influence of the same confusion of thought, not discriminating between *rent* and arrears of *rent*, a prohibition was awarded in Miller *v.* Marshall, 1 Va. Cas. 158, to prevent a justice of the peace from taking cognizance of a claim for arrears of a freehold *rent* because it was a freehold estate. The *rent* or right itself, where the estate or interest therein is an estate of freehold, cannot be recovered in a personal action, but the arrears, like the severed fruits of the soil, are not real property, but personalty, and the injury of withholding them is a personal injury, which a personal action is well fitted to redress." 2 Min. Inst. 32. See also Hayden *v.* McMillan, 4 Tex. Civ. App. 479.

The distinction made by Dr. Minor is also recognized in Washburn's definition of *rent*, 2 Washburn on Real Prop. (5th ed.), bk. 2, p. 5, and is obvious. For it is a contradiction in terms to define *rent* as "a certain profit," or "the return," and, at the same time, to denominate it an incorporeal hereditament. Yet a large majority of the lexicographers and text writers fall into this inconsistency. 2 Black. Com. 41; 3 Kent's Com. 460. See also Webst. Dict.; Bouv. L. Dict.; Abb. L. Dict.; And. L. Dict.

Same — Incident to Reversion — Realty. — *Rent* is an incident to the reversion, and follows it whithersoever and into whatsoever hands it may pass, unless they are severed by the act of their owner or by operation of law, and then they may become vested in different persons. Condit *v.* Neighbor, 13 N. J. L. 83.

Rent is a part of the realty, and passes as such with the estate. Van Wicklen *v.* Paulson, 14 Barb. (N. Y.) 655; Den *v.* Craig, 15 N. J. L. 195.

Rent usually signifies a chattel-real interest in land. Bruce *v.* Thompson 26 Vt. 746.

Same — Choses in Action. — *Rent* not yet due is not a chose in action. Van Wicklen *v.* Paulson, 14 Barb. (N. Y.) 654.

Same — Incorporeal Hereditaments. — *Rent* is an incorporeal hereditament. Den *v.* Craig, 15 N. J. L. 195; Brown *v.* Brown, 33 N. J. Eq. 659; Payn *v.* Beal, 4 Den. (N. Y.) 412. See also HEREDITAMENTS, vol. 15, p. 337; INCORPOREAL, vol. 16, p. 155.

Arrears of Rent Held to Be Personalty. — Hayden *v.* McMillan, 4 Tex. Civ. App. 479.

Certainty. — The profit must be certain or capable of being reduced to certainty by either party. See the title LANDLORD AND TENANT, vol. 18, p. 260, and see Smoot *v.* Strauss, 21 Fla. 620.

In Henderson *v.* Henderson, 15 Can. L. T. 397, where a father gave to one of his sons the possession of a farm upon the understanding that he should contribute such sum as could be spared off the farm after its yielding a living to him, for the payment of a mortgage thereon, it was held that the money contributed by the son was not *rent*.

The term *rent* has been held to embrace an unsettled claim for the use of land, where such appeared to have been the intent of the legislature. Elder *v.* Henry, 2 Sneed (Tenn.) 86.

Profit. — The right must be to a profit, usually, though not necessarily, money, for it frequently consists of part of the products of the land, labor, etc. See the title LANDLORD AND TENANT, vol. 18, p. 261, and see Smoot *v.* Strauss, 21 Fla. 620; Hayden *v.* McMillan, 4 Tex. Civ. App. 479.

The phrase "*rents*, issues, or profits" includes the proceeds of the land, whether in

money or in kind. Eason *v.* Henderson, 12 Q. B. 997, 64 E. C. L. 997. See also Early *v.* Friend, 16 Gratt. (Va.) 46; Newton *v.* Wilson, 3 Hen. & M. (Va.) 483. And see ISSUE, vol. 17, p. 538; PROFITS, vol. 23, p. 191. *Compare* Henderson *v.* Eason, 17 Q. B. 701, 79 E. C. L. 701.

Same — Crops — Ice. — Thus *rent* may be payable in crops, Clarke *v.* Cobb, 121 Cal. 595; Whithed *v.* St. Anthony, etc., Elevator Co., 9 N. Dak. 224, or in ice, Fisk *v.* Brayman, 21 R. I. 201.

Same — Failure to Call Consideration Rent. — In Sheaff's Appeal, 55 Pa. St. 406, it was said: "As surely as the reservation is expressed in English, some profits or emoluments of this particular lease were intended to be reserved, and unless they were *rents*, it is impossible to see what they could be. That they were not called *rents* is immaterial."

Same — Support. — In Stephens *v.* Reynolds, 6 N. Y. 458, it was said: "It must be a profit; but it is not necessary that it should be in money; for spurs, capons, horses, corn, and other matters are frequently rendered for *rent*." In that case it was held that a lease of agricultural land in consideration that the lessor be comfortably supported during life was a valid lease.

But in Owing's Case, 1 Bland (Md.) 290, it was held that a charge of an annual sum upon land for the support of a lunatic, though not a *rent*, was an incumbrance.

Same — Trees, Herbage, Etc. — In Hayden *v.* McMillan, 4 Tex. Civ. App. 483, it was said: "'The reservation, in order to come within the definition of *rent*, must be of a profit (something not in the grantor before), whether in labor, provisions, part of the annual product, money, or other things. Hence a reservation of the trees or of the vesture or herbage growing on the land at the time would not be a *rent*, because not a profit.' 2 Min. Inst 33."

Issuing Periodically. — The profit or return reserved must be payable periodically, but it need not be yearly. If it issues from period to period during the whole continuance of the grantee's estate, whether from year to year or from month to month, etc., this will constitute the reservation a rent; but, if the purchase money of land is payable in instalments, but not at intervals continuing throughout the duration of the estate, it is not a *rent*. 2 Min. Inst. 33; 2 Black. Com. 41." Smoot *v.* Strauss, 21 Fla. 620; Coogan *v.* Parker, 2 S. Car. 266.

Issuing Out of Lands and Tenements Corporeal. — It must issue out of lands and tenements corporeal; therefore a rent cannot be reserved out of an advowson, a common, an office, a franchise, or the like. 2 Black. Com. 41; 2 Min. Inst. 33; 3 Kent's Com. 460; Taylor *v.* Hart, 73 Miss. 32; Miners' Bank *v.* Heilner, 47 Pa. St. 457; Coogan *v.* Parker, 2 S. Car. 255, 16 Am. Rep. 666; Dyer *v.* Cleaveland, 18 Vt. 244. See also the title LANDLORD AND TENANT, vol. 18, p. 260. *Compare* Payne *v.* Esdaile, 13 App. Cas. 622.

In Van Rensselaer *v.* Bonesteel, 24 Barb. (N. Y.) 368, it was said: "The very definition of *rent* is that it is a certain profit issuing yearly out of land. 2 Black. Com. 41. The land itself is the principal debtor."

Same — Franchise. — In Macdonell *v.* International, etc., R. Co., 60 Tex. 595, it was said: "In its strict sense the word *rent* can only be applied to lands and tenements corporeal, and it would not apply to a franchise; but it is evident that the word as used in the petition, and in the charter of the city, which is set out in the brief of appellee correctly, is not used in such a restricted sense."

Same — Charge upon Estate. — In Otis *v.* Conway, 114 N. Y. 16, it was said: "Technically, *rent* is something which a tenant renders out of the profits of the land which he enjoys. Equitably, it is a charge upon the estate, and the lessee, in good conscience, ought not to take the profits thereof without a due discharge of the *rent*."

Issuing Out of Furniture. — In Com. *v.* Contner, 18 Pa. St. 447, the court, *per* Black, C. J., said: "Now a sum of money payable periodically, for the use of chattels, is not *rent* in any legal sense of the word. It cannot be distrained for; and unless it can, it is not demandable out of the proceeds of a sheriff's sale; for this right comes in place of a distress by the plain words of the statute. *Rent* must not only issue out of land, but it must be fixed, definite, and certain in amount, whether payable in money, chattels, or labor. If, therefore, a lease so mixes the real and personal property together that it cannot be determined how much of what is called the *rent* is to be paid for the chattels, and how much is the profit of land, there can be no distress for nonpayment of it." The *Pennsylvania* court, however, has qualified these propositions, holding in Mickle *v.* Miles, 31 Pa. St. 21, that "a rent may issue out of lands and tenements corporeal, and also out of them and their furniture."

Same — Rent May Issue Out of Farm and Its Stock. — Spencer's Case, 5 Coke 17*b*; Sutliff *v.* Atwood, 15 Ohio St. 193. *Compare* Payne *v.* Esdaile, 13 App. Cas. 622.

In Return for Land that Passes. — As *rent* is the return for the land that passes, it must be reserved to the grantor. If reserved to a stranger, it not only is not a good *rent* but at common law was altogether void and was not binding as a contract. 2 Min. Inst. 34; Co. Litt. 47*a*, 143*b*; Bac. Abr., tit. Rents, G; Gilb. Rents 54. And see the title LANDLORD AND TENANT, vol. 18, p. 261, paragraph *To Whom Reserved*.

Rent is a compensation for the land that passes. And it is declared by Prof. Minor that this is "the crowning characteristic of a proper *rent*, and it is to be regretted that it was ever lost sight of in the nomenclature connected with this subject." It will be observed that if the owner of lands grants a periodical payment issuing out of his lands, though it lacks this characteristic, it is universally denominated a *rent*. 2 Min. Inst. 34. See also Owing's Case, 1 Bland (Md.) 290; Taylor *v.* Hart, 73 Miss. 22; Dyett *v.* Pendleton, 8 Cow. (N. Y.) 730; Hoeveler *v.* Fleming, 91 Pa. St. 324; Coogan *v.* Parker, 2 S. Car. 255, 16 Am. Rep. 666.

In Damainville *v.* Mann, 32 N. Y. 206, it was said: "It is the essential condition upon which the lessee or his assignee is suffered to enjoy the possession, and take the proceeds to

three classes, viz., rent service, rent charge, and rent seck.[1]

RENTAL — RENTAL VALUE. (See also RENTS AND PROFITS, *post*; VALUE; and see the titles DAMAGES, vol. 8, p. 537; EMINENT DOMAIN, vol. 10, p. 1043.) — Rental is defined as "a sum total of rents; as, an estate that yields a rental of ten thousand dollars a year."[2]

RENT CHARGE. — See RENT, *ante*.

RENTED. — The word "rented," according to its common and authorized use, refers as well to the act of a lessee as to that of a lessor. The lessor rents land to the lessee; the lessee rents land of the lessor.[3]

his own use, that he shall pay the *rent* reserved in the deed under which he holds."

In Bates *v.* Phinney, 45 Mich. 389, it was said: "*Rent* is the consideration for occupancy, and there was no consideration for payment when enjoyment was to cease."

In Brown *v.* Cairns, 107 Iowa 730, it was said: "When there is a special covenant to pay the *rent*, the fact that the tenant never occupied the premises, or in any manner took possession of or asserted a right thereto, will not relieve him from liability upon his covenant, but he will be held to pay the *rent* for the full term." See also the title LANDLORD AND TENANT, vol. 18, p. 325.

Same — Not Return for Thing Enjoyed — Brickmaking. — In Deyo *v.* Bleakley, 24 Barb. (N. Y.) 15, where the owner of certain premises had leased them for brickmaking purposes for a certain time and for a certain *rent*, the court said: "In this case the *rent* is not merely, as stated by the learned judge, 'a return of the thing enjoyed — a profit payable out of the increase of the land;' it is rather a compensation for not returning the thing enjoyed, and a price paid for the conversion of the land into merchandise, which is constantly tending to render the land incapable of returning any increase." *Compare* the title LANDLORD AND TENANT, vol. 18, p. 261, paragraph *Royalties*.

1. See the title LANDLORD AND TENANT, vol. 18, p. 260. And see the following cases:

Rent Service. — Van Rensselaer *v.* Jewett, 2 N. Y. 151; De Lancey *v.* Piepgras, 138 N. Y. 39; Smith *v.* Campbell, 3 Hawks (10 N. Car.) 598; Wallace *v.* Harmstad, 44 Pa. St. 495.

Rent Charge. — Den *v.* Craig, 15 N. J. L. 195; People *v.* Haskins, 7 Wend. (N. Y.) 467; Van Rensselaer *v.* Chadwick, 24 Barb. (N. Y.) 336, *affirmed* 22 N. Y. 32; Van Rensselaer *v.* Jewett, 2 N. Y. 151; Smith *v.* Campbell, 3 Hawks (10 N. Car.) 598; Wallace *v.* Harmstad, 44 Pa. St. 495; Miners' Bank *v.* Heilner, 47 Pa. St. 457; Smith *v.* Charleston Dist., 1 Bay (S. Car.) 445.

Rent Seck. — Den *v.* Craig, 15 N. J. L. 195; Van Rensselaer *v.* Jewett, 2 N. Y. 151; People *v.* Haskins, 7 Wend. (N. Y.) 467; Smith *v.* Campbell, 3 Hawks (10 N. Car.) 598; Wallace *v.* Harmstad, 44 Pa. St. 495; Miners' Bank *v.* Heilner, 47 Pa. St. 457.

Fee-farm Rent. — See FEE, vol. 12, p. 891, note

Annuity. — See the title ANNUITIES, vol. 2, p. 387, note 4.

2. **Rental.** — Fremont, etc., R. Co. *v.* Bates, 40 Neb. 393, *quoting* Webst. Dict.

Rental Value. — It has been said that *rental value* and "value of the use" of the premises means substantially the same thing. Alexander *v.* Bishop, 59 Iowa 572; Leick *v.* Tritz, 94 Iowa 322.

Same — Fences. — The measure of damages for failure of a railroad company to fence has been held to be the depreciation in the *rental value* of the farm, which means the value of its use for any purpose for which it is adapted in the hands of a prudent and discreet farmer upon a judicious system of husbandry. Nelson *v.* Minneapolis, etc., R. Co., 41 Minn. 131. See also the title FENCES, vol. 12, p. 1035.

In Leick *v.* Tritz, 94 Iowa 325, it was said: "The term *rental value*, as used to measure damages, has been deemed to be the equivalent of 'actual damage,' in its legal signification. It is the commercial value of the use of a thing, and the fact is ascertainable by direct proof of what it would rent for, or by the proof of facts from which a fair *rental value* may be known."

Same — Sawmill. — It has been held that equivalent words to *rental value*, as applied to a sawmill, would be "the value of the use of the same." Wood *v.* State, 66 Md. 67.

Rental and Royalty Used Interchangeably. — See Western Union Tel. Co. *v.* American Bell Telephone Co., 105 Fed. Rep. 687.

3. **Rented.** — Gray *v.* La Fayette County, 65 Wis. 569. This case arose upon the construction of a statute exempting the parsonage of a church, "whether occupied by its pastor permanently or *rented* for his benefit." The plaintiffs contended that the words "*rented* for his benefit" referred to a renting, by the church as lessee, of a parsonage for the benefit or use of its pastor, while the defendants insisted that the words referred to a renting by the church, to a lessee, of its own parsonage, for the same beneficial purpose. The court held that though neither construction would be forced or unnatural, yet, looking at other provisions of the statute, the plaintiff's construction must be adopted.

So in Zink *v.* Grant, 25 Ohio St. 354, it was said: "The words '*rented* or leased' may be used in two senses. It is said that a landlord *rented* or leased his lands to his tenants, and with almost equal propriety it may be said that the tenant *rented* or leased an estate from his landlord."

Rented for Pasture. — In Noyes *v.* Stillman, 24 Conn. 24, it was said: "The word *rented*, aside from the qualification of it by the words with which it stands connected, naturally means that the tenant to whom the property is *rented* has the exclusive possession for the time. '*Rented* for a pasture' seems rather an equivocal phrase, which may be open to explanation, though it rather conveys the idea

RENTER. — See note 1.

RENTS AND PROFITS. (See also the titles EJECTMENT, vol. 10, p. 535; JOINT TENANTS AND TENANTS IN COMMON, vol. 17, p. 688; MORTGAGES, vol. 20, pp. 979, 1009; TRESPASS; TRUSTS; VENDOR AND PURCHASER; WILLS; and see MESNE PROFITS, vol. 20, p. 609; PROFITS, vol. 23, p. 189.) — See note 2.

RENT SECK. — See RENT, *ante.*

RENT SERVICE. —See RENT, *ante.*

RENUNCIATION. — See note 3.

REORGANIZATION OF CORPORATIONS. — See the title WINDING UP AND REORGANIZATION OF CORPORATIONS.

REPAIR. (See also the titles FIRE INSURANCE, vol. 13, p. 86; HIGHWAYS, vol. 15, p. 343; LANDLORD AND TENANT, vol. 18, p. 149; MARITIME LIENS, vol. 19, p. 1079; STREETS AND SIDEWALKS; and see ALTER, ALTERATION, ETC., vol. 2, p. 179; REPARATION, *post.*) — To "repair" is to restore to a sound or good state, after decay, injury, dilapidation, or partial destruction; as, to repair a house, a wall, or a ship.[4] To repair, as is ordinarily understood, means

that the tenant has an exclusive right, at least during the proper season for pasturing."

1. Renter Distinguished from Laborer. — See LABOR — LABORER, vol. 18, p. 77, note.

2. Rents and Profits. — In an order against an innocent occupier to account for *rents and profits*, the latter word means profits in the nature of rent, and as arising from the land, and not such profits as may have been made by carrying on a business — *e. g.*, a colliery upon the land. Errington *v.* Morewood, 29 S. J. 320, W. N. (85) 51.

"The *rents and profits* of an estate, the income, or the net income of it, are all quivalent expressions." Andrews *v.* Boyd, 5 Me. 203. See also People *v.* San Francisco Sav. Union, 72 Cal. 203; Earl *v.* Rowe, 35 Me. 420.

Purchase Money. — The *rents and profits* of a trust estate do not include purchase money received by the trustee from a sale of land rescinded through the purchaser's abandonment of the contract. Mansfield *v.* Alwood, 84 Ill. 497.

Gross Sum to Be Raised. (See also the title WILLS.) — Where a testator directed that a gross sum should be raised out of the *rents and profits* of the estate at a fixed time or for a definite purpose or object which must be accomplished within a short period of time, it has been held that such a direction would not be confined to raising the fund out of the mere annual rents, but would authorize the sale or mortgage of the estate itself. Green *v.* Belcher, 1 Atk. 506; Trafford *v.* Ashton, 1 P. Wms. 415; Baines *v.* Dixon, 1 Ves. 41; Allan *v.* Backhouse, 2 Ves. & B. 65; Gisborn *v.* Charter Oak L. Ins. Co., 142 U. S. 333; Schermerhorne *v.* Schermerhorne, 6 Johns. Ch. (N. Y.) 72.

But in Carrington *v.* Manning, 13 Ala. 639, it was said: "Now in respect to the terms *rents and profits*, these words are often, by a strained, technical, artificial construction, extended quite beyond any meaning which the testator intended them to have, and to raise a sum by *rents and profits* is held the same as raising it by sale."

Rents and Profits Distinguished from Rental Value. — Jones *v.* Massey, 14 S. Car. 307.

3. Executors' Renunciation. — "A *renunciation* is an act whereby a person named in a will as executor declines to take on himself the burden of that office. The act is, therefore, predicated of an existing office. It presupposes the existence of the will. If no will has been made, there is no executorship to renounce. Nor until it is shown that there is a will, can it appear that there is a renunciable executorship." Matter of Maxwell, 3 N. J. Eq. 614. See also the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 754.

4. Repair. — Webst. Dict.; Weaver *v.* Templin, 113 Ind. 303; Warren County *v.* Mankey, (Ind. App. 1902) 63 N. E. Rep. 865; Levi *v.* Coyne, (Ky. 1900) 57 S. W. Rep. 791; Pittsburg, etc., Pass. R. Co. *v.* Pittsburg, 80 Pa. St. 76; Fritsch *v.* Allegheny, 91 Pa. St. 228; Gulf City St. R., etc., Co. *v.* Galveston, 69 Tex. 663.

The word *repair* relates to the restoration of an existing condition. Matter of Board of Public Works, 144 N. Y. 444.

"To *repair* is to restore to a sound state, to mend, or refit." Cornell *v.* Vanartsdalen, 4 Pa. St. 370.

Repairs Must Be of Same Character and Kind as Original. — See Santa Cruz Rock Pavement Co. *v.* Broderick, 113 Cal. 628.

And in Ardesco Oil Co. *v.* Richardson, 63 Pa. St. 166, it was said: "*Repair* means to restore to its former condition, not to change either the form or the material. If you are to *repair* a wooden building, you are not to make it brick, stone, or iron, but you are to *repair* wood with wood." See also State *v.* White, 16 R. I. 594.

Maintain — Maintenance — Repair. — See MAINTAIN — MAINTENANCE, vol. 19, p. 611, note.

Slight Repairs. — In Howe *v.* Crawford County, 47 Pa. St. 362, in construing a statute which imposed on county commissioners the duty to *repair* bridges, the court said: "We cannot graduate *repairs*, and say slight ones shall be done, and large ones shall be neglected. The legislature did not mean we should do this. They meant by *repairs* whatever was necessary to make bridges safe and passable, and generally those *repairs* that are most thorough are in the end cheapest." *Compare* Jolly *v.* Baltimore Equitable Soc., 1 Har. & G. (Md.)

to amend; not to make a new thing, but to refit, to make good, or restore an existing thing.[1] Thus, the term does not include construction, reconstruction,[2]

301, set out *infra*, this note, *Same — Thorough Repair*.

Habitable Repair. — In Cooke *v.* Cholmondeley, 4 Drew 326, 4 Jur. N. S. 827, 27 L. J. Ch. 826, a direction to keep buildings in good *repair* was held to mean that state of *repair* in which they were at the testator's death, and not habitable *repair*.

Lease. (See also the title LANDLORD AND TENANT, vol. 18, p. 226.) — A covenant to *repair* means to keep the premises in as good *repair* as when the agreement was made. Middlekauff *v.* Smith, 1 Md. 340; Stultz *v.* Locke, 47 Md. 564.

Same — State Fitted for Use. — Where the lessors covenanted to keep the premises "in good necessary *repair*" during their term, it was held that this obligated the lessors to maintain the premises in a state fitted to the uses for which they were appropriated. Myers *v.* Burns, 33 Barb. (N. Y.) 405, *affirmed* 35 N. Y. 269.

Same — Rubbish. — The leaving of nine cartloads of ashes, brickbats, and rubbish by a tenant on quitting the demised premises is no breach of his agreement to yield up the premises peaceably, in good, tenantable *repair*. Thorndike *v.* Burrage, 111 Mass. 531.

Same — Additions. — Upon an agreement to rent a house and lot, out of the rent of which was "to be deducted any *repairs* that may be done to the same," the court held that the erection of a shed to the stable, a fowlhouse, and a privy were not *repairs*. Darby *v.* Farrow, 1 McCord L. (S. Car.) 517.

Highway — Relative Term. — See Foley *v.* East Flamborough Tp., 29 Ont. 141. See also the titles HIGHWAYS, vol. 15, p. 343; STREETS AND SIDEWALKS.

Same — Obstructions. — A duty to keep in *repair* includes a duty to remove all obstructions to the way. Pittsburg, etc., Pass. R. Co. *v.* Pittsburg, 80 Pa. St. 72.

In Fritsch *v.* Allegheny, 91 Pa. St. 228, it was said: "To *repair* a road or street, to restore it to its former condition and give it the essential properties of a suitable public highway, requires the removal of all obstacles cast upon it which impede its free passage."

Plumbing, Etc. — Under the head of *repairs* should be included new roofing, new plumbing, and whatever is reasonably necessary to keep up a house. Stephens *v.* Milnor, 24 N. J. Eq. 358.

Fire Insurance. — Within the meaning of a clause in a fire-insurance policy prohibiting alterations and *repairs* without special agreement therefor, the term *repairs* includes plumbing, rubbing and polishing hardwood floors, redecoration of walls, etc. German Ins. Co. *v.* Hearne, (C. C. A.) 117 Fed. Rep. 289.

Same — Thorough Repair. — In Jolly *v.* Baltimore Equitable Soc., 1 Har. & G. (Md.) 301, it was said: "It appears to have been conceded in argument that ordinary, necessary *repairs* might be made by the insured; but not a thorough *repair* like the present. The proof of the appellants is 'that the *repairs* made on this house were necessary for the purpose of rendering it tenantable,' and that they were made in the usual way. The bill of exceptions shows that by the word *repairs* both parties meant all that was done to the house. The distinction attempted to be taken has not been supported by any authorities, and in common sense and justice there can be no discrimination between the right to make ordinary *repairs* and such a thorough *repair* as is necessary for the purpose of rendering the house tenantable." *Compare* Howe *v.* Crawford County, 47 Pa. St. 362, set out *supra*, this note, *Slight Repairs*.

Out of Repair. — As to what constitutes a sufficient averment in an action for personal injuries that the street was out of *repair*, see Griffin *v.* Williamstown, 6 W. Va. 314. And see the title STREETS AND HIGHWAYS, 20 ENCYC. OF PL. AND PR. 953 *et seq*.

Painting. — Painting the outside of a house has been held not to be a *repair* within the English Workmen's Compensation Act, 1897. Wood *v.* Walsh, (1899) 1 Q. B. 1009.

Defective Drain. — In Alger *v.* Kennedy, 49 Vt. 120, 24 Am. Rep. 117, it was held that "a cellar partly filled with water month after month, because the drain has become stopped up, is out of *repair*;" and further that, if it was in such a condition that it rendered the whole tenement unfit and unsafe for habitation, there was no question that it needed *repairing*, and the jury should have been so instructed.

Repairs by Town. — Where a town, on raising the grade of a street, relaid at its own expense a sidewalk on adjacent private property, in consideration of a release by the property owner of all claims for damages on account of the change of grade, it was held that the town had not made *repairs* on the sidewalk so as to render it liable for personal injuries to a traveler thereon. Stockwell *v.* Fitchburg, 110 Mass. 305.

Repair Track. — In Richmond, etc., R. Co. *v.* Norment, 84 Va. 175, it was said: "A *repair* track is one upon which cars needing *repairs* are put, and upon which it is not customary for the shifting engine to come without notice to the overhaulers at work there."

Vessel. — The term *repair*, as applied to a vessel, has been held not to apply to the supplying of the loss of an anchor and chain. Anglin *v.* Henderson, 21 U. C. Q. B. 27.

1. Repair Does Not Mean to Make New Thing. — Todd *v.* Rowley, 8 Allen (Mass.) 58; Wattles *v.* South Omaha Ice, etc., Co., 50 Neb. 251.

2. Repair Does Not Include Construction or Reconstruction. — Chicago *v.* Sheldon, 9 Wall. (U. S.) 50; Peoria Sugar Refining Co. *v.* People's F. Ins. Co., 24 Fed. Rep. 773; Goodyear Shoe Machinery Co. *v.* Jackson, (C. C. A.) 112 Fed. Rep. 150; District of Columbia *v.* Washington, etc., R. Co., 1 Mackey (D. C.) 361, 4 Am. & Eng. R. Cas. 174; Warren County *v.* Mankey, (Ind. App. 1902) 63 N. E. Rep. 865; Farraher *v.* Keokuk, 111 Iowa 310; Ft. Wayne, etc., R. Co. *v.* Detroit, 34 Mich. 79; Farrar *v.* St. Louis, 80 Mo. 379; State *v.* Corrigan Consol.

or rebuilding.[1] But where it appears from other parts of the instrument under consideration, or by other means, that the term "repair" has been used in the sense of making something entirely new, that meaning will be given to it.[2]

St. R. Co., 85 Mo. 277; Reading *v.* United Traction Co., 202 Pa. St. 571; State *v.* White, 16 R. I. 594.

In Vincent *v.* Frelich, 50 La. Ann. 382, 69 Am. St. Rep. 439, it was said: "A building, as we understand, is ***repaired*** ' after it has been damaged; ' it is reconstructed after it has been demolished as a whole or in part."

Same — Use of Some of Old Material. — In Levi *v.* Coyne, (Ky. 1900) 57 S. W. Rep. 790, where a pavement was taken up, the grade changed, and new sand used, and part of the bricks used were new, it was held that this was a reconstruction, and not a ***repair***. The mere fact that some of the old material was used did not deprive the work of its proper designation. To the same effect see Farrar *v.* Keokuk, 111 Iowa 310.

" It seems too clear to admit of doubt or dispute that the covenants to ***repair*** do not embrace the erection of new buildings, whether built entirely of new material, or in part of new material, or in part of old structures; nor the cutting off of parts of the dwelling house and setting them up as independent structures. Such work cannot be regarded as ***repairs*** under the most liberal interpretation of that term." Naye *v.* Noezel, 50 N. J. L. 525.

Same — Drains. (See also the title DRAINS AND SEWERS, vol. 10, p. 220.) — In Romack *v.* Hobbs, (Ind. 1892) 32 N. E. Rep. 307, it was said: " The word ***repair***, by its own force and vigor, repels the implication that there is authority to construct new drains." See also *In re* Barney, (1894) 3 Ch. 562.

By an *Indiana* act in relation to drainage, the township trustees were authorized to ***repair*** drains and remove obstructions. It was held that they had no authority under this act to enlarge or improve the drains. Weaver *v.* Templin, 113 Ind. 298.

Same — Gutter of Mill. — A proposed by letter to B to put the gutter of a mill " in proper shape." B's letter of acceptance stated A's proposal to be to " ***repair*** and renew so far as necessary the gutter." It was held that the contract contained in the letters required A only to make such ***repairs*** and renewals that the existing gutter should do all that it was capable of doing when in good condition, according to its original plan of construction, and not to build a new gutter of a different construction, even if the original plan was defective. Dwight *v.* Ludlow Mfg. Co., 128 Mass. 280.

Same — Streets and Highways. (See also the titles HIGHWAYS, vol. 15, p. 343; STREETS AND SIDEWALKS.)—***Repair*** does not include the substitution of a new and different kind of pavement from that existing on a public street. Matter of Repaving Fulton St., (Supm. Ct.) 29 How. Pr. (N. Y.) 429; Blount *v.* Janesville, 31 Wis. 648.

And in Levi *v.* Coyne, (Ky. 1900) 57 S. W. Rep. 791, the reconstruction of a pavement was distinguished from its ***repair***.

By the term ***repairs*** is included whatever is necessary to keep the road in a proper condition for the traffic, having regard to the character and original manufacture of the road, but nothing further; it does not include converting a macadamized road into a paved road. Leek Imp. Com'rs *v.* Justices, 20 Q. B. D. 797.

But in Hall *v.* Concord, (N. H. 1902) 52 Atl. Rep. 867, it was held that regrading and widening a highway was a ***repair***.

Repair has been held not to extend to curbing, grading, and paving streets. Chicago *v.* Sheldon, 9 Wall. (U. S.) 50. But see People *v.* Brooklyn, 21 Barb. (N. Y.) 484.

An ordinance providing for the resurfacing of a street has been held to provide for ***repair*** only. Field *v.* Chicago, 198 Ill. 224.

Same — Patent. — In Goodyear Shoe Machinery Co. *v.* Jackson, (C. C. A.) 112 Fed. Rep. 150, it was said: " What is legitimate ***repair***, and what is reconstruction or reproduction as applied to a particular patented device or machine? When does ***repair*** destroy the identity of such device or machine and encroach upon invention? At what point does the legitimate ***repair*** of such device or machine end, and illegitimate reconstruction begin? It is impracticable, as well as unwise, to attempt to lay down any rule on this subject, owing to the number and infinite variety of patented inventions."

Same — Building. — To ***repair*** a building does not mean to enlarge or elevate it by raising it a story or extending its sides. Douglass *v.* Com., 2 Rawle (Pa.) 264. See also Stephens *v.* Milnor, 24 N. J. Eq. 358.

Same — Improvements. (See also IMPROVE — IMPROVEMENT, vol. 16, p. 59, note.) — " Improve " and ***repair*** are not equivalent words. Truscott *v.* Diamond Rock-Boring Co., 51 L. J. Ch. 261.

The word ***repairs*** does not embrace an improvement of the soil by improved cultivation, whether by manuring or any other mode of culture. Cornell *v.* Vanartsdalen, 4 Pa. St. 370.

In Western Paving, etc., Co. *v.* Citizens' St. R. Co., 128 Ind. 526, it was held that where an ordinance provided that a street-railway company should keep the space between the rails and a certain space outside each rail in ***repair***, the city could not, by a subsequent ordinance, impose on such company, without its consent, the obligation of paying a proportionate share of the cost where a street occupied by its railway was improved.

Repairs Held Not to Extend to Original Improvements. — See Santa Cruz Rock Pavement Co. *v.* Broderick, 113 Cal. 628.

1. Repair Does Not Include Rebuilding. — *In re* De Teissier, (1893) 1 Ch. 153; Mayer *v.* Morehead, 106 Ga. 436; Wattles *v.* South Omaha Ice, etc., Co., 50 Neb. 251.

2. Repair in Sense of Rebuild, Reconstruct, Etc. — Thompson *v.* Pendell, 12 Leigh (Va.) 603. See also Atty.-Gen. *v.* Wax Chandlers' Co., L. R. 6 H. L. 2.

In Martinez *v.* Thompson, 80 Tex. 568, it was held that the rebuilding of a defective wall was ***repairing*** a house.

Bridges. — In Howe *v.* Crawford County, 47

REPARATION. (See also REPAIR, *ante*, p. 470.) — See note 1.

REPAVE. — See PAVE — PAVEMENT — PAVING, ETC., vol. 22, p. 507; REPAIR, *ante*, p. 470; and see the title STREETS AND SIDEWALKS.

REPAY. (See generally the title PAYMENT, vol. 22, p. 513.) — To repay does not necessarily mean to repay money; it has also the meaning of return, restore, etc.[2]

REPEAL. (See also the title STATUTES.) — See note 3.

REPEATER. (See also the title CARRYING WEAPONS, vol. 5, p. 729.) — See note 4.

REPEATING SLANDER. — See note 5.

REPLEADER. — See the title REPLEADER, 18 ENCYC. OF PL. AND PR. 489.

REPLEGIANDO (DE HOMINE). (See also the titles HABEAS CORPUS, vol. 15, p. 125; REPLEVIN, *post.*) — The writ de homine replegiando was a common-law writ which lay to replevy a person out of prison or out of the custody of a private individual, upon giving security that the person replevied shall be forthcoming to answer any charge against him.[6] Where the person to be replevied had been conveyed out of the jurisdiction of the sheriff, a return was made by the sheriff to the replevin writ that the person was eloigned (*elongatus*), upon which a process issued called a capias ad witheram to imprison the defendant till he produced the person to be replevied.[7] This remedy has been resorted to in *England* by a husband to regain possession of his wife, who was alleged to be detained by her parents,[8] and by a master to regain possession of his servant.[9] Blackstone in his commentaries states that because the writ was guarded with so many exceptions it had become to a great extent obsolete, recourse being

Pa. St. 362, it was held that the ***repair*** of a bridge properly includes the erection of a new superstructure where the old superstructure had broken down from age and decay.

As Good Repair and Condition. — Where an ordinance required a street-railway company to keep the portion of the street between its railway tracks and two feet on each side thereof in as good ***repair*** and condition as the city kept the balance of the street, it was held that this meant more than that the company should keep the street in ordinary ***repair***, and that where the city paved the streets, it was the duty of the railway company to pave its portion. State *v.* Jacksonville St. R. Co., 29 Fla. 590, 50 Am & Eng. R. Cas. 179.

1. Reparation. — A statute provided that a person aggrieved by the neglect of a railroad company to post its schedule of freight rates, etc., according to statute, if the company refused to make proper ***reparation***, should be entitled to a penalty forfeited by the railroad company. In construing this provision in Arkansas, etc., R. Co. *v.* Harris, 62 Ark. 457, the court said: "Compensation, then, for injuries or wrongs suffered by reason of the failures to comply with the act to which penalties are annexed is what is meant by ***reparation***."

Reparation of Premises. — In Atty.-Gen. *v.* Wax Chandlers' Co., L. R. 6 H. L. 2, it was held that the term ***reparation*** of premises, used in a gift of those premises to a charity, must be held to comprehend their restoration in the event of any catastrophe befalling them. But see REPAIR, *ante*, p. 470.

2. Repay. — Grant *v.* Dabney, 19 Kan. 388, 27 Am. Rep. 125. This case arose upon the construction of the following contract: "Please let Mr. S. and family have whatever they may want for their support, and I will ***repay*** you for the same." The drawee engaged a physician to attend S. and his family. It was held that the drawee could not recover, upon the authority of the letter, from the drawer, for the medical services thus rendered, and that it would not be at variance with the language of the order to hold that the drawer had the right to ***repay*** in kind the articles furnished for the support of S.

3. Repealed by Constitution. — In Oakland Paving Co. *v.* Hilton, 69 Cal. 485, it was said: "When we say ceased, we mean it went out of existence, as if ***repealed*** by a valid act of the legislature. When it ceased to have existence it was recalled or revoked. This is the primary meaning of ***repeal***, as its etymology imports. That a statute may be recalled and ***repealed*** by a constitution, as well as by a statute, 'goes without saying.'" See also Cass *v.* Dillon, 2 Ohio St. 608.

4. Repeater — Carrying Concealed Weapons. — See Fife *v.* State, 31 Ark. 460; Puryear *v.* State, 44 Ga. 221; Andrews *v.* State, 3 Heisk. (Tenn.) 165; State *v.* Wilburn, 7 Baxt. (Tenn.) 60.

5. Repeating Slander. (See also the title LIBEL AND SLANDER, vol. 18, p. 851.) — In Sans *v.* Joerris, 14 Wis. 671, it was said: "If by the words ***repeating slander*** it were intended to include only those cases where the party asserts the truth of the slander, although he may at the time disclose where he first heard it, I should concede the entire correctness of the proposition. But those words are held to include cases where the party merely says he had heard the slander."

6. 3 Bl. Com. 129; Moore *v.* Watts, 1 Ld. Raym. 613.

7. 3 Bl. Com. 129; Moore *v.* Watts, 1 Ld. Raym. 613.

8. Delabastide *v.* Reynell, Carth. 287.

9. Grantham's Case, 3 Mod. 120.

had to the more effective writ of habeas corpus.[1] In the *United States* the writ has been recognized as an existing common-law remedy,[2] and during the time of slavery was held an appropriate remedy by which a person detained as a slave could contest the question of his right to freedom.[3] In some jurisdictions the remedy by writ de homine replegiando is expressly recognized by statute.[4]

REPLENISH. — "Replenish," from the Latin words *re*, again, and *plenus*, full, means literally to fill again, to fill up.[5]

1. Bl. Com. 129.

2. Matter of Martin, 2 Paine (U. S.) 348, 16 Fed. Cas. No. 9,154. *Compare* Johnson *v.* Medtart, 4 Har. & J. (Md.) 24.

3. Matter of Martin, 2 Paine (U. S.) 348, 16 Fed. Cas. No. 9,154. *Compare* Huger *v.* Barnwell, 5 Rich. L. (S. Car.) 273.

4. **Statutory Recognition** — *Maine.* — Bridges *v.* Bridges, 13 Me. 408; Richardson *v.* Richardson, 32 Me. 560; Hutchings *v.* Van Bokkelen, 34 Me. 126; Farnsworth *v.* Richardson, 35 Me. 267.

Massachusetts. — Williams *v.* Blunt, 2 Mass. 207; Wood *v.* Ross, 11 Mass. 271; Aldrich *v.* Aldrich, 8 Met. (Mass.) 102; Wright *v.* Wright, 2 Mass. 109.

New York. — Covenhoven *v.* Seaman, 1 Johns. Cas. (N. Y.) 23; Skinner *v.* Fleet, 14 Johns. (N. Y.) 263; Floyd *v.* Recorder, 11 Wend. (N. Y.) 180; Jack *v.* Martin, 12 Wend. (N. Y.) 311; Dixon *v.* Allender, 18 Wend. (N. Y.) 678; Aza *v.* Eitlinger, Anth. N. P. (N. Y.) 73; People *v.* Pillow, 3 N. Y. Super. Ct. 672.

Pennsylvania. — Morgan *v.* Reakirt, 4 Pa. L. J. Rep. 6, 6 Pa. L. J. 228; Wright *v.* Deacon, 5 S. & R. (Pa.) 62.

Under the *Maine* statute the writ de homine replegiando lies in favor of a person unlawfully imprisoned. Hutchings *v.* Van Bokkelen, 34 Me. 126; Garland *v.* Williams, 49 Me. 16. And was held to lie for the release of one arrested on a void warrant. Gurney *v.* Tufts, 37 Me. 130. Since the Maine Rev. Stat. of 1841 went into effect, the writ does not apply to persons held under a writ or warrant, however defective, issuing from any court, under color of law, Nason *v.* Staples, 48 Me. 123, but lies only in favor of a person unlawfully deprived of his liberty, and must be prosecuted in his name and for his benefit; it does not lie in favor of a party to recover one who owes service to him by contract. Richardson *v.* Richardson, 32 Me. 560; Farnsworth *v.* Richardson, 35 Me. 267. And by special provision in the Stat. 1821, c. 66, "for replevying a person" the writ cannot be maintained in behalf of a minor child against the father or guardian of such child. Bridges *v.* Bridges, 13 Me. 408.

Liability on Replevin Bond. — Covenhoven *v.* Seaman, 1 Johns. Cas. (N. Y.) 23, 2 Cai. Cas. (N. Y.) 322.

Where the defendant is successful under his plea that he holds the plaintiff in lawful custody, he is entitled to a judgment for the redelivery of the body of the plaintiff. Garland *v.* Williams, 49 Me. 16.

5. **Replenish.** — Bynum *v.* Miller, 89 N. Car. 395, the court saying: "To ***replenish*** a thing necessarily implies exhaustion, reduction, or diminution in the quantity of the commodity. * * * In common acceptation, when a merchant speaks of ***replenishing*** his stock of goods, it is understood that he means to fill up his stock that has been reduced by sales."

REPLEVIN.

By Briscoe Baldwin Clark.

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CROSS-REFERENCES.

For matters of PROCEDURE, see the ENCYCLOPÆDIA OF PLEADING AND PRACTICE, vol. 18, p. 494.

I. DEFINITION AND HISTORY. — At common law replevin was an action to recover the possession of specific chattels together with damages for the unlawful detention, whereby the chattel was, at the commencement of the action, taken into the possession of the officer and delivered over to the plaintiff upon security being given to make out the justice of his claim or return the property to the defendant.[1] Blackstone, in his commentaries, states that the action of replevin was grounded upon a distress and would lie only where there had been an illegal taking by way of distress.[2] This is, however, clearly an erroneous view of the scope of the action, as has frequently been pointed out by the courts and text writers.[3] The action of replevin is among the oldest known to the law and is treated of by such ancient commentators as Glanvil, Brocton, etc.[4]

Statutory Provisions extending and regulating the scope of the action were enacted at an early date in *England*.[5] And in the *United States*, while the action is to a great extent regulated by statutes,[6] still such statutory provisions are not to be regarded as the whole of the law of replevin, but the body and substance of the action lies in the common law, and the statutes are to be understood with reference to the common law.[7]

II. NATURE OF ACTION. — The action of replevin is an action *ex delicto* as distinguished from an action *ex contractu*.[8] It is distinguished from detinue in the *detinet* in that the possession of the chattel was acquired by the plaintiff at the commencement of the action,[9] and from trover and trespass, which are merely for the recovery of damages.[10] Where in replevin the plaintiff has obtained possession of the property, the action is one of a peculiar nature in which both parties are regarded as actors.[11] The action is not a proceeding *in rem*, but a proceeding *in personam*,[12] and judgments in such actions do not conclude persons unless jurisdiction was acquired of their person.[13] By express statutory provisions the action is in many jurisdictions given a much wider scope than at common law, in regard to the extent of the plaintiff's recovery, by permitting him, when the property cannot be secured by the officer, to proceed for the recovery of damages as for a conversion of the

1. Definition. — Minor's Inst., vol. 4, p. 382; Williamson *v.* Ringgold, 4 Cranch (C. C.) 42.

2. 3 Bl. Com. 145.

3. Minor's Inst., vol. 4, p. 382; Shannon *v.* Shannon, 1 Sch. & Lef. 327; Williamson *v.* Ringgold, 4 Cranch (C. C.) 42; Coursey *v.* Wright, 1 Har. & M. (Md.) 396; Ilsley *v.* Stubbs, 5 Mass. 283; Pangburn *v.* Patridge, 7 Johns. (N. Y.) 143, 5 Am. Dec. 250; Hopkins *v.* Hopkins, 10 Johns. (N. Y.) 372; Shearick *v.* Huber, 6 Binn. (Pa.) 2; Herdic *v.* Young, 55 Pa. St. 176, 93 Am. Dec. 739.

4. Beanie's Glanv. 294; Brocton 155.

5. Statute of Marlbridge, 52 Henry III.; 2 Westminster, c. 2, 13 Edw. I. (A. D. 1285).

6. Ward *v.* Broadwell, 1 N. Mex. 75; Manning *v.* Keenan, 73 N. Y. 45; Pulis *v.* Dearing, 7 Wis. 221.

7. Chadwick *v.* Miller, 6 Iowa 34; Duffy *v.* Murrill, 9 Ired. L. (31 N. Car.) 46; Rosenthal *v.* Lehman, 13 Phila. (Pa.) 1, 36 Leg. Int. (Pa.) 105. *Compare* Howard *v.* Crandall, 39 Conn. 213; Miller *v.* Warner, Brayt. (Vt.) 168.

8. Replevin Action Ex Delicto. — Wall *v.* De Mitkiewicz, 9 App. Cas. (D. C.) 109; Christy *v.* Ashlock, 93 Ill. App. 651; Rector *v.* Chevalier, 1 Mo. 345; Hecht *v.* Heimann, 81 Mo. App. 370; May *v.* Newingham, 17 Pa. Super. Ct. 469. See also Kiser *v.* Blanton, 123 N. Car. 400.

An action of replevin is an action "not founded on contract" within the meaning of the *Missouri* Rev. Stats., § 2925, which enacts that in all actions not founded on contract, if the plaintiff recovers any damages he shall recover his costs. Hecht *v.* Heimann, 81 Mo. App. 370.

9. See the title DETINUE, ENCYC. OF PL. AND PR., vol. 6, p. 643.

10. See the titles TRESPASS; TROVER AND CONVERSION.

11. Both Parties as Actors. — Barrett *v.* Forrester, 1 Johns. Cas. (N. Y.) 247; Reed *v.* Carpenter, 2 Ohio 79; Roe *v.* M'Crea, 1 Ashm. (Pa.) 17.

12. Proceeding in Personam.—Waite *v.* Triblecock, 5 Dill. (U. S.) 547; Bower *v.* Tallman, 5 W. & S. (Pa.) 556.

13. Waite *v* Triblecock, 5 Dill. (U. S.) 547; Edwards *v.* McCurdy, 13 Ill. 496. See the title RES JUDICATA, *post*.

property, or, at his option, to proceed for a recovery of the property or damages for its value.[1] The action, even as extended and modified by the statutes, is not, like attachment[2] and garnishment,[3] in derogation of the common law, and the statutory provisions in regard thereto are to be liberally construed for the advancement of the remedy.[4]

III. JURISDICTION AND VENUE. — **The Jurisdiction** of particular tribunals over actions of replevin is generally regulated in the several jurisdictions by express statutory provisions.[5] In the absence of express statute, courts of general jurisdiction have jurisdiction over replevin actions,[6] and the jurisdiction of federal courts over actions of replevin has been sustained.[7] Justices of the peace have no jurisdiction over replevin actions except as conferred by statutes.[8]

Jurisdictional Amount. — The question whether the action of replevin should be brought in a particular tribunal, such as a justice's court or a court of general jurisdiction, is regulated by statute and determined with regard to the value of the property to be replevied.[9] As a general rule, the value of the property as stated in the affidavit for the replevin writ is considered the value for the purpose of determining the jurisdiction of the court, and not the actual value of the property or the value as found by the jury in the replevin action.[10]

1. Statutory Extension of Scope of Action — *Arkansas.* — Eaton *v.* Langley, 65 Ark. 448.

Indiana. — West *v.* Graff, 23 Ind. App. 410.

Kansas. — Varner *v.* Bowling, 54 Kan. 380; Goodwin *v.* Sutheimer, 8 Kan. App. 212.

Michigan. — Parmalee *v.* Loomis, 24 Mich. 242; McArthur *v.* Oliver, 60 Mich. 605; Clark *v.* Dunlap, 50 Mich. 492.

Missouri. — Hamilton *v.* Clark, 25 Mo. App. 428.

New Jersey. — Hunton *v.* Palmer, 67 N. J. L. 94.

North Carolina. — Jarman *v.* Ward, 67 N. Car. 32.

Pennsylvania. — Bower *v.* Tallman, 5 W. & S. (Pa.) 556.

South Dakota. — Simpson Brick-Pressed Co. *v.* Marshall, 5 S. Dak. 528.

Wisconsin. — Hart *v.* Moulton, 104 Wis. 349, 76 Am. St. Rep. 881.

And see *infra*, this title, *Extent of Recovery by Parties*.

2. See the title ATTACHMENT, vol. 3, p. 181.

3. See the title GARNISHMENT, vol. 14, p. 731.

4. Martinez *v.* Martinez, 2 N. Mex. 464.

5. Jurisdiction. — Belcher *v.* Van Duzen, 37 Ill. 281; Batchelor *v.* Walburn, 23 Kan. 733; Sackett *v.* Kellogg, 2 Cush. (Mass.) 88; Baker *v.* Dubois, 32 Mich. 92; Jesse French Piano, etc., Co. *v.* Walker, 76 Mo. App. 558; Cahill *v.* Goodell, 20 R. I. 481.

Probate Courts. — Walters *v.* Ratliff, 10 Okla. 262.

6. Bouchard *v.* Parker, 32 La. Ann. 535.

7. Federal Courts. — Deshler *v.* Dodge, 16 How. (U. S.) 622. See also Cheseldine *v.* Mathers, 2 Disney (Ohio) 592.

8. Justice of Peace. — Bostwick *v.* Wayne Circuit judge, 115 Mich. 363.

9. Jurisdictional Amount — *United States.* — Burdett *v.* Doty, 38 Fed. Rep. 491.

California. — Astell *v.* Phillippi, 55 Cal. 265.

Colorado. — Thornily *v.* Pierce, 10 Colo. 250.

Connecticut. — Rosen *v.* Fischel, 44 Conn. 371.

Illinois. — Samuel *v.* Agnew, 80 Ill. 553.

Indiana. — Perkins *v.* Smith, 4 Blackf. (Ind.) 299; Harrell *v.* Hammond, 25 Ind. 104; Caffrey *v.* Dudgeon, 38 Ind. 512, 10 Am. Rep. 126; Deam *v.* Dawson, 62 Ind. 22; Grubaugh *v.* Jones, 78 Ind. 350; Fawkner *v.* Baden, 89 Ind. 587.

Kansas. — Leslie *v.* Reber, 4 Kan. 315; Miller *v.* Bogart, 19 Kan. 119; Griffiths *v.* Wheeler, 31 Kan. 17.

Maine. — Small *v.* Swain, 1 Me. 133.

Maryland. — Deitrich *v.* Swartz, 41 Md. 196.

Massachusetts. — King *v.* Dewey, 11 Cush. (Mass.) 218; Leonard *v.* Hannon, 105 Mass. 113; Blake *v.* Darling, 116 Mass. 300; Octo *v.* Teahan, 133 Mass. 430; Gray *v.* Dean, 136 Mass. 128.

Michigan. — Dinnen *v.* Baxter, 18 Mich. 457; Merrill *v.* Butler, 18 Mich. 294; Henderson *v.* Desborough, 28 Mich. 170; Carew *v.* Matthews, 41 Mich. 576; Kittridge *v.* Miller, 45 Mich. 478; Humphrey *v.* Bayn, 45 Mich. 565; Eldred *v.* Woolaver, 46 Mich. 241; Sager *v.* Shutts, 53 Mich. 116; Chilson *v.* Jennison, 60 Mich. 235.

Mississippi. — Higgins *v.* Deloach, 54 Miss. 498; Stephen *v.* Eiseman, 54 Miss. 535; Fenn *v.* Harrington, 54 Miss. 733; Illinois Cent. R. Co. *v.* Brookhaven Mach. Co., 71 Miss. 663.

Missouri. — Annis *v.* Bigney, 28 Mo. 247; Scott *v.* Russell, 39 Mo. 407; Gottschalk *v.* Klinger, 33 Mo. App. 410; Payne *v.* Weems, 36 Mo. App. 54.

Nebraska. — Hill *v.* Wilkinson, 25 Neb. 103; Bates *v.* Stanley, 51 Neb. 252.

New Jersey. — Day *v.* Compton, 37 N. J. L. 514.

Pennsylvania. — Matlack *v.* Brown, 2 Miles (Pa.) 15.

South Carolina. — Dillard *v.* Samuels, 25 S. Car. 318; Elder *v.* Greene, 34 S. Car. 154.

Tennessee. — Jacobs *v.* Parker, 7 Baxt. (Tenn.) 434.

Vermont. — Glover *v.* Chase, 27 Vt. 533; Tripp *v.* Leland, 39 Vt. 63; Fisk *v* Wallace, 51 Vt. 418; Andrews *v.* Baker, 59 Vt. 656.

Wisconsin. — Darling *v.* Conklin, 42 Wis. 478.

10. Test as to Amount — *Kansas.*—Griffiths *v.* Wheeler, 31 Kan. 17.

The Venue in actions of replevin is generally regulated by statutory provisions.[1] At common law the action was regarded as a local action,[2] and is made local likewise by most of the statutes of the several states, by the provisions of which the venue in replevin is required to be laid in the county where the property is situated at the time of the commencement of the action.[3] Under some statutes the action is made transitory, and in case the property to be replevied cannot be found, the plaintiff proceeds at his option for the recovery of a judgment for damages.[4]

IV. Property Which May Be Replevied — 1. In General — Personal Property. — All species of tangible personal property may be the subject of a replevin action,[5] including animate property,[6] money, when capable of identification,[7] such as money in a pouch or bag,[8] documents,[9] such as title deeds,[10] and the

Michigan. — Dinnen *v.* Baxter, 18 Mich. 457; Merrill *v.* Butler, 18 Mich. 294; Eldred *v.* Woolaver, 46 Mich. 241; Henderson *v.* Desborough, 28 Mich. 170; Carew *v.* Matthews, 41 Mich. 576; Chilson *v.* Jennison, 60 Mich. 235; Burt *v.* Addison, 74 Mich. 730.

Mississippi. — Stephen *v.* Eiseman, 54 Miss. 535.

Missouri. — Scott *v.* Russell, 39 Mo. 407; Gottschalk *v.* Klinger, 33 Mo. App. 410; Malone *v.* Hopkins, 40 Mo. App. 331.

Nebraska. — Bates *v.* Stanley, 51 Neb. 252.

Pennsylvania. — Matlack *v.* Brown, 2 Miles (Pa.) 15.

Tennessee. — Gray *v.* Jones, 1 Head (Tenn.) 542.

Wisconsin. — Darling *v.* Conklin, 42 Wis. 478.

Compare Sanford *v.* Scott, 38 Conn. 244; Small *v.* Swain, 1 Me. 133; Hall *v.* Monroe, 73 Me. 123; King *v.* Dewey, 11 Cush. (Mass.) 218; Sackett *v.* Kellogg, 2 Cush. (Mass.) 88; Pomeroy *v.* Trimper, 8 Allen (Mass.) 398, 85 Am. Dec. 714; Leonard *v.* Hannon, 105 Mass. 113; Octo *v.* Teahan, 133 Mass. 430; Blake *v.* Darling, 116 Mass. 300; Litchman *v.* Potter, 116 Mass. 371; Davenport *v.* Burke, 9 Allen (Mass.) 116.

1. Venue — *Iowa.* — Porter *v.* Dalhoff, 59 Iowa 459.

Mississippi. — Turner *v.* Lilly, 56 Miss. 576; Ellison *v.* Lewis, 57 Miss. 588; Richardson *v.* Davis, 59 Miss. 15.

Missouri. — Crocker *v.* Mann, 3 Mo. 472, 26 Am. Dec. 684; Thompson *v.* Bronson, 17 Mo. App. 456.

New Jersey. — Emmett *v.* Briggs, 21 N. J. L. 53.

North Carolina. — Smithdeal *v.* Wilkerson, 100 N. Car. 52.

Oregon. — Moorhouse *v.* Donaca, 14 Oregon 430.

Utah. — Nebeker *v.* Harvey, 21 Utah 363; Woodward *v.* Edmunds, 20 Utah 118.

Washington. — Stiles *v.* James, 2 Wash. Ter. 194.

Wisconsin. — Young *v.* Lego, 38 Wis 206.

2. Strong *v.* Lawler, 37 Conn. 177; Pease *v.* Simpson, 12 Me. 261; Judson *v.* Adams, 8 Cush. (Mass.) 556; Williams *v* Welch, 5 Wend. (N. Y.) 290; Atkinson *v.* Holcomb, 4 Cow. (N. Y.) 45; Williams *v.* Welch, 5 Wend. (N. Y.) 290.

3. Jordan *v.* Owens, 67 Ga. 616; Claton *v.* Ganey, 63 Ga. 331; Robinson *v.* Mead, 7 Mass. 353; Allen *v.* St. Louis, etc., R. Co., 38 Mo. App. 294; Sleeper *v.* Osgood, 50 N. H. 331. See also Cahill *v.* Goodell, 20 R. I. 481.

4. Healey *v.* Humphrey, 48 U. S. App. 437, (construing Nev. Stat., and upholding the jurisdiction of the court though the property to be replevied was without the state); Parvis *v.* Truax, 7 Houst. (Del.) 575; Louthain *v.* May, 77 Ind. 109; Cox *v.* Albert, 78 Ind. 241; Buck *v.* Young, 1 Ind. App. 558; Huckell *v.* McCoy, 38 Kan. 53.

5. Personal Property Generally. — Graff *v.* Shannon, 7 Iowa 508; Flentge *v.* Priest, 53 Mo. 540; Clark *v.* Griffith, 24 N. Y. 595; Roberts *v.* Dauphin Deposite Bank, 19 Pa. St. 75; Eddy *v.* Davis, 35 Vt. 248.

6. Animate Property — Birds. — Manning *v.* Mitcherson, 69 Ga. 447, 47 Am. Rep. 764. See also Haywood *v.* State, 41 Ark. 479.

Cattle — "Goods." — The term "goods" as used in Vermont Gen. Stat. 320, § 13, providing that replevin may be maintained for goods unlawfully taken, includes cattle as well as inanimate property. Eddy *v.* Davis, 35 Vt. 247. See also Mellen *v.* Moody, 23 Vt. 674; Briggs *v.* Oaks, 26 Vt. 148; Briggs *v.* Gleason, 29 Vt. 79.

Slaves. — See Brooke *v.* Berry, 1 Gill (Md.) 153.

Apprentice. — In *Delaware* it was, at a very early date, held that a master could not maintain replevin to regain possession of his apprentice, a free person. Morris *v.* Cannon, 1 Harr. (Del.) 220. See the title Replegiando de Homine, *ante*.

7. Money. — Farmers Alliance Warehouse, etc., Co. *v.* McElhannon, 98 Ga. 394.

8. Griffith *v.* Bogardus, 14 Cal. 410; Skidmore *v.* Taylor, 29 Cal. 619; Sharon *v.* Nunan, 63 Cal. 234; Eddings *v.* Boner, 1 Indian Ter. 173.

9. Documents. — Gibbs *v.* Usher, 1 Holmes (U. S.) 348.

Record Book of Corporation. — Southern Plank-Road Co. *v.* Hixon, 5 Ind. 165.

Parish Records. — Sawyer *v.* Baldwin, 11 Pick. (Mass.) 492. See also Baker *v.* Fales, 16 Mass. 147.

Vouchers. — Drake *v.* Auerbach, 37 Minn. 505.

Pass Book of Bank. — Wegner *v.* Second Ward Sav. Bank, 76 Wis. 242.

Verified Claim Against Decedent's Estate. — Willis *v.* Marks, 29 Oregon 493.

10. Title Deeds. — Wilson *v.* Rybolt, 17 Ind. 391, 79 Am. Dec. 486; Simmonsen *v.* Curtis, 43 Minn. 539.

The grantee may maintain replevin to recover a deed to real estate, although the fact of its delivery be in controversy, and the title

written evidences of indebtedness, such as bonds,[1] promissory notes,[2] bills of exchange,[3] certificates of deposit,[4] insurance policies,[5] and county warrants.[6]

Property on Person of Defendant. — In serving the writ of replevin the officer has no right to take from the person of the defendant articles of clothing or of personal use or adornment, and therefore such articles, while upon the person of the defendant, may be said not to be the subject of replevin without his consent.[7]

Dead Bodies. — In *Michigan* it has been held that an action of replevin would not lie to recover the possession of a dead human body, as in case of a judgment in favor of the defendant a return of the body could not be had nor could its value in money for failure to make a return be appraised or ascertained.[8]

Property Kept for Unlawful Purposes. — Property which is kept for an unlawful purpose may still be the subject of an action of replevin for the recovery of its possession where the owner is unlawfully deprived of its possession, such as intoxicating liquors kept for the purpose of illegal sale.[9] So also the fact that a chattel was made by the owner the prize in an unlawful lottery will not prevent him from recovering its possession by an action of replevin from one who unlawfully takes it from his possession, though it was the purpose of the owner to deliver the chattel to the winner of the lottery.[10]

2. Real Property. — The action of replevin is one for the recovery solely of personal property, and cannot be maintained to recover real property;[11] and property which in its original state was personal but which, by its annexation to the freehold, has become a part thereof cannot be recovered in replevin.[12] And this rule has been applied as regards personalty of the plaintiff which

to the real property consequently involved, provided the action is brought in a court with jurisdiction over real actions. Simmonsen *v.* Curtis, 43 Minn. 539. See, however, Hooker *v.* Latham, 118 N. Car. 179; Flannigan *v.* Goggins, 71 Wis. 28.

1. Bonds. — Douglass *v.* Wolf, 6 Kan. 88; Sager *v.* Blain, 44 N. Y. 445.

2. Notes. — Bales *v.* Scott, 26 Ind. 202; Highnote *v.* White, 67 Ind. 596; Merrell *v.* Springer, 123 Ind. 485; Graff *v.* Shannon, 7 Iowa 508; Kennedy *v.* Roberts, 105 Iowa 521. See also Black River Ins. Co. *v.* New York State L. & T. Co., 73 N. Y. 282.

An administrator may maintain replevin for a promissory note belonging to his decedent's estate. Pritchard *v.* Norwood, 155 Mass. 539.

Note Paid. — Where the maker has paid the holder, and the latter has promised to deliver up the note, but afterwards refuses to deliver, replevin may be maintained therefor. Savery *v.* Hays, 20 Iowa 25, 89 Am. Dec. 511.

"Personal Property." — The term "personal property," as used in the Ind. Rev. Stat., § 1266, includes a promissory note. Bush *v.* Groomes, 125 Ind. 14.

3. Smith *v.* Eals, 81 Iowa 235, 25 Am. St. Rep. 486 (by acceptor of bill of exchange to regain possession where the bill has been rendered invalid by an alteration).

4. Certificates of Deposit. — Robinson *v.* Stewart, 97 Mich. 454.

5. Insurance Policy. — Harris *v.* Harris, 43 Ark. 535.

6. County Warrant. — Saundris *v.* Jordan, 54 Miss. 428.

7. Property on Person of Defendant. — Maxham *v.* Day, 16 Gray (Mass.) 213, 77 Am. Dec. 409.

8. Dead Body. — Keyes *v.* Konkel, 119 Mich. 550, 75 Am. St. Rep. 423.

In *Missouri* it was held, on the ground of public policy, that replevin could not be maintained for the coffin and body after burial. Guthrie *v.* Weaver, 1 Mo. App. 136.

9. Property Kept for Unlawful Purpose — Intoxicating Liquors. — Monty *v.* Arneson, 25 Iowa 383. See also Booraem *v.* Crane, 103 Mass. 522. And see the title INTOXICATING LIQUORS, vol. 17, p. 189.

10. Prize in Lottery. — Martin *v.* Hodge, 47 Ark. 378, 58 Am. Rep. 763; Miller *v.* Le Piere, 136 Mass. 20.

11. Real Property. — Vausse *v.* Russel, 2 McCord L. (S. Car.) 329.

12. Personalty Annexed to Freehold — *Colorado.* — Eddy *v.* Hall, 5 Colo. 576.

Illinois. — Leman *v.* Best, 30 Ill. App. 324; Hacker *v.* Munroe, 56 Ill. App. 532.

Indiana. — Smith *v.* Stanford, 62 Ind. 392; Moore *v.* Combs, 24 Ind. App. 464.

Michigan.—McAuliffe *v.* Mann, 37 Mich. 539.

Nebraska. — See Oskamp *v.* Crites, 37 Neb. 837.

New York. — Cresson *v.* Stout, 17 Johns. (N. Y.) 116, 8 Am. Dec. 373.

Pennsylvania. — Roberts *v.* Dauphin Deposite Bank, 19 Pa. St. 71.

South Carolina. — Vausse *v.* Russel, 2 McCord L. (S. Car.) 329.

Texas. — Bull *v.* Jones, 9 Tex. Civ. App. 346.

Compare Stout *v.* Stoppel, 30 Minn. 56. See the title ACCESSION, vol. 1, p. 255.

A landlord, or purchaser from him, cannot maintain replevin for a building in the occupation of his tenant and thereby summarily remove his tenant. Smith *v.* Grant, 56 Me. 255; McCormick *v.* Riewe, 14 Neb. 509.

has been annexed without his consent to the freehold of the defendant;[1] though in other cases it has been held that the owner of personalty cannot be deprived of his title or right to possession and the right to maintain replevin therefor by its annexation to a freehold by a wrongdoer,[2] and it has also been held that the vendor in a conditional sale of personal property may recover the possession of the property, though it has been annexed to the freehold of the vendee.[3] Where property which has been annexed to the freehold is severed therefrom, even by a wrongdoer, it becomes personal property so as to become recoverable by an action of replevin,[4] and property annexed to the freehold may remain personalty by agreement of the parties, so that replevin may be maintained therefor.[5]

Crops. — Crops which have been severed from the freehold, of course, become personal property and may be the subject of an action of replevin.[6] But crops which are unmatured and growing, it seems, are a part of the realty within the rule prohibiting the use of a writ of replevin to recover such property, but after they have matured, though still standing, it seems that they are to be regarded as personal property so as to authorize the recovery of their possession by a replevin writ.[7]

3. Identification. — In order that personal property may be replevied it must have, as a rule, indicia or earmarks by which it may be identified and the specific property, to the possession of which the plaintiff is entitled, be seized upon the writ and given to the plaintiff.[8] Thus, replevin will not lie for money incapable of specific identification.[9]

Identity as Affected by Confusion. — Where the identity of the specific property is lost by the wrongful act of the defendant in commingling the property with other property of his own of the same nature and character, the courts have generally upheld the right of the plaintiff to recover by replevin from the mass a quantity equal to the amount he owned, without identifying each

1. Ogden *v.* Stock, 34 Ill. 522, 85 Am. Dec. 332; Salter *v.* Sample, 71 Ill. 430; Reese *v.* Jared, 15 Ind. 142, 77 Am. Dec. 88; Ricketts *v.* Dorrel, 55 Ind. 470; Brown *v.* Wallis, 115 Mass. 156. See also Dorr *v.* Dudderar, 88 Ill. 107; Harris *v.* Bannon, 78 Ky. 568.

2. Shoemaker *v.* Simpson, 16 Kan. 43; Central Branch R. Co. *v.* Fritz, 20 Kan. 430, 27 Am. Rep. 175; Michigan Mut. L. Ins. Co. *v.* Cronk, 93 Mich. 49; Mills *v.* Redick, 1 Neb. 437; McDaniel *v.* Lipp, 41 Neb. 713; Huebschmann *v.* McHenry, 29 Wis. 655.

3. Ott *v.* Specht, 8 Houst. (Del.) 61. See also Braddock Brewing Co. *v.* Pfaudler Vacuum Fermentation Co., (C. C. A.) 106 Fed. Rep. 604.

4. **Property Severed from Freehold** — *California.* — Sands *v.* Pfeiffer, 10 Cal. 259; Kimball *v.* Lohmas, 31 Cal. 154.

Illinois. — Davis *v.* Easley, 13 Ill. 192; Ogden *v.* Stock, 34 Ill. 522, 85 Am. Dec. 332; Salter *v.* Sample, 71 Ill. 430; Matzon *v.* Griffin, 78 Ill. 477; Dorr *v.* Dudderar, 88 Ill. 107.

Indiana. — Balliett *v.* Humphreys, 78 Ind. 388; Moore *v.* Combs, 24 Ind. App. 464.

Iowa. — Congregational Soc. *v.* Fleming, 11 Iowa 533, 79 Am. Dec. 511.

Michigan. — Elliott *v.* Hart, 45 Mich. 234.

Missouri. — Tudor Iron Works *v.* Hitt, 49 Mo. App. 472.

New York. — Cresson *v.* Stout, 17 Johns. (N. Y.) 116, 8 Am. Dec. 373; Laflin *v.* Griffiths, 35 Barb. (N. Y.) 58; Johnson *v.* Elwood, 53 N. Y. 431; Warren *v.* Leland, 2 Barb. (N. Y.) 613; Weeks *v.* Martin, 57 Hun (N. Y.) 589, 10 N. Y. Supp. 656.

Pennsylvania. — Harlan *v.* Harlan, 15 Pa. St. 507, 53 Am. Dec. 612; Brewer *v.* Fleming, 51 Pa. St. 102.

Wisconsin. — Huebschmann *v.* McHenry, 29 Wis. 655; Kirch *v.* Davies, 55 Wis. 287.

Where growing trees are sold by a landowner who subsequently cuts and removes them, the vendee may maintain replevin therefor. Warren *v.* Leland, 2 Barb. (N. Y.) 613.

5. **Annexation under Agreement.** — Hartwell *v.* Kelly, 117 Mass. 235; Gill *v.* De Armant, 90 Mich. 425; Weathersby *v.* Sleeper, 42 Miss. 732; Hines *v.* Ament, 43 Mo. 298; McDaniel *v.* Lipp, 41 Neb. 713; Brearley *v.* Cox, 24 N. J. L. 287; Fitzgerald *v.* Anderson, 81 Wis. 341. See also Bridges *v.* Thomas, 8 Okla. 620; Elliott *v.* Black, 45 Mo. 372.

6. **Crops.** — Simpson *v.* De Haven, 93 Ind. 411.

7. **Standing Matured Crops.** — Matlock *v.* Fry, 15 Ind. 483; Garth *v.* Caldwell, 72 Mo. 622; Salmon *v.* Fewell, 17 Mo. App. 118. See, however, Jones *v.* Dodge, 61 Mo. 368.

8. **Identification.** — Hart *v.* Morton, 44 Ark. 447; Mead *v.* Johnson, 54 Conn. 317; McDaniel *v.* Allen, 99 N. Car. 135.

9. **Money Incapable of Identification.** — Lovell *v.* Hammond Co., 66 Conn. 500; McElhannon *v.* Farmers Alliance Warehouse, etc., Co , 95 Ga. 670; Hoke *v.* Applegate, 92 Ind. 570; Hamilton *v.* Clark, 25 Mo. App. 428; Sager *v.* Blain, 44 N. Y. 445.

particular item as his original property.[1] And the same has been held though the confusion by the defendant was innocently done,[2] and also where the confusion was made by a stranger.[3] If the confusion is made by the defendant with the fraudulent intent of depriving the plaintiff of his property and the aliquot shares of the parties in the general mass cannot be ascertained, the plaintiff has been held entitled to recover in replevin the whole mass.[4] If the wrongful confusion has been made by the plaintiff, he may be denied the right to replevy any of the property.[5]

Change in Form of Property. — The owner of property may recover its possession, if it can be identified, though it no longer remains in its original form.[6] Thus, the owner of trees or logs has been held entitled to recover in replevin cross-ties,[7] or staves,[8] or boards,[9] or rails and posts[10] into which they have been converted by a wrongdoer; and the owner of cloth, the articles manufactured therefrom.[11]

V. Title to Support Replevin — 1. In General. — Whoever has the legal title to chattels and the right to their possession may, of course, maintain replevin to recover their possession.[12] Thus, replevin may be maintained by an administrator,[13] an assignee for the benefit of creditors,[14] a guardian,[15] or by a trustee.[16]

1. Identity as Affected by Confusion. — Schulenburg *v.* Harriman, 2 Dill. (U. S.) 398 (logs); Rust Land, etc., Co. *v.* Isom, 70 Ark. 99 (staves); Peterson *v.* Polk, 67 Miss. 163 (staves); Stearns *v.* Raymond, 26 Wis. 74 (logs); Eldred *v.* Oconto Co., 33 Wis. 133 (logs). See also Young *v.* Miles, 20 Wis. 615. *Compare* Ames *v.* Mississippi Boom Co., 8 Minn. 467.

If the confusion is caused by the wrongful act of the defendant, it is not necessary, to enable the plaintiff to recover in replevin, that the confusion should have been made with the express intention to prevent the plaintiff from identifying his property. Rust Land, etc., Co. *v.* Isom, 70 Ark. 99.

2. Rust Land, etc., Co. *v.* Isom, 70 Ark. 99, *distinguishing* Hart *v.* Morton, 44 Ark. 450.

3. Wilkinson *v.* Stewart, 85 Pa. St. 255 (oil).

4. Wingate *v.* Smith, 20 Me. 287.

5. Confusion by Plaintiff. — Williams *v.* Morrison, 32 Fed. Rep. 177 (paving stones).

6. Change in Form of Property. — Clemmons *v.* Brinn, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 157. See also Richardson *v.* York, 14 Me. 216.

7. McKinnis *v* Little Rock, etc., R. Co., 44 Ark. 210; Stotts *v.* Brookfield, 55 Ark. 307.

8. Rust Land, etc., Co. *v.* Isom, 70 Ark. 99; Peterson *v.* Polk, 67 Miss. 163.

9. Davis *v.* Easley, 13 Ill. 192; Wingate *v.* Smith, 20 Me. 287.

10. Snyder *v.* Vaux, 2 Rawle (Pa.) 423, 21 Am. Dec. 466.

11. Clemmons *v.* Brinn, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 157, *affirming* (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 844.

12. General Ownership and Right to Possession — *United States.* — Walker *v.* Hunter, 5 Cranch (C. C.) 462.

California. — Affierbach *v.* McGovern, 79 Cal. 268; More *v.* Finger, 128 Cal. 313.

Delaware. — Stockwell *v.* Robinson, 9 Houst (Del.) 313.

Georgia. — Hillyer *v.* Brogden, 67 Ga. 24.

Illinois. — Van Namee *v.* Bradley, 69 Ill. 299; Hacker *v* Munroe, 56 Ill. App. 532.

Iowa. — Cassel *v.* Western Stage Co., 12 Iowa 47; Gray *v.* Earl, 13 Iowa 188; Kocher *v.* Palmetier, 112 Iowa 84.

Kansas. — Birks *v.* French, 21 Kan. 238; Jones *v.* Annis, 47 Kan. 478.

Maine. — Wyman *v.* Gould, 47 Me. 159.

Maryland. — Biemuller *v.* Schneider, 62 Md. 547.

Massachusetts. — Miller *v.* Le Piere, 136 Mass. 20; Odd-Fellows Hall Assoc. *v.* McAllister, 153 Mass. 292.

Michigan. — Warren *v.* Gutches, 71 Mich. 407; Detroit Frear Stone Works *v.* White, 35 Mich. 77.

Missouri. — Anchor Milling Co. *v.* Walsh, 20 Mo. App. 107.

Nebraska. — Shelly *v.* Heater, 17 Neb. 505; Barlass *v.* Braash, 27 Neb. 212; Gamble *v.* Wilson, 33 Neb. 270.

New York. — Govin *v.* De Miranda, 140 N. Y. 474.

North Carolina. — Lutz *v.* Yount, Phil. L. (61 N. Car.) 367.

Oklahoma. — Burchett *v.* Hamil, 5 Okla. 300.

Pennsylvania. — Charlotte Furnace Co. *v.* Stouffer, 127 Pa. St. 336.

South Carolina. — Johnston *v.* Holmes, 32 S. Car. 434.

South Dakota. — Church *v.* Foley, 10 S. Dak. 74.

Vermont. — McCole *v.* Varnum, 64 Vt. 163.

Title Acquired by Fraud. — The defendant in replevin cannot set up as a defense that the plaintiff acquired title from a third person through an abuse of confidential relations, if such third person makes no complaint. Town *v.* Tabor, 34 Mich. 262.

13. Administrator. — Bennett *v.* Schuster, 24 Minn. 383.

14. Assignee for Benefit of Creditors. — Cerf *v.* Phillips, 75 Cal. 185.

15. Guardian. — Temple *v.* Alexander, 53 Cal. 3; Smith *v.* Williamson, 1 Har. & J. (Md.) 147; Rose *v.* Eaton, 77 Mich. 247; Mayer *v.* Columbia Sav. Bank, 86 Mo. App. 108.

16. Trustee. — Gates *v.* Bennett, 33 Ark. 475; Jackson *v.* Hubbard, 36 Conn. 10; Church *v.* Foley, 10 S. Dak. 74. See also Roof *v.* Chattanooga Wood Split Pulley Co., 36 Fla. 284.

Cestuis Qui Trustent cannot maintain replevin based upon their equitable title alone.[1] And the action cannot be brought in the name of one person for the use of another,[2] though the insertion of a usee's name may be treated as a surplusage.[3]

Want of Title and Right to Possession. — One who has neither title to the property, general or special, nor the right to possession cannot maintain replevin therefor,[4] as the plaintiff must recover on the strength of his own title and right to possession, and not on the defendant's lack of title and right to possession.[5] And in cases where the title is in issue, and the right of possession is to be determined by the title, the burden of proof is upon the plaintiff to show title in himself.[6]

1. Cestuis Que Trustent — *Kentucky.* — Daniel *v.* Daniel, 6 B. Mon. (Ky.) 230.
Massachusetts. — Lewis *v.* Buttrick, 102 Mass. 412.
Mississippi. — Garrett *v.* Carlton, 65 Miss. 188.
Missouri. — Leete *v.* State Bank, 141 Mo. 584.
New Jersey. — Woodruff *v.* Clark, 42 N. J. L. 198.
New York. — Anchor Brewing Co. *v.* Burns, 32 N. Y. App. Div. 272; National Bank *v.* Rogers, 1 N. Y. App. Div. 623; Wheeler *v.* Allen, 49 Barb. (N. Y.) 460; Birdsall *v.* Patterson, 51 N. Y. 43. *Compare* National Bank *v.* Rogers, 166 N. Y. 380, *affirming* 44 N. Y. App. Div. 357.
Assignee of Note Secured by Mortgage. — Ramsdell *v.* Tewksbury, 73 Me. 197.
2. Roof *v.* Chattanooga Wood Split Pulley Co., 36 Fla. 284; Meyer *v.* Mosler, 64 Miss. 610; Moore *v.* Watson, 20 R. I. 495.
3. Roof *v.* Chattanooga Wood Split Pulley Co., 36 Fla. 284.
4. Both Title and Right to Possession Wanting — *United States.* — U. S. *v.* Kennan, Pet. (C. C.) 168.
Arkansas. — Dixon *v.* Thatcher, 14 Ark. 141.
California. — Cardinell *v.* Bennett, 52 Cal. 476; Keech *v.* Beatty, 127 Cal. 177.
Colorado. — Baker *v.* Cordwell, 6 Colo. 199.
Connecticut. — Weller *v.* Ely, 45 Conn. 547.
Delaware. — Jefferson *v.* Chase, 1 Houst. (Del.) 219.
Georgia. — McEvoy *v.* Hussey, 64 Ga. 314.
Illinois. — Mulheisen *v.* Lane, 82 Ill. 117; Stockon *v.* Lochnitt, 31 Ill. App. 214.
Maine. — Gillerson *v.* Mansur, 45 Me. 25.
Maryland. — Stevenson *v.* Ridgely, 3 Har. & J. (Md.) 281.
Massachusetts. — Dawson *v.* Wetherbee, 16 Gray (Mass.) 123.
Michigan. — Hoag *v.* Breman, 3 Mich. 160.
Mississippi. — Wheeler *v* Dixon, 51 Miss. 550; Power *v.* Telford, 60 Miss. 195.
Nebraska. — Jimmerson *v.* Greene, 7 Neb. 26.
New Hampshire. — Taylor *v.* True, 27 N. H. 220.
New York. — Vogt Mfg., etc., Co. *v.* Oettinger, 88 Hun (N. Y.) 83; Shapiro *v.* Lankay, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 39; Livingston *v.* Miller, 48 Hun (N. Y.) 232.
North Dakota. — Nichols, etc., Co. *v.* Hillsboro First Nat. Bank, 6 N. Dak. 404.
Oklahoma. — Olson *v.* Thompson, 6 Okla. 74, 576.
Oregon. — Kimball *v.* Redfield, 33 Oregon 292.
Pennsylvania. — Lake Shore, etc., R. Co. *v.* Ellsey, 85 Pa. St. 283.
Tennessee. — McFerrin *v.* Perry, 1 Sneed (Tenn.) 314.
Utah. — Munns *v.* Loveland, 15 Utah 250.
5. *Arkansas.* — Kennedy *v.* Clayton, 29 Ark. 270.
Delaware. — Wilkins *v.* Wilson, 1 Marv. (Del.) 404.
Indiana. — Davis *v.* Warfield, 38 Ind. 461.
Iowa. — Marienthal *v.* Shafer, 6 Iowa 223; Hamilton *v.* Iowa City Nat. Bank, 40 Iowa 307.
Massachusetts. — Stanley *v.* Neale, 98 Mass. 343.
Missouri. — Updyke *v.* Wheeler, 37 Mo. App. 680; Ætna Nat. Bank *v.* Water Power Co., 58 Mo. App. 532; Springfield Grocer Co. *v.* Shackelford, 65 Mo. App. 364; Maryville Nat. Bank *v.* Snyder, 85 Mo. App. 82.
Nebraska. — St. John *v.* Swanback, 39 Neb. 841; Johannson *v.* Miller, 45 Neb. 53; Herman *v.* Kneipp, 59 Neb. 208.
Pennsylvania. — Reinheimer *v.* Hemingway, 35 Pa. St. 432; Swope *v.* Crawford, 17 Lanc. L. Rev. 196.
6. Burden of Proof — *United States.* — Williamson *v.* Ringgold, 4 Cranch (C. C.) 39; Uncapher *v.* Baltimore, etc., R. Co., 112 Fed. Rep. 899.
Arkansas. — Kennedy *v.* Clayton, 29 Ark. 270.
California. — Smith *v.* Arnold, 56 Cal. 640; Butler *v.* Estrella Raisin Vineyard Co., 124 Cal. 239.
Connecticut. — Kavanagh *v.* Phelps, 36 Conn. 111.
Delaware. — Pennington *v.* Chandler, 5 Harr. (Del.) 394; Wilkins *v.* Wilson, 1 Marv. (Del.) 404.
Illinois. — Anderson *v.* Talcott, 6 Ill. 365; Underwood *v.* White, 45 Ill. 437; Chandler *v.* Lincoln, 52 Ill. 74; Hacker *v.* Munroe, 56 Ill. App. 532; McFarlan *v.* McClellan, 3 Ill. App. 295; Schweinfurth *v.* Matson, 37 Ill. App. 62; Pinkstaff *v.* Cochran, 58 Ill. App. 72; Duquesne Mfg. Co. *v* Williams, 79 Ill. App. 276.
Indiana. — Turner *v.* Cool, 23 Ind. 56, 85 Am. Dec. 449; Krug *v.* Herod, 69 Ind. 78.
Iowa. — Stanchfield *v.* Palmer, 4 Greene (Iowa) 23; Hamilton *v.* Iowa City Nat. Bank, 40 Iowa 307; Hillman *v.* Brigham, 110 Iowa 220.
Kansas. — Parkhurst *v.* Sharp, 10 Kan. App. 575, 61 Pac. Rep. 531.
Maine. — Webber *v.* Read, 65 Me. 564. *Compare* Greene *v.* Dingley, 24 Me. 131.
Maryland. — Lamotte *v.* Wisner, 51 Md. 543.
Massachusetts. — Chaffee *v.* Blaisdell, 142 Mass. 538; Gibbs *v.* Childs, 143 Mass. 103.

2. Right to Possession. — The action is primarily a possessory action, and though the plaintiff has the legal title to the property he cannot recover unless he also has the right to the possession of the property.[1]

3. Title or Right to Possession Acquired After Commencement of Action. — In order successfully to maintain replevin, the plaintiff should have had, at the time the action was commenced, the right to maintain the action.[2] But as the defendant is to be considered an actor in the action in so far as he demands a return of the property, it is generally held that when the plaintiff obtains the possession of the property at the commencement of the action, and the defendant, in his answer, demands a return of the property, and at the trial it appears that the defendant is not entitled to possession for the reason that

Michigan. — White *v.* White, 58 Mich. 546.

Missouri. — Morgner *v.* Biggs, 46 Mo. 65; Andrews *v.* Costician, 30 Mo. App. 29; Allamong *v.* Peoples, 75 Mo. App. 276; Westbay *v.* Milligan, 89 Mo. App. 294.

Nebraska. — Jenkins *v.* Mitchell, 40 Neb. 664; Westover *v.* Vandoran, 29 Neb. 652.

New Jersey. — Hunt *v* Chambers, 21 N. J. L. 620; Harwood *v.* Smethurst, 29 N. J. L. 195, 80 Am. Dec. 207.

New York. — Wheeler *v.* Vanderveer, 88 Hun (N. Y.) 233; Western Union Sewing Mach. Co. *v.* Sachs, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 736

North Dakota. — Haveron *v.* Anderson, 3 N. Dak 540.

South Carolina. — Peeples *v.* Warren, 51 S. Car. 560.

Washington. — Dodd *v.* Williams-Smithson Co , 27 Wash. 89.

Wisconsin. — Wheeler, etc., Mfg. Co. *v.* Teetzlaff, 53 Wis. 211.

1. Right to Possession Essential — *Arkansas.* — Phelan *v.* Bonham, 9 Ark. 389; Thatcher *v.* Franklin, 37 Ark. 66; Carpenter *v.* Glass, 67 Ark. 135.

California. — Lambert *v.* McCloud, 63 Cal. 162; People's Sav. Bank *v.* Jones, 114 Cal. 242; Sutton *v.* Stephan, 101 Cal. 545.

Colorado. — Hillsburg *v.* Harrison, 2 Colo. App. 298.

Connecticut. — Brown *v.* Chicopee Falls Co., 16 Conn. 87; Spencer *v.* Roberts, 42 Conn. 75.

Delaware. — Stapleford *v.* White, 1 Houst. (Del.) 238; Ott *v.* Specht, 8 Houst. (Del.) 61.

Georgia. — Tyus *v.* Rust, 34 Ga. 382; King *v.* Ford, 70 Ga. 628.

Illinois. — Schermerhorn *v.* Cassem, 9 Ill. App. 156; Parker *v.* Foster, 29 Ill. App. 586; Travers *v.* Cook, 42 Ill. App. 580; Streator Tile Works *v.* Coe, 53 Ill. App. 483; Gazelle *v.* Doty, 73 Ill. App. 406.

Indiana. — Noble *v.* Epperly, 6 Ind. 414; Entsminger *v.* Jackson, 73 Ind. 144; Brown *v.* Loesch, 3 Ind. App. 145.

Iowa. — Lytle *v.* Crum, 50 Iowa 37.

Kansas. — Rucker *v.* Donovan, 13 Kan. 251, 19 Am. Rep. 84; Cooper *v.* Brown, 23 Kan. 582.

Kentucky. — Hooser *v.* Hays, 10 B. Mon. (Ky.) 72, 50 Am. Dec. 540.

Maryland. — Dentzel *v.* City, etc., R. Co., 90 Md. 434.

Massachusetts. — Fowler *v.* Parsons, 143 Mass. 401; Lane *v.* Chadwick, 146 Mass. 68.

Michigan. — Hunt *v.* Strew, 33 Mich. 85; Coan *v.* Mole, 39 Mich. 454; Vanmeter *v.* Crossman, 39 Mich. 610.

Mississippi. — Frizell *v.* White, 27 Miss. 198.

Missouri. — White Sewing Mach. Co. *v.* McBride, 27 Mo. App. 470.

Nebraska. — Riewe *v.* McCormick, 11 Neb. 261; Blue Valley Bank *v.* Bane, 20 Neb. 294.

New York. — Wood *v.* Orser, 25 N. Y. 348; Osmun *v.* Barker, 92 Hun (N. Y.) 609; M'Curdy *v.* Brown, 1 Duer (N. Y.) 101.

Oregon. — Kimball *v.* Redfield, 33 Oregon 292.

Pennsylvania. — Stone *v.* Rogers, 17 Pa. Super. Ct. 358; Heilman *v.* McKinstry, 18 Pa. Super. Ct. 70; Brown *v.* Dempsey, 95 Pa. St. 243; Weed *v.* Hall, 101 Pa. St. 592.

Rhode Island. — Halstead *v.* Cooper, 12 R. I. 500.

South Carolina. — Leonard *v.* Brockman, 46 S. Car. 128.

Wisconsin. — Timp *v.* Dockham, 32 Wis. 146; Northrup *v.* Trask, 39 Wis. 515; Gaynor *v.* Blewitt, 69 Wis. 582.

2. Title or Right to Possession Acquired After Action Commenced — *Arkansas.* — Hill *v.* Robinson, 16 Ark. 90; Britt *v.* Aylett, 11 Ark. 476.

California. — Fredericks *v.* Tracy, 98 Cal. 658; Vanalstine *v.* Whelan, 135 Cal. 232; Masterson *v.* Clark, (Cal. 1895) 41 Pac. Rep. 796; Holly *v.* Heiskell, 112 Cal. 174; Bane *v.* Peerman, 125 Cal. 220.

Illinois. — Ator *v.* Rix, 21 Ill. App. 309; Mathews *v.* Granger, 71 Ill. App. 467.

Indiana. — Brown *v.* Loesch, 3 Ind. App. 145.

Iowa. — Cassel *v.* Western Stage Co., 12 Iowa 47; Alden *v.* Carver, 13 Iowa 253, 81 Am. Dec. 430.

Maine. — Ingraham *v.* Martin, 15 Me. 373.

Massachusetts. — Gates *v.* Gates, 15 Mass. 310; Collins *v.* Evans, 15 Pick. (Mass.) 63.

Michigan. — Belden *v.* Laing, 8 Mich. 500; Clark *v.* West, 23 Mich. 242.

Minnesota. — Loomis *v.* Youle, 1 Minn. 175.

Missouri. — Pilkington *v.* Trigg, 28 Mo. 95.

Montana. — Cameron *v.* Wentworth, 23 Mont. 70.

Nebraska. — Tackaberry *v.* Gilmore, 57 Neb. 450; Peterson *v.* Lodwick, 44 Neb. 771; Shreck *v.* Gilbert, 52 Neb. 813; Brown *v.* Hogan, 49 Neb. 746.

New York. — Dodworth *v.* Jones, 4 Duer (N. Y.) 201.

Washington.—Dow *v.* Dempsey, 21 Wash. 86.

Wisconsin. — Stern *v.* Riches, 111 Wis. 589.

The commencement of the action is regarded within this rule as at the time the writ is served and not when sued out. Howard *v.* Bartlett, 70 Vt. 314. *Compare* Wheeler, etc., Mfg. Co. *v.* Teetzlaff, 53 Wis. 211.

his interest or right to the possession of the property has ceased intermediate the commencement of the action and the trial, and the right to the possession has vested in the plaintiff, the court will not order a return of the property to the defendant, but will leave the property in the possession of the plaintiff.[1]

4. Special Property. — A special property accompanied with the right to possession has always been considered sufficient upon which to maintain an action of replevin.[2]

5. Adverse Possession. — Where a person together with those under whom he claims has been in the adverse possession of personal property during the full period of limitation, his title is absolute, and he may, on the basis of such a title, maintain replevin against the original owner to recover possession of the property.[3]

6. Prior Possession. — The prior possession of personal property is a sufficient title as against one who by trespass takes the property from the possession of the plaintiff, and who does not connect his right to do so with the title of the true owner,[4] but the prior possession unconnected with any special

1. Denial of Return. — O'Connor *v.* Blake, 29 Cal. 312; Barney *v.* Brannan, 51 Conn. 175; Ingraham *v.* Martin, 15 Me. 373. See also Atorz. Rix, 21 Ill. App. 309; Brook *v.* Bayless, 6 Okla. 568. *Compare* Collins *v.* Evans, 15 Pick. (Mass.) 63.

2. Special Property — *Arkansas.* — Wilson *v.* Royston, 2 Ark 315; Cox *v.* Morrow, 14 Ark. 603; Bostick *v.* Brittain, 25 Ark. 482.

California. — Garcia *v.* Gunn, 119 Cal. 315.

Connecticut. — Peters *v.* Stewart, 45 Conn. 103, 29 Am. Rep. 663.

Delaware. — Stockwell *v.* Robinson, 9 Houst. (Del.) 313.

Illinois. — Currier *v.* Ford, 26 Ill. 488; Wetsel *v.* Mayers, 91 Ill. 497; Blakely Printing Co. *v.* Pease, 95 Ill. App. 341.

Indiana. — Walpole *v.* Smith, 4 Blackf. (Ind.) 304.

Maryland. — Brooke *v.* Berry, 1 Gill (Md) 153.

Massachusetts. — Rich *v.* Ryder, 105 Mass. 306.

Michigan. — Davidson *v.* Gunsolly, 1 Mich. 388; Tandler *v.* Saunders, 56 Mich. 142; Eldridge *v.* Sherman, 70 Mich. 266.

Mississippi. — McGill *v.* Howard, 61 Miss. 411; Coleman *v.* Low, (Miss. 1893) 13 So. Rep. 227.

Missouri. — Holliday *v.* Lewis, 15 Mo. 403; Randol *v.* Buchanan, 61 Mo. App. 445, 1 Mo. App. Rep. 666; Rapp *v.* Vogel, 45 Mo. 524; Wren *v.* Kuhler, 68 Mo. App. 680.

Nebraska. — Nollkamper *v.* Wyatt, 27 Neb. 565; Griffing *v.* Curtis, 50 Neb. 334; Wilson *v.* City Nat. Bank, 51 Neb. 87.

New Hampshire. — Mitchell *v.* Roberts, 50 N. H. 486; Stevens *v.* Chase, 61 N. H. 340.

New York. — Tanco *v.* Booth, (C. Pl. Gen. T.) 15 N. Y. Supp. 110; Johnson *v.* Carnley, 10 N. Y. 570, 61 Am. Dec. 762; Frost *v.* Mott, 34 N. Y. 253; Brockway *v.* Burnap, 12 Barb. (N. Y.) 347.

North Carolina. — Hopper *v.* Miller, 76 N. Car. 402.

Pennsylvania. —Woods *v.* Nixon, Add. (Pa.) 131, 1 Am. Dec. 364; Mead *v.* Kilday, 2 Watts (Pa.) 110; Hoffman *v.* Sellers, 5 Pa. Dist. 395.

Tennessee. — Brammell *v.* Hart, 12 Heisk. (Tenn.) 366; Kirby *v.* Miller, 4 Coldw. (Tenn.) 3.

Vermont. — Tittemore *v.* Labounty, 60 Vt. 624.

Wisconsin. — Gillett *v.* Treganza, 6 Wis. 343.

Special Property of Officer under Attachment or Execution. — Flanagan *v.* Newman, 5 Colo. App. 245; Polite *v.* Jefferson, 5 Harr. (Del.) 388; Dunkin *v.* McKee, 23 Ind. 447; Arn *v.* Parker, 39 Kan. 338; Carroll *v.* Frank, 28 Mo. App. 69; Pracht *v.* Gunn, 69 N. Y. App. Div. 396; Pugh *v.* Calloway, 10 Ohio St. 488; Martin *v.* Watson, 8 Wis. 315. *Compare* Walpole *v.* Smith, 4 Blackf. (Ind.) 304.

Livery-stable Keeper Having Possessory Lien. — Heaps *v.* Jones, 23 Mo. App. 617; Young *v.* Kimball, 23 Pa. St. 193.

3. Hicks *v.* Fluit, 21 Ark. 463.

4. Prior Possession — *Arkansas.* — Prater *v.* Frazier, 11 Ark. 249; Oxley Stave Co. *v.* Staggs, 59 Ark. 370.

Delaware. — Stockwell *v.* Robinson, 9 Houst. (Del.) 313.

Georgia. — McDuffie *v.* Irvine, 91 Ga. 748; Marchman *v.* Todd, 15 Ga. 25.

Illinois. — Wheeler *v* McCorristen, 24 Ill. 40; Van Namee *v.* Bradley, 69 Ill. 299; Cummins *v.* Holmes, 109 Ill. 15; McElhanon *v.* McFerron, 36 Ill. App. 22; Bartleson *v.* Mason, 53 Ill. App. 644; Downey *v.* Arnold, 97 Ill. App. 91.

Indiana. — Ingersoll *v.* Emmerson, 1 Ind. 76; Moorman *v.* Quick, 20 Ind. 67.

Kansas. — Buckhalter *v.* Nuzum, 9 Kan. App. 885, 61 Pac. Rep. 310.

Kentucky. — Borron *v.* Landes, 1 Duv. (Ky.) 299.

Maryland. — Hopper *v.* Callahan, 78 Md. 529.

Michigan. — Van Baalen *v.* Dean, 27 Mich. 104. See also Hatch *v.* Fowler, 28 Mich. 205; Conely *v.* Dudley, 111 Mich. 122.

Minnesota. — Anderson *v.* Gouldberg, 51 Minn. 294.

Missouri. — Springfield Grocer Co. *v.* Shackelford, 56 Mo. App. 642. *Compare* Stone *v.* McNealy, 59 Mo. App. 396; Poe *v.* Stockton, 39 Mo. App. 550; Draper *v.* Farris, 56 Mo. App. 417; Westbay *v.* Milligan, 89 Mo. App. 294.

Nebraska. — Filley *v.* Norton, 17 Neb. 472; Barkley *v.* Leiter, 49 Neb. 123; Schars *v.* Barnd, 27 Neb. 94.

interest in the property or right to retain possession will not sustain an action of replevin against the true owner, though the latter, in taking the property from the possession of the former, committed a breach of the peace.[1] If the plaintiff has the right to the possession of the property, it is immaterial that he may not have held at any time the actual possession of the property.[2]

7. Agents and Servants. — An agent from whose possession the property of his principal has been taken by a stranger has been held entitled to maintain replevin therefor in his own name.[3] In some cases, however, the courts have denied the right of mere agents or servants to maintain in their own name replevin for property of their principal wrongfully taken from their possession by a stranger;[4] and an agent who has never been in possession of the property of his principal, but who is merely given authority by his principal to take possession, cannot maintain replevin in his own name to recover possession.[5] If an agent has a lien upon the chattels of his principal, as in case of a factor for advances, he then has a special property in chattels and may maintain replevin therefor, if wrongfully deprived of their possession.[6]

8. Title Dependent on Ownership of Real Estate. — Where the title to property which has become personalty by reason of its severance from the soil or freehold depends upon the ownership of the real estate, it has been held that the true owner, if out of possession, could not in replevin recover the property where its severance from the freehold was made by a person holding adversely and in good faith under claim and color of title, as the action of replevin could not be made the means of litigating and determining the title to real estate as between conflicting claimants.[7] But as against a mere trespasser,

New York. — Rogers *v.* Arnold, 12 Wend. (N. Y.) 37; Johnson *v.* Carnley, 10 N. Y. 570, 61 Am. Dec. 762; Eyre *v.* Higbee, 35 Barb. (N. Y.) 502; Gerber *v.* Monie, 56 Barb. (N. Y.) 652; Guilford *v.* Mills, 57 Hun (N. Y.) 493.

North Carolina. — Scott *v.* Elliott, Phil. L. (61 N. Car.) 104; Freshwater *v.* Nichols, 7 Jones L. (52 N. Car.) 251.

Ohio. — Williams *v.* West, 2 Ohio St. 82; Gray *v.* Allen, 14 Ohio 58, 45 Am. Dec. 523.

South Carolina. — Peeples *v.* Warren, 51 S. Car. 560.

Texas. — Jackson *v.* Nelson, (Tex. Civ. App. 1897) 39 S. W. Rep. 315.

Vermont. — Sprague *v.* Clark, 41 Vt. 6.

Wisconsin. — McCourt *v.* Bond, 64 Wis. 596.

See also Deaderick *v.* Oulds, 86 Tenn. 14, 6 Am. St. Rep. 812; Garcia *v.* Gunn, 119 Cal. 315.

Possession Wrongfully Obtained. — Bare possession of property, though wrongfully obtained, is sufficient title to enable the party enjoying it to maintain replevin against a mere stranger to the property who takes it from him. Anderson *v.* Gouldberg, 51 Minn. 294. See also Reynolds *v.* Horton, 2 Wash. 185. *Compare* Ellsworth *v.* McDowell, 44 Neb. 707; Parham *v.* Riley, 4 Coldw. (Tenn.) 5.

1. McMahill *v.* Walker, 22 Mo. App. 170; Alsbrook *v.* Shields, 67 N. Car. 333; Coverlee *v.* Warner, 19 Ohio 29; Bogard *v.* Jones, 9 Humph. (Tenn.) 739.

2. Actual Possession. — Lazard *v.* Wheeler, 22 Cal. 139; Garcia *v.* Gunn, 119 Cal. 315; Chinn *v.* Russell, 2 Blackf. (Ind.) 172; Bunker *v.* McKenney, 63 Me. 529; Vogel *v.* Badcock, (Supm. Ct. Gen. T.) 1 Abb. Pr. (N. Y.) 176; Hoffman *v.* Sellers, 5 Pa. Dist. 395.

3. Agents. — Bartels *v.* Arms, 3 Colo. 72; Eldridge *v.* Sherman, 70 Mich. 266; Pallen *v.* Bogy, 78 Mo. App. 88.

An auctioneer has been held entitled to maintain replevin for property entrusted to him for sale. Tyler *v.* Freeman, 3 Cush. (Mass.) 261, where an auctioneer who had sold goods on a condition which was not complied with was permitted to maintain replevin therefor.

4. Pease *v.* Ditto, 185 Ill. 317, 189 Ill. 456; Ludden *v.* Leavitt, 9 Mass. 104, 6 Am. Dec. 45. See also Harris *v.* Smith, 3 S. & R. (Pa.) 20.

5. Fullerton *v.* Morse, 162 Ill. 43; Dixon *v.* Hancock 4 Cush. (Mass.) 96. See also Siedenbach *v.* Riley, 111 N. Y. 560. *Compare* Nichol *v.* Abram, 20 Pa. Co. Ct. 605.

6. Nesmith *v* Dyeing, etc., Co., 1 Curt. (U. S.) 130; Williams *v.* Bugg, 10 Mo. App. 585. See also Holbrook *v.* Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607.

7. Ownership of Real Estate — *California.* — Page *v.* Fowler, 28 Cal. 605 (hay); Halleck *v.* Mixer, 16 Cal. 574.

Illinois. — Anderson *v.* Hapler, 34 Ill. 436, 85 Am. Dec. 318 (timber).

Kansas. — Rees *v.* Higgins, 9 Kan. App. 832 (building).

Mississippi. — Miller *v.* Wesson, 58 Miss. 831 (timber).

New York. — Stockwell *v.* Phelps, 34 N. Y. 363, 90 Am. Dec. 710 (hay).

North Carolina. — Harrison *v.* Hoff, 102 N. Car. 126.

Pennsylvania. — Brown *v.* Caldwell, 10 S. & R. (Pa.) 114, 13 Am. Dec. 660 (slates quarried); National Transit Co. *v.* Weston, 121 Pa. St. 485 (oil); Powell *v.* Smith, 2 Watts (Pa.) 126 (fixtures severed from freehold).

See also Mather *v.* Trinity Church, 3 S. & R. (Pa.) 509, 8 Am. Dec. 663; Baker *v.* Howell, 6 S. & R. (Pa.) 476; Giffin *v.* South West Pennsylvania Pipe Lines, 172 Pa. St. 580 (oil); Beatty *v.* Brown, 76 Ala. 267.

or one not acting under a *bona fide* claim of title, the owner of land remains the owner of property severed from the freehold, such as timber, hay, etc., and by virtue of his ownership of the real estate may maintain replevin to recover such property when severed and removed by trespassers;[1] and the same has been held true as to property severed by one in possession where his possession was not adverse to the owner,[2] and *a fortiori* one who wrongfully cuts timber on the land of another cannot replevy it from the owner of

Occupancy of Land by Persons Camping Thereon for the Purpose of Felling Trees to be rafted is not such as will defeat the true owner's action of replevin for trees cut thereon. Philips *v.* Gastrell, 61 Miss. 413. See also Brewer *v.* Fleming, 51 Pa. St. 102.

The Original Owner of Land Sold to Pay Taxes cannot maintain replevin for timber cut by the purchaser between the times of sale and of redemption. Cromelien *v.* Brink, 29 Pa. St. 522.

The Vendor cannot replevy timber cut by the vendee under a license in a contract of sale on breach of condition in such contract. Beckwith *v.* Philleo, 15 Wis. 223.

1. **Severance by Trespasser** — *United States.* — Schulenburg *v.* Harriman, 2 Dill. (U. S.) 398 (timber cut on state lands).

Arkansas. — McKinnis *v.* Little Rock, etc., R. Co., 44 Ark. 210 (timber cut on school lands); Stotts *v.* Brookfield, 55 Ark. 307 (timber); Rust Land, etc., Co. *v.* Isom, 70 Ark. 99 (timber). See also Oxley Stave Co. *v.* Staggs, 59 Ark. 370 (timber); Rogers *v.* Kerr, 42 Ark. 100.

California. — Halleck *v.* Mixer, 16 Cal. 574 (trees cut by trespasser); Kimball *v.* Lohmas, 31 Cal. 154 (timber); Hines *v.* Good, 128 Cal. 38 (building).

Illinois. — Davis *v.* Easley, 13 Ill. 192. See also Anderson *v.* Hapler, 34 Ill. 436, 85 Am. Dec. 318.

Kentucky. — Sawyer *v.* Middlesborough Town Co., (Ky. 1891) 17 S. W. Rep. 444 (stone quarried).

Maine. — Luce *v.* Ames, 84 Me. 133 (building).

Michigan. — Nitz *v.* Bolton, 71 Mich. 388; Keweenaw Assoc. *v.* O'Niel, 120 Mich. 270.

Mississippi. — Phillips *v.* Gastrell, 61 Miss. 413 (timber).

New York. — Laflin *v.* Griffiths, 35 Barb. (N. Y.) 58 (replevin by mortgagee in possession for fixtures removed); Weeks *v.* Martin, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 656 (timber). See also Johnson *v.* Elwood, 53 N. Y. 431.

Pennsylvania. — Brewer *v.* Fleming, 51 Pa. St. 102.

Washington. — Laurendeau *v.* Fugelli, 1 Wash. 559.

Wisconsin. — Huebschmann *v.* McHenry, 29 Wis. 655 (building); Brewster *v.* Carmichael, 39 Wis. 456 (timber); Keystone Lumber Co. *v.* Kolman, 94 Wis. 465, 59 Am. St. Rep. 905. See also Stahl *v.* Lynn, 81 Wis. 668; Mohn *v.* Stoner, 14 Iowa 115; Hart *v.* Vinsant, 6 Heisk. (Tenn.) 616.

The Vendee in a contract for the sale of land, with the right to cut and remove the timber thereon, may maintain replevin against a trespasser who cuts and removes the timber. Gamble *v.* Cook, 106 Mich. 561.

A Licensee who has paid a valuable consideration for a license to cut and remove timber from land may also maintain such an action against a trespasser. Keystone Lumber Co. *v.* Kolman, 94 Wis. 465, 59 Am. St. Rep. 905. *Compare* Gillerson *v.* Mansur, 45 Me. 25.

But where timber and minerals are severed by the owner of the land, the title thereto does not vest in a mere licensee so as to enable him to maintain replevin for them as against the owner of the land, as the severance by the owner operates as a revocation of the license and the title, not having vested before severance in the licensee, will not pass by severance after the license has been revoked. Gillett *v.* Treganza, 6 Wis. 343. See also Keystone Lumber Co. *v.* Kolman, 94 Wis. 465, 59 Am. St. Rep. 905.

2. Harlan *v.* Harlan, 15 Pa. St. 507, 53 Am. Dec. 612 (replevin by purchaser at sheriff's sale for fixtures removed by former owner).

In Rich *v.* Baker, 3 Den. (N. Y.) 79, a purchaser of land sold on execution sale was held not to be entitled to maintain replevin in the cepit for timber cut and removed from the premises by the execution defendant after the execution sale, and during the fifteen months allowed to him to redeem, but during which time he was entitled to the possession.

A Vendor in a contract for sale of land, if entitled to resume possession, may maintain replevin for a building wrongfully removed by the vendee. Ogden *v.* Stock, 34 Ill. 523, 85 Am. Dec. 332; Michigan Mut. L. Ins. Co. *v.* Cronk, 93 Mich. 49.

Where a vendee who is entitled to possession of land under contract of sale removes and sells a house from the land, the vendor, if he has no right of possession, cannot maintain replevin for the house against the purchasers thereof. Weed *v.* Hall, 101 Pa. St. 592. See also Northrup *v.* Trask, 39 Wis. 515.

A Mortgagee has been held entitled to maintain replevin for fixtures wrongfully severed from the realty by the mortgagor. Sands *v.* Pfeiffer, 10 Cal. 258; Dorr *v.* Dudderar, 88 Ill. 107 (building); Waterman *v.* Matteson, 4 R. I. 539 (replevin by mortgagee for timber cut and removed by mortgagor in substantial diminution of the security). See also Mosher *v.* Vehue, 77 Me. 169; Matzon *v.* Griffin, 78 Ill. 477.

Mortgagee After Default in Condition of Mortgage. — McKelvey *v.* Creevey, 72 Conn. 464, 77 Am. St. Rep. 321.

Mortgagee Out of Possession. — Kircher *v.* Schalk, 39 N. J. L. 335.

Purchaser at Foreclosure — Period of Redemption. — Peoples Sav. Bank *v.* Jones, 114 Cal. 422.

In *Minnesota* where trees were severed from the realty before the purchaser under a foreclosure sale was entitled to the possession of

the land,[1] or a purchaser from such owner.[2] And if the true owner has gained possession of timber, etc., severed from the real estate by one in possession under adverse claim of title, he may defeat an action of replevin by the adverse claimant to regain possession.[3]

Sufficiency of Title. — Proof merely of a short prior possession of land at a remote period is insufficient to support replevin for timber severed from the land by a trespasser.[4] But proof of actual possession of land will make a *prima facie* case of title and right as against any but the true owner or one connecting his title with him, so as to enable the person in possession to recover in replevin timber severed from the land by a trespasser intruding upon his possession.[5]

Crops raised and severed by one in possession of land, though without title, become the property of such persons, and the title thereto is not in the owner of the land so as to enable the latter to recover them in replevin;[6] and *a fortiori* crops raised by one in possession of land may be replevied from a stranger who unlawfully deprives the former of possession.[7] If the owner of the land ejects a person who was in possession without authority and had planted crops, the latter cannot maintain replevin for such crops if harvested by the former,[8] and if the person ejected unlawfully re-enters and harvests the crop, the owner of the land may maintain replevin therefor.[9] As against one in possession as a mere trespasser without color of title or right, the owner of land may recover in replevin crops planted and harvested by the former.[10]

9. Mortgagor. — A mortgagor of chattels, if entitled to the possession, may maintain replevin for the property,[11] but, of course, he cannot maintain replevin to regain possession from a mortgagee who had become entitled to possession.[12]

10. Mortgagee. — After the mortgagee of chattels has become entitled to the possession of the mortgaged property, he may enforce such right and recover possession of the property in an action of replevin as against the mortgagor,[13]

the premises, it was held that replevin would not lie for their recovery. Berthold *v.* Holman, 12 Minn. 335, 93 Am. Dec. 234.

Replevin by Landlord for Chattels Wrongfully Severed from Freehold by Tenant. — Anderson *v.* Hapler, 34 Ill. 436, 85 Am. Dec. 318; Leonard *v.* Stickney, 131 Mass. 541.

1. Thus, timber wrongfully cut by the mortgagor or a stranger cannot be replevied from the mortgagee. Mosher *v.* Vehue, 77 Me. 169.

2. Allen *v.* Cowley, 128 Mich. 530 (timber cut by trespassers on state lands).

3. Busch *v.* Nester, 70 Mich. 525.

4. Webb *v.* Phillips, (C. C. A.) 80 Fed. Rep. 954.

5. Webb *v.* Phillips, (C. C. A.) 80 Fed. Rep. 954; Davis *v.* Easley, 13 Ill. 192; Hungerford *v.* Redford, 29 Wis. 345.

Settler on Public Lands. — In *Colorado* it has been held that a person in possession of public lands as a settler cannot maintain replevin to recover timber severed therefrom by one who intruded upon his possession, as the remedy given by the statute for such wrongs is exclusive. Adkison *v.* Hardwick, 12 Colo. 581. See also Bower *v.* Higbee, 9 Mo. 259, where it was held that a pre-emptor under Act of Congress 1840, before he had proved his claim, could not maintain replevin for timber cut on the land by a trespasser.

6. Crops. — Pennybecker *v.* McDougal, 46 Cal. 661; Martin *v.* Thompson, 62 Cal. 618, 45 Am. Rep. 663; Emerson *v.* Whitaker 83 Cal. 147; Caldwell *v.* Custard, 7 Kan. 303; McAllister *v.* Lawler, 32 Mo. App. 91; Renick *v.* Boyd, 99 Pa. St. 555, 44 Am. Rep. 124.

7. Barnhart *v.* Ford, 37 Kan. 520.

8. Partee *v.* Dickson, 78 Ga. 34; Hooser *v.* Hays, 10 B. Mon. (Ky.) 72, 50 Am. Dec. 540; Elliott *v.* Powell, 10 Watts (Pa.) 453, 36 Am. Dec. 200. *Compare* Lehman *v.* Kellerman, 65 Pa. St. 489.

9. Oyster *v.* Oyster, 32 Mo. App. 270.

10. Laurendeau *v.* Fugelli, 5 Wash. 632; Hall *v.* Durham, 117 Ind. 429. See De Mott *v.* Hagerman, 8 Cow. (N. Y.) 220, 18 Am. Dec. 443.

11. Mortgagor. — Eames *v.* Snell, 143 Mass. 165. See also Edwin *v.* Jacobson, 47 Ill. App. 93; Moffitt *v.* Shields, 67 Mich. 610; Wills *v.* Barrister, 36 Vt. 220.

12. Dougherty *v* Bonavia, 124 Mass. 210; Jayne *v.* Dillon, 28 Miss. 283; Dreyfus *v.* Cage, 62 Miss 733; Shackelford *v.* Hargreaves, 42 Neb. 680; Holzhausen *v.* Parkhill, 85 Wis. 446.

13. Mortgagee — *Alabama.* — Morrison *v.* Judge, 14 Ala. 182; Mervine *v.* White, 50 Ala. 388.

Arkansas. — Marks *v.* McGehee, 35 Ark. 217.

California. — Flinn *v.* Ferry, 127 Cal. 648.

Colorado. — Machette *v.* Wanless, 1 Colo. 225.

Indiana. — Charles *v.* Malott, 51 Ind. 350.

Kansas. — Brookover *v.* Esterly, 12 Kan. 149.

Kentucky. — Brown *v.* Phillips, 3 Bush (Ky.) 656.

Maine. — Packard *v.* Low, 15 Me. 48.

or persons claiming under the latter,[1] or strangers,[2] or an officer levying on the property for an indebtedness of the mortgagor.[3] Where the statutes authorize the sale of mortgaged chattels subject to the mortgage at the instance of creditors of the mortgagor, an officer levying upon the property is entitled to the possession for the purpose of sale, and therefore the mortgagee cannot recover the possession from him in replevin.[4]

An Assignee of a Chattel Mortgage may maintain replevin for the property to the same extent as can the original mortgagee.[5]

Requisite Proof to Sustain Action. — To entitle a mortgagee to recover in replevin he, of course, must show that his right to the possession of the property has accrued,[6] and identify the property sought to be replevined as that covered

Michigan. — Norris *v.* Vosburgh, 98 Mich. 426; Eldridge *v.* Sherman, 70 Mich. 266.

Missouri. — Jackson *v.* Cunningham, 28 Mo. App. 354.

New York. — Leadbetter *v.* Leadbetter, 57 Hun (N. Y.) 587, 11 N. Y. Supp. 228.

Oklahoma — Payne *v.* McCormick Harvesting Mach. Co., (Okla. 1901) 66 Pac. Rep. 287.

Oregon. — Mayes *v.* Stephens, 38 Oregon 512.

South Carolina. — Wallingford *v.* Aiken, 44 S. Car. 396.

Tennessee. — Cartwright *v.* Smith, 104 Tenn. 689.

Wisconsin. — Bates *v.* Wilbur, 10 Wis. 415; Rose *v.* Tolly, 15 Wis. 443; Gage *v.* Wayland, 67 Wis. 566.

Wyoming. — Schlessinger *v.* Cook, 9 Wyo. 256.

One who takes a mortgage of chattels in his own name, but in fact for the benefit of another, may maintain replevin for such chattels in his own name, without joining such other person. Allen *v.* Kennedy, 49 Wis. 549.

After the Assignment of the Mortgage the mortgagee's right to possession vests in his assignee and he cannot sue in replevin for the property. Kavanaugh *v.* Brodball, 40 Neb. 875; Gamble *v.* Wilson, 33 Neb. 270.

Value of Goods Exceeding Indebtedness Secured by Mortgage. — Norris *v.* Vosburgh, 98 Mich. 426.

1. Ballou *v.* Jones, 37 Ill. 95; Hibbard *v.* Zenor, 82 Iowa 505; Halpin *v.* Stone, 78 Wis. 183.

Junior Mortgagee. — Russell *v.* Longmoor, 29 Neb. 209.

2. *Alabama.* — Hopkins *v.* Thompson, 2 Port. (Ala.) 433.

Iowa. — Union Bank *v.* Creamery Package Mfg. Co., (Iowa 1897) 70 N. W. Rep. 728.

Nebraska. — Meyer *v.* Plattsmouth First Nat. Bank, (Neb. 1902) 88 N. W. Rep. 867.

New York. — Fuller *v.* Acker, 1 Hill (N. Y.) 473.

Vermont. — Calkins *v.* Clement, 54 Vt. 635.

Wisconsin. — Welch *v.* Sackett, 12 Wis. 243; Frisbee *v.* Langworthy, 11 Wis. 375.

3. *United States.* — Wood *v.* Weimar, 104 U. S. 786.

California. — Stringer *v.* Davis, 35 Cal. 25.

Colorado. — Hall *v.* Johnson, 21 Colo. 414.

Illinois. — Nelson *v.* Wheelock, 46 Ill. 25.

Indiana. — Mobley *v.* Letts, 61 Ind. 11.

Iowa. — Hibbard *v.* Zenor, 82 Iowa 505.

Kansas. — Rankine *v.* Greer, 38 Kan. 343, 5 Am. St. Rep. 751; Starr *v.* Cox, 9 Kan. App. 882, 57 Pac. Rep. 247; Williams *v.* Miller, 6 Kan. App. 626.

Massachusetts. — Esson *v.* Tarbell, 9 Cush. (Mass.) 407.

Michigan. — Cary *v.* Hewitt, 26 Mich. 228; Macomber *v.* Saxton, 28 Mich. 516; Hendrickson *v.* Walker, 32 Mich. 68; Merrill *v.* Denton, 73 Mich. 628.

Missouri. — National Brewery Co. *v.* Lindsay, 72 Mo. App. 591.

New York. — Guilford *v.* Mills, 57 Hun (N. Y.) 493; Swift *v.* Hart, 12 Barb. (N. Y.) 530.

Oregon. — Moorhouse *v.* Donaca, 14 Oregon 430.

Pennsylvania. — Post *v.* Berwind-White Coal Min. Co., 176 Pa. St. 297.

South Carolina. — Spriggs *v.* Camp, 2 Spears L. (S. Car.) 181.

Wisconsin. — Frisbee *v.* Langworthy, 11 Wis. 375.

Statutory Agreements. — Citizens' Nat. Bank *v.* Oldham, 136 Mass. 515.

4. Kahn *v.* Hayes, 22 Ind. App. 182; Macomber *v.* Saxton, 28 Mich. 516.

5. Assignee of Mortgage. — Barbour *v.* White, 37 Ill. 164; Sehrt-Patterson Milling Co. *v.* Levan, 9 Kan. App. 523.

An Assignee of Indebtedness Secured by Mortgage cannot replevy the property when the chattel mortgage was not assigned to him in writing. Ramsdell *v.* Tewksbury, 73 Me. 197. See, however, Kingsland, etc., Mfg. Co. *v.* Chrisman, 28 Mo. App. 308; Campbell Printing Press, etc., Co. *v.* Roeder, 44 Mo. App. 324; Gamble *v.* Wilson, 33 Neb. 270; Kavanaugh *v.* Brodball, 40 Neb. 875; Woodruff *v.* King, 47 Wis. 261.

6. What Mortgagee Must Show — *Dakota.* — Madison Nat. Bank *v.* Farmer, 5 Dak. 282.

Indiana. — Johnson *v.* Simpson, 77 Ind. 412.

Kentucky. — McIsaacs *v.* Hobbs, 8 Dana (Ky.) 268.

Maine. — Ingraham *v.* Martin, 15 Me. 374; Pierce *v.* Stevens, 30 Me. 184.

Maryland. — Dentzel *v.* City, etc., R. Co., 90 Md. 434.

Minnesota. — Kellogg *v.* Anderson, 40 Minn. 207.

Missouri. — Baldridge *v.* Dawson, 39 Mo. App. 527; Boeger *v.* Langenberg, 42 Mo. App. 7.

Nebraska. — Camp *v.* Pollock, 45 Neb. 771; Hudelson *v.* Tobias First Nat. Bank, 51 Neb. 557.

North Carolina. — Moore *v.* Ray, 108 N. Car. 252.

Wisconsin. — Schweitzer *v.* Hanna, 91 Wis. 318.

by the mortgage.[1] And where the action is against one not claiming under the mortgagor, the burden is upon the mortgagee to show the superior title of his mortgagor; he cannot merely rely on his mortgage as proof of title.[2]

Invalidity of the Mortgage is a defense to an action by the mortgagee to recover possession;[3] thus, if a mortgage is invalid as against subsequent purchasers or creditors of the mortgagor, the mortgagee cannot recover possession of the property as against such persons;[4] so, also, a discharge of the mortgage by payment is a defense.[5]

11. Vendor and Vendee — *a.* In General. — In case of executed unconditional sales on credit, the nonpayment of the purchase price does not revest title in the vendor so as to enable him to recover the property from the vendee by an action of replevin.[6]

In Executory Contracts of Sale, though the vendor may be liable on his contract for failure to deliver the property, the title to the property does not pass to the vendee so as to enable him to recover the possession by replevin.[7] So, also, an executory contract for the sale of property does not divest the title of the vendor so as to prevent an action of replevin by him against a third person to recover possession.[8] A contract of sale may, however, be executed as distinguished from executory, so as to vest title in the vendee upon which he may maintain an action of replevin for the recovery of possession though there has been no actual delivery of possession to the vendee.[9] Thus, there may be a sale of property in the custody of a third person so as to vest title in the vendee upon which he may maintain replevin,[10] as in case of a transfer of a bill of lading.[11]

1. Myers *v.* Van Norman, 87 Ill. App. 500; Coman *v.* Thompson, 43 Mich. 389. *Compare* Falk *v.* Decou, 8 Kan. App. 765.

2. Wilkes *v.* Gates, 68 Miss. 263; Musser *v.* King, 40 Neb. 892, 42 Am. St. Rep. 700. See also Leighton *v.* Stuart, 10 Neb. 224.

3. Janvrin *v.* Fogg, 49 N. H. 340.

Want of Consideration. — Ruiter *v.* Plate, 77 Iowa 17; Shrieves *v.* Morris, 151 Mass. 310.

Usury. — Treanor *v.* Sheldon Bank, 90 Iowa 575.

4. Reese *v.* Mitchell, 41 Ill. 365; Farr *v.* Kilgour, 117 Mich. 227; Jones *v.* Loree, 37 Neb. 816.

Burden of Proving that Mortgage Was Recorded upon Mortgagee. — Kahn *v.* Hayes, 22 Ind. App. 182.

5. Bellamy *v.* Doud, 11 Iowa 285; Dentzel *v.* City, etc., R. Co., 90 Md. 434. See also Stein *v.* Hastings, 45 Minn. 196.

Presumption of Payment from Lapse of Time. — Mayes *v.* Stephens, 38 Oregon 512.

6. **Vendor — Nonpayment — Sales on Credit.** — McNail *v.* Ziegler, 68 Ill. 224; Mixer *v.* Cook, 31 Me. 340; Witherby *v.* Sleeper, 101 Mass. 138; Oester *v.* Sitlington, 115 Mo. 247.

7. **Vendee — Executory Contracts of Sale** — *Arkansas.* — Hodges *v.* Nall, 66 Ark. 135.

Connecticut. — Mead *v.* Johnson, 54 Conn. 317.

Delaware. — Wilkins *v.* Wilson, 1 Marv. (Del.) 404.

Georgia. — Wilson *v.* Reese, 37 Ga. 578.

Illinois. — Updike *v.* Henry, 14 Ill. 378; Stanley *v.* Robinson, 14 Ill. App. 480.

Kentucky. — Day *v.* Evanston, (Ky. 1901) 64 S. W. Rep. 749, 23 Ky. L. Rep. 1099.

Maine. — Stone *v.* Peacock, 35 Me. 385; Morrison *v.* Dingley, 63 Me. 553; Pettengill *v.* Merrill, 47 Me. 109; Lawry *v.* Ellis, 85 Me. 500.

Massachusetts. — Ropes *v.* Lane, 9 Allen (Mass.) 502; Scudder *v.* Worster, 11 Cush. (Mass.) 573; Keeler *v.* Goodwin, 111 Mass. 490.

Michigan. — Breitenwischer *v.* Clough, 116 Mich. 340.

Nebraska. — Goodman *v.* Kennedy, 10 Neb. 270; Graves *v.* Damrow, 28 Neb. 271; Barrett *v.* Turner, 2 Neb. 172.

New Jersey. — Kerr *v.* Henderson, 62 N. J. L. 724.

New York. — Johnson *v.* Hunt, 11 Wend. (N. Y.) 137. See also Levy *v.* Kelter, 63 N. Y. App. Div. 392.

South Carolina. — Kirven *v.* Pinckney, 47 S. Car. 229.

See also Hart *v.* Livingston, 29 Iowa 217.

Sale of Portion of Larger Mass Without Separation. — Lawry *v.* Ellis, 85 Me. 500.

8. **By Vendor.** — Brooks *v.* Libby, 89 Me. 151.

Recovery of Possession by Vendor for Purpose of Delivery to His Vendee. — Bemis *v.* De Land, 177 Mass. 182.

9. De St. Aubin *v.* Field, 27 Colo. 414; Wilkins *v.* Wilson, 1 Marv. (Del.) 404; Rhea *v.* Riner, 21 Ill. 526; Barker *v.* Bushnell, 75 Ill. 220; Cheney *v.* Eastern Transp. Line, 59 Md. 557; Sandler *v.* Bresnaham, 53 Mich. 567; Winslow *v.* Leonard, 24 Pa. St. 14, 62 Am. Dec. 354; Kent Iron, etc., Co. *v.* Norbeck, 150 Pa. St. 559. See also Locke *v.* Hedrick, 24 Kan. 763.

10. Lazard *v.* Wheeler, 22 Cal. 139; Wall *v.* De Mitkiewicz, 9 App. Cas. (D. C.) 109; Whipple *v.* Thayer, 16 Pick. (Mass.) 25, 26 Am. Dec. 626; Norton *v.* Simonds, 124 Mass. 19; Vogel *v.* Badcock, (Supm. Ct. Gen. T.) 1 Abb. Pr. (N. Y.) 176. See also Nash *v.* Fredericks, (Supm. Ct. Gen. T.) 12 Abb. Pr. (N. Y.) 147. *Compare* Hunter *v.* Voigt, 8 Pa. Super. Ct. 484.

11. Sheppard *v.* Newhall, 47 Fed. Rep. 468; Peters *v.* Elliott, 78 Ill. 321; Green Bay First

b. CONDITIONAL SALES. — Where, in cases of conditional sales of chattels, the vendor has become entitled to the possession of the property by reason of the nonperformance of conditions, the action of replevin will lie to enforce such right, either as against the vendee,[1] or a sheriff levying upon the property for an indebtedness of the vendee,[2] or a third person claiming under the vendee.[3] Before there has been a default in the conditions of the sale so as to entitle the vendee to the possession, he, of course, cannot recover possession by replevin.[4]

c. SALES PROCURED BY FRAUD. — Where a sale or barter of chattels is procured by fraud and deceit, the person who has parted with his property by reason of such fraud may, upon a rescission of the transaction, maintain replevin to regain possession of the property as against the fraudulent vendee or any other person not holding the chattels as a *bona fide* purchaser.[5] If the vendor, after discovery of the fraud, ratifies the sale, his right to rescind and

Nat. Bank *v.* Dearborn, 115 Mass. 219, 15 Am. Rep. 92.

1. Vendor — Conditional Sales — *United States.* — Sutherland *v.* Brace, 73 Fed. Rep. 624, 34 U. S. App. 638, *affirming* 71 Fed. Rep. 469; Ryle *v.* Knowles Loom Works, (C. C. A.) 87 Fed. Rep. 976; Jewett Car Co. *v.* Kirkpatrick Constr. Co., 107 Fed. Rep. 622.

Arkansas. — Ames Iron Works *v.* Rea, 56 Ark. 450; Faisst *v.* Waldo, 57 Ark. 270.

Delaware. — Standard Sewing Mach. Co. *v.* Frame, 2 Penn. (Del.) 430; Ott *v.* Specht, 8 Houst. (Del.) 61.

District of Columbia. — Wall *v.* De Mitkiewicz, 9 App. Cas. (D. C.) 109.

Illinois. — Tufts *v.* Johnson, 29 Ill. App. 112.

Iowa. — Peck *v.* Bonebright, 75 Iowa 98; Bray *v.* Flickinger, 79 Iowa 313.

Kansas. — Hall *v.* Draper, 20 Kan. 137.

Maine. — Eaton *v.* Munroe, 52 Me. 63; Bunker *v.* McKenney, 63 Me. 529.

Massachusetts. — Meldrum *v.* Snow, 9 Pick. (Mass.) 441, 20 Am. Dec. 489; C. B. Cottrell, etc., Co. *v.* Carter, 173 Mass. 155.

Michigan. — New Home Sewing Mach. Co. *v.* Bothane, 70 Mich. 443, Grand Rapids Chair Co. *v.* Lyon, 73 Mich. 438.

Mississippi. — Duke *v.* Shackleford, 56 Miss. 552.

Montana. — Sanford *v.* Gates, 21 Mont 277.

New Hampshire. — Proctor *v.* Tilton, 65 N. H. 3.

New York. — Thomson *v.* McLean, 59 Hun (N. Y.) 627, 14 N. Y. Supp. 55; Kidd *v.* Belden, 19 Barb. (N. Y.) 266; Scofield *v.* Kreiser, (N. Y. City Ct. Gen. T.) 14 N. Y. Supp. 274.

Tennessee. — Holmark *v.* Molin, 5 Coldw. (Tenn.) 482.

Washington. — Bancroft-Whitney Co. *v.* Gowan, 24 Wash. 66.

Wisconsin. — Bent *v.* Hoxie, 90 Wis. 625; Hyland *v.* Bohn Mfg. Co., 92 Wis. 157.

Statutory Requirements as to Return of Part Payments. — Burt *v.* Mears, 41 Mo. App. 231.

2. Bassett *v.* Armstrong, 6 Mich. 397.

3. *Michigan.* — Gill *v.* De Armant, 90 Mich. 425.

Mississippi. — Duke *v.* Shackleford, 56 Miss. 552.

New Hampshire. — Partridge *v.* Philbrick, 60 N. H. 556.

New York. — Fischer *v.* Cohen, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 117; Frischman *v.* Mandel, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 820, 56 N. Y. Supp. 1029; Bohde *v.* Farley, 49 N. Y. Super. Ct. 42.

Pennsylvania. — Ferguson *v.* Lauterstein, 160 Pa. St. 427.

See also Sanford *v.* Gates, 18 Mont. 398.

In an action of replevin by a conditional vendor against a *bona fide* purchaser from his vendee, the burden of proof is on the plaintiff to show the condition of the sale, and that it has not been complied with, so that his right to possession has accrued. Ketchum *v.* Brennan, 53 Miss. 596.

4. Before Breach of Condition. — Savall *v.* Wauful, (Supm. Ct.) 21 Civ. Pro. (N. Y.) 18.

Burden of Proving Breach of Condition Is on Vendor. — Heilman *v.* McKinstry, 18 Pa. Super. Ct. 70; Johnston *v.* McCart, 24 Wash. 19.

5. Sales Procured by Fraud — *United States.* — Henry L. Crane Boot, etc., Co. *v.* Trentman, 34 Fed. Rep. 620; Claflin *v.* Beaver, 35 Fed. Rep. 259.

Arkansas. — Merritt *v.* Robinson, 35 Ark. 483.

California. — Nudd *v.* Thompson, 34 Cal. 39.

Colorado. — Sopris *v.* Truax, 1 Colo. 89; Benesch *v.* Waggner, 12 Colo. 534, 13 Am. St. Rep. 254; Benesch *v.* Mitchelson, 12 Colo. 539.

Florida. — Hammond *v.* Lynes, 21 Fla. 118.

Georgia. — Wilcox *v.* Turner, 46 Ga. 218.

Illinois. — Butters *v.* Haughwout, 42 Ill. 18, 89 Am. Dec. 401; Moriarty *v.* Stofferan, 89 Ill. 528; Doane *v.* Lockwood, 115 Ill. 490; Farwell *v.* Hanchett, 120 Ill. 573; Hacker *v.* Munroe, 61 Ill. App. 420.

Indiana. — Thompson *v.* Peck, 115 Ind. 512; Alexander *v.* Swackhamer, 105 Ind. 81, 55 Am. Rep. 180; Peters Box, etc., Co. *v.* Lesh, 119 Ind. 98, 12 Am. St. Rep. 367; Mahoney *v.* Gano, 2 Ind. App. 107; Parrish *v.* Thurston, 87 Ind. 437; Brower *v.* Goodyer, 88 Ind. 572.

Iowa. — Gittings *v.* Carter, 49 Iowa 338; Lillie *v.* McMillan, 52 Iowa 463.

Maryland. — Benesch *v.* Weil, 69 Md. 276.

Massachusetts. — Manning *v.* Albee, 14 Allen (Mass.) 7, 92 Am. Dec. 736; Buffington *v.* Gerrish, 15 Mass. 156, 8 Am. Dec. 97; Morse *v.* Dearborn, 109 Mass. 593; Raphael *v.* Reinstein, 154 Mass. 178.

Michigan. — Bristol *v.* Braidwood, 28 Mich. 191; Arnstine *v.* Treat, 71 Mich. 561; Pangborn *v.* Ruemenapp, 74 Mich. 572.

Missouri. — Stone *v.* Barrett, 34 Mo. App. 15; Stern Auction, etc., Co. *v.* Mason, 16 Mo. App. 473; Young *v.* Glascock, 79 Mo. 574;

maintain replevin is lost,[1] and the property cannot be recovered after it has passed into the hands of a *bona fide* purchaser from the fraudulent vendee.[2]

12. Joint Tenants and Tenants in Common. — As one joint tenant or tenant in common of a chattel is not entitled to the exclusive possession of the chattel or any part thereof as against his cotenant, he cannot maintain an action of replevin against the latter to recover his interest therein.[3] Thus,

Greenway *v.* James, 34 Mo. 326; Poe *v.* Stockton, 39 Mo. App. 550.

Nebraska. — Faulkner *v.* Klamp, 16 Neb. 174; Phenix Iron Works Co. *v.* McEvony, 47 Neb. 228, 53 Am. St. Rep. 527; Woodbridge *v.* DeWitt, 51 Neb. 98.

New Hampshire. — Farley *v.* Lincoln, 51 N. H. 577, 12 Am. Rep. 182.

New York. — Root *v.* French, 13 Wend. (N. Y.) 570, 28 Am. Dec. 482; Andrew *v.* Dieterich, 14 Wend. (N. Y.) 31; Cary *v.* Hotailing, 1 Hill (N. Y.) 311, 37 Am. Dec. 323; Devoe *v.* Brandt, 53 N. Y. 462; McKnight *v.* Morgan, 2 Barb. (N. Y.) 173; Wheaton *v.* Baker, 14 Barb. (N. Y.) 594; Hunter *v.* Hudson River Iron, etc., Co., 20 Barb. (N. Y.) 495; Bliss *v.* Cottle, 32 Barb. (N. Y.) 322; Decker *v.* Mathews, 12 N. Y. 313; Goshen Nat. Bank *v.* Bingham, 118 N. Y. 349, 16 Am. St. Rep. 765; Wise *v.* Grant, 140 N. Y. 593; Enright *v.* Fellheimer, (Supm. Ct. Tr. T.) 25 Misc. (N. Y.) 664; Moller *v.* Tuska, 87 N. Y. 166; Powers *v.* Benedict, 88 N. Y. 605; Klingenstein *v.* Belsinger, (N. Y. City Ct. Gen. T.) 34 Misc. (N. Y.) 804; Grossman *v.* Walters, 58 Hun (N. Y.) 603, 11 N. Y. Supp. 471; Schwabeland *v.* Buchler, (N. Y. City Ct. Gen. T.) 8 Misc. (N. Y.) 86; Schoonmaker *v.* Kelly, 42 Hun (N. Y.) 299; Deimel *v.* Olney, (Supm. Ct. Spec. T.) 18 Abb. N. Cas. (N. Y.) 248. See also Butler *v.* Reynolds, 3 Thomp. & C. (N. Y.) 242.

Ohio. — Wilmot *v.* Lyon, 7 Ohio Cir. Dec. 394, 11 Ohio Cir. Ct. 238.

Pennsylvania. — Harner *v.* Fisher, 58 Pa. St. 453; Neff *v.* Landis, 110 Pa. St. 204; Bush *v.* Bender, 113 Pa. St. 94; Cincinnati Cooperage Co. *v.* Gaup, 170 Pa. St. 545.

Texas. — Mineralized Rubber Co. *v.* Cleburne, 22 Tex. Civ. App. 621.

Vermont. — Chamberlin *v.* Fuller, 59 Vt. 247.

Washington. — Price Baking Powder Co. *v.* Rinear, 17 Wash. 95.

Wisconsin. — Dowling *v.* Lawrence, 58 Wis. 282.

Under the New York Statute (Code Civ. Pro., § 1690) which provides that where chattels are seized on execution against the property of a person other than the plaintiff in replevin, the plaintiff cannot, if at the time of the seizure he did not have the right to reduce the chattels to possession, maintain replevin therefor, a vendor who is entitled to rescind the sale for fraudulent representations on the part of the vendee cannot maintain replevin against a sheriff who has taken the chattels on execution against the vendee, if at the time of such seizure the vendor had not rescinded the sale. Wise *v.* Grant, 140 N. Y. 593.

If, however, prior to the seizure by the sheriff, the vendor has rescinded the sale, he may recover the property from the sheriff. Schwabeland *v.* Buchler, (N. Y. City Ct. Gen. T.) 8 Misc. (N. Y.) 86.

1. Ratification of Sale. — Soper Lumber Co. *v.* Halsted, etc., Co., 73 Conn. 547; Ormsby *v.* Dearborn, 116 Mass. 386.

2. Bona Fide Purchaser. — Jackson *v.* Sparks, 36 Ga. 445; Brown *v.* Campsall, 6 Har. & J. (Md.) 491; Pinkerton Bros. Co. *v.* Bromley, 128 Mich. 236; Lee *v.* Portwood, 41 Miss. 109; Benedict *v.* Williams, 48 Hun (N. Y.) 123. See the title SALES, *post.*

3. Cotenant — *Alabama.* — Parsons *v.* Boyd, 20 Ala. 112.

Arkansas. — Hill *v.* Robinson, 16 Ark. 90; Ward *v.* Worthington, 33 Ark. 830; Washington *v.* Love, 34 Ark. 93; McKennon *v.* May, 39 Ark. 442; Person *v.* Wright, 35 Ark. 169; Titsworth *v.* Frauenthal, 52 Ark. 254; Hart *v.* Morton, 44 Ark. 447; Carle *v.* Wall, (Ark. 1891) 16 S. W. Rep. 293.

California. — Hewlett *v.* Owens, 50 Cal. 474; Balch *v.* Jones, 61 Cal. 234.

Colorado. — Hoeffer *v.* Agee, 9 Colo. App. 189.

Connecticut. — Prentice *v.* Ladd, 12 Conn. 331.

Delaware. — Ellis *v.* Culver, 2 Harr. (Del.) 129.

Georgia. — Usry *v.* Rainwater, 40 Ga. 328.

Illinois. — Low *v.* Martin, 18 Ill. 286.

Indiana. — Mills *v.* Malott, 43 Ind. 248; Bowen *v.* Roach, 78 Ind. 361.

Maryland. — M'Elderry *v.* Flannagan, 1 Har. & G. (Md.) 308; Ferrall *v.* Kent, 4 Gill (Md.) 209; Cheney *v.* Eastern Transp. Line, 59 Md. 561.

Massachusetts. — Kimball *v.* Thompson, 4 Cush. (Mass.) 441, 50 Am. Dec. 799; Barnes *v.* Bartlett, 15 Pick. (Mass.) 71; Wills *v.* Noyes, 12 Pick. (Mass.) 324; Silloway *v.* Brown, 12 Allen (Mass.) 30; Hart *v.* Fitzgerald, 2 Mass. 509, 3 Am. Dec. 75.

Michigan. — Kindy *v.* Green, 32 Mich. 310.

Mississippi. — Holton *v.* Binns, 40 Miss. 491.

Missouri. — Cross *v.* Hulett, 53 Mo. 397; Lisenby *v.* Phelps, 71 Mo. 522; Pulliam *v.* Burlingame, 81 Mo. 111, 51 Am. Rep. 229; Spooner *v.* Ross, 24 Mo. App. 599; Gossett *v.* Drydale, 48 Mo. App. 430; Kelley *v.* Vandiver, 75 Mo. App. 435.

New Jersey. — Chambers *v.* Hunt, 22 N. J. L. 552.

New York. — Barrowcliffe *v.* Cummins, 66 Hun (N. Y.) 1; Hudson *v.* Swan, (Brooklyn City Ct. Gen. T.) 7 Abb N. Cas. (N. Y.) 324; Russell *v.* Allen, 13 N. Y. 173.

North Carolina. — Strauss *v.* Crawford, 89 N. Car. 149; Bonner *v.* Latham, 1 Ired. L. (23 N. Car.) 271.

Oregon. — Phipps *v.* Taylor, 15 Oregon 484; Huffman *v.* Knight, 36 Oregon 581; Sharp *v.* Johnson, 38 Oregon 246. See aso Guille *v.* Wong Fook, 13 Oregon 577.

Tennessee. — Jackson *v.* Stockard, 9 Baxt. (Tenn.) 260.

Wisconsin. — Newton *v.* Gardner, 24 Wis. 232; Ashland Lodge No. 63 *v.* Williams, 100 Wis. 223, 69 Am. St. Rep. 912.

one tenant in common of a crop, though it is divisible by weight or measure, cannot recover against his cotenant in replevin for his share of the crop.[1] Still, in a number of cases, one tenant in common in an undivided mass of the same general quality, such as grain, and in this way capable of division by weight or measure, has been permitted to recover in replevin his share from his cotenant, after demand and refusal.[2] And it has frequently been recognized that where chattels of the same nature and quality belonging to different owners are mingled in one mass, each may have a separate property in his share and each be entitled to sever it from the share or shares of the others, and, if necessary for the preservation of his rights, to maintain replevin for the same, subject to deductions for any loss or waste properly falling to his share while the property remained in mass.[3]

One Partner cannot recover in replevin partnership property from his copartner,[4] nor from a sheriff who levies upon or attaches a partnership chattel on an execution or attachment for the individual debt of one partner,[5] nor from a stranger.[6] But the surviving partner may recover in replevin the property from the administrator or executor of his deceased partner.[7]

Action Against Stranger. — One tenant in common of a chattel cannot sue in his own name alone to replevin the chattel from a stranger,[8] nor from one to whom his cotenant sells, pledges, or delivers the chattels,[9] nor from an officer who levies on the undivided interest of his cotenant.[10]

Right of Possession under Agreement. — If, by agreement with his cotenants, one tenant in common is entitled to the exclusive possession of the chattel, he may maintain replevin therefor against either of his cotenants who wrongfully

1. Cotenant of Crop — *Arkansas.* — Ward *v.* Worthington, 33 Ark. 830; McKennon *v.* May, 39 Ark. 442; Moseley *v.* Cheatham, 62 Ark. 133; Hart *v.* Morton, 44 Ark. 447. See also Titsworth *v.* Frauenthal, 52 Ark. 254.

Colorado. — Hoeffer *v.* Agee, 9 Colo. App. 189.

Georgia. — Usry *v.* Rainwater, 40 Ga. 328.

Missouri. — Gossett *v.* Drydale, 48 Mo. App. 430.

See also Phipps *v.* Taylor, 15 Oregon 484.

2. Pitman *v.* Baumstark, 63 Kan. 69; Sutherland *v.* Carter, 52 Mich. 471; Wattles *v.* Dubois, 67 Mich. 313; Ellingboe *v.* Brakken, 36 Minn. 156; Kaufmann *v.* Schilling, 58 Mo. 218; Fines *v.* Bolin, 36 Neb. 621; Grimes *v.* Cannell, 23 Neb. 187; Snyder *v.* Stehman, 10 Pa. Super. Ct. 639; Henderson *v.* Lauck, 21 Pa. St. 359. See also Huff *v.* Henry, 57 Mo. App. 341.

3. Commingling Goods. — Read *v.* Middleton, 62 Iowa 317; Piazzek *v.* White, 23 Kan. 621, 33 Am. Rep. 211: Ryder *v.* Hathaway, 21 Pick. (Mass.) 305; Ellingboe *v.* Brakken, 36 Minn. 156; Grimes *v.* Cannell, 23 Neb. 187; Kimberly *v.* Patchin, 19 N. Y. 330, 75 Am. Dec. 334; Inglebright *v.* Hammond, 19 Ohio 337. And see *supra*, this title, *Property Which May Be Replevied—Identification.*

4. Partners. — Usry *v.* Rainwater, 40 Ga 329; Reynolds *v.* McCormick, 62 Ill. 412.

5. Hacker *v.* Johnson, 66 Me. 21; Scrugham *v.* Carter, 12 Wend. (N. Y.) 131.

If a sheriff levies on partnership property as the sole property of one partner for the latter's individual indebtedness and takes the same into his possession, denying the interests of the partnership thereto, the partners may all join and recover the property in replevin. Ferguson *v.* Day, 6 Ind. App. 138.

6. Heaton *v.* Wilson, 123 N. Car. 398.

7. Smith *v.* Wood, 31 Md. 293.

8. Action Against Stranger — *United States.* — D'Wolf *v.* Harris, 4 Mason (U. S.) 515.

Delaware. — Fell *v.* Taylor, 2 Penn. (Del.) 372.

Georgia. — Peebles *v.* Morris, 77 Ga. 536.

Indiana. — Bain *v.* Trixler, 24 Ind. App. 246.

Maine. — McArthur *v.* Lane, 15 Me. 245.

Maryland. — Brown *v.* Ravenscraft, 88 Md. 216.

Massachusetts. — Hart *v.* Fitzgerald, 2 Mass. 509, 3 Am. Dec. 75; Hackett *v.* Potter, 131 Mass. 50; Bray *v.* Raymond, 166 Mass. 146.

Missouri. — Deyerle *v.* Hunt, 50 Mo. App. 541; Upham *v.* Allen, 73 Mo. App. 224, 76 Mo. App. 206.

North Carolina. — Holmes *v.* Godwin, 69 N. Car. 467; Heaton *v.* Wilson, 123 N. Car. 398.

Tennessee. — Collier *v.* Yearwood, 5 Baxt. (Tenn.) 581.

See also Low *v.* Martin, 18 Ill. 292. *Compare* Chaffee *v.* Harrington, 60 Vt. 718.

9. Peebles *v.* Morris, 77 Ga. 536; Schenck *v.* Long, 67 Ind. 579; Frans *v.* Young, 24 Iowa 375; Russell *v.* Allen, 13 N. Y. 173.

Where two minor brothers gave a mortgage of their goods, owned in common, which was affirmed by one on coming of age, the other cannot maintain replevin against the mortgagee in possession. Keegan *v.* Cox, 116 Mass. 289.

10. Read *v.* Middleton, 62 Iowa 317; Hart *v.* Fitzgerald, 2 Mass. 509, 3 Am. Dec. 75; Kimball *v.* Thompson, 4 Cush. (Mass.) 441, 50 Am. Dec. 799; Ladd *v.* Billings, 15 Mass. 15; Hackett *v.* Potter, 131 Mass. 50; Bray *v.* Raymond, 166 Mass. 146; Scrugham *v.* Carter, 12 Wend. (N. Y.) 131; Sharp *v.* Johnson, 38 Oregon 246.

withhold possession from him,[1] or against a third person.[2]

VI. For What Taking or Detention Replevin Will Lie. — 1. In General. — The writ of replevin would lie at common law for the recovery of chattels unlawfully taken by the defendant, irrespective of the manner of taking, and was not restricted to merely a wrongful taking by distress;[3] still the writ was generally used in cases of unlawful distress for rent,[4] or where animals damage feasant were distrained.[5] In some jurisdictions in the *United States* the writ would lie only where the taking was by distress or attachment,[6] or where the chattel was taken away by fraud or violence or without the owner's consent.[7]

Unlawful Detention. — Upon the question whether the writ would lie where there had been merely an unlawful detention, but not an original unlawful taking, the earlier decisions were in conflict. The general rule of the common law was that in order to maintain replevin there must have been an unlawful taking[8]

1. Right of Possession under Agreement. — Morgan *v.* Hedges, 4 Colo. 526; Rich *v.* Ryder, 105 Mass. 306; Newton *v.* Gardner, 24 Wis. 232.

2. Harkey *v.* Tillman, 40 Ark. 551; Bostick *v.* Brittain, 25 Ark. 482; Chaffee *v.* Harrington, 60 Vt. 718.

3. Not Restricted to Taking on Distress — *England.* — George *v.* Chambers, 11 M. & W. 149; *Ex p.* Chamberlain, 1 Sch. & Lef. 320; Allen *v.* Sharp, 2 Exch. 352, 17 L. J. Exch. 209; Mellor *v.* Leather, 1 El. & Bl. 619, 72 E. C. L. 619.

Delaware. — Clark *v.* Adair, 3 Harr. (Del.) 113; Drummond *v.* Hopper, 4 Harr. (Del.) 327.

Indiana. — Daggett *v.* Robins, 2 Blackf. (Ind.) 415, 21 Am. Dec. 752.

Maryland. — Cullum *v.* Bevans, 6 Har. & J. (Md.) 469.

Mississippi. — Burrage *v.* Melson, 48 Miss. 237.

Missouri. — Crocker *v.* Mann, 3 Mo. 472, 26 Am. Dec. 684.

New Jersey. — Bruen *v.* Ogden, 11 N. J. L. 370, 20 Am. Dec. 593.

New York. — Marshall *v.* Davis, 1 Wend. (N. Y.) 109, 19 Am. Dec. 463; Pangburn *v.* Patridge, 7 Johns. (N. Y.) 140, 5 Am. Dec. 250.

Pennsylvania. — Harlan *v.* Harlan, 15 Pa. St. 507, 53 Am Dec. 612; Boyle *v.* Rankin, 22 Pa. St. 168; Herdic *v.* Young, 55 Pa St. 176, 93 Am. Dec. 739; Weaver *v.* Lawrence, 1 Dall. (Pa.) 156.

Fraudulent Taking. — A party obtained possession of property under pretext of hiring it, but for the real purpose of taking it to another state to be attached for a debt owed to him. It was held that his act was a naked trespass *ab initio* and that he was liable in replevin to the owner. Joplin *v.* Carrier, 11 S. Car. 327.

4. Distress — *England.* — Evans *v.* Elliott, 6 N. & M. 606, 5 Ad. & El. 142, 31 E. C. L. 301, 2 Hurl. & W. 231, 6 L. J. K. B. 259; Jones *v.* Johnson, 5 Exch. 862; Gay *v.* Mathews, 9 Jur. N. S. 716; Glynn *v.* Thomas, 11 Exch. 870, 2 Jur. N. S. 378; French *v.* Phillips, 2 Jur. N. S. 1169, 1 H. & N. 564; Jacob *v.* King, 5 Taunt. 451, 1 E. C. L. 154, 1 Marsh. 135; Anonymous, 1 Chit. 196; Howe *v.* Scarrott, 4 H. & N. 723, 28 L. J. Exch. 325.

Illinois. — Hare *v.* Stegall, 60 Ill. 380; McCarthy *v.* Hetzner, 70 Ill. App. 480.

Kentucky. — Dean *v.* Ball, 3 Bush (Ky.) 502.

Mississippi. — Towns *v.* Boarman, 23 Miss. 186.

New Jersey. — Osgood *v.* Green, 30 N. H. 210.

Pennsylvania. — Sommer Piano Co. *v.* Wood, 8 Kulp (Pa.) 494; Repp *v.* Sousman, 9 Kulp (Pa.) 180; Thomas *v.* Baner, 19 Pa Co. Ct. 273, 6 Pa. Dist. 177; Bonsall *v.* Comly, 44 Pa. St. 442.

South Carolina. — Hilson *v.* Blain, 2 Bailey L. (S. Car.) 169. See also Southern R. Co. *v.* Sarratt, 58 S. Car. 98.

Lease Against Public Policy. — Where rent accruing on a lease, illegal as against public policy, is distrained for, replevin will lie for the property so distrained. The maxim with regard to illegal contracts — *in pari delicto potior est conditio possidentis* — does not preclude the maintenance of the action. Gallagher *v.* McQueen, 35 N. Bruns. 198. See also the title Illegal Contracts, vol. 15, p. 927.

5. Campau *v.* Konan, 39 Mich. 362; Cox *v.* Chester, 77 Mich. 494; Brown *v.* Smith, 1 N. H. 36; Kimball *v.* Adams, 3 N. H. 182; Osgood *v.* Green, 33 N. H. 318. *Compare* Johnson *v.* Wing, 3 Mich. 163; Hale *v.* Clark, 19 Wend. (N. Y.) 498.

6. Restriction to Distress and Attachment. — Watson *v.* Watson, 9 Conn. 140, 23 Am. Dec. 324; Wheelock *v.* Cozzens, 6 How. (Miss.) 279; Hewitson *v.* Hunt, 8 Rich. L. (S. Car.) 106, Vaiden *v.* Bell, 3 Rand. (Va.) 448.

7. Fraudulent or Violent Taking. — New *v.* Le Hardy, 46 Ga. 616; Peak *v.* Cogborn, 50 Ga. 562; Mossman *v.* McKinley, 67 Ga. 391; Welborn *v.* Shirly, 65 Ga. 695; Trotti *v.* Wyly, 77 Ga. 684.

8. Unlawful Detention — General Rule — *England.* — *Ex p.* Chamberlain, 1 Sch. & Lef. 320; Comerford *v.* Blake, 2 Ir. Eq. 176; Galloway *v.* Bird, 4 Bing. 299, 13 E. C. L. 443. *Compare* Farrell *v.* Beresford, 1 Ball. & B. 328; Mennie *v.* Blake, 6 El. & Bl. 842, 88 E. C. L. 842.

United States. — Meany *v.* Head, 1 Mason (U. S.) 319.

Arkansas. — Trapnall *v.* Hattier, 6 Ark. 18; Town *v.* Evans, 6 Ark. 260.

Delaware. — Drummond *v.* Hopper, 4 Harr. (Del.) 327.

Illinois. — Wright *v.* Armstrong, 1 Ill. 172.

Kentucky. — Harper *v.* Baker, 3 T. B. Mon. (Ky.) 421.

Minnesota. — Coit *v.* Waples, 1 Minn. 134.

Mississippi. — Wheelock *v.* Cozzens, 6 How.

and the taking must have been from the possession of the plaintiff.[1] Thus, replevin would not lie against a bailee who wrongfully detained the property bailed,[2] nor against one who received the property from a bailee and wrongfully detained it from the bailor.[3] It was not necessary that the wrongful taking should have been by the defendant, but if there was originally a wrongful taking, replevin could be maintained against any person in whose hands or possession the property was found.[4]

Minority Rule. — In *Massachusetts* an unlawful detention merely was held sufficient to sustain the issuance of the writ.[5]

Statutory Provisions. — At the present time, in nearly all the jurisdictions in the *United States* the issuance of the writ is expressly authorized by statute, not only where the taking was unlawful, but also in case of unlawful detention.[6]

2. Necessity for Possession by Defendant. — The action of replevin being a possessory action, to render the defendant liable therein it is generally essential that he should have had the possession of the property sought to be replevied at the commencement of the action;[7] and the fact that by statu-

(Miss.) 279; Punchard *v.* Rundell, 1 How. (Miss.) 508.

Missouri. — Rector *v.* Chevalier, 1 Mo. 345.

New Hampshire. — Dame *v.* Dame, 43 N. H. 37; Carter *v.* Piper, 57 N. H. 217.

New Jersey. — Haythorne *v.* Rushforth, 19 N. J. L. 160, 38 Am. Dec. 540; Harwood *v.* Smethurst, 29 N. J. L. 195, 80 Am. Dec. 207.

New York. — Thompson *v.* Button, 14 Johns. (N. Y.) 84; Clark *v.* Skinner, 20 Johns. (N. Y.) 465, 11 Am. Dec. 302; Marshall *v.* Davis, 1 Wend. (N. Y.) 109, 19 Am. Dec. 463; Pangburn *v.* Patridge, 7 Johns. (N. Y.) 140, 5 Am. Dec. 250; Ely *v.* Ehle, 3 N. Y. 506.

North Carolina. — Cummings *v.* MacGill, Term (4 N. Car.) 98.

Virginia. — Vaiden *v.* Bell, 3 Rand. (Va.) 448.

1. Dillon *v.* Wright, 7 J. J. Marsh. (Ky.) 10; Cummings *v.* MacGill, 2 Murph. (6 N. Car.) 357.

2. Galloway *v.* Bird, 12 Moo. 547, 4 Bing. 299, 13 E. C. L. 443; Meany *v.* Head, 1 Mason (U. S.) 319.

3. Mennie *v.* Blake, 6 El. & Bl. 842, 88 E. C. L. 842; Marshall *v.* Davis, 1 Wend. (N. Y.) 109, 19 Am. Dec. 463.

4. Murphy *v.* Tindall, Hempst. (U. S.) 10; Gray *v.* Nations, 1 Ark. 557; Parish *v.* Morey, 40 Mich. 417. *Compare* Harper *v.* Baker, 3 T. B. Mon. (Ky.) 421.

Purchaser from Tortfeasor. — Where one purchased a chattel from another who tortiously obtained it, the rightful owner could recover it by replevin, although the seller may have been pecuniarily responsible, and the owner made no effort to hold him to accountability. Welker *v.* Wolverkuehler, 49 Mo. 35.

5. **Minority Rule.** — Portland Bank *v.* Stubbs, 6 Mass. 422, 4 Am. Dec. 151; Badger *v.* Phinney, 15 Mass. 359, 8 Am. Dec. 105; Baker *v.* Fales, 16 Mass. 147; Perry *v.* Stowe, 111 Mass. 60; Whitman *v.* Merrill, 125 Mass. 127.

6. **Statutory Change** — *United States.* — Denver Onyx, etc., Mfg. Co. *v.* Reynolds, 72 Fed. Rep. 464, 36 U. S. App. 538; Sutherland *v.* Brace, 73 Fed. Rep. 624, 34 U. S. App. 638, *affirming* 71 Fed. Rep. 469. See also Uncapher *v.* Baltimore, etc., R. Co., 112 Fed. Rep. 899.

Arkansas. — Beebe *v.* DeBaun, 8 Ark. 510.

California. — Skidmore *v.* Taylor, 29 Cal. 619; Flanders *v.* Locke, 53 Cal. 20.

Indiana. — Daggett *v.* Robins, 2 Blackf. (Ind.) 415, 21 Am. Dec. 752; Helman *v.* Withers, 3 Ind. App. 532, 50 Am. St. Rep. 295.

Maine. — Bartlett *v.* Goodwin, 71 Me. 350.

Maryland. — Cullum *v.* Bevans, 6 Har. & J. (Md.) 469.

Massachusetts. — Baker *v.* Fales, 16 Mass. 147; Marston *v.* Baldwin, 17 Mass. 606.

Michigan. — Trudo *v.* Anderson, 10 Mich. 357, 81 Am. Dec. 795; Hickey *v.* Hinsdale, 12 Mich. 99; LeRoy *v.* East Saginaw City R. Co., 18 Mich. 233, 100 Am. Dec. 162; Sexton *v.* McDowd, 38 Mich. 148; Gildas *v.* Crosby, 61 Mich. 413.

Mississippi. — Burrage *v.* Melson, 48 Miss. 237.

Ohio. — Stone *v.* Wilson, Wright (Ohio) 159.

Pennsylvania. — Weaver *v.* Lawrence, 1 Dall. (Pa.) 156; Lee *v.* Gould, 47 Pa. St. 398; Harlan *v.* Harlan, 15 Pa. St. 507, 53 Am. Dec. 612; Herdic *v.* Young, 55 Pa. St. 176, 93 Am. Dec. 739; Craig *v.* Kline, 65 Pa. St. 399, 3 Am. Rep. 636.

Rhode Island. — Waterman *v.* Matteson, 4 R. I. 539.

South Dakota. — Willis *v.* DeWitt, 3 S. Dak. 281.

Wisconsin. — Ronge *v.* Dawson, 9 Wis. 246.

Retroactive Effect of Statute. — The provision (Rev. Stat. Conn. 1875, tit. 19, pt. 15, § 1) that "replevin may be maintained to recover any goods or chattels wrongfully detained," etc., was held not to be retroactive and therefore not applicable to an action of replevin pending when the law was passed. Smith *v.* Lyon, 44 Conn. 175.

7. **Necessity for Possession by Defendant** — *Arkansas.* — Beebe *v.* De Baun, 8 Ark. 510; Wallace *v.* Brown, 17 Ark. 449; Burr *v.* Daugherty, 21 Ark. 559.

California. — Riciotto *v.* Clement, 94 Cal. 105; Hendeson *v.* Hart, 122 Cal. 332; Keech *v.* Beatty, 127 Cal. 177; Richards *v.* Morey, 133 Cal. 437. See also Hawkins *v.* Roberts, 45 Cal. 38; Visher *v.* Smith, 91 Cal. 260.

District of Columbia. — Carpenter *v.* Starr, 1 Mackey (D. C.) 417.

Georgia. — Bell *v.* Ober, etc., Co., 111 Ga. 668.

Indiana. — Baer *v.* Martin, 2 Ind. 229; Entsminger *v.* Jackson, 73 Ind. 144; Standard Oil Co. *v.* Bretz, 98 Ind. 231; Van Gorder *v.* Smith,

tory provisions the plaintiff in replevin is allowed to recover the value of the property, the possession of which he has not received, does not change this rule.[1] Thus, where at the time of the commencement of the action the plaintiff was in possession of the property, the action cannot be maintained.[2] So, also, replevin will not lie against a bailee for property which through his negligence was destroyed before the commencement of the action,[3] or against

99 Ind. 404; Peninsular Stove Co. *v.* Ellis, 20 Ind. App. 491; West *v.* Graff, 23 Ind. App. 410; Fruits *v.* Elmore, 8 Ind. App. 278.

Iowa. — Coffin *v.* Gephart, 18 Iowa 256; Hove *v.* McHenry, 60 Iowa 227. *Compare* Ralston *v.* Black, 15 Iowa 47.

Kansas. — Moses *v.* Morris, 20 Kan. 208; Brand *v.* Hedwick, 43 Kan. 131; Davis *v.* Van De Mark, 45 Kan. 130.

Maine. — Ramsdell *v.* Buswell, 54 Me. 546, *overruling* Sayward *v.* Warren, 27 Me. 453.

Massachusetts. — Richardson *v.* Reed, 4 Gray (Mass.) 441, 64 Am. Dec. 77; Byron *v.* Crippen, 4 Gray (Mass.) 312; Hall *v.* White, 106 Mass. 599.

Michigan. — Aber *v.* Bratton, 60 Mich. 357; Gildas *v.* Crosby, 61 Mich. 413; McMorran *v.* Murphy, 68 Mich. 246; House *v.* Turner, 106 Mich. 240; Eales *v.* Francis, 115 Mich. 636; Jenney *v.* Mussey Tp., 121 Mich. 229; Reid *v.* Parks, 122 Mich. 363.

Mississippi. — McCormick *v.* McCormick, 40 Miss. 760; Krosmopolski *v.* Paxton, 58 Miss. 581; Griffin *v.* Lancaster, 59 Miss. 340; Myrick *v.* National Cash-Register Co., (Miss. 1899) 25 So. Rep. 155.

Missouri. — Davis *v.* Randolph, 3 Mo. App. 454; Staley House Furnishing Co. *v.* Wallace, 21 Mo. App. 128; Rogers *v.* Davis, 21 Mo. App. 150; Feder *v.* Abrahams, 28 Mo. App. 454; Woolner *v.* Levy, 48 Mo. App. 469; Myers *v.* Lingenfelter, 81 Mo. App. 251; Penn *v.* Brashear, 65 Mo. App. 24, 2 Mo. App. Rep. 1132.

Nebraska. — Heidiman-Benoist Saddlery Co. *v.* Schott, 59 Neb. 20; Burr *v.* McCallum, 59 Neb. 326; Depriest *v.* McKinstry, 38 Neb. 194.

Nevada. — Gardner *v.* Brown, 22 Nev. 156.

New Hampshire. — Mitchell *v.* Roberts, 50 N. H. 486.

New York. — Roberts *v.* Randel, 3 Sandf. (N. Y.) 707; Brockway *v.* Burnap, 12 Barb. (N. Y.) 347; Elwood *v.* Smith, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 528; Sinnott *v.* Feiock, 165 N. Y. 444, *affirming* (Supm. Ct. App. Div.) 54 N. Y. Supp. 1110; Alaske Unterstuetzung Verein *v.* Wall, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 174; Hastings *v.* Nagel, 83 Hun (N. Y.) 205. See also Shapiro *v.* Lankay, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 39. See, however, Drake *v.* Wakefield, (Supm. Ct. Spec. T.) 11 How. Pr. (N. Y.) 106. *Compare* Ellis *v.* Lersner, 48 Barb. (N. Y.) 539; Devoe *v.* Brandt, 53 N. Y. 463; Dunham *v.* Troy Union R. Co., 1 Abb. App. Dec. (N. Y.) 565; Latimer *v.* Wheeler, 3 Abb. App. Dec. (N. Y.) 35.

North Carolina. — Myers *v.* Credle, 63 N. Car. 504; Haughton *v.* Newberry, 69 N. Car. 456; Moore *v.* Brady, 125 N. Car. 35.

North Dakota. — Best *v.* Muir, 8 N. Dak. 44, 73 Am. St. Rep. 742.

Ohio. — Semper *v.* Bentley, 8 Ohio Cir. Dec. 356, 15 Ohio Cir. Ct. 515.

Pennsylvania. — English *v.* Dalbrow, 1 Miles (Pa.) 160; Hulett *v.* Patterson, (Pa. 1887) 8 Atl. Rep. 917.

South Dakota. — Willis *v.* DeWitt, 3 S. Dak. 281; McCormick Harvesting Mach. Co. *v.* Woulph, 11 S. Dak. 252.

Washington. — Dow *v.* Dempsey, 21 Wash. 86.

Wisconsin. — Johnson *v.* Garlick, 25 Wis. 705; Grace *v.* Mitchell, 31 Wis. 533, 11 Am. Rep. 613; Libby *v.* Murray, 51 Wis. 371; Kiefer *v.* Carrier, 53 Wis. 404; Stahl *v.* Chicago, etc., R. Co., 94 Wis. 315; McHugh *v.* Robinson, 71 Wis. 565.

Claim of Interest. — Van Gorder *v.* Smith, 99 Ind. 404.

Marking Cattle with Defendant's Brand. — Sawyer *v.* Kenan, 95 Ga. 552.

Fraudulent Vendee. — Sinnott *v.* Feiock, 165 N. Y. 444, *affirming* (Supm. Ct. App. Div.) 54 N. Y. Supp. 1110.

Holder of Warehouse Receipt. — The holder of a warehouse receipt is not in the constructive possession of the property bailed and replevin cannot be maintained against him for such property. Best *v.* Muir, 8 N. Dak. 44, 73 Am. St. Rep. 742.

1. Burr *v.* Daugherty, 21 Ark. 559; Riciotto *v.* Clement, 94 Cal. 105; Reid *v.* Parks, 122 Mich. 363; Krosmopolski *v.* Paxton, 58 Miss. 581; Heidiman-Benoist Saddlery Co. *v.* Schott, 59 Neb. 20; Dow *v.* Dempsey, 21 Wash. 86. *Compare* Belknap Sav. Bank *v.* Robinson, 66 Conn. 542.

2. Plaintiff in Possession — *Arkansas.* — Pyburne *v.* Moses, 54 Ark. 121.

California. — Carman *v.* Ross, 64 Cal. 249.

Delaware. — Reed *v.* Wiltbank, 2 Penn. (Del.) 243.

Illinois. — Johnson *v.* Prussing, 4 Ill. App. 575.

Indiana. — Owens *v.* Gascho, 154 Ind. 225. *Compare* Teeple *v.* Dickey, 94 Ind. 124.

Massachusetts. — Calnan *v.* Stern, 153 Mass. 413.

Michigan. — Hickey *v.* Hinsdale, 12 Mich. 99; Gidday *v.* Witherspoon, 35 Mich. 368; Morrison *v.* Lumbard, 48 Mich. 548; Aber *v.* Bratton, 60 Mich. 357.

New York. — Barnett *v.* Selling, 70 N. Y. 496; Austin *v.* Wauful, 59 Hun (N. Y.) 620, 13 N. Y. Supp. 184.

Wisconsin. — Wheeler, etc., Mfg. Co. *v.* Teetzlaff, 53 Wis. 211; Kiefer *v.* Carrier, 53 Wis. 404.

Possession After Action Instituted. — After replevin for specific personal property has been commenced by the service of a summons, a voluntary taking of the property, not from the defendants themselves, but by the plaintiff's picking it up where he chanced to find it, does not extinguish the right of action. Tracy *v.* New York, etc., R. Co., 9 Bosw. (N. Y.) 396.

3. Destruction of Property. — Burr *v.* Daugherty, 21 Ark. 559.

a person who had sold and delivered possession of the property to his vendee prior to the commencement of the action.[1] So, also, a mere paper levy of an attachment or execution without taking the property into the possession of the officer will not authorize the maintenance of a replevin action against the officer;[2] likewise where the officer left the property with the person in whose possession it was at the time of the levy, taking from him, however, a forthcoming bond;[3] or where the officer who had seized the property on attachment or execution sold and delivered it to the purchaser before the commencement of the action;[4] or where the officer, having seized property on a void execution before the issuance of the replevin writ, delivered it over to a third person claiming title thereto.[5] So, also, the person at whose suit the execution or attachment is issued is not liable in replevin for property wrongfully taken on the execution or attachment if the possession of the property seized was not delivered to him,[6] though it would seem to be otherwise where such creditor was an actual participant in the levy and the withholding of the property seized by the officer.[7]

Estoppel to Deny Possession. — The defendant in replevin may be estopped to deny that he was in possession of the property at the time the action was commenced, as where he pleads the general issue without disclaimer,[8] or when he pleads ownership and demands a return of the property,[9] or where he admits possession and attempts to justify the same under color of right,[10] or where the defendant executes a redelivery bond and thereby secures a return of the property.[11]

Exception to General Rule. — In some jurisdictions, if the person wrongfully detaining the property refuses upon demand to return the same to the rightful owner, the plaintiff is permitted under statutes to recover for the value of the property, though after demand, but before the issuance of the writ, the defendant had parted with the possession of the property.[12] And this is

1. Property Sold and Delivered — *Kansas.* — Davis *v.* Van DeMark, 45 Kan. 130.

Maine. — Ramsdell *v.* Buswell, 54 Me. 546, *overruling* Sayward *v.* Warren, 27 Me. 453.

Michigan. — Gildas *v.* Crosby, 61 Mich. 413; McMorran *v.* Murphy, 68 Mich. 246.

Mississippi. — McCormick *v.* McCormick, 40 Miss. 760; Myrick *v.* National Cash-Register Co., (Miss. 1899) 25 So. Rep. 155.

Missouri. — Feder *v.* Abrahams, 28 Mo. App. 454; Kansas Moline Plow Co. *v.* Wayland, 81 Mo. App. 305.

North Carolina. — Haughton *v.* Newberry, 69 N. Car. 456.

Ohio. — Semper *v.* Bentley, 8 Ohio Cir. Dec. 356, 15 Ohio Cir. Ct. 515.

Compare Tasker *v.* Ryan, 4 N. Y. App. Div. 616; Dudley *v.* Green, 46 S. Car. 199.

2. Paper Levy. — Gaff *v.* Harding, 48 Ill. 150; Standard Oil Co. *v.* Bretz, 98 Ind. 231; Owens *v.* Gascho, 154 Ind. 225; Brand *v.* Hedwick, 43 Kan. 131; Hickey *v.* Hinsdale, 12 Mich. 99; Libby *v.* Murray, 51 Wis. 371. *Compare* Maxon *v.* Perrott, 17 Mich. 332, 97 Am. Dec. 191; Gutsch *v.* McIlhargey, 69 Mich. 377; Chicago, etc., R. Co *v.* Reid, 74 Mich. 366.

3. Hove *v.* McHenry, 60 Iowa 227; Morrison *v.* Lumbard, 48 Mich. 548; Austin *v.* Wauful, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 184. *Compare* Hursh *v.* Starr, 6 Kan. App. 8.

4. Riciotto *v.* Clement, 94 Cal. 105; Moses *v.* Morris, 20 Kan. 208; Gardner *v.* Brown, 22 Nev. 156.

5. Hall *v.* White, 106 Mass. 599.

6. Attachment or Execution Creditor — *California.* — Keech *v.* Beatty, 127 Cal. 177.

Illinois. — Blatchford *v.* Boyden, 18 Ill. App. 378.

Massachusetts. — Richardson *v.* Reed, 4 Gray (Mass.) 441, 64 Am. Dec. 77.

Michigan. — House *v.* Turner, 106 Mich. 240.

Ohio. — Bogan *v.* Stoutenburgh, 7 Ohio (pt. ii.) 133.

Wisconsin. — Grace *v.* Mitchell, 31 Wis. 533, 11 Am. Rep. 613.

See also Tripp *v.* Leland, 42 Vt. 487. *Compare* Harris *v.* Hayfield, 5 Wash. 230.

Intervention by Judgment or Attaching Creditor. — Valle *v.* Cerre, 36 Mo. 575, 88 Am. Dec. 161.

Substitution of Attachment or Execution Creditor as Defendant. — France *v.* Omaha First Nat. Bank, 3 Wyo. 187.

7. Grindrod *v.* Lauzon, 47 Mich. 584; Tripp *v.* Leland, 42 Vt. 487.

Execution Creditor Directing Officers to Seize the Particular Property. — Knapp *v.* Smith, 27 N. Y. 277.

8. Estoppel. — Harrison *v.* Clark, 74 Conn. 18. See also McNamara *v.* Lyon, 69 Conn. 447.

9. Flynn *v.* Jordan, 17 Neb. 518.

10. Hursh *v.* Starr, 6 Kan. App 8.

11. Giving Redelivery Bond.—Jordan *v.* Johnson, 1 Kan. App. 657; Nye *v.* Weiss, 7 Kan. App. 627; Carpenter *v.* Stearns, 32 Mo. App. 132; Harris *v.* Hayfield, 5 Wash. 230. See also Black *v.* Foster, (Supm. Ct. Gen. T.) 7 Abb. Pr. (N. Y.) 406.

12. Exception to General Rule — *Arkansas.* — Washington *v.* Love, 34 Ark. 93; Harkey *v.* Tillman, 40 Ark. 551.

Kentucky. — Pool *v.* Adkisson, 1 Dana (Ky.) 110.

especially true where the defendant had parted with the possession for the express purpose of evading the replevin action.[1]

Constructive Possession. — A person may have the constructive possession of the property so as to subject him to liability in a replevin action, though he has not the actual personal possession.[2] Thus, where a prior action of replevin was dismissed because of informality in the replevin bond, and a judgment for a return to the defendant ordered and the plaintiff returned the property to the place whence it was taken on the writ, the defendant is to be deemed in the constructive possession of the property, though he has not taken out a writ of return or actually received the property, so as to authorize a second replevin action against him.[3] And it has even been held that the mere judgment for a return to the defendant on dismissal of the prior action places the property in the defendant's constructive possession so as to authorize the institution by the plaintiff of a second action without any attempt to return the property taken in the prior action.[4] If the property has been actually returned to the defendant on the dismissal of the proper replevin action, a second action may be maintained against him on account of such possession.[5]

Possession of Agent or Servant. — Where an agent or servant is holding possession for his principal or master, the latter is deemed to be in possession, so as to authorize the maintenance against him of a replevin action for the property.[6]

Several Persons May Have the Joint Constructive Possession of property so as to authorize the maintenance of a replevin action against all for its wrongful detention, though the property is in the actual possession of one only.[7]

3. Seizure on Judicial Process — *a.* IN GENERAL. — The owner of property seized on valid judicial process issued against him cannot maintain replevin for its recovery.[8] Thus, the owner of spirituous liquors seized on a warrant

New York. — Brockway *v.* Burnap, 16 Barb. (N. Y.) 309; Tasker *v.* Ryan, 4 N. Y. App. Div. 616; Ellis *v.* Lersner, 48 Barb. (N. Y.) 546; Nichols *v.* Michael, 23 N. Y. 266; Barnett *v.* Selling, 70 N. Y. 494.

Virginia. — Burnley *v.* Lambert, 1 Wash. (Va.) 308.

See also Holliday *v.* Poston, 60 S. Car. 103; Dudley *v.* Green, 46 S. Car. 199. *Compare* Rogers *v.* Davis, 21 Mo. App. 150.

1. Helman *v.* Withers, 3 Ind. App. 532, 50 Am. St. Rep. 295; Gassner *v.* Marquardt, 76 Wis. 579; Murray *v.* Norwood, 77 Wis. 405. See also Burke *v.* Koch, 75 Cal. 356; Schmidt *v.* Bender, 39 Kan. 437.

2. **Constructive Possession.** — Moore *v.* Moore, 4 Mo. 421; Gallagher *v.* Bishop, 15 Wis. 276.

3. Walbridge *v.* Shaw, 7 Cush. (Mass.) 560.

But if the defendant in the prior replevin suit which was dismissed without a judgment for a return refuses to accept a return, the return of the property to the place from which it was taken does not place it in the constructive possession of the defendant so as to render a second action of replevin maintainable against him. Calnan *v.* Stern, 153 Mass. 413; McHugh *v.* Robinson, 71 Wis. 565; Way *v.* Barnard, 36 Vt. 366.

4. Teeple *v.* Dickey, 94 Ind. 124.

5. Morton *v.* Sweetser, 12 Allen (Mass.) 134.

6. **Possession of Agent or Servant.** — Johnson *v.* Howe, 7 Ill. 342; Richey *v.* Ford, 84 Ill. App. 121; Kellar *v.* Victoria Lumber Co., 45 La. Ann. 476; Bradley *v.* Gamelle, 7 Minn. 331; Crum *v.* Elliston, 33 Mo. App. 591; Morris *v.* Danielson, 3 Hill (N. Y.) 168; Stewart *v.* Wells, 6 Barb. (N. Y.) 79; Neff *v.* Thompson, 8 Barb. (N. Y.) 213; Chapman *v.* Andrews, 3 Wend. (N. Y.) 240.

In Coomer *v.* Gale Mfg. Co., 40 Mich. 691, it was held that replevin would lie against a purchaser of property, even though he allowed it to remain in the seller's hands. In this case it was said that he yet had the control of the same, and in permitting the assignors to remain in possession he did not thereby, as to the plaintiff, sever his right to the control of the property so as to prevent the maintaining of this action against him.

Township. — A township treasurer is not so far the agent of the township as to render his possession of property wrongfully seized for taxes the possession of the township, so as to authorize the maintenance against it of an action of replevin. Jenney *v.* Mussey Tp., 121 Mich. 229.

Liability of Sheriff for Wrongful Taking by Deputy. — Depriest *v.* McKinstry, 38 Neb. 194.

Possession by Defendant's Attorney. — Mitchell *v.* Eure, 126 N. Car. 77.

7. **Joint Possession by Several Persons.** — Christy *v.* Ashlock, 93 Ill. App. 651; Meixell *v.* Kirkpatrick, 33 Kan. 282; Schmidt *v.* Bender, 39 Kan. 437; Gutsch *v.* McIhargey, 69 Mich. 377; Crum *v.* Elliston, 33 Mo. App. 591; Moorhouse *v.* Donaca, 14 Oregon 430; Oyler *v.* Dautoff, 36 Oregon 357; Riley *v.* Noyes, 44 Vt. 455; Rowe *v.* Hicks, 58 Vt. 18.

8. **Seizure on Judicial Process Against Plaintiff.** — Wilson *v.* Weller, 1 Brod. & B. 57, 5 E. C. L. 18; Wootten *v.* Harvey, 6 East 76; Rex *v.* Hoseason, 14 East 605; Musgrave *v.* Hall, 40 Me. 498; Ilsley *v.* Stubbs, 5 Mass. 283. See also Pracht *v.* Gunn, 69 N. Y. App. Div. 396.

in due form against him cannot maintain replevin for the property.[1] If the seizure is in pursuance of an unconstitutional law, the person against whom the process is issued may maintain replevin for the property.[2]

b. ATTACHMENT AND EXECUTION — (1) *Replevin by Defendant.* — The defendant against whom an attachment or execution is issued and properly levied upon thereunder cannot, as a general rule, successfully maintain replevin against the officer to regain possession of the property.[3] And this has been held true in the absence of statutory authorization, though the property was exempt;[4] but the statutes at the present time in many jurisdictions expressly permit a debtor whose exempt property has been so seized to maintain replevin therefor.[5]

Want of Jurisdiction. — If the attachment or execution was issued by a court without jurisdiction, replevin may be maintained for the property seized.[6]

Justification by Officer. — Where an officer justifies by virtue of a seizure on execution or attachment, he must show sufficient facts to make out a levy

1. Warrant for Seizure of Intoxicating Liquors. — Musgrave *v.* Hall, 40 Me. 498; Allen *v.* Staples, 6 Gray (Mass.) 491.

Where proceedings are commenced under the *Iowa* "act for the suppression of intemperance," approved Jan. 22, 1855, by the seizure of intoxicating liquors alleged to be owned and kept for sale, in violation of the law, it is not competent for a party to take the case away from the tribunal whose jurisdiction has attached by instituting an action of replevin and regaining possession of the liquors. Funk *v.* Israel, 5 Iowa 438.

2. Seizure under Unconstitutional Law. — Cooley *v.* Davis, 34 Iowa 128.

3. Replevin by Attachment or Execution Defendant — *United States.* — Livingston *v.* Smith, 5 Pet. (U. S.) 90; Freeman *v.* Howe, 24 How. (U. S.) 450; Deshler *v.* Dodge, 16 How. (U. S.) 622.

Arkansas. — Spring *v.* Bourland, 11 Ark. 658, 54 Am. Dec. 243.

Colorado. — McCraw *v.* Welch, 2 Colo. 284.

Indiana. — Newcomer *v.* Alexander, 96 Ind. 453; Hartlep *v.* Cole, 101 Ind. 458; Miller *v.* Hudson, 114 Ind. 550.

Iowa. — Funk *v.* Israel, 5 Iowa 438; Armel *v.* Lendrum, 47 Iowa 535; Morgan *v.* Zenor, 88 Iowa 175.

Kansas. — Westenberger *v.* Wheaton, 8 Kan. 169.

Kentucky. — Clay *v.* Caperton, 1 T. B. Mon. (Ky.) 10, 15 Am. Dec. 77; Morgan *v.* Craig, Hard. (Ky.) 108.

Maine. — Musgrave *v.* Hall, 40 Me. 498.

Maryland. — Ranoul *v.* Griffie, 3 Md. 54.

Michigan. — Hubbardston Lumber Co. *v.* Covert, 35 Mich. 254; Gottesman *v.* Chipman, 125 Mich. 60.

Missouri. — Buis *v.* Cooper, 63 Mo. App. 196.

New Hampshire. — Kellogg *v.* Churchill, 2 N. H. 412, 9 Am. Dec. 104.

New Jersey. — Hawke *v.* Lepple, 51 N. J. L. 208, 14 Am. St. Rep. 677.

New York. — Thompson *v.* Button, 14 Johns. (N. Y.) 84; Gardner *v.* Campbell, 15 Johns. (N. Y.) 401.

Tennessee. — Hughes *v.* Whitaker, 4 Heisk. (Tenn.) 399.

Vermont. — Waite *v.* Starkey, 68 Vt. 181; Prescott *v.* Starkey, 71 Vt. 118.

Wisconsin. — Booth *v.* Ableman, 16 Wis. 460, 84 Am. Dec. 711; Griffith *v.* Smith, 22 Wis. 647.

Wyoming. — Dayton *v.* Wyoming Nat. Bank, 1 Wyo. 263.

See also Gates *v.* Gates, 15 Mass. 310; Daniels *v.* Cole, 21 Neb. 156.

Replevin will not lie against an officer for property attached on the ground that since the attachment the indebtedness has been paid. Livingston *v.* Smith, 5 Pet. (U. S.) 90.

Execution Issued on Judgment Paid but Not Satisfied of Record. — Armel *v.* Lendrum, 47 Iowa 535.

4. Exempt Property. — Buis *v.* Cooper, 63 Mo. App. 196; Prescott *v.* Starkey, 71 Vt. 118.

5. Exempt Property — *Arkansas.* — Meadow *v.* Wise, 41 Ark. 285; Settles *v.* Bond, 49 Ark. 114; Mills *v.* Pryor, 65 Ark. 214. See also Donnelly *v.* Wheeler, 34 Ark. 111.

District of Columbia. — Wallingsford *v.* Bennett, 1 Mackey (D. C.) 303.

Florida. — Allen *v.* Ingram, 39 Fla. 239.

Indiana. — Thompson *v.* Ross, 87 Ind. 156; Newcomer *v.* Alexander, 96 Ind. 453; Hartlep *v.* Cole, 101 Ind. 458; Louisville, etc., R. Co. *v.* Payne, 103 Ind. 183.

Iowa. — Wilson *v.* Stripe, 4 Greene (Iowa) 551, 61 Am. Dec. 138.

Kansas. — Westenberger *v.* Wheaton, 8 Kan. 169.

Michigan. — Maxon *v.* Perrott, 17 Mich. 332, 97 Am. Dec. 191; Vanderhorst *v.* Bacon, 38 Mich. 669, 31 Am. Rep. 328.

Nebraska. — Johnson *v.* Neal, 32 Neb. 14; Starrett *v.* Deerfield, 40 Neb. 846.

New York. — Conklin *v.* McCauley, 41 N. Y. App. Div. 452.

North Dakota. — Wagner *v.* Olson, 3 N. Dak. 69.

Oregon. — Krause *v.* Herbert, 16 Oregon 429.

South Carolina. — Burr *v.* Brantley, 40 S. Car. 538; Southern R. Co. *v.* Sarratt, 58 S. Car. 98.

Tennessee. — Wilson *v.* McQueen, 1 Head (Tenn.) 17.

Wisconsin. — Gilman *v.* Williams, 7 Wis. 329, 76 Am. Dec. 219; Connolly *v.* Straw, 53 Wis. 645; Stern *v.* Riches, 111 Wis. 589.

6. Want of Jurisdiction. — George *v.* Chambers, 2 Dowl. N. S. 783, 11 M. & W. 149; Repine *v.* McPherson, 2 Kan. 340: Adams *v.* Hubbard, 30 Mich. 104. See also Morgan *v.* Zenor, 88 Iowa 175.

under a *prima facie* valid writ,[1] and must prove his official character.[2]

(2) *Replevin by Third Person.* — It has been held at common law that where the goods of one person are seized by an officer in the levy of an attachment or execution against the property of another person, replevin cannot be maintained by such rightful owner against the officer to regain possession of the property, as the property, by virtue of the levy, is in the custody of the law,[3] and this has been held true though the property when seized was in the possession of the plaintiff in replevin, and not in the possession of the attachment or execution defendant.[4] By the great weight of authority, however, which in some jurisdictions is recognized by statute, it is held that where in process running against the property of one person the property of another is taken, the latter may maintain replevin therefor,[5] and

1. Justification by Officer. — Dayton *v.* Fry, 29 Ill. 525; Graham *v.* Shaw, 38 Kan. 734; Arn *v.* Parker, 39 Kan. 338; Beach *v.* Botsford, 1 Dougl. (Mich.) 199, 40 Am. Dec. 45; Clarke *v.* Laird, 60 Mo App. 289, 1 Mo. App. Rep. 106; McCarty *v.* Gage, 3 Wis. 404; Densmore Commission Co. *v.* Shong, 98 Wis. 380. See also Morgan *v.* Zenor, 88 Iowa 175.

2. Larsen *v.* Ditto, 90 Ill. App. 384; McCarty *v.* Gage, 3 Wis. 404; Densmore Commission Co. *v.* Shong, 98 Wis. 380.

3. Replevin by Third Person — Minority Rule. — Smith *v.* Huntington, 3 N. H. 76, 41 Am. Dec. 331; McLeod *v.* Oates, 8 Ired. L. (30 N. Car.) 387; Carroll *v.* Hussey, 9 Ired. L. (31 N. Car.) 89. See also Butts *v.* Woods, 4 N. Mex. 187.

In *Connecticut* and *New Hampshire* the statutes have expressly authorized third persons to maintain replevin for property attached. See Wheeler *v.* Eaton, 67 N. H. 368; Kittredge *v.* Holt, 55 N. H. 621; Jackson *v.* Hubbard, 36 Conn. 10; Brown *v.* Chickopee Falls Co., 16 Conn. 87; Howard *v.* Crandall, 39 Conn. 213; Smith *v.* Lyon, 44 Conn. 175.

In *Connecticut* the action of replevin for property wrongfully taken on attachment is to be brought against the person at whose suit the process on which the property was seized was issued instead of against the officer. Bowen *v.* Hutchins, 18 Conn. 550; Hathaway *v.* St. John, 20 Conn. 343; McDonald *v.* Holmes, 45 Conn. 157.

In *North Carolina* it was held that the statute (Code, § 322) which requires the plaintiff in replevin to file an affidavit that the property had not been taken on execution issued against him changed the prior rule and permitted a third person whose property was seized on execution against another to maintain replevin against the officer therefor. Jones *v.* Ward, 77 N. Car. 337; Mitchell *v.* Sims, 124 N. Car. 411, *distinguishing* Williamson *v.* Nealy, 119 N. Car. 339.

4. Carroll *v.* Hussey, 9 Ired. L. (31 N. Car.) 89.

5. General Rule — *United States.* — Wood *v.* Weimar, 104 U. S. 786; Harkness *v.* Russell, 118 U. S. 663; Wise *v.* Jefferis, 51 Fed. Rep. 641, 7 U. S. App. 275.

Arkansas. — Willis *v.* Reinhardt, 52 Ark. 128.

California. — Howell *v.* Foster, 65 Cal. 169; Kellogg *v.* Burr, 126 Cal. 38; Rodgers *v.* Bachman, 109 Cal. 552.

Colorado. — Stone *v.* O'Brien, 7 Colo. 458; Carpenter *v.* Innes, 16 Colo. 165, 25 Am. St. Rep. 255.

Delaware. — Truitt *v.* Revill, 4 Harr. (Del.) 71.

Illinois. — Samuel *v.* Agnew, 80 Ill. 553; Kingman *v.* Reinemer, 166 Ill. 208, *affirming* 58 Ill. App. 173; Ide *v.* Gilbert, 62 Ill. App. 524; Schneider *v.* Burke, 86 Ill. App. 160.

Indiana. — Chinn *v.* Russell, 2 Blackf. (Ind.) 171; Louisville, etc.. Canal Co. *v.* Holborn, 2 Blackf. (Ind) 267; Louthain *v.* Fitzer, 78 Ind. 449; Hadley *v.* Hadley, 82 Ind. 75; Aman *v.* Mottweiler, 15 Ind. App. 405; Kahn *v.* Hayes, 22 Ind. App. 182; Patterson *v.* Snow, 24 Ind. App. 572.

Iowa. — Morrill *v.* Miller, 3 Greene (Iowa) 104; Talbot *v.* De Forest, 3 Greene (Iowa) 586; Smith *v.* Montgomery, 5 Iowa 370; Gimble *v.* Ackley, 12 Iowa 27; Finch *v.* Hollinger, 43 Iowa 598; Ramsden *v.* Wilson, 49 Iowa 211; Seaton *v.* Higgins, 50 Iowa 305; Waterhouse *v.* Black, 87 Iowa 317; Glover *v.* Narey, 92 Iowa 286.

Kansas. — Going *v.* Orns, 8 Kan. 85; Kelley *v.* Burchfield, 27 Kan. 700; Sims *v.* Mead, 29 Kan. 124; Scott *v.* Wagner, 2 Kan. App. 386; Reiley *v.* Haynes, 38 Kan. 259, 5 Am. St. Rep. 737; Rankine *v.* Greer, 38 Kan. 343, 5 Am. St. Rep. 751.

Kentucky. — Stephens *v.* Frazier, 2 B. Mon. (Ky.) 250.

Maine. — Hall *v.* Gilmore, 40 Me. 578.

Massachusetts. — Wiggin *v.* Day, 9 Gray (Mass.) 97; Ilsley *v.* Stubbs, 5 Mass. 280.

Michigan. — Nicholson *v.* Dyer, 45 Mich. 610; Carew *v.* Matthews, 41 Mich. 576; Grindrod *v.* Lauzon, 47 Mich. 584; O'Connor *v.* Gidday, 63 Mich. 630; Merrill *v.* Denton, 73 Mich. 628; Dayo *v.* Provinski, 90 Mich. 351.

Minnesota. — Whitney *v.* Swensen, 43 Minn. 337; Hazeltine *v.* Swensen, 38 Minn. 424.

Mississippi. — Yarborough *v.* Harper, 25 Miss. 112; Saunders *v.* Jordan, 54 Miss. 428.

Missouri. — Wangler *v.* Franklin, 70 Mo. 659; Crum *v.* Elliston, 33 Mo. App. 591; W. W. Kendall Boot, etc., Co. *v.* Bain, 46 Mo. App. 581; Keen *v.* Munger, 52 Mo. App. 660.

Nebraska. — Tootle *v.* Sheldon, 10 Neb. 44; Davis *v.* Getchell, 32 Neb. 792; Williams *v.* Eikenberry, 22 Neb. 210.

New Jersey. — Boswell *v.* Green, 25 N. J. L. 390.

New York. — Dunham *v.* Wyckoff, 3 Wend. (N. Y.) 280, 20 Am. Dec. 695; Clark *v.* Skinner, 20 Johns. (N. Y.) 465, 11 Am. Dec. 302; Wheeler *v.* M'Farland, 10 Wend. (N. Y.) 318; Chapman *v.* Andrews, 3 Wend. (N. Y.) 240; King *v.* Orser, 4 Duer (N. Y.) 431; Stewart *v.* Wells, 6 Barb. (N. Y.) 79; Merritt *v.* Lyon, 3 Barb. (N.

this is true though the property was in the possession of the attachment or execution debtor at the time of its seizure,[1] or in possession of a third person.[2]

A Person in a Representative Capacity may maintain replevin for property seized on execution or attachment issued against him in his individual capacity.[3]

In What Court Action to Be Brought. — The replevin action need not be brought in the court by which the process on which the officer seized the property was issued;[4] though the federal courts have held that where property is seized on attachment or execution issuing out of their courts, and property belonging to another than the attachment or execution debtor is seized thereon, replevin cannot be maintained in a state court by the true owner against the marshal to recover the property,[5] and state courts have followed this doctrine.[6]

Y.) 110; Williamson *v.* Lawrence, (N. Y. City Ct. Gen. T.) 8 Misc. (N. Y.) 71; Thompson *v.* Button, 14 Johns. (N. Y.) 84. See also Pracht *v.* Gunn, 69 N. Y. App. Div. 396. *Compare* Judd *v.* Fox, 9 Cow. (N. Y.) 259.

Ohio. — Bailey *v.* Swain, 45 Ohio St. 657.

Oklahoma. — Irwin *v.* Walling, 4 Okla. 128.

Oregon. — Lewis *v.* Birdsey, 19 Oregon 164.

South Carolina. — Dudley *v.* Green, 46 S. Car. 199.

Tennessee. — Keep Mfg. Co. *v.* Moore, 11 Lea (Tenn.) 285.

Vermont. — Angell *v.* Keith, 24 Vt. 371.

Washington. — Scott *v.* McGraw, 3 Wash. 675; Dawson *v.* Baum, 3 Wash. Ter. 464.

Wisconsin. — Gallagher *v.* Bishop, 15 Wis. 276; James *v.* Van Duyn, 45 Wis. 512; Kaufer *v.* Walsh, 88 Wis. 63.

Wyoming. — McGlinchey *v.* Morrison, 1 Wyo. 105; France *v.* Omaha First Nat. Bank, 3 Wyo. 187.

In Kentucky it is held that as the estate of a mortgagor is subject to execution, a mortgagee cannot maintain replevin against an officer levying an execution on the property while in the possession of the mortgagee as that of the mortgagor. McIsaacs *v.* Hobbs, 8 Dana (Ky.) 271.

And this has been held true though at the time the officer denies the validity of the mortgagee's claim. Squires *v.* Smith, 10 B. Mon. (Ky.) 33. See also Swigert *v.* Thomas, 7 Dana (Ky.) 223; Furber *v.* Dearborn, 107 Mass. 122.

Intervention as Cumulative Remedy. — Patterson *v.* Snow, 24 Ind. App. 572; Saunders *v.* Jordan, 54 Miss. 428; Wangler *v.* Franklin, 70 Mo. 659; Scott *v.* McGraw, 3 Wash. 675. See also Morrill *v.* Miller, 3 Greene (Iowa) 104.

Statutory Prohibitions. — In some jurisdictions the statutes expressly prohibit the maintenance of replevin actions against an officer by third persons to recover property seized on writs of execution or attachment. Taylor *v.* Ellis, 200 Pa. St. 191; Weed *v.* Hill, 2 Miles (Pa.) 122; Cortland Wagon Co. *v.* Landis, 9 Pa. Dist. 490; Butts *v.* Woods, 4 N. Mex. 187.

Under Code Miss. 1880, § 2633, the maintenance of replevin is prohibited where the remedy by interposition of a claim to the property seized on the attachment or execution is adequate. Bernheimer *v.* Martin, 66 Miss. 486.

This provision, however, does not apply when the property is seized on execution issued out of the Supreme Court, as the remedy by intervention is not applicable, State *v.* Booker, 61 Miss. 16; or in other instances where the remedy by intervention is inapplicable, Andrews *v.* McLeod, 66 Miss. 348. See further Kendrick *v.* Watkins, 54 Miss. 495; Maxey *v.* White, 53 Miss. 80; Dogan *v.* Bloodworth, 56 Miss. 419.

In New York the statute (Code Civ. Pro., §§ 1690, 1693), provides that replevin may not be maintained for property seized by virtue of a writ of attachment of execution against the property of a person other than the plaintiff in the replevin action, if at the time of the seizure the plaintiff had not the right to reduce the chattel to his possession. Klee *v.* Grant, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 88; Klee *v.* Grant, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 412 (sale on approval).

Therefore the vendor who is entitled to rescind a sale on the ground of fraud cannot maintain replevin against the officer for property sold which was seized on execution before a rescission of the sale. Wise *v.* Grant, 140 N. Y. 593; Pinckney *v.* Darling, 158 N. Y. 728, 53 N. E. Rep. 1130, *affirming* 3 N. Y. App. Div. 555; Borgfeldt *v.* Wood, 92 Hun (N. Y.) 260.

1. Possession by Attachment or Execution Debtor. — Wood *v.* Weimar, 104 U. S. 786; Ide *v.* Gilbert, 62 Ill. App. 524; Whitney *v.* Swensen, 43 Minn. 337; Scott *v.* McGraw, 3 Wash. 675.

2. Possession by Third Person. — Kellogg *v.* Burr, 126 Cal. 38; Dunham *v.* Wyckoff, 3 Wend. (N. Y.) 280, 20 Am. Dec. 695.

3. Thus, an action of replevin may be maintained by a trustee to recover trust property which has been attached as his own in an action against him as an individual. Jackson *v.* Hubbard, 36 Conn. 10.

4. What Court. — Carpenter *v.* Innes, 16 Colo. 165, 25 Am. St. Rep. 255; Seaton *v.* Higgins, 50 Iowa 305; Dayo *v.* Provinski, 90 Mich. 351.

Thus, replevin lies in the District Court to recover property held by an officer under process issued by the Circuit Court. Ramsden *v.* Wilson, 49 Iowa 211.

Execution Issued from Supreme Court. — State *v.* Booker, 61 Miss. 16.

5. Process from Federal Courts. — Freeman *v.* Howe, 24 How. (U. S.) 450 (attachment); Covell *v.* Heyman, 111 U. S. 176 (execution).

Replevin in a state court will not lie to recover possession from a marshal of property seized by him under process issuing out of the federal court in proceedings *in rem*. Slocum *v.* Mayberry, 2 Wheat. (U. S.) 9.

6. Parks *v.* Wilcox, 6 Colo. 489; Munson *v.* Harroun, 34 Ill. 422, 85 Am. Dec. 316; Hannebut *v.* Cunningham, 3 Ill. App. 353; Lewis *v.* Buck, 7 Minn. 104, 82 Am. Dec. 73; Baker *v.* Daily, 6 Neb. 464.

Other state courts have permitted a replevin action to be maintained therein to recover property wrongfully seized by a marshal under process issued out of a federal court,[1] especially where the federal court could not grant full relief and protection to the person whose property was wrongfully seized on process against another.[2] If the consent of the federal court from which the process issued is given to the maintenance of the replevin action in the state court, the action may be maintained.[3]

Proof to Maintain Action. — If the property was in the possession of the plaintiff in the replevin action at the time of its seizure by the officer, such possession is *prima facie* evidence of title so as to throw on the officer the burden of proving in the replevin action that it was the property of the person against whom the attachment or execution issued or was subject to seizure thereon;[4] but if the property was in the possession of the person against whom the attachment or execution issued, the burden is upon a third person seeking to recover the same from the officer in replevin to show title and right to possession,[5] and he must show the regularity of the writ under which he seized the property.[6]

Against Purchasers at Sheriff's Sale. — Where the property of one person is seized on execution or attachment issued against another person, the former may, of course, maintain replevin therefor as against the purchaser at the sheriff's sale.[7]

c. SEIZURE ON REPLEVIN — (1) *Cross-replevin by Defendant.* — The defendant in an action of replevin from whom the property has been taken cannot maintain, during the pendency of such action, a second action of replevin to regain the possession of the property, but must assert his rights in the first action;[8] so, also, the defendant in the first replevin cannot, together

1. Howe *v.* Freeman, 14 Gray (Mass.) 566, *reversed* 24 How. (U. S.) 450.

In Gilman *v.* Williams, 7 Wis. 329, 76 Am. Dec. 219, it was held that if the officer was a United States marshal, replevin will lie against him in the state courts for goods taken by him on execution which were exempt by the state law.

2. Carew *v.* Matthews, 41 Mich. 576, *distinguishing* Freeman *v.* Howe, 24 How. (U. S.) 450.

3. Mitchell *v.* Smith, 13 Colo. 170; Smith *v.* Bauer, 9 Colo. 380.

4. Wyatt *v.* Freeman, 4 Colo. 14.

5. Babe *v.* Coyne, 53 Cal. 261. See also Berwald *v.* Ray, 8 Pa. Super. Ct. 365.

6. W. W. Kendall Boot, etc., Co. *v.* Bain, 46 Mo. App. 581.

7. **Against Purchaser at Sale.** — Dodd *v.* McCraw, 8 Ark. 83; Coombs *v.* Gorden, 59 Me. 111; Hexter *v.* Schneider, 14 Oregon 184; Huber *v.* Sharck, 2 Browne (Pa.) 160; Shearick *v.* Huber, 6 Binn. (Pa.) 2; Ward *v.* Taylor, 1 Pa. St. 238. See Bryan *v.* Whitsett, 39 Ga. 715.

In Mississippi it has been held that the statutory provision that the action of replevin shall not be maintainable in any case of the seizure of property under execution or attachment when a remedy is given to claim the property in some mode prescribed by law did not prohibit the maintenance of replevin against the purchaser at the execution or attachment sale, but applied only to replevin against the officer. Armistead *v.* Bernard, 62 Miss. 180.

8. **Cross-replevin** — *Arkansas.* — Beers *v.* Wuerpul, 24 Ark. 272.

California. — Fleming *v.* Wells, 65 Cal. 336.

Florida. — Tyson *v.* Bowden, 8 Fla. 61, 71 Am. Dec. 101.

Maine. — Hines *v.* Allen, 55 Me. 114, 92 Am. Dec. 574.

Maryland. — Powell *v.* Bradlee, 9 Gill & J. (Md.) 220.

Michigan. — Belden *v.* Laing, 8 Mich. 500; Clark *v.* West, 23 Mich. 242; Fisher *v.* Busch, 64 Mich. 180.

Minnesota. — Chadbourn *v.* Rahilly, 34 Minn. 346.

Missouri. — Rhoades *v.* McNulty, 52 Mo. App. 301.

New Hampshire. — Bonney *v.* Smith, 59 N. H. 411.

New York. — Morris *v.* DeWitt, 5 Wend. (N. Y.) 71; Hunt *v.* Mootry, (Supm. Ct. Gen. T.) 10 How. Pr. (N. Y.) 478.

Pennsylvania. — Lowry *v.* Hall, 2 W. & S. (Pa.) 129, 37 Am. Dec. 495.

Tennessee. — Dearmon *v.* Blackburn, 1 Sneed (Tenn.) 390, 60 Am. Dec. 160.

Wisconsin. — Watkins *v.* Page, 2 Wis. 92.

See also Rhines *v.* Phelps, 8 Ill. 455; Davis *v.* Gambert, 57 Iowa 239; Bates County Nat. Bank *v.* Owen, 79 Mo. 429. *Compare* Trowbridge *v.* Bosworth, 45 Conn. 166.

The fact that the second action is brought in another state is immaterial. Lowry *v.* Hall, 2 W. & S. (Pa.) 129, 37 Am. Dec. 495.

Replevin Against Agent. — One whose property has been taken on a writ of replevin against his agent or bailee cannot retake it by replevin from the plaintiff in the first action during the pendency of that action, as the fact that the parties in the two suits are nominally different, the agent being the party to one and his principal the party to the other, does not

with a third person, maintain a cross-replevin.[1] This rule prohibits equally a second replevin action by a purchaser from the defendant in the first action pending such action,[2] and where, pending a replevin suit, the officer by whom the property was seized retains possession, the plaintiff in such action cannot maintain another action of replevin against the officer to gain possession of the property.[3]

Dismissal or Abatement of First Action. — After the first replevin action has been dismissed or is abated, the defendant therein may maintain a second action of replevin against the plaintiff to regain possession of the property, his remedy on the replevin bond given in the first action not being exclusive,[4] and such an action has been held maintainable against one who purchases the property from the plaintiff.[5]

Effect of Redelivery Bond. — Where the defendant in the first replevin action executes a redelivery bond and retains possession, the plaintiff in such action cannot, during its pendency, bring a second action of replevin against the defendant for the property,[6] nor can a third person, as the possession of the defendant in such a case is the possession of the court.[7]

(2) *Cross-replevin by Third Person.* — Where property has been replevied and delivered to the plaintiff, a person not a party to such action may, without waiting for the determination of such action, maintain another action of replevin for the property.[8] While the officer serving the replevin writ is in possession for the purpose of delivering the property to the plaintiff, the possession of the officer while making the transfer, it seems, cannot be disturbed by an action of replevin by a third person.[9] But if the plaintiff waives the immediate delivery of the possession of the property, and the officer retains possession, such third person may maintain replevin against the officer.[10] And a statutory provision for trial of the right of property by intervention, when it is claimed by any person other than the defendant in replevin, is not exclusive.[11]

4. Seizure for Taxes. — At common law replevin would lie to recover from

prevent it from being strictly a cross-replevin. Larsen *v.* Nichols, 62 Minn. 256, 54 Am. St. Rep. 639. See also Fisher *v.* Busch, 64 Mich. 180.

In White *v.* Dolliver, 113 Mass. 400, 18 Am. Rep. 502, however, a principal whose property had been replevied by a writ against his agent or bailee, was held entitled to maintain replevin against the plaintiff in the first action during the pendency of the prior action. And to the same effect is Westbay *v.* Milligan, 74 Mo. App. 179.

1. Beers *v.* Wuerpul, 24 Ark. 272.

2. Hines *v.* Allen, 55 Me. 115, 92 Am. Dec. 574.

3. Pollard *v.* Stovall, 60 Miss. 266.

4. Bruner *v.* Dyball, 42 Ill. 34; Lockwood *v.* Perry, 9 Met. (Mass.) 440. *Compare* Fleming *v.* Wells, 65 Cal. 336.

5. Lockwood *v.* Perry, 9 Met. (Mass.) 440, *distinguishing* Gordon *v.* Jenney, 16 Mass. 469.

6. **Effect of Redelivery Bond.** — Turner *v.* Reese, 22 Kan. 319. See also Hunt *v.* Mootry, (Supm. Ct. Gen. T.) 10 How. Pr. (N. Y.) 478.

7. U. S. *v.* Dantzler, 3 Woods (U. S.) 719; Semel *v.* Dunn, (N. Y. City Ct.) 28 Civ. Pro. (N. Y.) 206. See also Oswego First Nat. Bank *v.* Dunn, 97 N. Y. 149, 49 Am. Rep. 517.

8. **Replevin by Third Persons** — *Arkansas.* — Hogan *v.* Deuell, 24 Ark. 216, 88 Am. Dec. 769.

Kansas. — Gross *v.* Bogard, 18 Kan. 288.

Maine. — Hines *v.* Allen, 55 Me. 114, 92 Am. Dec. 574.

Maryland. — Powell *v.* Bradlee, 9 Gill & J. (Md.) 220.

Massachusetts. — Ilsley *v.* Stubbs, 5 Mass. 280; Blanchard *v.* Child, 7 Gray (Mass.) 155; White *v.* Dolliver, 113 Mass. 400, 18 Am. Rep. 502; Kelleher *v.* Clark, 135 Mass. 45; Globe Works *v.* Wright, 106 Mass. 207. *Compare* Portland Bank *v.* Stubbs, 6 Mass. 422, 4 Am. Dec. 151.

Missouri. — Coen *v.* Watkins, 62 Mo. App. 502; Westbay *v.* Milligan, 74 Mo. App. 179.

Nevada. — Buckley *v.* Buckley, 9 Nev. 373.

New Hampshire. — Bell *v.* Bartlett, 7 N. H. 178; Sanborn *v.* Leavitt, 43 N. H. 473.

New Jersey. — Weiner *v.* Van Rensselaer, 43 N. J. L. 547.

Ohio. — Frank *v.* Jenkins, 22 Ohio St. 597.

Tennessee. — Dearmon *v.* Blackburn, 1 Sneed (Tenn) 390, 60 Am. Dec. 160.

9. **Against Officer.** — White *v.* Dolliver, 113 Mass. 400, 18 Am. Rep. 502; Yost *v.* Schleicher, 62 Neb. 601; Sanborn *v.* Leavitt, 43 N. H. 473; Weiner *v.* Van Rensselaer, 43 N. J. L. 547; McCarthy *v.* Ockerman, 154 N. Y. 565, *affirming* 92 Hun (N. Y.) 19; Welter *v.* Jacobson, 7 N. Dak. 32, 66 Am. St. Rep. 632; Watkins *v.* Page, 2 Wis. 92.

10. Davis *v.* Gambert, 57 Iowa 239; Reiley *v.* Haynes, 38 Kan. 259, 5 Am. St. Rep. 737. See also Powell *v.* Bradlee, 9 Gill & J. (Md.) 220.

11. Hogan *v.* Deuell, 24 Ark. 216, 88 Am. Dec. 769; Davis *v.* Gambert, 57 Iowa 239.

an officer property seized on a warrant for taxes where the levy of the tax was invalid.[1] Thus, where a person is rated in respect of property not in his occupation, he may replevy any distress for such rate,[2] or where the statute authorizing the tax was unconstitutional,[3] or where the officer keeps the property seized on a tax warrant beyond the time within which it could be legally sold,[4] or where, upon a tender of all taxes owing, the officer refused to turn over the property seized for such taxes.[5] In case there was a mere irregularity in the assessment of the tax, not rendering it void, replevin would not lie,[6] as where the assessment was excessive,[7] or the seizure was irregular.[8] Where the personal property of one against whom the tax was not assessed and who was not liable therefor was seized by the officer, such person could maintain replevin for the property.[9]

Statutory Provisions. — At the present time the statutes in many jurisdictions expressly provide that no property taken or detained by any officer for a tax shall be replevied, or require the plaintiff in replevin to make an affidavit that the property has not been taken for any tax.[10] As the object of such statutes is to insure the prompt collection of the revenue for the government expenses, they not only prohibit the maintenance of replevin by the person against whom the tax was assessed,[11] though the seizure was irregular,[12] and though the tax was void by reason of the unconstitutionality of the statute under which it was levied,[13] but also prohibit a third person whose property has been seized on a tax warrant against another from maintaining replevin for

1. Seizure for Taxes — Common-law Rule — *England.* — Gay *v.* Mathews, 9 Jur. N. S. 716, *affirmed* on appeal 11 W. R. 922, 4 B. & S. 425, 116 E. C. L. 425; Rhymney R. Co. *v.* Price, 16 L. T. N. S. 394; Bristol *v.* Wait, 3 N. & M. 359; Fenton *v.* Boyle, 2 B. & P. N. R. 399, 1 Taunt. 344. See also Atty.-Gen. *v.* Brown, 1 Swanst. 304; London, etc., R. Co. *v.* Buckmaster, L. R. 10 Q. B. 70, 44 L. J. M. C. 29, 23 W. R. 160.

Iowa. — Macklot *v.* Davenport, 17 Iowa 379; Buell *v.* Ball, 20 Iowa 282.

Missouri. — Henry *v.* Bell, 75 Mo. 194.

New York. — Wright *v.* Briggs, 2 Hill (N. Y.) 77.

Vermont. — Stoddard *v.* Gilman, 22 Vt. 568; Reed *v.* Chandler, 32 Vt. 285.

Wisconsin. — Dudley *v.* Ross, 27 Wis. 679.

2. Bristol *v.* Wait, 3 N. & M. 359, 1 Ad. & El. 264, 28 E. C. L. 80.

3. Morford *v.* Unger, 8 Iowa 82; Langworthy *v.* Dubuque, 13 Iowa 86; Macklot *v.* Davenport, 17 Iowa 379.

4. Brackett *v.* Vining, 49 Me. 356; Farnsworth Co. *v.* Rand, 65 Me. 19.

5. Miller *v.* McGehee, 60 Miss. 905.

6. Mere Irregularities. — Atlantic, etc., R. Co. *v.* Cleino, 2 Dill. (U. S.) 175; Hershey *v.* Fry, 1 Iowa 593; Emerick *v.* Sloan, 18 Iowa 139; Buell *v.* Ball, 20 Iowa 282; Bilbo *v.* Henderson, 21 Iowa 56; Buell *v.* Schaale, 39 Iowa 293; Rubey *v.* Shain, 54 Mo. 207; American Tool Co. *v.* Smith, 32 Hun (N. Y.) 121.

7. Marshall *v.* Pitman, 2 Moo. & S. 745, 9 Bing. 595, 23 E. C. L. 394; Mowrer *v.* Helferstine, 80 Mo. 23; Norris *v.* Jones, 81 Hun (N. Y.) 304, 7 Misc. (N. Y.) 198.

8. Brackett *v.* Whidden, 3 N. H. 17.

9. Third Persons. — Atlantic, etc., R. Co. *v.* Cleino, 2 Dill. (U. S.) 175; Daniels *v.* Nelson, 41 Vt. 161, 98 Am. Dec. 577.

10. Statutory Change — *United States.* — Treat *v.* Staples, Holmes (U. S.) 1 (Act Cong. March 2, 1833, June 30, 1864, July 13, 1866); Deshler *v.* Dodge, 16 How. (U. S.) 622.

Colorado. — McKay *v.* Batchellor, 2 Colo. 591.

Illinois. — Campbell *v.* Head, 13 Ill. 122; McClaughry *v.* Cratzenberg, 39 Ill. 117; Mt. Carbon Coal, etc., Co. *v.* Andrews, 53 Ill. 176; Vocht *v.* Reed, 70 Ill. 491; Evans *v.* Bouton, 85 Ill. 579.

Indiana. — Maple *v.* Vestal, 114 Ind. 325; Adams *v.* Davis, 109 Ind. 10. See also Louisville, etc., R. Co. *v.* Payne, 103 Ind. 183; Bridges *v.* Layman, 31 Ind. 384; Bringhurst *v.* Pollard, 6 Ind. 452.

Michigan. — Phenix *v.* Clark, 2 Mich. 327; Hill *v.* Wright, 49 Mich. 229; Coe *v.* Gregory, 53 Mich. 19; Hood *v.* Judkins, 61 Mich. 575; Hill *v.* Graham, 72 Mich. 659; Northwestern Cooperage, etc., Co. *v.* Scott, 123 Mich. 357; Roberts *v.* Denio, 118 Mich. 544; Forster *v.* Brown, 119 Mich. 86.

New York. — Niagara Elevating Co. *v.* McNamara, 4 Thomp. & C. (N. Y.) 604; Hudler *v.* Golden, 36 N. Y. 446; O'Reilly *v.* Good, 42 Barb. (N. Y.) 521; People *v.* Albany C. Pl., 7 Wend. (N. Y.) 485.

Pennsylvania. — Stiles *v.* Griffith, 3 Yeates (Pa.) 82.

Wisconsin. — Power *v.* Kindschi, 58 Wis. 539, 46 Am. Rep. 652; Kaehler *v.* Dobberpuhl, 60 Wis. 256; Enos *v.* Bemis, 61 Wis. 656; Keystone Lumber Co. *v.* Pederson, 93 Wis. 466.

11. Missouri *v.* Spiva, 42 Fed. Rep. 435.

12. Missouri *v.* Spiva, 42 Fed. Rep. 435 (seizure without prior demand).

Seizure Without Color of Right. — A statute prohibiting replevin where the property has been seized does not apply where the seizure was without color of right, as where the officer seized the property outside the territory in which he had authority to act. McKay *v.* Batchellor, 2 Colo. 591.

13. McClaughry *v.* Cratzenberg, 39 Ill. 117. See also Mt. Carbon Coal, etc., Co. *v.* Andrews,

the property,[1] especially where the property seized was in the possession of the person against whom the tax warrant issued.[2] In some cases the courts have refused to extend the statutory prohibition so as to preclude a third person from maintaining replevin for property seized on a tax warrant against another,[3] especially where the property seized was not in the possession of the person against whom the tax warrant was issued.[4]

In Michigan the provision that "no replevin shall lie for any property taken by virtue of any warrant for the collection of any tax" was held to apply only where a valid tax might by legal possibility have been imposed and collected by regular and proper proceeding under some statute authority,[5] and did not prohibit a corporation which was exempt from taxation from maintaining replevin for property seized on a warrant to enforce a tax assessed against it without regard to its exemption.[6]

Against Purchaser at Tax Sale. — The statutes prohibiting generally the maintenance of replevin for property seized for taxes apply only to actions against the officer, and not to an action against a purchaser at the tax sale.[7]

5. Possession of Receiver. — Where a receiver without authority takes possession of personal property belonging to a third person, the owner may maintain replevin against him therefor.[8]

6. Possession of Assignee in Bankruptcy or Insolvency. — Where assignees in bankruptcy or insolvency take possession of property of a third person, the latter may maintain replevin therefor.[9]

7. Possession of Executor or Administrator. — There is no principle of law which prohibits the maintenance of an action of replevin against an executor or administrator who withholds property from the owner under the claim that it was the property of his decedent.[10]

8. Possession of Public Officers. — In *Pennsylvania* the statutes prohibit replevin against public officers taking possession of property while acting in their several offices.[11] And it has been held that the archives of any federal department of the government are not in the possession of the head of the department, chief of bureau, or clerk under either, for the time being, but in the possession of the government, and therefore a person cannot, by replevin against such head of department or other public officer, take papers from the public archives on the claim of title thereto.[12] Where property is withheld by police officers as evidence against persons charged with crime, the owner, though not one of the persons charged with violating the law, has been denied the right to regain possession of the property by replevin.[13] Otherwise, the

53 Ill. 176. *Compare* McKay *v.* Batchellor, 2 Colo. 591.

1. Treat *v.* Staples, Holmes (U. S.) 1; Vocht *v.* Reed, 70 Ill. 491; People *v.* Albany C. Pl., 7 Wend. (N. Y.) 485.

2. Sheldon *v.* Van Buskirk, 2 N. Y. 473.

3. Travers *v.* Inslee, 19 Mich. 98; Tousey *v.* Post, 91 Mich. 631.

4. Stockwell *v.* Vietch, (Supm. Ct. Gen. T.) 15 Abb. Pr. (N. Y.) 412; Hallock *v.* Rumsey, 22 Hun (N. Y.) 89; Dubois *v.* Webster, 7 Hun (N. Y.) 371.

5. McCoy *v.* Anderson, 47 Mich. 502 (tax assessed against nonresident).

6. Le Roy *v.* East Saginaw City R. Co., 18 Mich. 233, 100 Am. Dec. 162.

7. Heagle *v.* Wheeland, 64 Ill. 423; Power *v.* Kindschi, 58 Wis. 539, 46 Am. Rep. 652.

8. **Against Receiver.** — Gutsch *v.* McIlhargey, 69 Mich. 377. And see generally the title RECEIVERS, vol. 23, p. 1122.

9. **Assignees in Insolvency and Bankruptcy.** — Dugan *v.* Nichols, 125 Mass. 576; Starke *v.* Paine, 85 Wis. 633. See, however, Phenix Milling Co. *v.* Anderson, 78 Ill. App. 253; Hanchett *v.* Waterbury, 115 Ill. 220.

Assignment Pending Replevin. — In replevin where the order of delivery is issued and served with the summons, by taking and delivering the property to the plaintiff, the plaintiff's right to proceed to final trial and judgment cannot be defeated by the assignment of the property by the defendant for the benefit of his creditors, after the commencement of the action, and before the service of the order of delivery. Collier *v.* Bickley, 33 Ohio St. 523.

10. **Against Executors and Administrators.** — Grand Council, etc., *v.* Cornelius, 30 Pittsb. Leg. J. N. S. (Pa.) 232. See also Biemuller *v.* Schneider, 62 Md. 547.

11. **Against Public Officers.** — McJunkin *v.* Mathers, 158 Pa. St. 137; Boos *v.* Mathers, (Pa. 1893) 27 Atl. Rep. 881.

12. Brent *v.* Hagner, 5 Cranch (C. C.) 71.

13. **Property Held as Evidence in Criminal Proceedings.** — Mutual Commission, etc., Co. *v.* Moore, 13 App. Cas. (D. C.) 78; Simpson *v.* St.

fact that the defendant in replevin claims to be in possession as a public officer is no defense if his withholding of the property is wrongful.[1]

9. Possession as Agent. — Where an agent wrongfully withholds property from the owner, he cannot defend an action of replevin therefor on the ground that his possession is merely that of an agent;[2] this is in pursuance of the general rule that as regards third persons the agent is liable equally with his principal for acts of misfeasance.[3]

10. Possession as Garnishee. — The fact that the person wrongfully withholding property has been summoned as garnishee with respect thereto in an action against a third person is no defense to an action of replevin by the owner to recover the property.[4]

VII. Demand and Refusal — 1. In General — Where Taking Wrongful. — Where the taking or possession by the defendant was wrongful in the first instance, the plaintiff is not required to make a demand upon him for the return of the property before he can maintain replevin therefor.[5] Thus, no demand is necessary before bringing replevin for animals purchased by the defendant at an illegal sale by a poundmaster,[6] or against a purchaser who procures a sale by fraud and deceit,[7] or against one who procures the property from such

John, 93 N. Y. 363. *Compare* Easter *v.* Traylor, 41 Kan. 493.

In Byrne *v.* Byrne, 89 Wis. 659, an officer arresting a person for the larceny of a horse took possession of the horse, but before the trial of the thief, by order of the court, it was restored to the accused upon giving bonds to return it; the order for return provided that the right of the true owner to replevy the horse should not be impaired thereby. It was held that the horse was not in the custody of the law, and therefore could be replevied by the owner.

1. Read *v.* Brayton, 143 N. Y. 342, *reversing* 72 Hun (N. Y.) 633.

2. Possession as Agent. — Hewitt *v.* Watertown Steam Engine Co., 65 Ill. App. 153; Rose *v.* Cash, 58 Ind. 278; Warder-Bushnell, etc., Co. *v.* Harris, 81 Iowa 153; Eveleth *v.* Blossom, 54 Me. 447, 92 Am. Dec. 555; Stevenson *v.* Taylor, 2 Mich. N. P. 95; Read *v.* Brayton, 143 N. Y. 342; Haskins *v.* Kelly, (N. Y. Super. Ct. Gen. T.) 1 Abb. Pr. N. S. (N. Y.) 63.

3. See the title Agency, vol. 1, p. 1132.

4. Against Garnishee. — Dufer *v.* Hayden, 12 Colo. 196; Hanselman *v.* Kegel, 60 Mich. 540.

5. Demand — Original Wrongful Taking or Detention — *Delaware.* — Truax *v.* Parvis, 7 Houst. (Del.) 330; Stockwell *v.* Robinson, 9 Houst. (Del.) 313.

Illinois. — Richey *v.* Ford, 84 Ill. App. 121; W. H. Howard Commission Co. *v.* National Live Stock Bank, 93 Ill. App. 473.

Indiana. — Lewis *v.* Masters, 8 Blackf. (Ind.) 244; Jones *v.* Smith, 123 Ind. 585; Ahlendorf *v.* Barkous, 20 Ind. App. 657.

Iowa. — Stanchfield *v.* Palmer, 4 Greene (Iowa) 23; Delancey *v.* Holcomb, 26 Iowa 94; Kennedy *v.* Roberts, 105 Iowa 521.

Kansas. — Stone *v.* Bird, 16 Kan. 488; Jordan *v.* Johnson, 1 Kan. App. 656.

Maine. — Galvin *v.* Bacon, 11 Me. 28, 25 Am. Dec. 258.

Massachusetts. — Kelleher *v.* Clark, 135 Mass. 45.

Michigan. — Le Roy *v.* East Saginaw City R. Co., 18 Mich. 234, 100 Am. Dec. 162; Vanderhorst *v.* Bacon, 38 Mich. 669, 31 Am. Rep. 328; Payn *v.* Gidley, 122 Mich. 605.

Minnesota. — Guthrie *v.* Olson, 44 Minn. 404.

Missouri. — Kidd *v.* Johnson, 49 Mo. App. 486.

Nebraska. — Wilcox *v.* Beitel, 43 Neb. 457.

Nevada. — Perkins *v.* Barnes, 3 Nev. 557.

New York. — Stillman *v.* Squire, 1 Den. (N. Y.) 327; Pierce *v.* Van Dyke, 6 Hill (N. Y.) 613; Schwabeland *v.* Holahan, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 176; Coie *v.* Carl, 82 Hun (N. Y.) 360; Pringle *v.* Phillips, 5 Sandf. (N. Y.) 157.

North Carolina. — Taylor *v.* Hodges, 105 N. Car. 344.

Oklahoma. — Chandler *v.* Colcord, 1 Okla. 260; Burchett *v.* Purdy, 2 Okla. 391.

Oregon. — Moser *v.* Jenkins, 5 Oregon 447; Moorhouse *v.* Donaca, 14 Oregon 430.

South Carolina. — Ladson *v.* Mostowitz, 45 S. Car. 388; Cromer *v.* Watson, 59 S. Car. 488; Burckhalter *v.* Mitchell, 27 S. Car. 240.

Utah. — Woodward *v.* Edmunds, 20 Utah 118.

Wisconsin. — Wadleigh *v.* Buckingham, 80 Wis. 230; Hyland *v.* Bohn Mfg. Co., 92 Wis. 157; Perkins *v.* Best, 94 Wis. 168.

Wrongful Taking by Agent. — Cromer *v.* Watson, 59 S. Car. 488.

Possession Acquired Through Mistake Induced by Defendant. — Purves *v.* Moltz, (N. Y. Super. Ct. Spec. T.) 2 Abb. Pr. N. S. (N. Y.) 409, 32 How. Pr. (N. Y.) 478.

6. Clark *v.* Lewis, 35 Ill. 417.

7. Fraudulent Vendee — *Connecticut.* — Lynch *v.* Beecher, 38 Conn. 490.

Illinois. — Farwell *v.* Hanchett, 19 Ill. App. 620. See also Kellogg *v.* Turpie, 93 Ill. 266, 34 Am. Rep. 163; Farwell *v.* Hanchett, 120 Ill. 573.

Indiana. — Parrish *v.* Thurston, 87 Ind. 437.

Kansas. — Salisbury *v.* Barton, 63 Kan. 552.

Maine. — Ayers *v.* Hewett, 19 Me. 281.

Massachusetts. — Bussing *v.* Rice, 2 Cush. (Mass.) 48.

Michigan. — Carl *v.* McGonigal, 58 Mich. 567; Reeder *v.* Moore, 95 Mich. 594.

Ohio. — Wilmot *v.* Lyon, 7 Ohio Cir. Dec. 394, 11 Ohio Cir. Ct. 238.

fraudulent purchaser in bad faith,[1] or without value.[2] In some jurisdictions one who purchases or acquires property from a tortfeasor, though in good faith, is not entitled to have a demand made upon him before replevin against him is instituted,[3] though in other jurisdictions it is held that the action will not lie against such a person without a previous demand by the owner, so as to enable him to deliver over the property without suit.[4]

Where Possession Lawful. — Where the possession of the defendant was in the first instance lawful, and he has committed no act whereby his possession is rendered unlawful, a demand upon him so as to terminate his rightful possession must be made before replevin can be instituted;[5] as where a bailee in possession has done no act inconsistent with his bailor's rights,[6] or where a purchaser under a conditional sale is in possession,[7] or where the finder of property takes it into his possession for safe keeping,[8] or where a mortgagor is allowed to remain in possession,[9] or where, before maturity of a mortgage,

1. Lynch *v.* Beecher, 38 Conn. 490; Goldschmidt *v.* Berry, 18 Ill. App. 276.

2. Farwell *v.* Hanchett, 19 Ill. App. 620; Bussing *v.* Rice, 2 Cush. (Mass.) 48; Koch *v.* Lyon, 82 Mich. 513; Stillman *v.* Squire, 1 Den. (N. Y.) 327. *Compare* Wolff *v.* Zeller, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 646; Talcott *v.* Belding, (N. Y. Super. Ct. Gen. T.) 46 How. Pr. (N. Y.) 419.

3. Possession Acquired from Tortfeasor — *Arkansas.* — McNeill *v.* Arnold, 17 Ark. 154.

California. — More *v.* Finger, (Cal. 1899) 58 Pac. Rep. 322, *affirmed* 128 Cal. 313. *Compare* Beebe *v.* De Baun, 8 Ark. 562.

Kansas.—Shoemaker *v.* Simpson, 16 Kan. 43.

Maine. — Galvin *v.* Bacon, 11 Me. 28, 25 Am. Dec. 258; Prime *v.* Cobb, 63 Me. 200.

Michigan — Trudo *v.* Anderson, 10 Mich. 357, 81 Am. Dec. 795; Ballou *v.* O'Brien, 20 Mich. 304; Whitney *v.* McConnell, 29 Mich. 12; Denton *v.* Smith, 61 Mich. 432.

Missouri. — Moore *v.* Simms, 47 Mo. App. 182.

Purchaser from Bailee. — Moore *v.* Simms, 47 Mo. App. 182.

Property Wrongfully Mortgaged by Owner's Husband. — Denton *v.* Smith, 61 Mich. 431.

4. *Indiana.* — Wood *v.* Cohen, 6 Ind. 455, 63 Am. Dec. 389; Conner *v.* Comstock, 17 Ind. 90; Ledbetter *v.* Embree, 12 Ind. App. 617.

Iowa. — Stanchfield *v.* Palmer, 4 Greene (Iowa) 23; Gilchrist *v.* Moore, 7 Iowa 9.

New York. — Millspaugh *v.* Mitchell, 8 Barb. (N. Y.) 335; Talcott *v.* Belding, (N. Y. Super. Ct. Gen. T.) 46 How. Pr. (N. Y.) 419; Barrett *v.* Warren, 3 Hill (N. Y.) 348. See also Pierce *v.* Van Dyke, 6 Hill (N. Y.) 613; Pringle *v.* Phillips, 5 Sandf. (N. Y.) 157. See, however, Milligan *v.* Brooklyn Warehouse, etc., Co., (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 55.

South Carolina. — Ladson *v.* Mostowitz, 45 S. Car. 388; Burckhalter *v.* Mitchell, 27 S. Car. 243.

See also Homan *v.* Laboo, 1 Neb. 204; Dearing *v.* Smith, 66 Vt. 60. *Compare* Schwamb Lumber Co. *v.* Schaar, 94 Ill. App. 544.

The burden of showing good faith is upon the person claiming to have received the property in good faith from the wrongdoer. Pierce *v.* Van Dyke, 6 Hill (N. Y.) 613.

5. Demand to Terminate Rightful Possession — *California.* — Campbell *v.* Jones, 38 Cal. 507.

Delaware. — Truax *v.* Parvis, 7 Houst. (Del.) 330; Stockwell *v.* Robinson, 9 Houst. (Del.) 313.

Georgia. — Liptrot *v.* Holmes, 1 Ga. 391.

Illinois. — Hudson *v.* Maze, 4 Ill. 582; Ingalls *v.* Bulkley, 13 Ill. 315; Simmons *v.* Jenkins, 76 Ill. 479; Harris *v.* McCasland, 29 Ill. App. 430; Ehle *v.* Deitz, 32 Ill. App. 547; Toledo, etc., R. Co. *v.* American Refrigerator Transit Co., 41 Ill. App. 625.

Indiana. — Lewis *v.* Masters, 8 Blackf. (Ind.) 244; Combs *v.* Bays, 19 Ind. App. 263; Thieme *v.* Zumpe, 152 Ind. 359.

Iowa. — Stanchfield *v.* Palmer, 4 Greene (Iowa) 23.

Kansas. — Jordan *v.* Johnson, 1 Kan. App. 656; Chipman *v.* McDonald, 9 Kan. App. 882, 57 Pac. Rep. 252.

Maine. — Mewman *v.* Jenne, 47 Me. 520.

Massachusetts.—Gates *v.* Gates, 15 Mass. 310.

Michigan. — Darling *v.* Tegler, 30 Mich. 54; Adams *v.* Wood, 51 Mich. 411.

Minnesota. — Stratton *v.* Allen, 7 Minn. 502. See also Hurd *v.* Simonton, 10 Minn. 423.

Nebraska. — Paters *v.* Parsons, 18 Neb. 194.

New York. — Purves *v.* Moltz, (N. Y. Super. Ct. Spec. T.) 32 How. Pr. (N. Y.) 478; White *v.* Brown, 5 Lans. (N. Y.) 78; Fleischman *v.* Glaser, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 555; Porges *v.* Cohen, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 703; Wolff *v.* Zeller, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 646; Moran *v.* Abbott, 26 N. Y. App. Div. 570; Goodwin *v.* Wertheimer, 99 N. Y. 149; Delahunty *v.* Hake, 10 N. Y. App. Div. 230; Boughton *v.* Bruce, 20 Wend. (N. Y.) 234; Dunham *v.* Wyckoff, 3 Wend. (N. Y.) 280, 20 Am. Dec. 695.

South Carolina. — Ludden *v.* Sumter, 47 S. Car. 335.

South Dakota. — Olson *v.* Ausdal, 13 S. Dak. 26.

Wisconsin. — Nay *v.* Crook, 1 Pin. (Wis.) 546; George *v.* McGovern, 83 Wis. 555, 35 Am. St. Rep. 77.

6. Against Bailee. — Campbell *v.* Jones, 38 Cal. 507; Delahunty *v.* Hake, 10 N. Y. App. Div. 230; Moran *v.* Abbott, 26 N. Y. App. Div. 570.

7. Against Conditional Vendee. — Truax *v.* Parvis, 7 Houst. (Del.) 330; Moran *v.* Abbott, 26 N. Y. App. Div. 570; Wheeler, etc., Mfg. Co. *v.* Teetzlaff, 53 Wis. 211.

8. Against Finder. — Becker *v.* Vandercook, 54 Mich. 114.

9. Against Mortgagor. — Newman *v.* Jenne,

a sheriff levies upon the mortgaged property on process against the mortgagor,[1] or where a pledgor receives collaterals upon a usurious contract.[2] So, also, in case of a lease of real and personal property, with covenant for redelivery of possession after termination of the lease, a demand upon the lessee for redelivery of the property after the termination of the lease is required before replevin can be maintained against him therefor.[3]

Officer Taking Goods on Attachment or Execution. — Where an officer in levying an attachment or execution takes property of a third person from the possession of the latter, such third person is not required to make a demand upon the officer before instituting replevin therefor,[4] especially where such third person at the time of the levy notifies the officer of his ownership;[5] and it has been held that a demand was unnecessary though at the time of its seizure the property was in the possession of the person against whom the process issued;[6] still, in a number of cases it has been held that if the property was in the possession of the person against whom the process was directed, and was taken by the officer without notice of the third person's title, a demand must be made upon him before instituting replevin.[7] And it seems that a demand would be required where the owner permitted the property to become mingled with that of the execution debtor.[8]

Statutory Provision. — In some jurisdictions the statutes provide that a demand shall be made upon an officer levying an attachment or execution on the property of a third person before replevin can be maintained against him.[9] Where an officer attaches property under process which is void, replevin will lie against him without demand.[10]

Purchasers at Execution Sale. — Where the property of one person is sold on execution or attachment against another, the former may maintain replevin therefor against the purchaser, without first making a demand upon him for the property,[11] and this has been held true though the property at the time of its

47 Me. 520; Cadwell *v.* Pray, 41 Mich. 307. See also Bowman *v.* Roberts, 58 Miss. 130. *Compare* Hood *v.* Olin, 68 Mich. 165; Morris *v.* Rucks, 62 Miss. 76.

1. Keller *v.* Robinson, 153 Ill. 458, *affirming* 55 Ill. App. 56; Gilbert *v.* Murray, 69 Ill. App. 664.

2. **Against Pledgee.** — Boughton *v.* Bruce, 20 Wend. (N. Y.) 234.

3. **Against Lessee.** — White *v.* Brown, 5 Lans. (N. Y.) 78.

4. **Officer Levying Attachment or Execution** — *California.* — Ledley *v.* Hays, 1 Cal. 160. See also Woodworth *v.* Knowlton, 22 Cal. 164.

Colorado. — Stone *v.* O'Brien, 7 Colo. 458; Smith *v.* Jensen, 13 Colo. 213.

Delaware. — Stockwell *v.* Robinson, 9 Houst. (Del.) 313.

District of Columbia. — Justh *v.* Wilson, 19 D. C. 529.

Illinois. — Tuttle *v.* Robinson, 78 Ill. 332; Nigh *v.* Dovel, 84 Ill. App. 228.

Kansas. — Dickson *v.* Randal, 19 Kan. 212; Burgwald *v.* Donelson, 2 Kan. App. 301.

Maine. — Stone *v.* Perry, 60 Me. 48.

Michigan. — Merrill *v.* Denton, 73 Mich. 628; Malachiski *v.* Stellwagen, 85 Mich. 41.

New York. — Acker *v.* Campbell, 23 Wend. (N. Y.) 372; Schwabeland *v.* Holahan, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 176.

Oklahoma. — Chandler *v.* Colcord, 1 Okla. 260; Burchett *v.* Purdy, 2 Okla. 391.

5. Stone *v.* Bird, 16 Kan. 488.

6. **Property in Possession of Attachment or Execution Creditor.** — Forbes *v.* Martin, 7 Houst. (Del.) 375; Williams *v.* Luckett, 18 D. C. 275; Sanders *v.* Wilson, 19 D. C. 555; Stone *v.* Perry, 60 Me. 48; Bussing *v.* Rice, 2 Cush. (Mass.) 48; Buffington *v.* Gerrish, 15 Mass. 156, 8 Am. Dec. 97; Hopkins *v.* Bishop, 91 Mich. 328, 30 Am. St. Rep. 480; Whitney *v.* Levon, 34 Neb. 443; Bancroft *v.* Blizzard, 13 Ohio 30.

7. Stone *v.* O'Brien, 7 Colo. 458; Tuttle *v.* Robinson, 78 Ill. 332; Lewis *v.* Whittemore, 5 N. H. 364, 22 Am. Dec. 466, Roth *v.* Wells, 41 Barb. (N. Y.) 194; Hall *v.* Tuttle, 2 Wend. (N. Y.) 475; Thompson *v.* Button, 14 Johns. (N. Y.) 84. *Compare* Farwell *v.* Hanchett, 19 Ill. App. 620; Stillman *v.* Squire, 1 Den. (N. Y.) 327.

8. Wildman *v.* Sterritt, 80 Mich. 651. See also Shumway *v.* Rutter, 8 Pick. (Mass.) 443, 19 Am. Dec. 340.

9. **Statutory Provision.** — Brenot *v.* Robinson, 108 Cal. 143; Paden *v.* Goldbaum, (Cal. 1894) 37 Pac. Rep. 759; Finch *v.* Hollinger, 43 Iowa 598; Peterson *v.* Espeset, 48 Iowa 262; Bensley *v.* McMillan, 49 Iowa 517; Reisner *v.* Currier, 58 Iowa 213; Danforth *v.* Harlow, 76 Iowa 236; Monaghan *v.* Longfellow, 82 Me. 419; Ashcroft *v.* Simmons, 151 Mass. 497 (replevin by mortgagee).

10. Aspell *v.* Hosbein, 98 Mich. 117.

11. **Against Purchaser at Execution Sale.** — O'Neill *v.* Henderson, 15 Ark. 235, 60 Am. Dec. 568; Liptrot *v.* Holmes, 1 Ga. 391; Edmunds *v.* Hill, 133 Mass. 445; Manwaring *v.* Jenison, 61 Mich. 122; Hexter *v.* Schneider, 14 Oregon 184. *Compare* Arthur *v.* Wallace,

seizure under the process was in the possession of the person against whom the process was directed.[1]

Seizure for Taxes. — Where upon a tax warrant against one person the goods of another are seized while in the latter's possession, he may maintain replevin therefor without a prior demand.[2]

2. Time of Demand. — The demand, when necessary, should be made before the replevin writ is issued to the officer for service.[3]

3. By Whom Demand to Be Made. — The demand, when necessary, need not be made personally by the plaintiff in replevin, but may be made by his agent.[4] The person making the demand as agent must have been authorized to do so,[5] and it has been held that the agent must at the time show his authority to make the demand.[6]

4. Upon Whom Demand to Be Made. — The demand is to be made upon the person in possession.[7] Where persons are in the joint possession of property, and a demand is made upon one against whom replevin is brought, he cannot defend on the ground that a demand should also have been made upon his copossessor.[8]

5. General Sufficiency of Demand and Refusal. — No technical form of demand is necessary; any language which is understood to be a demand on the part of the plaintiff and a reply that is understood to be a refusal will be sufficient.[9] In making the demand the plaintiff is not required to state the nature of his title or interest.[10] Where, in making the demand, the plaintiff claims more property than he is entitled to, the defendant, if he refuses to deliver any, cannot object to the sufficiency of the demand.[11] The person upon whom the demand is made should be given a reasonable time to comply therewith,[12] but the plaintiff need not delay the institution of the replevin action to enable the defendant to investigate and satisfy himself that the demand is rightful.[13] Where the demand requires, aside from the delivery of possession, the performance of some further act with regard to the property, though the defendant is under contract duty to perform such act, his refusal to perform such act, without denying the plaintiff's right to take possession of the property in its existing condition, would not authorize the maintenance

8 Kan. 267; Van Brunt *v.* Schenck, 11 Johns. (N. Y.) 384; Gillet *v.* Roberts, 57 N. Y. 28.

1. Hicks *v.* Britt, 21 Ark. 422.

2. **Seizure for Taxes.** — Coie *v.* Carl, 82 Hun (N. Y.) 360.

3. **Time of Demand.** — Underwood *v.* Tatham, 1 Ind. 276; Darling *v.* Tegler, 30 Mich. 54.

4. **Demand by Agent.** — New York State Bank *v.* Waterhouse, 70 Conn. 76, 66 Am. St. Rep. 82. See also Brown *v.* Poland, 54 Conn. 313.

5. Fleischman *v.* Glaser, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 555.

6. Ingalls *v.* Bulkley, 13 Ill. 315. See also Watt *v.* Potter, 2 Mason (U. S.) 77.

7. **Demand on Person in Possession.** — Barnes *v.* Gardner, 60 Mich. 133; Wise *v.* Grant, 66 Hun (N. Y.) 626, 20 N. Y. Supp. 828; Lill's Chicago Brewery Co. *v.* Russell, 22 Wis. 178; Wheeler etc., Mfg. Co. *v.* Teetzlaff, 53 Wis. 211.

A Demand on the Defendant's Agent while in possession was held sufficient to support replevin against the principal after the agent had delivered the property over to his principal. Congdon *v.* Bailey, 121 Mich. 570.

8. **Persons in Joint Possession.** — McGregor *v.* Cole, 100 Mich. 262.

9. **Sufficiency of Demand and Refusal.** — Truax *v.* Parvis, 7 Houst. (Del.) 330; Bennett Bros. Co. *v.* Tam, 24 Mont. 457; Zachrisson *v.* Ahman, 2 Sandf. (N. Y.) 68; Kiefer *v.* Carrier, 53 Wis. 404; Merriam *v.* Lynch, 53 Wis. 82.

It is not essential to a sufficient demand in a replevin of numerous and widely scattered articles of personal property, after a peremptory refusal to surrender, that the plaintiff should try to compel the defendant to hear a list thereof read, or to go with him from place to place and have them pointed out. Appleton *v.* Barrett, 29 Wis. 221.

10. **Stating Nature of Interest.**—Schoolcraft *v.* Simpson, 123 Mich. 215 (demand on officer for attached property).

11. **Demand Including Too Much Property.** — King *v.* Fitch, 2 Abb. App. Dec. (N. Y.) 508.

12. **Giving Time for Compliance with Demand.** — Kane *v.* Reid, (N. Y. City Ct. Gen. T.) 33 Misc. (N. Y.) 802.

In Bent *v.* Bent, 44 Vt. 633, where the property of the plaintiff had been left in the house of the defendant, the refusal of the latter to allow the former to enter his building for the purpose of taking away the property, accompanied, however, with an offer to deliver the property when the plaintiff should call for it, was held not to be such a refusal to deliver as would authorize replevin to be maintained for the property.

13. Parker *v.* Palmer, 13 R. I. 359.

of replevin against him for the property.[1] So, also, it seems that the demand should be personal so as to enable the defendant to deliver over possession.[2]

Offer of Restitution. — Where before the institution of the action the defendant unconditionally offers to restore the property, such offer is equivalent to tender and is a good defense to the action.[3]

6. Waiver of Necessity for Demand. — The law dispenses with the necessity of a demand, though the defendant's possession was, in the first instance, lawful, where he afterwards has committed acts inconsistent with the title or the right to possession of the property and conducted himself in such a way as to show that a demand would be wholly unavailing;[4] as where a bailee of property asserts ownership by attempting to sell.[5]

Inconsistent Defense. — If the defendant, in defense, relies on title in himself or a stranger, he cannot assert that a demand for the property should have been made upon him before institution of the action.[6] The rule whereby a demand

1. Thomas *v.* Williams, 32 Hun (N. Y.) 257.

2. Personal Demand. — Thus, in Dearing *v.* Smith, 66 Vt. 60, where the owner of property wrote to one lawfully in possession for the property, the latter's failure to reply to the letter was held not to authorize replevin against him therefor.

3. Tender. — Savage *v.* Perkins, (Supm. Ct. Spec. T.) 11 How. Pr. (N. Y.) 17.

4. Waiver of Demand — Demand Unavailing — *Arkansas.* — Fleeman *v.* Horen, 8 Ark. 355; Prater *v.* Frazier, 11 Ark. 249; McNeill *v.* Arnold, 17 Ark. 154; Henry *v.* Fine, 23 Ark. 417.

Colorado. — Lamping *v.* Keenan, 9 Colo. 390; Hennessey *v.* Barnett, 12 Colo. App. 254.

Connecticut. — Brown *v.* Poland, 54 Conn. 313.

District of Columbia. — Wall *v.* De Mitkiewicz, 9 App. Cas. (D. C.) 109.

Illinois. — Johnson *v.* Howe, 7 Ill. 344; Cranz *v.* Kroger, 22 Ill. 74; Oswald *v.* Hutchinson, 26 Ill. App. 273; Sinamaker *v.* Rose, 62 Ill. App. 118.

Kansas. — Shoemaker *v.* Simpson, 16 Kan. 43; Chapin *v.* Jenkins, 50 Kan. 385; Barton *v.* Mulvane, 59 Kan. 313.

Massachusetts. — Blanchard *v.* Child, 7 Gray (Mass.) 155; Putnam *v.* Cushing, 10 Gray (Mass.) 334.

Michigan. — Galvin *v.* Galvin Brass, etc., Works, 81 Mich. 16; Breitenwischer *v.* Clough, 111 Mich. 6, 66 Am. St. Rep. 372.

Minnesota. — Guthrie *v.* Olson, 44 Minn. 404.

Mississippi. — Morris *v.* Rucks, 62 Miss. 76.

Nebraska. — Ogden *v.* Warren, 36 Neb. 715.

New York. — Torres *v.* Rogers, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 176; Milligan *v.* Brooklyn Warehouse, etc., Co., (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 55.

Washington. — Seattle Nat. Bank *v.* Meerwaldt, 8 Wash. 630; Carstens *v.* Earles, 26 Wash. 676.

Wisconsin. — Oleson *v.* Merrill, 20 Wis. 462, 91 Am. Dec. 428; Wadleigh *v.* Buckingham, 80 Wis. 230.

5. Prater *v.* Frazier, 11 Ark. 249.

6. Relying on Inconsistent Defense—*California.* — Latta *v.* Tutton, 122 Cal. 279, 68 Am. St. Rep. 30.

Colorado. — Lamping *v.* Keenan, 9 Colo. 390; Hennessey *v.* Barnett, 12 Colo. App. 254.

Connecticut. — Kavanagh *v.* Phelps, 36 Conn. 111; Sander *v.* Goldsmith, 41 Conn. 578; McNamara *v.* Lyon, 69 Conn. 447.

Florida. — Webster *v.* Brunswick-Balke Callender Co., 37 Fla. 433.

Illinois. — Gaff *v.* Harding, 66 Ill. 61; Kingman *v.* Reinemer, 58 Ill. App. 173; Hamilton *v.* Seeger, 75 Ill. App. 599.

Iowa. — Smith *v.* McLean, 24 Iowa 322; Redding *v.* Page, 52 Iowa 406; Leek *v.* Chesley, 98 Iowa 593.

Kansas. — Shoemaker *v.* Simpson, 16 Kan. 43; Raper *v.* Harrison, 37 Kan. 243; Ft. Scott First Nat. Bank *v.* Drake, 29 Kan. 311, 44 Am. Rep. 646; Chapin *v.* Jenkins, 50 Kan. 385; Greenawalt *v.* Wilson, 52 Kan. 109; Barton *v.* Mulvane, 59 Kan. 313; Bliss *v.* Couch, 46 Kan. 400; Farmers', etc., Bank *v.* Glen Elder Bank, 46 Kan. 376; Fuller *v.* Torson, 8 Kan. App. 652; Jordan *v.* Johnson, 1 Kan. App. 656; State Bank *v.* Norduft, 2 Kan. App. 55.

Maine. — Seaver *v.* Dingley, 4 Me. 306; Galvin *v.* Bacon, 11 Me. 28, 25 Am. Dec. 258; Lewis *v.* Smart, 67 Me. 206; O'Neil *v.* Bailey, 68 Me. 429.

Minnesota. — Guthrie *v.* Olson, 44 Minn. 404; Miller *v.* Adamson, 45 Minn. 99; Ellingboe *v.* Brakken, 36 Minn. 156.

Mississippi. — Dearing *v.* Ford, 13 Smed. & M. (Miss.) 269; Newell *v.* Newell, 34 Miss. 385.

Montana. — Francisco *v.* Benepe, 6 Mont. 243.

Nebraska. — Homan *v.* Laboo, 1 Neb. 204; Whitney *v.* Levon, 34 Neb. 443; Wilcox *v.* Beitel, 43 Neb. 457; Herman *v.* Kneipp, 59 Neb. 208.

New York. — Knapp *v.* Scheider, 10 Daly (N. Y.) 218.

North Carolina. — Satterthwaite *v.* Ellis, 129 N. Car. 67; Buffkins *v.* Eason, 112 N. Car. 162; J. H. Hayes Woolen Co. *v.* McKinnon, 114 N. Car. 661. See also Wiley *v.* Logan, 95 N. Car. 358.

South Dakota. — Howard *v.* Braun, 14 S. Dak. 579.

Washington. — Seattle Nat. Bank *v.* Meerwaldt, 8 Wash. 630.

Wisconsin. — Byrne *v.* Byrne, 89 Wis. 659.

Wyoming. — Bunce *v.* McMahon, 6 Wyo. 24.

See also Goldsmith *v.* Taussig, 60 Mo. App. 460, 1 Mo. App. Rep. 178. See, however, Windsor *v.* Boyce, 1 Houst. (Del.) 605; Ludden *v.* Sumter, 47 S. Car. 335; Burckhalter *v.* Mitchell, 27 S. Car. 240.

is unnecessary where the defendant contests the case on the merits does not apply to cases where the demand is necessary not only to render further detention by the defendant wrongful but also to vest in the plaintiff the right to possession.[1]

7. Effect of Failure to Make Demand. — Where a demand is necessary and the plaintiff institutes his action without demand, and secures the possession of the property, the defendant will be entitled to costs when he properly interposes the defense of failure to make demand,[2] but he is not entitled to a judgment for a return of the property.[3] The plaintiff cannot recover damages for the detention.[4]

VIII. Extent of Recovery by Parties — 1. Where Plaintiff Is Successful — *a.* Recovery of Specific Property. — Where the property is taken upon the replevin writ and delivered over to the plaintiff, the plaintiff is of course entitled, in case he proves his title and right to possession, to a judgment confirming in him the right to the possession of the property.[5] If the property is not taken on the writ, as is permitted by statute in some jurisdictions, but remains in the possession of the defendant, the plaintiff, if successful, is entitled to a judgment awarding to him the possession of the property,[6] which may be enforced by a seizure of the property for delivery to the plaintiff.[7] If, pending the replevin action, the plaintiff's title or right to possession is legally divested and becomes vested in the defendant, he is entitled only to a judgment for costs and damages for the time the property was wrongfully detained from him by the defendant, and not for the recovery of the possession of the property or its value.[8]

Alternate Judgment. — Where the judgment is in the alternative, giving to the plaintiff the right to the possession of the property or its value as fixed, in case the property cannot be had, the plaintiff is entitled to demand and enforce the delivery of the property, and the defendant has not the election to satisfy the judgment by tendering the amount of the judgment for value.[9] But where the alternate judgment for the value of the property is tendered and accepted by the plaintiff, the title to the property, as regards the right of the plaintiff, then vests in the defendant.[10]

b. Damages for the Taking or Detention — (1) *In General.* — While the action of replevin is primarily for the recovery of the possession of the property, the plaintiff is entitled in such action to recover the damages he has suffered by reason of the unlawful taking or detention;[11] and nominal damages

1. People's Furniture, etc., Co. *v.* Crosby, 57 Neb. 282, 73 Am. St. Rep. 504.

2. **Effect of Failure to Make Demand.** — Chipman *v.* McDonald, 9 Kan. App. 882, 57 Pac. Rep. 252; Dearing *v.* Ford, 13 Smed. & M. (Miss.) 269.

3. **Judgment for Return.** — McGregor *v.* Cole, 100 Mich. 262.

4. **Damages for Detention.** — Arthur *v.* Wallace, 8 Kan. 267.

5. **Award Confirming Possession.** — Claudius *v.* Aguirre, 89 Cal. 501; Mattingly *v.* Crowley, 42 Ill. 300; Chissom *v.* Lamcool, 9 Ind. 530; Swope *v.* Burnham, 6 Okla. 736.

6. Thompson *v.* Greene, 85 Ala. 240; Harris *v.* Harris, 43 Ark. 535; Gulath *v.* Waldstein, 7 Mo. App. 66; Harris *v.* Hitt, 58 Mo. App. 459; Cain *v.* Cain, (Supm. Ct. Spec. T.) 28 Abb. N. Cas. (N. Y.) 423; Hay *v.* Muller, (C. Pl. Spec. T.) 23 Civ. Pro. (N. Y.) 321, 7 Misc. (N. Y.) 670; Hammel *v.* Sigler, 2 Ohio Dec. 356, 7 Ohio N. P. 303; Gallipolis Furniture Co. *v.* Symmes, 10 Ohio Cir. Dec. 514, 19 Ohio Cir. Ct. 659; Putnam *v.* Webb, 15 Oregon 440; Beemis *v.* Wylie, 19 Wis. 318. *Compare* Cooke *v.* Aguirre, 86 Cal. 479.

7. Hall *v.* Tillman, 110 N. Car. 220.

8. **Divestiture of Plaintiff's Title Pending Action.** — Deal *v.* Osborne, 42 Minn. 102.

9. **Alternate Judgment.** — Black *v.* Hilliker, 130 Cal. 190; Hanlon *v.* O'Keefe, 55 Mo. App. 528.

10. Marix *v.* Franke, 9 Kan. 132.

11. **Damages for Taking and Detention** — *England.* — Smith *v.* Enright, 63 L. J. Q. B. 220, 69 L. T. N. S. 724.

Arkansas. — Gray *v.* Nations, 1 Ark. 557; Town *v.* Wilson, 8 Ark. 464; Jetton *v.* Smead, 29 Ark. 372.

California. — Livestock Gazette Pub. Co. *v.* Union Stockyard Co., 114 Cal. 447; Hickey *v.* Coschina, 133 Cal. 81.

Colorado. — Allen *v.* Steiger, 17 Colo. 552.

Delaware. — Truitt *v.* Revill, 4 Harr. (Del.) 71.

Iowa. — Hoover *v.* Rhoads, 6 Iowa 505.

Kansas. — Chase County Nat. Bank *v.* Thompson, 54 Kan. 307.

Kentucky. — Philips *v.* Harriss, 3 J. J. Marsh. (Ky.) 122, 19 Am. Dec. 166.

Maryland. — Cumberland Coal, etc., Co. *v.* Tilghman, 13 Md. 74; Burnett *v.* Bealmear, 79 Md. 36.

follow a judgment for the plaintiff where no actual damages are proved, as of course.[1]

Measure of Damages. — The plaintiff is entitled to recover such damages as will compensate him for all the detriment proximately caused by the wrongful taking or detention by the defendant,[2] including special damages.[3]

Remote Damages, not proximately caused by the unlawful detention, cannot be recovered,[4] nor can speculative damages or damages based on mere conjecture be recovered.[5]

Proof of Damages. — The amount of his damages must be proven by the plaintiff to entitle him to a judgment for more than nominal damages.[6]

Special Interest. — Where the plaintiff has only a special interest in the property and it is wrongfully taken or detained from him by a stranger to the title, the plaintiff is still entitled to recover for all injuries to the property through such unlawful taking or detention.[7]

Damages After Institution of Action. — Where the property is not taken on the replevin writ but remains in the possession of the defendant, in rendering the judgment for the property damages may also be given for the wrongful detention up to the time of the trial or rendition of judgment, and are not limited merely to damages for the detention prior to the institution of the replevin action.[8] But where the declaration of the plaintiff was in the detinuit and the defendant gave bond and retained possession, the plaintiff can recover damages only to the time the property was replevied.[9]

Massachusetts. — Allen *v.* Butman, 138 Mass. 586.

Michigan. — Riley *v.* Littlefield, 84 Mich. 22, Byrnes *v.* Palmer, 113 Mich. 17.

Missouri. — Donohue *v.* McAleer, 37 Mo. 312; Alley *v.* Gamelick, 55 Mo. 518; Steinwender *v.* Outley, 5 Mo. App. 588; Hopper *v.* Hopper, 84 Mo. App. 117.

Nebraska. — Baker *v.* Daily, 6 Neb. 464; Frey *v.* Drahos, 7 Neb. 194; Gordon *v.* Little, 41 Neb. 250.

Nevada. — Buckley *v.* Buckley, 12 Nev. 423.

New Hampshire. — Kendall *v.* Fitts, 22 N. H. 1; Messer *v.* Bailey, 31 N. H. 9.

New York. — Hopkins *v.* Hopkins, 10 Johns. (N. Y.) 369; Hay *v.* Muller, (C. Pl. Spec. T.) 23 Civ. Pro. (N. Y.) 321; Tracy *v.* New York, etc., R. Co., 9 Bosw. (N. Y.) 396.

Oklahoma. — Jackson *v.* Glaze, 3 Okla. 143.

Pennsylvania. — Fisher *v.* Whoollery, 25 Pa. St. 197; Harrisburg Electric Light Co. *v.* Goodman, 129 Pa. St. 206.

South Carolina. — Jones *v.* Hiers, 57 S. Car. 427.

Tennessee. — Parham *v.* Riley, 4 Coldw. (Tenn.) 5.

Vermont. — Starkey *v.* Waite, 69 Vt. 193.

Wisconsin. — Bourda *v.* Jones, 110 Wis. 52.

Where the plaintiff acquires possession of the property by virtue of the replevin writ, his subsequent sale of the property does not affect his right to recover damages for its unlawful detention. Donohoe *v.* McAleer, 37 Mo. 312.

The defendant cannot, of course, object to a withdrawal by the plaintiff of his claim for damages. Williams *v.* Hoehle, 95 Wis. 510.

1. Nominal Damages. — Hammond *v.* Solliday, 8 Colo. 610; Cardwill *v.* Gilmore, 86 Ind. 428; Whitman *v.* Merrill, 125 Mass. 127; Frey *v.* Drahos, 7 Neb. 194; Segelke *v.* Finan, 48 Hun (N. Y.) 310; Starkey *v.* Waite, 69 Vt. 193; Thomas *v.* Wiesmann, 44 Wis. 339; Riess *v.* Delles, 45 Wis 662.

2. Damages Recoverable. — Livestock Gazette Pub. Co. *v.* Union Stockyards Co., 114 Cal. 447; Schars *v.* Barnd, 27 Neb. 94.

Expenses in Replacing Building. — Byrnes *v.* Palmer, 113 Mich. 17.

3. Special Damages. — Smith *v.* Enright, 69 L. T. N. S. 724; Clark *v.* Martin, 120 Mass. 543; Schars *v.* Barnd, 27 Neb. 94.

But to entitle the plaintiff to special damages he must specially allege the same in his complaint. Stevenson *v.* Smith, 28 Cal. 102, 87 Am. Dec. 107; Whitney *v.* Levon, 34 Neb. 443; Armagost *v.* Rising, 54 Neb. 763. *Compare* Clark *v.* Martin, 120 Mass. 543.

4. Remote Damages. — Riley *v.* Littlefield, 84 Mich. 22; Wanborg *v.* Karst, 4 Mo. App. 563; Morgan *v.* Reynolds, 1 Mont. 163; Jones *v.* Hiers, 57 S. Car. 427.

Loss of Job. — In Replevin for Carpenter's Tools, the fact that the plaintiff lost a job by reason of the unlawful detention of the tools is too remote to be considered as an element of damages. Kelly *v.* Altemus, 34 Ark. 184, 36 Am. Rep. 6.

5. Speculative Damages. — Smith *v.* Bryant, 1 Kan. App. 754; Ascher *v.* Schaeper, 25 Mo. App. 1.

6. Proof of Damages. — Wheeler *v.* Kassabaum, 76 Cal. 90; Hopkins *v.* Davis, 23 N. Y. App. Div. 235; Norris *v.* Clinkscales, 47 S. Car. 488.

7. Special Interest. — Thus, in replevin by a mortgagee entitled to immediate possession of the property replevied, if the taking and detention were unlawful, he is entitled to the damages directly caused thereby, although the property is of greater value than the mortgage debt. Allen *v.* Butman, 138 Mass. 586.

8. Lesser *v.* Norman, 51 Ark. 301; Coffin *v.* Taylor, 16 Oregon 375.

9. Truitt *v.* Revill, 4 Harr. (Del.) 71.

Assessment of Value of Property. — Where the property is not taken on the replevin writ and the plaintiff elects under statutory sanction to take a judgment for its value, it has been held that his recovery is restricted to the value of the property at the time of its conversion by the defendant, with interest; damages generally for the unlawful detention cannot also be allowed,[1] but if the plaintiff is entitled only to an alternate judgment for value in case the property cannot be had, he is entitled, it seems, to an allowance for damages for the unlawful detention in addition to the judgment for the value of the property,[2] and this rule is especially applicable where the value of the property for the purpose of the alternate judgment is fixed at the time of trial.[3]

(2) *Interest on Value.* — In many instances the courts have allowed as proper damages interest on the value of the property during the time the wrongful detention continued.[4] But, of course, interest on the value of the property is not necessarily the limit of the damages recoverable,[5] and in addition to such interest, damages have been allowed for special depreciation in the value of the property during the detention.[6]

(3) *Deterioration in Value.* — The plaintiff may recover as damages for all deterioration or depreciation in the value of the property while it was unlawfully detained by the defendant,[7] and it is immaterial whether such depreciation arises from the defendant's act, or default, or from other causes.[8]

1. Assessment of Value. — Hanselman *v.* Kegl, 60 Mich. 540. *Compare* Cook *v.* Hamilton, 67 Iowa 394; Hasted *v.* Dodge, (Iowa 1888) 39 N. W. Rep. 668, *overruling* (Iowa 1887) 35 N. W. Rep. 462; Harrisburg Electric Light Co. *v.* Goodman, 129 Pa. St. 206.

2. Farrar *v.* Eash, 5 Ind. App. 238; Chase County Nat. Bank *v.* Thompson, 54 Kan. 307. *Compare* Jackson *v.* Glaze, 3 Okla. 143.

3. Miller *v.* Bryden, 34 Mo. App. 602.

4. Interest on Value of Property — *United States.* — Webb *v.* Phillips, (C. C. A.) 80 Fed. Rep. 954.

California. — Kelly *v.* McKibben, 54 Cal. 192; Garcia *v.* Gunn, 119 Cal. 315. See also Freeborn *v.* Norcross, 49 Cal. 313.

Colorado. — Johnson *v.* Bailey, 17 Colo. 59; Austin *v.* Terry, 13 Colo. App. 141.

Kansas. — Werner *v.* Graley, 54 Kan. 383.

Missouri. — Reno *v.* Kingsbury, 39 Mo. App. 240.

New York. — Earle *v.* Gorham Mfg. Co., 2 N. Y. App. Div. 460; Crossley *v.* Hojer, (N. Y. Super. Ct. Gen. T.) 11 Misc. (N. Y.) 57; Twinam *v.* Swart, 4 Lans. (N. Y.) 263; Redmond *v.* American Mfg. Co., 121 N. Y. 415, *affirming* 56 N. Y. Super. Ct. 372.

North Carolina. — Hall *v.* Tillman, 110 N. Car. 220.

Texas. — Jackson *v.* Nelson, (Tex. Civ. App. 1897) 39 S. W. Rep. 315.

Wisconsin. — Graves *v.* Sittig, 5 Wis. 219; Bigelow *v.* Doolittle, 36 Wis. 115; Wadleigh *v.* Buckingham, 80 Wis. 230; Bourda *v.* Jones, 110 Wis. 52; Wegner *v.* Second Ward Sav. Bank, 76 Wis. 242. See also Bonesteel *v.* Orvis, 22 Wis. 522; Bigelow *v.* Doolittle, 36 Wis. 115.

5. Morgan *v.* Reynolds, 1 Mont. 163; Northrup *v.* Cross, 2 N. Dak. 433.

6. Crossley *v.* Hojer, (N. Y. Super. Ct. Gen. T.) 11 Misc. (N. Y.) 57, *affirmed* (N. Y. 1899) 53 N. E. Rep. 1124; Wadleigh *v.* Buckingham, 80 Wis. 230.

7. Deterioration in Value — *California.* — Stevenson *v.* Smith, 28 Cal. 102, 87 Am. Dec. 107.

Illinois. — Clow *v.* Yount, 93 Ill. App. 112. *Compare* Odell *v.* Hole, 25 Ill. 204.

Kansas. — Russell *v.* Smith, 14 Kan. 366.

Massachusetts. — Allen *v.* Butman, 138 Mass. 586.

Michigan. — Riley *v.* Littlefield, 84 Mich. 22.

Missouri. — Miller *v.* Bryden, 34 Mo. App. 602.

Nebraska. — Schars *v.* Barnd, 27 Neb. 94. See also Whitney *v.* Levon, 34 Neb. 443.

New York. — Young *v.* Willet, 8 Bosw. (N. Y.) 486; Rowley *v.* Gibbs, 14 Johns. (N. Y.) 385; Crossley *v.* Hojer, (N. Y. Super. Ct. Gen. T.) 11 Misc. (N. Y.) 57, *affirmed* (N. Y. 1899) 53 N. E. Rep. 1124; Brewster *v.* Silliman, 38 N. Y. 430.

South Carolina. — Miami Powder Co. *v.* Port Royal, etc., R. Co., 47 S. Car. 324, 58 Am. St. Rep. 880.

Wisconsin. — Wadleigh *v.* Buckingham, 80 Wis. 230; Findlay *v.* Knickerbocker Ice Co., 104 Wis. 375.

See also Church *v.* Foley, 10 S. Dak. 74.

If the plaintiff is allowed as damages the value of the use of the property while detained from him, he cannot, in addition thereto, recover damages for the amount of the natural depreciation in value. Odell *v.* Hole, 25 Ill. 205.

So, also, if the possession of the property cannot be had by the plaintiff and judgment is rendered for its value as of the time of the unlawful conversion by the defendant, with interest, damages for the depreciation in value during the detention and after such conversion are not also recoverable. Hall *v.* Tillman, 110 N. Car. 220.

Depreciation in Value of Race Horse from Want of Care. — Riley *v.* Littlefield, 84 Mich. 22. See also Stevenson *v.* Smith, 28 Cal. 102, 87 Am. Dec. 107.

Depreciation in Value of Bonds. — Clow *v.* Yount, 93 Ill. App. 112.

8. Cause of Deterioration Immaterial. — Young *v.* Willet, 8 Bosw. (N. Y.) 486; Findlay *v.* Knickerbocker Ice Co., 104 Wis. 375.

(4) *Value of Use.* — The plaintiff has generally been permitted to recover as damages for the detention of property which has a usable value, the value of the use of the property during the time it was unlawfully detained by the defendant.[1]

(5) *Expenses Incurred to Locate and Secure Property.* — In some instances the expenses incurred by the plaintiff before the institution of the replevin action, in attempting to locate and secure possession of the property, have been allowed to him as damages for its detention.[2]

(6) *Expenses Incurred in Replevin Action.* — The expenses incurred by the plaintiff in the prosecution of the replevin action, aside from such items as are taxed as costs, are not recoverable as damages for the detention of the property.[3] Thus, the plaintiff cannot recover as such damages the amount he was required to pay to enable him to get a replevy bond,[4] nor the amount of fees paid to his attorney,[5] nor for loss of time or traveling and hotel expenses incurred in the trial of the action.[6]

1. Value of Use — *United States.*— Merchants', etc., Oil Co. *v.* Kentucky Refining Co., (C. C. A.) 81 Fed. Rep. 821.

Arkansas. — Kelly *v.* Altemus, 34 Ark. 184, 36 Am. Rep. 6.

Colorado. — Johnson *v.* Bailey, 17 Colo. 59. See also Smith *v.* Stevens, 14 Colo. App. 491.

Idaho. — Sebree *v.* Smith, 2 Idaho 329.

Illinois. — Butler *v.* Mehrling, 15 Ill. 488; Odell *v.* Hole, 25 Ill. 204.

Indiana. — Lingle *v.* Kitchen, 69 Ind. 349; Farrar *v.* Eash, 5 Ind. App. 238.

Iowa. — Minthon *v.* Lewis, 78 Iowa 620.

Kansas. — Yandle *v.* Kingsbury, 17 Kan. 195, 22 Am. Rep. 282; Ladd *v.* Brewer, 17 Kan. 204; Bell *v.* Campbell, 17 Kan. 211; Palmer *v.* Meiners, 17 Kan. 478; Kennett *v.* Fickel, 41 Kan. 211; Werner *v.* Graley, 54 Kan. 383; Brown *v.* Morris, 3 Kan. App. 86; Barton *v.* Mulvane, 59 Kan. 313.

Minnesota. — Williams *v.* Wood, 61 Minn. 194; Qualy *v.* Johnson, 80 Minn. 408; Nash *v.* Larson, 80 Minn. 458.

Missouri. — Paddock *v.* Somes, 102 Mo. 226; Anchor Milling Co. *v.* Walsh, 24 Mo. App. 97.

Montana. — Chauvin *v.* Valiton, 8 Mont. 451; Morgan *v.* Reynolds, 1 Mont. 163. See also Brunell *v.* Cook, 13 Mont. 497.

New York. — Crossley *v.* Hojer, (N. Y. Super. Ct. Gen. T.) 11 Misc. (N. Y.) 57; Allen *v.* Fox, 51 N. Y. 562, 10 Am. Rep. 641. See also Young *v.* Atwood, 5 Hun (N. Y.) 234.

North Dakota. — Northrup *v.* Cross, 2 N. Dak. 433.

Oregon. — Coffin *v.* Taylor, 16 Oregon 375.

Tennessee. — Stanley *v.* Donoho, 16 Lea (Tenn.) 492.

Texas. — Mineralized Rubber Co. *v.* Cleburne, 22 Tex. Civ. App. 621.

Utah. — Farrand, etc., Organ Co. *v.* Board of Church Extension, 17 Utah 469.

Wisconsin. — Barney *v.* Douglass, 22 Wis. 464.

Compare Dorsey *v.* Manlove, 14 Cal. 553.

Right to the Use. — In *Minnesota* it is held that the value of the use of the property replevied can be recovered as damages for its detention only by one who has the right to such use, and therefore, as a mortgagee, after default in the mortgage, has the right to the possession only for the purpose of foreclosure or sale under the mortgage, and not for the purpose of using the property, he cannot, in replevin for the property, recover the value of its use. Thompson *v.* Scheid, 39 Minn. 102, 12 Am. St. Rep. 619.

Intention to Use. — In *Colorado* it was held that though damages in replevin for domestic animals may be based upon the value of their use whenever it is made to appear that the plaintiff intended to use the animals and by the wrongful detention by the defendant had been deprived of their use, still, where the evidence fails to show a purpose or intention on the part of the owner to use such animals, it is error to allow a recovery for the value of their use. Smith *v.* Stevens, 14 Colo. App. 491. See also Barney *v.* Douglass, 22 Wis. 464.

Proof of Value of Use. — Brown *v.* Morris, 3 Kan. App. 86.

Considerations Affecting Value of Use. — Sebree *v.* Smith, 2 Idaho 329.

2. Expenses in Locating and Securing Property. — Arzaga *v.* Villalba, 85 Cal. 191; Cain *v.* Cody, (Cal. 1892) 29 Pac. Rep. 778. See also Bennett *v.* Lockwood, 20 Wend. (N. Y.) 223, 32 Am. Dec. 532; McDonald *v.* North, 47 Barb. (N. Y.) 532; Parroski *v.* Goldberg, 80 Wis. 339. *Compare* Kelly *v.* McKibben, 54 Cal. 192; Davis Sewing Mach. Co. *v.* Best, 50 Hun (N. Y.) 76; Scott *v.* Beard, 5 Kan. App. 560.

3. Expenses of Replevin Action. — Trimble *v.* Keer-Rountree Mercantile Co., 56 Mo. App. 683.

4. Wilson *v.* Hillhouse, 14 Iowa 199.

5. Attorney Fees — *California.* — Harris *v.* Smith, 132 Cal. 315. See also Murphy *v.* Mulgrew, 102 Cal. 547, 41 Am. St. Rep. 200.

Dakota. — Jandt *v.* South, 2 Dak. 46.

Mississippi. — Taylor *v.* Morton, 61 Miss. 24; Carraway *v.* Wallace, (Miss. 1895) 17 So. Rep. 930.

Missouri. — Trimble *v.* Keer-Rountree Mercantile Co., 56 Mo. App. 683; Wright *v.* Broome, 67 Mo. App. 32.

New York. — Hampton, etc., R., etc., Co. *v.* Sizer, (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 391; Cook *v.* Gross, 60 N. Y. App. Div. 446; Sinskie *v.* Brust, 66 N. Y. App. Div. 34.

South Carolina. — Loeb *v.* Mann, 39 S. Car. 465.

Wyoming. — Knight *v.* Beckwith Commercial Co., 6 Wyo. 500.

6. Loss of Time, Traveling and Hotel Expenses. — Jandt *v.* South, 2 Dak. 46; Taylor *v.* Morton, 61 Miss. 24; Hampton, etc., R., etc., Co. *v.*

(7) *Exemplary Damages.* — Where the unlawful taking or detention by the defendant was the result of malice or wantonness, the plaintiff may, as in other tort actions,[1] recover exemplary damages;[2] but exemplary damages should not be allowed when there is no evidence of any wrong motive, malice, or wantonness in the detention of the property.[3]

c. RECOVERY FOR VALUE OF PROPERTY — (1) *In General.* — Where the property is taken on the writ of replevin and turned over to the plaintiff, he is not entitled to a judgment for the value of the property.[4] Where the property is not taken on the replevin writ and delivered to the plaintiff he is, under some statutes, entitled to proceed and recover a judgment for the value of the property or for the possession of the property, and in the alternative for its value in case the property cannot be had.[5] In some jurisdictions where the property is not taken on the writ, the plaintiff has the option to take a judgment absolutely for the value of the property.[6] In other jurisdictions this

Sizer, (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 391; Loeb *v.* Mann, 39 S. Car. 465. See also Wildman *v.* Sterritt, 80 Mich. 651.

1. See the title EXEMPLARY DAMAGES, vol. 12, p. 2.

2. Exemplary Damages. — Holt *v.* Van Eps, 1 Dak. 206; Heard *v.* James, 49 Miss. 236; M'Donald *v.* Scaife, 11 Pa. St. 381, 51 Am. Dec. 556; Schofield *v.* Ferrers, 46 Pa. St. 438; Wiley *v.* McGrath, 194 Pa. St. 498, 75 Am. St. Rep. 709; Lander *v.* Ware, 1 Strobh. L. (S. Car.) 15.

3. Merchants', etc., Oil Co. *v.* Kentucky Refining Co., (C. C. A.) 69 Fed. Rep. 218; McCormick Harvesting Mach. Co. *v.* Drake, 5 Kan. App. 882, 48 Pac. Rep. 944; Cummings *v.* Gann, 52 Pa. St. 484; Findlay *v.* Knickerbocker Ice Co., 104 Wis. 375; Knight *v.* Beckwith Commercial Co., 6 Wyo. 500.

4. Recovery for Value of Property. — Burnett *v.* Bealmear, 79 Md. 36; Merrill *v.* Butler, 18 Mich. 294; Baird *v.* Taylor, 30 Mo. App. 580; Hanscom *v.* Burmood, 35 Neb. 504; Lindauer *v.* Teeter, 41 N. J. L. 255; Webb *v.* Hecox, (County Ct.) 27 Misc. (N. Y.) 169; Marrinan *v.* Knight, 7 Okla. 419; Phipps *v.* Taylor, 15 Oregon 484; Donnel *v.* Drake, 16 Montg. Co. Rep. (Pa.) 114; Miller *v.* Warden, 111 Pa. St. 300; Everit *v.* Walworth County Bank, 13 Wis. 419.

5. Where Property Cannot Be Had — *Arkansas.* — Jetton *v.* Smead, 29 Ark. 372.

California. — Henderson *v.* Hart, 122 Cal. 332.

Connecticut. — Belknap Sav. Bank *v.* Robinson, 66 Conn. 542.

Illinois. — Dart *v.* Horn, 20 Ill. 212; Karr *v.* Barstow, 24 Ill. 580; Kehoe *v.* Rounds, 69 Ill. 351; Hews *v.* Wall, 27 Ill. App. 445.

Indiana. — Burket *v.* Pheister, 114 Ind. 503.

Kansas. — Babcock *v.* Ashmead, 24 Kan. 585; Tootle *v.* Berkley, 57 Kan. 111.

Kentucky. — Greenwade *v.* Fisher, 5 B. Mon. (Ky.) 167.

Michigan. — Parmalee *v.* Loomis, 24 Mich. 242; McBrian *v.* Morrison, 55 Mich. 351; Hanselman *v.* Kegel, 60 Mich. 540.

Minnesota. — Caldwell *v.* Bruggerman, 4 Minn. 270.

Missouri. — Paddock *v.* Somes, 102 Mo. 226.

Nebraska. — Hainer *v.* Lee, 12 Neb. 452; Heidiman-Benoist Saddlery Co. *v.* Schott, 59 Neb. 20, Lininger *v.* Mills, 29 Neb. 297; Baum Iron Co. *v.* Union Sav. Bank, 50 Neb. 387. See also Deck *v.* Smith, 12 Neb. 389.

New York. — Dows *v.* Rush, 28 Barb. (N. Y.) 157; Hedges *v.* Payne, 63 Hun (N. Y.) 630; Guyon *v.* Rooney, (Supm. Ct. Gen. T.) 17 Civ. Pro. (N. Y.) 172; Corn Exch. Bank *v.* Blye, 54 Hun (N. Y.) 312.

North Carolina. — Spencer *v.* Bell, 109 N. Car. 39; Hall *v.* Tillman, 110 N. Car. 220.

Ohio. — Pugh *v.* Calloway, 10 Ohio St. 488.

Oklahoma. — Wade *v.* Gould, 8 Okla. 690; McFadyen *v.* Masters, 8 Okla. 174.

Oregon. — Guille *v.* Wong Fook, 13 Oregon 577; Moorhouse *v.* Donaca, 14 Oregon 430.

Pennsylvania. — Bower *v.* Tallman, 5 W. & S. (Pa.) 556.

South Carolina. — Joplin *v.* Carrier, 11 S. Car. 327.

Tennessee. — Nashville Ins., etc., Co. *v.* Alexander, 10 Humph. (Tenn.) 378.

Texas. — Morris *v.* Coburn, 71 Tex. 406; Bergstrom *v.* Franklin, 74 Tex. 38.

Wisconsin. — Heeron *v.* Beckwith, 1 Wis. 17; Warner *v.* Sauk County Bank, 20 Wis. 492; Pranke *v.* Herman, 76 Wis. 428.

And see *supra*, this title, *Nature of Action*.

6. Optional Judgment for Value — *Florida.* — Jeffreys *v.* Greeley, 20 Fla. 819; Anderson *v.* Carlin, 24 Fla. 199; McGriff *v.* Ried, 37 Fla. 51.

Georgia. — Hudson *v.* Goff, 77 Ga. 281; Wolf *v.* Kennedy, 93 Ga. 219; Clark *v.* Thompson, 99 Ga. 221.

Iowa. — Davis *v.* Bayliss, 51 Iowa 435; Cook *v.* Hamilton, 67 Iowa 394; Hasted *v.* Dodge, (Iowa 1887) 35 N. W. Rep. 462, (Iowa 1888) 39 N. W. Rep. 668. *Compare* Nichols *v.* Sheldon Bank, 98 Iowa 603.

Nebraska. — Philleo *v.* McDonald, 27 Neb. 142.

Pennsylvania. — Schofield *v.* Ferrers, 46 Pa. St. 438.

Wisconsin. — Pratt *v.* Donovan, 10 Wis. 378; Brewster *v.* Carmichael, 39 Wis. 456; Riess *v.* Delles, 45 Wis. 662; Tuckwood *v.* Hanthorn, 67 Wis. 326. *Compare* Mayhew *v.* Mather, 82 Wis. 355.

Sufficiency of Election. — Wolf *v.* Kennedy, 93 Ga. 219; Oskaloosa Steam-Engine Works *v.* Nelson, 54 Iowa 519.

Time of Exercising Election. — Riess *v.* Delles, 45 Wis. 662. See also Pratt *v.* Donovan, 10 Wis. 378.

Waiver of Right to Elect Money Judgment. — Hudson *v.* Goff, 77 Ga. 281.

judgment is to be in the alternative so as to enable the defendant to discharge it by a return of the property, the plaintiff not being entitled to a judgment absolutely for the value of the property,[1] and a tender of the property by the defendant will prevent the plaintiff from afterwards enforcing the judgment for value.[2] And where the action is brought to recover several distinct articles which are not taken on the writ and delivered to the plaintiff, the alternate judgment for value should fix the separate value of each article, so that the defendant can return any one or more of the articles and avoid liability *pro tanto* on the alternate judgment for value;[3] but even in the latter jurisdictions, where the property has been disposed of by the defendant or he is in such a position that he cannot make a return, it has been held not to be error to render a judgment for the value of the property instead of the alternative judgment for its possession or value in case it cannot be found.[4] This alternate judgment for the value of the property is for the benefit of the plaintiff and may be waived by him.[5]

(2) *Assessment of Value* — (a) **In General.** — The plaintiff must, of course, show the value of the property to entitle him to a judgment in the alternative therefor,[6] and the general rules of evidence as to admissibility and sufficiency

1. *United States.* — Boley *v.* Griswold, 20 Wall. (U. S.) 486 (Mont. stat.); Hanchett *v.* Humphreys, 84 Fed. Rep. 862 (Nev. Stat.).

Alabama. — Southern Warehouse Co. *v.* Johnson, 85 Ala. 178.

Arkansas. — Rowark *v.* Lee, 14 Ark. 425; Jetton *v.* Smead, 29 Ark. 372; Hanf *v.* Ford, 37 Ark. 544.

California. — Washburn *v.* Huntington, 78 Cal. 573; Etchepare *v.* Aguirre, 91 Cal. 288, 25 Am. St. Rep. 180; Meads *v.* Lasar, 92 Cal. 221. See also Stewart *v.* Taylor, 68 Cal. 5.

Indiana. — Bales *v.* Scott, 26 Ind. 202; Farrar *v.* Eash, 5 Ind. App. 238.

Kansas. — Ward *v.* Masterson, 10 Kan. 77; Babb *v.* Aldrich, 45 Kan. 218; Clouston *v.* Gray, 48 Kan. 31; Chase County Nat. Bank *v.* Thompson, 54 Kan. 307.

Mississippi. — Anderson *v.* Tyson, 6 Smed. & M. (Miss.) 244.

Missouri. — Hamilton *v.* Clark, 25 Mo. App. 428; Nichols *v.* Dodson Lead, etc., Co., 85 Mo. App. 584.

Nevada. — Lambert *v.* McFarland, 2 Nev. 58; Carson *v.* Applegarth, 6 Nev. 187.

New York. — Stauff *v.* Maher, 2 Daly (N. Y.) 142; Wolf *v.* Farley, (C. Pl. Gen. T.) 16 N. Y. Supp. 168; Young *v.* Atwood, 5 Hun (N. Y.) 234; Phillips *v.* Melville, 10 Hun (N. Y.) 212; Gallarati *v.* Orser, 27 N. Y. 324; McNamara *v.* Eisenleff, (Buffalo Super. Ct. Gen. T.) 14 Abb. Pr. N. S. (N. Y.) 25; Fitzhugh *v.* Wiman, 9 N. Y. 559; Lewin *v.* Towbin, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 780; Kingsley *v.* Sauer, (County Ct.) 17 Misc. (N. Y.) 544.

Texas. — Tignor *v.* Toney, 13 Tex. Civ. App. 518; Jackson *v.* Nelson, (Tex. Civ. App. 1897) 39 S. W. Rep. 315; Clopton *v.* Goodbar, (Tex. Civ. App. 1900) 55 S. W. Rep. 972; Lang *v.* Dougherty, 74 Tex. 226. See also Davis *v.* Calhoun, 41 Tex. 554.

Washington. — Hall *v.* Law Guarantee, etc., Soc., 22 Wash. 305.

Compare Witcher *v.* Watkins, 11 Colo. 548, (replevin before justice of the peace).

2. Johnson *v.* Gallegos, 10 N. Mex. 1; Marks *v.* Willis, 36 Oregon 1, 78 Am. St. Rep. 752.

To Whom Tender to Be Made. — Childs *v.* Wilkinson, 15 Tex. Civ. App. 687.

Delivery of Property to Plaintiff's Attorneys. — High *v.* Emerson, 23 Wash. 103.

Sufficiency of Tender. — Nimon *v.* Reed, 79 Iowa 524.

3. *Alabama.* — Southern Warehouse Co. *v.* Johnson, 85 Ala. 178; Johnson *v.* McLeod, 80 Ala. 433.

Arkansas. — Hanf *v.* Ford, 37 Ark. 544. See also Noland *v.* Leech, 10 Ark. 504.

Texas. — Clopton *v.* Goodbar, (Tex. Civ. App. 1900) 55 S. W. Rep. 972; Jackson *v.* Nelson, (Tex. Civ. App. 1897) 39 S. W. Rep. 315.

Compare Byrne *v.* Lynn, 18 Tex. Civ. App. 252; Stevenson *v.* Lord, 15 Colo. 131; Rennebaum *v.* Atkinson, (Ky. 1899) 52 S. W. Rep. 828; Kingsley *v.* Sauer, (County Ct.) 17 Misc. (N. Y.) 544. See also Drane *v.* Hilzheim, 13 Smed. & M. (Miss.) 336.

4. *United States.* — Burton *v.* Platter, (C. C. A.) 53 Fed. Rep. 901; Boley *v.* Griswold, 20 Wall. (U. S.) 486.

California. — Brown *v.* Johnson, 45 Cal. 76; Whetmore *v.* Rupe, 65 Cal. 238; Caruthers *v.* Hensley, 90 Cal. 559; Seligman *v.* Armando, 94 Cal. 314; Burke *v.* Koch, 75 Cal. 356; Henderson *v.* Hart, 122 Cal. 332.

Colorado. — McCarthy *v.* Strait, 7 Colo. App. 59.

Kansas. — Babb *v.* Aldrich, 45 Kan. 218; Clouston *v.* Gray, 48 Kan. 31.

Missouri. — Dillard *v.* McClure, 64 Mo. App. 488, 2 Mo. App. Rep. 1042.

Compare McNamara *v.* Eisenheff, (Buffalo Super. Ct. Gen. T.) 14 Abb. Pr. N. S. (N. Y.) 25.

Where, pending the replevin action, the defendant, who retained possession of the property, sold it at a judicial sale and the plaintiff purchased the property at such sale, the plaintiff was held not entitled to an absolute money judgment for the full value of the property, but merely for the amount of the purchase money paid by him with interest. Northrup *v.* Cross, 2 N. Dak. 433. See also Leonard *v.* Maginnis, 34 Minn. 506.

5. Stevens *v.* McMillin, 37 Minn. 509.

6. Proof of Value. — Sauer *v.* Traeger, 56 Minn. 364.

apply in regard to such proof.[1] The plaintiff cannot recover in excess of the value alleged;[2] and it has been held that the allegation as to value was binding upon the defendant upon his failure to deny its truth.[3] In *Kansas* it has been held that the allegation by the plaintiff in his affidavit for the replevin writ as to the value of the property was not conclusive upon him so as to preclude him from establishing a greater value for the purpose of the alternate judgment for value.[4]

(b) **Assessment of Value in Point of Time.** — Under the statutes which provide for an alternate judgment for the value of the property in case a delivery of the property is not had, the rule generally applied is to assess the value of the property at the time of the trial, together with damages for the detention.[5] In some cases, however, the value of the property has been assessed as of the time of the unlawful taking with interest thereon as damages for the detention.[6]

(c) **Where Value Increased by Defendant's Labor.** — Where in replevin for property wrongfully taken or detained the defendant has, since such wrongful taking or detention, expended money or labor in increasing the value of the property, according to the general rule he is not entitled to have any deduction from the value of the property for the money or labor so expended, in assessing the value for the purpose of the alternate judgment,[7] especially where he did not act in good faith;[8] but there are some cases which hold that where the defendant did act in good faith the plaintiff can recover only the value of the property less the increased value put upon it by the labor and expenditures of the defendant.[9]

(d) **Where Plaintiff Has Special Interest Only.** — Where the plaintiff has only a

1. Admissibility of Evidence as to Value — *California.* — Black *v.* Black, 74 Cal. 520.

Dakota. — Holt *v.* Van Eps, 1 Dak. 206.

Kansas. — Carson *v.* Golden, 36 Kan. 705; Lamont *v.* Williams, 43 Kan. 558.

Minnesota. — Stearns *v.* Johnson, 17 Minn. 142.

Missouri. — Miller *v.* Bryden, 34 Mo. App. 602.

New York. — Schoeneman *v.* Chamberlin, 55 N. Y. App. Div. 351.

Utah. — Newton *v.* Brown, 1 Utah 287.

Owner's Estimate of Value. — Where the action is for the recovery of papers having a peculiar value to the plaintiff, the jury may consider his estimate of value, the rule of market value being inapplicable. Drake *v.* Auerbach, 37 Minn. 505.

2. Burton *v.* Cochran, 5 Kan. App. 508; Peterson *v.* Hall, 61 Minn. 268; Brook *v.* Bayless, 6 Okla. 568. See, however, Singer Mfg. Co. *v.* Doxey, 65 Ind. 65.

3. Tucker *v.* Parks, 7 Colo. 62. *Compare* Sopris *v.* Webster, 1 Colo. 507; Jenkins *v.* Steanka, 19 Wis. 126, 88 Am. Dec. 675.

4. Mills *v.* Mills, 39 Kan. 455.

5. Assessment of Value as of Time of Trial — *Arizona.* — Gray *v.* Robinson, (Ariz. 1893) 33 Pac. Rep. 712.

Iowa. — Bonnot Co. *v.* Newman, 109 Iowa 580; Neeb *v.* McMillan, 98 Iowa 718.

Kansas. — Sims *v.* Mead, 29 Kan. 124.

Missouri. — Hoester *v.* Teppe, 27 Mo. App. 207; Pope *v.* Jenkins, 30 Mo. 529; Miller *v.* Bryden, 34 Mo. App. 602; Jennings *v.* Sparkman, 48 Mo. App. 246; Kirkendall *v.* Hartsock, 58 Mo. App. 234; Wm. S. Merrill Chemical Co. *v.* Nickells, 66 Mo. App. 678, 2 Mo. App. Rep. 1378.

Nebraska. — Hainer *v.* Lee, 12 Neb. 452; Baum Iron Co. *v.* Union Sav. Bank, 50 Neb. 387. See also Honaker *v.* Vesey, 57 Neb. 413.

Nevada. — Gardner *v.* Brown, 22 Nev. 156.

New York. — Brewster *v.* Silliman, 38 N. Y. 423; Duffus *v.* Schwinger, 79 Hun (N. Y.) 541; Sommer *v.* Adler, 36 N. Y. App. Div. 107; Devlin *v.* Kosel, (Brooklyn City Ct. Gen. T.) 3 Misc. (N. Y.) 40.

Oklahoma. — Wade *v.* Gould, 8 Okla. 690.

Texas. — Morris *v.* Coburn, 71 Tex. 406.

6. Assessment as of Time of Conversion. — Hanselman *v.* Kegel, 60 Mich. 540, State *v.* Shevlin-Carpenter Co., 62 Minn. 99; Maguire *v.* Dutton, 54 N. J. L. 597; Findlay *v.* Knickerbocker Ice Co., 104 Wis. 375; Bonesteel *v.* Orvis, 22 Wis. 522; Ingram *v.* Rankin, 47 Wis. 406, 32 Am. Rep. 762.

7. Increase in Value by Defendant's Labor. — Gray *v.* Robinson, (Ariz. 1893) 33 Pac. Rep. 712; Sims *v.* Mead, 29 Kan. 124.

In Sommer *v.* Adler, 36 N. Y. App. Div. 107, where the defendant by fraud procured a sale of cloth to him and the seller brought replevin therefor after it had been manufactured into clothing, it was held that the alternate judgment for value should be based on the value of the cloth in its unmanufactured state.

Incumbrance Discharged by Defendant. — Devlin *v.* Kosel, (Brooklyn City Ct. Gen. T.) 3 Misc. (N. Y.) 40.

8. State *v.* Shevlin-Carpenter Co., 62 Minn. 99.

9. Good Faith of Defendant. — State *v.* Shevlin-Carpenter Co., 62 Minn. 99; Bond *v.* Griffin, 74 Miss. 599; Single *v.* Schneider, 24 Wis. 299. See also Peters Box, etc., Co. *v.* Lesh, 119 Ind. 98, 12 Am. St. Rep. 367; Dyke *v.* National Transit Co., 22 N. Y. App. Div. 360.

In *Wisconsin* this rule has been held applicable though the taking by the defendant

special property in the chattels to be replevied, accompanied with the right to possession, and the general property is in the defendant, in assessing the value of the property for the purpose of the alternate judgment for value the assessment is to be on the basis of the plaintiff's special interest, and not on the basis of the full value of the property.[1] But if the defendant is a stranger to the title, the alternate judgment for value may be for the full value of the property and not merely for the value of the plaintiff's special interest.[2]

2. Where Defendant Is Successful — *a.* RETURN OF PROPERTY — (1) *In General.* — Where the plaintiff's title to the property is in issue, the action being founded on the right of property, and the verdict or finding is for the defendant, he is entitled to a judgment for the return of the property which was taken from him on the replevin writ and delivered to the plaintiff.[3] And though the plaintiff had the general property in the chattels replevied, if the defendant had a special property therein, entitling him to possession, he is equally entitled to a judgment for a return.[4] So, also, the defendant is entitled to a judgment for a return though the defense is title in a stranger,[5] or where he relies on his possession of the property when replevied and the

was not in good faith. Single *v.* Schneider, 30 Wis. 570.

1. Special Property in Plaintiff, General Property in Defendant — *Georgia.* — Holmes *v.* Langston, 110 Ga. 861.

Iowa. — Harward *v.* Davenport, 105 Iowa 592.

Kansas. — Wolfley *v.* Rising, 12 Kan. 535.

Michigan. — Kehl *v.* Lynn, 34 Mich. 360; Olin *v.* Lockwood, 102 Mich. 443.

Minnesota. — Bassett *v.* Haren, 61 Minn. 346.

Mississippi. — Lloyd *v.* Goodwin, 12 Smed. & M. (Miss.) 223; Bates *v.* Snider, 59 Miss. 497.

Missouri. — Lewis *v.* Mason, 94 Mo. 551; Harvey *v.* Stephens, 159 Mo. 486.

North Carolina. — Griffith *v.* Richmond, 126 N. Car. 377.

North Dakota. — Angel *v.* Egger, 6 N. Dak. 391.

Oklahoma. — McFadyen *v.* Masters, (Okla. 1901) 66 Pac. Rep. 284.

South Dakota. — National Bank *v.* Feeney, 9 S. Dak. 550.

Wisconsin. — Kaufer *v.* Walsh, 88 Wis. 63; Hass *v.* Prescott, 38 Wis. 146.

See also Wood *v.* Weimar, 104 U. S. 786; Jones *v.* Annis, 47 Kan. 478; Saxton *v.* Williams, 15 Wis. 292.

2. As Against Stranger. — Morris *v.* Burley, 74 Iowa 45.

3. Return of Property — *England.* — Gamon *v.* Jones, 4 T. R. 509.

California. — Waldman *v.* Broder, 10 Cal. 378.

Connecticut. — Osborne *v.* Banks, 46 Conn. 444.

Delaware. — Clark *v.* Adair, 3 Harr. (Del.) 113.

Illinois. — Underwood *v.* White, 45 Ill. 437; Chandler *v.* Lincoln, 52 Ill. 74; Pratt *v.* Tucker, 67 Ill. 346; Kimball *v.* Citizens' Sav. Bank, 3 Ill. App. 320; MacLachlan *v* Pease, 66 Ill. App. 634.

Indiana. — Wright *v.* Mathews, 2 Blackf. (Ind.) 187; Mikesill *v.* Chaney, 6 Ind. 52; Matlock *v.* Straughn, 21 Ind. 128; Hyde *v.* Courtwright, 14 Ind. App. 106; Woodard *v.* Myers, 15 Ind. App. 42; Burket *v.* Pheister, 114 Ind. 503; Everman *v.* Hyman, 3 Ind. App. 459.

Kansas. — Kayser *v.* Bauer, 5 Kan. 211; Sumner *v.* Cook, 12 Kan. 162.

Kentucky. — Philips *v.* Harriss, 3 J. J. Marsh. (Ky.) 122, 19 Am. Dec. 166.

Maine. — Moulton *v.* Bird, 31 Me. 296; Hoeffner *v.* Stratton, 57 Me. 360.

Maryland. — Lamotte *v.* Wisner, 51 Md. 543.

Massachusetts. — Hoffman *v.* Noble, 6 Met. (Mass.) 68, 39 Am. Dec. 711; Dawson *v.* Wetherbee, 2 Allen (Mass.) 461; McNeal *v.* Leonard, 3 Allen (Mass.) 268; Kimball *v.* Thompson, 4 Cush. (Mass.) 441, 50 Am. Dec. 799; Barry *v.* O'Brien, 103 Mass. 520.

Michigan. — Humphrey *v.* Bayn, 45 Mich. 565.

Minnesota. — Daley *v.* Mead, 40 Minn. 382; Adamson *v.* Soundby, 51 Minn. 460.

Missouri. — State *v.* Dunn, 60 Mo. 64; Ingals *v.* Ferguson, 138 Mo. 358.

Nebraska. — Bilby *v.* Townsend, 29 Neb. 220; Search *v.* Miller, 9 Neb. 26.

North Dakota. — Nichols, etc., Co. *v.* Paulson, 10 N. Dak. 440.

Oklahoma. — Kuhlman *v.* Willams, 1 Okla. 136.

South Dakota. — Pitts Agricultural Works *v.* Young, 6 S. Dak. 557.

4. Clow *v.* Yount, 93 Ill. App. 112; Wester *v.* Long, 63 Kan. 876; Stephens *v.* Frazier, 2 B. Mon. (Ky.) 250; Gaines *v.* Tibbs, 6 Dana (Ky.) 143. See also Saffell *v.* Wash, 4 B. Mon. (Ky.) 92; McArthur *v.* Lane, 15 Me. 245; Shields *v.* Moody, 120 Mich. 472.

5. *Illinois.* — Chandler *v.* Lincoln, 52 Ill. 74; Kimball *v.* Citizens' Sav. Bank, 3 Ill. App. 320; Lochnitt *v.* Stockon, 31 Ill. App. 217.

Indiana. — Hyde *v.* Courtwright, 14 Ind. App. 106.

Kentucky. — Tuley *v.* Mauzey, 4 B. Mon. (Ky.) 5.

Maine. — Moulton *v.* Bird, 31 Me. 296; Hoeffner *v.* Stratton, 57 Me. 360.

Maryland. — Lamotte *v.* Wisner, 51 Md. 543.

Massachusetts. — Hoffman *v.* Noble, 6 Met. (Mass.) 68, 39 Am. Dec. 711; Quincy *v.* Hall, 1 Pick. (Mass.) 357, 11 Am. Dec. 198.

South Dakota. — Pitts Agricultural Works *v.* Young, 6 S. Dak. 557.

Compare Nichols *v.* Potts, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 273.

plaintiff fails to show any title to the property or right to its possession.[1]

Action Between Cotenants. — Where the defendant and the plaintiff were co-owners in the property taken from the defendant and delivered to the plaintiff, and the judgment is for the defendant on the ground that one co-owner cannot maintain replevin against another co-owner in possession, the defendant is entitled to a judgment for a return.[2]

Where Property Not Described in the Replevin Writ is taken thereon and turned over to the plaintiff, the court may order its return to the defendant.[3]

Title Not in Issue. — A judgment for a return to the defendant should not be given where the judgment is for the defendant on the ground that he did not have the possession of the property, and therefore had not unlawfully detained it,[4] nor where the plaintiff fails because he made no demand upon the defendant for the property before the action was commenced,[5] nor where the defendant expressly disclaims or renounces any interest or claim to the property,[6] nor for property which was not taken under the replevin writ, its possession being otherwise acquired by the plaintiff.[7]

Divestiture of Title Pending Action. — The fact that after the commencement of the replevin action the defendant has parted with his title to the property, or his right to possession has terminated, does not deprive him of the right to a judgment for a return, if the plaintiff has not acquired the title and right to possession.[8] But where, pending the action of replevin, the defendant has lost his right to the possession of the property and such right has become vested in the plaintiff, the court on equitable principles denies to the defendant a judgment for the return of the property.[9] Where at the time of the commencement of the action the plaintiff was entitled to possession, but pending the action he transfers his right to the defendant, the court may properly order a return of the property to the defendant.[10]

Possession Retained by Defendant. — Where the property is not taken on the writ but remains in the possession of the defendant, or where it is returned to the defendant upon a redelivery bond, an order for the return of the property to the defendant is, of course, unnecessary.[11]

Where There Are Several Defendants, and one makes no claim to the property, a judgment for a return should not be rendered in their favor jointly,[12] but a judgment for a return may be rendered in favor of the others.[13] And one defendant who has no title or right to possession cannot object that a return of the property to his co-defendant was not ordered.[14]

1. Salter *v.* Sutherland, 125 Mich. 662, 8 Detroit Leg. N. 692; Stanley *v.* Neale, 98 Mass. 343; Reinheimer *v.* Hemingway, 35 Pa. St. 432.

2. Witham *v.* Witham, 57 Me. 447; Ingals *v.* Ferguson, 138 Mo. 358, *reversing* 59 Mo. App. 299. See also Peebles *v.* Morris, 77 Ga. 536; Humphrey *v.* Bayn, 45 Mich. 565.

3. Claflin *v* Beaver, 41 Fed. Rep. 204. See also Citizens' Nat. Bank *v.* Larabee, 64 Kan. 158.

4. **Defense of Nondetention** — *Arkansas.* — Brown *v.* Stanford, 22 Ark. 76; Pyburne *v.* Moses, 54 Ark. 121.

Illinois. — Johnson *v.* Howe, 7 Ill. 342; Chandler *v.* Lincoln, 52 Ill. 74.

Kansas. — Hursh *v.* Starr, 6 Kan. App. 8.

Kentucky. — Saffell *v.* Wash, 4 B. Mon. (Ky.) 94.

Massachusetts. — Whitwell *v.* Wells, 24 Pick. (Mass.) 25.

Michigan. — Gidday *v.* Witherspoon, 35 Mich. 368; Hinchman *v.* Doak, 48 Mich. 168.

Wisconsin.—Gallagher *v.* Bishop, 15 Wis. 276.

5. **Failure to Make Demand.** — Farrah *v.* Bursley, 100 Mich. 547; Smith Woolen Mach. Co. *v.* Holden, 73 Vt. 396.

6. **Disclaimer of Interest.** — Cochran *v.* Gottwald, 40 N. Y. Super. Ct. 442.

7. Kirby *v.* Tompkins, 48 Ark. 273; Gallup *v.* Wortmann, 11 Colo. App. 308; Jandt *v.* Potthast, 102 Iowa 223.

8. **Divestiture of Title Pending Action.** — Dawson *v.* Wetherbee, 2 Allen (Mass.) 461; Kimball *v.* Thompson, 4 Cush. (Mass.) 441, 50 Am. Dec. 799; Hallett *v.* Fowler, 10 Allen (Mass.) 36. *Compare* Campbell *v.* Quinton, 4 Kan. App. 317; Tuck *v.* Moses, 58 Me. 461.

9. O'Connor *v.* Blake, 29 Cal. 312; Flinn *v.* Ferry, 127 Cal. 648; Doane *v.* Lockwood, 115 Ill. 490; Lane *v.* Kohn, 79 Ill. App. 396; Ingraham *v.* Martin, 15 Me. 373; Martin *v.* Bayley, 1 Allen (Mass.) 381; Wheeler *v.* Train, 4 Pick. (Mass.) 168; Simpson *v.* M'Farland, 18 Pick. (Mass.) 427, 29 Am. Dec. 602.

10. Giroux *v.* Wheeler, 163 Mass. 48.

11. Harrod *v.* Hill, 2 Dana (Ky.) 165; Ware River R. Co. *v.* Vibbard, 114 Mass. 458; Hackett *v.* Bonnell, 16 Wis. 471.

12. Jandt *v.* Potthast, 102 Iowa 223.

13. Fischer *v.* Johnson, 74 Mo. App. 64.

14. Sheehan *v.* Golden, 85 Hun (N. Y.) 462; Oppenheim *v.* Lewis, 20 N. Y. App. Div. 332.

In New Hampshire it was held at an early date that the defendant, though successful, was not entitled to a judgment for the return of the property but was limited to a judgment for its value;[1] by a later statutory provision, however, the defendant was given the right to a judgment for a return if he prevailed.[2]

Pleading Non Cepit and Non Detinet. — It is generally held that the pleas of *non cepit* or *non detinet* admit property in the plaintiff and put in issue only the wrongful taking or detention, and under those pleas alone, if the plaintiff fails the defendant is not entitled to a judgment for return.[3] And where the answer contains pleas of *non cepit* and *non detinet*, together with special pleas of property in the defendant or in another, a general verdict of not guilty has been considered as responsive only to the pleas of *non cepit* and *non detinet*, and therefore not to authorize a judgment for a return to the defendant.[4]

Demand for Return. — Under some statutes, to entitle the defendant to a judgment for a return he must, in his answer, demand a return,[5] or that the defendant serve upon the plaintiff's counsel a notice of a demand for a judgment for a return,[6] but at common law a formal demand for a return does not seem to have been required.[7]

(2) *Satisfaction and Enforcement of Judgment.* — A tender of the property to the defendant will constitute a satisfaction of the alternate judgment for its value in case the property is not returned, so as to prevent the enforcement of such alternate judgment.[8] The judgment, however, for a return of the property can be satisfied only by the actual return or tender of the property,[9] and the return must be of the identical property replevied; a return of similar property of equal value is insufficient.[10]

1. Bell *v.* Bartlett, 7 N. H. 178.

2. Pub. Stat. N. H. (1901), p. 753, §§ 7, 8.

3. **Pleas Non Cepit and Non Detinet** — *Illinois.* — Anderson *v.* Talcott, 6 Ill. 365; Vose *v.* Hart, 12 Ill. 378; Ingalls *v.* Bulkley, 15 Ill. 224; Bourk *v.* Riggs, 38 Ill. 320; Hanford *v.* Obrecht, 38 Ill. 493; Underwood *v.* White, 45 Ill. 437; Van Namee *v.* Bradley, 69 Ill. 299; Rohe *v.* Pease, 189 Ill. 207, *reversing* 89 Ill. App. 657; Mattson *v.* Hanisch, 5 Ill. App. 102; Hackett *v.* Jones, 34 Ill. App. 562; Dyer *v.* Brown, 71 Ill. App. 317.

Iowa. — Jandt *v.* Potthast, 102 Iowa 223.

Kentucky. — Bonner *v.* Coleman, 3 B. Mon. (Ky.) 464; Powell *v.* Triplett, 6 B. Mon. (Ky.) 420.

Massachusetts. — Whitwell *v.* Wells, 24 Pick. (Mass.) 25; Holmes *v.* Wood, 6 Mass. 1.

New York. — People *v.* Niagara C. Pl., 4 Wend. (N. Y.) 217.

Wisconsin. — Douglass *v.* Garrett, 5 Wis. 85; Gallagher *v.* Bishop, 15 Wis. 276.

4. Bourk *v.* Riggs, 38 Ill. 320; Hanford *v.* Obrecht, 38 Ill. 493; Hackett *v.* Jones, 34 Ill. App. 562; McKeal *v.* Freeman, 25 Ind. 151; Gaines *v.* Tibbs, 6 Dana (Ky.) 143.

Where in replevin there is a plea of property in the defendant, together with pleas of *non cepit* and *non detinet*, a verdict that "we, the jury, find the issues for the defendant" is not analogous to the verdict of "not guilty," and will not authorize a judgment for a return to the defendant. Underwood *v.* White, 45 Ill. 437. See also MacLachlan *v.* Pease, 66 Ill. App. 634.

5. **Demand for Return.** — Gould *v.* Scannell, 13 Cal. 430; Pico *v.* Pico, 56 Cal. 453; Banning *v.* Marleau, 101 Cal. 238; Young *v.* Glascock, 79 Mo. 574; Wm. S. Merrill Chemical Co. *v.* Nickells, 66 Mo. App. 678, 2 Mo. App. Rep. 1378; Fowler *v.* Carr, 55 Mo. App. 145; Cartmell Mach. Co. *v.* Sikes, 83 Mo. App. 565. See also Kirby *v.* Tompkins, 48 Ark. 274.

6. McCobb *v.* Christiansen, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 825; Christiansen *v.* Mendham, 45 N. Y. App. Div. 554.

7. King *v.* Ramsay, 13 Ill. 623; Underwood *v.* White, 45 Ill. 438; Chandler *v.* Lincoln, 52 Ill. 76; Plant *v.* Crane, 7 Ind. 486; Conner *v.* Comstock, 17 Ind. 90; Matlock *v.* Straughn, 21 Ind. 128; Gaines *v.* Tibbs, 6 Dana (Ky.) 144; Bates *v.* Buchanan, 2 Bush (Ky.) 117; Tuley *v.* Mauzey, 4 B. Mon. (Ky.) 5; Norman *v.* Robinson, 47 Mo. App. 655.

8. **Tender of Property — Satisfaction of Alternate Judgment for Value.** — Thompson *v.* Laughlin, 91 Cal. 313; Frey *v.* Drahos, 10 Neb. 594; Reavis *v.* Horner, 11 Neb. 479; White *v.* Woodruff, 25 Neb. 797; Manker *v.* Sine, 47 Neb. 736; Otto *v.* Burch, 50 Neb. 894; Williams *v.* Eikenberry, 22 Neb. 210; Nichols, etc., Co. *v.* Paulson, 10 N. Dak. 440; Marks *v.* Willis, 36 Oregon 1, 78 Am. St. Rep. 752.

Place of Tender. — Reavis *v.* Horner, 11 Neb. 479.

Sufficiency of Tender — Bulky Articles. — Eickhoff *v.* Eikenbary, 52 Neb. 332; Frey *v.* Drahos, 10 Neb. 594; Gans *v.* Woolfolk, 2 Mont. 458.

9. **Satisfaction of Judgment for Return.** — Yallop-De Groot Co. *v.* Minneapolis, etc., R. Co., 33 Minn. 482.

10. **Return of Identical Property.** — Eickhoff *v.* Eikenbary, 52 Neb. 332; Richardson Drug Co. *v.* Teasdall, 59 Neb. 150; Irvin *v.* Smith, 68 Wis. 227. See also Union Stove, etc., Works *v.* Breidenstein, 50 Kan. 53.

Destruction of Property. — The fact that the property replevied has been destroyed while in the hands of the plaintiff, without his fault, does not excuse him from liability [1] though such destruction is by an act of God, as where living animals replevied die.[2]

Return in Part. — Where the property replevied consists of articles in no way dependent upon each other for use or value, the defendant is required to receive a part in satisfaction *pro tanto* of a judgment for a return of the property.[3]

Condition in Which Property Must Be Returned. — The defendant is not required to accept a return of the property unless it is in substantially the condition in which it was at the time it was taken from him.[4]

If the Property Is Returned to the Same Custody from which it was taken it will, it seems, be a sufficient compliance with a judgment for a return.[5]

Alternate Judgment. — A judgment in replevin for the defendant for a return of the property or its value does not, upon entry, pass the title in the property to the plaintiff, but the defendant may pursue the property and recover it back in whosesoever hands he finds it,[6] or he may pursue the fund realized by the plaintiff through a sale of the property. The plaintiff has no right at his option to retain the property or chosen articles and pay their value to the defendant.[7] Where a judgment is rendered for the defendant for a return of the property or in the alternative for its value, it has been held that the affirmative duty is upon the defendant to make the return, and that if he fails within a reasonable time to make a return, an ordinary execution may be issued to enforce the alternate money judgment for the value of the property.[8] A return of *elongatur* by the sheriff is conclusive between the parties that the judgment for a return to the defendant has not been performed.[9]

b. Damages for Wrongful Taking by Plaintiff. — The defendant in replevin, if successful, in addition to the recovery of the property, or its value where a return cannot be had, is entitled to recover damages for the wrongful taking and detention of the property by the plaintiff, by virtue of the replevin writ.[10] And a statutory provision prohibiting counterclaims in replevin

1. **Destruction of Property.** — De Thomas *v.* Witherby, 61 Cal. 92, 44 Am. Rep. 542; Brown *v.* Johnson, 45 Cal. 76; Carrel *v.* Early, 4 Bibb (Ky.) 270; Caldwell *v.* Fenwick, 2 Dana (Ky.) 333; Scott *v.* Hughes, 9 B. Mon. (Ky.) 104; Reavis *v.* Horner, 11 Neb. 479; Richardson Drug Co. *v.* Teasdall, 59 Neb. 150; Suydam *v.* Jenkins, 3 Sandf. (N. Y.) 614, *disapproving* Carpenter *v.* Stevens, 12 Wend. (N. Y.) 589.

2. De Thomas *v.* Witherby, 61 Cal. 92, 44 Am. Rep. 542. *Compare* Meilvin *v.* Winslow, 10 Me. 397; Carpenter *v.* Stevens, 12 Wend. (N. Y.) 589.

3. **Return in Part.** — Edwin *v.* Cox, 61 Ill. App. 567; Reavis *v.* Horner, 11 Neb. 479; Archer *v.* Long, 47 S. Car. 556; Jackson *v.* Nelson, (Tex. Civ. App. 1897) 39 S. W. Rep. 315. *Compare* Kingsley *v.* Sauer, (County Ct.) 17 Misc. (N. Y.) 544.

4. Nichols, etc., Co. *v.* Paulson, 10 N. Dak. 440; Capital Lumbering Co. *v.* Learned, 36 Oregon 544, 78 Am. St. Rep. 792.

5. Osborne *v.* Banks, 46 Conn. 444.
Where the property was replevied from a constable holding under a writ of attachment, the bond running to him and to his successors in office, it was held to be properly returned to another constable holding an execution under the judgment rendered in the suit. Richards *v.* Rape, 3 Ill. App. 24.

6. Rathbun *v.* Ranney, 14 Mich. 382; Acker *v.* White, 25 Wend. (N. Y.) 614; Ross *v.* Morse, (Mich. 1902) 88 N. W. Rep. 881, 8 Detroit Leg. N. 987.

7. Black *v.* Hilliker, 130 Cal. 190.

8. Eickhoff *v.* Eikenbary, 52 Neb. 332. See also Capital Lumbering Co. *v.* Learned, 36 Oregon 544, 78 Am. St. Rep. 792.
In *Kentucky* it is held that where a judgment is rendered in the alternative for a return of the property or for its value in case a return cannot be had, an execution as for a money judgment cannot be issued until there has been a return of execution by the sheriff showing that the property cannot be found. Rennebaum *v.* Atkinson, 105 Ky. 396.

9. Phillips *v* Hyde, 1 Dall. (Pa.) 439.

10. **Damages for Taking** — *England.* — Gamon *v.* Jones, 4 T. R. 509.
Connecticut. — Quinnipiac Brewing Co. *v.* Hackbarth, (Conn. 1902) 50 Atl. Rep. 1023.
Iowa. — McIntire *v.* Eastman, 76 Iowa 455.
Maine. — Washington Ice Co. *v.* Webster, 68 Me. 449; Dillingham *v.* Smith, 32 Me. 182.
Massachusetts. — Boston Loan Co. *v.* Myers, 143 Mass. 446.
Minnesota. — Ward *v.* Anderberg, 36 Minn. 300.
Missouri. — Edwards *v.* Eveler, 84 Mo. App. 405.
Nebraska. — School Dist. Number Two *v.* Shoemaker, 5 Neb. 36; Creighton *v.* Newton, 5 Neb. 100; Teel *v.* Miles, 51 Neb. 542; Schrandt *v.* Young, 62 Neb. 254.

actions does not prevent the defendant from recovering such damages.[1]

Measure of Damages. — The defendant is entitled to recover as damages such a sum as will be a fair indemnity to him for the injury he has sustained by reason of the unlawful taking and detention of his property.[2] Injury to other property of the defendant by reason of the taking of the property replevied cannot be considered as an element of the damages recoverable in the replevin action.[3]

Nominal Damages. — In the absence of proof of actual damages the defendant is entitled to nominal damages only.[4] And in other cases the defendant may be restricted to a recovery of nominal damages only, as where a recovery is defeated merely for failure to make demand before instituting the suit,[5] or where he was merely the pledgee of the property and therefore without authority to use it while in his possession,[6] or claimed merely a possessory lien upon the property,[7] or where the property replevied was securities bearing interest.[8]

Interest on Value. — The interest on the value of the property for the time the defendant was deprived of its possession is not necessarily the measure of his damages,[9] though in some instances it has been adopted as the proper measure of damages.[10]

Special Damages. — The defendant may recover special damages which he has suffered by reason of the property being taken from him,[11] but in order to do so he must show their amount with certainty.[12] Thus, where the defendant has incurred expenses in anticipation of future dealings with the property replevied which are rendered valueless to him by reason of the property being taken from him on the replevin writ, he may recover the amount of such expenses.[13]

The Depreciation in the Value of the Property while detained from the defendant may be recovered by him as damages.[14]

Value of Use. — Where the property replevied from the defendant was of such a character that it was daily used by him, he has been held entitled to recover as damages such amount as the use of the property was worth for the time he was deprived of its possession.[15] But if he elects to take a judgment

New York. — Woodruff *v.* Cook, 25 Barb. (N. Y.) 505; Barnard *v.* Devine, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 182.

North Dakota. — Nichols, etc., Co. *v.* Paulson, 10 N. Dak. 440.

Compare Wolf *v.* Blue, 5 Blackf. (Ind.) 153; White *v.* Lloyd, 3 Blackf. (Ind.) 390; Phipps *v.* Wilson, 125 N. Car. 106.

1. McIntire *v.* Eastman, 76 Iowa 455.

2. **Measure of Damages.** — Boston Loan Co. *v.* Myers, 143 Mass. 446.

3. Thus, in replevin for a building, injury to personal property therein occasioned by the removal of the building and the exposure of such property to the weather cannot be recovered by the defendant as an element of damages. Jameson *v.* Kent, 42 Neb. 412.

4. **Nominal Damages.** — Seabury *v.* Ross, 69 Ill. 533; Bartlett *v.* Brickett, 14 Allen (Mass.) 62.

5. Darling *v.* Tegler, 30 Mich. 54. And see Cunningham *v.* Metropolitan Lumber Co., (C. C. A.) 110 Fed. Rep. 332.

6. McArthur *v.* Howett, 72 Ill. 358. See also Peyton *v.* Robertson, 9 Wheat. (U. S.) 527.

7. Marx *v.* Woodruff, 50 Mich. 361 (replevin of impounded animals).

8. Bartlett *v.* Brickett, 14 Allen (Mass.) 62.

9. **Interest on Value.** — Boston Loan Co. *v.* Myers, 143 Mass. 446; Schrandt *v.* Young, 62 Neb. 254.

10. Hurd *v.* Gallaher, 14 Iowa 394; Barnes *v.* Bartlett, 15 Pick. (Mass.) 71; Hooker *v.* Hammill, 7 Neb. 231; Collins *v.* Houston, 138 Pa. St. 481; Halbert *v.* San Saba Springs Land, etc., Assoc., (Tex. Civ. App. 1895) 34 S. W. Rep. 636. *Compare* Andrews *v.* Costican, 30 Mo. App. 29; Smith *v.* Roby, 6 Heisk. (Tenn.) 546.

11. **Special Damages.** — Bateman *v.* Blake, 81 Mich. 227; Woodruff *v.* Cook, 25 Barb. (N. Y.) 505.

12. Hays *v.* Windsor, 130 Cal. 230.

13. Washington Ice Co. *v.* Webster, 68 Me. 449.

Thus, the expense of procuring teams and appliances for the removal of ice replevied, and which the replevin renders useless, may enter into the damages. Washington Ice Co. *v.* Webster, 62 Me. 341, 16 Am. Rep. 462, 68 Me. 449.

14. **Depreciation in Value.** — Teel *v.* Miles, 51 Neb. 542; Clow *v.* Yount, 93 Ill. App. 112; Bowersock *v.* Adams, 59 Kan. 779, 54 Pac. Rep. 1064; Hooker *v.* Hammill, 7 Neb. 231.

15. **Value of Use.** — Butler *v.* Mehrling, 15 Ill. 488; Hartley State Bank *v.* McCorkell, 91 Iowa 660; Boston Loan Co. *v.* Myers, 143 Mass. 446, (household furniture replevied); Clark *v.* Martin, 120 Mass. 543; Burt *v.* Burt, 41 Mich. 82; Hutchinson *v.* Hutchinson, 102 Mich. 635; Peerless Mach. Co. *v.* Gates, 61 Minn. 124; Schrandt *v.* Young, 62 Neb. 254.

Deduction for Wear and Tear Incident to Use when property is not used by the plaintiff. Peerless Mach. Co. *v.* Gates, 61 Minn. 124.

for the value of the property, as he may do in some jurisdictions, it seems that the value at the time the property was taken from him, with interest to the time of trial, is the full measure of damages, and he cannot in addition be allowed damages for the value of its use.[1]

Counsel Fees and Expenses of Action. — Counsel fees paid by the defendant in defense of the action are not an element of damages recoverable by him,[2] nor are other expenses in preparing to defend the action.[3]

Exemplary Damages. — It seems that exemplary damages may be awarded to the defendant where the institution of the replevin action by the plaintiff was vexatious and oppressive.[4]

Speculative Damages. — The defendant is not permitted to recover speculative damages.[5]

Offset Against Damages. — The plaintiff cannot offset against the defendant's claim for damages payment which he has voluntarily made upon the liabilities of the defendant.[6]

c. RECOVERY FOR VALUE OF PROPERTY — (1) *In General.* — Where the defendant was successful under his plea of property and the property which had been taken on the replevin writ and delivered to the plaintiff could not be returned, the defendant was entitled at common law to a judgment in the replevin action for the value of the property,[7] and this form of relief is generally recognized under the statutes governing the action of replevin in the several jurisdictions in the *United States*.[8] And if the plaintiff has no title or right to possession, the defendant is entitled to an alternate judgment for the full value of the property though he had only a possessory title or special

1. Becker *v.* Staab, 114 Iowa 319; Just *v.* Porter, 64 Mich. 565. *Compare* Hartley State Bank *v.* McCorkell, 91 Iowa 660.

2. **Counsel Fees and Expenses of Action.** — Hays *v.* Windsor, 130 Cal. 230; Black *v.* Hilliker, 130 Cal. 190; Cowden *v.* Lockridge, 60 Miss. 385; Ryan, etc., Cattle Co. *v.* Slaughter, 6 Utah 278.

3. Becker *v.* Staab, 114 Iowa 319.

4. **Exemplary Damages.** — Washington Ice Co. *v.* Webster, 68 Me. 449. See also Cable *v.* Dakin, 20 Wend. (N. Y.) 172; Marquisse *v.* Ormston, 15 Wend. (N. Y.) 368. *Compare* Butler *v.* Mehrling, 15 Ill. 488; Riewe *v.* McCormick, 11 Neb. 261.

5. **Speculative Damages.** — Butler *v.* Mehrling, 15 Ill. 488; Schrandt *v.* Young, 62 Neb. 254.

6. Thus, a payment by a plaintiff in replevin of a tax assessed to the defendant on the property — no seizure being made to enforce collection and the defendant objecting — is to be regarded as voluntary, and will not be allowed in reduction of the defendant's damages for the taking. Washington Ice Co. *v.* Webster, 68 Me. 449.

7. **Judgment for Value.** — Fitz. N. B. 159, note c.; Clark *v.* Adair, 3 Harr. (Del.) 113.

8. *United States.* — Williams *v.* Morrison, 29 Fed. Rep. 282.

Arizona. — Levy *v.* Leatherwood, (Ariz. 1898) 52 Pac. Rep. 359.

California. — Brown *v.* Johnson, 45 Cal. 76; Myers *v.* Moulton, 71 Cal. 498.

Georgia. — Jessie French Piano, etc., Co. *v.* Cardwell, 114 Ga. 340.

Illinois. — Janes *v.* Gilbert, 168 Ill. 627.

Indiana. — Noble *v.* Epperly, 6 Ind. 468.

Iowa. — Minthon *v.* Lewis, 78 Iowa 620.

Kansas. — Higbee *v.* McMillan, 18 Kan. 133.

Maine. — Washington Ice Co. *v.* Webster, 62 Me. 364, 16 Am. Rep. 462; Washington Ice Co. *v.* Webster, 68 Me. 449.

Massachusetts. — Veazie *v.* Somerby, 5 Allen (Mass.) 280.

Michigan. — Charpentier *v.* Bresnahan, 74 Mich. 48.

Mississippi. — Pearce *v.* Twichell, 41 Miss. 344.

Missouri. — Hohenthal *v.* Watson, 28 Mo. 360; Clarkson *v.* Jenkins, 48 Mo. App. 221.

Nebraska. — Moore *v.* Kepner, 7 Neb. 291; Ulrich *v.* McConaughey, 63 Neb. 10; Bates *v.* Stanley, 51 Neb. 252.

New York. — Dwight *v.* Enos, 9 N. Y. 470.

North Carolina. — Rawlings *v.* Neal, 126 N. Car. 271.

North Dakota. — Nichols, etc., Co. *v.* Paulson, 10 N. Dak. 440.

Wisconsin. — Puncheon *v.* Hill, 38 Wis. 156.

Destruction of Property by Fire Pending a Replevin Action is no defense to a judgment for the defendant for value. Suppiger *v.* Gruaz, 137 Ill. 216.

Where, in replevin for live stock, after the plaintiff had acquired possession some of the cattle died, the defendant, upon electing to take a money judgment, is entitled to have it cover all the property. Lillie *v.* McMillan, 52 Iowa 463.

For Property Not Taken under the Writ, but otherwise acquired by the plaintiff before action, no judgment for value can be rendered. Jandt *v.* Potthast, 102 Iowa 223.

In *Indiana*, where replevin is instituted in the justices' court and an appeal is taken to the Circuit Court, a judgment for the defendant rendered in the Circuit Court can be only for the return of the property and not for its value in case a return cannot be had. Van Meter *v.* Barnett, 119 Ind. 35. See also People *v.* Judges, 1 Dougl. (Mich.) 302.

interest in the property, the title or general ownership being in a stranger.[1] This provision allowing the defendant to take judgment in the alternative for the value of the property in case a return cannot be had has been held to be for the benefit of the defendant and that, therefore, the plaintiff cannot object to a judgment for a return of the property without the alternative that, if the property cannot be had, the defendant may recover its value.[2]

Option to Take Judgment for Value. — In some jurisdictions the defendant is permitted by statute, where he is successful, at his option to waive a return of the property and take judgment for its value.[3] In other jurisdictions the defendant is entitled to judgment for the value of the property only where a return cannot be had, thereby leaving to the plaintiff the right to return the property.[4] But even in the latter jurisdiction, if it is admitted by the plaintiff that he has disposed of the property or is not in a position to make a return, he cannot object that the judgment for the defendant is for the value of the property instead of in the alternate for a return or the value in case no return can be had.[5] And a judgment for value instead of for a return or value is not

1. Special Property in Defendant — *Arizona.* — Hall *v.* Southern Pac. Co., (Ariz. 1899) 57 Pac. Rep. 617.

Dakota. — Madison Nat. Bank *v.* Farmer, 5 Dak. 282.

Illinois. — Wheat *v.* Bower, 42 Ill. App. 600.

Kansas. — Hall *v.* Jenness, 6 Kan. 356.

Michigan. — Steere *v.* Vanderberg, 90 Mich. 187.

Missouri. — Dilworth *v.* McKelvy, 30 Mo. 149; Fallon *v.* Manning, 35 Mo. 271; Frei *v.* Vogel, 40 Mo. 149.

New York. — Morss *v.* Stone, 5 Barb. (N. Y.) 516; Buck *v.* Remsen, 34 N. Y. 383.

Oregon. — Coos Bay, etc., R. Co. *v.* Siglin, 34 Oregon 80.

Defendant One of Several Cotenants. — Lowe *v.* Smith, 23 Mo. App. 44.

2. Thompson *v.* Scheid, 39 Minn. 102, 12 Am. St. Rep. 619; Morrison *v.* Austin, 14 Wis. 601. See also Lamping *v.* Payne, 83 Ill. 463; Woodbury *v.* Tuttle, 26 Ill. App. 211; Dixon *v.* Atkinson, 86 Mo. App. 24; Scott *v.* Burrill, 44 Neb. 755.

3. Option of Defendant — *Arkansas.* — Hill *v.* Fellows, 25 Ark. 11.

Iowa. — Hartley State Bank *v.* McCorkell, 91 Iowa 660; Becker *v.* Staab, 114 Iowa 319.

Michigan. — People *v.* Tripp, 15 Mich. 518; Humphrey *v.* Bayn, 45 Mich. 565; Henderson *v.* Desborough, 28 Mich. 170; Stack *v.* Smith, 54 Mich. 238; Johnson *v.* Dick, 69 Mich. 108; Steere *v.* Vanderberg, 90 Mich. 187.

Wisconsin. — Pratt *v.* Donovan, 10 Wis. 378; Farmers' L. & T. Co. *v.* Commercial Bank, 15 Wis. 424, 82 Am. Dec. 689; Timp *v.* Dockham, 32 Wis. 146; Kloety *v.* Delles, 45 Wis. 484. *Compare* Smith *v.* Coolbaugh, 19 Wis. 106; Baxter *v.* Berg, 88 Wis. 399.

See also Herring *v.* Corder, 49 Mo. App. 378.

Where Property Restored. — If, pending the replevin action, the property has been restored to the possession of the defendant, he cannot afterwards, if successful, elect to take a judgment for the value of the property. Harrow *v.* Ryan, 31 Iowa 156.

Failure of Officer to Make Return of Replevin Writ. — Frank *v.* Brown, 119 Mich. 631.

Possessory Title in Defendant. — Steere *v.* Vanderberg, 90 Mich. 187; Whitney *v.* Hyde, 91 Mich. 13.

Where the Defendant in Replevin Has Waived Return he is entitled to a verdict for the value of such property in his possession as is claimed by the declaration, but as to the ownership of which there is no evidence. White *v.* White, 58 Mich. 546.

Exercise of Election. — In *Michigan* it is held that the record must show an election by the defendant to take a judgment for the value of the property in lieu of its return. Adams *v.* Champion, 31 Mich. 233. See, however, Hill *v.* Fellows, 25 Ark. 11. But this election is sufficiently shown by a recital to such effect in the judgment. Kline *v* Kline, 49 Mich. 419; Brown *v.* Horning, 76 Mich. 542.

Time of Exercising Election. — Brown *v.* Horning, 76 Mich. 542.

Property Taken under Replevin Writ by Mistake. — Dewey *v.* Hastings, 79 Mich. 263.

4. *California.* — Washburn *v.* Huntington, 78 Cal. 577; Etchepare, *v.* Aguirre, 91 Cal. 288, 25 Am. St. Rep. 180.

Colorado. — Horn *v.* Citizens Sav., etc., Bank, 8 Colo. App. 535.

Kansas. — Hall *v.* Jenness, 6 Kan. 356.

Kentucky. — Rogers *v.* Bradford, 8 Bush (Ky.) 163; Reid *v.* King, 89 Ky. 388.

Minnesota. — Robertson *v.* Davidson, 14 Minn. 554.

Nebraska. — Manker *v.* Sine, 35 Neb. 746; Singer Mfg. Co. *v.* Dunham, 33 Neb. 686; Martin *v.* Foltz, 54 Neb. 162.

New York. — Cochran *v.* Gottwald, 41 N. Y. Super. Ct. 317; Dwight *v.* Enos, 9 N. Y. 470, Wood *v.* Orser, 25 N. Y. 348; Seaman *v.* Luce, 23 Barb. (N. Y.) 240; Glann *v.* Younglove, 27 Barb. (N. Y.) 480.

North Carolina. — Horton *v.* Horne, 99 N. Car. 219.

South Carolina. — Robbins *v.* Slattery, 30 S. Car. 328, note.

Tennessee. — Nashville Ins., etc., Co. *v.* Alexander, 10 Humph. (Tenn.) 378; Hamilton *v.* Henney Buggy Co., 102 Tenn. 714.

5. *California.* — Brown *v.* Johnson, 45 Cal. 77.

Colorado. — McCarthy *v.* Strait, 7 Colo. App. 59.

Idaho. — Johnson *v.* Fraser, 2 Idaho 371.

Indian Territory. — Noble *v.* Worthy, 1 Indian Ter. 458.

void so as to be subject to collateral attack.[1]

Special Interest in Defendant. — Where the plaintiff is the general owner of the property, but the defendant has a special property therein, with right to possession, in fixing the value of the property in case a return is not had the value of the defendant's special property only is to be considered.[2] Thus, where the defendant holds the property under a valid attachment or execution, the judgment for value is to be for the amount of the judgment or claim for which attachment issued in case the value of the property exceeds such amount;[3] and the same principle applies where the defendant has only a possessory lien,[4] or where the mortgagor replevies property from the mortgagee.[5] Where property distrained for rent, taxes, etc., is improperly replevied, the defendant is entitled only to an alternate judgment for value to the extent of the claim distrained for,[6] though some statutes, as a penalty for replevying property lawfully distrained for rent or taxes, authorize a judgment for the defendant for double or treble the amount of the rent or tax.[7] Where the defendant's interest in the property is a lien for money, his recovery for the value of his special interest should in no case

Nebraska. — Goodman *v.* Kennedy, 10 Neb. 270; Selby *v.* McQuillan, 59 Neb. 158; Ulrich *v.* McConaughey, 63 Neb. 10, *disapproving* Lee *v.* Hastings, 13 Neb. 508.

Compare Cochran *v.* Gottwald, 41 N. Y. Super. Ct. 317; Robbins *v.* Slattery, 30 S. Car. 328, note.

1. Fromlet *v.* Poor, 3 Ind. App. 425; Robertson *v.* Davidson, 14 Minn. 554.

2. Where Plaintiff General Owner — *Arizona.* — Levy *v.* Leatherwood, (Ariz. 1898) 52 Pac. Rep. 359.

California. — Pico *v.* Martinez, 55 Cal. 148.

Colorado. — Witkowski *v.* Hill, 17 Colo. 372.

Indiana. — Noble *v.* Epperly, 6 Ind. 468; Geisendorff *v.* Eagles, 70 Ind. 418.

Indian Territory. — Barse Live Stock Commission Co. *v.* Adams, 2 Indian Ter. 119.

Iowa. — Peck *v.* Bonebright, 75 Iowa 98.

Kansas. — Deford *v.* Hutchison, 45 Kan. 332; Scott *v.* Beard, 5 Kan. App. 560; Shahan *v.* Smith, 38 Kan. 474; Friend *v.* Green, 43 Kan. 168.

Kentucky. — Anderson *v.* Heile, 23 Ky. L. Rep. 1115, 64 S. W. Rep. 849.

Maine. — Crabtree *v.* Clapham, 67 Me. 326.

Michigan. — Fowler *v.* Hoffman, 31 Mich. 216; Sterner *v.* Hodgson, 63 Mich. 419; Williams *v.* Bresnahan, 66 Mich. 634; Ellis *v.* Simpkins, 81 Mich. 1; Kelsey *v.* Ming, 118 Mich. 438.

Missouri. — Dilworth *v.* McKelvy, 30 Mo. 149; Fulkerson *v.* Dinkins, 28 Mo. App. 160; Gentry *v.* Templeton, 47 Mo. App. 55; Hall *v.* Bramell, 87 Mo. App. 285.

Nebraska. — Creighton *v.* Haythorn, 49 Neb. 526; Earle *v.* Burch, 21 Neb. 702.

New York. — McCobb *v.* Christiansen, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 119.

Ohio. — Wolf *v.* Meyer, 12 Ohio St. 432; Coe *v.* Peacock, 14 Ohio St. 187.

Oklahoma. — McFadyen *v.* Masters, (Okla. 1901) 66 Pac. Rep. 284.

Utah. — Ryan, etc., Cattle Co. *v.* Slaughter, 6 Utah 278.

Wisconsin. — Gaynor *v.* Blewitt, 69 Wis. 582; Bleiler *v.* Moore, 88 Wis. 438.

3. *Arizona.* — Levy *v.* Leatherwood, (Ariz. 1898) 52 Pac. Rep. 359.

Colorado. — Witkowski *v.* Hill, 17 Colo. 372.

Illinois. — MacLachlan *v.* Pease, 171 Ill. 527, *affirming* 66 Ill. App. 634.

Iowa. — Hayden *v.* Anderson, 17 Iowa 158; McNorton *v.* Akers, 24 Iowa 369; Ormsby *v.* Nolan, 69 Iowa 130.

Kansas. — Shahan *v.* Smith, 38 Kan. 474; Ponceler *v.* Marshall, 45 Kan. 672; Pope *v.* Bowzer, 1 Kan. App. 727; Moore *v.* Shaw, 1 Kan. App. 103.

Michigan. — Williams *v.* Bresnahan, 66 Mich. 634; New Home Sewing Mach. Co. *v.* Bothane, 70 Mich. 443; Mueller *v.* Provo, 80 Mich. 475, 20 Am. St. Rep. 525.

Minnesota. — Dodge *v.* Chandler, 13 Minn. 114; La Crosse, etc., Steam Packet Co. *v.* Robertson, 13 Minn. 291.

Missouri. — Kerr *v.* Drew, 90 Mo. 147.

Nebraska. — Welton *v.* Beltezore, 17 Neb. 399; Kilpatrick-Koch Dry Goods Co. *v.* Strauss, 45 Neb. 793; Gates *v.* Parrott, 31 Neb. 581; Gamble *v.* Wilson, 33 Neb. 270.

Wisconsin. — Booth *v.* Ableman, 20 Wis. 602; Blakeslee *v.* Rossman, 44 Wis. 550; Bleiler *v.* Moore, 88 Wis. 438; Clark *v.* Lamoreux, 70 Wis. 508.

Where a Mortgagor Replevies Property seized on execution against him, and the mortgage is a prior lien to the execution and the equity of redemption is of no appreciable value, the defendant's alternate judgment for value is only for nominal charges. Geisendorff *v.* Eagles, 70 Ind. 418.

So, Also, Where a Mortgagee Improperly Replevies the Mortgaged Chattels which had been seized on execution against the mortgagor, but the time of the mortgage was prior to the execution and the value of the property is less than the mortgage debt, the defendant is entitled only to nominal damages as an alternate judgment for value. Coe *v.* Peacock, 14 Ohio St. 187.

4. Dilworth *v.* McKelvy, 30 Mo. 149.

5. Burke *v.* Birchard, 47 Wis. 35.

6. Neale *v.* Mackenzie, 1 Gale 119, 1 M. & W. 747; Moore *v.* Lee, 51 Miss. 375; Barr *v.* Hughes, 44 Pa. St. 516; Fitzsimmons *v.* Paul, 31 Pittsb. Leg. J. N. S. (Pa.) 137. See also Clemons *v.* Will, 5 Lack. Leg. N. (Pa.) 143.

7. Newman *v.* Bernard, 3 Moo. & S. 738, 10

exceed the full value of the property.[1]

(2) *Offset Against Value.* — Where the plaintiff had expended money in the improvement of the property replevied and thereafter the defendant acquired possession of the property and the property was then taken from his possession in the replevin action, the value of the property for the purpose of an alternate judgment for the defendant is to be assessed at its full value, without deduction for the expenditures by the plaintiff in its improvement.[2] Where a judgment is rendered for the defendant for the value of the property the plaintiff cannot set off against such judgment a claim due to him from the defendant, and thereby defeat the defendant's personal exemption.[3]

(3) *Proof of Value.* — The rules of evidence as to admissibility and incompetency upon proof of value generally apply equally to such evidence when offered by the defendant to prove the value of the replevied property for the purpose of an alternate judgment for value in his favor.[4]

The Burden of Proving the value of the property for the purpose of an alternate judgment for the defendant for its value is upon the defendant.[5]

Recitals in Plaintiff's Affidavit or Bond as Proof of Value. — The recitals by the plaintiff in his affidavit for the issuance of the writ of replevin, or in the replevy bond, are evidence in favor of the defendant as to the value of the property,[6] but they are not conclusive so as to preclude the plaintiff from showing that the property is of less value,[7] and *a fortiori* do not conclude the defendant from showing that the property is of greater value.[8]

Estimation of Value as Regards Time. — In some jurisdictions the value of the property replevied for the purpose of a judgment in favor of the defendant for its value is to be estimated as of the time the property was taken on the replevin writ,[9] especially where the defendant, under statutory sanction, elects to take a judgment for the value of the property, with interest to the date of the judgment.[10] In other jurisdictions the value is assessed as of the time of the trial,[11] and the defendant is given as damages for the detention

Bing. 274, 25 E. C. L. 130; Maxwell *v.* Light, 1 Call (Va.) 117.

1. Moore *v.* Shaw, 1 Kan. App. 103; Scott *v.* Beard, 5 Kan. App. 560; Severance *v.* Melick, 15 Neb. 610; Welton *v.* Beltezore, 17 Neb. 399; Cruts *v.* Wray, 19 Neb. 581; Jennings *v.* Johnson, 17 Ohio 154, 49 Am. Dec. 451. *Compare* Janes *v.* Gilbert, 168 Ill. 627.

Presumption.— Forster *v.* Brown, 119 Mich. 86.

2. Cunningham *v.* Metropolitan Lumber Co., (C. C. A.) 110 Fed. Rep. 332; Nitz *v.* Bolton, 71 Mich. 388, 80 Mich. 470. See also Hall *v.* Southern Pac. Co., (Ariz. 1899) 57 Pac. Rep. 617.

3. Rawlings *v.* Neal, 126 N. Car. 271.

4. **Proof of Value.** — Minthon *v.* Lewis, 78 Iowa 620; Washington Ice Co. *v.* Webster, 68 Me. 449; Jennings *v.* Prentice, 39 Mich. 421; Denton *v.* Smith, 61 Mich. 431; Ellis *v.* Simpkins, 81 Mich. 1; Brizsee *v.* Maybee, 21 Wend. (N. Y.) 144; Weitz *v.* Wenham, 6 Ohio Cir. Dec. 563, 10 Ohio Cir. Ct. 348; Cassidy *v.* Elias, 90 Pa. St. 434; Harrington *v.* Neely, 7 Baxt. (Tenn.) 442.

5. **Burden of Proof.** — Keystone Implement Co. *v.* Welsheimer, 8 Kan. App. 861, 55 Pac. Rep. 348; Archer *v.* Long, 32 S. Car. 171; Mann *v.* Grove, 4 Heisk. (Tenn.) 403.

6. **Recitals in Affidavit or Bond.** — Weil *v.* Ryus, 39 Kan. 564; Schultz *v.* Hickman, 27 Mo. App. 21; Lamy *v.* Remuson, 2 N. Mex. 245; Butts *v.* Woods, 4 N. Mex. 187.

7. Linn *v.* Wright, 18 Tex. 317, 70 Am. Dec. 282; Jenkins *v.* Steanka, 19 Wis. 126, 88 Am. Dec. 675. *Compare* Washington Ice Co. *v.* Webster, 62 Me. 341, 16 Am. Rep. 462; Lamy *v.* Remuson, 2 N. Mex. 245; Butts *v.* Woods, 4 N. Mex. 187; Capital Lumbering Co. *v.* Learned, 36 Oregon 544, 78 Am. St. Rep. 792.

In Weyerhaeuser *v.* Foster, 60 Minn. 223, it was held that except in exceptional cases the value so fixed by the plaintiff is conclusive upon him.

8. Thomas *v.* Spofford, 46 Me. 408; Washington Ice Co. *v.* Webster, 62 Me. 364, 16 Am. Rep. 462.

9. **Estimation of Value as Regards Time.** — Taylor *v.* Richardson, 4 Houst. (Del.) 300; Garrett *v.* Wood, 3 Kan. 231; Berthold *v.* Fox, 13 Minn. 501, 97 Am. Dec. 243; Moore *v.* Kepner, 7 Neb. 291; Aultman *v.* Stichler, 21 Neb. 72; Connelly *v.* Edgerton, 22 Neb. 82.

10. Just *v.* Porter, 64 Mich. 565; Suydam *v.* Jenkins, 3 Sandf. (N. Y.) 614.

11. *Missouri.*—Chapman *v.* Kerr, 80 Mo. 158 [*disapproving* Woodburn *v.* Cogdal, 39 Mo. 228; Miller *v.* Whitson, 40 Mo. 101]; Burkeholder *v.* Rudrow, 19 Mo. App. 60; Anchor Milling Co. *v.* Walsh, 20 Mo. App. 107; Schultz *v.* Hickman, 27 Mo. App. 21; Hinchey *v.* Koch, 42 Mo. App. 230; Kirkendall *v.* Hartsock, 58 Mo. App. 234; Standard Oil Co. *v.* Meyer Bros. Drug Co., 84 Mo. App. 76. See also Pope *v.* Jenkins, 30 Mo. 528; Mix *v.* Kepner, 81 Mo. 93; Kreibohm *v.* Yancey, 154 Mo. 67.

North Carolina. — Holmes *v.* Godwin, 69 N. Car. 467.

Texas. — Halbert *v.* San Saba Springs Land,

the amount of any deterioration in value from the time the property was replevied to the time of trial.[1]

d. DISMISSAL, DISCONTINUANCE, AND NONSUIT. — Where the plaintiff has acquired possession of the property by virtue of the replevin writ, he cannot voluntarily dismiss the action so as to prevent the defendant from demanding an inquiry into the right to the possession for the purpose of the return of the property in case he is entitled thereto, and for the recovery of damages for its wrongful taking.[2] And where the plaintiff suffers a dismissal or discontinuance for failure to prosecute the action, the court may order a return of the property to the defendant,[3] and the same is true when the plaintiff is either voluntarily or involuntarily nonsuited.[4] A judgment for a return to the defendant may be rendered where the writ is abated,[5] as where it is abated for want of the requisite bond,[6] or the requisite affidavit,[7] or for failure of the writ to describe sufficiently the property to be replevied.[8]

Want of Jurisdiction. — Where the court in which the action of replevin is instituted has no jurisdiction, and the property has been taken under the writ and delivered to the plaintiff, the court, in dismissing the action, cannot ren-

etc., Assoc., (Tex. Civ. App. 1895) 34 S. W. Rep. 636.

See also Mayberry *v.* Cliffe, 7 Coldw. (Tenn.) 117.

1. Chapman *v.* Kerr, 80 Mo. 158; Anchor Milling Co. *v.* Walsh, 20 Mo. App. 107; Hinchey *v.* Koch, 42 Mo. App. 230.

2. Dismissal, Discontinuance, and Nonsuit — *United States.* — Jumeau *v.* Brooks, (C. C. A.) 109 Fed. Rep. 353. *Compare* Davison *v.* Gibson, (C. C. A.) 76 Fed. Rep. 717; Lapp *v.* Ritter, 88 Fed. Rep. 109 (construing Indiana statute).

Arkansas. — Glenn *v.* Porter, 68 Ark. 320.

District of Columbia. — Corbett *v.* Pond, 10 App. Cas. (D. C.) 17.

Iowa. — Chadwick *v.* Miller, 6 Iowa 34; Marshall *v.* Bunker, 40 Iowa 121; Crist *v.* Francis, 50 Iowa 257.

Kansas. — McVey *v.* Burns, 14 Kan. 291.

Kentucky. — Kerley *v.* Hume, 3 T. B. Mon. (Ky.) 181.

Massachusetts. — Quincy *v.* Hall, 1 Pick. (Mass.) 357, 11 Am. Dec. 198.

Michigan. — Soper *v.* Hawkins, 56 Mich. 527; Saunders *v.* Closs, 117 Mich. 130.

Missouri. — Smith *v.* Winston, 10 Mo. 299.

Nebraska. — Aultman *v.* Reams, 9 Neb. 487; Moore *v.* Herron, 17 Neb. 697; Ahlman *v.* Meyer, 19 Neb. 63; Garber *v.* Palmer, 47 Neb. 699; Vose *v.* Muller, 48 Neb. 602; Houck *v.* Linn, 56 Neb. 743.

New Mexico. — Brannin *v.* Bremen, 2 N. Mex. 40.

New York. — Rosenberg *v.* Flack, 57 Hun (N. Y.) 587, 10 N. Y. Supp. 759.

Pennsylvania. — Broom *v.* Fox, 2 Yeates (Pa.) 531.

Washington. — Liebmann *v.* McGraw, 3 Wash. 520.

Wisconsin. — Saunderson *v.* Lace, 1 Chand. (Wis.) 231.

See also Salkold *v.* Skelton, Cro. Jac. 519; Mikesill *v.* Chaney, 6 Ind. 52. *Compare* Wiseman *v.* Lynn, 39 Ind. 250; Hulman *v.* Benighof, 125 Ind. 481.

3. *California.* — Kneebone *v.* Kneebone, 83 Cal. 645.

Delaware. — McIlvaine *v.* Holland, 5 Harr. (Del.) 226.

Illinois. — McCrory *v.* Hamilton, 39 Ill. App. 490; Luthy *v.* Kline, 56 Ill. App. 314; Tanton *v.* Slyder, 93 Ill. App. 455. See also American Preservers' Co. *v.* Bishop, 83 Ill. App. 493.

Iowa. — Rickner *v.* Dixon, 2 Greene (Iowa) 591; Funk *v.* Israel, 5 Iowa 438.

Michigan. — Wheeler *v.* Wilkins, 19 Mich. 78; Treadwell *v.* Paddock, 75 Mich. 286; Johnson *v.* Dick, 69 Mich. 108; Hoffman *v.* Gorman, 123 Mich. 485.

Minnesota. — Pabst Brewing Co. *v.* Butchart, 68 Minn. 303.

Missouri. — Reed *v.* Wilson, 13 Mo. 28; Maids *v.* Watson, 13 Mo. 544; Nelson *v.* Luchtemeyer, 49 Mo. 56.

Nebraska. — Bolin *v.* Fines, 60 Neb. 443.

Ohio. — Wellman *v.* Wellman, 11 Ohio Dec. (Reprint) 815, 30 Cinc. L. Bul. 19.

Oregon. — Capital Lumbering Co. *v.* Hall, 10 Oregon 202.

4. *Illinois.* — Fowler *v.* Richardson, 32 Ill. App. 252.

Iowa. — Harman *v.* Goodrich, 1 Greene (Iowa) 13.

Maine. — Washington Ice Co. *v.* Webster, 68 Me. 449.

Michigan. — Pearsons *v.* Eaton, 18 Mich. 79.

New Mexico. — Brannin *v.* Bremen, 2 N. Mex. 40.

New York. — Murphy *v.* Jenkins, 1 Den. (N. Y.) 669; Van Alstine *v.* Kittle, 18 Wend. (N. Y.) 524. See also Gale *v.* Hoysradt, (Supm. Ct. Spec. T.) 1 How. Pr. (N. Y.) 72.

North Carolina. — Pannell *v.* Hampton, 10 Ired. L. (32 N. Car.) 463.

Wisconsin. — Fugina *v.* Brownlie, 65 Wis. 628.

Wyoming. — Bath *v.* Ingersoll, 1 Wyo. 280.

5. Walko *v.* Walko, 64 Conn. 74; Greely *v.* Currier, 39 Me. 516; Bettinson *v.* Lowery, 86 Me. 218; Kendrick *v.* Watkins, 54 Miss. 495; Xenia Twine, etc., Co. *v.* Hooven, etc., Co., 11 Ohio Dec. (Reprint) 120, 25 Cinc. L. Bul. 10.

6. Fleet *v.* Lockwood, 17 Conn. 233; Wallridge *v.* Shaw, 7 Cush. (Mass.) 560; Lowe *v.* Brigham, 3 Allen (Mass.) 429.

7. Barruel *v.* Irwin, 2 N. Mex. 223. *Compare* Bolin *v.* Fines, 60 Neb. 443.

8. Parsell *v.* Genesee Circuit Judge, 39 Mich. 542.

der a judgment for the return of the property to the defendant or for its value.[1]

3. Where Each Party Is Partly Successful. — In some instances the plaintiff has attempted to replevy distinct chattels to some of which he had title and right to possession, while the title and right to the possession of the others were in the defendant; in such a case the plaintiff recovers as to the part of the chattels to which he has title and right to possession and the defendant as to the chattels to which he has title and right to possession.[2]

4. Costs. — With regard to the allowance of costs in replevin actions, the general rule applicable to actions usually prevails, that is, that the costs are allowed to the successful party.[3] And where each party is partly successful,

1. Want of Jurisdiction — *United States.* — Burdett *v.* Doty, 38 Fed. Rep. 491.

Iowa. — Williams *v.* Chapman, 60 Iowa 57.

Massachusetts. — Gray *v.* Dean, 136 Mass. 128; Jordan *v.* Dennis, 7 Met. (Mass.) 590.

Michigan. — Parsell *v.* Genesee Circuit Judge, 39 Mich. 542.

Nebraska. — Bolin *v.* Fines, 60 Neb. 443; State *v.* Letton, 56 Neb. 158.

See also Miller *v.* Daly, 55 Neb. 771; Smith *v.* Fisher, 13 R. I. 624; Booth *v.* Ableman, 16 Wis. 460, 84 Am. Dec. 711. *Compare* Swain *v.* Savage, 55 Neb. 687.

2. Where Each Party Is Partly Successful — *Dakota.* — Jandt *v.* South, 2 Dak. 46.

Delaware. — Knowles *v.* Pierce, 5 Houst. (Del.) 178.

Georgia. — Bell *v.* Ober, etc., Co., 111 Ga. 668.

Illinois. — O'Keefe *v.* Kellogg, 15 Ill. 347.

Indiana. — Wright *v.* Mathews, 2 Blackf. (Ind.) 187.

Iowa. — Becker *v.* Staab, 114 Iowa 319.

Montana. — Collier *v.* Fitzpatrick, 19 Mont. 562.

Nebraska. — Pilger *v.* Marder, 55 Neb. 113.

New Hampshire. — Williams *v.* Beede, 15 N. H. 483.

Texas. — Jackson *v.* Phillips, (Tex. Civ. App. 1896) 35 S. W. Rep. 745.

3. Costs — *England.* — Jamieson *v.* Trevelyan, 10 Exch. 748, 3 C. L. R. 702, 24 L. J. Exch. 74, 1 Jur. N. S. 334; Jones *v.* Johnson, 6 Exch. 133, 2 L. M. & P. 177, 20 L. J. M. C. 169; Newnham *v.* Bever, 7 Dowl. & L. 253, 8 C. B. 560, 65 E. C. L. 560.

Arizona. — Billups *v.* Freeman, (Ariz. 1898) 52 Pac. Rep. 367.

Arkansas. — Rowark *v.* Lee, 14 Ark. 425; Morrill *v.* Daniel, 47 Ark. 316.

California. — Edgar *v.* Gray, 5 Cal. 267; O'Connor *v.* Blake, 29 Cal. 312; Rohr *v.* McCaig, 33 Cal. 309; Wheatland Mill Co. *v.* Pirrie, 89 Cal. 459; Meads *v.* Lasar, 92 Cal. 221, 93 Cal. 530.

Colorado. — Clark *v.* Dreyer, 9 Colo. App. 453.

Connecticut. — Barney *v.* Brannan, 51 Conn. 175.

Delaware. — McIlvaine *v.* Holland, 5 Harr. (Del.) 226.

Florida. — McGriff *v.* Ried, 37 Fla. 51; Webster *v.* Brunswick-Balke Callender Co., 37 Fla. 433.

Georgia. — Wall *v.* Johnson, 88 Ga. 524.

Illinois. — Butler *v.* Mehrling, 15 Ill. 488; Lill *v.* Stookey, 72 Ill. 495; Doane *v.* Lockwood, 115 Ill. 490; Farwell *v.* Hanchett, 19 Ill. App. 620; Scaling *v.* Knollin, 94 Ill. App. 443.

Indiana. — Chissom *v.* Lamcool, 9 Ind. 530; Polk *v.* Nickens, 63 Ind. 439.

Iowa. — Harvey *v.* Pinkerton, 101 Iowa 246.

Kansas. — Garrett *v.* Wood, 3 Kan. 231; Furrow *v.* Chapin, 13 Kan. 107; Smith *v.* Woodleaf, 21 Kan. 717; Sims *v.* Mead, 29 Kan. 124; Cowling *v.* Greenleaf, 32 Kan. 392; Armel *v.* Layton, 33 Kan. 41.

Kentucky. — Asbell *v.* Tipton, 1 B. Mon. (Ky.) 300.

Maine. — Harding *v.* Harris, 2 Me. 162; Ridlon *v.* Emery, 6 Me. 261; Brewer *v.* Curtis, 12 Me. 51; Ingraham *v.* Martin, 15 Me. 373; Dodge *v.* Reed, 40 Me. 331; Lewis *v.* Warren, 49 Me. 322; Washington Ice Co. *v.* Webster, 62 Me. 341, 16 Am. Rep. 462, 68 Me. 449.

Massachusetts. — Davis *v.* Hastings, 8 Cush. (Mass.) 313; Wheeler *v.* Train, 4 Pick. (Mass.) 168; Martin *v.* Bayley, 1 Allen (Mass.) 381; Ashton *v.* Touhey, 131 Mass. 26.

Michigan. — Merrill *v.* Butler, 18 Mich. 294; Hinchman *v.* Doak, 48 Mich. 168; Kirby Carpenter Co. *v.* Trombley, 101 Mich. 447; Byrnes *v.* Palmer, 113 Mich. 17.

Minnesota. — Oleson *v.* Newell, 12 Minn. 186; Coit *v.* Waples, 1 Minn. 134.

Mississippi. — Dearing *v.* Ford, 13 Smed. & M. (Miss.) 269.

Missouri. — Steinwender *v.* Outley, 5 Mo. App. 589; Ingals *v.* Ferguson, 59 Mo. App. 299.

Nebraska. — Tilden *v.* Stilson, 49 Neb. 382; Rodgers *v.* Graham, 36 Neb. 730; Scott *v.* Burrill, 44 Neb. 755; Hooker *v.* Hammill, 7 Neb. 231; Search *v.* Miller, 9 Neb. 26.

Nevada. — Lambert *v.* McFarland, 2 Nev. 58.

New Jersey. — Chambers *v.* Hunt, 20 N. J. L. 109; Hunton *v.* Palmer, 67 N. J. L. 94.

New Mexico. — Ward *v.* Broadwell, 1 N. Mex. 75; Brannin *v.* Bremen, 2 N. Mex. 40.

New York. — Rogers *v.* Arnold, 12 Wend. (N. Y.) 31; Hawley *v.* Green, 18 Wend. (N. Y.) 654; Johnson *v.* Fellows, 6 Hill (N. Y.) 353; Minks *v.* Wolf, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 238; Vowles *v.* Murray, (Brooklyn City Ct. Spec. T.) 50 How. Pr. (N. Y.) 159; Hoag *v* Moss, (Marine Ct. Spec. T.) 1 City Ct. (N. Y.) 174; Davis *v.* Newcomb, 1 Den. (N. Y.) 661; Wilkins *v.* Williams, (Supm. Ct. Gen. T.) 15 Civ. Pro. (N. Y.) 168; Claflin *v.* Davidson, (N. Y. Super. Ct. Spec. T.) 8 Civ. Pro. (N. Y.) 46; Lockwood *v.* Waldorf, 91 Hun (N. Y.) 281; Herman *v.* Girvin, 8 N. Y. App. Div. 418; Rapid Safety Filter Co. *v.* Wyckoff, (N. Y. City

part of the property being awarded to each, the costs are apportioned.[1] The expenses of taking and removing the property by the officer are taxable as part of the costs.[2] In *Illinois* it was held that the costs of the writ of *de retorno habendo* are no part of the costs to be recovered with the judgment,[3] and in *Michigan*, where a building was replevied and removed from the land of the defendant and a judgment for a return was rendered for the defendant, the expense of replacing the building upon the land was held not to be taxable as costs, but should be recovered as damages for the taking.[4]

IX. Replevin Bond — 1. Necessity for Bond. — At common law, the sheriff was required to take pledges from the plaintiff to prosecute the action, and by the statute of Westminster II., c. 2, § 3 (13 Edw. I.) the sheriff was required to take pledges for the prosecution of the action and also for a return of the property replevied if a return should be awarded. By the statute of 11 Geo. II., c. 19, § 23, the sheriff was required to take a bond with sureties, in double the value of the property to be replevied, conditioned for the prosecution of the action without delay, and for the return of the property replevied in case a return was awarded. At the present time in the *United States* the statutes generally require, where the property is to be taken at the commencement of the action and delivered over to the plaintiff, a bond with sureties conditioned generally for the prosecution of the action, the return of the property if a return is adjudged, and the payment of all costs and damages adjudged to the defendant.[5] Where the necessary bond is not taken, the officer, in executing the writ

Ct. Gen. T.) 19 Misc. (N. Y.) 351, 20 Misc. (N. Y.) 429; Young *v.* Atwood, 5 Hun (N. Y.) 234; Kilburn *v.* Lowe, 37 Hun (N. Y.) 237; Mertens *v.* Fitzwater, 53 Hun (N. Y.) 597; McLain *v.* Mathushek Piano Mfg. Co., 54 N. Y. App. Div. 126; Small *v.* Bixley, 18 Wend. (N. Y.) 514; Newell Universal Mill Co. *v.* Muxlow, 115 N. Y. 170.

North Carolina. — Horton *v.* Horne, 99 N. Car. 219; Rawlings *v.* Neal, 126 N. Car. 271.

Ohio. — Rowan *v.* Johnson, 2 Ohio Dec. (Reprint) 254, 2 West. L. M. 155.

Oklahoma. — Kuhlman *v.* Willams, 1 Okla. 136.

Oregon. — Phipps *v.* Taylor, 15 Oregon 484.

Pennsylvania. — Shoemaker *v.* Shoemaker, 7 Kulp (Pa.) 528.

Tennessee. — Parham *v.* Riley, 4 Coldw. (Tenn.) 5.

Texas. — Hill *v.* M'Dermot, Dall. (Tex.) 419; Avery *v.* Avery, 12 Tex. 54, 62 Am. Dec. 513.

Utah. — Ryan, etc., Cattle Co. *v.* Slaughter, 6 Utah 278.

Vermont. — Holden *v.* Torrey, 31 Vt. 690; Starkey *v.* Waite, 69 Vt. 193.

Wisconsin. — Hill *v.* Bloomer, 1 Pin. (Wis.) 463; Everit *v.* Walworth County Bank, 13 Wis. 419; McCutchin *v.* Platt, 22 Wis. 561; Lanyon *v.* Woodward, 65 Wis. 543; Clark *v.* Lamoreux, 70 Wis. 508.

1. Apportionment of Costs — *Connecticut.* — Seeley *v.* Gwillim, 40 Conn. 111.

Indiana. — Chinn *v.* Russell, 2 Blackf. (Ind.) 171.

Kansas. — Dresher *v.* Corson, 23 Kan. 313; Friend *v.* Green, 43 Kan. 167.

Massachusetts. — Arnold *v.* Brackett, *cited* in Powell *v.* Hinsdale, 5 Mass. 344, note.

New Hampshire. — Brown *v.* Smith, 1 N. H. 36.

New Jersey. — Field *v.* Post, 38 N. J. L. 346.

New York. — Wright *v.* Williams, 2 Wend. (N. Y.) 632; Seymour *v.* Billings, 12 Wend. (N. Y.) 285; Small *v.* Bixley, 18 Wend. (N. Y.) 514; Johnson *v.* Fellows, 6 Hill (N. Y.) 353; Hull *v.* Halsted, (Supm. Ct. Spec. T.) 1 How. Pr. (N. Y.) 174; Porter *v.* Willet, (N. Y. Super. Ct.) 14 Abb. Pr. (N. Y.) 319; Summers *v.* Jarvis, (Supm. Ct.) 14 Abb. Pr. (N. Y.) 322, note.

Ohio. — Clark *v.* Keith, 9 Ohio 72.

Vermont. — Poor *v.* Woodburn, 25 Vt. 234.

Wisconsin. — Lanyon *v.* Woodward, 65 Wis. 543.

2. Young *v.* Atwood, 5 Hun (N. Y.) 234.

3. Langdoc *v.* Parkinson, 2 Ill. App. 136.

4. Byrnes *v.* Palmer, 113 Mich. 17.

5. Necessity for Replevin Bond — *Arkansas.* — Wilson *v.* Williams, 52 Ark. 360; Pirani *v.* Barden, 5 Ark. 81; Pool *v.* Loomis, 5 Ark. 110.

Colorado. — Hook *v.* Fenner, 18 Colo. 283, 36 Am. St. Rep. 277.

Connecticut. — Smith *v.* Trawl, 1 Root (Conn.) 165.

Delaware. — Plunkett *v.* Moore, 4 Harr. (Del.) 379.

Indiana. — Lemert *v.* Shaffer, 5 Ind. App. 468, *affirmed* 5 Ind. App. 473.

Iowa. — McGuffie *v.* Dervine, 1 Greene (Iowa) 251.

Maine. — Baldwin *v.* Whittier, 16 Me. 33; Garlin *v.* Strickland, 27 Me. 443; Greely *v.* Currier, 39 Me. 516.

Massachusetts. — Cady *v.* Eggleston, 11 Mass. 285; Wolcott *v.* Mead, 12 Met. (Mass.) 516.

New Jersey. — Caldwell *v.* West, 21 N. J. L. 411.

New York. — De Reguie *v.* Lewis, 3 Robt. (N. Y.) 708.

Pennsylvania. — Taylor *v.* Adams Express Co., 9 Phila. (Pa.) 272; Cummings *v.* Gann, 52 Pa. St. 484. *Compare* Clawsen *v.* Seanor, 6 Lack. Leg. N. (Pa.) 102, 23 Pa. Co. Ct. 257, 30 Pittsb. Leg. J. N. S (Pa.) 312.

Tennessee. — Jones *v.* Richardson, 99 Tenn. 614.

and seizing the property, is liable to the defendant as a trespasser or for misfeasance, for whatever damages the defendant may suffer.[1] So, also, in case the necessary bond is not given the action is abatable,[2] or may be dismissed or quashed at the instance of the defendant.[3] As the object of the bond is security to the defendant, he can waive the security if he pleases,[4] and it has been held that if the defendant goes to the trial of the action on the merits, he waives objections to the bond and the action will not afterwards be dismissed for insufficiency of the bond.[5] So, also, if the plaintiff recovers in the replevin action, the judgment will not be reversed on appeal on account of objections to the replevin bond, as the defendant could not have been injured thereby.[6] Where the plaintiff does not demand possession of the property at the commencement of the action, but allows the property to remain in the defendant's possession, as he may do under some statutes, he is not required to give bond.[7]

Deposit in Lieu of Bond. — Where the statute requires a replevin bond to be taken, the sheriff is not authorized to receive a money deposit as security in lieu of a bond.[8]

Replevin by United States. — The provision of the Revised Statutes that whenever any process issues from a Circuit Court by the United States, no obligation, bond, or other security shall be required from it, either to prosecute the action or to answer in damages or costs, exempts the federal government from the obligation imposed by state statutes of giving bond in replevin actions in which it is plaintiff.[9]

Requiring Further Security in Case of Insufficiency of Original Bond. — Under some statutes the plaintiff in replevin, to entitle him to retain possession of the property pending the replevin action, must keep good his security for the return

Vermont. — Bennett *v.* Allen, 30 Vt. 684; Thurber *v.* Richmond, 46 Vt. 395.

Wisconsin. — Morris *v.* Baker, 5 Wis. 389; Graves *v.* Sittig, 5 Wis. 219; Shaw *v.* Webster, 21 Wis. 129.

1. Liability of Officer for Failure to Require Bond — *Arkansas.* — Pirani *v.* Barden, 5 Ark. 81; State *v.* Stephens, 14 Ark. 264; Wilson *v.* Williams, 52 Ark. 360.

Connecticut. — Smith *v.* Trawl, 1 Root (Conn.) 165.

Delaware. — Plunkett *v.* Moore, 4 Harr. (Del.) 379.

Illinois. — Arter *v.* People, 54 Ill. 228.

Maine. — Garlin *v.* Strickland, 27 Me. 443; Wilkins *v.* Dingley, 29 Me. 73; Kimball *v.* True, 34 Me. 84; Green *v.* Walker, 37 Me. 25; Hall *v.* Monroe, 73 Me. 123.

New York. — Gibbs *v.* Bull, 18 Johns. (N. Y.) 435; Morris *v.* Van Voast, 19 Wend. (N. Y.) 283.

Pennsylvania. — Com. *v.* Rees, 3 Whart. (Pa.) 124.

Tennessee. — Horton *v.* Vowel, 4 Heisk. (Tenn.) 622.

2. Abatement of Action. — Fleet *v.* Lockwood, 17 Conn. 233; Bloomer *v.* Craig, 6 Dana (Ky.) 310; Greely *v.* Currier, 39 Me. 516; Cady *v.* Eggleston, 11 Mass. 285; Smith *v.* Fisher, 13 R. I. 624.

3. Dismissal — *Indiana.* — Allen *v.* Frederick, 26 Ind. App. 430.

Maine. — Greely *v.* Currier, 39 Me. 516.

Massachusetts. — Claflin *v.* Thayer, 13 Gray (Mass.) 459; Wolcott *v.* Mead, 12 Met. (Mass.) 516; Case *v.* Pettee, 5 Gray (Mass.) 27; Clark *v.* Connecticut River R. Co., 6 Gray (Mass.) 363; Cady *v.* Eggleston, 11 Mass. 285.

Michigan. — Hopkins *v.* Green, 93 Mich. 394.

New York. — Smith *v.* McFall, 18 Wend. (N. Y.) 521; Hawley *v.* Bates, 19 Wend. (N. Y.) 632.

Rhode Island. — Simpson *v.* Wilcox, 18 R. I. 40.

Tennessee. — Horton *v.* Vowel, 4 Heisk. (Tenn.) 622.

Vermont. — Campbell *v.* Morey, 27 Vt. 575; Bennett *v.* Allen, 30 Vt. 684; Thurber *v.* Richmond, 46 Vt. 395; Eastman *v.* Barnes, 58 Vt. 329.

4. Waiver of Bond. — Spencer *v.* Dickerson, 15 Ind. 368; Greely *v.* Currier, 39 Me. 516; Simonds *v.* Parker, 1 Met. (Mass.) 508.

5. *Indiana.* — Spencer *v.* Dickerson, 15 Ind. 368.

Maine. — Johnson *v.* Richards, 11 Me. 49; Carnick *v.* Wilson, 34 Me. 593.

Massachusetts. — Wolcott *v.* Mead, 12 Met. (Mass.) 516; Chandler *v.* Smith, 14 Mass. 315.

Michigan. — Bloomingdale *v.* Chittenden, 75 Mich. 305. See also Pistorius *v.* Swarthout, 67 Mich. 186.

New Mexico. — Laird *v.* Upton, 8 N. Mex. 409.

South Carolina. — De Bow *v.* M'Clary, 3 McCord L. (S. Car.) 44.

Texas. — Willis *v.* Thompson, 85 Tex. 301.

Vermont. — Tripp *v.* Howe, 45 Vt. 523.

See also Spencer *v.* Bell, 109 N. Car. 39.

6. McGuffie *v.* Dervine, 1 Greene (Iowa) 251; Kennedy *v.* Roberts, 105 Iowa 521.

7. Dillard *v.* Samuels, 25 S. Car. 318.

8. Deposit in Lieu of Bond. — Cummings *v.* Gann, 52 Pa. St. 484.

9. Replevin by Federal Government. — U. S. *v.* Bryant, 111 U. S. 499.

of the property to the defendant if awarded, and if the bond given by the plaintiff at the institution of the action subsequently becomes insufficient, the court may require him to give additional security,[1] and where the plaintiff fails to comply with the order requiring him to give additional security, the court should direct the redelivery of the property to the defendant.[2] In the absence of such a statutory provision, the court has no right, it seems, to require the plaintiff to give additional security where the security of the original bond becomes insufficient by reason of the subsequent insolvency of the sureties thereon,[3] nor on the ground that the alleged value of the property, for double the value of which the bond was given, was less than the true value.[4]

Amendment of Bonds. — Where the replevin bond was insufficient, some courts have refused, on plea in abatement of the action or on motion for its dismissal, to permit the plaintiff to amend and file a proper bond;[5] in other jurisdictions the courts have adopted the practice, the propriety and convenience of which are obvious, of allowing the plaintiff to remedy irregularities in his bond by amendment or the filing of a new bond.[6]

Bond for Indemnification of Sheriff. — Where the property to be replevied is in the hands of and claimed by a third person, no rule of public policy forbids the officer executing the writ from taking a bond indemnifying him from liability by reason of his seizure of the property.[7]

2. Form and Execution — *a.* PRINCIPAL. — Where the statute merely requires that a bond with sureties shall be given it is not necessary that the plaintiff be a party to the bond, but the bond may be that of a third person as principal.[8] Where a person signs a replevin bond in his individual capacity he is individually liable thereon, though in the body of the bond his name appears as "agent for and acting on behalf of the plaintiff in the replevin action."[9] So, also, the addition of the word "trustee," "agent," etc., to his signature is regarded as *descriptio personæ* and not as relieving the signer from individual liability upon the bond.[10]

1. Requiring Further Security. — Greig *v.* Ware, 25 Colo. 184. See also Prichard *v.* Hopkins, 52 Iowa 120.

2. Varner *v.* Bowling, 54 Kan. 380.

3. Hohenstein *v.* Westminster Candle Co., 31 N. Y. App. Div. 11. See also U. S. Land, etc., Co. *v.* Bussey, 53 Hun (N. Y.) 516; Manley *v.* Patterson, (Supm. Ct. Spec. T.) 3 Code Rep. (N. Y.) 89; Dixon *v.* Thatcher, 8 Ark. 134; Lynch *v.* Bruce, 2 Dougl. (Mich.) 123.

4. U. S. Land, etc., Co. *v.* Bussey, 53 Hun (N. Y.) 516. See also De Reguie *v.* Lewis, 3 Robt. (N. Y.) 708; Bulmer *v.* Jenkins, 3 How. Pr. (N. Y.) 11.

5. Amendment. — Greely *v.* Currier, 39 Me. 516; Simpson *v.* Wilcox, 18 R. I. 40; Whitford *v.* Goodwin, 13 R. I. 145; Smith *v.* Fisher, 13 R. I. 624.

6. *Arkansas.* — Smith *v.* Howard, 23 Ark. 203.

Illinois. — Treman *v.* Morris, 9 Ill. App. 237.

Kentucky. — Bloomer *v.* Craig, 6 Dana (Ky.) 310.

Michigan. — Pistorius *v.* Swarthout, 67 Mich. 186; Hatch *v.* Christmas, 68 Mich. 84; Moore *v.* Lewis, 76 Mich. 300; Hopkins *v.* Green, 93 Mich. 394; Bublitz *v.* Trombley, 113 Mich. 413.

Nebraska. — Hudelson *v.* Tobias First Nat. Bank, 51 Neb. 557.

New Hampshire. — Briggs *v.* Wiswell, 56 N. H. 319.

New York. — Hawley *v.* Bates, 19 Wend. (N. Y.) 632; Hafelin *v.* Silverman, (N. Y. City Ct. Gen. T.) 11 Misc. (N. Y.) 723; Newland *v.* Willetts, 1 Barb. (N. Y.) 20; Whaling *v.* Shales, 20 Wend. (N. Y.) 673; Dale *v.* Gilbert, 59 Hun (N. Y.) 615, 12 N. Y. Supp. 370; Rich *v.* Conley, (Supm. Ct. Spec. T.) 64 N. Y. Supp. 333; Taylor *v.* Jackson, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 300.

See also Tackaberry *v.* Gilmore, 57 Neb. 450.

7. Bond for Indemnification of Officer. — Martin *v.* Bolenbaugh, 42 Ohio St. 508.

Extent of Liability on Indemnity Bond. — Lott *v.* Mitchell, 32 Cal. 23; Scott *v.* Tyler, 14 Barb. (N. Y.) 202.

8. Principal on Bond. — Kinney *v.* Mallory, 3 Ala. 626; Philippi Christian Church *v.* Harbaugh, 64 Ind. 240; Cooper *v.* Brown, 7 Dana (Ky.) 333; Howe *v.* Handley, 28 Me. 241; Cahill's Appeal, 48 Mich. 616; Frei *v.* Vogel, 40 Mo. 149; South Missouri Land Co. *v.* Jeffries, 40 Mo. App. 360; Stephen *v.* Eiseman, 54 Miss. 535.

Of course, if the plaintiff signs the replevin bond he is bound by the terms of the instrument to the same extent as is any other obligor. Buck *v.* Lewis, 9 Minn. 314.

Bond by One of Several Plaintiffs. — Where the statute requires a bond from the plaintiff or some one in his behalf, with sufficient sureties, a bond in which one of the plaintiffs is principal is sufficient. Dunbar *v.* Scott, 14 R. I. 152.

9. Carlisle Shoe Co. *v.* Bailey, 69 Ill. App. 349.

10. Bowen *v.* Penny, 76 Ga. 743.

b. OBLIGEE. — Under some statutes the bond is to be made payable to the sheriff or officer to whom the replevin writ is directed;[1] under other statutes the bond is made payable to the defendant in the replevin action from whose possession the property is taken.[2] If no one is named as the obligee in the bond, the places where such name should appear being left blank, the bond is void and no action can be maintained thereon.[3]

c. SURETIES. — The statutory requirement as to sureties must be complied with,[4] and the solvency of the plaintiff does not dispense with the necessity for a compliance with such requirement.[5] Where the statute requires a bond with "sureties" a bond with only one surety is insufficient.[6] The sureties must be other than the plaintiffs to the action, and therefore where the action is in the name of a partnership, a bond signed by the partnership, with one of the partners as surety, is insufficient.[7] The names of the sureties need not be recited in the body of the bond.[8] Where the sureties are a partnership, their signature in the partnership name does not render the bond insufficient.[9] The sureties in the replevin, to render themselves liable thereon, must, of course, have the legal capacity to enter into the contract of suretyship,[10] and they are not estopped to deny such capacity for the reason that the property has been taken on the replevin writ and delivered over to the plaintiff.[11]

d. PENALTY. — The statutes generally require a bond for the penalty in double the value of the property to be replevied,[12] and it is not a compliance with such statutes to give a bond the penalty of which is "double the value of the property hereinafter named to be replevied," but the bond must express a sum in the penalty.[13]

e. CONDITIONS. — The bond should, of course, be conditioned as required by the statute.[14] Thus, when required by statute, the bond must be conditioned for the payment of such damages as may be awarded to the defendant,[15] and for a return of the property if awarded.[16] A substantial compliance with the statutes is sufficient; thus, a bond conditioned "for the prosecution of the action" has been held sufficient under a provision requiring a bond conditioned "for the prosecution of the action without delay and with effect."[17]

f. DELIVERY. — There must be a delivery of the bond to render it operative,[18] but a delivery to the officer serving the writ for the use of the defendant in the replevin action is a sufficient delivery.[19]

1. Obligee. — Speer *v.* Skinner, 35 Ill. 282; Chadwick *v.* Badger, 9 N. H. 450.

Writ Served by Coroner. — Where the replevin writ is issued to and served by the coroner the bond is made payable to him; the statutory provision naming the sheriff as the party to whom the bond is to be given means only that the bond shall be given to the officer serving the writ. Speer *v.* Skinner, 35 Ill. 282.

Bond Payable to Predecessor of Sheriff Executing Writ Is Valid. — Petrie *v.* Fisher, 43 Ill. 442.

2. Purple *v.* Purple, 5 Pick. (Mass.) 226; Eickhoff *v.* Eikenbary, 52 Neb. 332.

3. Titus *v.* Berry, 73 Me. 127.

4. Nonresidents as Sureties. — State *v.* Wait, 23 Neb. 166.

5. Wilson *v.* Williams, 52 Ark. 360. See also Smith *v.* Trawl, 1 Root (Conn.) 165.

6. Number of Sureties. — Greely *v.* Currier, 39 Me. 516; Claflin *v.* Thayer, 13 Gray (Mass.) 459; Wolcott *v.* Mead, 12 Met. (Mass.) 516; Smith *v.* McFall, 18 Wend. (N. Y.) 521; Whaling *v.* Shales, 20 Wend. (N. Y.) 673, Whitford *v.* Goodwin, 13 R. I. 145.

7. Hopkins *v.* Green, 93 Mich. 394; Dorus *v.* Somers, 57 Conn. 192.

8. Names of Sureties.—Affeld *v.* People, 12 Ill. App. 502; Wheeler *v.* Paterson, 64 Minn. 231. See also Clarke *v.* Bell, 2 Litt. (Ky.) 164.

9. Judson *v.* Adams, 8 Cush. (Mass.) 556.

10. Sturdevant *v.* Farmers, etc., Bank, 62 Neb. 472 (state bank has no capacity to become surety on replevin bond).

11. Sturdevant *v.* Farmers, etc., Bank, 62 Neb. 472.

12. Penalty of Bond.—Deardorff *v.* Ulmer, 34 Ind. 353; Briggs *v.* Wiswell, 56 N. H. 319.

13. Case *v.* Pettee, 5 Gray (Mass.) 27; Clark *v.* Connecticut River R. Co., 6 Gray (Mass.) 363; Bennett *v.* Allen, 30 Vt. 684.

14. Conditions of Bond. — Cobb *v.* Thompson, 87 Ala. 381; Campbell *v.* Morey, 27 Vt. 575; Thurber *v.* Richmond, 46 Vt. 395.

15. Simpson *v.* Wilcox, 18 R. I. 40.

16. Eastman *v.* Barnes, 58 Vt. 329.

17. Parrott *v.* Scott, 6 Mont. 340.

18. Delivery of Bond. — Parrott *v.* Scott, 6 Mont. 340.

19. Smith *v.* Whiting, 97 Mass. 316.

Conditional Delivery to Officer. — A surety on a replevin bond, in the absence of knowledge or consent of the defendant in the replevin action, cannot claim that the undertaking was delivered to the sheriff on an understanding

g. CONSIDERATION. — No consideration aside from the institution of the replevin action and the demand for the property replevied is necessary to the validity of the replevin bond.[1] And the fact that the property at the time of the institution of the replevin action was in the possession of the plaintiff does not render the bond invalid and prevent a recovery thereon by the defendant.[2] Where a bond is given in replevin, but a writ for the delivery of the property is not issued nor the property replevied, no liability upon the bond attaches to the obligors.[3]

h. APPROVAL OF BOND AND JUSTIFICATION OF SURETIES. — In some jurisdictions the statutes provide for the approval of the bond by the officer to whom it is delivered or by the court in which the action is instituted,[4] and also for the justification of the sureties upon exception to them by the defendant.[5]

i. IDENTIFICATION OF ACTION. — The bond must with sufficient certainty identify the action in which it is given,[6] but a misrecital in the bond of the date on which the replevin action was commenced does not invalidate the bond so as to prevent a recovery thereon by the obligee.[7]

j. CLERICAL ERRORS. — Clerical errors in a replevin bond will not necessarily invalidate it, but the court in construing the bond will correct such mistakes and give to it the meaning intended by the parties.[8]

k. ESTOPPEL TO ALLEGE DEFECTS IN BOND. — Where a bond defective in form is given and the property is replevied and delivered over to the plaintiff, though such defects may render the bond invalid as a statutory bond, still, for the purpose of a recovery upon the bond by the defendant, if successful in the replevin action, the bond will be sustained as a common-law obligation and the obligor and his sureties will not be permitted to set up such defects to escape liability upon the bond.[9] This principle has been applied where there was only one surety upon the bond instead of two as required by the statute;[10] where the bond was signed by more than the required number of

with him that it was not to be regarded as delivered unless the principal indemnified the surety within a certain time. Richardson *v.* People's Nat. Bank, 57 Ohio St. 299.

1. Consideration of Bond. — Harrison *v.* Utley, 6 Hun (N. Y.) 565.

2. Harrison *v.* Wilkin, 69 N. Y. 412.

3. Reno *v.* Woodyatt, 81 Ill. App. 553; McTeer *v.* Briscoe, (Tenn. Ch. 1899) 61 S.W. Rep. 564.

4. Approval of Bond. — Lathrop *v.* Bowen, 121 Mass. 107; Cromer *v.* Watson, 59 S. Car. 488; Rinear *v.* Skinner, 20 Wash. 541.

5. Justification of Sureties — *Massachusetts.* — Stone *v.* Jenks, 142 Mass. 519.

Michigan. — Hatch *v.* Christmas, 68 Mich. 84; Johnson *v.* Stilson, 42 Mich. 541.

Minnesota. — Wheeler *v.* Paterson, 64 Minn. 231.

Nebraska. — Shull *v.* Barton, 58 Neb. 741; Busch *v.* Moline, etc., Co., 52 Neb. 83.

New York. — Pardee *v.* Buell, 2 Hill (N. Y.) 357; Wilson *v.* Williams, 18 Wend. (N. Y.) 581; Cusick *v.* Cohen, 3 Den. (N. Y.) 267; Grotz *v.* Hussey, (C. Pl. Gen. T.) 61 How. Pr. (N. Y.) 448; Westervelt *v.* Bell, 19 Wend. (N. Y.) 531; Weed *v.* Hinton, 7 Hill (N. Y.) 157; Clark *v.* Hooper, 69 Hun (N. Y.) 445; Troy Carriage Works *v.* Muxlow, (N. Y. City Ct. Gen. T.) 15 Misc. (N. Y.) 696, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 561; Webb *v.* Hecox, (County Ct.) 27 Misc. (N. Y.) 169.

South Carolina. — Cromer *v.* Watson, 59 S. Car. 488.

6. Identification of Action. — Arter *v.* People, 54 Ill. 228; Matthews *v.* Storms, 72 Ill. 316.

7. Graves *v.* Shoefelt, 60 Ill. 462; Hotz *v.* Bollman Bros. Co., 47 Ill. App. 378.

8. Clerical Errors. — Green *v.* Walker, 37 Me. 25 (insertion of name of plaintiff instead of defendant); Eickhoff *v.* Eikenbary, 52 Neb. 332.

9. Estoppel to Allege Defects in Bond — *Alabama.* — Mitchell *v.* Ingram, 38 Ala. 395; Russell *v.* Locke, 57 Ala. 420; Adler *v.* Potter, 57 Ala. 571.

Connecticut. — Nichols *v.* Standish, 48 Conn. 321.

Delaware. — Lambden *v.* Conoway, 5 Harr. (Del.) 1.

Florida. — Branch *v.* Branch, 6 Fla. 314.

Illinois. — Hotz *v.* Bollman Bros. Co., 47 Ill. App. 378.

Indiana. — Hartlep *v.* Cole, 120 Ind. 247; Rauh *v.* Waterman, (Ind. App. 1901) 61 N. E. Rep. 743.

New Hampshire. — Claggett *v.* Richards, 45 N. H. 360.

South Carolina. — Bofil *v.* Russ, 3 Strobh. L. (S. Car.) 98.

Texas. — Jones *v.* Hays, 27 Tex. 1; Colorado City Nat. Bank *v.* Lester, 73 Tex. 542; McLeod Artesian Well Co. *v.* Craig, (Tex. Civ. App. 1897) 43 S. W. Rep. 934; Whitaker *v.* Sanders, (Tex. Civ. App. 1899) 52 S. W. Rep. 638.

10. Cady *v.* Eggleston, 11 Mass. 285; Shaw *v.* Tobias, 3 N. Y. 188; Capital Lumbering Co. *v.* Learned, 36 Oregon 544, 78 Am. St. Rep. 792.

sureties;[1] where the seal was, by mistake, omitted from the bond;[2] where the bond was not executed until after the service of the replevin writ;[3] where the penalty of the bond was less than double the value of the property replevied;[4] where the bond failed to contain all of the statutory conditions;[5] where it contained provisions or conditions in addition to those required by the statute;[6] and where the sureties when excepted to by the defendant failed to justify.[7] So, also, the fact that one of the parties to the bond was not *sui juris*, and therefore was not capable of binding himself as an obligor, does not affect the liability of the other obligors.[8] Irregularities in the institution and prosecution of the replevin action will not render the bond given therein void and prevent a recovery thereon by the defendant,[9] such as the fact that the replevin writ was issued without the prior affidavit required by statute being filed,[10] or where the officer serving the replevin writ failed to make a return thereof on the return day,[11] or a failure to file the bond with the clerk of the court in which the replevin action was instituted.[12] If the bond was given in an action over which the court had no jurisdiction, it has been held that the bond was void and no recovery could be had thereon.[13]

3. Effect of Taking Bond. — The giving of the bond by the plaintiff in replevin has only the effect of conferring upon him as against the defendant the right to the possession of the property and does not affect the title to the property,[14] and therefore if the plaintiff was without title a sale by him pending the replevin action does not pass a good title to the purchaser.[15]

4. Breach of and Recovery on Bonds — *a.* In General. — The general rules for the construction and interpretation of written instruments apply to replevin bonds.[16] The conditions in the replevin bond are considered as independent, and if any of such conditions are not complied with, there is a breach of the bond.[17] In an action on the replevin bond, irrespective of the condition on which the action is based, the extent of the recovery cannot exceed the penalty of the bond.[18] Exemplary or punitive damages are not recoverable in an action on the bond.[19]

1. Simonds *v.* Parker, 1 Met. (Mass.) 508; Saeltzer *v.* Ginther, 2 Miles (Pa.) 87.

2. Edwin *v.* Cox, 61 Ill. App. 567.

3. Cady *v.* Eggleston, 11 Mass. 285.

4. Trueblood *v.* Knox, 73 Ind. 310; Carver *v.* Carver, 77 Ind. 498; Tuck *v.* Moses, 54 Me. 115.

5. Hicklin *v.* Nebraska City Nat. Bank, 8 Neb. 463 (omission of condition for return of property).

6. Clark *v.* Morss, 28 W. N. C. (Pa.) 301 (provision for confession of judgment); Hershey *v.* McLaughlin, 17 Pa. Super. Ct. 87; Colorado City Nat. Bank *v.* Lester, 73 Tex. 542.

7. Van Duyne *v.* Coope, 1 Hill (N. Y.) 557; Decker *v.* Anderson, 39 Barb. (N. Y.) 346.

8. Goodell *v.* Bates, 14 R. I. 65.

9. McFadden *v.* Fritz, 110 Ind. 1.

10. Nichols *v.* Standish, 48 Conn. 321; Jennison *v.* Haire, 29 Mich. 208; Stimer *v.* Allen, 88 Mich. 140.

11. Smith *v.* Whiting, 97 Mass. 316.

12. Hedderick *v.* Pontet, 6 Mont. 345.

13. Rosen *v.* Fischel, 44 Conn. 371.

14. **Effect of Bond.** — Hunt *v.* Robinson, 11 Cal. 262. See also M'Rae *v.* M'Lean, 3 Port. (Ala.) 138. See, however, Smith *v.* McGregor, 10 Ohio St. 461.

15. Lockwood *v.* Perry, 9 Met. (Mass.) 440.

16. See the title Interpretation and Construction, vol. 17, p. 1.

17. **Conditions Independent** — *England.*—Morgan *v.* Griffith, 7 Mod. 380; Perreau *v.* Bevan, 5 B. & C. 284, 11 E. C. L. 230, Moore *v.* Bowmaker, 7 Taunt. 97, 2 E. C. L. 96.

Colorado. — Imel *v.* Van Deren, 8 Colo. 90; Sopris *v.* Lilly, 1 Colo. 266.

Illinois. — Humphrey *v.* Taggart, 38 Ill. 228; Vinyard *v.* Barnes, 124 Ill. 346; Morehead *v.* Yeazel, 10 Ill. App. 263.

Indiana. — Brown *v.* Parker, 5 Blackf. (Ind.) 291; Thomas *v.* Irwin, 90 Ind. 557.

Kansas. — McKey *v.* Lauflin, 48 Kan. 581; Little *v.* Bliss, 55 Kan. 94.

Maine. — Jones *v.* Smith, 79 Me. 452.

Massachusetts. — Smith *v.* Whiting, 100 Mass. 122.

Minnesota. — Boom *v.* St. Paul Foundry, etc., Co., 33 Minn. 253.

Oregon. — Carlon *v.* Dixon, 14 Oregon 293.

Pennsylvania. — Gibbs *v.* Bartlett, 2 W. & S. (Pa.) 29; Pittsburgh Nat. Bank *v.* Hall, 107 Pa. St. 583.

Rhode Island. — Gardiner *v.* McDermott, 12 R. I. 206.

South Carolina. — Alderman *v.* Roesel, 52 S. Car. 162. *Compare* Dugan *v.* England, Harp. L. (S. Car.) 215.

18. Hefford *v.* Alger, 1 Taunt. 218; Truitt *v.* Collins, 2 Penn. (Del.) 36; Kellar *v.* Carr, 119 Ind. 127; Fraser *v.* Little, 13 Mich. 195, 87 Am. Dec. 741; Carlon *v.* Dixon, 14 Oregon 293; Miles *v.* Davis, 36 Tex. 690.

19. Dalby *v.* Campbell, 26 Ill. App. 502.

The Burden of Proving a breach of the bond is upon the party alleging the breach.[1]

b. CONDITION FOR RETURN OF PROPERTY — (1) *In General.* — Where the bond is conditioned for a return of the property in case the plaintiff fails to recover, it is not necessary, in case of a dismissal of the action, that a judgment be rendered for the return of the property to the defendant to enable him to recover on the bond for a failure to return the property.[2] But if the condition is for a return of the property if adjudged or awarded to the defendant, there must be a judgment for a return in the replevin action to render a failure to return a breach of such condition.[3] And where there were several defendants and the condition was for a return "to the defendants," if a return should be awarded it must be in favor of all the defendants in order to render a failure to return a breach of the bond.[4] Where the court had no jurisdiction of the replevin action, it has been held that it could not award a judgment for a return of the property on dismissal of the action which would be effective as the basis for the breach of the condition for a return if a return should be adjudged.[5] The condition for a return requires only the return of the property actually taken under the replevin writ.[6] In an action on the bond for a breach of the condition for a return the obligors cannot attack the judgment for a return for irregularities for which the judgment may have been reversed on appeal in the replevin action.[7]

(2) *Performance of Duty to Return.* — The affirmative duty is imposed upon the obligors in the replevin bond to return the property,[8] and an action may

1. Gallup *v.* Wortmann, 11 Colo. App. 308; McManus *v.* Donohoe, 175 Mass. 308; Lewis *v.* Bonnert, 12 Pa. Co. Ct. 366.

2. Condition for Return of Property. — Ernst *v.* Hogue, 86 Ala. 502; Persse *v.* Watrous, 30 Conn. 139.

3. *California.* — Mitchum *v.* Stanton, 49 Cal. 303; Clary *v.* Rolland, 24 Cal. 148. See also Chambers *v.* Waters, 7 Cal. 390.

Colorado. — Colorado Springs Co. *v.* Hopkins, 5 Colo. 206; Imel *v.* Van Deren, 8 Colo. 90.

Connecticut. — Ladd *v.* Prentice, 14 Conn. 109.

Illinois. — Abrahams *v.* Jones, 20 Ill. App. 83; Fellheimer *v.* Hainline, 65 Ill. App. 384; Reno *v.* Woodyatt, 81 Ill. App. 553; Vinyard *v.* Barnes, 124 Ill. 346.

Indiana. — Thomas *v.* Irwin, 90 Ind. 557.

Kansas. — Citizens' State Bank *v.* Morse, 60 Kan. 526.

Kentucky. — Cooper *v.* Brown, 7 Dana (Ky.) 333.

Maine. — Pettygrove *v.* Hoyt, 11 Me. 66; Smallwood *v.* Norton, 20 Me. 83, 37 Am. Dec. 39.

Minnesota. — Clark *v.* Norton, 6 Minn. 412.

Ohio. — Munding *v.* Michael, 6 Ohio Cir. Dec. 76, 10 Ohio Cir. Ct. 165.

South Carolina. — Elder *v.* Greene, 34 S. Car. 154.

Wisconsin. — Ashley *v.* Peterson, 25 Wis. 621.

See also Barton *v.* Donnelly, (Supm. Ct. Spec. T.) 6 Misc. (N. Y.) 473.

4. Robinson *v.* Bonjour, 16 Colo. App. 458; Abrahams *v.* Jones, 20 Ill. App. 83.

5. Elder *v.* Greene, 34 S. Car. 154.

6. What to Be Returned. — Jackson *v.* Bry, 3 Ill. App. 586; Reno *v.* Woodyatt, 81 Ill. App. 553; Miller *v.* Moses, 56 Me. 128; Pettit *v.* Allen, 64 N. Y. App. Div. 579; Knott *v.* Sherman, 7 S. Dak. 522; Elliott *v.* Long, 77 Tex. 467. See also Doogan *v.* Tyson, 6 Gill & J. (Md.) 453.

7. Cox *v.* Sargent, 10 Colo. App. 1; Dudley *v.* Conely, 125 Mich. 300, 7 Detroit Leg. N. 509; Christiansen *v.* Mendham, 45 N. Y. App. Div. 554.

Thus, the obligors cannot object that the judgment for a return was rendered without a claim therefor having been made by the defendant, as required by statute. Christiansen *v.* Mendham, 45 N. Y. App. Div. 554. *Compare* Gallup *v* Wortmann, 11 Colo. App. 308.

So, also, where a judgment for a return is rendered in the defendant's favor, the obligors cannot object, in an action on the bond for breach of the condition for a return, that the value of the property was not assessed and an alternate judgment therefor rendered in the replevin action, but the value may be assessed in the action on the bond. Sweeney *v.* Lomme, 22 Wall. (U. S.) 208; Whitney *v.* Lehmer, 26 Ind. 503; Yelton *v.* Slinkard, 85 Ind. 190. See, however, Nickerson *v.* Chatterton, 7 Cal. 568; Clary *v.* Rolland, 24 Cal. 147.

8. Affirmative Duty to Return. — Peck *v.* Wilson, 22 Ill 205; Berry *v.* Hoeffner, 56 Me. 170; Parker *v.* Simonds, 8 Met. (Mass.) 205; Capital Lumbering Co. *v.* Learned, 36 Oregon 544, 78 Am. St. Rep. 792; Arthur *v.* Sherman, 11 Wash. 254.

Replevied goods were by consent of parties left on the premises of the defendant in charge of a third person; the plaintiff's attorney wrote to the defendant, giving him notice that he could retain them. It was held in action on the replevin bond that the letter was not a sufficient return if the goods were in charge of an agent of the plaintiff in replevin, unless the agent was withdrawn. Pittsburgh Nat. Bank *v.* Hall, 107 Pa. St. 583.

be maintained on the bond for breach of the condition for a return without a writ *de retorno habendo* being first issued on the judgment for a return,[1] or even a demand being made upon the plaintiff for a return.[2] Some statutes require the issuance and return unsatisfied of a writ *de retorno habendo* before an action can be maintained on the bond for breach of the condition for a return.[3] While the defendant is bound to accept an offer to return the property if seasonably made by the plaintiff,[4] or even a return of a substantial part of the property in discharge *pro tanto* of the condition for a return,[5] still, if the plaintiff has failed for an unreasonable time to make a return, he cannot, after the defendant has elected to sue upon the bond for damages for a failure to return, prevent a recovery by an offer to return.[6] The condition to return the property requires a return of the property in like good order and condition as when taken on the writ of replevin,[7] and a return of the identical property replevied.[8] The return must comply with the condition in the bond and be to the defendant in the replevin action.[9] If, on a judgment for the defendant for a return and a writ *de retorno habendo*, the sheriff takes possession of the property replevied, this is a lawful delivery of possession to the defendant and a substantial compliance with the condition for a return of the property,[10] and the same is true if the property is delivered up on an order of the court and sold and the proceeds go to the defendant in replevin.[11] So, also, if the defendant in replevin by any means actually acquires the possession, even though such possession is acquired pending the replevin action, this is a substantial compliance with the condition for a return of the property.[12]

Excuses for Nonreturn. — The obligor is not released from liability for failure to return the property because a return has been rendered impossible by reason of events happening without his own fault.[13]

Proof of Nonreturn. — The return of *elongata* or *eloignment* by a sheriff on a writ *de retorno habendo* is conclusive in an action on the replevin bond.[14]

1. Sweeney *v.* Lomme, 22 Wall. (U. S.) 208; Hunter *v.* Sherman, 3 Ill. 539; Smith *v.* Pries, 21 Ill. 656; Peck *v.* Wilson, 22 Ill. 205; Knapp *v.* Colburn, 4 Wend. (N. Y.) 619. *Compare* Scott *v.* Scott, 50 Mich. 372.

2. Sweeney *v.* Lomme, 22 Wall. (U. S.) 208; Cushenden *v.* Harman, 2 Tyler (Vt.) 431; Wetherbee *v.* Colby, 6 Vt. 647.

3. Cowden *v.* Pease, 10 Wend. (N. Y.) 334; Cowdin *v.* Stanton, 12 Wend. (N. Y.) 120; Pemble *v.* Clifford, 2 McCord L. (S. Car.) 31. See also Dugan *v.* England, Harp. L. (S. Car.) 215.

4. **Offer to Return.** — Bradley *v.* Reynolds, 61 Conn. 271; Harts *v.* Wendell, 26 Ill. App. 275; Eickhoff *v.* Eikenbary, 52 Neb. 332; Johnson *v.* Mason, 64 N. J. L. 258, *distinguishing* Field *v.* Post, 38 N. J. L. 346.

5. Harts *v.* Wendell, 26 Ill. App. 275. See also Meyers *v.* Bloon 20 Tex. Civ. App. 554.

6. Bradley *v.* Reynolds, 61 Conn. 271.

7. **Condition of Property Returned.** — Parker *v.* Simonds, 8 Met. (Mass.) 205; Capital Lumbering Co. *v.* Learned, 36 Oregon 544, 78 Am. St. Rep. 792; Gibbs *v.* Bartlett, 2 W. & S. (Pa.) 29.

8. **Return of Identical Property.** — Eickhoff *v.* Eikenbary, 52 Neb. 332.

9. **To Whom Returned.** — Gould *v.* Warner, 3 Wend. (N. Y.) 54; Capital Lumbering Co. *v.* Learned, 36 Oregon 544, 78 Am. St. Rep. 792.

10. Carrico *v.* Taylor, 3 Dana (Ky.) 33.

11. Richards *v.* Craig, 8 Baxt. (Tenn.) 457. *Compare* Shell *v.* Hummel, 1 Pearson (Pa.) 19; Krumbhaar *v.* Stetler, 10 Pa. Co. Ct. 12.

12. Harrow *v.* Ryan, 31 Iowa 156; Rinker *v.* Lee, 29 Neb. 783; Otto *v.* Burch, 50 Neb. 894. See also Heyns *v.* Norton, 3 Ohio Cir. Dec. 222, 5 Ohio Cir. Ct. 452. *Compare* Buckmaster *v.* Beames, 9 Ill. 443.

13. **Excuse for Nonreturn.** — Ward *v.* Hood, 124 Ala. 570; Suppiger *v.* Gruaz, 137 Ill. 216; Schott *v.* Youree, 142 Ill. 233; Scott *v.* Rogers, 56 Ill. App. 571; George *v.* Hewlett, 70 Miss. 1, 35 Am. St. Rep. 626; McPherson *v.* Acme Lumber Co., 70 Miss. 649; Seaman *v.* Paddock, 55 Mo. App. 296; Suydam *v.* Jenkins, 3 Sandf. (N. Y.) 614; Harrison *v.* Wilkin, 78 N. Y. 390; Porter *v.* Miller, 7 Tex. 468; Cohen *v.* Adams, 13 Tex. Civ. App. 118; Arthur *v.* Sherman, 11 Wash. 254. *Compare* Bobo *v.* Patton, 6 Heisk. (Tenn.) 172, 19 Am. Rep. 593; Mosely *v.* Baker, 2 Sneed (Tenn.) 367.

But it has been held, where a live animal was replevied, that it was a good defense to an action on the bond for a breach of the condition for a return that the animal had died pending the replevin action. Melvin *v.* Winslow, 10 Me. 397; Carpenter *v.* Stevens, 12 Wend. (N. Y.) 589. *Compare* Suydam *v.* Jenkins, 3 Sandf. (N. Y.) 643.

And where a slave was replevied, and his return was rendered impossible by reason of the emancipation of slaves pending the replevin action, this was held a good excuse for a failure to return so as to release the plaintiff in replevin from liability for breach of the condition for a return. Pait *v.* McCutchen, 43 Tex. 291.

14. Caldwell *v.* West, 21 N. J. L. 411.

(3) *Extent of Recovery for Nonreturn* — (a) **In General.** — The defendant in replevin is generally entitled to recover, for breach of the condition for a return, the value of the property replevied,[1] and if the plaintiff in replevin has no interest in the property, the defendant may recover its full value for a failure to return, though he has only a special interest in the property or even a mere possessory title.[2] If the defendant in replevin has only a special interest in the property with right to possession, and the plaintiff is the general owner, the value of such special interest is the extent of recovery.[3] Also, if the plaintiff in replevin is the general owner, and the defendant in replevin has an execution or attachment lien on the property, the measure of damages for a nonreturn is the amount of such lien if less than the value of the property.[4] As a general rule, for the purpose of a recovery in an action on the bond, the value of the property has been estimated as of the time of the rendition of the judgment for a return,[5] and interest on such value may also be allowed.[6] If the value of the property was greater at the time of the order for its return than at the time it was taken under the replevin writ, the defendant in replevin has been held entitled to recover, in an action on the bond for nonreturn, the value at the time of the order for a return.[7] If, pending the action of replevin and before the rendition of the judgment for a return of the property, the property has depreciated in value through the fault of the plaintiff in replevin, the defendant has been held entitled to recover for its nonreturn its value at the time it was taken under the replevin writ.[8]

If the Right and Title to the Property Are Adjudicated in the replevin action in favor of the defendant, such questions are deemed conclusively settled and the obligors in the replevin bond are estopped, in an action on the bond for a failure to return the property, to contest the title to the property for any purpose;[9]

1. Extent of Recovery for Nonreturn — *United States.* — Washington Ice Co. *v.* Webster, 125 U. S. 426; Sweeney *v.* Lomme, 22 Wall. (U. S.) 208.

California. — Ginica *v.* Atwood, 8 Cal. 446; Mitchum *v.* Stanton, 49 Cal. 303.

Connecticut. — Webster *v.* Price, 1 Root (Conn.) 56; Buel *v.* Davenport, 1 Root (Conn.) 261; Ormsbee *v.* Davis, 18 Conn. 555; Bradley *v.* Reynolds, 61 Conn. 271.

Illinois. — Chapin *v.* Matson, 37 Ill. App. 257; Tedrick *v.* Wells, 59 Ill. App. 657; Pace *v.* Neal, 92 Ill. App. 416; Tanton *v.* Slyder, 93 Ill. App. 455.

Indiana. — Walls *v.* Johnson, 16 Ind. 374; Schrader *v.* Wolflin, 21 Ind. 238; Story *v.* O'Dea, 23 Ind. 326; Whitney *v.* Lehmer, 26 Ind. 503.

Maine. — Wyman *v.* Robinson, 73 Me. 384, 40 Am. Rep. 360.

Massachusetts. — Parker *v.* Simonds, 8 Met. (Mass.) 205.

Nebraska. — Eickhoff *v.* Eikenbary, 52 Neb. 332.

New Jersey. — Caldwell *v.* West, 21 N. J. L. 411; Peacock *v.* Haney, 37 N. J. L. 179.

New York. — Pettit *v.* Allen, 64 N. Y. App. Div. 579.

Pennsylvania. — Chase *v.* Sherwood, 4 Lack. Leg. N. (Pa.) 271.

Tennessee. — Muhling *v.* Ganeman, 4 Baxt. (Tenn.) 88.

Texas. — Talcott *v.* Rose, (Tex. Civ. App. 1901) 64 S. W. Rep. 1009.

2. *United States.* — Sweeney *v.* Lomme, 22 Wall. (U. S.) 208.

Illinois. — Atkins *v.* Moore, 82 Ill. 240. See also Broadwell *v.* Paradice, 81 Ill. 474; Smith *v.* Hertz, 37 Ill. App. 36.

Indiana. — Smith *v.* Lisher, 23 Ind. 500. *Compare* Stockwell *v.* Byrne, 22 Ind. 6.

Maine. — Farnham *v.* Moor, 21 Me. 508.

Michigan. — Williams *v.* Vail, 9 Mich. 162, 80 Am. Dec. 76; Ryan *v.* Akeley, 42 Mich. 516.

See also Pearl *v.* Garlock, 61 Mich. 419, 1 Am. St. Rep. 603; Capen *v.* Bartlett, 153 Mass. 346; Staples *v.* Word, (Tex. Civ. App. 1898) 48 S. W. Rep. 751. *Compare* Vinton *v.* Mansfield, 48 Conn. 474; Gould *v.* Hayes, 71 Conn. 86; Clements *v.* Dempsey, 7 Pa. Super. Ct. 52; Parrott *v.* Scott, 6 Mont. 340.

3. Ernst *v.* Hogue, 86 Ala. 502; Hannon *v.* O'Dell, 71 Conn. 698; David *v.* Bradley, 79 Ill. 316; Treman *v.* Morris, 9 Ill. App. 237; McFadden *v.* Ross, 108 Ind. 512; Consolidated Tank Line Co. *v.* Bronson, 2 Ind. App. 1; Ringgenberg *v.* Hartman, 124 Ind. 186. See also Miller *v.* Cheney, 88 Ind. 466.

4. Treman *v.* Morris, 9 Ill. App. 237; Bartlett *v.* Kidder, 14 Gray (Mass.) 449. See also Le Barron *v.* Taylor, 53 Iowa 637; Bradford *v.* Taylor, 74 Tex. 175.

5. Swift *v.* Barnes, 16 Pick. (Mass.) 194; Caldwell *v.* West, 21 N. J. L. 411; Peacock *v.* Haney, 37 N. J. L. 179; Western Mortg., etc., Co. *v.* Shelton, 8 Tex. Civ. App. 550; Talcott *v.* Rose, (Tex. Civ. App. 1901) 64 S. W. Rep. 1009.

6. Hopkins *v.* Ladd, 35 Ill. 178; Walls *v.* Johnson, 16 Ind. 374; Caldwell *v.* West, 21 N. J. L. 411; Peacock *v.* Haney, 37 N. J. L. 179.

7. Treman *v.* Morris, 9 Ill. App. 237; Leighton *v.* Brown, 98 Mass. 515.

8. Bradley *v.* Reynolds, 61 Conn. 271.

9. Effect of Adjudication of Title — *Alabama.* — Ernst *v.* Hogue, 86 Ala. 502.

Colorado. — Clark *v.* Howell, 3 Colo. 564;

but if such right and title have not been adjudicated in the replevin action, the obligors in the replevin bond may show ownership in the plaintiff in replevin in mitigation of damages for a failure to return the property.[1] In such a case, however, the defendant would be entitled to recover nominal damages though the title to the property was in the plaintiff in replevin.[2]

Condition of Property. — When the property is not returned in like good order and condition as when replevied, as required by the condition of the bond, the defendant may recover for such breach the amount of the depreciation in value.[3]

The Costs of a writ *de retorno habendo* are recoverable as damages for a breach of the condition for a return of the property.[4]

(b) **Proof of Value.** — The admissibility of evidence to prove the value of the property for the purpose of recovery for breach of the condition to make a return is subject to the general rules as to evidence in other actions to prove value. The amount for which the plaintiff in replevin sold the property, though at public auction, pending the replevin action, is not evidence in his favor of its value.[5]

The Burden of Proving the value of the property is upon the defendant in replevin to entitle him, in an action on the bond, to recover more than nominal damages for breach of the condition for a return.[6]

The Assessment of the Value of the property in the replevin action is conclusive of its value as against the obligors in an action on the bond for breach of the condition for a return.[7]

The Appraisal of the property at the instance of the plaintiff in replevin at

Lee *v.* Grimes, 4 Colo. 185; Colorado Springs Co. *v.* Hopkins, 5 Colo. 206.

Connecticut. — Ormsbee *v.* Davis, 16 Conn. 567.

Illinois. — McMurchy *v.* O'Hair, 67 Ill. 242.

Indiana. — Ringgenberg *v.* Hartman, (Ind. 1889) 20 N. E. Rep. 637; Woods *v.* Kessler, 93 Ind. 356; McFadden *v.* Fritz, 110 Ind. 1; Ringgenberg *v.* Hartman, 124 Ind. 186; Carr *v.* Ellis, 37 Ind. 465; Smith *v.* Mosby, 98 Ind. 445.

Iowa. — Hawley *v.* Warner, 12 Iowa 42; Crites *v.* Littleton, 23 Iowa 205.

Michigan. — Jacobson *v.* Metzgar, 43 Mich. 403; Henry *v.* Ferguson, 55 Mich. 399.

Nebraska. — Moore *v.* Kepner, 7 Neb. 291.

1. *Alabama.* — Savage *v.* Gunter, 32 Ala. 467; Ernst *v.* Hogue, 86 Ala. 502.

Colorado. — Lee *v.* Grimes, 4 Colo. 185. *Compare* Clark *v.* Howell, 3 Colo. 564.

Connecticut. — Allen *v.* Woodford, 36 Conn. 143; Jackson *v.* Emmons, 59 Conn. 493; Fielding *v.* Silverstein, 70 Conn. 605, Hannon *v.* O'Dell, 71 Conn. 698.

Illinois. — King *v.* Ramsay, 13 Ill. 619, Chinn *v.* McCoy, 19 Ill. 604; Ledford *v.* Weber, 7 Ill. App. 87; Rankin *v.* Kinsey, 7 Ill. App. 215; Schweer *v.* Schwabacher, 17 Ill. App. 78; Holler *v.* Coleson, 23 Ill. App. 324; Hanchett *v.* Buckley, 27 Ill. App. 159; Webber *v.* Mackey, 31 Ill. App. 369; Clark *v.* Hanchett, 40 Ill. App. 212; Hertz *v.* Kaufman, 46 Ill. App. 591; O'Donnell *v.* Colby, 55 Ill. App. 112; Farson *v.* Gilbert, 85 Ill. App. 364; Lyon *v.* Pease, 86 Ill. App. 251; Weber *v.* Hertz, 87 Ill. App. 601, *affirmed* 188 Ill. 68; Magerstadt *v.* Harder, 95 Ill. App. 303; Hanchett *v.* Gardner, 138 Ill. 571, *affirming* 37 Ill. App. 79. *Compare* Colby *v.* O'Donnell, 38 Ill. App. 196.

Indiana. — Wallace *v.* Clark, 7 Blackf. (Ind.) 298; Hulman *v.* Benighof, 125 Ind. 481; Robinson *v.* Teeter, 10 Ind. App. 698.

Iowa. — Hawley *v.* Warner, 12 Iowa 42.

Kansas. — Little *v.* Bliss, 55 Kan. 94.

Maine. — Jones *v.* Smith, 79 Me. 452; Tuck *v.* Moses, 58 Me. 461. *Compare* Smallwood *v.* Norton, 20 Me. 83, 37 Am. Dec. 39.

Maryland. — Belt *v.* Worthington, 3 Gill & J. (Md.) 247; Mason *v.* Summer, 22 Md. 312; Crabbs *v.* Koontz, 69 Md. 59.

Massachusetts. — Davis *v.* Harding, 3 Allen (Mass.) 302; Easter *v.* Foster, 173 Mass. 39, 73 Am. St. Rep. 257.

Michigan. — Lindner *v.* Brock, 40 Mich. 618; Pearl *v.* Garlock, 61 Mich. 419, 1 Am. St. Rep. 603; Simmons *v.* Robinson, 101 Mich. 240.

Rhode Island. — Wright *v.* Card, 16 R. I. 719.

Vermont. — Safford *v.* Gallup, 53 Vt. 291.

Dismissal for Want of Jurisdiction. — O'Donnell *v.* Colby, 153 Ill. 324, *reversing* 55 Ill. App. 112.

2. Schweer *v.* Schwabacher, 17 Ill. App. 78; Hertz *v.* Kaufman, 46 Ill. App. 591; Davis *v.* Crow, 7 Blackf. (Ind.) 129; Wright *v.* Card, 16 R. I. 719.

3. Washington Ice Co. *v.* Webster, 125 U. S. 426; Yelton *v.* Slinkard, 85 Ind. 190; Citizens' Nat. Bank *v.* Oldham, 136 Mass. 515. See also Dalby *v.* Campbell, 26 Ill. App. 502; Davis *v.* Fenner, 12 R. I. 21. *Compare* Douglass *v.* Douglass 21 Wall. (U. S.) 98; Newton *v.* Round, 109 Iowa 286.

4. Langdoc *v.* Parkinson, 2 Ill. App. 136.

5. Schrader *v.* Wolflin, 21 Ind. 238.

6. Sopris *v.* Lilley, 2 Colo. 496.

7. Assessment of Value in Replevin Action. — Smith *v.* Mosby, 98 Ind. 445; Ringgenberg *v.* Hartman, (Ind. 1889) 20 N. E. Rep. 637; Gordon *v.* Williamson, 20 N. J. L. 77; Capital Lumbering Co. *v.* Learned, 36 Oregon 544, 78 Am. St. Rep. 792.

the time it was taken on the writ is not evidence as against the defendant of its value in an action on the bond for a failure to make return, and certainly is not conclusive upon him.[1]

Recitals as to Value in Replevin Writ and Bond. — The better doctrine seems to be that as a general rule, in an action on the bond to recover the value of the property for breach of the condition for a return, the obligors are precluded from asserting that the property replevied was not at least of the value set forth in the replevin writ and bond,[2] though it would seem that if the valuation of the property has been stated under a mistake as to its actual condition, it should not be conclusive upon the obligors,[3] and in some cases the courts, while acknowledging such valuation as *prima facie* evidence of the value as against the plaintiff,[4] refuse to give to it a conclusive effect.[5] The defendant in replevin is not precluded from showing that the value of the property exceeded the amount so recited.[6]

c. CONDITION TO PROSECUTE ACTION — (1) *In General.* — **The Condition to "Prosecute" the Action** has been held to require a prosecution to final judgment on the merits,[7] and further, to require, it has been held, a successful prosecution of the action,[8] and is broken by a discontinuance or dismissal of the action.[9]

Duly to Prosecute. — The condition that the plaintiff shall "duly" prosecute has been held not to require that the plaintiff should be successful, but merely to require that the action be prosecuted to final judgment.[10] Such condition, however, would be broken by the plaintiff suffering a dismissal of the action,[11] or by unnecessary delay to prosecute without good cause, although no judgment was entered.[12]

To Prosecute to Final Judgment. — The condition to prosecute to "final judgment" requires a prosecution to final judgment upon the merits of the case,[13] and is broken by the plaintiff being nonsuited or suffering a dismissal or discontinuance.[14] It does not seem that the abatement of the action through the death of the plaintiff would be a breach of the condition to prosecute to final judgment.[15]

1. **Appraisal.** — Kafer *v.* Harlow, 5 Allen (Mass.) 348; Leighton *v.* Brown, 98 Mass. 515; Caldwell *v.* West, 21 N. J. L. 411.

2. **Recitals in Writ and Bond.** — Washington Ice Co. *v.* Webster, 125 U. S. 426; Cyclone Steam Snowplow Co. *v.* Vulcan Iron Works, (C. C. A.) 52 Fed. Rep. 920, *affirming* 48 Fed. Rep. 652; Trimble *v.* State, 4 Blackf. (Ind.) 435; McFadden *v.* Fritz, 110 Ind. 1; Wiseman *v.* Lynn, 39 Ind. 250; Tuck *v.* Moses, 58 Me. 461; Huggeford *v.* Ford, 11 Pick. (Mass.) 223; Swift *v.* Barnes, 16 Pick. (Mass.) 194; Capital Lumbering Co. *v.* Learned, 36 Oregon 544, 78 Am. St. Rep. 792.

3. Cyclone Steam Snowplow Co. *v.* Vulcan Iron Works, (C. C. A.) 52 Fed. Rep. 920, 10 U. S. App. 387.

4. Farson *v.* Gilbert, 85 Ill. App. 364; Love *v.* People, 94 Ill. App. 237; Gibbs *v.* Bartlett, 2 W. & S. (Pa.) 29; McLeod Artesian Well Co. *v.* Craig, (Tex. Civ. App. 1897) 43 S. W. Rep. 934. See also Monday *v.* Vance, (Tex. Civ. App. 1899) 51 S. W. Rep. 346; Bradley *v.* Morse, 21 Wis. 680.

5. Farson *v.* Gilbert, 85 Ill. App. 364; Gibbs *v.* Bartlett, 2 W. & S. (Pa.) 29.

6. Cyclone Steam Snowplow Co. *v.* Vulcan Iron Works, (C. C. A.) 52 Fed. Rep. 920; Washington Ice Co. *v.* Webster, 125 U. S. 426; Thomas *v.* Spofford, 46 Me. 408; Miller *v.* Moses, 56 Me. 128; Tuck *v.* Moses, 58 Me. 461; Caldwell *v.* West, 21 N. J. L. 411. See also Story *v.* O'Dea, 23 Ind. 326; Watts *v.* Overstreet, 78 Tex. 571.

7. **Condition to Prosecute Action.** — Alderman *v.* Roesel, 52 S. Car. 162.

8. Berghoff *v.* Heckwolf, 26 Mo. 511.

9. Alderman *v.* Roesel, 52 S. Car. 162.

10. **"Duly" to Prosecute.** — Citizens' State Bank *v.* Morse, 60 Kan. 526. *Compare* McAlester *v.* Suchy, 1 Indian Ter. 666; Biddinger *v.* Pratt, 50 Ohio St. 719.

11. McAlester *v.* Suchy, 1 Indian Ter. 666; McKey *v.* Lauflin, 48 Kan. 581; Citizens' State Bank *v.* Morse, 60 Kan. 526; Little *v.* Bliss, 55 Kan. 94; McCormick Harvesting Mach. Co. *v.* Fisher, 63 Kan. 199.

Dismissal on Motion of Defendant for Want of Jurisdiction. — Biddinger *v.* Pratt, 50 Ohio St. 719.

12. Citizens' State Bank *v.* Morse, 60 Kan. 526.

13. **To Prosecute to "Final Judgment."** — Pierce *v.* King, 14 R. I. 611.

14. Pettygrove *v.* Hoyt, 11 Me. 66; Jones *v.* Smith, 79 Me. 452; Smith *v.* Whiting, 100 Mass. 122; Clark *v.* Norton, 6 Minn. 412; Gardiner *v.* McDermott, 12 R. I. 206; Pierce *v.* King, 14 R. I. 611.

Dismissal for Want of Jurisdiction. — Pierce *v.* King, 14 R. I. 611.

15. Badlam *v.* Tucker, 1 Pick. (Mass.) 285. *Compare* Corbett *v.* Pond, 10 App. Cas. (D. C.) 17; McCormick Harvesting Mach. Co. *v.* Fisher, 63 Kan. 199.

To Prosecute to or with Effect. — The condition to prosecute the action "to effect," or "with effect," requires a successful prosecution of the action,[1] and extends to one continued prosecution from the commencement to the termination of the action; thus, if on appeal by the defendant from a judgment in the lower court for the plaintiff, the judgment is reversed and no *venire de novo* is awarded, the condition is broken.[2] The condition is likewise broken when judgment passes against the plaintiff,[3] or where the plaintiff suffers a voluntary or involuntary nonsuit, dismissal, or discontinuance of the action.[4] In *New York* it has been held that where an action of replevin instituted before a justice of the peace was abated by reason of the absence of the justice at the time set for the return of the summons, there was not a breach of the condition.[5] Before an action can be maintained for breach of the condition to prosecute the replevin action to effect, there must have been a termination of the replevin action.[6]

(2) *Extent of Recovery for Failure to Prosecute.* — For breach of the condition duly to prosecute the action or prosecute the action to effect, the defendant has been held entitled to recover in an action on the bond all the damages he has sustained by reason of the institution of the replevin action and the taking of the property from his possession,[7] such as the costs awarded to the defendant in the replevin action,[8] and damages for the detention of the property.[9] And on breach of such a condition, a recovery for the value of the property in case of its nonreturn has been permitted,[10] though in some cases

1. To Prosecute "To" or "With Effect." — Perreau *v.* Bevan, 5 B. & C. 284, 11 E. C. L. 230; Turnor *v.* Turner, 2 Brod. & B. 112, 6 E. C. L. 60; Morehead *v.* Yeazel, 10 Ill. App. 263, Brown *v.* Parker, 5 Blackf. (Ind.) 291; Wheat *v.* Catterlin, 23 Ind. 85; Yelton *v.* Slinkard, 85 Ind. 190; Boom *v.* St. Paul Foundry, etc., Co., 33 Minn. 253; Gibbs *v.* Bartlett, 2 W. & S. (Pa.) 29; Ingram *v.* Cox, 5 Pa. Dist. 617.

In *Connecticut* it has been held that a verdict and judgment for the defendant on the plea of *non cepit*, the plaintiff being entitled to retain the property, was not a breach by the plaintiff of the condition "to prosecute to effect" or "make good his plea." Ladd *v.* Prentice, 14 Conn. 109.

2. Gibbs *v.* Bartlett, 2 W. & S. (Pa.) 29. See also Persse *v.* Watrous, 30 Conn. 139; Barbour *v.* Perry, 41 Ill. App. 613.

3. Gould *v.* Warner, 3 Wend. (N. Y.) 54.

4. Nonsuit, Dismissal, or Discontinuance — *Colorado.* — Cox *v.* Sargent, 10 Colo. App. 1.

Connecticut. — Persse *v.* Watrous, 30 Conn. 139; Allen *v.* Woodford, 36 Conn. 143; Fielding *v.* Silverstein, 70 Conn. 605.

Delaware. — Truitt *v.* Collins, 2 Penn. (Del.) 36.

Georgia. — Smith *v.* Adams, 79 Ga. 802; Marshall *v.* Livingston, 77 Ga. 21; Thomas *v.* Price, 88 Ga. 533.

Illinois. — Langdoc *v.* Parkinson, 2 Ill. App. 136.

Indiana. — Sherry *v.* Foresman, 6 Blackf. (Ind.) 56; O'Neal *v.* Wade, 3 Ind. 410; Waddell *v.* Bradway, 84 Ind. 537; Peffley *v.* Kenrick, 4 Ind. App. 510; Rauh *v.* Waterman, (Ind. App. 1901) 61 N. E. Rep. 743, *rehearing denied* (Ind. App. 1902) 63 N. E. Rep. 42.

Kentucky. — Roman *v.* Stratton, 2 Bibb (Ky.) 199.

Minnesota. — Boom *v.* St. Paul Foundry, etc., Co., 33 Minn. 253.

Missouri. — Berghoff *v.* Heckwolf, 26 Mo. 511; Morrison *v.* Yancey, 23 Mo. App. 670.

Compare Scott *v.* Scott, 50 Mich. 372; Bown *v.* Weppner, 62 Hun (N. Y.) 579.

In Parrott *v.* Scott, 6 Mont. 340, a dismissal of the replevin suit by the plaintiff was held to be a breach of the condition of the bond to prosecute the replevin action.

Dismissal for Want of Jurisdiction. — McDermott *v.* Isbell, 4 Cal. 113; Bates *v.* Williams, 43 Ill. 494. See, however, Rosen *v.* Fischel, 44 Conn. 371.

5. Pierce *v.* Hardee, 1 Thomp. & C. (N. Y.) 557. See also Kidder *v.* Merryhew, 32 Mich. 470.

6. Cornish *v.* Keesee, 17 Ark. 391; Mulhall *v.* McVay, 2 Okla. 534.

7. Extent of Recovery for Failure to Prosecute. — Cox *v.* Sargent, 10 Colo. App. 1; Truitt *v.* Collins, 2 Penn. (Del.) 36; Little *v.* Bliss, 55 Kan. 94.

8. Costs. — Truitt *v.* Collins, 2 Penn. (Del.) 36; Langdoc *v.* Parkinson, 2 Ill. App. 136; Phillips *v.* Hyde, 1 Dall. (Pa.) 439; Tibbal *v.* Cahoon, 10 Watts (Pa.) 232; Ingram *v.* Cox, 5 Pa. Dist. 617; Balsley *v.* Hoffman, 13 Pa. St. 609.

9. Damages for Detention. — Sopris *v.* Lilley, 2 Colo. 496, *overruling* 1 Colo. 266.

10. Value of Property — *Colorado.* — Cox *v.* Sargent, 10 Colo. App. 1.

Connecticut. — Persse *v.* Watrous, 30 Conn. 139.

Delaware. — Truitt *v.* Collins, 2 Penn. (Del.) 36.

Georgia. — Thomas *v.* Price, 88 Ga. 533; Smith *v.* Adams, 79 Ga. 802.

Indiana. — Peffley *v.* Kenrick, 4 Ind. App. 510. See also Waddell *v.* Bradway, 84 Ind. 537.

Iowa. — Hall *v.* Smith, 10 Iowa 45.

Kansas. — Manning *v.* Manning, 26 Kan. 98; McKey *v.* Laufin, 48 Kan. 581; Little *v.* Bliss, 55 Kan. 94.

Massachusetts. — Smith *v.* Whiting, 100 Mass. 122.

the courts have denied the right to recover the value of the property replevied on the breach merely of the condition to prosecute the action to effect.[1] Where there is a breach of the condition to prosecute to effect and no judgment for a return was awarded, in an action on the bond, the plaintiff in replevin may show his title to the property in mitigation of damages;[2] it is otherwise, however, where in the replevin action there is an adjudication as to title in favor of the defendant.[3] To entitle the defendant in replevin to recover more than nominal damages for breach of the condition to prosecute the action to effect, he must prove actual damages,[4] but without proof of actual damages, he is entitled to recover in any case nominal damages.[5]

d. CONDITION TO PAY DAMAGES. — Where the condition of the bond is for the payment of all damages the defendant may suffer by the replevying, the defendant may recover such damages in an action on the bond as he could have in the replevin action.[6] But where the condition is to pay such damages or sum as may be awarded to the defendant in the replevin action, no recovery can be had on the bond for damages to the defendant by reason of the taking of the property from his possession unless they are awarded to him in the replevin action.[7] In some jurisdictions the statutes require, before an action can be maintained on the replevin bond for breach of the condition to pay any judgment which may be recovered by the defendant against the plaintiff, that an execution to enforce the judgment shall be first issued and returned unsatisfied,[8] but in the absence of such a statutory requirement it is not necessary that execution should have been issued to enforce the judgment for damages before an action can be maintained on the bond.[9] Where the judgment is in the alternative for a return of the property replevied or for its value as fixed in case a return cannot be had, it has been held that there must have been an execution issued on the judgment for a return before a recovery could be had on the bond for a breach of a condition to pay such sum as might be recovered against the plaintiff in replevin.[10] The money judgment is, as a general rule, conclusive upon the obligors on the replevin bond when sued for breach of the condition to pay whatever sum may be recovered by the defendant in replevin against the plaintiff,[11] and where a judgment is rendered in the replevin action for the value of the property, in an action on the bond for breach of the condition to pay the judgment, the obligors cannot object that

Missouri. — Elliott *v.* Black, 45 Mo. 372; Morrison *v.* Yancey, 23 Mo. App. 670, *distinguishing* White *v.* Van Houten, 51 Mo. 577; Barghoff *v.* Heckwolf, 26 Mo. 511.

Pennsylvania. — Pittsburgh Nat. Bank *v.* Hall, 107 Pa. St. 583; Gibbs *v.* Bartlett, 2 W. & S. (Pa.) 29; Balsley *v.* Hoffman, 13 Pa. St. 605.

Rhode Island. — Gardiner *v.* McDermott, 12 R. I. 206.

See also Boley *v.* Griswold, 20 Wall. (U. S.) 486; Boom *v.* St. Paul Foundry, etc., Co., 33 Minn. 253.

1. Fellheimer *v.* Hainline, 65 Ill. App. 384; Wall *v.* Humphreys, 4 Dana (Ky.) 209; Pettygrove *v.* Hoyt, 11 Me. 66; Clark *v.* Norton, 6 Minn. 412. *Compare* Roman *v.* Stratton, 2 Bibb (Ky.) 199.

2. Allen *v.* Woodford, 36 Conn. 143; Truitt *v.* Collins, 2 Penn. (Del.) 36; Farson *v.* Gilbert, 85 Ill. App. 364; Crabbs *v.* Koontz, 69 Md. 59.

3. Boom *v.* St. Paul Foundry, etc., Co., 33 Minn. 253.

4. Imel *v.* Van Deren, 8 Colo. 90; Robinson *v.* Teeter, 10 Ind. App. 698; Jones *v.* Smith, 79 Me. 452.

5. Crabbs *v.* Koontz, 69 Md. 59; Smith *v.* Whiting, 100 Mass. 122; Alderman *v.* Roesel, 52 S. Car. 162.

6. **Condition to Pay Damages.** — Washington Ice Co. *v.* Webster, 125 U. S. 426; Quinnipiac Brewing Co. *v.* Hackbarth, 74 Conn. 392; Gould *v.* Hayes, 71 Conn. 86; Smith *v.* Dillingham, 33 Me. 384; Thomas *v.* Spofford, 46 Me. 408; Miltimore *v.* Bottom, 66 Vt. 168. See also Hall *v.* Smith, 10 Iowa 45.

7. Ginica *v.* Atwood, 8 Cal. 446; Sopris *v.* Lilley, 2 Colo. 496; Yelton *v.* Slinkard, 85 Ind. 190; Pettit *v.* Allen, 64 N. Y. App. Div. 579; Cheatham *v.* Morrison, 31 S. Car. 326. See also White *v.* Van Houten, 51 Mo. 577.

8. Cameron *v.* Boyle, 2 Greene (Iowa) 154; Phillips *v.* Waterhouse, 40 Mich. 273. See also Jennison *v.* Haire, 29 Mich. 207; Hershiser *v.* Jordan, 25 Neb. 275; Mulhall *v.* McVay, 2 Okla. 534.

9. Robertson *v.* Davidson, 14 Minn. 554; Potter *v.* James, 7 R. I. 312.

10. Hager *v.* Clute, 10 Hun (N. Y.) 447.

11. Cantril *v.* Babcock, 11 Colo. 143; Estey *v.* Harmon, 40 Mich. 645; Ryan *v.* Akeley, 42 Mich. 516; Christiansen *v.* Mendham, (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 662; Charleston *v.* Price, 1 McCord L. (S. Car.) 299.

the judgment should have been in the alternative for a return of the property or the value in case of a nonreturn.[1]

e. CONDITION TO PAY COSTS. — Where the condition of the bond is to prosecute the action to final judgment and pay such costs as the defendant shall recover, the failure to pay a judgment in the defendant's favor for costs is a breach of the bond and entitles the defendant to recover in an action on the bond the amount of the costs;[2] and an action may be maintained on the bond for such costs without an execution having been first issued on the judgment therefor.[3] Where the condition of the bond is for the payment of such sum as may, for any cause, be recovered against the plaintiff in replevin, the defendant may recover thereon the costs awarded to him in the replevin action.[4]

f. DISCHARGE OF SURETIES. — The sureties on a replevin bond may be discharged from liability to the same extent as sureties upon other obligations,[5] by agreements between the plaintiff and the defendant to the injury of the sureties.[6] A fraudulent agreement between the plaintiff and the defendant, whereby judgment is rendered against the plaintiff, will discharge the sureties,[7] as will a release of the plaintiff as principal from liability on the replevin bond.[8] The transfer of the replevin action to another court in pursuance of a statutory provision does not discharge the sureties.[9] Where property is replevied from a sheriff who has levied upon it under writs of attachment or execution, the substitution as defendant of the attachment or execution creditor does not discharge the sureties on the replevin bond.[10] And where the original plaintiff in replevin dies, and the action is renewed in the name of his representatives, the sureties on the replevin bond are not released.[11] The performance of the conditions of the bond, of course, releases the sureties from further liability.[12]

X. REDELIVERY BOND — Custody of Property Pending Action. — At common law the plaintiff in the replevin action was entitled to the possession of the replevied property pending the replevin action, and this right is recognized by the statutes governing the actions in the several jurisdictions in the *United States*.[13] It has been held that the court could, by commitment for contempt, protect the plaintiff's right to such possession as against the defendant.[14] Under the

1. McCarthy *v.* Strait, 7 Colo. App. 59; Eisenhart *v.* McGarry, 15 Colo. App. 1; Mason *v.* Richards, 12 Iowa 73; Robertson *v.* Davidson, 14 Minn. 554. *Compare* Lee *v.* Hastings, 13 Neb. 508; Field *v.* Lumbard, 53 Neb. 397.

2. **Condition to Pay Costs.** — Larson *v.* Laird, 36 Ill. App. 402; Kellar *v.* Carr, 119 Ind. 127; Hovey *v.* Coy, 17 Me. 266; Cook *v.* Lothrop, 18 Me. 260; Monroe *v.* Heintzman, 46 Mich. 12; Potter *v.* James, 7 R. I. 312.

Attorney's Fees Expended in Replevin Action. — Jones *v.* Findley, 84 Ga. 52; Harts *v.* Wendell, 26 Ill. App. 275; Dalby *v.* Campbell, 26 Ill. App. 502; Siegel *v.* Hanchett, 33 Ill. App. 634; Scott *v.* Rogers, 56 Ill. App. 571; Edwin *v.* Cox, 61 Ill. App. 567; Reno *v.* Woodyatt, 81 Ill. App. 553; Washburne *v.* Burke, 84 Ill. App. 587; Pace *v.* Neal, 92 Ill. App. 416; Davis *v.* Crow, 7 Blackf. (Ind.) 129; Kenley *v.* Com., 6 B. Mon. (Ky.) 583.

3. Cook *v.* Lothrop, 18 Me. 260.

4. Morrill *v.* Daniel, 47 Ark. 316; Tibbles *v.* O'Connor, 28 Barb. (N. Y.) 538; Hinckley *v.* Kreitz, 58 N. Y. 588; Carlon *v.* Dixon, 14 Oregon 293; Rhodes *v.* Burkart, 28 S. Car. 154.

5. **Discharge of Sureties.** — See the title SURETYSHIP.

6. Bowmaker *v.* Moore, 3 Price 214; Bolton *v.* Nitz, 88 Mich. 354. See also Dannels *v.* Fitch, 8 Pa. St. 495.

Thus, where the plaintiff and the defendant in replevin, without the consent of the surety, agree upon reference to arbitrators of matters in dispute, whereby performance of the condition of the bond to prosecute the action to effect is suspended, the surety on the bond is discharged from liability. Bowmaker *v.* Moore, 3 Price 214. See also Aldridge *v.* Harper, 10 Bing. 118, 25 E. C. L. 53; Pirkins *v.* Rudolph, 36 Ill. 308. *Compare* Daniels *v.* Patterson, 3 N. Y. 47.

7. Wright *v.* Hake, 38 Mich. 525.

8. Thomas *v.* Wilson, 6 Blackf. (Ind.) 203.

9. Reusch *v.* Demass, 34 Mich. 95.

10. Elder *v.* Fielder, 9 Baxt. (Tenn.) 272. *Compare* Smith *v.* Roby, 6 Heisk. (Tenn.) 546.

11. Greer *v.* Howard, 41 Ohio St. 591.

12. Chambers *v.* Waters, 7 Cal. 390; Edwards *v.* Cottrell, 43 Iowa 194; Toland *v.* Swearingen, 39 Tex. 447.

13. **Custody.** — Knott *v.* People, 83 Ill. 532; Clark *v.* West, 23 Mich. 242; Ford *v.* Bushor, 48 Mich. 534; Vanderburgh *v.* Bassett, 4 Minn. 242; Jenkins *v.* State, 60 Neb. 205; Morris *v.* DeWitt, 5 Wend. (N. Y.) 71.

14. Knott *v.* People, 83 Ill. 532.

statutes in some jurisdictions the plaintiff in replevin may waive his right to the immediate possession of the property, the possession to be obtained, in case the plaintiff is successful, by execution after judgment.[1] This right on the part of the plaintiff to the possession of the property replevied pending the replevin action is a mere possessory right, and does not confer upon him any independent title which will enable him to transfer or sell the property to a third person nor prevent the defendant, if successful in the replevin action, from following the property in the hands of such third person.[2]

Redelivery Bond. — In many jurisdictions the statutes authorize the defendant in replevin upon the execution of a redelivery bond to retain possession of the property replevied pending the replevin action.[3] As this right on the part of

1. Benjamin *v.* Smith, 43 Minn. 146; Vogel *v.* Badcock, (Supm. Ct. Gen. T.) 1 Abb. Pr. (N. Y.) 176. See also *supra*, this title, *Extent of Recovery by Parties*.

2. Lockwood *v.* Perry, 9 Met. (Mass.) 440; Mohr *v.* Langan, 162 Mo. 474; Caldwell *v.* Gans, 1 Mont. 570. See also Hunt *v.* Robinson, 11 Cal. 262; Mohr *v.* Langan, 77 Mo. App. 481. *Compare* Donohoe *v.* McAleer, 37 Mo. 312; Union Nat. Bank *v.* Moline, etc., Co., 7 N. Dak. 201; Knight *v.* Kinney, 3 Ohio Cir. Dec. 662, 7 Ohio Cir. Ct. 59; Smith *v.* McGregor, 10 Ohio St. 461; Stewart *v.* Wolf, (Pa. 1886) 7 Atl. Rep. 165.

Injunction Restraining Sale by Plaintiff. — Brody *v.* Chittenden, 106 Iowa 340; Hunt *v.* Williams, 4 Ohio Cir. Dec. 568, 7 Ohio Cir. Ct. 224.

3. **Redelivery Bond** — *Alabama.* — Rich *v.* Lowenthal, 99 Ala. 487.

Arkansas. — Jetton *v.* Smead, 29 Ark. 372.

Colorado. — Smith *v.* Stubbs, 16 Colo. App. 130.

Delaware. — Ott *v.* Specht, 8 Houst. (Del.) 61.

District of Columbia. — Wall *v.* De Mitkiewicz, 9 App. Cas. (D. C.) 109.

Georgia. — Duckworth *v.* Duckworth, 43 Ga. 265; Jones *v.* Findley, 84 Ga. 52; Holmes *v.* Langston, 110 Ga. 861; Farmers Alliance Warehouse, etc., Co. *v.* McElhannon, 98 Ga. 394.

Indiana. — June *v.* Payne, 107 Ind. 307.

Indian Territory. — Eddings *v.* Boner, 1 Indian Ter. 173.

Iowa. — Stuart *v.* Trotter, 75 Iowa 96.

Kansas. — Kennedy *v.* Brown, 21 Kan. 174; Turner *v.* Reese, 22 Kan. 319; Carr *v.* Huffman, 47 Kan. 188; Union Stove, etc., Works *v.* Breidenstein, 50 Kan. 53; Jordan *v.* Johnson, 1 Kan. App. 656; Swartz *v.* English, 4 Kan. App. 509; Boyd *v.* Huffaker, 39 Kan. 525; O'Loughlin *v.* Carr, 9 Kan. App. 818.

Kentucky. — Terry *v.* Johnson, 22 Ky. L. Rep. 1210, 60 S. W. Rep. 300.

Michigan. — Busch *v.* Fisher, 89 Mich. 192.

Minnesota. — Vanderburgh *v.* Bassett, 4 Minn. 242; New England Furniture, etc., Co. *v.* Bryant, 64 Minn. 256.

Mississippi. — Phillips *v.* Cooper, 59 Miss. 17; Tyler *v.* Davis, 63 Miss. 345; Hazlett *v.* Witherspoon, (Miss. 1899) 25 So. Rep. 150.

Missouri. — Joseph Schnaider Brewing Co. *v.* Niederweiser, 28 Mo. App. 233; Peters *v.* Lowenstein, 44 Mo. App. 406.

Montana. — Hedderick *v.* Pontet, 6 Mont. 345.

New Jersey. — Frazier *v.* Fredericks, 24 N. J. L. 162; Field *v.* Post, 38 N. J. L. 346; Johnson *v.* Mason, 64 N. J. L. 258; Ft. Wayne Electric Corp. *v.* Security Trust, etc., Co., 65 N. J. L. 221; Cowen *v.* Bloomberg, 66 N. J. L. 385.

New York. — Lisher *v.* Pierson, 11 Wend. (N. Y.) 58; Teschner *v.* Deveron, (Marine Ct. Spec. T.) 59 How. Pr. (N. Y.) 467; Quarch *v.* Metz, (N. Y. City Ct. Gen. T.) 15 Misc. (N. Y.) 622; Weber *v.* Manne, 42 Hun (N. Y.) 557; Corn Exch. Bank *v.* Blye, 102 N. Y. 305; Auerbach *v.* Marks, 10 Daly (N. Y.) 171; Grant *v.* Booth, (Supm. Ct. Spec. T.) 21 How. Pr. (N. Y.) 354; Graham *v.* Wells, (Supm. Ct.) 18 How. Pr. (N. Y.) 377; Pettit *v.* Allen, 64 N. Y. App. Div. 579; Emerson *v.* Booth, 51 Barb. (N. Y.) 40; Dale *v.* Gilbert, 128 N. Y. 625; Nowell *v.* Gilbert, 49 Hun (N. Y.) 489; O'Connell *v.* Kelly, 15 Daly (N. Y.) 513; Martin *v.* Gilbert, 119 N. Y. 298, 16 Am. St. Rep. 823; Slack *v.* Heath, 4 E. D. Smith (N. Y.) 95.

North Carolina. — Hall *v.* Tillman, 103 N. Car. 276; Smith *v.* Whitten, 117 N. Car. 389; Griffith *v.* Richmond, 126 N. Car. 377.

Ohio. — Green *v.* Farrin, 5 Ohio Cir. Dec. 181, 11 Ohio Cir. Ct. 294; Berwanger *v.* Bristol, 3 Ohio Dec. 683, 3 Ohio N. P. 161.

Oregon. — Lewis *v.* McNary, 38 Oregon 116.

Pennsylvania. — Snyder *v.* Frankenfield, 4 Pa. Dist. 767; Chaffee *v.* Sangston, 10 Watts (Pa.) 265; Knowles *v.* Lord 4 Whart. (Pa.) 500, 34 Am. Dec. 525; Moore *v.* Shenk, 3 Pa. St. 13, 45 Am. Dec. 619; Fisher *v.* Whoollery, 25 Pa. St. 197; Bradford *v.* Frederick, 101 Pa. St. 445; Harrisburg Electric Light Co. *v.* Goodman, 129 Pa. St. 206.

South Carolina. — Brock *v.* Bolton, 37 S. Car. 40.

Tennessee. — Harris *v.* Taylor, 3 Sneed (Tenn.) 536, 67 Am. Dec. 576.

Texas. — Pait *v.* McCutchen, 43 Tex. 291; Siddall *v.* Goggan, 68 Tex. 708; Watts *v.* Overstreet, 78 Tex. 571; Krall *v.* Campbell Printing Press, etc., Co., 79 Tex. 556; Boykin *v.* Rosenfield, 69 Tex. 115; Gunn *v.* Pickering, 4 Tex. App. Civ. Cas., § 276; Bemis *v.* Wells, 10 Tex. Civ. App. 626; Levy *v.* Lee, 13 Tex. Civ. App. 510; McLeod Artesian Well Co. *v.* Craig, (Tex. Civ. App. 1897) 43 S. W. Rep. 934; Avery *v.* Popper, (Tex. Civ. App. 1898) 45 S. W. Rep. 951; Monday *v.* Vance, (Tex. Civ. App. 1899) 51 S. W. Rep. 346.

See also Montgomery *v.* Black, 4 Har. & M. (Md.) 391.

The obligation incurred under a redelivery bond in replevin is very similar to that incurred under the general forthcoming and delivery bonds, which have been fully treated elsewhere in this work. See the title FORTHCOMING AND DELIVERY BONDS, vol. 13, p. 1139.

the defendant to retain possession upon giving a redelivery bond is purely statutory, he must comply with the statutory requirements therefor.[1] Where such a bond is given the plaintiff cannot, pending the action, maintain a second replevin action to retake the property from the defendant.[2] This bond is not in lieu of the property to such an extent as to allow the defendant, where judgment is rendered against him for the property or its assessed value in case the property cannot be had, to retain the property and pay its assessed value against the will of the plaintiff,[3] nor can the defendant, by the sale of the property to a third person, confer upon him a title as against the plaintiff.[4] A bond which does not comply with the requirements of the statutes so as to be valid as a statutory redelivery bond may, however, be binding upon the obligors as a common-law obligation.[5] Where the action in which the redelivery bond is given is dismissed, the bond becomes *functus officio* and no recovery can be had thereon.[6] Where the defendants secure possession of the property replevied by giving a redelivery bond, they are estopped to assert in the replevin action that the property was not in their possession at the time the action was instituted,[7] nor can the defendant, after giving such a bond, deny the identity of the goods so claimed and retained by him with those claimed in the replevin writ.[8] Mere delay on the part of the plaintiff in prosecuting the replevin action will not discharge the obligors on the redelivery bond.[9]

Condition for Return of Property. — Where the condition of the bond is merely for the redelivery of the property to the plaintiff, the obligors are discharged by a tender of the property,[10] and this has been held true though the condition of the property had deteriorated while retained by the defendant after the execution of the redelivery bond.[11] So, also, it has been held that by a redelivery of a part of the property the obligors could avoid liability on the bond *pro tanto*,[12] and while the affirmative duty is upon the defendant to deliver the property to the plaintiff, where possession is awarded to him, within a reasonable time and that, too, without a demand for its delivery,[13] still, what is a reasonable time must, to a very great extent, depend upon the circumstances attending each particular case.[14] The obligors cannot satisfy the condition for a delivery of the property except by a delivery of the identical property replevied.[15]

Condition of Property. — Where the condition of the redelivery bond is to deliver the property in as good condition as it was when the action was commenced, the destruction of the property pending the action, though without the defend-

1. Vanderburgh *v.* Bassett, 4 Minn. 242; Teschner *v.* Deveron, (Marine Ct. Spec. T.) 59 How. Pr. (N. Y.) 467; M'Cann *v.* Thompson, (Supm. Ct. Spec. T.) 13 How. Pr. (N. Y.) 380.

2. Turner *v.* Reese, 22 Kan. 319.

3. Swantz *v.* Pillow, 50 Ark. 300, 7 Am. St. Rep. 98. *Compare* Swope *v.* Crawford, 18 Lanc. L. Rev. 177, 16 Pa. Super. Ct. 474.

4. Swantz *v.* Pillow, 50 Ark. 300, 7 Am. St. Rep. 98.

5. Terry *v.* Johnson, 22 Ky. L. Rep. 1210, 60 S. W. Rep. 300; Hedderick *v.* Pontet, 6 Mont. 345.

6. **Action Dismissed.** — Hail *v.* Tunstall, 21 Tex. Civ. App. 593; Barrett *v.* Habern, 22 Tex. Civ. App. 207; Bullock *v.* Traweek, (Tex. Civ. App. 1892) 20 S. W. Rep. 724; Mitchell *v.* Bloom, 91 Tex. 634; Mitchell *v.* Bloom, (Tex. Civ. App. 1898) 46 S. W. Rep. 406; Lincoln *v.* Hollenbach, (Tex. Civ. App. 1899) 49 S. W. Rep. 686; Love *v.* Hudson, 24 Tex. Civ. App. 377.

7. Benesch *v.* Waggner, 12 Colo. 534, 13 Am. St. Rep. 254; Benesch *v.* Mitchelson, 12 Colo. 539; Joseph Schnaider Brewing Co. *v.* Niederweiser, 28 Mo. App. 233; Diossy *v.* Morgan, 74 N. Y. 11; Griffith *v.* Richmond, 126 N. Car. 377. *Compare* Bell *v.* Ober, etc., Co., 111 Ga. 668. See *supra*, this title, *For What Taking or Detention Replevin Will Lie.*

8. Ott *v.* Specht, 8 Houst. (Del.) 61; Stern-Block Co. *v.* Heinsheimer, 1 Ohio Dec. 651, 1 Ohio N. P. 43. *Compare* Rouse *v.* Haas, 26 N. Y. App. Div. 171.

9. Smith *v.* Stubbs, 16 Colo. App. 130.

10. Larabee *v.* Cook, 8 Kan. App. 776; New England Furniture, etc., Co. *v.* Bryant, 64 Minn. 256; Parker *v.* Oxendine, 85 Mo. App. 212; Hall *v.* Tillman, 103 N. Car. 276; Lewis *v.* McNary, 38 Oregon 116.

11. Douglass *v.* Douglass, 21 Wall. (U. S.) 98. *Compare* June *v.* Payne, 107 Ind. 307.

12. Larabee *v.* Cook, 8 Kan. App. 776.

13. June *v.* Payne, 107 Ind. 307.

14. June *v.* Payne, 107 Ind. 307.

15. Binkley *v.* Dewall, 9 Kan. App. 891; Union Stove, etc., Works *v.* Breidenstein, 50 Kan. 53.

ant's fault, does not discharge the obligors from the obligation to deliver.[1]

Collateral Attack. — Where a judgment for the delivery of the property to the plaintiff is rendered in the replevin action, such judgment cannot be collaterally attacked in an action on the redelivery bond.[2]

Measure of Damages. — For breach of the condition to redeliver, the measure of damages is the value of the property not redelivered;[3] the plaintiff cannot also recover the costs adjudged to the plaintiff in the replevin action.[4]

Condition for Payment of Judgment. — Where the condition of the redelivery bond is for the delivery of property to the plaintiff if adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant, and the plaintiff in replevin recovers a judgment for the value of the property, the obligors on the bond are liable for its payment, and are not discharged by the plaintiff's waiver of a judgment for the delivery of the property.[5] Where the bond is conditioned for the performance of the judgment in the replevin action, the obligors are liable for the costs adjudged to the plaintiff.[6]

REPLEVY. (See also the title REPLEVIN, *ante*.) — The term "replevy" means to redeliver goods which have been distrained to the original possessor of them, on his giving pledges.[7]

REPLEVY BAIL. — See the titles FORTHCOMING AND DELIVERY BONDS, vol. 13, p. 1129; STAY AND SUPERSEDEAS; and see the title REPLEVIN, 18 ENCYC. OF PL. AND PR. 615.

REPLEVY BOND. — See the title REPLEVIN, *ante*.

REPLICATION. — See the title REPLICATIONS AND REPLIES, 18 ENCYC. OF PL. AND PR. 639.

REPLY. — See the title REPLICATIONS AND REPLIES, 18 ENCYC. OF PL. AND PR. 639.

REPORT. (See also the titles COPYRIGHT, vol. 7, p. 508; DOCUMENTARY EVIDENCE, vol. 9, p. 877; RECORDS, *ante*, p. 155.) — A report is a printed or written collection of accounts or relations of cases judicially argued and determined.[8] For other meanings of the word see note 9.

1. Hinkson *v.* Morrison, 47 Iowa 167.

Property Destroyed by Fire. — Hazlett *v.* Witherspoon, (Miss. 1899) 25 So. Rep. 150; McPherson *v.* Acme Lumber Co., 70 Miss. 649: George *v.* Hewlett, 70 Miss. 1, 35 Am. St. Rep. 626.

This rule has been applied when the property replevied was an animal which died pending the replevin action. Hinkson *v.* Morrison, 47 Iowa 167.

2. Kennedy *v.* Brown, 21 Kan. 171; Boyd *v.* Huffaker, 39 Kan. 525, 40 Kan. 634; O'Loughlin *v.* Carr, 9 Kan. App. 818.

3. **Damages for Breach.** — Karthaus *v.* Owings, 2 Gill & J. (Md.) 430; Busch *v.* Fisher, 89 Mich. 192; Young *v.* Pickens, 45 Miss. 553; Lutes *v.* Alpaugh, 23 N. J. L. 165; Talcott *v.* Belding, (N. Y. Super. Ct. Gen. T.) 46 How. Pr. (N. Y.) 419; Phillips *v.* Stroup, (Pa. 1889) 17 Atl. Rep. 220; Colorado City Nat. Bank *v.* Lester, 73 Tex. 542; McLeod Artesian Well Co. *v.* Craig, (Tex. Civ. App. 1897) 43 S. W. Rep. 934. See also Frazier *v.* Fredericks, 24 N. J. L. 162.

4. Lutes *v.* Alpaugh, 23 N. J. L. 165. *Compare* Phillips *v.* Cooper, 59 Miss. 17.

5. Johnson *v.* Mason, 64 N. J. L. 258; Thomson *v.* Joplin, 12 S. Car. 580. See also Hall *v.* Tillman, 115 N. Car. 500. *Compare* New England Furniture, etc., Co. *v.* Bryant, 64 Minn. 256.

6. Morrill *v.* Daniel, 47 Ark. 316; Hall *v.* Tillman, 110 N. Car. 220.

In Brock *v.* Bolton, 37 S. Car. 40, *distinguishing* Rhodes *v.* Burkart, 28 S. Car. 155, a redelivery bond conditioned for the return of the property and for the payment of any "damages" awarded against the defendant was held not to include costs of the replevin action awarded to the plaintiff.

7. **Replevy.** — Kirk *v.* Morris, 40 Ala. 225, *quoting* Bouv. L. Dict. See also Bell *v.* Thomas, 8 Ala. 527; Colorado City Nat. Bank *v.* Lester, 73 Tex. 542.

8. **Report.** — Bouv. L. Dict.

9. **Report and Rumor.** — A statute provided that a juror should not be disqualified for an opinion founded only on rumor and newspaper *reports*. In construing this statute in State *v.* Culler, 82 Mo. 627, the court said: "If next we turn to *report*, we find it one of the synonyms of 'rumor,' another 'hearsay,' another 'story;' so that when we couple the word 'newspaper' with the word *reports*, it would seem impossible to doubt the legislative meaning as being simply this: A rumor or current story printed in a newspaper."

Reference. (See also the title REFEREES, *ante*.) — In Indiana Cent. R. Co. *v.* Bradley, 7 Ind. 53, it was said: "The result of a trial by jury is called a verdict; by the court, a finding; by arbitrators, an award; and by a referee or referees, a *report*."

Mailing. — Mailing a letter, prepaid and properly addressed, to an insurance company,

REPORT AND CASE MADE. — See the title REPORT AND CASE MADE, 18 ENCYC. OF PL. AND PR. 725.

REPORTER. — See generally the title PUBLIC OFFICERS, vol. 23, p. 314.

REPOSITORY. — A repository is "a place where things are or may be deposited for safety or preservation; a depository; a storehouse; a magazine.[1]

REPRESENT. — To represent is to describe or portray in words; to declare; to set forth; to exhibit to another mind in language.[2] To represent also means to stand in place of.[3]

REPRESENTATION. (See also LEGAL REPRESENTATIVES, PERSONAL REPRESENTATIVES, REPRESENTATIVES, ETC., vol. 18, p. 813; SUCCESSION; WILLS.) — See note 4.

REPRESENTATIONS. (See also the titles ESTOPPEL, vol. 11, p. 385; FRAUD AND DECEIT, vol. 14, p. 12; RESCISSION, CANCELLATION, AND REFORMATION, *post;* VENDOR AND PURCHASER.) — A representation is a statement of an existing fact.[5]

REPRESENTATIVES. — See LEGAL REPRESENTATIVES, PERSONAL REPRESENTATIVES, REPRESENTATIVES, ETC., vol. 18, p. 813.

REPRESENTING. — See note 6.

if done by general direction of their agent, satisfies a condition in a policy that the facts stated in the letter shall be *reported* to the company. Edwards *v.* Mississippi Valley Ins. Co., 1 Mo. App. 192.

Report at Custom House. — A charter-party required the vessel to *report* at the custom house. In construing this provision in Mignano *v.* MacAndrews, 49 Fed. Rep. 377, *affirmed* (C. C. A.) 53 Fed. Rep 958, the court said: "There is no ambiguity in the phrase 'to *report* at the custom house;' it is equivalent to the words 'to be entered at the custom house.'"

1. **Repository.** — State *v.* Sprague, 149 Mo. 419, *quoting* Cent. Dict.

2. **Represent.** — Butts *v.* Long, 94 Mo. App. 687, *quoting* Cent. Dict. and Webst. Dict.

Promise. — "The word *represent* does not import a promise." Cooper *v.* Landon, 102 Mass. 60.

As Represented. — See Reed *v.* Patterson, 7 W. Va. 263; Crislip *v.* Cain, 19 W. Va. 554.

3. Chase *v.* Swayne, 88 Tex. 224.

4. **Succession.** — In Stallworth *v.* Stallworth, 29 Ala. 79, it was said: "The terms *representation* and 'right of *representation*,' as found in the statutes, are of no modern origin. Their import is clearly defined, viz., 'that these representatives take neither more nor less, but just so much as their principals would have done.' 3 Black. Com. 216, 217; 2 Kent's Com. 424, 425, 426. Representatives stand in the same relationship — the same 'degree of kindred,' to the person 'last seized' as the person they represent. They take *per stirpes*."

Representation and Heirship Distinguished. — See Gaines *v.* Strong, 40 Vt. 362, set out in the title HEIR, HEIRS, AND THE LIKE, vol. 15, p. 319.

5. **Representations.** — Clark *v.* Ralls, 50 Iowa 277, *citing* Grove *v.* Hodges, 55 Pa. St. 504.

Estoppel — Silence. — In Foster *v.* McAlester, (Indian Ter. 1900) 58 S. W. Rep. 685, it was said: "Indeed, the term *representation* includes silence in certain cases; for silence, where one is bound to speak, is ordinarily equivalent to an admission of fact." *Quoting* Bigelow on Estoppel 553.

Representations and Warranty Distinguished. (See also the titles ACCIDENT INSURANCE, vol. 1, p. 284; FIRE INSURANCE, vol. 13, p. 86; INSURANCE, vol. 16, p. 830; LIFE INSURANCE, vol. 19, p. 39; MARINE INSURANCE, vol. 19, p. 930; WARRANTY.) — *Alabama.* — Alabama Gold L. Ins. Co. *v.* Johnston, 80 Ala 470.

Dakota. — Waterbury *v.* Dakota F. & M. Ins. Co., 6 Dak. 471.

Indiana. — Mutual Ben. L. Ins. Co. *v.* Miller, 39 Ind. 486.

Iowa. — Clark *v.* Ralls, 50 Iowa 277.

Maine. — Williams *v.* New England Mut. F. Ins. Co., 31 Me. 219.

Massachusetts. — White *v.* Provident Sav. L. Assur. Soc., 163 Mass. 108.

Minnesota. — Ætna Ins. Co. *v.* Grube, 6 Minn. 82; Price *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 497.

Missouri. — Mers *v.* Franklin Ins. Co., 68 Mo. 131.

New Jersey. — Dewees *v.* Manhattan Ins. Co., 34 N. J. L. 244.

New York. — Vandervoort *v.* Smith, 2 Cai. (N. Y.) 160; Pierce *v.* Empire Ins. Co., 62 Barb. (N. Y.) 644; Alston *v.* Mechanics' Mut. Ins. Co., 4 Hill (N. Y.) 343; Cushman *v.* U. S. Life Ins. Co., 4 Hun (N. Y.) 786.

Ohio. — Byers *v.* Farmers' Ins. Co., 35 Ohio St. 615.

Oregon. — Buford *v.* New York L. Ins. Co., 5 Oregon 339.

Pennsylvania. — Lycoming Ins. Co. *v.* Mitchell, 48 Pa. St. 372.

Tennessee. — Boyd *v.* Vanderbilt Ins. Co., 90 Tenn. 215.

Wisconsin. — Blumer *v.* Phœnix Ins. Co., 45 Wis. 627.

6. **Representing.** — Where petitioners described themselves as "*representing* a majority of the taxpayers of the town," and the affidavit of verification attached to the petition stated that the "persons signing said petition are a majority of the taxpayers," it was held that the word *representing* did not import that the majority did not themselves sign, but did it through agents *representing* such taxpayers, but that the word might be treated as having reference to the term "majority," not to the persons constituting it. Solon *v.* Williamsburgh Sav. Bank, 114 N. Y. 130.

REPRIEVE, PARDON, AND AMNESTY.

By Hiram Thomas.

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CROSS-REFERENCES.

For matters of PROCEDURE, *see in the* ENCYCLOPÆDIA OF PLEADING AND PRACTICE, *the titles* PARDONS, vol. 15, p. 447, *and cross-references there given;* SENTENCE AND JUDGMENT (IN CRIMINAL CASES), vol. 19, p. 428.

For the rights of an accomplice testifying for the prosecution, to obtain a pardon as a matter of equitable right, see in this work the title ACCOMPLICES, vol. 1, p. 406 *et seq.; see also* APPROVE, vol. 2, p. 519.

For the validity of a contract to secure a pardon, see the titles ATTORNEY AND CLIENT, vol. 3, p. 344; *COMPOUNDING OFFENSES*, vol. 6, pp. 409, 410, note.

For the effect of pardon in removing the disqualification of a convict to testify in court, see the title INFAMY AND INFAMOUS CRIMES, vol. 16, p. 250 *et seq.* *And concerning proof of a pardon under such circumstances, see the same title*, p. 252.

For the effect of a pardon as to shares of fines or penalties vested in an informer, see the title INFORMERS, vol. 16, p. 326. *And for the effect of a remission of a fine or forfeiture by the Secretary of the Treasury, as regards the informer's share, see the same title*, p. 327.

For pardons and commutations of sentences of offenders against the military law, see the title MILITARY LAW, vol. 20, pp. 657, 658.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this title, see the following titles in this work: CONSTITUTIONAL LAW, vol. 6, p. 882; *CONVICTION*, vol. 7, p. 498, note; *DE FACTO OFFICERS*, vol. 8, p. 771; *GOVERNOR*, vol. 14, p. 1095; *PRESIDENT OF THE UNITED STATES; SENTENCE AND PUNISHMENT; WAR; and the specific cross-references in the notes throughout this title.*

I. Classification and Definitions — 1. Pardon Defined — *a.* General Definition. — A pardon is an act of grace which proceeds from the power intrusted with the execution of the laws, and exempts the individual on whom it is bestowed from the punishment which the law inflicts for a crime that he has committed.[1]

b. Absolute Pardon. — A pardon is full or absolute when it freely and unconditionally "absolves the party from all the legal consequences of his crime and his conviction, direct and collateral; including the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided."[2]

c. Conditional Pardon. — A pardon is conditional either where it does not become operative until its recipient has performed some specified act, or where it becomes void when some specified event occurs.[3]

d. Partial Pardon. — A pardon is partial where it remits only a portion of the punishment, or absolves from only a part of the legal consequences of the crime.[4]

e. Implied Pardon. — A further class of pardons has been recognized,

1. Definition of Pardon. — U. S. *v.* Wilson, 7 Pet. (U. S.) 150, *per* Marshall, C. J., *quoted* with approval in the following cases:

United States. — 4 Op. Atty.-Gen. 458; U. S. *v.* Cullerton, 8 Biss. (U. S.) 171; Greathouse's Case, 2 Abb. (U. S.) 394, 6 Op. Atty.-Gen. 402; Collie's Case, 9 Ct. Cl. 450; Matter of De Puy, 3 Ben. (U. S.) 319.

Michigan. — Rich *v.* Chamberlain, 104 Mich. 436.

New York. — Roberts *v.* State, 30 N. Y. App. Div. 107 (*citing* 17 Am. and Eng. Encyc. of Law (1st ed.), p. 317); People *v.* Court Sess., (Supm. Ct. Spec. T.) 8 N. Y. Crim. 355.

Ohio. — *Ex p.* Lockhart, 1 Disney (Ohio) 107; State *v.* Peters, 43 Ohio St. 629.

Oklahoma. — Territory *v.* Richardson, 9 Okla. 579.

Pennsylvania. — Com. *v.* House, 10 Pa. Super. Ct. 266.

It is the private though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court. U. S. *v.* Wilson, 7 Pet. (U. S.) 150, *per* Marshall, C. J., *quoted* with approval in Greathouse's Case, 2 Abb. (U. S.) 394.

Lord Coke's definition is as follows: "A work of mercy, whereby the king, either before or after attainder, sentence, or conviction, forgiveth any offense, punishment, execution," etc. 3 Inst. 233, *quoted* with approval in Territory *v.* Richardson, 9 Okla. 579; Rich *v.* Chamberlain, 104 Mich. 436, and in *Ex p.* Wells, 18 How. (U. S.) 307.

Pardon has been further defined as "a remission of guilt," and as "a declaration of record by a sovereign that a particular individual is to be relieved from the legal consequences of a particular crime." Territory *v.* Richardson, 9 Okla. 579.

The Entering of a Nolle Prosequi by the prosecuting attorney is not an attempted exercise of the pardoning power. State *v.* Wear, 145 Mo. 162.

2. Absolute Pardon Defined. — 1 Bish. Crim. L., § 916; Carr *v.* State, 19 Tex. App. 663, 53 Am. Rep. 395.

3. Conditional Pardon Defined. — Carr *v.* State, 19 Tex. App. 653, 53 Am. Rep. 395; 1 Bish. Crim. L., § 914.

4. Partial Pardon Defined. — Carr *v.* State, 19 Tex. App. 663, 53 Am. Rep. 395; 1 Bish. Crim. L., § 914.

termed "implied pardons;" these, however, have been of very rare occurrence and are somewhat anomalous in their character. The circumstances under which they have arisen are set forth in the notes.[1]

2. Amnesty or General Pardon. — Amnesty has been defined as "a general pardon granted to a class of persons by law or proclamation."[2]

3. Reprieve. — A reprieve is the withdrawing of a sentence for an interval of time, whereby the execution is suspended. The word is derived from the French *reprendre*, meaning to take back.[3]

4. Commutation of Sentence. — A commutation of sentence is a substitution of a less for a greater punishment by authority of law.[4]

5. Parole. — A parole, as the term is used in criminal law, may be defined as the release of a convict from imprisonment upon certain conditions to be observed by him, and a suspension of his sentence during his liberty thus granted.[5]

6. Distinctions — Pardon and Commutation of Sentence Distinguished. — A pardon is to be distinguished from a commutation of sentence in that the former does, while the latter does not, relieve the person convicted from the consequences which the law attaches to his conviction. As will be shown in another part of this title,[6] a pardon not only entirely remits the punishment, but creates in the offender a new credit and capacity; whereas a commutation of sentence in effect reaffirms the offender's adjudged guilt, and simply mitigates the severity of the penalty.[7]

Parole and Pardon Distinguished. — A parole, whereby a prisoner is given his liberty subject to conditions, but remains in the legal custody and control of

1. Implied Pardons. — In a case decided apparently in 22 Edw. III., and *cited* in Rawleigh's Case, 2 Rolle 50, a person attainted of felony went with the king to war in Gascony, and there had command under the king. Being afterward "impeached" and questioned concerning the felony, he pleaded the said matter and for that was discharged. In Rawleigh's Case, 2 Rolle 50, 2 How. St. Tr. 34, the prisoner on being arraigned to receive sentence for high treason, and being asked what he had to say why execution should not be awarded against him, said that since the treason he had been commissioned by the king as an officer in the navy, and in the commission had been called a loyal subject of the king; and that the commission therefore amounted to "a pardon in law." It was held, however, that while these circumstances might well have amounted to an implied or constructive pardon of a simple felony, as in the case referred to in 22 Edw. III., yet in case of treason, a pardon by implication would not suffice; express words of pardon being deemed essential.

Where an officer of the marine corps, under a sentence pronounced but not yet executed, was appointed to a new commission, it was held that his appointment operated as a constructive pardon. 6 Op. Atty.-Gen. 123. Likewise where a passed midshipman, under sentence of suspension and on half pay, was appointed to the office of lieutenant in the navy, it was held that his appointment amounted to an implied pardon, and that he was entitled to his pay as lieutenant from the date of his commission. 4 Op. Atty.-Gen. 8. The principle of the two cases last cited appears to be that the appointment to the higher office necessarily worked a discharge of the sentence.

But the order of the secretary of the navy that an officer under sentence of suspension shall attend a court martial as a witness does not operate as a constructive or implied pardon. 6 Op. Atty.-Gen. 714.

2. Amnesty Defined. — Davies *v.* McKeeby, 5 Nev. 369. See also AMNESTY, vol. 2, p. 307.

3. Reprieve Defined. — 4 Black. Com. 394, *quoted* with approval in Butler *v.* State, 97 Ind. 374; Matter of Buchanan, 146 N. Y. 264; and Sterling *v.* Drake, 29 Ohio St. 457, 23 Am. Rep. 762.

It is merely a postponement of the execution of the sentence as pronounced by the court. State *v.* Rose, 29 La. Ann. 755. See also Clifford *v.* Heller, 63 N. J. L. 105. See also *infra*, this title, *Operation and Effect of Pardon — Of Reprieve.*

4. Commutation of Sentence Defined. — Lee *v.* Murphy, 22 Gratt. (Va.) 789, 12 Am. Rep. 563.

A commutation has been defined also as a change of punishment to which a person has been condemned, into a less severe one. Bouvier's L. Dict.; Rich *v.* Chamberlain, 107 Mich. 381; *Ex p.* Parker, 106 Mo. 555; State *v.* Peters, 43 Ohio St. 650; State *v* State Board of Corrections, 16 Utah 478. See also Ogletree *v.* Dozier, 59 Ga. 800.

This definition describes the sense in which the word "commutation" is used in the *Missouri* constitution. *Ex p.* Parker, 106 Mo. 555.

Commutation has been further defined as "the change of one punishment known to the law, for another and different punishment also known to the law." *Ex p.* Janes, 1 Nev. 319.

5. Parole Defined. — See Fuller *v.* State, 122 Ala. 32.

6. See *infra*, this title, *Operation and Effect of Pardon.*

7. Pardon and Commutation Distinguished. — Young *v.* Young, 61 Tex. 191.

Conditional Pardon Distinguished from Commutation. — *Ex p.* Janes, 1 Nev. 319.

the proper authorities, is to be distinguished from a pardon upon the ground that it does not exempt the prisoner from the entire punishment inflicted by law, the prisoner still remaining under sentence.[1]

Parole and Commutation of Sentence Distinguished. — The release of a prisoner on parole does not amount to a commutation of his sentence, since it does not change his punishment into a less severe one; the sentence remaining in force, and the prisoner, while enjoying his liberty, being liable to be reimprisoned at any time.[2]

Reprieve and Commutation of Sentence Distinguished. — A reprieve may be distinguished from a commutation of sentence by the fact that the effect of a reprieve is to suspend the sentence temporarily, but otherwise to leave it in full force; whereas the effect of a commutation is to abrogate and set aside the sentence by substituting a new and different punishment.[3]

II. Nature of Pardon. — A pardon is a mere act of grace; it cannot be demanded as a matter of right. It proceeds upon the theory that the person to whom it is granted is guilty of the crime for which the pardon is given, and not upon the theory of his innocence.[4] Therefore where a prisoner has been convicted of a crime, if the judgment of conviction was erroneous, the proper remedy is by an appeal or an application to set aside the judgment, and not by pardon; the question being for the judicial branch of the government and not for the executive.[5] At the early common law an exception existed to the rule that a pardon could not be had as a matter of right. Thus, in cases of excusable homicide, or homicide *se defendendo*, the accused was not entitled to a verdict of acquittal; but upon a special verdict finding the facts the prisoner would be bailed by the court, and upon certifying the record into chancery a pardon under the statute of Gloucester, chapter 9, issued as a matter of course, or even as a matter of right, without the necessity of application to the crown; and this pardon operated to restore the prisoner's goods which were forfeited by reason of the offense.[6] But later it became the practice for the court to direct a verdict of acquittal as in cases of justifiable homicide.[7]

Further Discussion of the nature of pardon will be found in another part of this title.[8]

III. Origin and History. — In jurisdictions where our system of jurisprudence obtains, the pardoning power has been exercised from time immemorial, and has always been considered a necessary attribute of sovereignty.[9] In *England* it seems that in ancient times the right of pardoning offenses within certain territorial districts was claimed by the "lords marchers" (Lords of Marches) and others, who had *jura regalia* by ancient grants from the crown or by prescription; but by the statute of 27 Hen. VIII., c. 24, § 1, the pardoning power was taken away from all such persons, and it was declared that this power should thereafter be vested solely in the crown.[10]

IV. By Whom Pardoning Power May Be Exercised — 1. In England and the British Colonies. — As it has been shown above, the pardoning power in

1. Parole and Pardon Distinguished. — George *v.* Lillard, 106 Ky. 820. See also Woodward *v.* Murdock, 124 Ind. 444.

2. Parole and Commutation of Sentence Distinguished. — George *v.* Lillard, 106 Ky. 820.

3. Reprieve and Commutation Distinguished. — State *v.* Rose, 29 La. Ann. 755.

4. Nature of Pardon. — Greathouse's Case, 2 Abb. (U. S.) 382; Grubb *v.* Bullock, 44 Ga. 382; Cook *v.* Chosen Freeholders, 26 N. J. L. 326, *affirmed* 27 N. J. L. 637; Roberts *v.* State, 160 N. Y. 217; Com. *v.* Halloway, 44 Pa. St. 210, 84 Am. Dec. 431.

5. Pardon Not a Remedy for Erroneous Conviction. — Roberts *v.* State, 160 N. Y. 217, *affirming* 30 N. Y. App. Div. 106. See also Ball *v.* Com., 8 Leigh (Va.) 726; Younger *v.* State, 2 W. Va. 584.

6. Pardon of Persons Guilty of Excusable Homicide at Common Law. — 1 East P. C. 220; Hale P. C. 250; 5 Comyns's Dig. 171.

7. 1 East P. C. 220. See generally the title Murder and Manslaughter, vol. 21, p. 202.

8. See *infra*, this title, *Nature and Extent of Pardoning Power; Construction and Validity of Pardons*.

9. 7 Bacon's Abr., title Pardon (A), p. 406; Rex *v.* Parsons, 1 Show. 284; 5 Op. Atty.-Gen. 579.

10. 2 Hawk. P. C. 538, § 1; 7 Bacon's Abr., title Pardon (A), p. 406.

England is vested in the crown.[1] This power so vested in the crown may be exercised not merely within the territorial limits of the United Kingdom, but throughout the whole of the British dominions. The authority to exercise this prerogative may be delegated to viceroys and colonial governors representing the crown, but such delegation of authority does not divest the crown of its ultimate power to exercise the prerogative directly by pardoning an offense committed anywhere within the British dominions.[2] It seems to have been the practice to delegate to colonial governors, in express terms, the authority to pardon, either by commissions under the Great Seal or in instructions communicated to them by the crown. This practice, having prevailed universally and for a long series of years, affords strong reasons for the conclusion that the prerogative of pardoning offenses is not incidental to the office of a colonial governor, and can be exercised by him, in the absence of legislative authority, only under powers expressly conferred by the crown.[3]

Certain Statutes have from time to time been enacted delegating the pardoning power in certain cases to the governors of certain colonies, and these statutes generally provide for the effect that shall be given to pardons granted under the power thus delegated.[4]

2. In the United States — *a.* PRESIDENT OF THE UNITED STATES. — By article 2, section 2, of the Constitution of the United States it is provided that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." And under this power the President has granted reprieves and pardons since the commencement of the present government.[5]

b. GOVERNORS OF STATES AND TERRITORIES, AND BOARDS OF PARDON — (1) *In General.* — The constitutions of the several states provide in various terms the extent of the pardoning power that shall exist in each, and declare in whom it shall be vested. In perhaps the majority of states this power is given by the constitution to the governor, sometimes subject to certain limited control by the legislature. In other states the constitution provides for boards of pardon, composed generally of various members of the different departments of the state government; the governor of the state usually being a member of the board. Similarly diverse provisions are to be found in the various organic acts of the territories.[6]

1. Pardoning Power in Crown. — See the foregoing paragraph, and see also 1 Bac. Abr. 615.

General Pardons, however, are commonly granted by act of Parliament. 2 Hawk. P. C. 543, § 9; 1 Chitty's Cr. Law 771.

2. Extent of Power of Crown — Delegation of Power. — Atty.-Gen. *v.* Atty.-Gen., 23 Can. Sup. Ct. 468, *per* Strong, C. J. See also the title DOMINION of CANADA, vol. 10, p. 55 *et seq.*

3. Atty.-Gen. *v.* Atty.-Gen., 23 Can. Sup. Ct. 468, *per* Strong, C. J.

Lieutenant-Governor of Prince Edward Island. — Prior to the Act of Confederation of 1867, and when the province of Prince Edward Island was an independent colony of Great Britain, the pardoning power resided in the lieutenant-governor. Mitchell *v.* Harvie, 1 P. E. Island 64.

4. Statutes Delegating Pardoning Power to Colonial Governors. — Stat. 30 Geo. III., c. 47, § 1; 4 Geo. IV., c. 96, §§ 34, 35; 5 Geo. IV., c. 84. See Gough *v.* Davies, 2 Kay & J. 625, note; Fleming *v.* Smith, 12 Ir. C. L. 404; Watson's Case, 9 Ad. & El. 731, 36 E. C. L. 255; Matter of Parker, 5 M. & W. 32.

5. *Exp.* Wells, 18 How. (U. S.) 307.

6. See the constitutions of the various states and the organic acts of the territories.

Wherever the different constitutional provisions relating to the pardoning power have been involved in judicial decisions, they will be found stated throughout this title where the specific subject-matter of the decisions is discussed, and separate enumeration of them in this part of the title is deemed unnecessary.

By the Indiana Constitution the pardoning power of the governor is subject to legislative control in that the general assembly may by law constitute a council, to be composed of officers of state, without whose advice and consent the governor shall not have power to grant pardons in any case except such as may by law be left to his sole power. State *v.* Dunning, 9 Ind. 20.

The Court of Pardons of New Jersey represents not the British Parliament, but the king and his privy council. It is in no judicial sense a court. It is not called a court in the constitution. "Whether we look to its origin, its prototype, or its duties, it is in no sense a court. It has before it no parties, it hears no evidence, it decides no law, and it can render no judgment." Cook *v.* Chosen Freeholders, 26 N. J. L. 326, *affirmed* 27 N. J. L. 637.

(2) *Governor De Facto.* — As an illustration of the general rule that the acts of a *de facto* public officer are valid so far as they concern the public, or third persons who have an interest in the acts done,[1] it is held that where the office of governor is contended for by two rival claimants, neither of whom has full and peaceable possession thereof, the one who has the full right to claim possession at the time he assumes to take it, and who has perfect color of title to the office, is governor *de facto*, and is authorized to grant a pardon.[2] And, of course, the other claimant to the office is not so authorized, and a pardon issued by him under such circumstances is invalid.[3] Obviously the office of governor of a state cannot be held by two persons at the same time, and hence when a person claiming and exercising the right of governor has been declared by a final and conclusive decision of the legislature not to be entitled to the office, and another person is at the same time exercising the powers of governor under claim of right, the latter becomes governor both *de facto* and *de jure*, and a pardon thereafter issued by the former is invalid.[4]

(3) *Governor Attempting to Hold Over Term.* — One who has held the office of governor and still claims to hold it after the expiration of his term, but whose successor has been chosen and has duly qualified, is without authority to grant a pardon; and an instrument issued by him and purporting to be a pardon is without legal effect.[5] And the same result is reached where the person issuing the instrument has resigned or abandoned the office of governor, or is otherwise estopped by his own acts from claiming to hold over his term.[6]

(4) *Death or Resignation of Governor and Devolution of Powers.* — Where the constitution of a state confers the pardoning power upon the executive, this power may be exercised by the person who at the time is lawfully administering the government as chief executive magistrate. Thus when the governor dies or resigns his office and his powers devolve upon the speaker or president of the senate, the latter officer may exercise the pardoning power;[7] and when he resigns his office as senator, the powers of administering the government devolve upon the speaker of the house of assembly, and the pardoning power may lawfully be exercised by him.[8]

c. CONSTITUTIONAL LIMITATIONS UPON PARDONING POWER — (1) *In General.* — Where the constitution of a state in conferring the pardoning power upon the executive provides that the power may be exercised only upon certain conditions, compliance with these conditions is essential to the valid exercise of the power.[9]

Pardon by Territorial Governor After Adoption of State Constitution. — Where by virtue of the organic act the governor of a territory had the power to grant pardons generally, but upon the territory becoming a state the constitution provided that the pardoning power should be vested in a board of pardons consisting

1. See the title DE FACTO OFFICERS, vol. 8, p. 816.

2. *Ex p.* Norris, 8 S. Car. 408.

3. Powers *v.* Com., (Ky. 1901) 61 S. W. Rep. 735.

4. Powers *v.* Com., (Ky. 1901) 61 S. W. Rep. 735. This case involved the Goebel election law of March 11, 1898 (Ky. Stat., § 1596*a*, subsec. 11), which provided that "when a new election is ordered or the incumbent adjudged not to be entitled, his powers shall immediately cease, and if the office is not adjudged to another it shall be deemed to be vacant." It having been decided that this act of the legislature was final, and was a self-executed judgment (Taylor *v.* Beckham, (Ky. 1900) 56 S. W. Rep. 177), it was held in the principal case that a pardon issued by the incumbent of the office, who was adjudged not to be entitled thereto, was void and of no effect. See also the title DE FACTO OFFICERS, vol. 8, p. 799.

5. *Ex p.* Smith, 8 S. Car. 495.

6. *Ex p.* Smith, 8 S. Car. 495. See generally the title DE FACTO OFFICERS, vol. 8, p. 771.

7. **Devolution of Governor's Powers.** — Clifford *v.* Heller, 63 N. J. L. 116.

8. Sutton *v.* McIlhany, 1 Ohio Dec. (Reprint) 235, 5 West. L. J. 356.

9. **Consent of Senate to Pardon or Commutation of Sentence by Governor Held Essential.** — State *v.* Rose, 29 La. Ann. 755.

But a communication from the secretary of the senate to the governor, informing him that his recommendation for a pardon has been received and acted upon promptly, sufficiently shows the proper action of the senate. State *v.* Baptiste, 26 La. Ann. 134.

of a certain number of persons including the governor, it was held that a pardon thereafter issued by the governor alone was void and inoperative.[1]

Statutes Passed under Authority of Constitution. — As has been indicated above, the constitutions of a number of states have conferred upon the legislature a limited power to regulate either the exercise of the pardoning power or the manner of making applications for pardons, and in various instances the state legislatures have passed statutes under and by virtue of these constitutional provisions. Statutes of this character, however, are generally less effective than restrictive provisions imposed directly by the constitution.[2]

(2) *Statutes Regulating Mode of Application for Pardon* — **Rule that Statutory Regulations Do Not Affect Pardoning Power.** — Where statutes passed by virtue of constitutional authority purport merely to regulate the manner in which pardons shall be applied for, it is generally held that they do not abrogate, limit, or in any way affect the constitutional authority, jurisdiction, or power of the governor to grant pardons; that they neither deprive him of any of his power, nor restrict him in its exercise.[3] In the absence of constitutional restriction the power of the governor to grant pardons cannot depend upon an application for a pardon being made in a particular way, and a pardon granted by him without compliance with the statute regulating the manner of application is valid and effectual.[4] And where the constitution of a state confers upon the governor the power of granting pardons upon such conditions as he may choose to impose, or upon the terms specified in acts of the legislature, if a pardon granted by him does not conform to the terms of the statute, it will be considered as having been granted under his general constitutional authority.[5]

Failure of Legislature to Provide Regulations. — Where the legislature has constitutional authority to make regulations concerning the exercise of the pardoning power, the circumstance that in a given instance the legislature has failed to provide any such rules or regulations does not deprive the governor of his power to pardon, or restrict him in its exercise.[6]

Rule that Statutory Regulations Restrict Pardoning Power. — In *Indiana*, however, a more stringent rule obtains. Thus where under the constitution the governor had power to remit fines and forfeitures subject to such regulations as might

1. *Ex p.* Janes, 1 Nev. 319.

2. See the following subdivision.

3. **Statutory Regulation of Application for Pardon — Governor's Power Unaffected** — *Maine.* — Opinion of Justices, 85 Me. 547.

Michigan. — People *v.* Marsh, 125 Mich. 410.

New York. — *In re* Edymoin, 8 How. Pr. (N. Y.) 478.

Ohio. — State *v.* Jones, 8 Ohio Dec. 645. But see Sutton *v.* McIlhany, 1 Ohio Dec. (Reprint) 235, 5 West. L. J. 356.

Oklahoma. — Territory *v.* Richardson, 9 Okla. 579.

Washington. — State *v.* Jenkins, 20 Wash. 78.

Wyoming. — *In re* Moore, 4 Wyo. 98.

Such a statute has been held permissive only. Opinion of Justices, 85 Me. 547.

4. **Governor May Grant Pardon Without Complying with Statute.** — *In re* Edymoin, 8 How. Pr. (N. Y.) 478; Territory *v.* Richardson, 9 Okla. 579.

In the case of *In re* Edymoin, 8 How. Pr. (N. Y.) 478, it was further held that the governor having jurisdiction to grant a pardon, and having exercised it, the courts on habeas corpus cannot go behind the pardon to inquire into the regularity of the governor's proceedings in granting it.

Illustrations. — Where such a statute provided that the application for a pardon must be first made to the justices of the Supreme Judicial Court, it was held that the statute did not provide an exclusive method for applying for pardons; that otherwise it would be unconstitutional as an encroachment upon the pardoning power of the executive; and that a pardon might be granted without complying with the statute. Opinion of Justices, 85 Me. 547.

Likewise where a statute created an advisory board with authority to investigate applications for pardons, and to advise the governor concerning them, it was held that the governor might grant a pardon without application to the advisory board, and that a pardon so granted by him was full and effectual. People *v.* Marsh, 125 Mich. 410.

Similarly the governor of a state may grant an absolute and valid pardon, although the board of pardons constituted by statute and required to pass upon all applications for executive clemency has recommended to the governor that only a commutation of sentence be granted. State *v.* Jenkins, 20 Wash. 78.

5. *Ex p.* Hunt, 10 Ark. 284.

6. Baldwin *v.* Scoggin, 15 Ark. 432; Woodward *v.* Murdock, 124 Ind. 442.

be prescribed by law, and a statute existed regulating the methods of applying for such remissions, it was held that the power of remission was not granted to the governor absolutely, but that he could exercise it only pursuant to legislative regulations, and hence that where the statutory requirements had not been complied with, a remission by the governor was inoperative.[1]

(3) *Pardoning Power in Cases of Treason.* — In the constitutions of a number of states the power to pardon in cases of treason is expressly reserved and excepted out of the general grant of the pardoning power; and in these states the power to grant pardons in cases of treason is generally vested in the legislature, the authority of the governor in such cases being limited to the granting of a reprieve or a suspension of execution until the matter can be brought before the legislature when in session.[2] No such reservation, however, exists in the Federal Constitution. The power of the President to pardon in cases of treason has apparently never been seriously questioned, and instances of general pardons by him of that offense during and after the civil war are quite numerous.[3]

d. POWERS OF LEGISLATURE AS TO PARDONS — (1) *Introductory Statement.* — The question whether the pardoning power is purely and solely an executive function, so that it cannot be in any way exercised or impaired by any other branch of the state or federal government, is not altogether free from doubt and has given rise to considerable diversity of judicial opinion.

(2) *Principle that Legislature Cannot Exercise or Impair Pardoning Power* — (a) **Rule Stated.** — Since it is a principle of constitutional law that each of the great departments of the government, viz., the executive, the legislative, and the judicial, shall in its sphere be supreme and independent of the others, and that a grant of general powers to one department constitutes an implied exclusion of the other departments from the exercise of those powers,[4] it is the prevailing weight of judicial opinion that a grant of the pardoning power by the constitution upon the executive department of either the state or federal government precludes the legislative department of that government from exercising or controlling that power; in other words, that the pardoning power is solely an executive function, and cannot be exercised, limited, or impaired by the legislature.[5]

1. Statute Held to Restrict Power of Governor. — State *v.* Dunning, 9 Ind. 20.

2. Power of Legislature in Treason Cases — *Florida.* — Singleton *v.* State, 38 Fla. 297, 56 Am. St. Rep. 177.

Indiana. — State *v.* Dunning, 9 Ind. 20.

Louisiana. — State *v.* Rose, 29 La. Ann. 755.

Michigan. — People *v.* Moore, 62 Mich. 496.

Virginia. — Com. *v.* Caton, 4 Call (Va.) 5 (decided under the Virginia Constitution of 1776, and the Act of Assembly of the same year).

See also the title TREASON.

3. President's Power to Pardon Treason. — See Waring's Case, 7 Ct. Cl. 501, where these pardons are enumerated. See also *infra*, this title, *Operation and Effect of Pardon — In Respect to Property Rights — Property Confiscated by United States; Property Abandoned or Captured in War.*

4. Separation of Powers of Government. — See the title CONSTITUTIONAL LAW, vol. 6, pp. 1006, 1008, 1009.

5. Pardon an Executive Function Not Subject to Legislative Control — *United States.* — *Ex p.* Garland, 4 Wall. (U. S.) 333; U. S. *v.* Klein, 13 Wall. (U. S.) 128; 5 Op. Atty.-Gen. 579; 8 Op. Atty.-Gen. 281; 16 Op. Atty.-Gen. 27.

Alabama. — Fuller *v.* State, 122 Ala. 32.

Indiana. — Parker *v.* State, 135 Ind. 536.

Kentucky. — Routt *v.* Feemster, 7 J. J. Marsh. (Ky.) 131.

Maine. — Opinion of Justices, 85 Me. 547.

Michigan. — People *v.* Moore, 62 Mich. 497.

Ohio. — See note to State *v.* Gardiner, Wright (Ohio) 405.

Oklahoma. — Territory *v.* Richardson, 9 Okla. 579.

Pennsylvania. — Com. *v.* Denniston, 9 Watts (Pa.) 142; Diehl *v.* Rodgers, 169 Pa. St. 323.

Texas. — Easterwood *v.* State, 34 Tex. Crim. 400.

Congress can neither limit the effect of a pardon by the President, nor exclude from its enjoyment any class of offenders. The President's pardoning power cannot be fettered by any legislative restrictions, and it is not within the power of Congress to inflict directly or indirectly any punishment which shall be beyond the reach of executive clemency. *Ex p.* Garland, 4 Wall. (U. S.) 333. See also *Ex p.* Law, 35 Ga. 285 (U. S. Dist. Ct. So. Dist. of Georgia).

An act of Congress purporting to authorize the President to extend pardon and amnesty to certain classes of offenders is to be regarded merely as a suggestion. U. S. *v.* Klein, 13 Wall. (U. S.) 139.

In Brown *v.* Walker, 161 U. S. 601, it was

(b) **Applications of Principle — Statutes Held to Be Encroachments upon Pardoning Power.** — Since Congress cannot directly or indirectly impair the legal effect of a pardon, an act of Congress that would produce such a result will be held unconstitutional.[1] Likewise where the governor of a state has by the constitution the power to pardon both before and after conviction, that power belongs to him exclusively and cannot in any way be exercised by the legislature.[2] Similarly in a state where the constitution grants to the governor the power to pardon after conviction, it is held that the only power by which a prisoner can be discharged before conviction is vested in the attorney-general in the court in respect to *nolle prosequi;* and that the legislature is without power or authority to pass an act prohibiting the infliction of punishment under an existing criminal statute, and directing that causes pending against persons under the statute shall be dismissed. Such an act of the legislature is unconstitutional.[3] Where the power of remitting fines and penalties is given to the governor, it cannot be exercised directly or indirectly by the legislature. Hence an act by the legislature directing the county treasurer to refund fines that have been paid is an encroachment upon the power of the executive, and is unconstitutional and invalid.[4]

Legislature Cannot Remove Disabilities Incident to Conviction. — The legislature of a state cannot even indirectly remove the disabilities of a convict that are incident to his conviction, for this would encroach upon the pardoning power vested in the executive.[5]

Legislature Cannot Restore Convict to Civil Rights. — In a state where the constitution vests in a board of pardon the power to grant pardons after conviction, it is not competent for the legislature to pass a statute providing that a person convicted of a crime shall be restored to civil rights.[6]

Statute Requiring Governor to File Reasons for Pardon. — The legislature cannot compel the governor to make public his reasons for granting a pardon.[7]

(c) **Statutes Held Not to Be Encroachments upon Pardoning Power** — *aa.* Statutes in Aid of Pardoning Power. — Although in a jurisdiction where the pardoning power is so vested in the executive by the constitution that it cannot be impaired or encroached upon by the legislature by any pretense of regulating its exercise, yet a provision may be made by statute which shall render the exercise of the pardoning power convenient and efficient. In a number of states statutes of this character have been passed,[8] and when the question of their constitu-

said, *per* Brown, J. (*obiter*), that although the pardoning power is vested in the President, "this power has never been held to take from Congress the power to pass acts of general amnesty." But Field, J., in a dissenting opinion (p. 638), took a directly opposite view, *citing Ex p.* Garland, 4 Wall. (U. S.) 380.

Court Reluctant to Infer Legislative Intent to Impair Pardoning Power. — See Routt *v.* Feemster, 7 J. J. Marsh. (Ky.) 131.

President Cannot by Pardon Repeal Act of Congress. — Confiscation Cases, 20 Wall. (U. S.) 92.

1. Acts of Congress Impairing Effect of Pardon Are Unconstitutional. — *Ex p.* Garland, 4 Wall. (U. S.) 381; U. S. *v.* Klein, 13 Wall. (U. S.) 128; Carlisle *v.* U. S., 16 Wall. (U. S.) 147; *Ex p.* Law, 35 Ga. 285 (U. S. Dist. Ct. So. Dist. of Georgia). See also Witkowski's Case, 7 Ct. Cl. 393.

2. Statute Releasing from Prosecution. State *v.* Sloss, 25 Mo. 291, 69 Am. Dec. 467, *followed* in State *v.* Todd, 26 Mo. 175. *Compare* Pleuler *v.* State, 11 Neb. 574.

3. State *v.* Fleming, 7 Humph. (Tenn.) 152, 46 Am. Dec. 73.

4. Statute Directing that Fines Be Refunded. — Haley *v.* Clark, 26 Ala. 439, holding further that it makes no difference whether the fine has or has not been paid.

5. Legislature Cannot Indirectly Remove Civil Disabilities. — Thus where a statute disqualified a convict to be a witness, an omission of the disqualifying clause in a subsequent statute was held not to remove the incompetency of a person who was convicted after the first statute, but before the last. State *v.* Grant, 79 Mo. 113, 49 Am. Rep. 218.

6. Legislature Cannot Restore Convict to Civil Rights. — Singleton *v.* State, 38 Fla. 297, 56 Am. St. Rep. 177.

7. Reasons for Granting Pardons. — 16 Op. Atty.-Gen. 27.

8. Statutes in Aid of Pardoning Power. — Fuller *v.* State, 122 Ala. 32; *Ex p.* Hunt, 10 Ark. 284; Kennedy's Case, 135 Mass. 48; Rich *v* Chamberlain, 104 Mich. 436; *In re* Whalen, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 915; Com. *v.* Haggerty, 4 Brews. (Pa.) 332; State *v.* Dyches, 28 Tex. 535. See also State *v.* Mateer, 105 Iowa 72 (statute authorizing the governor to remit fines and penalties).

tionality has arisen they have been declared valid by the courts.[1]

bb. Statutes Controlling Jurisdiction of Courts. — Since the rights of a person who has been pardoned, in regard to recovering from the United States government property forfeited, confiscated, captured, or abandoned, depend upon the statutes giving him a right of action against the government in the Court of Claims and conferring upon that court jurisdiction to hear his cause and render judgment therein, it is within the constitutional powers of Congress to impose restrictions or limitations upon the rights it confers, in so far as such rights depend upon the question of jurisdiction;[2] and in a proper case even entirely to deprive the court of jurisdiction of the cause.[3] Such acts of the legislative branch of the government are held not to impair in legal contemplation the effect of the pardon.

cc. Statutes Providing for Speedy Trial. — Under constitutional provisions that "in criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury of the county," the legislature has the power to declare by statute that when a criminal prosecution has been once begun the accused must be brought to trial within a certain time or else be discharged; and such a statute is not an encroachment upon the pardoning power.[4]

dd. Statutes Barring Legal Proceedings. — A statute that simply bars legal proceedings which, if continued, might result in the imposition of a fine or forfeiture, is not an encroachment upon that branch of the pardoning power relating to the remission of fines and forfeitures; the reason being that the statute does not purport to grant a remission.[5]

ee. Statutes Regulating Punishment of Crime — (*aa*) *In General.* — Since the legislature has power to declare what punishment shall follow a crime, a statute merely prescribing modes of punishment in certain cases does not constitute an attempt to exercise the pardoning power, and is not on that account unconstitutional.[6]

Statute Providing Alternative Punishment. — Thus a statute providing that persons may be punished for nonpayment of fines, and that after a certain period of imprisonment they shall be entitled to the benefit of the laws for the relief of insolvent debtors, and upon request may be discharged in the same manner as insolvents, merely provides an alternative form of punishment, and is not unconstitutional as an encroachment upon the pardoning power.[7]

(*bb*) *"Good Time" Statutes.* — The class of statutes commonly known as "good time" statutes, whereby prisoners are allowed by reason of good conduct certain credits or deductions from the terms of their imprisonment, are generally held to fall within the power of the legislature to prescribe punishment

1. Same Held Constitutional. — Fuller *v.* State, 122 Ala. 32; Kennedy's Case, 135 Mass. 48; Rich *v.* Chamberlain, 104 Mich. 436; *In re* Whalen, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 915. See also Knapp *v.* Thomas, 39 Ohio St. 392, 48 Am. Rep. 462.

Acts of Congress Conferring upon the Secretary of the Treasury the Power to Remit Fines and Penalties, in certain cases, are within the class of legislation mentioned in the text. See *infra*, this section, *Pardoning Powers of Other Bodies or Officers — Of Secretary of Treasury as to Remission of Fines, etc.*

2. Austin *v.* U. S., 25 Ct. Cl. 437, *affirmed* 155 U. S. 417.

3. Hart *v.* U. S., 118 U. S. 62.

4. State *v.* Wear, 145 Mo. 162.

5. State *v.* Forkner, 94 Iowa 1.

6. Statutes Regulating Punishment Not Encroachments upon Pardoning Power. — *Ex p.* Parker, 106 Mo. 551; People *v.* Warden, (Supm. Ct.) 39 Misc. (N. Y.) 113 (dealing with indeterminate sentences); *Ex p.* Scott, 19 Ohio St. 581.

7. Imprisonment for Nonpayment of Fine — Discharge as Insolvent Debtor. — *Ex p.* Parker, 106 Mo. 551; *Ex p.* Scott, 19 Ohio St. 581.

In Order for a Statute to Be Held Unconstitutional upon the ground that it changes the penalty of an offense and is therefore an attempted exercise of the power of commutation, it must appear that the punishment substituted is less severe than the other. *Ex p.* Parker, 106 Mo. 555.

Hiring Out Convicts to Pay Fines. — A statute providing for the collection of fines imposed upon free negroes and free persons of color convicted of any criminal offense, by directing them to be hired out under certain rules, was held not to be so clearly repugnant to the provision of the state constitution granting the pardoning power to the governor, as to war-

for crime, and not to be unconstitutional as encroaching upon the pardoning power.[1] But on the other hand such a statute, while held not to be an encroachment upon the pardoning power, has been declared to be unconstitutional as an interference with the judgment of the court sentencing the criminal.[2] And a statute of this class has been held unconstitutional as to all sentences in force at the time of its passage, upon the ground that it was an unauthorized exercise of the pardoning power.[3]

(*cc*) *Statutes Authorizing Parole of Prisoners.* — The constitutionality of statutes authorizing persons in control of penal institutions to release the inmates thereof on parole or conditional discharge is treated elsewhere in this work.[4]

ff. Statutes Disposing of Fines and Forfeitures. — Statutes providing that fines and forfeitures, or moieties thereof, incurred or imposed by certain courts, be paid to certain public officers, such as commissioners of public buildings[5] or commissioners of roads,[6] to be used for public purposes, have been held not to encroach upon the constitutional power of the governor to remit so much of any fine or forfeiture as is not by law given to an informer or other private person for private purposes, and the governor's power in the premises remains unrestricted.

gg. Statutes Controlling Counties. — Since counties are public corporations, and, unless the constitution or organic law provides otherwise, are under legislative control, it has been held that a state or territorial legislature can pass an act releasing a penalty accruing to a county after a verdict in a civil action has been rendered in favor of the county, but before judgment.[7]

hh. Statutes Providing for Reports by Governor. — A statute requiring a territorial governor to report annually to the legislature the cases of reprieve, commutation, and pardon that have come before him, is not violative of the organic act, since it is a legitimate object of legislation to ascertain not only the existence and character of crimes, but the mode in which they should be dealt with.[8]

(d) **Legislature Cannot Delegate Pardoning Power.** — It is conceded that so far as the pardoning power is conferred by the constitution upon the executive department, it cannot be delegated to any other branch of the government by any act of the legislature, and consequently that any statute purporting so to delegate that power is unconstitutional and without legal effect.[9] Thus the

rant the courts in pronouncing the act unconstitutional. State *v.* Manuel, 4 Dev. & B. L. (20 N. Car.) 20.

1. "Good Time" Statutes Constitutional. — *Ex p.* Wadleigh, 82 Cal. 518. See generally the title Prisons and Prisoners, vol. 22, pp. 1307, 1308.

It seems also that the same rule applies to a statute providing that prisoners who have served three-fourths of their sentence, and have behaved according to the prison regulations and in a manner satisfactory to the prison inspectors, shall be discharged without a pardon in the same manner as if they had served the full period of their sentence. (Laws of *Missouri*, 1865–66, pp. 19, 20, § 1, as amended by Rev. Stat. Mo., § 6533; Rev. Stat. 1899, § 8919.) *Ex p.* Parker, 106 Mo. 554.

2. "Good Time" Statute Held Unconstitutional as Interfering with Sentence. — Com. *v.* Halloway, 42 Pa. St. 446, 82 Am. Dec. 526. See generally the title Sentence and Punishment.

3. "Good Time" Statute Held to Encroach upon Pardoning Power. — State *v.* McClellan, 87 Tenn. 52.

For a Full Discussion see the title Prisons and Prisoners, vol 22, pp. 1307, 1308.

4. "Parole" Statutes. — See the title Prisons and Prisoners, vol. 22, pp. 1307, 1308. See also State *v.* Page, 60 Kan. 664; People *v.* Warden, (Supm. Ct.) 39 Misc. (N. Y.) 113, where the constitutionality of such statutes was upheld.

Effect of Parole by Governor. — See *infra*, this title, *Operation and Effect of Pardon — Of Parole.*

5. Statutes Appropriating Fines to Public Use. — State *v.* Simpson, 1 Bailey L. (S. Car.) 378.

6. State *v.* Williams, 1 Nott & M. (S. Car.) 26.

7. Release by Legislature of Penalty Accruing to a County. — Coles *v.* Madison County, 1 Ill. 154, 12 Am. Dec. 161. See also Holliday *v.* People, 10 Ill. 214; Conner *v.* Bent, 1 Mo. 235.

For the rule that counties are under legislative control, see the title Counties, vol. 7, pp. 965, 970.

8. 16 Op. Atty.-Gen. 27.

9. Pardoning Power of Governor Cannot Be Delegated by Legislature. — See People *v.* Court Sess., 141 N. Y. 294; State *v.* Forkner, 94 Iowa 1.

The Power of Remission Conferred by Congress upon the Secretary of the Treasury is not within this rule. See *infra*, this section, *Pardoning Powers of Other Bodies or Officers — Of Secretary of Treasury as to Remission of Fines, etc.*

legislature cannot delegate to a court the right to exercise any part of the pardoning power vested in the governor by the constitution.[1] Likewise where the constitution of a state invests the governor with power to "commute penalties" the legislature cannot delegate that power to another body.[2]

(3) *Principle that Legislature May Exercise Pardoning Power.* — The view has been expressed that the pardoning power is not naturally or necessarily an executive function, and that when the constitution of a state is silent as to any portion of the pardoning power, that portion belongs no more to one branch of the government than to another. Therefore, where the constitution of a state conferred upon the governor the power to grant pardons after conviction, it was held that the legislature was not precluded from granting a general pardon or act of amnesty before conviction, and that such an act was not an encroachment upon the powers of the executive department.[3] In *Illinois* it has been held that it is competent for the legislature to release from imprisonment a person who has been convicted of a crime,[4] and to pass an act releasing a penalty incurred under a prior act.[5] It has likewise been held that it is competent for the legislative assembly of a territory to pass an act vacating and annulling a judgment and sentence, and remitting the fine and imprisonment thereby imposed. Such a legislative act when duly approved and signed by the governor appears to have been equivalent to a pardon.[6]

General Pardons or Amnesty by Act of Legislature Not Attacked. — The legislatures of several states have from time to time passed acts of amnesty or general pardon applicable to offenses arising out of the civil war. While these statutes have come before the courts for construction,[7] the question whether they are unconstitutional as being encroachments upon the pardoning power of the executive has rarely been raised.[8]

e. PARDONING POWERS OF OTHER BODIES OR OFFICERS — (1) *In General.* — From the foregoing discussion the correct principle appears to be that where the constitution of a state confers the pardoning power in general terms upon the executive department, that power cannot in any of its phases be exercised by another branch of the government.[9] In conformity to this principle, the pardoning power as vested in the governor of a state cannot be

1. Legislature Cannot Delegate Pardoning Power to Court. — Butler *v.* State, 97 Ind. 373, *disapproving* State *v.* Speck, 20 Ind. 211, and State *v.* Shideler, 51 Ind. 64, and holding that the court cannot remit fines and forfeitures even where a statute purports to confer upon them the authority to do so; and that such statute invades the pardoning power and therefore is unconstitutional. See also People *v.* Court Sess., 141 N. Y. 294, where the rule of the text was admitted, but the statute in question was held not to delegate any part of the pardoning power. *Compare* Pleuler *v.* State, 11 Neb. 574.

2. Ogletree *v.* Dozier, 59 Ga. 800.

3. State *v.* Nichols, 26 Ark. 74, 7 Am. Rep. 600. See also State *v.* Forkner, 94 Iowa 1.

There are several dicta to the effect that in the absence of express constitutional restrictions the legislature of a state can grant pardon or amnesty, or confer upon the court within its jurisdiction the authority to issue pardons or reprieves. Butler *v.* State, 97 Ind. 374, *per* Hammond, J. [*citing* State *v.* Nichols, 26 Ark. 74, 7 Am. Rep. 600]: State *v.* Applewhite, 75 N. Car. 229. See also State *v.* Dunning, 9 Ind. 20.

In Michael *v.* State 40 Ala. 361, an act authorizing the governor to issue a proclamation of pardon and amnesty was repealed before the pardon had been accepted by the prisoner, and it was held that the prisoner could not thereafter avail himself of the pardon.

4. Rankin *v.* Beaird, 1 Ill. 163.

5. Coles *v.* Madison County, 1 Ill. 154, 12 Am. Dec. 161, *approved* in Chicago, etc., R. Co. *v.* Adler, 56 Ill. 344.

6. People *v.* Stewart, 1 Idaho 546.

7. Statutes of Amnesty Construed. — Michael *v.* State, 40 Ala. 361; Terrill *v.* Rankin, 2 Bush (Ky.) 453, 92 Am. Dec. 500; Haddix *v.* Wilson, 3 Bush (Ky.) 523; State *v.* Blalock, Phil. L. (61 N. Car.) 242; State *v.* Cook, Phil. L. (61 N. Car.) 535; State *v.* Keith, 63 N. Car. 140; State *v.* Shelton, 65 N. Car. 294; State *v.* Haney, 67 N. Car. 467; State *v.* Applewhite, 75 N. Car. 229.

8. Statutes of Amnesty — Whether Constitutional. — In State *v.* Nichols, 26 Ark. 74, 7 Am. Rep. 600 (see the first paragraph of this subdivision), it was held that such a statutory pardon, inasmuch as it purported to operate before conviction, did not encroach upon the constitutional power of the governor to grant pardons after conviction. This case seems to be the only one in which the question was squarely raised, but as appears from the discussion throughout this subsection, the decision is contrary to the weight of judicial opinion, if not the weight of actual authority.

9. See *supra*, this section, *Powers of Legislature as to Pardons.*

exercised in the form of the remission or compromise of fines by a district attorney or a board of county supervisors;[1] and the remission of fines that have been lawfully and finally imposed cannot be granted by the courts, since such action would be a usurpation of the pardoning power.[2] Likewise the courts are without power to mitigate or commute punishment imposed by sentence.[3] Certain limited powers, however, in the nature of the pardoning power, are vested in other branches of the government or in certain public officers.

(2) *Of Military and Naval Officers.* — By the 112th article of war it is provided that every officer who is authorized to order a general court martial shall have power to pardon or mitigate any punishment adjudged by the court martial.[4]

(3) *Of Secretary of Treasury as to Remission of Fines, etc.* — Certain acts of Congress from time to time have conferred upon the secretary of the treasury the power to remit fines, penalties, and forfeitures imposed for certain offenses against the laws of the United States. Since these statutes have been acquiesced in for many years, and the practice of the secretary of the treasury in respect to their provisions has become established and regarded as a valid exercise of authority, it is held that his exercise of the power so given cannot now be questioned, and will not be considered as an encroachment upon the pardoning power of the President.[5] It seems that the power conferred upon the secretary of the treasury by these statutes does not supersede the ultimate power of the President to pardon, but that it is granted for reasons of expediency, and in order that justice may be more readily and satisfactorily administered.[6]

(4) *Of Mayor and City Council.* — It has been held that the pardoning power of a governor does not extend to the violation of a city ordinance.[7] And under a city ordinance providing that under certain conditions the mayor should have authority to discharge from the city prison persons confined there for the nonpayment of fines imposed for the violation of an ordinance, and providing also that he should have the power to reduce such fines upon the recommendation of the police judge, and that he should have the power to reduce sentences for good conduct without such recommendation, it has been held that the mayor has the power to pardon subject to the limitations imposed by the ordinance, that he is the sole judge of the extent of the condition which gives him the right, and that unless he has acted corruptly his action is final.[8] Under such provisions a pardon by the mayor appears to

1. District Attorney and County Supervisors Cannot Remit Fines. — McKay *v.* Woodruff, 77 Iowa 413. See also Manitowoc County *v.* Sullivan, 51 Wis. 115.

2. Courts Cannot Remit Fines. — See the title FINES AND PENALTIES, vol. 13, p. 71.

3. Court Cannot Commute Sentence. — Opinion of Justices, 14 Mass. 472, note.

4. See the title MILITARY LAW, vol. 20, p. 658.

5. Practice of Secretary of Treasury under Federal Statutes Will Not Be Disturbed. — U. S. *v.* Morris, 1 Paine (U. S.) 237, *affirmed* 10 Wheat. (U. S.) 246; The Laura, 114 U. S. 411, *affirming* 19 Blatchf. (U. S.) 562, *approved* in Brown *v.* Walker, 161 U. S. 601. See also the title INFORMERS, vol. 16, p. 327.

6. 6 Op. Atty.-Gen. 493.

The power of the secretary of the treasury under the act for the mitigation and remission of forfeitures (Acts of Congress March 3, 1797, and February 1, 1800) has been said to bear no analogy to the pardoning power of the British crown, and to be wholly distinct from the pardoning power of the President of the United States under the Constitution, inasmuch as the object of the act is to afford merited relief in cases where courts of justice are obliged to inflict a penalty. U. S. *v.* Morris, 1 Paine (U. S.) 209, *affirmed* 10 Wheat. (U. S.) 246.

For the Extent of the Power of the Secretary of Treasury in Cases of this Character, see the following cases: The Margaretta, 2 Gall. (U. S.) 515; The Gray Jacket, 5 Wall. (U. S.) 369; U. S. *v.* Morris, 10 Wheat. (U. S.) 284, *affirming* 1 Paine (U. S.) 227; M'Lane *v.* U. S., 6 Pet. (U. S.) 404; 6 Op. Atty.-Gen. 393, 488. See also the title INFORMERS, vol. 16, p. 327.

7. See *infra*, this title, *Nature and Extent of Pardoning Power — Power of Governor Confined to Offenses Against State.*

8. Pardon by Mayor for Violation of City Ordinance. — *In re* Monroe, 46 Fed. Rep. 52. In this case it was further held that in the absence of any evidence to the contrary the court would presume that the pardon was granted in good faith.

have the same effect as any other pardon. It destroys the offense committed by the prisoner, and removes the penal consequences thereof. A police judge cannot therefore legally order the pardoned person to be recommitted, and a police officer may lawfully disobey such an order.[1] In *Illinois* it has been held that a city council may under certain circumstances remit a fine imposed for a violation of a city ordinance.[2]

3. By Whom Reprieve May Be Granted — *a.* At Common Law. — A reprieve at common law might be granted either by the king in the exercise of his pardoning power, or by the court; for every court which had the power to award execution had like power to suspend or postpone the execution awarded.[3]

b. Under Various Constitutions. — By the Constitution of the United States the power of reprieve is vested in the President, and provisions exist in probably the greater number of state constitutions whereby the power to grant reprieves is vested in the governor or in a board of pardons.[4] But, due somewhat perhaps to a lack of uniformity in constitutional provisions on this point, as well as to a difference of opinion as to the nature of the power, the few decisions that have arisen in the United States concerning the power of granting reprieves are not altogether harmonious. The results of the decisions in the various states where the question has arisen are set forth in the notes.[5]

1. *In re* Monroe, 46 Fed. Rep. 52.

2. **Remission of Fine by City Council.** — See the title Fines and Penalties, vol. 13, p. 71.

3. **Reprieve Either by King or by Court at Common Law.** — 2 Hale P. C. 412; 1 Chitty Crim. Law 757, 758; *Ex p.* Howard, 17 N. H. 545; Sterling *v.* Drake, 29 Ohio St. 457, 23 Am. Rep. 762; State *v.* Hawk, 47 W. Va. 434. See also Clifford *v.* Heller, 63 N. J. L. 116.

For an exhaustive examination of the sources of the power to grant reprieves and suspensions of sentence, see Sterling *v.* Drake, 29 Ohio St. 457, 23 Am. Rep. 762.

4. See the Constitution of the United States, art. 2, § 2; and see the constitutions of the various states, and the organic acts of the territories.

5. **Who May Grant Reprieve under State Constitution — Louisiana.** — In Louisiana the power of reprieve is vested in the governor by the constitution, and this power, it is held, cannot be exercised by the court. State *v.* Rose, 29 La. Ann. 762, holding that the court cannot suspend the execution of the sentence of a criminal so that he may have time to reinstate an appeal which has been dismissed with the attorney-general's consent upon a void commutation of sentence by the governor.

Mississippi. — The constitution of Mississippi vests in the governor the power to grant reprieves; and when a reprieve is granted by him for a certain time the execution of the sentence takes place at the expiration of the time mentioned, and this by force of the original sentence. *Ex p.* Fleming, 60 Miss. 910.

New Hampshire. — Since at common law reprieves could be granted either by the court having jurisdiction of the cause or by the crown, it is held in New Hampshire that the power to grant a reprieve is not necessarily included in the pardoning power, and consequently under the constitution of that state, which confers the pardoning power upon the governor and council, the power of reprieve does not pass by implication; but where the circumstances of a case are such that a reprieve cannot be granted by the court, as where the court is not in session, it is held that the power belongs of necessity to the governor as chief executive magistrate. *Ex p.* Howard, 17 N. H. 545.

New Jersey. — It is held in New Jersey that the granting of a reprieve and the fixing of a day for the execution of a convicted criminal is by the common law a judicial power, and except in so far as it is expressly permitted by the constitution, this power cannot be exercised by the governor or the person administering the government. The constitution bestows upon the executive department the power to grant reprieves, but limits the exercise of that power to a period of ninety days after sentence. As an incident to the power, the executive department may direct that execution be had within the ninety days, and in that event the execution takes place not by force of the executive warrant, but by virtue of the judgment of the court. After the lapse of the ninety days, however, the power of the executive in this respect ceases and determines. Clifford *v.* Heller, 63 N. J. L. 105.

New York. — By art. iv., § 5, of the New York Constitution, the power of reprieve is vested in the governor. Where a reprieve is granted to a convict by the governor, for the purpose of having the conviction reviewed by an appellate court, it is the duty of the sheriff to execute the sentence of the court on the day to which the execution is respited, unless the judgment be reversed or annulled, or a further respite be granted; and it is not necessary in such case that the convict be previously brought into court by habeas corpus. People *v.* Enoch, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197. For similar procedure under later statutes, see Matter of Ferris, 35 N. Y. 262; Moett *v.* People, 85 N. Y. 373; Matter of Buchanan, 146 N. Y. 264.

Ohio. — Under the Ohio constitution the governor is authorized of his own motion to reprieve or suspend for a specified interval of time the execution of a prisoner under sentence of death. A warrant from the gov-

4. By Whom Suspension of Sentence May Be Granted — *a.* AT COMMON LAW. — The power of a court of record possessing jurisdiction in criminal cases to suspend the rendition of sentence after conviction is inherent in all such courts by the common law, and belongs of common right to every tribunal having authority to pass execution in a criminal case.[1]

b. STATUTES CONFERRING POWER UPON COURT. — Statutes conferring upon a court of record possessing jurisdiction in criminal cases the power to suspend sentence in its discretion, either during the good behavior of the person convicted, in certain classes of cases,[2] or pending an appeal or writ of error,[3] do not give to the court the power either to preclude itself or its successor from subsequently passing sentence, or to absolve the convict from punishment or to restore his civil rights; and therefore such statutes are not in conflict with the provisions of a state constitution conferring upon the governor the power to grant reprieves and pardons, but are merely declaratory of the common law.

c. SUSPENSION OF SENTENCE FOR INDEFINITE PERIOD. — Whether a court has the authority to suspend sentence indefinitely has given rise to a conflict in the authorities. The better rule appears to be that while the court may suspend judgment temporarily or for stated periods from time to time, it is without authority to suspend the sentence or defer its rendition for an indefinite period, or to refuse altogether to pass judgment so that the offender is relieved from punishment; since such authority belongs to the pardoning power alone, and its exercise by the courts is an unwarranted usurpation of that power.[4] But it has been held on the contrary that by virtue of long-established custom, supportable upon considerations of public policy, the court may in its sound discretion suspend sentence indefinitely, or, in a case where the punishment prescribed by statute may be merely nominal, may refuse to render any judgment whatsoever; and that the exercise of this authority is not a usurpation of the pardoning power.[5] In *Utah* a principle has been announced which embraces some of the elements of both the foregoing rules.[6]

d. SUSPENSION OF SENTENCE TO GIVE TIME TO APPLY FOR PARDON — (1) *In General.* — It is not only within the power of the court having jurisdiction of the cause, but it is also common practice in some jurisdictions at least, to suspend the passing of sentence in order to give time for the convict

ernor to the sheriff to suspend the execution until a day certain, and commanding him on that day to execute the sentence, is a proper form of reprieve, and authorizes the sheriff on the day named to execute the sentence without further order of the court. Sterling *v.* Drake, 29 Ohio St. 457, 23 Am. Rep. 762.

West Virginia. — In West Virginia, though the constitution expressly confers upon the governor the power to grant reprieves, it is said that the power to pardon necessarily includes the power to reprieve or suspend the execution of the sentence until the matter can be inquired into and determined. It is held, therefore, that the power to grant reprieves in all cases of felony, where the necessity therefor exists, is vested in the governor; that he is the sole judge of such necessity, and that his conclusions are not reviewable by the courts, but are binding upon all other departments of the government. State *v.* Hawk, 47 W. Va. 434.

1. Suspension of Sentence by Court at Common Law. — 2 Hale P. C. 412; 1 Chitty Crim. L. (1st ed.) 758; People *v.* Court Sess., 141 N. Y. 288. See also Parker *v.* State, 135 Ind. 534.

Power to Suspend Sentence Distinguished from Power to Reprieve. — *Per* O'Brien, J., in People *v.* Court Sess., 141 N. Y. 294.

2. Statutes Conferring upon Court Power to Suspend Sentence. — People *v.* Court Sess., 141 N. Y. 288, *reversing* 66 Hun (N. Y.) 550.

3. Parker *v.* State, 135 Ind. 534, *modifying* Butler *v.* State, 97 Ind. 373. See also Sterling *v.* Drake, 29 Ohio St. 457, 23 Am. Rep. 762. *Compare* State *v.* Rose, 29 La. Ann. 755.

4. Rule that Courts May Not Suspend Sentence Indefinitely. — U. S. *v.* Wilson, 46 Fed. Rep. 748 (U. S. C. C. Dist. Idaho); People *v.* Reilly, 53 Mich. 263, *per* Champlin, J.; People *v.* Brown, 54 Mich. 15; People *v.* Morrisette, (Oyer & T. Ct.) 20 How. Pr. (N. Y.) 118.

And the presentation to a judge of a petition for an indefinite suspension of sentence constitutes a grave impropriety. People *v.* Brown, 54 Mich. 15.

5. Rule that Indefinite Suspension of Sentence Is Within Discretion of Court. — People *v.* Mueller, (Ill.) 4 Crim. L. Mag. 725; State *v.* Addy, 43 N. J. L. 113, 39 Am. Rep. 547. See generally the title SENTENCE AND PUNISHMENT.

6. People *v.* Blackburn, 6 Utah 347.

to apply for a pardon, or to await the effect of an application that has already been made for a pardon.[1]

(2) *Fixing Remote Day for Execution.* — Wherever the law by its own terms inflicts upon the convict a specific punishment, it is usual for the court, in its discretion, to direct that the punishment be inflicted on some day so distant as to enable the convict to apply for a pardon in the meantime.[2]

Where Punishment Is Within Discretion of Court. — But it has been held that wherever the nature of the punishment depends upon the discretion of the court, this reason for postponement does not exist, and that it is proper for the court to pass sentence within a reasonable time in order that the executive may be informed what the punishment is to be, and thus may be enabled to act with full knowledge of the circumstances.[3]

Where Punishment Is Imprisonment. — Under a *Tennessee* statute [4] providing that where a convict has been sentenced to imprisonment the presiding judge may in all proper cases postpone the execution of the sentence in order to give time to apply for executive clemency, it has been held that the judge should exercise this power only where he considers that the convict is a proper subject for such clemency and where the circumstances are such that a pardon or commutation should be recommended.[5]

V. Nature and Extent of Pardoning Power — 1. Interpretation of Constitutional Grants of Pardoning Power. — At the time when the common law of England was adopted as a part of the jurisprudence of the United States, the law relating to the pardoning power of the crown was well established; the meaning of the terms "pardon," "reprieve," and the like were thoroughly understood, and the rules governing the nature and extent of the pardoning power, the construction of pardons and their effect, were well settled. The pardoning power as conferred by the Constitution of the United States and the constitutions of the various states is in its essential elements the same as the pardoning power which for centuries has been exercised by the king of England, and which prior to the Revolution was exercised in those parts of this country which were British colonies. When, therefore, it becomes necessary to construe and interpret any constitutional grant of the pardoning power, the established principles of the common law of England, and the meaning of legal terms as understood and used in the jurisprudence of that country, furnish a basis for the decisions of both the state and the federal courts throughout the United States; and in the absence of constitutional or statutory limitations, or settled rules of interpretation to the contrary, the English common law will be deemed controlling.[6]

1. Sentence Suspended Pending Application for Pardon. — Com. *v.* Lockwood, 109 Mass. 323, 12 Am. Rep. 699 (where numerous instances of the practice are mentioned); State *v.* Frink, 1 Bay (S. Car.) 168; Allen *v.* State, Mart. & Y. (Tenn) 294.

Thus in *England* where a prisoner pleads a charter of pardon, which upon inspection appears not to cover his case, the court, assuming that the crown intended to grant an effectual pardon, will give the prisoner a reasonable time to obtain one. Foster's Crown Law 366.

2. Fixing Remote Day for Execution. — State *v.* Manuel, 4 Dev. & B. L. (20 N. Car.) 20; State *v.* Chitty, 1 Bailey L. (S. Car.) 404.

3. Punishment Within Discretion of Court. — State *v.* Chitty, 1 Bailey L. (S. Car.) 404.

4. M. & V. Code (Tenn.), § 6096.

5. Convict Must Be Morally Entitled to Clemency. — Crane *v.* State, 94 Tenn. 98.

6. Constitutional Grants of Pardoning Power Interpreted by the English Common Law — *United States.* — U. S. *v.* Wilson, 7 Pet. (U. S.) 150; *Ex p.* Wells, 18 How. (U. S.) 307; 4 Op. Atty.-Gen. 459; 5 Op. Atty.-Gen. 536; 6 Op. Atty.-Gen. 402.

Alabama. — *Ex p.* Powell, 73 Ala. 517, 49 Am. Rep. 71.

California. — People *v.* Bowen, 43 Cal. 439, 13 Am. Rep. 148.

Georgia. — Dominick *v.* Bowdoin, 44 Ga. 357.

Indiana. — State *v.* Leak, 5 Ind. 359. See also State *v.* Farley, 8 Blackf. (Ind.) 229.

Louisiana. — McDowell *v.* Couch, 6 La. Ann. 366.

New Jersey. — Cook *v.* Chosen Freeholders, 26 N. J. L. 326, *affirmed* 27 N. J. L. 637.

New York. — People *v.* Potter, (Supm. Ct.) 1 Park. Crim. (N .Y.) 52.

North Carolina. — State *v.* McIntire, 1 Jones L. (46 N. Car.) 7, 59 Am. Dec. 566.

Ohio. — Sterling *v.* Drake, 29 Ohio St. 457, 23 Am. Rep. 762.

Pennsylvania. — Bramson's Case, 1 Ashm. (Pa.) 90; Flavell's Case, 8 W. & S. (Pa.) 198; Com. *v.* Haggerty, 4 Brews. (Pa.) 330.

2. What Powers Are Included — *a.* IN GENERAL. — The word "pardon" is generic and includes every character of executive clemency.[1]

b. POWER TO GRANT AMNESTY. — A constitutional grant of the pardoning power includes the power to issue a proclamation of amnesty.[2]

c. POWER TO GRANT CONDITIONAL PARDONS. — The power to grant an absolute pardon carries with it the lesser power of granting a conditional pardon; and it is a well-settled rule, both in England and the United States, that the officer or body in whom the pardoning power is vested may annex to a pardon any condition, precedent or subsequent, which is not immoral, illegal, or impossible of performance, and that upon compliance with this condition the validity of the pardon will depend. This rule is a principle of the common law; but in many states the constitutions expressly provide that the governor may grant conditional pardons.[3]

d. POWER TO GRANT PARTIAL PARDONS. — The power to grant an absolute pardon includes the power to grant a partial pardon; as a remission of a part of the penalty or punishment, without remitting the whole.[4]

e. POWER TO REMIT FINES AND PENALTIES — (1) *In General.* — The power to grant pardons is generally interpreted as inclusive of the power to remit fines and penalties; and in many states this power is expressly conferred by the constitution.[5]

Virginia. — Lee *v.* Murphy, 22 Gratt. (Va.) 789, 12 Am. Rep. 563.

The principle of the text was first enunciated by Chief Justice Marshall in U. S. *v.* Wilson, 7 Pet. (U. S.) 150, a case which has been widely followed. See the foregoing cases in this note.

1. "Pardon" Includes All Forms of Executive Clemency. — *Ex p.* Wells, 18 How. (U. S.) 307; Davies *v.* McKeeby, 5 Nev. 369. See also Jones *v.* Board of Registrars, 56 Miss. 770, 31 Am. Rep. 385.

2. Power to Pardon Includes Power to Grant Amnesty. — U. S. *v.* Klein, 13 Wall. (U. S.) 147; Davies *v.* McKeeby, 5 Nev. 369.

The Power of the President of the United States to Issue Proclamations of Amnesty is too clear to require further citation of authority. In another part of this title numerous cases arising under proclamations of amnesty by the President are collected and discussed. See *infra*, this title, *Operation and Effect of Pardon — In Respect to Property Rights — Property Confiscated by United States, et seq.*

3. Pardoning Power Includes Power to Annex Conditions — *England.* — 4 Black. Com. 401.

United States. — *Ex p.* Wells, 18 How. (U. S.) 307; 1 Op. Atty.-Gen. 482; 14 Op. Atty.-Gen. 124.

Alabama. — Fuller *v.* State, 122 Ala. 37.

Arkansas. — *Ex p.* Hawkins, 61 Ark. 321, 54 Am. St. Rep. 209.

California. — *Ex p.* Marks, 64 Cal. 29, 49 Am. Rep. 684.

Iowa. — Arthur *v.* Craig, 48 Iowa 267, 30 Am. Rep. 395.

Louisiana. — McDowell *v.* Couch, 6 La. Ann. 370.

Massachusetts. — Kennedy's Case, 135 Mass. 48; Perkins *v.* Stevens, 24 Pick. (Mass.) 278.

Michigan. — People *v.* Marsh, 125 Mich. 410.

Minnesota. — State *v.* Wolfer, 53 Minn. 135, 39 Am St. Rep. 582.

New York. — People *v.* Potter, (Supm. Ct.) 1 Park. Crim. (N. Y.) 47; *In re* Whalen, (Supm. Ct. Gen. T.) 19 N. Y. Supp 915.

Pennsylvania. — Com. *v.* Haggerty, 4 Brews. (Pa.) 330; Flavell's Case, 8 W. & S. (Pa.) 197.

South Carolina. — State *v.* Fuller, 1 McCord L. (S. Car.) 178; State *v.* Smith, 1 Bailey L. (S. Car.) 283, 19 Am. Dec. 679.

Virginia. — Lee *v.* Murphy, 22 Gratt. (Va.) 789, 12 Am. Rep. 563, *explaining* Com. *v.* Fowler, 4 Call. (Va.) 35, and *distinguishing* the opinion of Fry, J., in Ball *v.* Com., 8 Leigh (Va.) 726.

See also *infra*, this title, *Construction and Validity of Pardons — Of Conditional Pardons.*

4. Remission of Part of Punishment. — 5 Op. Atty.-Gen. 579; 14 Op. Atty.-Gen. 124; Perkins *v.* Stevens, 24 Pick. (Mass.) 280; State *v.* Twitty, 4 Hawks (11 N. Car.) 193; Duncan *v.* Com., 4 S. & R. (Pa.) 449. See also Wilkerson *v.* Allan, 23 Gratt. (Va.) 10.

5. Pardoning Power Includes Power to Remit Fines and Penalties — *United States.* — 4 Op. Atty.-Gen. 458; 5 Op. Atty.-Gen. 579.

Georgia. — Matter of Flournoy, 1 Ga. 606.

Iowa. — See also State *v.* Beebee, 87 Iowa 636.

New Jersey. — Cook *v.* Chosen Freeholders, 26 N. J. L. 326, *affirmed* 27 N. J. L. 637.

North Carolina. — State *v.* Twitty, 4 Hawks (11 N. Car.) 193.

Pennsylvania. — Cope *v.* Com., 28 Pa. St. 297.

South Carolina. — State *v.* Williams, 1 Nott & M. (S. Car.) 26; State *v.* Simpson, 1 Bailey L. (S. Car.) 378.

See generally the title FINES AND PENALTIES, vol. 13, p. 70 *et seq.*

The President of the United States may remit the penalty inflicted upon an officer by sentence of a court-martial, although he cannot reinstate the offending officer after the sentence has been carried into effect. Vanderslice *v.* U. S., 19 Ct. Cl. 481.

In *Pennsylvania* the power of the governor in respect to the remission of fines and penalties has been held to include only such fines and penalties as are payable to the commonwealth, or which, being originally payable to the commonwealth, have by statute been appropriated to the use of the respective counties. Shoop *v.* Com., 3 Pa. St. 126.

But his power does include such fines as

(2) *After Payment.* — The pardoning power, however, does not embrace the power to restore the fine or penalty after it has been paid into the treasury of the state or to the persons or body entitled by law to receive it.[1] And a fine or penalty actually paid into the treasury of the United States is beyond the President's power of pardon or remission and cannot be restored by him, since under the Constitution moneys paid into the treasury of the United States can be withdrawn therefrom only by act of Congress.[2]

f. POWER TO COMMUTE OR MITIGATE SENTENCES. — The power to pardon is generally held to include the power to mitigate or commute sentences, the theory being that the greater power includes the less;[3] and in some states the constitution expressly confers upon the governor the power of granting commutations of sentence.[4]

g. POWER TO GRANT PAROLE. — In the absence of constitutional restrictions, or of restrictive statutes passed by virtue of constitutional authority, it is generally held that the pardoning power includes the power to release a convict on parole; a parole being in the nature of a conditional pardon, though more limited in its effect.[5]

Conditional Parole. — And since the governor of a state may grant a parole, he may annex thereto any condition that is not illegal, immoral, or impossible of performance.[6]

h. POWER TO GRANT REPRIEVES.— The question in whom the power of granting reprieves is vested, together with the extent of that power, is discussed in another part of this title.[7]

3. What Offenses May Be Pardoned — *a.* CRIMINAL OFFENSES IN GENERAL. — Unless restricted in some way, as in England by act of Parliament, or in the United States by constitutional limitation, the power to grant pardon in cases of crime appears to be coextensive with the power to inflict punishment.[8]

were originally payable to the commonwealth but have been given by the commonwealth to a county. Cope *v.* Com., 28 Pa. St. 297.

An Early New Hampshire Statute (statute of July 6, 1827, N. H. Laws 1830, 475) authorized the Court of Common Pleas to remit, under certain circumstances, the fine and costs imposed in a criminal prosecution where the offender was confined in jail for failure of payment, and to discharge the prisoner upon such terms and conditions as the court might think proper. Strafford County *v.* Jackson, 14 N. H. 16.

1. Power to Remit Not Inclusive of Power to Restore. — Rucker *v.* Bosworth, 7 J. J. Marsh. (Ky.) 645; Cook *v.* Chosen Freeholders, 27 N. J. L. 637, *affirming* 26 N. J. L. 328, and *disapproving* the opinion of Nisbit, J., in Matter of Flournoy, 1 Ga. 606, and holding further that under the laws of *New Jersey* the criminal who had paid the fine could not maintain an action to recover it. And see *infra*, this section, *Rights of Third Persons Cannot Be Impaired.*

2. Moneys in Treasury of the United States. — 2 Op. Atty.-Gen. 329; 8 Op. Atty.-Gen. 281.

3. Power of Mitigation and Commutation Included. — *Ex p.* Wells, 18 How. (U. S.) 307; McDowell *v.* Couch, 6 La. Ann. 366; Perkins *v.* Stevens, 24 Pick. (Mass.) 278; Kennedy's Case, 135 Mass. 48; Lee *v.* Murphy, 22 Gratt. (Va.) 789, 12 Am. Rep. 563. *Contra*, *Ex p.* Janes, 1 Nev. 319.

4. See generally the constitutions of the various states, and the organic acts of the several territories.

In *New York* a wide discretion is given to the executive in respect to conditions which may be attached to pardons and commutations of sentence, and a condition may be imposed upon a commutation of sentence as well as upon a pardon, and its operation is the same in each case. People *v.* Burns, 77 Hun (N. Y.) 92. See also *In re* Whalen, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 915.

In *Virginia* the executive is authorized to commute only such punishments as are capital; but he may substitute for the conviction, with the prisoner's consent, any other punishment recognized by statute or the common law. Lee *v.* Murphy, 22 Gratt. (Va.) 789, 12 Am. Rep. 563.

5. Power to Grant Parole Included. — Fuller *v.* State, 122 Ala. 37; Woodward *v.* Murdock, 124 Ind. 442.

6. Condition May Be Annexed. — Woodward *v.* Murdock, 124 Ind. 439.

7. See *supra*, this title, *By Whom Pardoning Power May Be Exercised — By Whom Reprieve May Be Granted.*

8. Power to Pardon Coextensive with Power to Punish — *England.* — Rex *v.* Parsons, 1 Show. 284.

United States. — 2 Op. Atty.-Gen. 329; 3 Op. Atty.-Gen. 418; 4 Op. Atty.-Gen. 458; 5 Op. Atty.-Gen. 579; 16 Op. Atty.-Gen. 27; *Ex p.* Garland, 4 Wall. (U. S.) 333.

Massachusetts. — Kennedy's Case, 135 Mass. 48.

Oklahoma. — Territory *v.* Richardson, 9 Okla. 579.

Pennsylvania. — Bramson's Case, 1 Ashm. (Pa.) 90.

Proceedings in the Ecclesiastical Court. — In

Power of Crown in Cases of Murder. — Although under a certain early English statute [1] restricting the pardoning power in cases of murder, it appeared to be doubtful whether the king could pardon murder generally, it has long since been settled that the pardoning power of the king extends to cases of murder, as well as to minor offenses.[2]

Committing to Prison Beyond the Realm. — In England, by the Habeas Corpus Act,[3] it was provided, that to commit a subject to prison beyond the realm was a præmunire beyond the pardoning power of the king.[4]

Treason. — In the United States the power to pardon in cases of treason is generally reserved out of the constitutional grant of the pardoning power to the executive, and is vested in the legislature. But this restriction does not occur in the Federal Constitution.[5]

b. CASES OF IMPEACHMENT. — The subject of the pardoning power in cases of impeachment is fully discussed elsewhere in this work.[6]

c. PUBLIC NUISANCES. — A public nuisance has been held to be within the scope of the pardoning power in so far as the penalty imposed for its commission or maintenance is concerned; and a pardon for such a nuisance will discharge the offender from liability for the fine or penalty imposed. But the pardoning power cannot be exercised to impair the right of the public or of an individual to abate the nuisance, and hence a pardon of the nuisance will not operate to bar the right of abatement.[7]

d. CONTEMPT OF COURT. — The question whether contempt of court falls within the scope of the pardoning power has arisen but seldom, but the few decisions dealing with it are in conflict.[8] It was formerly considered that the pardoning power of the President of the United States embraced the power to pardon for contempt of the courts of the United States, whether the offense was in disobedience to the process of the court or in misbehavior in its presence.[9] In a recent case, however, it was held that the pardoning power of the President does not embrace commitment for a civil contempt, such, for instance, as the failure to comply with a writ of mandamus directing a judge to levy a tax to pay a judgment rendered against a county; the reason being that in such a case the proceeding of commitment is not an execution of the criminal law, but is a remedy by which a third party is enabled to

England it was held that inasmuch as all proceedings in the Ecclesiastical Court *ex officio* were conducted on behalf of the king, since they were instituted only to correct and punish for a crime, or other offense, and not for the particular interest of a third party, the pardoning power of the king extended to all such cases in that court. Hall's Case, 5 Coke 51.

Burning in the Hand. — The practice of burning in the hand a person to whom the benefit of clergy had been extended could be dispensed with by the exercise of the pardoning power vested in the crown. Biggin's Case, 5 Coke 50.

1. Stat. 13 Rich. II., c. 2, st. 2, c. 1, repealed in part by Stat. 16 Rich. II., c. 6. See also Stat. 2 Edw. III., c. 2; Stat. 14 Edw. III., c. 15.

2. Murder Within the Pardoning Power of Crown. — 4 Black. Com. 400, 401; 1 Chitty's Cr. Law 763; Rex *v.* Coney, 3 Mod. 37, Rex *v.* Parsons, 2 Salk. 499, 1 Show. 283; Rex *v.* Anonymous, 4 Mod. 61. See also Foster's Crown Law, c. 7, pp. 303, 304; 2 Hawk. P. C., c. 37, §§ 14, 15, 16, 17, pp. 545, 546.

3. 31 Car. II., c. 2, § 12.

4. Committing to Prison Beyond Realm. — 1 Chit. Crim. L. 763.

5. Treason. — See *supra*, this title, *By Whom Pardoning Power May Be Exercised — Constitutional Limitations upon Pardoning Power — Pardoning Power in Cases of Treason.*

6. See the title IMPEACHMENT, vol. 15, pp. 1072, 1073.

7. Pardon of Public Nuisance Discharges Fine but Does Not Affect Right of Abatement. — 5 Comyns's Dig. 175; Anonymous, 12 Coke 30; Nichols *v.* Nichols, Plowd. 487; 2 Hawk. P. C. 538, § 1; Rex *v.* Wilcox, 2 Salk. 458.

Continuing Nuisance. — While the king may pardon a nuisance that is transient only, a nuisance that is continuing and cannot be ended until removed or abated is not within the scope of his power except as to the fine or other punishment imposed for its commission. Thomas *v.* Sorrell, Vaugh. 333.

8. See the title CONTEMPT, vol. 7, p. 69, where the authorities are discussed.

In a more recent *Tennessee* case it was held that a criminal contempt of court was within the pardoning power of the governor, and that the judgment imposing fine and imprisonment for the contempt constituted a conviction within the meaning of the constitutional provisions authorizing the governor to pardon after conviction. Sharp *v.* State, 102 Tenn. 9, 73 Am. St. Rep. 851.

9. See the title CONTEMPT, vol. 7, p. 69.

enforce and secure his civil rights, and that the exercise of the pardoning power in such cases would be unwarranted in law, since it would destroy the legal rights and remedies of private suitors.[1]

e. CONDEMNATION OF VESSEL AND CARGO IN PRIZE COURT. — The pardoning power of the President of the United States does not embrace any case of forfeiture, loss, or condemnation not imposed by law as a punishment for some offense committed by some person or class of persons; it cannot therefore include the condemnation of a vessel and cargo in a prize court, the proceeding not being criminal in its nature, and no person being charged with an offense or being in a condition to be relieved by a pardon.[2]

f. CIVIL OFFENSES AND LIABILITIES. — It is probably beyond question that civil liabilities accruing to the government, and arising out of an offense against that government, are within the pardoning power, provided the rights of third persons will not be impaired by its exercise. Thus, costs accruing to the government or state,[3] and forfeitures of bail bonds[4] where the money remains uncollected and rights of third persons thereto have not vested, may be remitted by the officer or body in whom the pardoning power resides. In comparatively early times in England, a number of general pardons were granted by the crown and Parliament, and were made expressly applicable to civil liabilities. Some of these acts of general pardon were very sweeping in their terms, and included civil liabilities of almost every character except such as were expressly excepted by the terms of the pardon.[5]

4. Power of Governor Confined to Offenses Against the State. — The pardoning power of a governor of a state or territory is confined in its operation to offenses against the laws of that state or territory. It does not include an offense against the laws of the United States, since such an offense is solely within the pardoning power of the President;[6] neither does it include an offense against a municipal corporation, such, for instance, as the violation of a city ordinance.[7]

5. What Persons May Be Pardoned. — It seems beyond doubt that all citizens or subjects of a government who are domiciled within its territory are within the operation of its pardoning power, to the same extent that they are within

1. Pardoning Power of President Does Not Extend to Civil Contempts. — *In re* Nevitt, (C. C. A.) 117 Fed. Rep. 448, reviewing a number of the authorities cited in the title referred to in the foregoing note. See also Hendryx *v.* Fitzpatrick, 19 Fed. Rep. 811, holding that an order of commitment for civil contempt is not within the pardoning power of the President.

2. Mere Condemnation in Prize Court Not Within Pardoning Power. — 10 Op. Atty.-Gen. 452, holding further that in such a case, there being nothing upon which a pardon can operate, the President cannot remit the forfeiture and restore the property or its proceeds; such an act being nothing more than a surrender of pecuniary or proprietary rights and interests of the United States. See also The Gray Jacket, 5 Wall. (U. S.) 342.

Forfeiture of Vessel for Engaging in Slave Trade. — The forfeiture of a vessel for engaging in the slave trade in violation of the Act of 1818, prohibiting trade in slaves, was, however, considered to fall within the pardoning power of the President; the theory being that although the proceeding was by information *in rem* against the vessel, in its essence it was a prosecution for an offense against the United States. 4 Op Atty.-Gen. 573.

3. Uncollected Costs Accruing to State or United States. — 3 Op. Atty.-Gen. 418; State *v.* Underwood, 64 N. Car. 599. See also Libby *v.* Nicola, 21 Ohio St. 420.

And the President may remit the costs in a criminal prosecution, although the criminal has been pardoned and released from imprisonment by a former President upon giving security for the payment of the same costs. 3 Op. Atty.-Gen. 418.

4. Remission of Uncollected Forfeitures on Bail Bonds. — Com. *v.* Denniston, 9 Watts (Pa.) 142; Com. *v.* Shick, 61 Pa. St. 495; State *v.* Dyches, 28 Tex. 535; Com. *v.* Morgan, 14 B. Mon. (Ky.) 314; Com. *v.* Spraggins, 18 B. Mon. (Ky.) 512.

5. Pardon of Civil Liabilities by Crown and Parliament. — For construction of some of these pardons, see Ratcliffe's Case, 2 Dyer 172*a*; Phitton's Case, 6 Coke 79; Wyrral's Case, 5 Coke 49*b*; Tombes *v.* Ethrington, 1 Lev. 121; Atty.-Gen. *v.* Colvile, Hardres 229; Atty.-Gen. *v.* Hutchinson, Hardres 324; Atty.-Gen. *v.* Guerdon, Hardres 373; Atty.-Gen. *v.* Beston, Hardres 424; Atty.-Gen. *v* Palmer, Hardres 440; Strickland *v.* Thorp, Cro. Jac. 207.

6. Governor Cannot Pardon for Offense against Federal Laws. — 6 Op. Atty.-Gen. 430; 7 Op. Atty.-Gen. 761.

7. Governor Cannot Pardon for Violation of City Ordinance. — State *v.* Renick, 157 Mo. 292. See also Shoop *v.* Com., 3 Pa. St. 126.

the operation of its laws, and that when guilty of an offense, they may obtain the benefits to be derived from the exercise of that power.[1]

Resident Aliens. — Since aliens domiciled in a country other than the one whose subjects they are owe a temporary allegiance to the government of their domicil, they are subject to the laws of that government, and therefore when guilty of violation of such laws they are entitled to the benefits of a general pardon and amnesty offered to offenders against those laws.[2]

Nonresident Aliens. — An alien, however, owes no allegiance to a country of which he is not a subject and in which he is not domiciled; and consequently an act of his which would constitute a crime against the laws of a certain country were he domiciled therein cannot constitute a criminal offense against the laws of that country when it is committed during his residence elsewhere. Therefore, a general pardon and amnesty issued in that country to offenders against its laws cannot inure to his benefit, even though he has committed an act which would make him a criminal were he a subject of that government.[3]

Infants in Reform Schools. — It has been considered that infants committed to a reform school, not for any legal offense, but for lack of home and friends or for the reason that they are unmanageable, do not come within the operation of the pardoning power.[4]

6. When Power May Be Exercised — *a.* IN GENERAL. — Where a person is guilty of several offenses, the pardoning power may be exercised as to one and not as to another;[5] and where the punishment is divided into distinct parts, one part may be remitted without affecting the rest and another part may be remitted at another time.[6] Likewise where one offense results in different liabilities, the pardoning power may be exercised to discharge one without discharging the other.[7] And a part of a judgment may be remitted by one executive and another part by his successor in office.[8]

Pardon for Future Offense. — It seems to be conceded that on obvious considerations of public policy the pardoning power cannot be exercised to grant immunity from punishment for an act or offense to be committed in the future,[9] at least where the act or offense is *malum in se* as being against the law of nature, or so far harmful to the public as to be indictable at common law.[10]

Promise to Pardon — Offer of Pardon. — A promise to pardon does not amount to a pardon, and may be withdrawn at any time. But a pardon may be offered, and the offer kept open and thus be continuing, so that the person to whom it is offered may accept it at a future day.[11]

Pardon of Past Offense, to Take Effect in Futuro. — Likewise a pardon may be granted to take effect at a future time, as at a certain period of the offender's imprisonment; and such an instrument is not merely a remission or commutation, but a pardon which at the arrival of the time mentioned becomes full and absolute.[12]

1. See Courteen's Case, Hob. 271.

2. **Resident Aliens Within Pardoning Power.** — Courteen's Case, Hob. 271; Carlisle *v.* U. S., 16 Wall. (U. S.) 147; Green's Case, 8 Ct. Cl. 412.

3. **Nonresident Aliens Not Entitled to Benefit of Amnesty.** — Courteen's Case, Hob. 271; Young *v.* U. S., 97 U. S. 39.

4. **Infants in Reform Schools.** — Matter of Mason, 3 Wash 612, *per* Stiles, J.

5. **Pardon of Separate Parts of Punishment and at Different Times.** — Duncan *v.* Com., 4 S. & R. (Pa.) 449. See also *supra*, this section, *Power to Grant Partial Pardons.*

6. 3 Op. Atty.-Gen. 418; 11 Op. Atty.-Gen. 229; Duncan *v.* Com., 4 S. & R. (Pa.) 449.

7. Duncan *v.* Com., 4 S. & R. (Pa.) 449.

8. **Remission in Part by One Executive, Part by Successor.** — 3 Op. Atty.-Gen. 418.

9. **Pardon Cannot Be Granted for Future Offense.** — 11 Op. Atty.-Gen. 229.

10. 2 Hawk. P. C., c. 37, § 28, p. 550. See also *Ex p.* Wells, 18 How. (U. S.) 307.

11. **Pardon Promised or Offered.**—11 Op. Atty.-Gen. 230.

12. **Pardon to Take Effect in Futuro.** — A pardon of a prisoner "to take effect two years from the time that he commenced said service in the penitentiary," — two years being the length of his sentence — was held to be within the rule of the text. Rivers *v.* State, 10 Tex. App. 181.

b. BEFORE OR AFTER CONVICTION — **No Constitutional Restriction.** — Where the constitution confers the pardoning power without restriction as to the time when it may be exercised, a pardon may be granted before as well as after conviction.[1]

Governor with Power to Pardon After Conviction. — Under constitutions conferring upon the governor power to grant pardons after conviction, it is held that he may pardon as soon as the offender's guilt is legally ascertained; and therefore that he may pardon after a verdict of guilty, but before sentence,[2] or after verdict and sentence, but pending an appeal.[3]

Provision that Pardon Before Conviction Shall Be Unavailing. — And although the constitution of a state provides that no pardon granted before conviction shall avail the party pleading it, yet it has been held that a pardon granted after verdict and before sentence is operative to entitle the convict to his discharge; especially where long settled practice has been based upon such an interpretation of the constitution.[4]

c. AFTER PUNISHMENT. — In the absence of constitutional limitation a pardon may be granted after the criminal has suffered the punishment adjudged for his crime.[5]

d. CIRCUMSTANCES UNDER WHICH REPRIEVE GRANTED. — At common law, there were three classes of circumstances under which reprieves were granted. First, reprieves were granted by the king at his pleasure. Second, the court in the exercise of its sound discretion granted reprieves where the circumstances of the particular case rendered it expedient that the execution of

1. Pardon May Be Granted Before or After Conviction. — 1 Op. Atty.-Gen. 342; 6 Op. Atty.-Gen. 20; Dominick *v.* Bowdoin, 44 Ga. 357; Grubb *v.* Bullock, 44 Ga. 379; State *v.* Woolery, 29 Mo. 300; Territory *v.* Richardson, 9 Okla. 579.

But the power to pardon before conviction should be exercised with reserve, and only for exceptional considerations. 6 Op. Atty.-Gen. 20

Established Practice a Matter of Weight. — The long and undisturbed usage by the executive, apparently matured into prescriptive authority, should in the absence of other precedent be of great weight in determining when a pardon may be granted. Com. *v.* Bush, 2 Duv. (Ky.) 265; Com. *v.* Lockwood, 109 Mass. 323, 12 Am. Rep. 699.

In *Kentucky* it has been considered that the power cannot be exercised until the offense shall have been so charged and defined, in some judicial proceeding instituted for enforcing its legal penalty, as to identify it and make the remission effectual as a bar to any other prosecution for the same act. Com. *v.* Bush, 2 Duv. (Ky.) 264.

2. After Verdict and Before Sentence. — People *v.* Marsh, 125 Mich. 410; Blair *v.* Com., 25 Gratt. (Va.) 850.

3. After Verdict and Sentence and Pending an Appeal. — State *v.* Alexander, 76 N. Car. 231, 22 Am. Rep. 675; State *v.* Teeter, 76 N. Car. 239; State *v.* Heaton, 76 N. Car. 241.

After Verdict, Before Sentence and Pending Bill of Exceptions. — Where the governor has power to pardon after conviction, he may pardon after a verdict of guilty and before sentence is pronounced, and pending a bill of exceptions; and this although the pardon is conditional, and a condition imposed is not a condition precedent to the taking effect of the pardon; in such a case the acceptance of the pardon is an admission of guilt, and operates as a waiver of the bill of exceptions. People *v.* Marsh, 125 Mich. 410.

After Verdict and Formal Entry of Sentence by Clerk. — A pardon is granted "after conviction" where a verdict of guilty has been rendered fixing the punishment, and the clerk according to the usual practice, without special direction from the court, has entered formal sentence on the verdict. And although the prisoner has, on the same day on which the order was entered, obtained an order releasing him on bond, "pending the filing and hearing of a motion for a new trial," the pardon is granted "after conviction," for under the foregoing circumstances the judgment in form is final. Parker *v.* State, 103 Tenn. 547.

Remission of Forfeiture of Bail Bond, Though Accused Not Convicted. — In a state where the governor had power to pardon and to remit fines and forfeitures after conviction, it was held that he could remit a judgment of forfeiture against sureties on a bail bond, even though the person accused who was the principal in the bond had not been convicted; and that the power of the executive to act in such a case arose when a final judgment against the sureties had been rendered in the court of last resort. State *v.* Dyches, 28 Tex. 535.

4. Rule under Massachusetts Constitution. — Com. *v.* Lockwood, 109 Mass. 323, 12 Am. Rep. 699 (where numerous instances of the practice are collected).

5. Pardon May Be Granted After Punishment. — 9 Op. Atty.-Gen. 478; Stetler's Case, 1 Phila. (Pa.) 302, 9 Leg. Int. (Pa.) 38, 22 Fed. Cas. No. 13,380; People *v.* Bowen, 43 Cal. 439, 13 Am. Rep. 148; State *v.* Baptiste, 26 La. Ann. 134; Sutton *v.* McIlhany, 1 Ohio Dec. (Reprint) 235, 5 West. L. J. 356; Hunnicutt *v.* State, 18 Tex. App. 498, 51 Am. Rep. 330; Missouri, etc., R. Co. *v.* Howell, (Tex. Civ. App. 1894)

the sentence should be delayed; and by common usage reprieves thus granted could be vacated by the court, although the session was adjourned or finished. Third, reprieves were granted by the court in cases of necessity. Thus where the offender was a woman who was pregnant, and was under sentence of death, the judges were bound to grant a stay of execution until she should be delivered and for a reasonable time thereafter; this practice being of very ancient origin, and provided for by the laws of William the Conqueror. Also in cases where the prisoner became insane between the time of the sentence and the time fixed for execution the judges were bound to grant a reprieve.[1] Pregnancy, however, was no ground for staying the rendition of judgment, but only for postponing the execution.[2] In any event, the woman must have been quick with child,[3] the question of pregnancy being determined by a jury of twelve discreet matrons, and their verdict recorded.[4] The privilege of having the execution stayed because of the prisoner's pregnancy could be granted but once, and if the prisoner were pregnant a second time, the execution would not be again delayed.[5]

7. Expediency of Exercising Pardoning Power. — The propriety or expediency of exercising the pardoning power in a particular case, or of annexing any terms or conditions to a pardon, is a matter resting wholly within the discretion of the officer or body in whom the pardoning power is vested.[6]

8. Rights of Third Persons Cannot Be Impaired — *a.* IN GENERAL. — It is a well settled principle of the common law that the pardoning power cannot be exercised to abrogate or impair any rights or vested interests of third persons, and that such rights cannot be affected by the operation of that power.[7]

30 S. W. Rep. 98. See also U. S. *v.* Jones, (U. S. Cir. Ct.) 2 Wheel. Crim. (N. Y.) 451, 26 Fed. Cas. No. 15,493.

1. Circumstances under which Reprieves Were Granted at Common Law. — 2 Hale P. C. 412; 1 Chitty Crim. Law 758, 759, 760; 4 Bl. Com. 394, 395; Sterling *v.* Drake, 29 Ohio St. 457, 23 Am. Rep. 762.

Ohio Statutes. — Provisions for granting reprieves in cases of pregnant women sentenced to death, and in cases of insanity occurring after the death sentence, have been incorporated in the Ohio statutes, which also prescribe the mode of procedure to be observed in such cases. Ohio Crim. Code, §§ 187–191; Sterling *v.* Drake, 29 Ohio St. 457, 23 Am. Rep. 762.

2. Pregnancy No Ground for Delaying Passing of Sentence. — 2 Hale P. C. 412; 4 Bl. Com. 394.

3. Prisoner Must Be Quick with Child. — 2 Hale P. C. 413; 1 Chitty Crim. Law 759.

4. Pregnancy Determined by Jury of Matrons. — 2 Hale P. C. 413; 1 Chitty Crim. Law 760.

5. Only One Reprieve for Pregnancy. — 2 Hale P. C. 413; 4 Bl. Com 395; Brookes N. Cas. 48.

6. Governor the Sole Judge of Expediency of Granting Pardon. — *Ex p.* Hunt, 10 Ark. 284; Opinion of Justices, 120 Mass. 600; Flavell's Case, 8 W. & S. (Pa.) 199; State *v.* Ward, 9 Heisk. (Tenn.) 100. See also Hester *v.* Com., 85 Pa. St. 139.

President Taking Advice of Attorney-General. — In a number of instances where applications for pardon have been made to the President of the United States, the opinion of the attorney-general has been taken in respect t the sufficiency of the facts upon which the application was based, the worthiness of the offender, and like matters. See 1 Op. Atty.-Gen. 359; 2 Op. Atty.-Gen. 249, 330; 4 Op. Atty.-Gen. 237, 325; 6 Op. Atty.-Gen. 493.

Punishment Discretionary with Court. — Where the punishment in a given case is discretionary with the court, it has been said that it will be presumed that the pardoning power will be exercised only in extreme cases. State *v.* McIntire, 1 Jones L. (46 N. Car.) 1, 59 Am. Dec. 566.

7. Interests of Third Persons — *England.* — 5 Comyns's Dig. 175; Nichols *v.* Nichols, Plowd. 487.

United States. — 5 Op. Atty.-Gen. 532; Confiscation Cases, 20 Wall. (U. S.) 113; Hendryx *v.* Fitzpatrick, 19 Fed. Rep. 811; *In re* Nevitt, (C. C. A.) 117 Fed. Rep. 448. See also U. S. *v.* Lancaster, 4 Wash. (U. S.) 64.

Arkansas. — *Ex p.* Purcell, 61 Ark. 17.

Georgia. — See Matter of Flournoy, 1 Ga. 606.

Iowa. — State *v.* Beebee, 87 Iowa 636.

New York. — Matter of Deming, 10 Johns. (N. Y.) 232.

Pennsylvania. — Bramson's Case, 1 Ashm. (Pa.) 84.

Texas. — *Ex p.* Mann, 39 Tex. Crim. 491, 73 Am. St. Rep. 961.

And see generally the cases cited *infra*, throughout this subdivision.

Rights of Informers to Shares of Fines and Penalties Not Affected. — State *v.* Williams, 1 Nott & M. (S. Car.) 26; Rowe *v.* State, 2 Bay (S. Car.) 565; Rucker *v.* Bosworth, 7 J. J. Marsh. (Ky.) 645. But see U. S. *v.* Thomasson, 4 Biss. (U. S.) 336. See generally the title INFORMERS, vol. 16, p. 326.

A Statute Merely Releasing an Offender from Imprisonment, since a release from imprisonment does not impair a vested right to a share of a fine imposed by the judgment, has been held valid and constitutional in a jurisdiction where the legislature has power to release from imprisonment. Rankin *v.* Beaird, 1 Ill. 163.

Thus a pardon cannot be granted where a third person has an interest in the judgment of the court; at least the pardon cannot be made to impair such interest.[1]

b. RIGHTS OF ACTION. — Likewise, while a pardon may remove the penal consequences of an offense, it cannot operate to impair the civil rights of third persons against the offender to recover damages for injuries resulting from the offense.[2] Thus it has been held that an act of a state legislature granting pardon and amnesty does not take away a right of action by a private person for the value of property wrongfully taken by an offender pardoned by the statute;[3] and that such a statute would be unconstitutional in so far as its operation would impair civil remedies for private wrongs.[4] But in *North Carolina* the contrary was held under an amnesty act which in terms granted relief from civil liabilities.[5]

c. RIGHT TO RECEIVE COSTS. — In accordance with the principle that the pardoning power cannot be exercised to defeat the rights of third persons, it is held that the power cannot in any way be exercised so as to discharge a convicted criminal from liability to pay costs, the right to which is vested in third persons.[6]

d. RIGHTS NOT VESTED OR ACCRUED. — Although the pardoning power cannot defeat vested interests of third persons, yet until such interests have actually vested or accrued the power of pardon or remission may freely be exercised, and will prevent the vesting of such rights.[7]

Costs Not Vested. — Thus where costs in a criminal proceeding have not yet

Fees and Commissions of Attorneys, Clerks and Sheriffs in Penal or Criminal Cases. — The present constitution of *Kentucky* prohibits the governor from remitting the fees allowed by statute to clerks, sheriffs and commonwealth's attorneys in penal or criminal cases. Ky. Const., art. 3, § 10; Frazier *v.* Com., 12 B. Mon. (Ky.) 369; Com. *v.* Morgan, 14 B. Mon. (Ky.) 314; Com. *v.* Spraggins, 18 B. Mon. (Ky.) 512; Berry *v.* Sheehan, 87 Ky. 434.

The law was formerly otherwise. Routt *v.* Feemster, 7 J. J. Marsh. (Ky.) 131; Berry *v.* Sheehan, 87 Ky. 438. See *infra*, this section, paragraph *Fees and Commissions to Attorneys in Action on Forfeited Bail Bond.*

1. Third Person's Interest in Judgment. — Nichols *v.* Nichols, Plowd. 487; Hall's Case, 5 Coke 51; *In re* Nevitt, (C. C. A.) 117 Fed. Rep. 448; Bramson's Case, 1 Ashm. (Pa.) 84.

But though a pardon cannot discharge the suit of a third person, yet if the suit be discharged upon payment of money, the pardon may become operative to release the prisoner. Shackborough *v.* Biggins, Cro. Eliz. 632, 682.

2. Third Person's Right of Action for Damages. — Hedges *v.* Price, 2 W. Va. 192, 94 Am. Dec. 507, holding that a private individual may recover against a participant in the civil war for acts of trespass committed during the war, notwithstanding that the trespass has been pardoned by the President's amnesty proclamation. To the same effect see Caperton *v.* Martin, 4 W. Va. 138, 6 Am. Rep. 270; Caperton *v.* Bowyer, 4 W. Va. 176. See also *Ex p.* Browne, 2 Colo. 553.

3. Haddix *v.* Wilson, 3 Bush (Ky.) 523.

4. Terrill *v.* Rankin, 2 Bush (Ky.) 453, 92 Am. Dec. 500.

5. Civil Liability Removed. — Amnesty Act of 1866; Franklin *v.* Vannoy, 66 N. Car. 145, *distinguishing* Bryan *v.* Walker, 64 N. Car. 141.

6. Right to Costs Vested in Third Persons upon Conviction — *England.* — 5 Comyns's Dig. 175; Hall's Case, 5 Coke 51.

Arkansas. — *Ex p.* Purcell, 61 Ark. 17.

Indiana. — State *v.* Farley, 8 Blackf. (Ind.) 229.

Iowa. — Estep *v.* Lacy, 35 Iowa 419, 14 Am. Rep. 498; State *v.* Mateer, 105 Iowa 66.

Kansas. — Matter of Boyd, 34 Kan. 573.

Mississippi. — *Ex p.* Gregory, 56 Miss. 164.

Missouri. — State *v.* McO'Blenis, 21 Mo. 272.

Pennsylvania. — *Ex p.* McDonald, 2 Whart. (Pa.) 440.

Tennessee. — Smith *v.* State, 6 Lea (Tenn.) 637; Spellings *v.* State, 99 Tenn. 201.

Texas. — *Ex p.* Mann, 39 Tex. Crim. 491, 73 Am. St. Rep. 961.

See also *infra*, this title, *Operation and Effect of Pardon — General Effect of Pardon — Upon Liability for Costs.*

Forfeited Recognizance. — The rule of the text is applicable to costs in an action against a surety on a bond to appear and answer an indictment. State *v.* Beebee, 87 Iowa 636.

7. Rights Not Vested May Be Defeated by Pardon. — *England.* — Rex *v.* Greenvelt, 12 Mod. 119.

United States. — 5 Op. Atty.-Gen. 579.

Arkansas. — Fischel *v.* Mills, 55 Ark. 344.

Georgia. — Matter of Flournoy, 1 Ga. 606; Parrott *v.* Wilson, 51 Ga. 255.

New York. — Platner *v.* Sherwood, 6 Johns. Ch. (N. Y.) 118.

Pennsylvania. — Cope *v.* Com., 28 Pa. St. 297.

South Carolina. — State *v.* Williams, 1 Nott & M. (S. Car.) 26; State *v.* Simpson, 1 Bailey L. (S. Car.) 378.

Texas. — State *v.* Dyches, 28 Tex. 535.

vested in third persons by force of the conviction the pardoning power may be exercised to release the criminal from liability for such costs.[1]

Fees and Commissions to Attorneys in Action on Forfeited Bail Bond. — In *Kentucky*, under a statute providing that attorneys for the commonwealth shall be allowed certain fees or commissions on all judgments rendered on forfeited recognizances in behalf of the commonwealth,[2] it is held that such fees become vested only upon the rendering of the judgment, and therefore that the governor may remit the forfeiture before judgment and thereby prevent the right to the fee from accruing.[3]

e. CONTRACT WITH STATE FOR SERVICES OF CONVICTS. — Where private individuals contract with the state for the services of convicts they do so subject to the right of the executive to pardon, and therefore where the convicts whose services are thus contracted for are pardoned by the executive no right of action against the state accrues in favor of the persons thus deprived of their rights under the contract.[4]

VI. CONSTRUCTION AND VALIDITY OF PARDONS — 1. Of Pardons in General — *a.* GENERAL RULES OF CONSTRUCTION — English Common Law the Basis of Construction. — In another part of this title the principle is stated that constitutional grants of the pardoning power are to be interpreted primarily in the light of the English common law.[5] For the same reasons the English common law, as it existed when adopted in the jurisprudence of this country, furnishes a basis for the decisions of the courts in construing and carrying into effect the instrument of pardon itself.[6]

Pardon Construed Liberally as to Criminal. — It is a well settled rule of construction of pardons, that inasmuch as a pardon is an act of grace and clemency, and moreover since it partakes of the nature of a deed, it shall be construed strictly as to the grantor and liberally as to the grantee.[7]

1. See *infra*, this title, *Operation and Effect of Pardon — General Effect of Pardon — Upon Liability for Costs.*

Commissions to Attorneys in Action on Forfeited Bail Bond. — The commissions payable to attorneys representing the state in an action to collect the money due on a forfeited bail bond, are not costs and are not taxable as costs; the right thereto becomes vested only when the money is collected, and until that time the forfeiture is subject to remission whereby the commissions may be lost. State *v.* Dyches, 28 Tex. 535. See also the following paragraph of text.

2. Rev. Stat. Ky., c. 28, art. 1, § 24, p. 247.

3. Remission of Forfeiture on Recognizance Before Judgment. — Com. *v.* Morgan, 14 B. Mon. (Ky.) 314; Com. *v.* Spraggins, 18 B. Mon. (Ky.) 512. See also Com. *v.* Offutt, 82 Ky. 326.

Failure of Sureties to Rely upon Remission. — But although the remission is granted before judgment, if the sureties in the bail bond fail without adequate reason to rely upon the remission as a defense to the proceeding to enforce the forfeiture, they cannot after judgment deprive the officers of the commonwealth of the fees and commissions allowed by the statute; and where the sureties in such a case have paid over the amount of the forfeiture voluntarily and without mistake of law or fact, they cannot recover it. But if the amount appropriated as fees and commissions is in excess of that prescribed by statute, this excess may be recovered. Williams *v.* Shelbourne, 102 Ky. 579.

4. No Right of Action upon Pardon of Leased Convicts — Abuse of Pardoning Power. — State *v.* Ward, 9 Heisk. (Tenn.) 100, holding also that this is true notwithstanding that the pardoning power has been abused by the executive in pardoning a great number of leased convicts within a short time; the reason being that the state does not guarantee the fidelity of its officers.

5. See *supra*, this title, *Nature and Extent of Pardoning Power — Interpretation of Constitutional Grants of Pardoning Power.*

6. Pardon Construed According to English Common Law. — U. S. *v.* Wilson, 7 Pet. (U. S.) 150; *Ex p.* Wells, 18 How. (U. S.) 307; 4 Op. Atty.-Gen. 459; U. S. *v.* Athens Armory, 35 Ga. 363, (U. S. Dist. Ct. North. Dist. of Ga.); People *v.* Bowen, 43 Cal. 439, 13 Am. Rep. 148; Bramson's Case, 1 Ashm. (Pa.) 90; Lee *v.* Murphy, 22 Gratt. (Va.) 789, 12 Am. Rep. 563; Edwards *v.* Com., 78 Va. 39, 49 Am. Rep. 377.

7. Pardons Construed Liberally as to Criminal — *England.* — Quatermoigne's Case, Year Book, 37 Hen. VIII. 21, *cited* in Vaughan's Case, 5 Coke 49*b*; Wyrral's Case, 5 Coke 49*b*; Keilw. 198; Phitton's Case, 6 Coke 79.

United States. — 11 Op. Atty.-Gen. 230; Greathouse's Case, 2 Abb. (U. S.) 382. *Compare* U. S. *v.* Lancaster, 4 Wash. (U. S.) 64.

Arkansas. — *Ex p.* Hunt, 10 Ark. 284; Redd *v.* State, 65 Ark. 484. See also *Ex p.* Purcell, 61 Ark. 17.

Illinois. — Holliday *v.* People, 10 Ill. 214.

New York. — People *v.* Pease, 3 Johns. Cas. (N. Y.) 333.

North Carolina. — State *v.* Blalock, Phil. L. (61 N. Car.) 242; State *v.* Shelton, 65 N. Car. 294.

Pennsylvania. — Com. *v.* Ahl, 43 Pa. St. 59.

Intention to Remove Guilt Must Appear. — In order that the instrument may operate as a pardon, the intention to remove the offender's guilt must appear. Thus, a paper issued by the governor, and merely purporting to release and discharge a prisoner from the penitentiary, while it may operate as a simple release from imprisonment, does not carry with it the full effect of a pardon.[1] Likewise an act of the executive restoring a convicted criminal to the rights of citizenship does not amount to a pardon, since it does not purport to remove the legal infamy incident to the conviction.[2]

Pardon as a Contract with the State. — It has been considered that a legislative act granting pardon and amnesty operated as a contract between the state and the offender, and that such an act could not, therefore, be repealed by a subsequent statute, since the latter would take away from the offending person his vested right to immunity.[3] On the contrary, however, it is held that a proclamation of pardon and amnesty by the President of the United States is a mere act of clemency, grace, and conciliation, and is in no sense a contract.[4]

b. FORMAL REQUISITES — (1) *In General.* — It is generally considered that no particular form of words is necessary to constitute a pardon, and that it is sufficient if the intention of the executive clearly appears from the terms of the instrument.[5] Certain recitals in the instrument, however, are essential.

Recital of Crime or Offense. — Although a pardon will be construed most favorably for its recipient, yet the intention to pardon for a particular offense must clearly appear from the terms of the instrument, else the pardon as to that offense will be ineffectual.[6] Thus, where a pardon by its terms appears to have been intended to apply to a certain offense, it will operate in respect to that offense only, and will not embrace any other offense committed at a different time; for the intention to pardon cannot be extended further than the recitals in the instrument.[7] In *England* it appears to be the rule that

South Carolina. — Jones *v.* Harris, 1 Strobh. L. (S. Car.) 160.

Virginia. — Lee *v.* Murphy, 22 Gratt. (Va.) 789. 12 Am. Rep. 563.

In England some of the general pardons granted by the king and Parliament expressly provided for a liberal construction in favor of the offenders; such a provision, for instance, was incorporated in the act of general pardon of 12 Car. 2. Rex *v.* Barnard, Hardres 421.

An Order Suspending Execution of Sentence will be liberally construed as to the convict. State *v.* Mateer, 105 Iowa 66.

Pardons in Derogation of Law. — It has been considered in *Indiana* that pardons and remissions of fines and penalties are in derogation of law, and ought not to be extended except in cases which, if foreseen, would have been excepted from the operation of the law. State *v.* Leak, 5 Ind. 359.

1. Mere Order to Release from Imprisonment. — State *v.* Page, 60 Kan. 664; State *v.* Kirschner, 23 Mo. App. 349. See also Mitchell *v.* Harvie, 1 P. E. Island 64.

But the contrary has been held in a case where the imprisonment was the only punishment inflicted; an instrument under seal of the United States issued by the President, and directing that "the prisoner be forthwith released from prison" being held to be a pardon. Jones *v.* Harris, 1 Strobh. L. (S Car.) 160.

And a like result was reached where the instrument of pardon was similar in its terms to the one mentioned in the foregoing case. Hoffman *v.* Coster, 2 Whart. (Pa.) 453, where the instrument in question was held to restore the competency of the offender as a witness.

2. Mere Restoration to Rights of Citizenship. — People *v.* Bowen, 43 Cal. 439, 13 Am. Rep. 148, holding that such an instrument did not restore the offender's competency as a witness.

3. Statutory Pardon as a Contract. — State *v.* Keith, 63 N. Car. 140, holding also that such a repealing statute would act as an *ex post facto* law, by making offenses punishable which were not punishable when the act was passed.

4. Greathouse's Case, 2 Abb. (U. S.) 382.

5. No Particular Form or Words Essential. — Hoffman *v.* Coster, 2 Whart. (Pa.) 453; Jones *v.* Harris, 1 Strobh. L. (S. Car.) 160; Lee *v.* Murphy, 22 Gratt. (Va.) 789, 12 Am. Rep. 563.

Form of Oath under Amnesty Proclamation. — The validity of an oath required by proclamation of amnesty has been held not to be impaired by slight deviations from the form prescribed by the proclamation, where such deviations did not change the meaning of the oath required. Hamilton's Case, 7 Ct. Cl. 444.

Pardon Must Be under Seal. — See *infra*, this title, *Proof of Pardon.*

6. Intention to Pardon Particular Offense Must Appear. — Stetler's Case, 1 Phila. (Pa.) 302, 9 Leg. Int. (Pa.) 38, 22 Fed. Cas. No. 13,380; State *v.* Foley, 15 Nev. 64, 37 Am. Rep 458. See also *Ex p.* Higgins, 14 Mo. App. 601.

7. Recital of Specific Offense Limits Operation of Pardon. — Reg. *v.* Harrod, 2 C. & K. 294, 61 E. C. L. 294; Hawkins *v.* State, 1 Port. (Ala.) 475, 27 Am. Dec. 641; State *v.* Creech, 1 Mo. App. 370; State *v.* Foley, 15 Nev. 64, 37 Am

the king cannot pardon an offense without specifically naming it, for a pardon by the king without reciting the offense upon which it is intended to operate will be held invalid by the court, the theory being that the king was not informed of the particular offense of which the recipient of the pardon had been convicted.[1] A less stringent rule appears to prevail in respect to general pardons granted by Parliament, and it seems that such pardons, though couched in general terms, will be held valid and sufficient.[2]

Recital of Indictment and Conviction Essential. — It is a rule of the English common law with respect to pardons by the crown,[3] and it has been held to be the rule with respect to pardons by the executive,[4] that a pardon granted to a particular offender after conviction is of no avail unless it recites the indictment and conviction; the reason being that by the omission it appears that the king or governor was not informed of the facts of the case, and thus acted under a mistake. But this rule does not apply to a general pardon and amnesty intended to include whole classes of offenders and not founded on the consideration of the circumstances of particular cases.[5]

Test of Sufficiency of Recitals. — The criterion has been adopted that if it is possible to show that the pardon was intended to include, and does include, the offense in question, the pardon, if otherwise unobjectionable, will be held valid and sufficient.[6]

(2) *Immaterial Errors and Omissions.* — The fact that the recitals in a pardon contain some error, omission or irregularity in form, insufficient of itself to raise any ambiguity, or to give rise to a suggestion of any material mistake in the granting of the pardon, or in the identity of the criminal, is a circumstance which will not affect the essential validity of the pardon.[7]

Reasons for Granting Pardon Need Not Appear. — Where a pardon is otherwise regular and valid upon its face, and no suggestion of fraud or mistake appears,

Rep. 458; State *v.* M'Carty, 1 Bay (S. Car.) 334.

Different Offenses Arising from Same Act. — The recital of a specific and distinct offense in a pardon limits the operation of the pardon to the offense recited, and the pardon will not embrace any other offense for which a separate penalty or punishment is prescribed, although both offenses are constituted by the same act or series of acts. *Ex p.* Weimer, 8 Biss. (U. S.) 321, holding that a pardon for conspiracy to defraud the revenue under § 5440, U. S. Rev. Stat., did not entitle the criminal to demand that a judgment of forfeiture for fraud upon the revenue be cancelled. To the same effect see Stetler's Case, 1 Phila. (Pa.) 302, 9 Leg. Int. (Pa.) 38, 22 Fed. Cas. No. 13,380.

1. King's Pardon Must Recite Offense. — 2 Hawk. P. C., c. 37, § 9, p. 543; 1 Chit. Crim. L. 771; J. Kel. 28; Anonymous, 6 Coke 13*b*; Howard's Case, T. Raym. 13. See also *infra*, this section, *Effect of Fraud and Mistake.*

Piracy. — At common law a pardon of felony in general terms would not include piracy without particular mention of it, for piracy was not a common-law felony. 4 Black. Com. 400; 1 Chit. Crim. L. 771.

Certain Early Statutes provided that in cases of certain felonies, such as murder, rape, and treason, the king's pardon should be held ineffectual unless the offense were recited in the instrument. Stat. 13 Rich. II., st. 2, c. 1, *repealed in part* by Stat. 16 Rich. II., c. 6. See also Stat. 2 Edw. III., c. 2; Stat. 14 Edw. III., c. 15; Stat. 5 Hen. IV., c. 2; 4 Black. Com. 400, 401; 1 Chit. Crim. L. 763, 771; 2 Hawk. P. C., c. 37, §§ 14 to 17.

2. General Pardons by Parliament. — See 2 Hawk. P. C., c. 37, § 9, p. 543.

3. Recital of Indictment and Conviction Essential. — 2 Hawk. P. C., c. 37, § 8, p 542; 1 Chit. Crim. L., p. 770. See also *infra*, this section, *Effect of Fraud and Mistake.*

4. Stetler's Case, 1 Phila. (Pa.) 302, 9 Leg. Int. (Pa.) 38, 22 Fed. Cas. No. 13,380; State *v.* Foley, 15 Nev. 64, 37 Am. Rep. 458. See also State *v.* McIntire, 1 Jones L. (46 N. Car.) 1, 59 Am. Dec. 566; State *v.* Leak, 5 Ind. 359.

5. Proclamation of Amnesty Not Within Rule. — Greathouse's Case, 2 Abb. (U. S.) 382.

6. Test of Sufficiency. — Redd *v.* State, 65 Ark. 475; Com. *v.* Ohio, etc., R. Co., 1 Grant Cas. (Pa.) 329; Hunnicutt *v.* State, 18 Tex. App. 500, 51 Am. Rep. 330, 20 Tex. App. 633; Martin *v.* State, 21 Tex. App. 1.

7. Immaterial Errors and Irregularities. — Roy *v.* Norris, 1 Rolle 297; Parker's Case, Comb. 184; *In re* Edymoin, 8 How. Pr. (N. Y.) 478; Hester *v.* Com., 85 Pa. St. 139; Hunnicutt *v.* State, 18 Tex. App. 500, 51 Am. Rep. 330, 20 Tex. App. 633; Martin *v.* State, 21 Tex. App. 1.

Slight Mistake in Name of Prisoner Immaterial. — *In re* Edymoin, 8 How. Pr. (N. Y.) 478.

Slight Misdescription of Offense. — Hunnicutt *v.* State, 20 Tex. App. 632, where a recital in the pardon that the conviction was had for "cow-stealing" was held to be sufficient though the record showed that the offense was the theft of a steer.

Misrecital of Date of Conviction Immaterial. — Hunnicutt *v.* State, 18 Tex. App. 500, 51 Am. Rep. 330, 20 Tex. App. 633; Martin *v.* State, 21 Tex. App. 1. See also Howard's Case, T. Raym. 13; Martin *v.* State, 21 Tex. App. 1.

the reason why the pardon is granted need not be stated in the instrument;[1] and under such circumstances it is beyond the province of the court to investigate the reasons of the executive for exercising his power in the premises.[2]

c. LIMITATIONS AND EXCEPTIONS IN PARDONS. — Where a general pardon is granted for a special purpose, and contains express words of limitation restricting its operation to a particular class of persons, other classes of persons than those mentioned cannot obtain the benefits it confers.[3] In many of the pardons granted by Parliament in England there occur express limitations or exceptions, usually relating to particular classes of crimes.[4]

Repugnant Restriction. — But every limitation or restriction annexed to a pardon must be reasonable and consistent with sound rules of law, and must not be repugnant to the pardon itself; hence, where a pardon is granted with certain restrictions annexed thereto, which are incongruous with, and repugnant to, the pardon, the restrictions will be rejected and the pardon will be held to be full and absolute.[5]

d. REGISTRATION NOT ESSENTIAL. — Although the secretary of state is required by law to keep a register of the official acts of the governor, a pardon or commutation of sentence is not invalid for want of registry.[6]

e. DELIVERY AND ACCEPTANCE ESSENTIAL — (1) *General Principles.* — It is a settled rule that a pardon partakes of the nature of a deed; that to its validity and operative effect delivery is essential, and that the delivery is not complete without acceptance.[7]

Refusal to Accept. — Since delivery and acceptance are essential to the validity of the pardon, the instrument may be rejected by the person to whom it is

But see Stetler's Case, 1 Phila. (Pa.) 302, 9 Leg. Int. (Pa.) 38, 22 Fed. Cas. No. 13,380.

1. Reasons Need Not Be Stated. — Redd *v.* State, 65 Ark. 475.

Early Statute. — The Statute of 27 Edw. III., c. 2, provided that the name of the person suggesting the pardon should be recited in the instrument together with the "suggestion" on which it was granted, and that if the judges before whom the pardon was pleaded should find the "suggestion" to be untrue they should disallow the pardon. But in England at a comparatively early date this statute was construed to mean only that the king should be fully informed before he pardoned any felony. Rex *v.* Parsons, 2 Salk. 499, 1 Show. 283. See also Rex *v.* Coney, 3 Mod. 37.

And it seems clear that the statute is not generally in force in the United States. Greathouse's Case, 2 Abb. (U. S.) 382.

It has been held not to be in force in *Ohio.* Knapp *v.* Thomas, 39 Ohio St. 385, 48 Am. Rep. 462.

Whether it is in force in *Pennsylvania* was discussed but not decided in Com. *v.* Halloway, 44 Pa St 210, 84 Am. Dec. 431.

2. Court Will Not Investigate Reasons for Pardoning. — Greathouse's Case, 2 Abb. (U. S.) 382; *Ex p.* Hunt, 10 Ark. 286; Martin *v.* State, 21 Tex. App. 1; *In re* Moore, 4 Wyo. 98. See also Hester *v.* Com., 85 Pa. St. 139.

3. Limitation in Amnesty Proclamation. — Gay's Gold, 13 Wall. (U. S.) 358, decided under the proclamation of pardon and amnesty of December 25, 1868. See also State *v.* Cook, Phil. L. (61 N. Car.) 535.

4. For construction of some of these parliamentary pardons, see the following cases: Franklin's Case, 5 Coke 46*b*; Littleton's Case, 5 Coke 47; Drywood's Case, 5 Coke 48; Anonymous, 6 Coke 13*b*.

Suicide. — Where a pardon of the character mentioned expressly excepted the crime of murder from its operation, it was held that suicide, being an offense distinct from murder, was included in the pardon. Rex *v.* Ward, 1 Lev. 8; Tombes *v.* Ethrington, 1 Lev. 120.

For a discussion of the penal consequences of suicide at common law, see the title SUICIDE.

5. Restriction Inconsistent with Nature of Pardon.—People *v.* Pease, 3 Johns. Cas. (N.Y.) 333.

6. Registry in Office of Secretary of State Not Essential.— *Ex p.* Reno, 66 Mo. 266, 27 Am. Rep. 337.

7. Delivery and Acceptance Essential to Validity of Pardon — *United States.* — U. S. *v.* Wilson, 7 Pet. (U. S.) 150; Matter of De Puy, 3 Ben. (U. S.) 307.

Alabama. — Michael *v.* State, 40 Ala. 361; *Ex p.* Powell, 73 Ala. 517, 49 Am. Rep. 71.

Arkansas. — Redd *v.* State, 65 Ark. 475.

Georgia. — Grubb *v.* Bullock, 44 Ga. 379.

New York — See People *v.* Potter, (Supm. Ct.) 1 Park. Crim. (N. Y.) 51.

Ohio. — *Ex p.* Lockhart, 1 Disney (Ohio) 108.

Texas. — Hunnicutt *v.* State, 18 Tex. App. 498, 51 Am. Rep. 330.

The principle of the text was first announced by Chief Justice Marshall, in U. S. *v.* Wilson, 7 Pet. (U. S.) 150, *followed* in the cases cited in the foregoing note.

Conditional Pardon. — The rule of the text applies to a conditional pardon. Lee *v.* Murphy, 22 Gratt. (Va.) 798, 12 Am. Rep. 563, *per* Stiles, J.

Consent of Prisoner Not Essential to Validity of Reprieve. — Sterling *v.* Drake, 29 Ohio St. 457, 23 Am. Rep. 762.

tendered; and under such circumstances there seems to be no judicial power to force the pardon upon him.[1]

Release of Sureties on Bail Bond. — In order to make valid and operative a pardon granted before conviction, so as to discharge sureties on the prisoner's bail bond forfeited before the pardon, delivery and acceptance of the pardon by the prisoner must be shown. In other words, in order that the pardon may be valid as to the sureties, it must be valid as to the principal.[2]

Death of Prisoner Without Acceptance. — Where a person who has applied for a pardon which has been granted dies without accepting it, the pardon is inoperative to restore property rights, which, had there been an acceptance, could have been claimed by the offender's personal representative.[3]

Revocation Before Delivery. — The completed act of pardon exists only when the instrument has been delivered and accepted. Until such delivery and acceptance all that may have been done by the executive is a mere matter of intended clemency, which cannot operate in favor of the offender and which may be freely revoked or cancelled, either by the executive who granted the pardon [4] or by his successor in office.[5]

Consent of Insane Person Unnecessary. — But where the prisoner has become insane, a pardon or commutation of his sentence may be imposed upon him without his consent; the obvious reason being that he is incapable of giving a legal consent. Consequently where a person under sentence of death becomes insane and his sentence is commuted to life imprisonment, he cannot after his reason is restored reject the commutation and claim to be set at liberty.[6]

(2) *Sufficiency of Delivery and Acceptance* — (a) **In General.** — The principles applicable to the delivery of an ordinary deed and those applicable to the delivery of a pardon are analogous; and the delivery of a pardon is considered complete when the grantor has parted with his entire control or dominion over the instrument with the intention that it shall pass to the grantee, and the latter has assented to it, either in person or by his agent or attorney.[7] And since an unconditional pardon is highly beneficial to the grantee, it has

1. Criminal Cannot Be Forced to Accept Pardon. — U. S. *v.* Wilson, 7 Pet. (U. S.) 150; *Ex p.* Lockhart, 1 Disney (Ohio) 108. See also *In re* Callicot, 8 Blatchf. (U. S.) 89, 4 Fed. Cas. No. 2,323.

Conditional Pardon. — The same rule would seem to apply to a conditional pardon. Lee *v.* Murphy, 22 Gratt. (Va.) 789, 12 Am. Rep. 563, *per* Stiles, J.

But a Commutation of Sentence, it seems, is presumed to be for the culprit's benefit and may be imposed upon him without his acceptance or consent. Lee *v.* Murphy, 22 Gratt. (Va.) 789, 12 Am. Rep. 563. See also Matter of Victor, 31 Ohio St. 206.

In *Massachusetts*, however, it has been considered that the commutation of a sentence can be granted only with the convict's consent and by way of conditional pardon, and that the absolute right to change after sentence the punishment imposed by law does not exist in any branch of the government. Opinion of Justices, 14 Mass. 472, and note.

Prisoner with Notice of Pardon Cannot Have Habeas Corpus Though Acceptance Not Shown. — *In re* Callicot, 8 Blatchf. (U. S.) 89, 4 Fed. Cas. No. 2,323, *distinguishing* U. S. *v.* Wilson, 7 Pet. (U. S.) 150.

2. Grubb *v.* Bullock, 44 Ga. 379.

3. Meldrim's Case 7 Ct. Cl. 595.

4. Pardon May Be Revoked Before Delivery and Acceptance. — Com. *v* Halloway, 44 Pa. St. 210, 84 Am. Dec. 431.

5. Matter of De Puy, 3 Ben. (U. S.) 307.

But After Delivery and Acceptance the pardon cannot be revoked. See *infra*, this title, *Revocation of Pardon*.

6. Consent of Insane Person Unnecessary — Restoration of Reason. — Matter of Victor, 31 Ohio St. 206.

7. What Constitutes Sufficient Delivery. — *Ex p.* Powell, 73 Ala. 517, 49 Am. Rep. 71; Redd *v.* State, 65 Ark. 475; Hunnicutt *v.* State, 18 Tex. App. 498, 51 Am. Rep. 330.

Delivery to Agent of Prisoner. — A delivery of the pardon to an agent of the prisoner is an effectual delivery to the prisoner. Rosson *v.* State, 23 Tex. App. 287.

Delivery to Attorney — Testifying by Virtue of Pardon. — An effectual delivery of a pardon may be made to an attorney representing the person for whom the pardon is intended. And where the prisoner testifies in court under a pardon which was applied for by the attorney on behalf of the prisoner, and was sent to the attorney, a sufficient delivery and acceptance is shown. Redd *v.* State, 65 Ark. 475. See also Hunnicutt *v.* State, 18 Tex. App. 498, 51 Am. Rep. 330.

Delivery to Stranger. — It has been considered that with appropriate expressions of intention a valid delivery might be made to a stranger for the benefit of the criminal. *Ex p.* Powell, 73 Ala. 517, 49 Am. Rep. 71; Redd *v.* State, 65 Ark. 475; Hunnicutt *v.* State, 18 Tex. App. 498, 51 Am. Rep. 330.

been considered that in the absence of any proof to the contrary it will be presumed that the pardon has been accepted;[1] especially where the prisoner applied for the pardon and the governor has parted with all control over the instrument.[2]

Acceptance Must Be in Good Faith. — But though the delivery of a pardon may be complete upon acceptance, still the acceptance of a pardon to which there is annexed a condition must be made in good faith and with the intention of complying with the condition; otherwise the delivery is incomplete and the pardon will be held inoperative.[3]

(b) **Delivery to Warden of Prison.** — By reason of the practice in some states, the delivery of a charter of pardon to the warden of the prison where the offender is confined is held to be *prima facie* equivalent to a delivery to the prisoner, or is a constructive delivery to him.[4] And this result is reached though the warden of the prison has merely constructive, as distinguished from actual, custody of the prisoner.[5] But such a delivery depends for its legal validity entirely upon the intention of the executive; and it may be shown to be no delivery in law by proof of circumstances that are inconsistent with the intention to deliver.[6]

Return of Pardon by Warden. — After the pardon has been delivered to the warden of a prison who has actual or constructive custody and control of the prisoner for whom the pardon is intended, a return of the pardon by the warden to the governor is inoperative to defeat or impair the legal effect of the pardon; for upon delivery to the warden the executive act of grace is complete.[7]

(c) **Acceptance by Convict in Prison.** — Where the person to whom the pardon is issued is in prison under a legal conviction, his acceptance of a conditional pardon is not voidable or revocable by him on the ground that it is made under duress *per minas* and duress of imprisonment.[8]

f. EFFECT OF ACCEPTANCE — (1) *In General.* — Although a pardon is inoperative until delivery and acceptance, yet when once it has been delivered and accepted it becomes a valid act, and the person receiving it is of course entitled to all its benefits.[9]

(2) *As an Admission of Guilt* — (a) **In General.** — The acceptance of a pardon has the same legal effect as a confession of guilt or of the existence of a state of facts from which a judgment of guilt would follow.[10]

(b) **Effect upon Pending Appeal.** — Since the acceptance of a pardon admits the recipient's guilt, where a pardon is accepted pending an appeal, its acceptance operates as an admission that the criminal was rightly convicted, and therefore constitutes *ipso facto* a waiver of exceptions taken at the trial.[11] So

1. **Presumption of Acceptance.** — *Ex p.* Powell, 73 Ala. 517, 49 Am. Rep. 71; Redd *v.* State, 65 Ark. 475.

2. *Ex p.* Powell, 73 Ala. 517, 49 Am. Rep. 71.

3. *Ex p.* Marks, 64 Cal. 29, 49 Am. Rep. 684.

4. **Delivery to Warden of Prison a Delivery to Prisoner.** — *Ex p.* Powell, 73 Ala. 517, 49 Am. Rep. 71; *Ex p.* Reno, 66 Mo. 266, 27 Am. Rep. 337; Com. *v.* Halloway, 44 Pa. St. 210, 84 Am. Dec. 431.

Pardon Given to Marshal of Court to Be Delivered to Warden — Delivery Not Complete. — Matter of De Puy, 3 Ben. (U. S.) 307.

5. *Ex p.* Powell, 73 Ala. 517, 49 Am. Rep. 71.

6. Com. *v.* Halloway, 44 Pa. St. 210, 84 Am. Dec. 431.

7. *Ex p.* Powell, 73 Ala. 517, 49 Am. Rep. 71.

8. **Acceptance in Prison Not Made under Duress.** — *Ex p.* Wells, 18 How. (U. S.) 307; Greathouse's Case, 2 Abb. (U. S.) 382.

9. **Pardon Operative After Acceptance.** — 11 Op. Atty.-Gen. 230; *Ex p.* Powell, 73 Ala. 517, 49 Am. Rep. 71; *Ex p.* Hunt, 10 Ark. 284. See also *infra*, this title, *Operation and Effect of Pardon.*

10. **Acceptance of Pardon Admits Guilt.**—11 Op. Atty.-Gen. 228; Dominick *v.* Bowdoin, 44 Ga. 363; Manlove *v.* State, 153 Ind. 80; Com. *v.* Lockwood, 109 Mass. 323, 12 Am. Rep. 699; People *v.* Marsh, 125 Mich. 410.

Acceptance of Pardon that Is Inoperative. — But the acceptance of a conditional pardon which has never become operative is not evidence of guilt, although it contains recitals that the party by reason of certain acts has made himself liable to punishment; the reason being that since the grant of the pardon is inoperative it cannot work an estoppel. Scott's Case, 8 Ct. Cl. 458.

11. **Acceptance Waives Bill of Exceptions.** — Com. *v.* Lockwood, 109 Mass. 323, 12 Am. Rep. 699; People *v.* Marsh, 125 Mich. 410.

where a pardon is granted, accepted and brought to the attention of the court pending an appeal, the appeal will be dismissed.[1]

2. Of Conditional Pardons — *a.* In General. — It has already been stated that there may be annexed to a pardon any condition which is not immoral, illegal, or impossible of performance.[2]

Pardon Must Recite Condition. — In order that a condition annexed to a pardon shall be operative and binding it must appear upon the face of the instrument.[3]

Rules of Construction of Condition. — It has been held that inasmuch as a pardon is an act of grace limitations upon its operation should be strictly construed.[4] On the other hand it has been said to be an inflexible rule that he who seeks to avail himself of the benefits of a conditional pardon must show a rigid compliance with the conditions which it imposes.[5]

Promise of Pardon upon Compliance with Condition. — A promise to grant a pardon upon the performance of certain acts by a criminal does not operate as a pardon, and cannot be pleaded as one; and this although the person to whom the promise has been made has performed the acts in question, and is therefore equitably entitled to the pardon.[6]

b. Conditional Pardon as a Contract. — It has been considered that a conditional pardon delivered and accepted constitutes a contract between the sovereign power or the executive and the criminal that the former will release the latter upon compliance with the conditions.[7] A contrary view, however, has been taken, and it is held that a proclamation of amnesty by the President offering pardon to persons who had participated in the civil war, upon the condition of their subscribing to an oath to support the United States Constitution, did not constitute a contract, since it was a mere act of clemency, and its condition was intended not as a consideration to be performed but merely as a means to exclude from the benefits of the pardon persons who were unwilling to renounce future commission of the same offense.[8]

c. Condition Precedent. — Where the condition annexed to a pardon is a condition precedent, the pardon, even though accepted, does not become operative until the condition is performed; and until that time the sentence, if any has been rendered, remains in full force and effect.[9]

1. Dismissal of Appeal. — Manlove *v.* State, 153 Ind. 80; State *v.* Underwood, 64 N. Car. 599; State *v.* Alexander, 76 N. Car. 231, 22 Am. Rep. 675; State *v.* Teeter, 76 N. Car. 239; State *v.* Heaton, 76 N. Car. 241.

2. See *supra*, this title, *Nature and Extent of Pardoning Power — What Powers Are Included — Power to Grant Conditional Pardons.*

Sureties for Good Behavior — English Statutes. — By the statute of 10 Edw. III., c. 3, pardons were declared void unless the prisoner gave security for good behavior. Rex *v.* Parsons, 1 Show. 283, note.

This statute, however, was repealed by Stat. 5 & 6 Wm. & M., c. 13, under which it was discretionary with the court to require security for the good behavior of the prisoner and to remand him to prison until sureties were found. Under this statute, however, it seems that security was seldom or never required. Rex *v.* Chetwynd, 2 Stra. 1203. See also note to Rex *v.* Parsons, 1 Show. 283.

3. *Ex p.* Reno, 66 Mo. 266, 27 Am. Rep. 337.

4. Conditional Pardon Construed Liberally as to Offender. — Osborn *v.* U. S., 91 U. S. 478; *Ex p.* Hunt, 10 Ark. 286. See also Lee *v.* Murphy, 22 Gratt. (Va.) 801, 12 Am. Rep. 563; People *v.* Pease, 3 Johns. Cas. (N. Y.) 333.

Literal though Not Substantial Compliance Held Sufficient. — Rex *v.* Miller, 2 W. Bl. 797, 1 Leach C. C. 74.

5. Offender Must Comply Strictly with Condition. — Haym's Case, 7 Ct. Cl. 443; Scott's Case, 8 Ct. Cl. 457.

6. Promise to Pardon. — Rex *v.* Garside, 2 Ad. & El. 266, 29 E. C. L. 84, holding that while the plea of pardon was insufficient, yet the court in its discretion would defer the awarding of execution until the prisoner should have time to apply for a pardon according to the terms of the offer.

7. Conditional Pardon as a Contract. — People *v.* Potter, 1 Edm. Sel. Cas (N. Y.) 235; State *v.* Smith, 1 Bailey L. (S. Car.) 286, 19 Am. Dec. 679; Lee *v.* Murphy, 22 Gratt. (Va.) 791, 12 Am. Rep. 563.

8. Amnesty Not a Contract. — Greathouse's Case, 2 Abb. (U. S.) 382, holding further that the duty of supporting the Constitution of the United States is a paramount obligation, and that a promise or oath to perform this duty is not a good or a valuable consideration for the remission of penalties incurred by its previous violation. See also the foregoing paragraph of text.

9. Condition Precedent. — *In re* Ruhl, 5 Sawy. (U. S.) 187; Haym's Case, 7 Ct. Cl. 443; Waring's Case, 7 Ct. Cl. 501; *Ex p.* Marks, 64 Cal. 31, 49 Am. Rep. 684; People *v.* Potter, 1 Edm. Sel. Cas. (N. Y.) 235; Flavell's Case, 8 W. & S. (Pa.) 197; State *v.* Barnes, 32 S. Car. 14, 17 Am. St. Rep. 832.

d. CONDITION SUBSEQUENT. — In case of a condition subsequent, the pardon goes into effect but is rendered null and void by the nonperformance or violation of the condition, and thereupon the original sentence may be carried into execution.[1]

e. ILLEGAL CONDITION. — A condition annexed to a pardon must be lawful. An illegal condition is void and the pardon to which it is annexed is absolute.[2]

f. CONDITION IMPOSSIBLE TO BE PERFORMED. — Where a pardon is granted upon a condition precedent which is impossible to be performed, it is obvious that unless there exist some reason for holding the condition invalid the pardon can never become operative.[3]

g. CONDITION THAT OFFENDER LEAVE STATE OR COUNTRY. — A condition annexed to a pardon and requiring the offender to leave the state [4] or the United States [5] forthwith, and never to return thereto, is reasonable and valid, and is not in conflict with constitutional provisions prohibiting exile, banishment or transportation;[6] the reason of the rule being that the acceptance of the pardon together with its condition is wholly voluntary upon the part of the criminal.[7]

Criminal a Feme Covert. — The validity of a condition that the culprit shall leave the state is not affected by the fact that the offender is a married woman, and by law may not leave the state without her husband's permission.[8]

What Constitutes Compliance with Condition. — A condition that the criminal leave the country or state forthwith has been held to mean a departure and permanent absence during at least the term of the sentence.[9] And a pardon upon condition that the offender leave the state and never return has been held to contain both a condition precedent and a condition subsequent; the condition precedent being broken if the criminal should fail to leave the state, and the condition subsequent being violated if after leaving the state he should return thereto.[10]

1. Condition Subsequent. — *Ex p.* Marks, 64 Cal. 31, 49 Am. Dec. 684; Flavell's Case, 8 W. & S. (Pa.) 197; State *v.* Barnes, 32 S. Car. 14, 17 Am. St. Rep. 832. See also Com. *v.* Haggerty, 4 Brews. (Pa.) 330, and *infra*, this title, *Operation and Effect of Pardon — Of Conditional Pardons.*

2. Illegality of Condition. — Matter of Parker, 5 M. & W. 32, *per* Lord Abinger; Com. *v.* Haggerty, 4 Brews. (Pa.) 326, *per* Brewster, J.; People *v.* Potter, 1 Edm. Sel. Cas. (N. Y.) 235, *per* Edmonds, J.; Taylor *v.* State, 41 Tex. Crim. 148.

In Com. *v.* Fowler, 4 Call (Va.) 35, *explained* in Lee *v.* Murphy, 22 Gratt. (Va.) 795, 12 Am. Rep. 563, it was held that a condition in a pardon that the prisoner should submit himself to such authority as the executive should appoint for the purpose of confining him to bodily labor, in such manner and on such works as a majority of the directors of public buildings should order, and that he should continue to work as a common laborer for the space of three years and not be absent without license, was held illegal and the pardon, therefore, absolute and unconditional.

3. Condition Precedent Impossible of Performance. — State *v.* McIntire, 1 Jones L. (46 N. Car.) 9, 59 Am. Dec. 566.

4. Condition that Criminal Leave State Held Valid — *Arkansas.* — *Ex p.* Hawkins, 61 Ark. 321, 54 Am. St. Rep. 209.

California. — *Ex p.* Marks, 64 Cal. 29, 49 Am. Rep. 684.

Minnesota. — State *v.* Wolfer, 53 Minn. 135, 39 Am. St. Rep. 582.

New York. — People *v.* Potter, (Supm. Ct.) 1 Park. Crim. (N. Y.) 47.

Ohio. — *Ex p.* Lockhart, 1 Disney (Ohio) 110.

Pennsylvania. — Com. *v.* Haggerty, 4 Brews. (Pa.) 326, *overruling* Com. *v.* Hatsfield, 1 Pa. L. J. Rep. 177, 2 Pa. L. J. 37.

South Carolina. — State *v.* Fuller, 1 McCord L. (S. Car.) 178; State *v.* Smith, 1 Bailey L. (S. Car.) 283, 19 Am. Dec. 679; State *v.* Addington, 2 Bailey L. (S. Car.) 516, 23 Am. Dec. 150; State *v.* Barnes, 32 S. Car. 14, 17 Am. St. Rep. 832.

5. Condition that Offender Leave the United States. — People *v.* Potter, (Supm. Ct.) 1 Park. Crim. (N. Y.) 47; Flavell's Case, 8 W. & S. (Pa.) 197.

6. Constitutional Provisions Against Exile Not Violated. — *Ex p.* Hawkins, 61 Ark. 321, 54 Am. St. Rep. 209; *Ex p.* Lockhart, 1 Disney (Ohio) 105. See also Flavell's Case, 8 W. & S. (Pa.) 197.

7. Reason Assigned for Rule. — *Ex p.* Hawkins, 61 Ark. 321, 54 Am. St. Rep. 209; People *v.* Potter, 1 Edm. Sel. Cas. (N. Y.) 235; *Ex p.* Lockhart, 1 Disney (Ohio) 110.

8. State *v.* Fuller, 1 McCord L. (S. Car.) 178.

9. Com. *v.* Haggerty, 4 Brews. (Pa.) 326.

10. *Ex p.* Marks, 64 Cal. 29, 49 Am. Rep. 684.

But in *Arkansas* it has been held that a condition that the prisoner should leave the state without delay, no mention being made of his possible return, was complied with by merely

h. CERTAIN MISCELLANEOUS CONDITIONS CONSIDERED. — A number of miscellaneous conditions that have been annexed to pardons or commutations are discussed in the notes.[1]

3. Effect of Fraud and Mistake — *a.* GENERAL PRINCIPLES. — Where it appears that a pardon was granted upon a mistake as to any material fact, or was obtained by fraud or false representations, the court will declare it to be invalid and inoperative to confer any rights upon its recipient.[2]

Fraud Renders Pardon Voidable Only.—Although in some of the authorities a pardon obtained by fraud is said to be void, yet the correct principle is that a pardon so obtained is void only when in a proceeding authorized by law, before a court having jurisdiction for the purpose, and with ample opportunity for the criminal to defend, such a pardon is judicially declared to be void; and that where a pardon is obtained by fraud or misrepresentation it is voidable only, and remains in full force and effect until impeached in some appropriate proceeding.[3]

Absence of Falsity in Pardon. — Where a pardon has been obtained by a false representation, it is immaterial that there is no falsity apparent upon the face of the instrument.[4]

Fraud of Third Persons. — And it is likewise immaterial that the fraud was perpetrated not by the prisoner himself, but by third persons.[5]

b. METHOD OF ATTACKING PARDON. — As to the manner of attacking a pardon upon the ground of fraud or mistake in issuing it, the authorities are not harmonious. Perhaps the better rule — at all events, the rule of the best

leaving the state; and consequently that upon his return to the state he was not liable to re-arrest. *Ex p.* Hunt, 10 Ark. 284.

1. Condition that Criminal Abstain from Use of Intoxicants Is Valid. — Arthur *v.* Craig, 48 Iowa 264, 30 Am. Rep. 395; People *v.* Burns, 77 Hun (N. Y.) 92, *affirmed* 143 N. Y. 665; Huff *v.* Dyer, 2 Ohio Cir. Dec. 727, 4 Ohio Cir. Ct. 595.

Condition that Prisoner Shall Not Visit Saloons. — A condition that the prisoner should not visit places where intoxicating liquors were sold was considered to mean that he should not resort to such places for the purposes of drinking or engaging in recreation there, whereby he might be tempted to indulge his appetite for alcoholic beverages, and not to mean that he should be precluded from entering a saloon for any and all purposes. People *v.* Moore, 62 Mich. 496.

Conditional Commutation. — Where the sentence of a convict was commuted by the governor upon the condition that if between the date of his discharge under the commutation and the date of the expiration of the full term for which he was sentenced the prisoner should be convicted of any felony, he should, in addition to the penalty which should be imposed for said felony, be compelled to serve the remainder of the term which he would have been compelled to serve but for the commutation, and the prisoner was convicted of a felony during the interval mentioned, it was held that the condition was valid, and that he could not be released before he should have served out both the term of his second sentence and a term equal to the commuted part of his first sentence. *In re* Whalen, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 915, 65 Hun (N. Y.) 619. See also People *v.* Burns, 77 Hun (N. Y.) 92, *affirmed* 143 N. Y. 665.

Condition of Reimbursing County for Expenses of Prosecution. — A condition that the convict pay annually for five years a certain sum of money to the county in which the conviction was had, for the purpose of making reimbursement for the expenses incurred in his prosecution, has been held to be valid. People *v.* Marsh, 125 Mich. 410.

Pardon on Condition of Giving Security for Fine — Security in Excess of Fine Held Void. — Rood *v.* Winslow, Walk. (Mich.) 340, *affirmed* 2 Dougl. (Mich.) 68.

2. Fraud and Mistake — *England.* — 2 Hawk. P. C., c. 37, § 8, p. 542; 4 Black. Com. 400; Howard's Case, T. Raym. 13; Anonymous, 6 Coke 13*b*.

Georgia. — Dominick *v.* Bowdoin, 44 Ga. 361.

Indiana. — State *v.* Leak, 5 Ind. 359.

North Carolina. — State *v.* McIntire, 1 Jones L. (46 N. Car.) 1, 59 Am. Dec. 566.

Pennsylvania. — Com. *v.* Halloway, 44 Pa. St. 210, 84 Am. Dec. 431.

Texas. — Rosson *v.* State, 23 Tex. App. 287.

See also *supra*, this section, *Of Pardons in General — Formal Requisites.*

Remission of Forfeiture on Bail Bond. — A remission by the executive of a judgment of forfeiture upon a bail bond will be declared void where it was obtained by fraud, as by forged affidavits. Com. *v.* Kelly, 9 Phila. (Pa.) 586, 29 Leg. Int. (Pa.) 412.

Staying Execution to Give Time for Correction of Error. — But in a proper case execution may be stayed by the court to enable the prisoner to have the mistake corrected, as by obtaining another pardon. Howard's Case, T. Raym. 13.

3. Knapp *v.* Thomas, 39 Ohio St. 388, 48 Am. Rep. 462.

4. Fraud Need Not Appear from Instrument. — Com. *v.* Halloway, 44 Pa. St. 210, 84 Am. Dec. 431.

5. Fraud of Third Persons. — Com. *v.* Halloway, 44 Pa. St. 210, 84 Am. Dec. 431.

considered cases — is that in order to impeach a pardon for fraud or misrepresentation practiced in obtaining it, it is generally necessary, in the absence of statutory provisions to the contrary, to invoke the aid of the court in a direct proceeding, and that a pardon cannot be attacked on that ground in a collateral proceeding.[1] In accordance with this principle, where no suggestion of fraud or mistake appears upon the face of the instrument, fraud constitutes no ground for attacking the pardon on habeas corpus.[2] But where it appears from the terms of the instrument that the pardon was granted upon misinformation, its validity may be attacked on habeas corpus; and if its *prima facie* invalidity is not explained or rebutted by the prisoner, the pardon will be declared void.[3]

Nature of Proceeding Immaterial. — In a number of cases it appears to have been considered that the nature of the proceeding in which the question might be raised was immaterial, provided the issue was presented for the decision of the court.[4] And it has been held that a pardon might be attacked for fraud in habeas corpus proceedings.[5]

Omission or Mistake in Legislative Pardon. — An omission or mistake in a legislative act of pardon and amnesty as to the persons whom it shall include cannot be corrected by the court, since that body is simply a branch of the government co-ordinate with the legislature; and therefore a person seeking to take advantage of the act, although but for the omission he would have been excluded, can avail himself of the pardon notwithstanding the error, provided he is within the general terms of the statute.[6]

VII. Proof of Pardon. — A pardon granted by the governor of a state and bearing the great seal of the state is evidence *per se*, and no further proof is necessary as to the competency of the governor or of the regularity of the proceedings on which the pardon was granted.[7] And it has been considered that a pardon must be under the great seal in order to be valid.[8]

Lost Pardon — Parol Evidence. — Under statutes requiring the secretary of state to keep a record of the official acts of the governor, it is held that where the original charter of pardon has been lost, the pardon can be proved only by a certified copy under the great seal of the state; and in such a case, if it does not appear that such a certified copy of the instrument cannot be obtained from the secretary of state, parol evidence is inadmissible to prove the existence of the pardon or the terms thereof.[9] But proof that the pardon has been

1. **Pardon Cannot Be Collaterally Attacked for Fraud.** — Knapp *v.* Thomas, 39 Ohio St. 377, 48 Am. Rep. 462; Territory *v.* Richardson, 9 Okla. 579. And see the cases in the following note.

2. **Pardon Not Subject of Attack in Habeas Corpus.** — Knapp *v.* Thomas, 39 Ohio St. 377, 48 Am. Rep. 462; *In re* Edymoin, 8 How. Pr (N. Y.) 478, [*approved* in Greathouse's Case, 2 Abb. (U. S.) 382). But see *infra*, this subdivision, par. *Nature of Proceeding Immaterial.*

3. Rosson *v.* State, 23 Tex. App. 287.

Rebutting Inference of Fraud. — But under such circumstances, if the person claiming the pardon can show that in fact there was no fraud or misrepresentation, he may apply for a second writ of habeas corpus, and upon rebutting the inference of fraud arising from the terms of the pardon he will be entitled to be discharged. *Ex p.* Rossan, 24 Tex. App. 226.

4. **Nature of Proceeding Apparently Immaterial.** — State *v.* Leak, 5 Ind. 359; State *v.* McIntire, 1 Jones L. (46 N. Car.) 1, 59 Am. Dec. 566; Com. *v.* Kelly, 9 Phila. (Pa.) 586, 29 Leg. Int. (Pa.) 412.

5. **Attacking Pardon on Habeas Corpus.** — Dominick *v.* Bowdoin, 44 Ga. 357. See also *Ex p.* Marks, 64 Cal. 29, 49 Am. Rep. 684; Com. *v.* Halloway, 44 Pa. St. 219, 84 Am. Dec. 431.

6. **Error in Statutory Pardon.** — State *v.* Applewhite, 75 N. Car. 232.

7. **Pardon under Great Seal.** — U. S. *v.* Wilson, Baldw. (U. S.) 78; Dominick *v.* Bowdoin, 44 Ga. 361.

This is true under the provision of the federal constitutions making the official acts of one state valid in all other states. U. S. *v.* Wilson, Baldw. (U. S.) 78.

8. Sutton *v.* McIlhany, 1 Ohio Dec. (Reprint) 235, 5 West. L. J. 356, decided under a statute requiring that a pardon should be "under the hand of the governor and the seal of the state."

9. **Lost Pardon — Certified Copy Should Be Produced.** — Redd *v.* State, 65 Ark. 475; Hunnicutt *v.* State, 18 Tex. App. 498, 51 Am. Rep. 330; Brown *v.* State, (Tex. Crim. 1894) 28 S. W. Rep. 537.

Executive Minutes Certified by the Secretary of State are not evidence of the granting of the pardon. The pardon itself or a certified copy thereof must be produced. Cox *v.* Cox, 26 Pa. St. 375, 67 Am. Dec. 432.

mislaid or lost, and that diligent but unsuccessful search for it has been made, establishes a sufficient predicate to admit secondary evidence of its contents.[1]

Publication of Amnesty Proclamation. — In the absence of special provision by law, the publication or promulgation of a proclamation of amnesty is sufficient where the instrument is sealed with the seal of the United States and deposited in the office of the secretary of state.[2]

VIII. Operation and Effect of Pardon — 1. Of Pardons in General — *a.* When Pardon Becomes Operative. — It has been stated in another part of this title that a pardon becomes operative upon delivery,[3] and that a pardon may be granted to take effect at a future day.[4]

b. General Effect of Pardon — (1) *In General.* — An absolute pardon operates to prevent all further punishment for the offense for which it is given, to remove all penal consequences and disabilities incident to the conviction, and to create in the pardoned offender a new credit and capacity wholly unaffected by his crime.[5] This rule, however, is not universal in its application, and in some instances, upon considerations of public policy, it has been disregarded in order to meet the exigencies of the particular case.[6]

(2) *Effect of Pardon and of Amnesty the Same.* — It is sometimes said that while a pardon operates only to remove the penal consequences of the offense, amnesty works an oblivion or extinction of the crime. This distinction, how-

1. Hunnicutt *v.* State, 18 Tex. App. 498, 51 Am. Rep. 330.

2. What Constitutes Sufficient Publication of Amnesty Proclamation. — Lapeyre *v.* U. S., 17 Wall. (U. S.) 191, relating to the proclamation of January 24, 1865, 13 U. S. Stat. at L. 1769.

3. See *supra*, this title, *Construction and Validity of Pardons — Effect of Acceptance — In General.*

4. See *supra*, this title, *Nature and Extent of Pardoning Power — When Power May Be Exercised — In General.*

5. General Effect of Pardon — *England.* — Vaughan's Case, 5 Coke 49; York *v.* Allen, Cro. Eliz. 72; Hay *v.* Justices, 24 Q. B. D. 561.

United States. — *Ex p.* Garland, 4 Wall. (U. S.) 333; U. S. *v.* Klein, 13 Wall. (U. S.) 147; Carlisle *v.* U. S., 16 Wall. (U. S.) 151; Osborn *v.* U. S., 91 U. S. 477; *In re* Monroe, 46 Fed. Rep. 52; U. S. *v.* Athens Armory, 35 Ga. 363, (U. S. Dist. Ct. No. Dist. Ga.)

Arkansas. — *Ex p.* Hunt, 10 Ark. 284; *Ex p.* Purcel, 61 Ark. 17; Redd *v.* State, 65 Ark. 475.

Florida. — Matter of Executive Communication, 14 Fla. 318; Singleton *v.* State, 38 Fla. 297, 56 Am. St. Rep. 177.

Georgia. — Grubb *v.* Bullock, 44 Ga. 379.

Kentucky. — Com. *v.* Bush, 2 Duv. (Ky.) 264; Cowan *v.* Prowse, 93 Ky. 158.

Mississippi. — Jones *v.* Board of Registrars, 56 Miss. 768, 31 Am. Rep. 385.

Nevada. — State *v.* Foley, 15 Nev. 64, 37 Am. Rep. 458.

New York. — People *v.* Pease, 3 Johns. Cas. (N. Y.) 333.

Ohio. — *Ex p.* Lockhart, 1 Disney (Ohio) 108; Knapp *v.* Thomas, 39 Ohio St. 381, 48 Am. Rep. 462.

Oklahoma. — Territory *v.* Richardson, 9 Okla. 579.

Oregon. — Wood *v.* Fitzgerald, 3 Oregon 568.

Pennsylvania. — Cope *v.* Com., 28 Pa. St. 302; Com. *v.* Ahl, 43 Pa. St. 53.

Texas. — Hunnicutt *v.* State, 18 Tex. App. 519, 51 Am. Rep. 330; Easterwood *v.* State, 34 Tex. Crim. 400.

Virginia. — Edwards *v.* Com., 78 Va. 39, 49 Am. Rep. 377.

A Pardon by a Mayor under a City Ordinance, in so far as its terms extend, appears to have the same effect as any other pardon. *In re* Monroe, 46 Fed. Rep. 52.

Pardon in One State Operative in Another. — Where a person guilty of a crime against the laws of a state has been pardoned by the executive of that state, it has been held that his pardon removes all his disability to testify in the courts of other states. State *v.* Foley, 15 Nev. 64, 37 Am. Rep. 458; Whitcomb *v.* State, 14 Ohio 282.

A Surgeon in the Confederate Army, having been pardoned and having taken the amnesty oath and the oath of allegiance to the United States, was held entitled to recover for professional services rendered by him while as a noncombatant he was domiciled in Kentucky, Raynes *v.* Smith, 2 Duv. (Ky.) 430.

Murder — Pardon Between Stroke and Death. — By the English common law, where a man gave another a mortal wound, and between the stroke and the death a general pardon was granted of all felonies, offenses, and misdemeanors, the offender was pardoned of the felony; for although the act did not constitute felony until death occurred, yet since the pardon operated upon the offense constituted by the stroke, which was the beginning or cause of the felony, everything that followed from it was also pardoned. Cole's Case, Plowd. 401.

But on the other hand, if the pardon which came between the stroke and the death expressly excepted murder from its operation, the murderer was not pardoned thereby. Nicholas's Case, Foster 64, *explaining* and *distinguishing* Cole's Case, Plowd. 401. See also Com. *v.* Roby, 12 Pick. (Mass.) 496.

6. Exceptions to Rule. — See *infra*, this section, *Upon Disabilities Resulting from Conviction — In Respect to Personal Status — Disability to Hold Office — Alien's Right to Citizenship.*

ever, is not recognized in the actual decisions of the courts, and so far as it concerns the practical effects of a pardon and of a proclamation of amnesty upon particular individuals, no such distinction exists.[1]

(3) *Upon Fact of Judgment or Conviction* — (a) **In General.** — While a pardon absolves its recipient from guilt and removes the penal consequences of his crime, it does not affect the fact that he has been guilty. In other words, a pardon operates prospectively only, and has no retroactive effect; it does not annul the judgment or conviction or affect its lawfulness.[2] Expressions of judicial opinion are to be found, however, to the effect that in legal contemplation a pardon works an absolute obliteration of the offense itself;[3] and is in effect a reversal of the judgment, a verdict of acquittal and a judgment of discharge thereon, at least to the extent that it gives rise to a complete estoppel of record against further punishment pursuant to the conviction.[4] In cases dealing with cumulative punishment this theory has been adopted by some courts as a basis of decision, but, as will be seen, the weight of authority is to the contrary.[5]

(b) **No Right of Action for Damages for Imprisonment.** — Since a pardon has no retroactive effect and does not impute illegality to the judgment or conviction of the criminal, it does not entitle him to recover from the state damages for his imprisonment.[6]

(4) *Upon Liability for Fines and Penalties* — (a) **In General.** — The effect of an unconditional pardon being to release the offender from all the penal consequences of his offense, the pardon, therefore, by its own force operates to release him from liability for a fine or penalty, as well as to discharge him from imprisonment;[7] and this without special mention of the fine or penalty in the instrument.[8]

Action upon Official Bond. — Where a public officer has been convicted of a breach of his official duties, a pardon after conviction remits the legal consequence of his offense; and all remedies against him, not only by indictment but by civil action upon his official bond, are fully barred by the pardon.[9]

Effect of Mere Release from Imprisonment. — Inasmuch as imprisonment for nonpayment of a fine is not a satisfaction of the judgment, a mere release from such imprisonment does not discharge a criminal's civil liability to the state; it is not a satisfaction of the fine.[10]

1. No Distinction Between Effect of Pardon and of Amnesty. — Knote *v.* U. S., 95 U. S. 149; Brown *v.* Walker, 161 U. S. 601.

2. Pardon Does Not Alter Fact of Past Guilt. — Collie's Case, 9 Ct. Cl. 450; *In re* Spenser, (U. S. Dist. Ct. Oregon), 5 Sawy. (U. S.) 195, 13 Am. L. Rev. 167, (*explaining* and *limiting* the opinion of Field, J., in *Ex p.* Garland, 4 Wall. (U. S.) 380; Cook *v.* Chosen Freeholders, 26 N. J. L. 326, *affirmed* 27 N. J. L. 637; Baum *v.* Clause, 5 Hill (N. Y.) 199; Roberts *v.* State, 30 N. Y. App. Div. 106, *affirmed* 160 N. Y. 217; Hedges *v.* Price, 2 W. Va. 192, 94 Am. Dec. 507. See also 2 Hale P. C. 278.

3. Pardon Considered as Obliteration of Offense. — *Ex p.* Garland, 4 Wall. (U. S.) 380; Carlisle *v.* U. S., 16 Wall. (U. S.) 151; Knote *v.* U. S., 95 U. S. 149; Jones *v.* Board of Registrars, 56 Miss. 766, 31 Am. Rep. 385; Knapp *v.* Thomas, 39 Ohio St. 381, 48 Am. Rep. 462.

4. Knapp *v.* Thomas, 39 Ohio St. 381, 48 Am. Rep. 462.

5. See the title CUMULATIVE PUNISHMENT, vol. 8, pp. 483, 485, 492. And see *infra*, this section, *Upon Additional Punishment for Second Offense.*

6. Pardoned Convict Cannot Recover Damages for Imprisonment. — Roberts *v.* State, 30 N. Y. App. Div. 106, *affirmed* 160 N. Y. 217.

7. Pardon Discharges Liability for Fine or Penalty. — Marriot's Case, Godb. 178; U. S. *v.* McKee, 4 Dill. (U. S.) 128; Chisholm *v.* State, 42 Ala. 527; Holliday *v.* People, 10 Ill. 214; Cook *v.* Chosen Freeholders, 26 N. J. L. 326, *affirmed* 27 N. J. L. 637; Cope *v.* Com., 28 Pa. St. 297.

Continuing Act of Trespass. — Where the offense in question was a continuing trespass and the original act of trespass was within the terms of a pardon applicable to offenses committed prior to a day certain, but the trespass was continued after that day, it was held that since the continuation was merely a matter of increase of damages, a fine imposed for the original offense was within the operation of the pardon and was discharged thereby. Strickland *v.* Thorp, Cro. Jac. 207.

8. 16 Op. Atty.-Gen. 1. See also Cook *v.* Chosen Freeholders, 26 N. J. L. 326, *affirmed* 27 N. J. L. 637.

Order Suspending Execution of Sentence Bars Action to Collect Fine until Revocation of Order. — State *v.* Mateer, 105 Iowa 66.

9. U. S *v.* Cullerton, 8 Biss. (U. S.) 166.

10. State *v.* Richardson, 18 Ala. 109.

(b) **Restitution of Fines and Penalties.** — A pardon will work a remission of a fine or penalty, although it has been paid, and will entitle the person pardoned to receive it, as long as the money is still within the control of the executive and rights of third persons have not attached thereto.[1] But where the money has been paid into the treasury [2] or the rights of third persons have attached,[3] it has already been stated that the power of pardon or remission ceases.

(5) *Upon Liability for Costs* — (a) **Pardon Before Judgment.** — Since the right of third persons to receive costs does not accrue until judgment, a pardon granted, delivered, and pleaded before sentence, though after verdict of guilty, prevents the passing of sentence and thus discharges the offender from liability to pay the costs of prosecution.[4]

(b) **Pardon After Judgment.** — Since upon judgment for a criminal offense the liability of the accused to pay costs becomes fixed, and the right to the costs becomes vested in the persons entitled to receive them, it is universally held that a pardon of the accused subsequent to the judgment will not operate to discharge him from liability to pay the costs and will not affect the vested rights of those entitled thereto by virtue of the judgment.[5] Indeed, the pardoning power does not include the power of impairing vested interests of third persons, and thus the vested rights to costs is beyond the scope of its exercise.[6]

(c) **Pardon Pending Appeal.** — Where a pardon is granted pending an appeal by the criminal, the effect of the pardon upon the appellant's liability for costs depends largely upon the question whether the appeal vacates or merely suspends the judgment. No definite rule can be formulated from the decisions that have been rendered upon this subject, but the cases in which the question has been decided are discussed briefly in the notes.[7]

1. Restitution of Fine. — 14 Op. Atty.-Gen. 599, (*overruling* Smith's Case, 10 Op. Atty.-Gen. 1); 16 Op. Atty.-Gen. 1, holding also that a pardon operates *ipso facto* to entitle the convict to have the money refunded, even though there be no express words of restitution in the instrument.

So a pardon by the President entitles the offender to restitution of the fine after it has been paid to the marshal and deposited by him in court. 14 Op. Atty.-Gen. 599, *overruling* Smith's Case, 10 Op. Atty.-Gen. 1.

2. After Payment into the Treasury. — See *supra*, this title, *Nature and Extent of Pardoning Power — What Powers Are Included — Power to Remit Fines and Penalties — After Payment.*

3. Vested Rights of Third Persons. — See *supra*, this title, *Nature and Extent of Pardoning Power — Rights of Third Persons Cannot Be Impaired.*

4. Pardon Before Sentence Discharges Costs. — Watts's Case, Cro. Jac. 335; Hall's Case, 5 Coke 51; White *v.* State, 42 Miss. 635; State *v.* Underwood, 64 N. Car. 599; Duncan *v.* Com., 4 S. & R. (Pa.) 449; Com. *v.* Ahl, 43 Pa. St. 53; York County *v.* Dalhousen, 45 Pa. St. 372; Com. *v.* Hitchman, 46 Pa. St. 357.

Contra. — In Playford *v.* Com., 4 Pa. St. 144, *citing* Duncan *v.* Com., 4 S. & R. (Pa.) 449, *supra*, and decided evidently upon an erroneous conception of the ruling of that case, an opposite decision was rendered, which, however, was *disapproved* by the lower court in Com. *v.* Ahl, 43 Pa. St. 53.

5. Costs Not Remitted by Pardon After Judgment — *England.* — Brikenden's Case, Cro. Car. 9; Rex *v.* Rodman, Cro. Car. 199; Hall's Case, 5 Coke 51.

Alabama. — Chisholm *v.* State, 42 Ala. 527.

Arkansas. — Edwards *v.* State, 12 Ark. 123.

Illinois. — Holliday *v.* People, 10 Ill. 214.

Indiana. — State *v.* Farley, 8 Blackf. (Ind.) 229; Manlove *v.* State, 153 Ind. 80.

Iowa. — Estep *v.* Lacy, 35 Iowa 419, 14 Am. Rep. 498; State *v.* Beebee, 87 Iowa 636; State *v.* Mateer, 105 Iowa 66.

Kansas. — Matter of Boyd, 34 Kan. 570.

Mississippi. — *Ex p.* Gregory, 56 Miss. 164; Phillips *v.* State, 58 Miss. 579.

Missouri. — State *v.* McO'Blenis, 21 Mo. 272.

North Carolina. — State *v.* Mooney, 74 N. Car. 98, 21 Am. Rep. 487.

Ohio. — See Libby *v.* Nicola, 21 Ohio St. 414. An early case, Blanchard *v.* State, Wright (Ohio) 377, is *contra*, but under the later statutes as to costs it seems that this case is no longer an authority. See the preceding case.

Pennsylvania. — *Ex p.* McDonald, 2 Whart. (Pa.) 440; Schuylkill County *v.* Reifsnyder, 46 Pa. St. 446; Com. *v.* Shick, 61 Pa. St. 495.

Tennessee. — Smith *v.* State, 6 Lea (Tenn.) 637; Spellings *v.* State, 99 Tenn. 201.

Virginia. — Anglea *v.* Com., 10 Gratt. (Va.) 696.

6. See *supra*, this title, *Nature and Extent of Pardoning Power — Rights of Third Persons Cannot Be Impaired — Right to Receive Costs.*

7. Pardon Pending Appeal. — Where an appeal from a judgment against an offender vacates the judgment for all purposes, a pardon issued and produced in court after the appellate court has decided that there was no error, but before judgment has been given in the lower court pursuant to the decision, puts an end to all proceedings and discharges liability for costs. State *v.* Underwood, 64 N. Car. 599, *distinguishing* Hall's Case, 5 Coke 51, upon the ground that no third person had any interest in the costs.

(d) **Imprisonment to Compel Payment of Costs.** — Upon the question whether after a pardon granted after conviction the criminal can be kept in imprisonment to compel the payment of costs by him, there is a direct conflict in the authorities. In several jurisdictions it is held that even after a pardon so granted the convict may be imprisoned to compel him to satisfy the costs of prosecution.[1] And it is held in *Kansas* that such imprisonment is not within the constitutional inhibition against imprisonment for debt.[2] On the contrary, it is held in *Arkansas* and *Mississippi* that even though the pardon after conviction does not discharge the criminal from civil liability for costs accruing to third persons, yet, inasmuch as it discharges him from all the penal consequences of the judgment, he cannot after such pardon be kept in custody in order to compel the payment of the costs, and that such imprisonment amounts to imprisonment for debt in violation of the constitution.[3]

A Basis of Distinction between these conflicting views is, that in the jurisdictions where the convict after pardon may be kept in imprisonment for the costs, it is considered that the imprisonment for the costs is no part of the punishment, but is a means of enforcing the vested rights of the persons entitled to the costs, and thus is beyond the scope of the pardoning power;[4] whereas in the jurisdictions where the pardoned convict cannot be held in custody to compel the payment of costs, it is considered that such imprisonment is a part of the penal consequences of the judgment, and that the persons entitled to the costs have no vested right in the criminal remedy by which the costs are to be collected, or in the penalty imposed for failure to pay them.[5]

(6) *Upon Additional Punishment for Second Offense.* — Since a pardon cannot affect the conviction or judgment determining the guilt of the offender, the fact of the crime remaining for judicial consideration notwithstanding the pardon, and since the additional punishment prescribed by a statute for a second offense is no part of the penal consequences of the first, it appears to be the general rule that a pardoned criminal upon conviction for a repetition of his crime can be subjected to cumulative punishment. There is authority, however, to the contrary.[6]

A pardon pending appeal does not relieve the appellant from liability for costs fixed by the judgment in the lower court and due third persons; for where a pardon is granted pending an appeal the appeal will be dismissed. The appellant cannot review the judgment, because by accepting the pardon he has admitted that he was rightly convicted. He may not admit guilt to escape imprisonment and at the same time protest innocence to escape paying costs. Manlove *v.* State, 153 Ind. 80.

Where the defendant in a criminal case has had judgment rendered against him, fixing his punishment and taxing him with the payment of costs, and has given a bond to supersede the judgment pending an appeal, a pardon then given does not release him from civil liability for costs on the supersedeas bond, since the appeal has merely superseded the judgment both for the punishment and for the costs; hence upon failure to prosecute the appeal the appellate court upon motion by the state may render judgment on the bond for costs in both courts. Phillips *v.* State, 58 Miss. 578.

"If the offense be pardoned after costs taxed, and then the defendant appeal to a superior court, which gives new costs, whether upon affirmance or reversal of the first sentence, they shall not be avoided by reason of the pardon, because they are not given in respect of the offense, but of the award of former costs, which, being taxed before the pardon, are not avoided by it; and therefore the appeal was proper for determining whether they were well given or not." 2 Hawk. P. C. 546, § 43, *quoted with approval* in Phillips *v.* State, 58 Miss. 579.

1. Convict May Be Imprisoned for Costs After Pardon. — Matter of Boyd, 34 Kan. 570; *Ex p.* McDonald, 2 Whart. (Pa.) 440; Spellings *v.* State, 99 Tenn. 201 (confinement at hard labor in workhouse). See also Bennett *v.* State, 8 Humph. (Tenn.) 126; U. S. *v.* Lukins, 26 Fed. Cas. No. 15,638.

2. Matter of Boyd, 34 Kan. 570.

3. Convict Cannot Be Imprisoned for Costs After Pardon. — *Ex p.* Purcell, 61 Ark. 17; *Ex p.* Gregory, 56 Miss. 164.

4. Imprisonment for Costs No Part of Punishment. — Matter of Boyd, 34 Kan. 570.

5. Imprisonment for Costs a Part of Penal Consequences of Judgment. — *Ex p.* Purcell, 61 Ark. 17; *Ex p.* Gregory, 56 Miss. 164.

6. See the title CUMULATIVE PUNISHMENT, vol. 8, pp. 483, 485, 492.

As an instance of the minority rule that by the pardon the first offense is obliterated, and consequently a like offense afterwards committed is not a second offense, and is punishable only as a first and new crime, see State *v.* Martin, 59 Ohio St. 212, 69 Am. St. Rep. 762,

(7) *Upon Disabilities Resulting from Conviction* — (a) **In Respect to Personal Status** — *aa.* Disability to Follow Profession or Means of Livelihood. — The effect of a pardon, unless limited by its terms, is to restore to the offender personal rights and privileges forfeited by his conviction, and these include the privilege to follow his professional calling or means of livelihood. Thus, where by statute a conviction of felony worked a disqualification to sell liquors by retail, it was held that a pardon removed the disqualification.[1] And where by participation in rebellion against the federal government an attorney at law practicing in the federal courts became disqualified, it was held that by accepting a full pardon from the President and taking the required oath of allegiance he became entitled to resume practice.[2] But the President's pardon was held not to restore the right to practice in a state court.[3]

bb. Disability to Hold Office — (*aa*) *In General.* — While the general effect of a pardon, as to the restoration of rights and privileges and the creating of a new credit and capacity may be conceded, the fact that a pardon has been granted to a person convicted of an offense cannot warrant the assertion that such a person is as honest, reliable, and fit to hold a public office, as if he had constantly maintained the character of a law-abiding citizen; hence it has been held that the fact that a person has been convicted of offenses disqualifying him to hold the position of a police officer is not altered or affected by his pardon, and he may still be held unfit for the office.[4]

(*bb*) *Judicial Offices.* — In the United States it is held that where a person holding a judicial office has been convicted of a felony and thereby has forfeited his office and been rendered incompetent to perform its duties, a pardon granted to him will neither restore his competency nor avoid the forfeiture.[5] In an early English case, however, a contrary result was reached.[6]

cc. Disability to Vote. — Where under the constitution and statutes of a state the conviction of an infamous crime results in a disability to vote, a full pardon by the governor operates to remove the disability.[7] And by the weight of authority the same result occurs where the conviction is had in a federal court for a crime against the federal laws, or where the offense is against the

following Edwards *v.* Com., 78 Va. 39, 49 Am. Rep. 377, and *disapproving* Mount *v.* Com., 2 Duv. (Ky.) 93. See also State *v.* Williams, 5 Ohio Dec. 545.

1. Pardon Restores Right to Follow Means of Livelihood. — Hay *v.* Justices, 24 Q. B. D. 561.

2. Right of Attorney to Practice Law. — *Ex p.* Law, 35 Ga. 285, (U. S. Dist. Ct. So. Dist. of Ga.); *Ex p.* Garland, 4 Wall. (U. S.) 333.

Statute Requiring Oath of Past Loyalty. — It was further held in the case last cited that the Act of Congress, January 24, 1865, extending to attorneys of the federal courts the necessity for taking the additional oath prescribed by the Act of Congress, July 2, 1862, was unconstitutional and void; the reasons being that in its retrospective parts it constituted a bill of pains and penalties, possessing the characteristic attributes of a bill of attainder (except the death penalty), and was an *ex post facto* law, and moreover that it compelled a person to be a witness against himself and placed him beyond the power of executive clemency. See also Bill of Attainder, vol. 4, p. 56; and the title Ex Post Facto Laws, vol. 12, p. 531.

3. Pardon of President Restored Competency to Practice in Federal Court Only. — In *West Virginia* it was held that the President's pardon of attorneys who had participated in the rebellion did not restore their qualification to practice in the state courts without first taking an additional oath prescribed by a state statute. *Ex p.* Hunter, 2 W. Va. 122; *Ex p.* Quarrier, 4 W. Va. 210.

Disbarment After Pardon. — For a discussion of the law concerning the disbarment of an attorney after pardon, see the title Attorney and Client, vol. 3, p. 305.

The Mere Parole of a Convicted Attorney does not restore his privilege to practice and does not prevent his disbarment. People *v.* Monroe, 26 Colo. 232.

4. Qualification to Act as Police Officer. — State *v.* Hawkins, 44 Ohio St. 117. *Compare* Hildreth *v.* Heath, 1 Ill. App. 82, involving the eligibility of a person for the office of alderman.

5. Forfeiture of Judicial Office Not Affected by Pardon. — State *v.* Carson, 27 Ark. 469, (probate and county judge); Com. *v.* Fugate, 2 Leigh (Va.) 724, (justice of the peace).

6. Bennet *v.* Easedale, Cro. Car. 55.

7. Disability under State Laws — Pardon by Governor. — Sutton *v.* McIlhany, 1 Ohio Dec. (Reprint) 235, 5 West. L. J. 356; Wood *v.* Fitzgerald, 3 Oregon 568.

A Pardon Granted After Punishment for the offense has been suffered by the offender operates to restore his right to vote. Sutton *v.* McIlhany, 1 Ohio Dec. (Reprint) 235, 5 West. L. J. 356.

federal government and the pardon is granted by the President of the United States; that is, the disability under the state laws is removed;[1] but there is authority to the contrary.[2]

Pardoning Power of Governor Limited by Constitution. — Provisions have been made in the constitution of a state that a person convicted of a crime deemed infamous at common law shall not be permitted to exercise the privilege of voting until he be expressly restored thereto by act of the legislature. Under such constitutional provisions, of course, the pardon of the governor is inoperative to remove the disability, and the remedy lies solely in an application to the legislature.[3]

dd. Disability to Act as Juror. — Where a person by reason of conviction of a crime is rendered incompetent to act as a juror, an absolute pardon of his crime removes his disability and restores his competency.[4] And the pardon has this effect although granted after a convict has served the full term of his sentence.[5]

ee. Disability as Husband and Parent. — Where a person upon conviction of felony and sentence to life imprisonment has become civilly dead to all intents and purposes, in the absence of a statute to the contrary a full pardon operates to restore him to his rights and duties as a parent, and he therefore becomes entitled to the custody of his infant children who during his civil death have been placed in the care of a guardian.[6] But it seems clear that the pardon cannot affect the validity of the second marriage of his wife occurring during his civil death, since this would impair the rights of a third person.[7]

Statutes. — It is now declared by statute in *New York* that where a person has been sentenced to imprisonment for life within the state a pardon does not restore to him the rights of a previous marriage or the guardianship of a child who is the issue of such a marriage.[8] And similar statutes have been enacted in other states.[9]

ff. Alien's Right to Citizenship. — Since a pardon does not, in legal contemplation, obliterate the crime or alter the fact that the criminal has been guilty, it has been held that an alien who had been pardoned of perjury committed during his residence in the United States was not qualified to become a citizen under the naturalization laws;[10] for during his residence he had not "behaved as a man of good moral character," according to the requirements of the statute.[11]

(b) **In Respect to Personal Reputation.** — A pardon so clears the offender of the infamy incident to his crime that thereafter he may maintain an action for

1. **Disability under State Laws Removed by President's Pardon of Offense Against United States.** — Rison *v.* Farr, 24 Ark. 161, 87 Am. Dec. 52; Cowan *v.* Prowse, 93 Ky. 156; Jones *v.* Board of Registrars, 56 Miss. 766, 31 Am. Rep. 385; Davies *v.* McKeeby, 5 Nev. 369.

Pardon and Amnesty by President — "Test Oath" Statute Unconstitutional. — In Davies *v.* McKeeby, 5 Nev. 369, it was held that the President's pardon and amnesty of the offense of taking part in the rebellion against the federal government restored the right of suffrage forfeited by that offense under the express terms of the state constitution; that this right could not be impaired by a state statute requiring an oath that the citizen had not borne arms against the United States; and that such a statute was unconstitutional. The same result was reached in Rison *v.* Farr, 24 Ark. 161, 87 Am. Dec. 52, under slightly different circumstances.

2. **Contra.** — See Ridley *v.* Sherbrook, 3 Coldw. (Tenn.) 569. See also 7 Op. Atty.-Gen. 760. *Compare* 9 Op. Atty.-Gen. 478.

3. **Constitutional Provision Requiring Act of Legislature to Remove Disability.** — Opinion of Judges, 4 R. I. 583.

4. **Competency as Juror Restored by Pardon.** — Easterwood *v.* State, 34 Tex. Crim. 400; Puryear *v.* Com., 83 Va. 51. *Contra*, 2 Hale P. C. 278, *citing* 11 Hen. IV. 41.

5. Easterwood *v.* State, 34 Tex. Crim. 400.

6. **Right to Custody of Children Is Restored.** — Matter of Deming, 10 Johns. (N. Y.) 232, 483. See also the title Civil Death, vol. 6, p. 64.

7. **Second Marriage of Wife During Convict's Civil Death.** — Matter of Deming, 10 Johns. (N. Y.) 232.

8. **New York Statute.** — Gen. Laws N. Y., c. XLVIII., art. IV., § 28 (Heydecker's Gen. Laws and Rev. Stat., vol. 3, p. 3956).

9. See Stimson's Am. Stat. Law, § 6208.

10. **Naturalization Law.** — § 2165, U. S. Rev. Stat.

11. *In re* Spenser, 5 Sawy. (U. S.) 195.

slander against one who attributes to him a present criminality arising out of the pardoned offense.[1] But on the other hand, inasmuch as a pardon does not alter the fact of the past guilt, it is not slanderous to say that the offender was guilty of the crime of which he has been pardoned, and consequently for such a cause an action for slander cannot be maintained.[2]

(c) **In Respect to Property Rights** — *aa.* Property Divested by Civil Death. — While it may be conceded that where by attainder of felony or by conviction and consequent sentence to life imprisonment a convict becomes civilly dead for all purposes, so that his estate is divested and descends to his heirs,[3] a subsequent pardon will not restore his property rights,[4] yet where by conviction of felony and sentence to life imprisonment the convict does not become civilly dead for all purposes, and his property is not therefore divested and does not devolve upon his heirs, a pardon enables him to maintain an action in respect to an estate held by him prior to his conviction.[5]

bb. Property Forfeited. — Under the English common law whereby the lands and goods of a person guilty of felony were forfeited to the crown, a pardon granted before title had actually vested in the crown enabled the criminal to retain the property although there were no words of restitution or grant in the charter of the pardon.[6] But where the property had actually vested in the crown, express words of restitution or grant in the pardon were necessary in order to restore the property to the offender.[7] And in the United States, in the few instances where forfeitures can occur, if the forfeiture is complete and the property or interests of the offender are vested in the state[8] or United States,[9] a pardon cannot operate to restore them; at least in the absence of a statute, or of express words of restitution in the pardon.

cc. Property Confiscated by United States — (*aa*) *Effect of Pardon upon Operation of Confiscation Acts.* — Where real estate, which was owned in fee by a person who participated in the rebellion against the government of the United States, was condemned under the Confiscation Act of July 17, 1862,[10] and under the joint resolution of Congress of the same date,[11] and was sold under decree, the effect of the condemnation, decree, and sale was to divest the owner of his life estate in the property, and to leave the remainder or reversion expectant upon the termination of the confiscated life estate, either vested in him or else in abey-

1. Pardoned Criminal May Maintain Action of Slander. — Thus, a person who had committed a theft, but had been pardoned, was allowed to recover from one who called him a thief; but it seems that a recovery would not have been allowed if the defendant had merely said that the plaintiff had been a thief. Cuddington *v.* Wilkins, Hob. 81. See also Boston *v.* Tatam, Cro. Jac. 623; Leyman *v.* Latimer, 3 Ex. D. 20, 356; 2 Hale P. C., c. 27, § 48.

2. Imputation of Past Guilt Not Slanderous. — Baum *v.* Clause, 5 Hill (N. Y.) 196, *distinguishing* Cuddington *v.* Wilkins, Hob. 81. But see Boston *v.* Tatam, Cro. Jac. 623.

In Baum *v.* Clause, 5 Hill (N. Y.) 196, the imputation alleged to be slanderous was that the plaintiff had committed a theft; not that he was a thief.

3. See the title Civil Death, vol. 6, p. 64.

4. Pardon Does Not Restore Vested Rights of Heirs. — Matter of Deming, 10 Johns. (N. Y.) 232, where also the opinion was expressed that the pardon would not affect a sale by the convict's administrators appointed during his civil death. See also Rochon *v.* Leduc, 1 L. C. Jur. 252.

5. Pardon Restores Property Rights Not Vested in Others. — Platner *v.* Sherwood, 6 Johns. Ch. (N. Y.) 118.

6. Forfeitures of Property at Common Law. — 29 Hen. 8, B, Charters of Pardon 52; Brooke's New Cas., p. 32.

In Rex *v.* Saloway, 3 Mod. 101, this principle was applied to a case of suicide. See also 1 Hale P. C. 414. *Compare* Rex *v.* Ward, 1 Lev. 8; and see the title Suicide.

7. 29 Hen. 8, B, Charters of Pardon 52; Brooke's New Cas., p. 32; 5 Comyn's Dig. 176; Tombes *v.* Ethrington, 1 Lev. 120 (case of suicide); *Re* Church, 16 Jur. 517, 11 Eng. L. & Eq. 240 (conditional free pardon granted to convict while in penal colony after commutation of capital sentence). See also Rochon *v.* Leduc, 1 L. C. Jur. 252.

8. Forfeited Interests Vested in State or United States. — Aldrich *v.* Jessup, 3 Grant Cas. (Pa.) 158 (forfeiture for treason under statute).

9. Knote's Case, 10 Ct. Cl. 397, *affirmed* 95 U. S. 149; Vanderslice *v.* U. S., 19 Ct. Cl. 488 (forfeited pay of an officer sentenced by court-martial). See also Hart's Case, 15 Ct. Cl. 414.

10. Confiscation Act. — Act of Congress, July 17, 1862, c. 95, 12 Stat. at L., p 589, "An Act to Suppress Insurrection, to Punish Treason and Rebellion, and to Seize and Confiscate the Property of Rebels."

11. Resolution No. 63, 12 Stat. at L., p. 627.

ance, but beyond his power of alienation until his disability was removed. Hence a full pardon and amnesty granted to the offending owner, since it operated to remove his disabilities, had the effect of restoring him to his rights of property impaired, as indicated, by the foregoing statutes, except as to such interests as had been previously sold under judicial decree; and therefore it enabled him to convey the fee of his real estate, the life interest in which had been confiscated.[1]

(*bb*) *Proceeds of Confiscated Property Paid into Court.* — In cases arising under the statutes mentioned, a pardon and amnesty by the President of the United States subject to the exceptions it contained, restored to its recipient all rights of property lost by the offense pardoned, unless the property had by judicial process become vested in other persons, or had been paid into the treasury of the United States; hence where property of the offender had been confiscated and sold, and the proceeds thereof had been paid into court, these proceeds, being under the control of the court, could be recovered by the offender until an order for their distribution was made, or until they were paid to an informer legally entitled to them, or into the treasury of the United States.[2]

(*cc*) *Proceeds of Confiscated Property Paid into United States Treasury.* — Persons receiving the benefit of the President's pardon and amnesty were not thereby enabled to recover the proceeds of property previously condemned and sold under the Confiscation Act, after the proceeds had been paid into the treasury of the United States; since the right to them had so far vested in the United States as to fall within the constitutional provision that money in the treasury can be withdrawn therefrom only by an appropriation by Congress.[3] And from the circumstances of property's being seized and sold by the United States under the Confiscation Act, no implied contract arose between the owner of such property and the United States, whereby an action would lie in the Court of Claims to recover the proceeds.[4]

(*dd*) *Title Vested in United States or in Purchaser.* — A pardon and amnesty granted by the President did not annul past transactions or legal proceedings. It did not affect the title of the United States to property previously seized and condemned under the Confiscation Act,[5] or invalidate a previous judicial confiscation and sale of property under the act, so as to impair the purchaser's title to the estate he had thereby acquired.[6]

1. Effect of Confiscation Proceedings and of Pardon. — Illinois Cent. R. Co. *v.* Bosworth, 133 U. S. 92; U. S. *v.* Dunnington, 146 U. S. 350. "Estates and interests in land, present and future, which had not for such participation been previously condemned and sold to others, fell at once under the control and disposition of the original owners, as though the offenses alleged against them had never been committed." Jenkins *v.* Collard, 145 U. S. 546, *per* Field, J.

Earlier Statute. — An act of Congress of August 6, 1861, rendered property used in aid of the rebellion with the consent of the owner subject to seizure, condemnation, and confiscation. It regarded the consent of the owner to such use of his property as an offense, and inflicted the forfeiture by way of a penalty. A full pardon and amnesty by the President for all offenses committed by the owner of the property seized under this statute operated, when properly pleaded, as a bar to proceedings for condemnation, and relieved the owner from the forfeiture of such property so far as the right thereto accrued to the United States. Armstrong's Foundry, 6 Wall. (U. S.) 766; U. S. *v.* Athens Armory, 35 Ga. 344 (U. S. Dist. Ct. No. Dist. of Ga.).

For an Exhaustive Discussion of the distinction between the Act of 1861, 12 Stat. at L. 319, and the Act of 1862, 12 Stat. at L. 589, with the Resolution No. 63, 12 Stat. at L. 627, see Kirk *v.* Lynd, 106 U. S. 315. And see generally the title WAR.

2. Proceeds in Court Recoverable. — Osborn *v.* U. S., 91 U. S. 474; Brown *v.* U. S., Woolw. (U. S.) 198, McCahon (Kan.) 229.

3. Proceeds in Treasury of United States Not Recoverable. — Knote *v.* U. S., 95 U. S. 149. See also Hart's Case, 15 Ct. Cl. 414.

4. No Implied Contract to Pay Over Proceeds. — Knote *v.* U. S., 95 U. S. 149.

5. Title Vested in United States by Condemnation. — Semmes *v.* U. S., 91 U. S. 21; The Confiscation Cases, 20 Wall. (U. S.) 92. See also Bragg *v.* Lorio, 1 Woods (U. S.) 209.

Confiscation Act Not Repealed by President's Amnesty Proclamation. — The Confiscation Act was not repealed by the President's proclamation of pardon and amnesty in 1868, the President being without power to repeal an act of Congress. Confiscation Cases, 20 Wall. (U. S.) 92.

6. Title Vested in Purchaser under Judicial Sale. — U. S. *v.* Six Lots Ground, 1 Woods (U. S.)

(*ee*) *Conveyance After Confiscation and Before Pardon* — **By Quitclaim Deed.** — Since the pardon and amnesty did not operate retrospectively, it did not affect the owner's disability prior to the time of its removal; hence where the offender's life estate in his land had been duly confiscated under the statutes above mentioned, and thereafter, but prior to the removal of his disability by pardon and amnesty, he executed a quitclaim deed of the land, the deed was inoperative to transfer the fee to the grantee, and to prevent the grantor's heirs from inheriting it on his death.[1]

By Warranty Deed. — Yet where under such circumstances the offender during his disability to alienate the fee executed a warranty deed with covenants of seizin, such deed had the same legal effect and operation on future acquired interests as if the property had never been subjected to confiscation proceedings; that is, it operated to estop him and all persons claiming under him from asserting title to the premises as against the grantee, his heirs and assigns, and from conveying it to other parties. Therefore, when the disability of the offending owner was removed by pardon he stood in respect to such of the property as had not been sold under the decree of confiscation in precisely the same circumstances as though no confiscation proceedings had ever been had, and the pardon in removing his disability operated to enlarge his estate, which by force of the deed inured to the benefit of the grantee.[2] But since the amnesty could not affect the validity of a judicial confiscation and sale of property seized under the statutes, where the life interest of the owner of property had been sold under decree of confiscation the title of the purchaser remained unaffected by the removal of the original owner's disability by the President's pardon, and consequently the purchaser's title was not divested by a warranty deed executed by the original owner prior to the removal of the latter's disability. The estoppel worked by such deed could not extend to the purchaser under the decree.[3]

(*ff*) *Pardon on Condition that No Claim Be Made to Property.* — Where a claimant accepted a pardon containing the condition that he should make no claim to property or the proceeds thereof sold by decree of court under the confiscation laws of the United States, it was held that his claim to such property or its proceeds was barred, since by accepting the pardon he became bound by the condition.[4]

dd. Property Abandoned or Captured in War — (*aa*) *Effect of Pardon upon Operation of Abandoned and Captured Property Act.* — At the time of the Civil War in the United States, property of persons who were engaged in the rebellion against the federal government was frequently abandoned by its owners, or captured from them by the federal army. In the absence of statute the title to such property or its proceeds would have passed absolutely to the United States; but by an act of Congress, known as the Abandoned and Captured Property Act,[5] the owners of abandoned or captured property were given the right to recover its proceeds in the treasury, by an action in the Court of Claims, provided

234; Wallach *v.* Van Riswick, 92 U. S. 202; Jenkins *v.* Collard, 145 U. S. 560.

1. Quitclaim Deed Before Pardon Inoperative. — Menger *v.* Carruthers, 3 Kan. App. 75, *affirmed* 57 Kan. 425.

2. Estoppel by Warranty Deed. — Jenkins *v.* Collard, 145 U. S. 546.

3. Jenkins *v.* Collard, 145 U. S. 560.

4. Pardon on Condition that No Claim Be Made. — U. S. *v.* Six Lots Ground, 1 Woods (U. S.) 234; Semmes *v.* U. S., 91 U. S 21.

Same — Proceeds of Confiscated Money Bond Secured by Mortgage. — But under the rule that limitations upon the operation of a pardon shall be strictly construed, it was held that the acceptance of a conditional pardon of the character mentioned did not preclude its recipient from applying to the court for the proceeds of a confiscated money bond secured by mortgage, where the proceeds were collected by the officers of the court, in part by voluntary payment of the obligors and in part by the sale of the mortgaged lands; the reason being that the condition in the pardon was intended only to protect purchasers at judicial sales under the confiscation laws from the claims of the original owner as to the property or its proceeds. Osborn *v.* U. S., 91 U. S. 474.

5. Abandoned and Captured Property Act. — Act of Congress, March 12, 1863. See also the title War.

they could show that they had not given aid or comfort to the rebellion. An absolute pardon and amnesty, however, was held to relieve such claimants from all disabilities resulting from participation in the rebellion, and, therefore, to render it unnecessary for them to establish their loyalty to the federal government as a condition of enforcing their claims; a condition which by the express provisions of the statute would otherwise have been indispensable to a recovery.[1]

(*bb*) *Statute Requiring Proof of Claimant's Loyalty Notwithstanding Pardon.* — Since it is beyond the power of Congress to impair the legal effect of a pardon, an act of Congress requiring that proof of loyalty must be made by a claimant as a condition of enforcing his claim under the statute mentioned, irrespective of any pardon or amnesty whatsoever, and that if a pardon or amnesty reciting that the claimant took part in the rebellion should be accepted by the claimant without express disclaimer of, and protestation against, such recital of guilt, the pardon should be null and void as evidence of rights conferred thereby, was held to be unconstitutional.[2]

(*cc*) *Statutes Affecting Jurisdiction of Court of Claims.* — But since Congress has power to control the jurisdiction of the Court of Claims, certain statutes conferring jurisdiction in certain cases, upon condition that the claimant prove loyalty, and statutes depriving the court of jurisdiction as to certain claimants, have been held not to be encroachments upon the pardoning power, but to be valid and effective acts.[3]

(8) *Upon Liability of Sureties in Forfeited Bail Bond.* — While it may be conceded that the pardoning power embraces the power to remit civil liabilities on a forfeited bail bond or recognizance where the liability accrues solely to the state,[4] yet the question whether a pardon of a criminal who is the principal in a bond or recognizance will of itself operate to discharge the sureties from their civil liability for the forfeiture has given rise to a diversity of opinion. By a slight preponderance of authority a pardon of the criminal does not discharge the sureties from their liability on the forfeited bond; the reason being that this liability is a matter solely independent of the criminal offense charged, or of the punishment to be inflicted therefor.[5] In *Georgia*, however, it is stated to be beyond question that a pardon of the principal in the forfeited recognizance operates to discharge the sureties;[6] and the same

1. After Pardon, Establishment of Claimant's Loyalty Not Essential. — U. S. *v.* Padelford, 9 Wall. (U. S.) 531; U. S. *v.* Klein, 13 Wall. (U. S.) 128; Armstrong *v.* U. S., 13 Wall. (U. S.) 154; Pargoud *v.* U. S., 13 Wall. (U. S.) 156; Carlisle *v.* U. S., 16 Wall. (U. S.) 147; Witkowski's Case, 7 Ct. Cl. 393; Haym's Case, 7 Ct. Cl. 444; Waring's Case, 7 Ct. Cl. 501.

Resident Alien Entitled to Sue. — Carlisle *v.* U. S., 16 Wall. (U. S.) 147; Green's Case, 8 Ct. Cl. 412.

Nonresident Alien Not Entitled to Sue. — Young *v.* U. S., 97 U. S. 39.

Unconditional Pardon as to Claimants Previously Pardoned upon Conditions Not Complied With. — Waring's Case, 7 Ct. Cl. 501.

Condition of Taking Oath — Burden of Proof. — Waring's Case, 7 Ct. Cl. 501.

Limitation in Statute. — Haycraft *v.* U. S., 22 Wall. (U. S.) 81.

Death of Claimant Before Pardon — Personal Representative Cannot Sue under the Act. — Meldrim's Case, 7 Ct. Cl. 595.

2. Statute Held Unconstitutional. — U. S. *v.* Klein, 13 Wall. (U. S.) 128; Carlisle *v.* U. S., 16 Wall. (U. S.) 147; Witkowski's Case, 7 Ct. Cl. 393.

3. Claimant May Lose Rights by Statute Affecting Jurisdiction of Court of Claims. — See *supra*, this title, *By Whom Pardoning Power May Be Exercised — Powers of Legislature as to Pardons — Statutes Held Not to Be Encroachments upon Pardoning Power — Statutes Controlling Jurisdiction of Courts*, where the statutes of the character mentioned are discussed.

4. Power to Remit Forfeiture of Bail Bond. — See *supra*, this title, *Nature and Extent of Pardoning Power — What Offenses May Be Pardoned — Civil Offenses and Liabilities*. See also the title BAIL AND RECOGNIZANCE, vol.3, p. 724 *et seq.*

5. Pardon of Criminal Does Not Discharge Sureties from Liability on Forfeited Bail Bond. — Weatherwax *v.* State, 17 Kan. 428; Dale *v.* Com., 101 Ky. 612.

A similar principle has been announced in *Missouri*, the court holding that a remission of the principal's liability upon a forfeited recognizance would not discharge the surety, since the liability was several and not joint. State *v.* Davidson, 20 Mo. 212, 61 Am. Dec. 603.

6. Rule that Pardon of Principal Discharges Sureties. — Grubb *v.* Bullock, 44 Ga. 381, hold-

rule appears to prevail in *Alabama*.[1]

(9) *Upon Bastardy Proceedings.* — Where a person is convicted of fornication and bastardy, a full pardon granted and pleaded before sentence operates to discharge the prisoner from liability for the expenses of maintaining the bastard child; since after the pardon the court cannot lawfully pass an order of maintenance.[2] But if the pardon in such a case by its terms omits the bastardy or the expenses of maintaining the bastard child, and purports to operate only upon the adultery or fornication, then, although it is granted and pleaded before sentence, the court may still proceed to make an order for the maintenance of the bastard, although it cannot impose punishment for the crime.[3]

(10) *Effect of Pardon of Principal upon Liability of Accessory* — (a) **Accessory Before the Fact.** — At common law, if the principal in a crime were pardoned before judgment, the pardon operated to discharge the accessory before the fact; the reason being that the guilt of the accessory was dependent upon that of the principal, and as against the accessory the principal's guilt could be shown only by judgment upon verdict or confession, or by outlawry, and the pardon prevented the rendition of judgment. But if the principal were pardoned after judgment, the accessory could, of course, be brought to trial notwithstanding the pardon.[4] Under the modern statutes abrogating the rule of the common law that the offense of an accessory before the fact is derivative and dependent upon the guilt of the principal, an accessory is regarded as a separate offender whose guilt is wholly independent of that of the principal; therefore it seems clear that the pardon of the principal even before judgment will not avail the accessory.[5] At all events, it is held as at common law that a pardon of the principal after conviction does not operate in favor of the accessory, and the latter may still be brought to trial.[6]

(b) **Accessory After the Fact.** — The rule of the common law appears to have been that if the principal in a felony was pardoned before judgment although after conviction, the accessory after the fact was thereby discharged; but if the principal was pardoned after judgment, the accessory was not discharged.[7] But some of the modern statutes provide that the accessory after the fact may be indicted and tried whether the principal has or has not been pardoned.[8]

(c) **Aider and Abettor.** — The pardon of the principal after conviction will not avail an aider and abettor.[9]

(11) *Effect of Pardon After Punishment.* — A pardon granted to an offender after he has fully expiated his crime by suffering the punishment imposed by law has the same effect thereafter as a pardon granted before the completion of the punishment: it removes the infamy of guilt and all its attendant incapacities and disabilities, and makes the offender as it were a new man.[10]

ing, however, that in the particular case before the court the pardon was not operative because no sufficient delivery and acceptance by the criminal was shown.

1. Hatch *v.* State, 40 Ala. 718.

2. **Full Pardon Prevents Order of Maintenance.** — Com. *v.* Ahl, 43 Pa. St. 53.

3. Duncan *v.* Com., 4 S. & R. (Pa.) 449.

4. **Pardon of Principal at Common Law.** — Syre's Case, 4 Coke 43*b*; Goff *v.* Byby, Cro. Eliz. 540, 4 Coke 43*b*. See also the title ACCESSORY, vol. 1, p. 262.

5. **Result of Modern Statutes.** — See the title ACCESSORY, vol. 1, p. 263.

6. **Pardon of Principal Cannot Avail Accessory.** — Com. *v.* House, 10 Pa. Super. Ct. 259.

7. **Pardon of Principal — Discharge of Accessory After the Fact.** — 2 Hawk. P. C., c. 29, §§ 41, 42, 43, p. 453; Goff *v.* Byby, Cro. Eliz. 541, 4 Coke 43*b*.

8. **Provisions of Modern Statutes.** — See the title ACCESSORY, vol. 1, p. 264.

9. **Aider and Abettor Not Benefited by Pardon of Principal.** — Com. *v.* House, 10 Pa. Super. Ct. 259.

For an earlier English statute having this effect, see statute 1 Anne, c. 9, providing *inter alia* that upon conviction of the principal an accessory after the fact may be proceeded against notwithstanding the pardon of the principal. See also Foster 345, note; 2 Hawk. P. C., c. 29, §§ 41, 42, 43, p. 453.

10. **Pardon After Punishment Removes Disabilities.** — U. S. *v.* Jones, (U. S. Cir. Ct.) 2 Wheel. Crim. (N. Y.) 451, 26 Fed. Cas. No. 15,493; 9 Op. Atty.-Gen. 478; Singleton *v.* State, 38 Fla. 297, 56 Am. St. Rep. 177; State *v.* Baptiste, 26 La. Ann. 134; State *v.* Foley, 15 Nev. 64, 37 Am. Rep. 458; Sutton *v.* McIlhany, 1 Ohio Dec. (Reprint) 235, 5 West. L. J. 356; Hunni-

2. Of Conditional Pardons — *a.* EFFECT OF ACCEPTANCE. — It is settled law that, where a criminal accepts a pardon, he accepts it subject to all its valid conditions and limitations, and will be held bound to a compliance therewith.[1]

b. EFFECT OF COMPLIANCE WITH CONDITION. — Where a conditional pardon has been granted and accepted, and the convict has fulfilled the conditions thereof, the effect of the pardon becomes the same as though it were by its terms full and absolute.[2]

c. EFFECT OF VIOLATION OF CONDITION — (1) *Convict Liable to Rearrest and Recommitment.* — Where a prisoner has accepted a conditional pardon and has been released from imprisonment by virtue thereof, but has violated or failed to perform the condition, the pardon in case of a condition precedent does not take effect, and in case of a condition subsequent becomes void, and the criminal may thereupon be rearrested and compelled to undergo the punishment imposed by his original sentence, or as much thereof as he had not suffered at the time of his release.[3] In some jurisdictions the exercise of this power has been expressly sanctioned by statute.[4] Sometimes conditional pardons expressly provide that, upon violation of the condition, the offender shall be liable to summary arrest and recommitment for the unexpired portion of his original sentence. Such stipulations upon acceptance of the pardon become binding upon the convict and authorize his rearrest and recommitment upon the terms imposed.[5]

(2) *Proceedings upon Rearrest.* — Where a convict has been released under a conditional pardon, his rearrest and recommitment to his original sentence cannot be had upon the mere order of the governor alone, unless such a course is provided by statute or by the terms of the pardon. The convict is entitled to a hearing before some court of criminal jurisdiction in order that

cutt *v.* State, 18 Tex. App. 519, 51 Am. Rep. 330; Easterwood *v.* State, 34 Tex. Crim. 400. See also Stetler's Case, 1 Phila. (Pa.) 302, 9 Leg. Int. (Pa.) 38, 22 Fed. Cas. No. 13,380.

1. Prisoner Bound to Comply with Conditions of Pardon. — U. S. *v.* Six Lots Ground, 1 Woods (U. S.) 234; People *v.* Marsh, 125 Mich. 410. See also *Ex p.* Wells, 18 How. (U. S.) 307. And see the cases cited *infra*, this subdivision, *Effect of Violation of Condition*.

2. Pardon Absolute upon Fulfilment of Condition. — U. S. *v.* Cullerton, 8 Biss. (U. S.) 166; *Ex p.* Hunt, 10 Ark. 284; Lee *v.* Murphy, 22 Gratt. (Va.) 789, 12 Am. Rep. 563. And see *supra*, this section, *Of Pardons in General — General Effect of Pardon*.

3. On Violation of Condition Prisoner Remanded to Original Sentence — *England.* — Reg. *v.* Foxworthy, 7 Mod. 153; Rex *v.* Madan, 1 Leach C. C. 223; Coles's Case, Moo. K. B. 466.

United States. — *Ex p.* Wells, 18 How. (U. S.) 307.

Arkansas. — *Ex p.* Hawkins, 61 Ark. 321, 54 Am. St. Rep. 209.

Massachusetts. — Kennedy's Case, 135 Mass. 48.

Minnesota. — State *v.* Wolfer, 53 Minn. 135, 39 Am. St. Rep. 582.

New York. — People *v.* Potter, 1 Edm. Sel. Cas. (N. Y.) 235.

Ohio. — *Ex p.* Lockhart, 1 Disney (Ohio) 105. See also Huff *v.* Dyer, 2 Ohio Cir. Dec. 727, 4 Ohio Cir. Ct. 595.

Pennsylvania. — Com. *v.* Haggerty, 4 Brews. (Pa.) 326, *disapproving* Com. *v.* Hatsfield, 1 Pa. L. J. Rep. 177, 2 Pa. L. J. 37.

South Carolina. — State *v.* Fuller, 1 McCord L. (S. Car.) 178; State *v.* Smith, 1 Bailey L. (S. Car.) 283, 19 Am. Dec. 679; State *v.* Addington, 2 Bailey L. (S. Car.) 516, 23 Am. Dec. 150; State *v.* Chancellor, 1 Strobh. L. (S. Car.) 347, 47 Am. Dec. 557; State *v.* Barnes, 32 S. Car. 14, 17 Am. St. Rep. 832.

Expiration of Term of Sentence Before Rearrest. — It has been held that even though the term of imprisonment under the original sentence has expired at the time it is sought to recommit the criminal for breach of the condition, if the prisoner has not suffered punishment for the whole of that term, he may still be recommitted to serve out the remaining portion and thus complete the punishment originally imposed. State *v.* Barnes, 32 S. Car. 14, 17 Am. St. Rep. 832.

Condition that Convict Abstain from Use of Intoxicating Liquors — Drinking After Expiration of Original Term Held Not a Violation of Condition. — Huff *v.* Dyer, 2 Ohio Cir. Dec. 727, 4 Ohio Cir. Ct. 595.

4. Statutory Provisions. — See the statutes of the various states.

Massachusetts. — Stat. 1867, c. 301; West's Case, Pub. Stat., c. 218, §§ 12–14; Kennedy's Case, 135 Mass. 48; Stat. 1884, c. 255, § 34; Pub. Stat., c. 222, § 21; Conlon's Case, 148 Mass. 168.

See also *infra*, this section, *Proceedings upon Rearrest*, note, and see the title PRISONS AND PRISONERS, vol. 22, p. 1307, note.

5. Pardon Stipulating for Rearrest. — Arthur *v.* Craig, 48 Iowa 264, 30 Am. Rep. 395; People *v.* Potter, (Supm. Ct.) 1 Park. Crim. (N. Y.) 47.

he may show that he has performed the condition of the pardon, or that he has a legal excuse for not having done so, or that he is not the same person who was convicted; and on such a hearing the court may, in its discretion, take the verdict of a jury as to the facts involved. But the criminal is not entitled to a jury trial as a matter of right, except upon the question whether he is the same person who was convicted.[1]

(3) *Violation of Condition Not Ground for Indictment.* — In the absence of a statute, and unless the act constituting the violation of a condition in a pardon is in itself a criminal offense, the violation of the condition is not a ground for a prosecution by indictment.[2]

(4) *Excuse for Noncompliance with Condition.* — Where it is sought to rearrest and remand a released prisoner, upon the ground that he has not complied with the condition of his pardon, he may, when brought before the court to show cause why he should not be remanded to his original sentence, produce facts in his favor to show that he was unable to comply with the terms of the condition; and if such facts appear sufficient to the court, further time will usually be granted to enable the offender to obtain the benefits of the pardon by complying with its condition.[3]

d. Rights of Convict's Creditors Pending His Departure under Conditional Pardon. — Where a convict has been released on condition of his leaving the country for a certain time, it has been held that pending his departure he may not be arrested at the suit of a private person for a debt not arising out of his criminal offense; since if he cannot find bail or pay the debt he cannot comply with the condition of the pardon, and the pardon will therefore become unavailing.[4] But pending transportation under a conditional pardon a convict may be sued in a civil action, and if his goods are not forfeited by reason of his offense they may be taken in execution.[5]

3. Of Reprieve. — The effect of a reprieve is merely to delay or postpone the ultimate execution of the sentence. The sentence is in no other way affected thereby, but remains to be enforced at the expiration of the time for which the reprieve was granted.[6]

1. Convict on Rearrest Not Entitled to Trial by Jury. — State *v.* Wolfer, 53 Minn. 135, 39 Am. St. Rep. 582. See also Com. *v.* Haggerty, 4 Brews. (Pa.) 326; State *v.* Chancellor, 1 Strobh. L. (S. Car.) 347, 47 Am. Dec. 557.

In *New York* it is held that while the statutes provide no specific mode of procedure in such a case, yet the question of fact as to the violation of the condition is properly determined by the verdict of a jury, although it may be that the convict is not entitled thereto as of right. People *v.* Burns, 77 Hun (N. Y.) 92, *affirmed* 143 N. Y. 665.

Statutory Provisions. — See Kennedy's Case, 135 Mass. 48.

Michigan Statute Held Unconstitutional. — People *v.* Moore, 62 Mich. 496, *criticised* in State *v.* Wolfer, 53 Minn. 135, 39 Am. St. Rep. 582.

Stipulation in Pardon. — Arthur *v.* Craig, 48 Iowa 264, 30 Am. Rep. 395.

2. No Indictment for Violation of Condition. — State *v.* Wolfer, 53 Minn. 135, 39 Am. St. Rep. 582; State *v.* Smith, 1 Bailey L. (S. Car.) 289, 19 Am. Dec. 679. See also Fuller *v.* State, 122 Ala. 32. But see People *v.* Moore, 62 Mich. 496.

In England it seems that in former times at least the violation of a pardon, by returning from transportation, was by statute the subject of a new prosecution by indictment. See Rex *v.* Madan, 1 Leach C. C. 223; Rex *v.* Aickles, 1 Leach C. C. 390; Rex *v.* Miller, 2 W. Bl. 797; State *v.* Smith, 1 Bailey L. (S. Car.) 289, 19 Am. Dec. 679. See also 1 Chitty Cr. Law 795.

3. Convict Excused for Failure to Comply with Condition — "Distress of Poverty and Ill Health." — Rex *v.* Aickles, 1 Leach C. C. 390.

Where it appeared that the criminal had been insane part of the time since he had received his pardon, and during the whole time had been in bad health and very indigent circumstances, and had also been in confinement for several weeks for breaking the condition of his pardon, the court ordered that he should be discharged and should have forty days to comply with the condition. People *v.* James, 2 Cai. (N. Y.) 57.

In both the cases cited in this note the condition of the pardon was that the convict should leave the country within a specified time.

4. No Arrest of Convict in Civil Action Pending Departure under Conditional Pardon. — Reg. *v.* Foxworthy, 7 Mod. 153; Coppin *v.* Gunner, 2 Ld. Raym. 1572.

The rule of the text, however, cannot apply in a case where the pardon has been applied for but not granted, since it cannot appear whether the pardon will be conditional or absolute, or whether any pardon at all will be granted. Macdonald *v.* Ramsay, Foster 61.

5. Convict's Goods May Be Taken in Execution. — Coppin *v.* Gunner, 2 Ld. Raym. 1572.

6. Effect of Reprieve. — *Ex p.* Howard, 17 N.

4. Of Commutation of Sentence. — The exercise of the power of commutation limits and modifies the original sentence of the court. It does not, however, annul the sentence, but subject to the modifications it makes is *pro tanto* an affirmance.[1] Thus, where a person sentenced to death has had the sentence commuted to life imprisonment, his *status* is the same as if his original sentence had been one of life imprisonment.[2]

5. Of Parole — *a.* IN GENERAL. — A parole does not in any way displace or abridge the sentence, but merely suspends its execution temporarily or indefinitely, according to the terms and conditions upon which the parole is granted.[3]

b. EFFECT OF VIOLATION OF CONDITION. — A parole, like a pardon, is subject to acceptance or rejection by the convict to whom it is offered, and this is solely within his volition. If he elects to accept it and avail himself of the liberty it confers, he must do so upon the conditions on which it is granted, and these conditions are binding upon him. Hence, where a convict has been released under a parole, the effect of his violation of the condition is the same as though the parole were a pardon;[4] that is, the convict may be rearrested and remanded to serve out the unexpired term of his original sentence.[5]

6. Conditional Pardon Followed by Absolute Pardon. — Where a convict has received a full and unconditional pardon, its validity and effect cannot be altered by the circumstance that he had previously received a conditional pardon.[6] And this is true although the conditions of the previous pardon have not been complied with, for the absolute pardon obviously relieves the criminal of the necessity of fulfilling those conditions.[7]

IX. REVOCATION OF PARDON — 1. Pardon Revocable Before Delivery. — It has already been stated in another part of this title that before delivery and acceptance a pardon may be revoked by the officer or body granting it.[8]

2. Pardon Not Revocable After Delivery. — But if the pardon is not void in its inception it cannot be revoked for any cause after its delivery and acceptance are complete, for then it has passed beyond the control of the officer or body who granted it, and becomes a valid and operative act, of the benefits of which its recipient can be deprived only in some appropriate legal proceeding.[9] Thus, where a conditional pardon and amnesty has been granted, and

H. 545; Clifford *v.* Heller, 63 N. J. L. 105; State *v.* Cardwell, 95 N. Car. 643; Mishler *v.* Com., 62 Pa. St. 55, 1 Am. Rep. 377.

1. Effect of Commutation. — *Ex p.* Collins, 94 Mo. 22. See also McKay *v.* Woodruff, 77 Iowa 413.

2. 5 Op. Atty.-Gen. 370.

Conditional Commutation. — See *supra*, this title, *Construction and Validity of Pardons — Of Conditional Pardons — Certain Miscellaneous Conditions Considered.*

3. Effect of Parole. — Fuller *v.* State, 122 Ala. 32; Woodward *v.* Murdock, 124 Ind. 439.

4. See *supra*, this section, *Of Conditional Pardons — Effect of Violation of Condition.*

5. On Violation of Conditional Parole, Convict Remanded to Original Sentence. — Fuller *v.* State, 122 Ala. 32; Woodward *v.* Murdock, 124 Ind. 439. See also George *v.* Lillard, 106 Ky. 820.

Stipulation that Governor Should Be Sole Judge of Violation and Should Have Right to Revoke Parole. — Woodward *v.* Murdock, 124 Ind. 439.

Alabama Statute. — The Alabama statute (Code, §§ 5461, 5462), is held not to be unconstitutional as authorizing arrest without warrant, since upon violation of the condition the paroled criminal is in the position of an escaped convict. And under the statute the convict may be rearrested and remanded to serve the unexpired and unserved part of the original sentence, even though the condition of the parole was broken after the time at which the sentence would have ended but for its suspension. Fuller *v.* State, 122 Ala. 32.

"Good Time" Earned. — A prisoner released on parole is entitled to his discharge at the expiration of his original sentence less the time for which he has become entitled to credit for "good time" earned pursuant to a statute, although for a part of the term of his sentence he was at liberty on parole, the conditions of which he had violated. Woodward *v.* Murdock, 124 Ind. 439.

6. Effect of Full Pardon as to Prior Conditional Pardon. — Waring's Case, 7 Ct. Cl. 501; Martin *v.* State, 21 Tex. App. 1.

7. Waring's Case, 7 Ct. Cl. 501.

8. Revocation Before Delivery. — See *supra*, this title, *Construction and Validity of Pardons — Delivery and Acceptance Essential* — par. *Revocation Before Delivery.*

9. Pardon Not Revocable After Delivery — Contempted Revocation Inoperative. — *Ex p.* Powell, 73 Ala. 517, 49 Am. Rep. 71; Knapp *v.*

its conditions have been complied with, no subsequent act of the executive can impair its effect or deprive its recipient of the rights he has thereby acquired.[1]

3. Rules Applicable to Statutory Pardon. — Where the legislature of a state has power to grant a pardon, and by virtue of that power has granted a general pardon, which has been accepted by an offender, no subsequent act of the legislature can operate to impair or revoke the pardon, at least in so far as concerns the rights of the offender who has accepted it.[2] And a subsequent statute operating to repeal the act granting the pardon has been held unconstitutional.[3]

REPRISAL. — See LETTERS OF MARQUE AND REPRISAL, vol. 18, p. 837.

REPRISES. — "Reprises" are "yearly deductions, duties, or payments out of a manor and lands, as rent charge, rent seck, annuities, and the like."[4]

REPRODUCTION. — See REPAIR, *ante*.

REPUBLIC. — See note 5.

REPUBLICATION. — See the titles CODICILS, vol. 6, p. 195; WILLS.

REPUDIATE. — See note 6.

REPUGNANCY. (See also the titles INTERPRETATION AND CONSTRUCTION, vol. 17, p. 1; STATUTES; WILLS; and see the title REPUGNANCY, 18 ENCYC. OF PL. AND PR. 738.) — Repugnancy is a disagreement or inconsistency between two or more clauses of the same instrument. In deeds and other instruments *inter vivos*, the general rule is that the earlier clause prevails, if the inconsistency be not so great as to avoid the instrument for uncertainty.[7]

REPURCHASE. (See also the title CONDITIONAL SALES, vol. 6, p. 436.) — See note 8.

Thomas, 39 Ohio St. 377, 48 Am. Rep. 462; Rosson *v.* State, 23 Tex. App. 287. See also Matter of Depuy, 3 Ben. (U. S.) 307.

1. U. S. *v.* Hughes, 1 Bond (U. S.) 574.

2. **Statutory Pardon Not Revocable by Legislature.** — State *v.* Nichols, 26 Ark. 74, 7 Am. Rep. 600; State *v.* Keith, 63 N. Car. 140.

3. State *v.* Keith, 63 N. Car. 140, holding that the ordinance of 1868, c. 29, repealing the Amnesty Act of 1866, c. 3, operated substantially as an *ex post facto* law, and moreover took away from individuals their vested rights of immunity.

Repeal Before Acceptance. — But in a case where it appeared that an act of the legislature was necessary in order to give the governor authority to issue a general pardon, and such act was passed and a proclamation of amnesty issued accordingly, it was held that a subsequent statute repealing the first statute operated to deprive an offender of the benefit of the pardon, inasmuch as he had not accepted it prior to the repealing statute. Michael *v.* State, 40 Ala. 361.

4. **Reprises.** — Delaware, etc., Canal Co. *v.* Von Storch, 196 Pa. St. 104, *quoting* Cent. Dict. In this case a lease of coal lands provided that the lessees would pay to the lessor a stipulated rent "clear of and over and above all taxes and *reprises*." It was held that "*reprises* are any deductions necessary to be made from a gross fund in order to show a net result, or, in the language of the statutes, 'a clear profit.'" Delaware, etc., Canal Co. *v.* Von Storch, 196 Pa. St. 106.

Mortgages. — In Pulaski *v.* King, 1 Yeates (Pa.) 477, it was held that the term *reprises* included mortgages.

5. **Republic Distinguished from Monarchy.** — "The great distinction between monarchies and *republics* (at least our *republics*) in general is that in the former the monarch is considered as the sovereign, and each individual of his nation a subject to him, though in some countries with many important special limitations. This, I say, is generally the case, for it has not been so universally. But in a *republic* all the citizens, as such, are equal, and no citizen can rightfully exercise any authority over another, but in virtue of a power constitutionally given by the whole community, and such authority, when exercised, is in effect an act of the whole community which forms such body politic. In such governments, therefore, the sovereignty resides in the great body of the people, but it resides in them not as so many distinct individuals, but in their politic capacity only." Penhallow *v.* Doane, 3 Dall. (U. S.) 93.

6. **Repudiate.** — The term *repudiate* "is never applied to a refusal to perform a void contract, but to the denial of the binding force of a valid obligation." Wapello County *v.* Burlington, etc., R. Co., 44 Iowa 610, *per* Beck, J., *dissenting*.

7. **Repugnancy.** — Chapman *v.* Longworth, 71 Vt. 232. See also Doe *v.* Biggs, 2 Taunt. 109; Boren *v.* State, 23 Tex. App. 35.

Repugnancy and Inconsistency Used Interchangeably. — See INCONSISTENCY, vol. 16, p. 154.

8. **Redeem and Repurchase.** (See also REDEEM — REDEMPTION, *ante*.) — "The word 'redeem' means *repurchase*. The words are synonymous, and the first has come into use with lawyers to describe the right of a mortgagor of

REPUTABLE. — "Reputable" means worthy of repute or distinction; held in esteem; honorable; praiseworthy.[1]

REPUTATION — REPUTE. (See also the titles BOUNDARIES, vol. 4, p. 854; CHARACTER (IN EVIDENCE), vol. 5, p. 850; LIBEL AND SLANDER, vol. 18, p. 851; PEDIGREE, vol. 22, p. 640; WITNESSES.) — Reputation is the character which a man bears generally among the persons with whom he associates and by whom he is known;[2] the common knowledge of the community.[3]

lands, by reason of the old practice which prevailed in England of making absolute conveyances of lands by way of mortgage, with a covenant to reconvey upon the payment of the debt, an actual reconveyance being made." Pace *v.* Battles, 47 N. J. Eq. 174. See also Lawley *v.* Hooper, 3 Atk. 280; Robinson *v.* Cropsey, 2 Edw. (N. Y.) 138; Miller *v.* Ratterman, 47 Ohio St. 141.

But in Musgat *v.* Pumpelly, 46 Wis. 664, it was said: "We think the use of the words 'redeem' and 'redeemed' in this contract are of some significance in determining its legal effect. Although the use of the word 'redeem' is strictly proper to express the right to *repurchase* property sold conditionally, still, when used in legal documents and contracts, it is ordinarily understood to mean the right to release property pledged or mortgaged from the lien or claim of the pledgee or mortgagee." See also Barnes *v.* Holcomb, 12 Smed. & M. (Miss.) 315; Bagley *v.* Castile, 42 Ark. 81.

1. Reputable Dental College. — State Board of Dental Examiners *v.* People, 123 Ill. 245, *quoting* Webst. Dict. This case was a petition for a mandamus, alleging that the relator was a graduate of a "*reputable* dental college," and was entitled to a license under the *Illinois* act regulating the practice of dentistry, which provided that the state board of dental examiners should issue a license to any regular graduate of a "*reputable* dental college" without examination, and that such license had been refused to him by such board. It was held that while it was within the discretion of the examiners to determine what colleges were *reputable*, yet a mandamus would lie where there was a manifest abuse of such discretion from personal or selfish motives, and that under the particular circumstances of the case, a mandamus must be granted to compel the board to issue the license.

Reputable Freeholders. — See the title INTOXICATING LIQUORS, vol. 17, pp. 247, 248. See also FREEHOLD — FREEHOLDER, vol. 14, p. 530.

2. Reputation. — Dave *v.* State, 22 Ala. 39. See also State *v.* Brown, 55 Kan. 772.

Reputation signifies the qualities which a person is supposed to possess. Webst. Dict., *followed* in Andre *v.* State, 5 Iowa 394.

"*Reputation* is the estimate in which an individual is held by public fame in the place where he is known." Cooper *v.* Greeley, 1 Den. (N. Y.) 365.

Not Opinion One Holds of Himself. — In Spaits *v.* Poundstone, 87 Ind. 524, the court said: "A man's *reputation* is the estimate in which others hold him, not the opinion which he has of himself. The attempt to diminish our friend's good opinion of himself, though possibly unpleasant to him, is yet generally ineffectual, and is certainly not actionable, unless some one else overhears." *Quoting* Odgers on Libel and Slander, § 150. See also Barrow *v.* Lewellin, Hob. 62, and see the title LIBEL AND SLANDER, vol. 18, p. 851.

"**An Existing Reputation Is a Fact** to which any one may testify who knows it; he knows it because he hears it, and what he hears constitutes the *reputation*." Bathrick *v.* Detroit Post, etc., Co., 50 Mich. 642, 45 Am. Rep. 63.

Repute and Reputation. — Good *repute* is synonymous with good *reputation*. State *v.* Wheeler, 108 Mo. 665. *Compare* Com. *v.* Davis, 3 Pa. Dist. 271.

Hearsay. (See also the title HEARSAY EVIDENCE, vol. 15, p. 314.) — "*Reputation* is no other than the hearsay of those who may be supposed to have been acquainted with the fact, handed down from one to another." Higham *v.* Ridgway, 10 East 120, *quoted* in Haddock *v.* Boston, etc., R. Co., 3 Allen (Mass.) 301, 81 Am. Dec. 656.

Marriage. (See also the title MARRIAGE, vol. 19, p. 1205.) — In Cargile *v.* Wood, 63 Mo. 513, it was said: "*Reputation* consists of the belief and the speech of the people who have an opportunity to know the parties, and have heard of and observed their manner of living." See also Ashford *v.* Metropolitan L. Ins. Co., 80 Mo. App. 644.

3. Common Knowledge of Community. — Smith *v.* Compton, 67 N. J. L. 557, *quoting* Chellis *v.* Chapman, 125 N. Y. 221.

Proof of *reputation* is proof of what the community thinks, believes, or says. Hunnicutt *v.* Peyton, 102 U. S. 363.

Reputation of Bank. — In Norwood *v.* Harness, 98 Ind. 147, a special finding was to the effect that a bank had the *reputation* of being unsafe and weak. The court said: "The word *reputation*, used in such a connection, without limitation, implies generality; it means public opinion in the community; the '*reputation* of being a weak and unsafe bank' cannot exist unless there is, at least, something in the way of public rumor that would lead a good business man to withdraw his funds."

General Reputation — General Repute. (See also GENERAL, vol. 14, p. 950, notes, and see the titles CHARACTER (IN EVIDENCE), vol. 5, p. 875; WITNESSES.) — In French *v.* Millard, 2 Ohio St. 50, Thurman, J., said: "Any question not leading that asks for the general *reputation* of the witness for truth is sufficient; and if the word *reputation*, when unqualified, does *ex vi termini*, or in common parlance, mean general *reputation*, as we think it does, it is unnecessary to prefix the word 'general.'"

And in State *v.* Miller, 93 Mo. 263, it was held that an instruction which declared to the jury that in determining the credibility of a witness they might consider his *reputation* for morality would not constitute reversible error because of the omission of the word "general."

The word is frequently, but inaccurately, used as a synonym of character;[1] for character consists of those qualities which distinguish a man from others, while reputation is the opinion of others in regard to those qualities.[2]

REPUTED THIEVES. — See note 3.

REQUEST. (*Compare* REQUIRE, REQUIRED, ETC., *post.*) — To request is to ask for earnestly; to express desire for; to solicit; to entreat; to address with a request.[4] The words "request" and "require" have the same origin, though

But in State *v.* Clark, 9 Oregon 469, it was said: "In Page *v.* Finley, 8 Oregon 46, the witness was asked what the ***reputation*** of the party for chastity was — omitting the word 'general' — and the court held the question objectionable, because the witness was asked as to 'her ***reputation*** instead of her general ***reputation*** among her neighbors,' and reversed the judgment and ordered a new trial. In our judgment this is decisive of the case before us, unless Page *v.* Finley, 8 Oregon 46, is to be overruled. We imagine it would be difficult to find a case overruled to maintain a conviction."

Opinion of Bad Men. — In Brown *v.* U. S., 164 U. S. 224, it was said: "The jury were thus plainly told, not only that ***reputation*** could not grow out of the opinion of criminal or bad men, but that it could only grow out of the dispassionate judgment of men who were honest and good, and competent to form such a judgment. * * * The instruction given was too narrow and restrictive. Evidence of the ***reputation*** of a man for truth and veracity in the neighborhood of his home is equally competent to affect his credibility as a witness, whether it is founded upon dispassionate judgment, or upon warm admiration for constant truthfulness, or natural indignation at habitual falsehood, and whether his neighbors are virtuous or immoral in their own lives." See also Smith *v.* U. S., 161 U. S. 85.

1. Reputation and Character Used Synonymously. — See the title CHARACTER (IN EVIDENCE), vol. 5, p. 852, and see French *v.* Millard, 2 Ohio St. 51.

Repute and Character Used Synonymously. — Com. *v.* Davis, 3 Pa. Dist. 271.

2. Character and Reputation Distinguished. (See also the title CHARACTER (IN EVIDENCE), vol. 5, p. 852.) — Haley *v.* State, 63 Ala. 83; Sullivan *v.* State, 66 Ala. 50; Lyons *v.* State, 52 Ind. 426; Andre *v.* State, 5 Iowa 394; State *v.* Prizer, 49 Iowa 531; Carpenter *v.* People, 8 Barb. (N. Y.) 608; Kenyon *v.* People, 26 N. Y. 203, *affirming* (Supm. Ct. Gen. T.) 5 Park. Crim. (N. Y.) 254; Crozier *v.* People, (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 453; Safford *v.* People, (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 474; Marts *v.* State, 26 Ohio St. 168; State *v.* Wilson, 15 R. I. 180.

In Wright *v.* Crawfordsville, 142 Ind. 642, it was said: "***Reputation*** may be evidence of character; but it is not character itself. That which a person really is must be distinguished from what he is reputed to be. Reputed character is said to be the slow spreading influence of opinion, arising out of the deportment of an individual in the society in which he moves; and in admitting this species of character in evidence in actions, for any purpose for which it may be admissible under the rule allowing the same, specific or particular acts of immorality are not generally permitted to be shown."

In Seely *v.* Blair, Wright (Ohio) 685, it was said: "The character of persons is known to those who are acquainted with them before it is known abroad — they have character before they have ***reputation***. A man's actions are his character — they speak louder than words. A man's character must be true, his ***reputation*** may be most false."

3. Reputed Thieves. — In Cowles *v.* Dunbar, 2 C. & P. 565, 12 E. C. L. 265, it was held that the London Police Act, 3 Geo. IV., c. 55, § 21, authorizing the apprehension of suspected persons or ***reputed thieves***, applied only to the apprehension of persons of general bad character, as rogues and vagabonds, and not to apprehension on suspicion of a particular felony.

4. Request. — Webst. Dict., *quoted* in Long *v.* State, 23 Neb. 45, set out under ADVISE, vol. 1, p. 907.

Asking. — The constitution of a voluntary association provided that it should not be amended "unless by ***request*** of two-thirds of the whole society." As to whether the word ***request*** means that there must be an active solicitation by the required number of members for some amendment prior to its proposal, see Philomath College *v.* Wyatt, 27 Oregon 390.

Money to Be Laid Out upon Request. — In Thornton *v.* Hawley, 10 Ves. Jr. 137, it was said: "Nothing is more common than to direct money to be laid out upon ***request***. The object of that is only to insure that the act shall be done when the ***request*** is made; not to prevent it until ***request***. The intention of one party is not to have the obligation attaching upon him until the ***request***, in order to entitle himself to performance when the ***request*** is made; but the intention is not that the act shall never be done unless the ***request*** is made."

Requested by Mail. — An insurance policy provided for its avoidance if the assured should neglect, for the term of thirty days, to pay his premium note or any assessment thereon "when ***requested*** to do so, by mail or otherwise." The court, *per* Bigelow, C. J., said: "A ***request*** by mail is a familiar phrase and has a well-understood meaning. It does not import that the person to whom it is addressed shall receive it, but only that the person by whom it is to be made shall deposit in the post office a written ***request***, duly directed, so that in the usual course of the mail, it will reach its destination. Shed *v.* Brett, 1 Pick. (Mass.) 401." Accordingly, it was held that the policy was avoided by the neglect of the assured to pay the amount of an assessment for thirty days after a written ***request*** for payment, duly posted by the company, should

usage has given to them somewhat different meanings, which, however, are more distinctions in intensity than in effect or substance. The latter is nearer a command than the former.[1]

REQUIRE, REQUIRED, ETC. (*Compare* REQUEST, *ante.*) — To require means to demand; to ask as of right and by authority; to direct; to order; to command; to compel.[2] But the term is also used as meaning to ask

have reached the place of his residence, in due course of mail, whether he received it or not. Lothrop *v.* Greenfield Stock, etc., Ins. Co., 2 Allen (Mass.) 85.

Precatory Words. (See also the title PRECATORY TRUSTS, vol. 22, p. 1162.) — In Coulson *v.* Alpaugh, 163 Ill. 302, it was said: "The words ***request*** and 'requesting' are, under many circumstances, precatory words sufficient to raise a trust, and under other circumstances it is otherwise. It depends not only upon the sense in which the words are used — whether intended as imperative or as merely the expression of a wish or preference, the observance of which is left to the discretion of the first taker — but even where it is clear the language was intended as mandatory, it also depends upon the fact whether the intention is defeated by the other provisions of the will."

Same — Request Held to Be Mandatory. — See Pierson *v.* Garnet, 2 Bro. C. C. 226; Colton *v.* Colton, 127 U. S. 319; Coulson *v.* Alpaugh, 163 Ill. 298; Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144; Hutton *v.* Hutton, 41 N. J. Eq. 271.

Request and Wish Synonymous. — See Hopkins *v.* Glunt, 111 Pa. St. 290.

1. Request and Require. — Prentice *v.* Whitney, 8 Hun (N. Y.) 301. This case was an action against executors to recover a claim existing against their testator in his lifetime. The defendants pleaded the special statute of limitations, which authorized administrators to insert a notice "requiring" all persons having claims against the decedent to present them within six months. The notice upon which the defendants relied was in the usual form, except that it ***requested*** instead of "required" the creditors to present their claims. It was held that there was no reasonable difference between the words as thus used. See generally the title DEBTS OF DECEDENTS, vol. 8, p. 1003.

2. Require. — U. S. *v.* San Francisco Bridge Co., 88 Fed. Rep. 893; Meagher *v.* Van Zandt, 18 Nev. 234; Taylor *v.* Newberne, 2 Jones Eq. (55 N. Car.) 141, 64 Am. Dec. 565.

In Kennedy *v.* Falde, 4 Dak. 325, it was said: "To ***require*** is 'to demand; to insist upon having; to claim as by right and authority; to exact; to claim as indispensable.'"

In U. S. *v.* Dimmick, 112 Fed. Rep. 351, it was said: "The words 'prescribe,' 'direct,' and 'order' are all synonyms of the word ***require.***"

Require Attendance of Witnesses. — To ***require*** the attendance of a witness means to compel such attendance. Meagher *v.* Van Zandt, 18 Nev. 234. See also the title WITNESSES.

Required to Testify. — It is provided by a *Kansas* statute (now Gen. Stat. 1897, c. 102, § 217) that "no person on trial or examination, nor wife or husband of such person, shall be ***required*** to testify except as a witness on behalf of the person on trial or examination." In State *v.* McCord, 8 Kan. 239, 12 Am. Rep. 469, it was held that the word ***required***, as here used, had not the same meaning as the words "permitted" or "allowed." The court said: "This word has a definite meaning. It simply means that the state shall not demand as a right that such a witness under such circumstances shall testify. It does not profess to deal with the competency of the witness; only with the right of the prosecution to demand that they should testify, and the power of the court to enforce that demand. Therefore it does not prevent any such testimony from being voluntarily given." See also the title WITNESSES.

"Required" in Sense of "Needed." (See also NEED — NEEDFUL — NEEDLESSLY, vol. 21, p. 452.) — ***Required*** is frequently used as being substantially equivalent to "needed." See Dowdall *v.* Lenox, 2 Edw. (N. Y.) 272; McKeever *v.* Canonsburg Iron Co., 138 Pa. St. 184.

Required has the meaning of "rendered necessary or indispensable." Wilcox, etc., Guano Co. *v.* Phœnix Ins. Co., 60 Fed. Rep. 930; Kennedy *v.* Falde, 4 Dak. 325.

Same — Eminent Domain — Railways. (See also the title EMINENT DOMAIN, vol. 10, p. 1043.) — In Flint, etc., R. Co. *v.* Detroit, etc., R. Co., 64 Mich. 360, the appellant had filed a petition for the condemnation of private property for public use under the general railroad laws of *Michigan*. It was contended that the petition was defective in that it did not aver that the taking of the property described in it was necessary for public use. The court, *per* Champlin, J., said: "The petition sets up with sufficient certainty the rights which the petitioner seeks to acquire, and alleges that the property which is thus sought is ***required*** for the public use. It is true, the statute provides that the petition shall state that the taking of the property is 'necessary' for public use. But the word ***required***, in the sense in which it is used in the petition in this case, is synonymous with the word 'necessary.' It conveys the same meaning."

In Hooper *v.* Bourne, 3 Q. B. D. 280, Bramwell, L. J., said: "When a thing is said to be ***required*** for the purposes of a railway, it is not meant that no equivalent or substitute for it can be found, but it is meant that the thing is or will be at a future time useful for carrying on the traffic." See also Errington *v.* Metropolitan Dist. R. Co., 19 Ch. D. 559; Stockton, etc., R. Co. *v.* Brown, 9 H. L. Cas. 246; Kemp *v.* South-Eastern R. Co., L. R. 7 Ch. 364.

Same — Trustees. (See also the title SPENDTHRIFTS AND SPENDTHRIFT TRUSTS; TRUSTS AND TRUSTEES.) — In Boswell *v.* Hall, 8 Ohio Dec. 591, the court said: "The word ***require***, in one of its senses, means to demand as a matter of right; to have the right to compel."

as a favor, to request.[1]

REQUISITION. (See also the title EXTRADITION, vol. 12, p. 590.) — See note 2.

And in this case it was held that where a devise provided that certain income from real property should be paid to the devisee from time to time, as he might *require*, such devisee had the right from time to time to demand such income. See also Cadogan *v.* Essex, 2 Drew 227, 23 L. J. Ch. 487; Beauclerk *v.* Ashburnham, 8 Beav. 322.

But it has been held that if trustees are *required* to lend money to a husband on his personal security at the request of the wife, and the husband becomes insolvent, they are justified in refusing to lend, because the circumstances and position of the husband have so totally changed. Boss *v.* Godsall, 1 Y. & C. Ch. 617. See also Luther *v.* Bianconi, 10 Ir. Ch. 194; Costello *v.* O'Rourke, I. R. 3 Eq. 172.

Same — Required in Sense of "Having Imperative Need." — Park *v.* Candler, 114 Ga. 479, *quoting* Stand. Dict.

Same — "Requirements" and "Needs" Used Synonymously. — See Minnesota Lumber Co. *v.* Whitebreast Coal Co., 160 Ill. 93.

Redound and Required Distinguished. (See also REDOUND, *ante*.) — In Mattingly *v.* Read, 3 Met. (Ky.) 526, it was said: "The one is not equivalent to the other. 'Redound' signifies to conduce in the consequence, to contribute, to result. *Require* means to make necessary, to demand, to ask, as of right. The former is speculative in character, and looks to the future, whereas the latter expresses a necessity *in presenti*."

Knowledge. — An act of Congress made it unlawful for contractors engaged upon public works to *require* laborers to work more than eight hours per day. It was held that a charge that the defendant *required* its laborers to work more than eight hours on a day named necessarily implied that in making such requirement there was an intention upon the part of the defendant that its order or direction should be obeyed. U. S. *v.* San Francisco Bridge Co., 88 Fed. Rep. 893.

Suretyship. (See also the title SURETYSHIP.) — In Kennedy *v.* Falde, 4 Dak. 323, a letter from a surety to a creditor using the words "You had better collect the same from Falde, the principal," was held not to be such a *requirement* as would exonerate the surety.

Required Bond. — Where it was provided that an administrator's sale might be attacked on the ground that he had not given the *required* bond, the court said: "The word *required* is not used in the sense of 'ordered, or demanded, by the judge of probate.' * * * We take it that subdivision 2 of section 52, in speaking of the bond *required*, had reference to any bond *required* by law, whether it was to be given with or without the express direction of the probate judge." Babcock *v.* Cobb, 11 Minn. 347.

Required in Legal Proceedings. — In Bowers *v.* Beck, 2 Nev. 160, the court said: "We think where the statute [a stamp act] exempts bonds '*required* in legal proceedings,' it is not restricted to those bonds without which a suit cannot be prosecuted or defended; but it refers to all bonds given in the course of a legal proceeding, and which may be *required* to give either party an advantage or privilege to which he would be legally entitled in such proceeding by executing a proper bond." See also the title REVENUE LAWS, *post*.

Embezzlement. (See generally the title EMBEZZLEMENT, vol. 10, p. 1016.) — A United States statute provides that every person who, having money of the United States in his hands or possession, fails to deposit it with the treasurer of the United States when *required* to do so, shall be deemed guilty of embezzlement. In construing this statute the court said: "A general regulation of the secretary of the treasury, making it the duty of officers receiving public money to deposit the same at some stated time thereafter, is in legal effect a requirement that the money shall be so deposited at the time named in the regulation, and the wilful failure to make the deposit as *required* by such regulation is a violation of section 5492 of the Revised Statutes." U. S. *v.* Dimmick, 112 Fed. Rep. 351.

1. Removal of Causes. — Tennessee Coal, etc., Co. *v.* Waller, 37 Fed. Rep. 547. This case was a motion to remand the cause from the United States Circuit Court to the state court from which it had been removed. The act of Congress of March 3, 1887, § 3, provides that applications for removals must be made at the time, or any time before the defendant is *required* to answer or plead. It was insisted that the term *required* to answer or plead means "compelled" to do so. In accordance with the definition given in the text, the court held that the word could not be so construed, *citing* in support of this position Wedekind *v.* Southern Pac. Co., 36 Fed. Rep. 281, and refusing to follow McKeen *v.* Ives, 35 Fed. Rep. 803. See also the title REMOVAL OF CAUSES, 18 ENCYC. OF PL. AND PR. 286 *et seq.*

"Required" Held Not to Be Imperative. — In Upshur *v.* Baltimore, 94 Md. 757, in construing a statute providing for the policing of a city park, the court said: "The police commissioners are 'directed,' and in section 758 they are *required*, to make the detail; but neither of these words, in view of the whole context and the entire surroundings, creates an imperative, absolute duty, admitting of no discretion."

Called For. — Where a certain sum was to be paid in instalments as *required* by the payee, it was held that by the word *required*, as thus used, was meant "called for." McReynolds's Appeal, 66 Pa. St. 111.

2. Requisition. — In Mills *v.* Martin, 19 Johns. (N. Y.) 27, the court said: "To 'obey an order,' and to 'comply with a *requisition*,' is a phraseology which exhibits a correct discrimination in the use of language."

A statute provided that where a mortgagor was entitled to redeem he might require the mortgagee, instead of discharging or reconveying, to assign the mortgage debt and to convey the mortgaged property to such third person as the mortgagor directed; and further

RES. — See REM, *ante.*

that such right should belong to and be capable of being enforced by each incumbrancer or by the mortgagor, notwithstanding any intermediate incumbrance, but that the ***requisition*** of the incumbrancer should prevail over a ***requisition*** of the mortgagor, and as between incumbrancers, a ***requisition*** of a prior incumbrancer should prevail over a ***requisition*** of a subsequent incumbrancer. In construing this statute in Atwood *v.* Charlton, 21 R. I. 571, the court said: " The respondent treats the word ***requisition*** as equivalent to ' a desire to retain,' but the term ***requisition*** in the statute is evidently used in its literal sense of the act of requiring or demanding."

Requisition and Inquiry. — See INQUIRY — INQUISITION, vol. 16, p. 557.

Requisition by United States to State for Militia. — " The term ***requisition*** is borrowed from the usage under the old confederation of the states, and has acquired, with us, a peculiar and appropriate signification, as between the United States and the individual states." Mills *v.* Martin, 19 Johns. (N. Y.) 27.

RESCISSION, CANCELLATION, AND REFORMATION.

By Hiram Thomas.

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CROSS-REFERENCES.

For matters of PROCEDURE relating to this title, see in the ENCYCLOPÆDIA OF PLEADING AND PRACTICE *the titles BILLS OF PEACE*, vol. 3, p. 556; *BILLS QUIA TIMET*, vol. 3, p. 599; *JUDGMENTS*, vol. 11, p. 805; *QUIETING TITLE — REMOVAL OF CLOUD*, vol. 17, p. 274; *REMEDY AT*

LAW, vol. 18, p. 108; *RESCISSION, CANCELLATION, AND REFORMATION OF CONTRACTS*, vol. 18, p. 744.

For cancellation of a negotiable instrument as a discharge, see in this work the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 503 *et seq.*

For rescission of accord and satisfaction by a subsequent agreement, see the title ACCORD AND SATISFACTION, vol. 1, p. 409; *and for rescission of an accord and satisfaction upon the grounds of fraud, ignorance, or mistake, see the same title*, vol. 1, p. 428 *et seq.*

For the breach or nonperformance of a contract as a ground for rescission and right of action, see the titles CONTRACTS, vol. 7, p. 150 *et seq.; WAIVER AND ABANDONMENT.*

For inadequacy, want, or failure of consideration, as a ground for relief at law or in equity, see the title CONSIDERATION, vol. 6, pp. 694 *et seq.*, 790, 796, 797.

For rescission and cancellation of conveyances of land for failure of or defect in title, for fraud and for mistake, see the titles COVENANTS, vol. 8, p. 220 *et seq.; FRAUD AND DECEIT*, vol. 14, p. 158 *et seq.; VENDOR AND PURCHASER.*

For setting aside deeds on the ground of the grantor's mental incapacity and on the ground of fraud, duress, and undue influence practiced upon him, see the title DEEDS, vol. 9, p. 119 *et seq.; see also the title INSANITY*, vol. 16, p. 627 *et seq., and the preceding cross-reference.*

For rescission, cancellation, and reformation by grantor or vendor in conveyance or sale made to defraud creditors, see the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, pp. 272, 275, 276, 278, 279.

For insanity as a ground for equitable relief, see the title INSANITY, vol. 16, p. 627 *et seq.*

For mistake as a ground for equitable relief, see the title MISTAKE, vol. 20, p. 805.

For duress and undue influence as grounds for rescinding contracts and cancelling instruments, see the titles DEEDS, vol. 9, pp. 124, 125; *DURESS*, vol. 10, p. 320; *UNDUE INFLUENCE.*

For the reformation and cancellation of deeds of gift and voluntary settlements, see the title GIFTS, vol. 14, p. 1046.

For the setting aside of judicial and execution sales, see the titles JUDICIAL SALES, vol. 17, p. 995 *et seq.; SHERIFF'S SALES.*

For reformation of promissory notes for mistake, see the title MISTAKE, vol. 20, p. 829.

For rescission and cancellation as applied to conveyances of real property and to contracts relating to land, see the title VENDOR AND PURCHASER.

For reformation, rescission, and cancellation of policies of insurance, see the titles INSURANCE, vol. 16, pp. 869, 870, *et seq.; MISTAKE*, vol. 20, p. 830.

For the jurisdiction of particular courts to set aside wills, see the title PROBATE AND LETTERS OF ADMINISTRATION, vol. 23, pp. 136, 139, *et seq.*

For rescission of sales of personal property, see the title SALES, post.

For equitable relief against usurious contracts, see the title USURY.

For rescission, modification, and discharge of contracts by subsequent agreement and by waiver and estoppel, see the titles ACCORD AND SATISFACTION, vol. 1, p. 423 *et seq.; NOVATION*, vol. 21, p. 659; *WAIVER AND ABANDONMENT.*

For the revocation of testamentary instruments by cancellation, and for the reformation of such instruments, see the title WILLS.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this title, see the following titles in this work: ACCIDENT (IN EQUITY), vol. 1, p. 277; *ALTERATION OF INSTRUMENTS*, vol. 2, p. 181; *CANCEL—CANCELLATION*, vol. 5, p. 128; *CLOUD ON TITLE*, vol. 6, p. 149; *COMPOUNDING OFFENSES*, vol. 6, pp. 411 *et seq.*, 416 *et seq.; CONTRACTS*, vol. 7, p. 88; *EQUITY*, vol. 11, p. 145; *EXCHANGE OF PROPERTY*, vol. 11, p. 574 *et seq.; FRAUD AND DECEIT*, vol. 14, p. 12; *GAMBLING CONTRACTS*, vol. 14, p. 595; *ILLEGAL CONTRACTS*, vol. 15, pp. 927, 997, *et seq.; IMPLIED OR QUASI CONTRACTS*, vol. 15, pp. 1076, 1110; *IMPLIED WARRANTIES*, vol. 15, p. 1256 *et seq.; INJUNC-*

TIONS, vol. 16, p. 337; *INTOXICATION*, vol. 17, p. 398; *LACHES*, vol. 18, p. 95; *LIMITATION OF ACTIONS*, vol. 19, p. 136; *RELEASE AND DISCHARGE*, *ante*, p. 282; *RES JUDICATA*, *post*; *TENDER*; *TRUST DEEDS AND POWER OF SALE MORTGAGES*; *TRUSTS AND TRUSTEES*; *VENDOR AND PURCHASER*; *WARRANTY*; *and the various titles where particular classes of contracts, sales, or instruments are treated.*

I. **Scope of Title and Method of Treatment.** — The particular matters which may form grounds for the rescission, cancellation, or reformation of contracts or other written instruments are to be found fully discussed in the various titles throughout this work where those matters are specifically treated.[1] There remain for treatment in this connection, therefore, only the remedies of rescission, cancellation, and reformation, the jurisdiction of the courts to grant these remedies, and the effect of the remedies when granted. These matters will be discussed from the standpoint of the remedy rather than of right, and the specific matters of fact which constitute grounds for making these remedies available will be treated here only in so far as it is essential to a proper understanding of the subject.

Cases Where Fraud Is the Ground of Rescission furnish perhaps the most frequently occurring instances for relief of this character. In this branch of the law two classes of cases arise, the distinction between which should always be carefully observed, viz., cases where the defrauded party to the contract exercises his right to rescind or to withdraw from the contract, and perhaps thereafter institutes an action at law, treating the contract as at an end; and cases where he seeks the aid of a court of equity to have the contract avoided, and perhaps incidentally to obtain further relief.[2] Cases of the former class have already been fully treated in this work.[3] Cases of the latter class will be dealt with in this title.

II. **Definitions** — 1. **Rescission.** — Rescission has been defined generally as the "avoiding of a voidable contract."[4] This method of relief is the converse of specific performance.[5]

2. **Cancellation.** — In the sense in which the term is here used, to cancel a written instrument means to annul it — to destroy its legal force and validity. The methods employed to effect the cancellation in point of fact are discussed elsewhere in this work.[6] In decreeing the rescission of a contract the court will frequently direct the cancellation of an instrument which embodies the evidence of the contract, or of the obligations arising therefrom; this additional relief being granted for the purpose of making the rescission effectual, final, and complete.[7]

1. See the table of cross-references at the beginning of this title.

2. **Distinctions Between Actions Based upon Rescission and Suits for Rescission.** — See Gould *v.* Cayuga County Nat. Bank, 86 N. Y. 83; Brown *v.* Norman, 65 Miss. 378, 7 Am. St. Rep. 663; Engeman *v.* Taylor, 46 W. Va. 713.

3. **Remedies After Rescission by Act of Party.** — See the title Fraud and Deceit, vol. 14, p. 164 *et seq.*

4. **Rescission Defined.** — 1 Bishop on Contracts, § 679; Tecumseh State Bank *v.* Maddox, 4 Okla. 583.

Rescission of Written Obligation at Early Common Law. — "The word rescind takes its rise *vi termini*, as it would appear, from the syngraph, or writing some word vertically upon the parchment or paper on which duplicates of the contract were written, and then cutting through the word, so that each had its half, which, when united, would show the identity of the duplicate instrument. From these brought together and united, the word was cut away, so that the instrument or contract was said to be rescinded, and the cleaving undone." Zerger *v.* Sailer, 6 Binn. (Pa.) 30, *per* Brackenridge, J.

5. **Rescission the Converse of Specific Performance.** — Smith *v.* Hughes, 50 Wis. 620, *per* Orton, J. See also the title Specific Performance.

6. See Cancel — Cancellation, vol. 5, p. 128. See also the title Wills.

7. **Cancellation as Auxiliary to Rescission.** — Scruggs *v.* Driver, 31 Ala. 274; Kirby *v.* Harrison, 2 Ohio St. 326, 59 Am. Dec. 677; Wilson *v.* Getty, 57 Pa. St. 266. See also *infra*, this title, *Rescission and Cancellation*.

Other illustrations of this auxiliary use of the remedy occur in granting relief under bills to remove cloud on title (see the title Cloud on Title, vol. 6, p. 149); bills of peace (see in the Encyc. of Pl. and Pr. the title Bills of Peace, vol. 3, p. 556); bills *quia timet* (see in

3. Reformation. — To reform a written instrument is simply to rectify, alter or reconstruct it so as to make it conform to the intention of the parties thereto.[1]

III. Rescission and Cancellation — 1. Rescission in Equity — *a.* Jurisdiction and Its Exercise—(1) *Principle Stated.*—The jurisdiction of a court of equity, or of a court exercising the powers of a court of equity, to direct and enforce the rescission of contracts and the surrender and cancellation of written instruments, for due cause, is settled beyond question.[2] It is in fact an ancient head of equity jurisdiction founded upon the administration of a protective or preventive justice, and its exercise in this connection is had for the purpose of preventing or restraining the exercise of an injurious power which one man may, under the common law, hold over another.[3]

(2) *Exercise of Jurisdiction Discretionary.* — Rescission is a remedy which cannot be had as a matter of absolute right. Applications to a court of chancery for the exercise of its jurisdiction to rescind a contract are addressed to the sound discretion of the court;[4] but that discretion must be exercised either in granting or refusing the relief prayed, in conformity with established

the Encyc. of Pl. and Pr. the title Bills Quia Timet, vol. 3, p. 599); and bills for injunctions (see the title Injunctions, vol. 16, p. 337).

1. Reformation Defined. — Anderson's Law Dict. 867.

2. General Jurisdiction of Equity to Grant Rescission and Cancellation — *England.* — Cooper *v.* Joel, 27 Beav. 313, *affirmed* 1 De G. F. & J. 240; Hoare *v.* Bremridge, L. R. 14 Eq. 522, *affirmed* L. R. 8 Ch. 22.

United States. — Boyce *v.* Grundy, 3 Pet. (U. S.) 210; Tyler *v.* Savage, 143 U. S. 79; Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S 552; White *v.* Clarke, 5 Cranch (C. C.) 102, 29 Fed. Cas. No. 17,540, *affirmed* 12 Pet. (U. S.) 178; Mutual L. Ins. Co. *v.* Pearson, 114 Fed. Rep. 395.

Alabama. — Waddell *v.* Lanier, 62 Ala. 347; Merritt *v.* Ehrman, 116 Ala. 278; Walling *v.* Thomas, 133 Ala. 430.

California. — Lewis *v.* Tobias, 10 Cal. 574.

Connecticut. — Ferguson *v.* Fisk, 28 Conn. 501.

Georgia. — Butler *v.* Durham, 2 Ga. 413; Bond *v.* Watson, 22 Ga. 637; Walker *v.* Hunter, 27 Ga. 336.

Illinois. — Security Trust Co. *v.* Tarpey, 66 Ill. App. 589; Jones *v.* Neely, 72 Ill. 449.

Indiana. — Otis *v.* Gregory, 111 Ind. 504; Fitzmaurice *v.* Mosier, 116 Ind. 363, 9 Am. St. Rep. 854.

Iowa. — Hosleton *v.* Dickinson, 51 Iowa 244.

Kentucky. — Caldwell *v.* Caldwell, 1 J. J. Marsh. (Ky.) 53.

Maryland. — Taymon *v.* Mitchell, 1 Md. Ch. 496.

Massachusetts. — Commercial Mut. Ins. Co. *v.* McLoon, 14 Allen (Mass.) 351; Sherman *v.* Fitch, 98 Mass. 61; Fuller *v.* Percival, 126 Mass. 383; Holden *v.* Hoyt, 134 Mass. 181; Nathan *v.* Nathan, 166 Mass 294; Rackemann *v.* Riverbank Imp. Co., 167 Mass. 1, 57 Am. St. Rep. 427; Davis *v.* Peabody, 170 Mass. 397; Keene *v.* Demelman, 172 Mass. 17.

Michigan. — Cogswell *v.* Mitts, 90 Mich. 355.

New Jersey. — Cornish *v.* Bryan, 10 N. J. Eq. 151; Metler *v.* Metler, 18 N. J. Eq. 270, *affirmed* 19 N. J. Eq. 457; Monmouth County Mut. F. Ins. Co. *v.* Hutchinson, 21 N. J. Eq. 107; Smith *v.* Smith, 30 N. J. Eq. 564; Young Lock Nut Co. *v.* Brownley Mfg. Co., (N. J. 1896) 34 Atl. Rep. 947.

New York. — Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 517; Thompson *v.* Graham, 1 Paige (N. Y.) 384; McEvers *v.* Lawrence, Hoffm. (N. Y.) 176, *affirmed* 2 Ch. Sent. (N. Y.) 25; Johnson *v.* Wetmore, 12 Barb. (N. Y.) 433; Mayne *v.* Griswold, 3 Sandf. (N. Y.) 463; Cohen *v.* Ellis, (Supm. Ct. Spec. T.) 16 Abb. N. Cas. (N. Y.) 320 (*reversed* on other grounds 4 N. Y. St. Rep. 721); McHenry *v.* Hazard, 45 N. Y. 580; Becker *v.* Church, 115 N. Y. 562, *affirming* 42 Hun (N. Y.) 258.

Pennsylvania. — Wilson *v.* Getty, 57 Pa. St. 266; Ginsberg *v.* Rubinowitz, 20 Pa. Co. Ct. 230.

South Dakota. — Taylor *v.* National Bank, 6 S. Dak. 511.

Texas. — Moore *v.* Cross, (Tex. Civ. App. 1894) 26 S. W. Rep. 122.

Wisconsin. — Douglas County *v.* Walbridge, 38 Wis. 179.

Other authorities are to be found collected in the Encyc. of Pl. and Pr., vol. 18, p. 754.

3. Butler *v.* Durham, 2 Ga. 420, *per* Nisbet, J.; see also Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 517, *per* Kent, Ch.

Rescission of Stock Subscription. — Where a person has by fraud been induced to subscribe for the stock of a company, he may bring an equitable action to procure a rescission of the contract, a cancellation of his subscription, the removal of his name from the books of the company, and an accounting for sums paid for subscriptions. Bosley *v.* National Mach. Co., 123 N. Y. 551.

For a Full Discussion, see the title Stock and Stockholders.

4. Remedy Within Discretion of Court. — Clifford *v.* Brooke, 13 Ves. Jr. 133; Slim *v.* Croucher, 1 De G. F. & J. 527; Mutual L. Ins. Co. *v.* Pearson, 114 Fed. Rep. 395; Shaeffer *v.* Sleade, 7 Blackf. (Ind.) 184; Cain *v.* Guthrie, 8 Blackf. (Ind.) 409; Thomas *v.* McCue, 19 Wash. 293.

See also *infra*, this section, *Where Specific Performance Would Be Denied.*

principles of equity jurisprudence;[1] and before granting relief it should appear that no injustice will be done by placing both parties in the positions they occupied before the contract was made.[2]

(3) *Essential Grounds for Equitable Relief.* — In order for the court to grant relief by way of rescission, the case presented must embrace facts bringing it within some recognized head of equity jurisdiction, such as fraud, accident, mistake, duress, undue influence, or the like; or it must at least be shown that the complainant if denied equitable relief will sustain an injury for the redress of which a court of common law can afford no adequate remedy.[3]

Absence of Consideration No Ground for Setting Aside Conveyance. — It is elementary law that every person of sound and disposing mind and under no legal disability has the absolute right of disposing of his property in any way not expressly or impliedly forbidden by law and to any person legally capable of taking it. Hence, where a person competent to convey has fairly and knowingly made a complete conveyance of his land to another person competent to receive it, and no fraud, accident, mistake, or undue influence was involved in the transaction, the fact that the conveyance was wholly voluntary and without consideration constitutes no ground for rescinding the conveyance and cancelling the deed; and in such a case the fact that the disposition of the property was unwise, improvident, or absurd will not be considered by a court of equity.[4]

(4) *Where Specific Performance Would Be Denied.* — The equitable remedy of rescission has been said to be the converse of that of specific performance.[5]

1. Shaeffer *v.* Sleade, 7 Blackf. (Ind.) 184; Cain *v.* Guthrie, 8 Blackf. (Ind.) 409.

2. Thomas *v.* McCue, 19 Wash. 293.

3. **Essential Grounds for Equitable Relief** — *England.* — Willis *v.* Jernegan, 2 Atk. 251; Milnes *v.* Cowley, 8 Price 620.

United States. — Jaffrey *v.* Bear, 42 Fed. Rep. 569; U. S. Bank *v.* Lyon County, 46 Fed. Rep. 514; Courtright *v.* Burnes, 48 Fed. Rep. 501.

Arkansas. — Killian *v.* Badgett, 27 Ark. 166.

Alabama. — Stacey *v.* Walter, 125 Ala. 291.

Colorado. — Travelers Ins. Co. *v.* Redfield, 6 Colo. App. 190; Shaw *v.* Horner, 7 Colo. App. 83. *Compare* Campbell Printing Press, etc., Co. *v.* Marsh, 20 Colo. 22.

Georgia. — Davis *v.* Moorefield, 40 Ga. 185.

Illinois. — Gore *v.* Kramer, 117 Ill. 176; Naugle *v.* Yerkes, 187 Ill. 358, *affirming* 83 Ill. App. 310. *Compare* Wilson *v.* Roots, 119 Ill. 379.

Indiana. — Hardy *v.* Brier, 91 Ind. 91; Shuee *v.* Shuee, 100 Ind. 477.

Iowa. — Brainard *v.* Holsaple, 4 Greene (Iowa) 485.

Kansas. — Missouri River, etc., R. Co. *v.* Miami County, 12 Kan. 482.

Kentucky. — Davis *v.* James, 4 J. J. Marsh (Ky.) 8; Abel *v.* Cave, 3 B. Mon. (Ky.) 159; Meriweather *v.* Herran, 8 B. Mon. (Ky.) 162; Davis *v.* Hall, 4 T. B. Mon. (Ky.) 23. *Compare* Stewart *v.* Stewart, 7 J. J. Marsh. (Ky.) 183.

Michigan. — Liesemer *v.* Burg, 102 Mich. 20.

Mississippi. — Lewis *v.* Starke, 10 Smed. & M. (Miss.) 120. But see Meridan Waterworks Co. *v.* Marks, (Miss. 1894) 16 So. Rep. 357, *overruling* Meridian Waterworks Co. *v.* Schulherr, (Miss. 1892) 17 So. Rep. 167.

Missouri. — Tison *v.* Labeaume, 14 Mo. 198; Benton County *v.* Morgan, 163 Mo. 661; Schields *v.* Hickey, 26 Mo. App. 194. *Compare* Beland *v.* Anheuser Busch Brewing Co., 157 Mo. 593.

North Carolina. — Gunter *v.* Thomas, 1 Ired. Eq. (N. Car.) 199; Moore *v.* Reed, 2 Ired. Eq. (37 N. Car.) 580; Potter *v.* Everitt, 7 Ired. Eq. (42 N. Car.) 152.

Pennsylvania. — Rockafellow *v.* Baker, 41 Pa. St. 319, 80 Am. Dec. 624.

Texas. — Gann *v.* Shaw, 2 Tex. App. Civ. Cas., § 257.

Virginia. — Thompson *v.* Jackson, 3 Rand. (Va.) 504, 15 Am. Dec. 721; Robertson *v.* Hogshead, 3 Leigh (Va.) 667.

West Virginia. — Korne *v.* Korne, 30 W. Va. 1.

A plaintiff seeking the aid of equity to rescind a contract must show some useful purpose to be thereby accomplished. Huff *v.* Jennings, Morr. (Iowa) 454; Putzel *v.* Schulhof, 59 N. Y. Super. Ct. 88. Some substantial reason for relief must be shown, and the court will not act when kept in ignorance as to the reasons and purposes of the contract sought to be rescinded. Scanlan *v.* Gillan, 5 Cal. 182.

4. **Want of Consideration.** — Villers *v.* Beaumont, 1 Vern. 100; Toker *v.* Toker, 31 Beav. 629; Warner *v.* Jackson, 7 App. Cas. (D. C.) 211; Goodwin *v.* White, 59 Md. 503. See also the titles GIFTS, vol. 14, p. 1046; VENDOR AND PURCHASER.

Voluntary Settlement in Trust Without Power of Revocation Reserved. — Suits have frequently been instituted by grantors to set aside voluntary conveyances by way of settlements in trust without the power of revocation reserved. Cases of this character are discussed elsewhere in this work. See the titles GIFTS, vol. 14, p. 1046; TRUSTS AND TRUSTEES.

5. **Rescission the Converse of Specific Performance.** — Smith *v.* Hughes, 50 Wis. 625, *per* Orton, J.

The granting of relief by either remedy is not a matter of absolute right, but is largely within the sound discretion of the court, and no relief will be afforded in any case unless under all the attendant circumstances the exercise of jurisdiction would be just and equitable.[1] Accordingly, where the circumstances of a particular case are such that the court would refuse to enforce the contract specifically at the suit of one of the contracting parties, it is within the discretion of the court to grant rescission at the suit of the other party.[2] But the equitable remedies of specific performance and of rescission are not wholly reciprocal. Stronger reasons must exist for granting rescission than for refusing specific performance; and it is well settled that it is within the sound discretion of a court of equity to refuse to grant rescission even where the circumstances are such that it would refuse to decree specific performance at the suit of the other party. Under such circumstances the court usually declines to interfere in behalf of either party, and leaves them to their remedies at law, if any exist.[3]

(5) *Where Contract Has Been Fully Performed* — (a) **Relief Granted Only in Extreme Cases.** — Where the contract has been fully and voluntarily performed before relief by rescission is sought, it is only where the most forceful reasons exist for granting equitable relief that a court of equity or a court exercising equitable powers will interpose to decree the rescission of the contract; and this is true even though the circumstances of the case are such that were the contract unperformed, the court would not decree specific performance on behalf of the other party.[4] Indeed, it has been frequently held that nothing

1. Relief by Either Remedy Discretionary. — Butler *v.* Durham, 2 Ga. 422; Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 517; Kirby *v.* Harrison, 2 Ohio St. 326, 59 Am. Dec. 677; Stewart's Appeal, 78 Pa. St. 88. See also *supra*, this section, *Exercise of Jurisdiction Discretionary;* and see the title SPECIFIC PERFORMANCE.

2. Willan *v.* Willan, 16 Ves. Jr. 84; Kirby *v.* Harrison, 2 Ohio St. 326, 59 Am. Dec. 677. See also Esham *v.* Lamar, 10 B. Mon. (Ky.) 43.

3. Rescission Denied though Specific Performance Refused — *England.* — Redshaw *v.* Bedford Level, 1 Eden 346; Hilton *v.* Barrow, 1 Ves. Jr. 284; Twining *v.* Morrice, 2 Bro. C. C. 326; Mortlock *v.* Buller, 10 Ves. Jr. 292; Day *v.* Newman, 2 Cox Ch. 77.

United States. — Jackson *v.* Ashton, 11 Pet. (U. S.) 229.

Alabama. — Beck *v.* Simmons, 7 Ala. 71.

Iowa. — Morse *v.* Beale, 68 Iowa 463.

Mississippi. — See Liddell *v.* Sims, 9 Smed. & M. (Miss.) 596.

New Jersey. — Young Lock Nut Co. *v.* Brownley Mfg. Co., (N. J. 1896) 34 Atl. Rep. 947.

New York. — Seymour *v.* Delancy, 3 Cow. (N. Y.) 445.

Ohio. — Watkins *v.* Collins, 11 Ohio 31. But see Kirby *v.* Harrison, 2 Ohio St. 326, 59 Am. Dec. 677.

Pennsylvania. — Stewart's Appeal, 78 Pa. St. 88; Andrews *v.* Emery, 24 Pa. Co. Ct. 217.

Virginia. — Thompson *v.* Jackson, 3 Rand. (Va.) 504, 15 Am. Dec. 721; Stearns *v.* Beckham, 31 Gratt (Va.) 417.

See also the following subdivision.

4. Rescission of Executed Contracts Granted Only in Extreme Cases — *England.* — Willan *v.* Willan, 16 Ves. Jr. 83.

United States. — Atlantic Delaine Co. *v.* James, 94 U. S. 207. See also Morse Arms Mfg. Co. *v.* Winchester Repeating Arms Co., 33 Fed. Rep. 184.

Illinois. — Beebe *v.* Swartwout, 8 Ill. 162.

Iowa. — Morse *v.* Beale, 68 Iowa 463; Brainard *v.* Holsaple, 4 Greene (Iowa) 485.

New York. — Seymour *v.* Delancy, 3 Cow. (N. Y.) 445; Casserly *v.* Manners, 9 Hun (N. Y.) 697. See also Parfitt *v.* Kings County Gas, etc., Co., (Supm. Ct. Spec. T.) 12 Misc. (N. Y.) 278.

Pennsylvania. — Graham *v.* Pancoast, 30 Pa. St. 89; Nace *v.* Boyer, 30 Pa. St. 99; Rockafellow *v.* Baker, 41 Pa. St. 319, 80 Am. Dec. 624; Geddes's Appeal, 80 Pa. St. 442; Goggins *v.* Risley, 13 Pa. Super. Ct. 316. See also Lynch's Appeal, 97 Pa. St. 353; Du Bois *v.* Du Bois City Waterworks Co., 176 Pa. St. 430, 53 Am. St. Rep. 678; Longenecker *v.* Zion Evangelical Lutheran Church, 200 Pa. St. 567; Travis's Appeal, (Pa. 1887) 8 Atl. Rep. 601.

Rhode Island. — Fehlberg *v.* Cosine, 16 R. I. 163.

Virginia. — Thompson *v.* Jackson, 3 Rand. (Va.) 504, 15 Am. Dec. 721; Stearns *v.* Beckham, 31 Gratt. (Va.) 379.

Granting relief against an executed contract has been said to be "an exertion of the most extraordinary power of a court of equity." Atlantic Delaine Co. *v.* James, 94 U. S. 214, *per* Strong, J., *quoted with approval* in Morse Arms Mfg. Co. *v.* Winchester Repeating Arms Co., 33 Fed. Rep. 184.

Illustration. — Thus, while failure of consideration in a contract for the purchase of a patent would be a ground for the refusal of a court to enforce the contract if unperformed, yet where the contract has been performed and there was no fraud or mistake in the transaction and the purchaser had ample opportunity to determine the value of the patent, a court of equity will refuse to grant him relief by way of rescission. "It is no part of the duty

short of actual fraud or mistake will justify the court in granting rescission of an executed contract.[1] This rule is especially applicable where intervening rights of innocent third persons would be impaired by granting rescission.[2]

(b) **Where Fraud or Mistake Appears.** — Yet where it clearly appears that the party against whom rescission is sought was guilty of fraud, misrepresentation, or deceit, or of some other wrong of equal force in vitiating the contract, the circumstance that the contract has been fully and voluntarily performed before discovery of the facts giving rise to the right of rescission, will not operate to prevent the court from granting relief; under such circumstances the right to rescind is none the less available after full performance of the contract than before; provided, of course, that the person seeking this relief has not by his conduct waived the right, that the other party can be put *in statu quo*, and that no adverse rights of third persons have intervened.[3] The same principle applies where the ground for annulling a writing purporting to be a contract is that one of the parties executed it under a mistake as to a material fact; there being under such circumstances no meeting of the minds, and thus no real contract. In such a case the fact that full performance has been had of what purported to be the obligations of the parties will not prevent the court from granting relief.[4] But even in cases where fraud is the ground of rescission, the courts require a stronger degree of evidence to establish the invalidity of an executed contract than would be necessary if the contract were executory.[5]

(c) **Where There Is an Adequate Remedy at Law.** — It has been held, however, that even in a case of mutual mistake a court of equity will refuse to grant rescission of an executed contract unless it appears that if this relief is denied the complainant will sustain an injury for which he has no adequate remedy at law.[6]

(6) *In Cases of Fraud* — (a) **Introductory Statement.** — Where the question of the exercise of equitable jurisdiction has arisen for determination in cases of fraud, the decisions are not in entire harmony, and in the *United States* in many instances the law is unsettled and the cases are in irreconcilable conflict.[7] This is true not only with respect to the exercise of jurisdiction but even as to the very existence and extent of the jurisdiction itself in particular cases; and for this reason it has been deemed impossible to formulate any universal rules applicable to this branch of equity jurisprudence.[8] But while this is true, certain principles of a more or less general nature have been worked out

of a court of equity to relieve a purchaser from a foolish bargain after it has been fully consummated." Rockafellow *v.* Baker, 41 Pa. St. 319, 80 Am. Dec. 624.

1. Fraud or Mistake Must Appear. — Beebe *v.* Swartwout, 8 Ill. 162; Brainard *v.* Holsaple, 4 Greene (Iowa) 485; Graham *v.* Pancoast, 30 Pa. St. 89; Nace *v.* Boyer, 30 Pa. St. 99; Rockafellow *v.* Baker, 41 Pa. St. 319, 80 Am. Dec. 624; Geddes's Appeal, 80 Pa. St. 442; Thompson *v.* Jackson, 3 Rand. (Va.) 504, 15 Am. Dec. 721. See also Liddell *v.* Sims, 9 Smed. & M. (Miss.) 596.

It has been declared in *Wisconsin* that only executory contracts can be rescinded. Smith *v.* Hughes, 50 Wis. 625, *per* Orton, J. See also Booth *v.* Ryan, 31 Wis. 45.

2. Where Rights of Third Persons Have Intervened. — Parfitt *v.* Kings County Gas, etc., Co., (Supm Ct. Spec. T.) 12 Misc. (N. Y.) 278; Travis's Appeal, (Pa. 1887) 8 Atl. Rep. 601.

3. Contracts Fully Performed Rescinded for Fraud. — Willan *v.* Willan, 16 Ves. Jr. 83; Foster *v.* Gressett, 29 Ala. 393; Bryant *v.* Boothe, 30 Ala. 315; Baker *v.* Maxwell, 99 Ala. 558; Taymon *v.* Mitchell, 1 Md. Ch. 496; Liddell *v.* Sims, 9 Smed. & M. (Miss.) 596; Cohen *v.* Ellis, (Supm. Ct. Spec. T.) 16 Abb. N. Cas. (N. Y.) 320, *reversed* on other grounds, 4 N. Y. St. Rep. 721. See also Watson *v.* Stucker, 5 Dana (Ky.) 581; Seymour *v.* Delancy, 3 Cow. (N. Y.) 530.

4. Unilateral Mistake — Rescission After Performance. — Crowe *v.* Lewin, 95 N. Y. 423. See *infra*, this section, 1. (7) (*b*) *Mistake by One Party Ground for Rescission, Not for Reformation.*

5. Degree of Proof Necessary to Rescind Executed Contract. — Parfitt *v.* Kings County Gas, etc., Co., (Supm. Ct. Spec. T.) 12 Misc. (N. Y.) 278.

6. Absence of Legal Remedy Essential. — Morse *v.* Beale, 68 Iowa 463. But see *infra*, this section, 1. (7) (*a*) *General Principles;* 3. *Adequacy of Legal Remedy or Defense.*

7. Conflict of Authority Noted. — 1 Story's Eq. Jur. (13th ed.), p. 26, note *et seq.;* 2 Pomeroy's Eq. Jur., § 910; Mayne *v.* Griswold, 3 Sandf. (N. Y.) 475.

8. 2 Pomeroy's Eq. Jur., § 910.

by courts of equity, although it cannot be said that they are altogether harmonious in their application to particular conditions of fact. These principles, so far as they pertain to the equitable remedies under discussion, will be treated in this title.

(b) **Jurisdiction of Ancient Origin.** — In matters of fraud the general jurisdiction of the court of chancery is probably coeval with its existence. There appears to be no period in the history of the court when it did not possess this jurisdiction.[1]

(c) **As Affected by Remedy at Law** — *aa.* ORIGINAL JURISDICTION NOT AFFECTED BY SUBSEQUENT LEGAL REMEDY. — While it is well settled as a general doctrine of equity that where the plaintiff has a plain, adequate, and complete remedy at law, a court of equity will not grant him relief,[2] the application of this rule is governed and controlled by another principle equally well established, which is that if in a certain class of cases the original jurisdiction of equity has properly attached on account of the supposed absence or defect of a remedy at law, then that jurisdiction is not changed or taken away by the fact that courts of law have subsequently exercised jurisdiction in similar cases; in other words, the original jurisdiction of equity having once attached, whether in consequence of inability or the refusal of courts of law to grant relief, that jurisdiction is not lost by reason of the subsequent liberality or enlarged powers of courts of law.[3] Therefore, where equitable relief is sought to recover money damages for fraud, the question whether a court of equity will grant relief depends not merely upon the question whether the complainant has an adequate remedy by an action at law, but also upon the question whether the particular case presented falls within the scope of the original jurisdiction of equity; and if it does, the mere fact that a court of law will at the present day grant the same relief by way of damages as a court of equity will grant, does not oust the established jurisdiction of the latter tribunal.[4]

bb. CONCURRENT JURISDICTION — (*aa*) *Where Recovery of Money Is the Principal Relief Sought* — **aaa. Rule that Remedy at Law Is No Bar to Relief.** — It is generally stated that in all cases of fraud, except where wills of real estate are involved,[5] courts of equity have original jurisdiction which is at least concurrent with that of courts of law and, therefore, that the jurisdiction of equity to grant relief in such cases is not taken away or affected by reason of the fact that the complainant has an adequate remedy at law; hence relief may be granted in equity notwithstanding that the complainant can obtain the same relief by an action at law. This principle is well established in *England* and is recognized in many of the *United States*.[6]

bbb. Rule that Remedy at Law Is Ground for Denying Relief. — On the other hand, although

1. Jurisdiction over Fraud — Early Origin. — Evans *v.* Bicknell 6 Ves. Jr. 182; Jones *v.* Bolles, 9 Wall. (U. S.) 369; Mutual L. Ins. Co. *v.* Pearson, 114 Fed. Rep. 395; Bacon *v.* Bronson, 7 Johns. Ch. (N. Y). 201; Mayne *v.* Griswold, 3 Sandf. (N. Y.) 479; Cohen *v.* Ellis, (Supm. Ct. Spec. T.) 16 Abb. N. Cas. (N. Y.) 320, *reversed* on other grounds, 4 N. Y. St. Rep. 721; McHenry *v.* Hazard, 45 N. Y. 583. See also 2 Pom. Eq. Jur., § 912.

2. See the title EQUITY, vol. 11, p. 199 *et seq.*

3. Original Jurisdiction Not Ousted. — 1 Story's Eq. Jur., § 80; Mayne *v.* Griswold, 3 Sandf. (N. Y.) 463.

For a Full Discussion of this principle as applied to cases where the enlargement of jurisdiction is given by statute, see the title STATUTES.

4. Mayne *v.* Griswold, 3 Sandf. (N. Y.) 463, *reviewing* earlier decisions.

5. Jurisdiction of Equity to Set Aside Will of Land. — See the titles FRAUD AND DECEIT, vol. 14, pp. 176, 177; PROBATE AND LETTERS OF ADMINISTRATION, vol. 23, p. 128.

6. Equity May Grant Relief Notwithstanding Remedy at Law — *England.* — Colt *v.* Woollaston, 2 P. Wms. 156; Stent *v.* Bailis, 2 P. Wms. 220; Green *v.* Barrett, 1 Sim. 45; Evans *v.* Bicknell, 6 Ves. Jr. 182; Slim *v.* Croucher, 1 De G. F. & J. 527; Blair *v.* Bromley, 5 Hare 542, *affirmed* 2 Phil. 354; Ramshire *v.* Bolton, L. R. 8 Eq. 294; Hill *v.* Lane, L. R. 11 Eq. 215; St. Aubyn *v.* Smart, L. R. 5 Eq. 188, *affirmed* L. R. 3 Ch. 646. But see Newham *v.* May, 13 Price 749, *per* Alexander, Ld. Ch. B.

Georgia. — Griffin *v.* Sketoe, 30 Ga. 300 (bill to set aside a verdict and judgment for fraud and perjury).

Illinois. — Truett *v.* Wainwright, 9 Ill. 418 (bill to set aside a judgment).

Maryland. — Taymon *v.* Mitchell, 1 Md. Ch. 496, *per* Johnson, Ch.

Michigan. — Wyckoff *v.* Victor Sewing Mach. Co., 43 Mich. 309; Tompkins *v.* Hollister, 60

it may be conceded that courts of equity have concurrent jurisdiction with courts of law to grant relief in cases of fraud, yet the exercise of jurisdiction in such cases rests primarily in the sound discretion of the court of chancery;[1] and in conformity with this theory it has been frequently held that where the claim of a complainant in equity is for the recovery of money as damages for the fraud or otherwise, and he either does not seek rescission or other purely equitable relief, or seeks only a partial rescission (which, as will be shown, a court of equity grants only in extreme cases), the court will generally refuse to exercise jurisdiction, but will remit the complainant to his action at law, since the remedy to be had from that proceeding will afford him the same measure of protection and relief that can be given in equity.[2] In such cases the denial of relief in equity is deemed especially appropriate for the reason that the ascertainment of damages is the peculiar province of a jury;[3] and it is held that where nothing but the recovery of money is sought, a court of equity will refuse to exercise jurisdiction unless for some reason the remedy at law is inadequate.[4]

(*bb*) *Where Rescission Is the Principal Relief Sought* — aaa. **Remedy at Law No Ground for Denying Relief.** — Where the complainant in equity seeks to have a contract totally rescinded and declared void for fraud, the fact that he seeks also a recovery of money is not sufficient ground for the refusal of the court to entertain jurisdiction; for in an action at law the recovery of money is the principal object, while in the suit in equity the rescission of the contract is the principal matter of relief and the recovery of money is merely an incidental although a necessary consequence; hence the court being properly in possession of the cause for the purpose of granting purely equitable relief, will proceed to do complete justice between the parties, although a part of the relief granted is purely legal in its nature.[5] This principle is in full accordance with the broader principle of equity, that in all cases of fraud, if the party defrauded

Mich. 470; McKinney *v.* Curtiss, 60 Mich. 611.

New York. — Bacon *v.* Bronson, 7 Johns. Ch. (N. Y.) 201; Mayne *v.* Griswold, 3 Sandf. (N. Y.) 479; Cohen *v.* Ellis, (Supm. Ct. Spec. T.) 16 Abb. N. Cas. (N. Y.) 320, *reversed* on other grounds, 4 N. Y. St. Rep. 721. See also Thompson *v.* Graham, 1 Paige (N. Y.) 384.

Oregon. — Smith *v.* Griswold, 6 Oregon 440. And see the title EQUITY, vol. 11, p. 202.

Compare Critchfield *v.* Porter, 3 Ohio 518.

1. Granting or Denying Relief a Matter of Discretion. — Clifford *v.* Brooke, 13 Ves. Jr. 134; Slim *v.* Croucher, 1 De G. F. & J. 527. See also Hoare *v.* Bremridge, L. R. 14 Eq. 522, *affirmed* L. R. 8 Ch. 22.

2. Relief in Equity Refused Except Where Remedy at Law Is Inadequate — *England.* — Clifford *v.* Brooke, 13 Ves. Jr. 131; Newham *v.* May, 13 Price 749.

United States. — Ambler *v.* Choteau, 107 U. S. 586; Ferson *v.* Sanger, 2 Ware (U. S.) 256, 8 Fed. Cas. No. 4,751; Buzard *v.* Houston, 119 U. S. 347. See also Russell *v.* Clark, 7 Cranch (U. S.) 89.

Alabama. — Youngblood *v.* Youngblood, 54 Ala. 486. *Compare* the remarks of Brickell, C. J., in Waddell *v.* Lanier, 62 Ala. 348.

Connecticut. — See Coe *v.* Turner, 5 Conn. 86.

Georgia. — Huff *v.* Ripley, 58 Ga. 11.

Illinois. — Gore *v.* Kramer, 117 Ill. 182.

Kentucky. — Hardwick *v.* Forbes, 1 Bibb (Ky.) 212; Cocke *v.* Hardin, Litt. Sel. Cas. (Ky.) 374; Blackwell *v.* Oldman, 4 Dana (Ky.) 195.

Michigan. — Teft *v.* Stewart, 31 Mich. 367; Mack *v.* Frankfort, 123 Mich. 421, *reviewing* earlier Michigan cases.

New York. — Bradley *v.* Bosley, 1 Barb. Ch. (N. Y.) 125, *per* Walworth, Ch.; Mayne *v.* Griswold, 3 Sandf. (N. Y.) 463, *per* Mason, J.; Bosley *v.* National Mach. Co., 123 N. Y. 555, *per* Earle, J.

It has been said that in such a case a court of equity has no jurisdiction, Blackwell *v.* Oldham, 4 Dana (Ky.) 195; but generally the jurisdiction is conceded and the only question is as to the propriety of its exercise. See the cases in the preceding note.

3. Youngblood *v.* Youngblood, 54 Ala. 490; Hardwick *v.* Forbes, 1 Bibb (Ky.) 213; Blackwell *v.* Oldham, 4 Dana (Ky.) 195; Taft *v.* Stewart, 31 Mich. 367; Mack *v.* Frankfort, 123 Mich. 421.

4. Mack *v.* Frankfort, 123 Mich. 421, *reviewing* earlier authorities.

5. Granting Both Legal and Equitable Relief — *United States.* — Boyce *v.* Grundy, 3 Pet. (U. S.) 210; Ferson *v.* Sanger, 2 Ware (U. S.) 256, 8 Fed. Cas. No. 4,751. See also Tyler *v.* Savage, 143 U. S. 79. *Compare* Buzard *v.* Houston, 119 U. S. 347.

Alabama. — Waddell *v.* Lanier, 62 Ala. 348.

Illinois. — See Jones *v.* Neely, 72 Ill. 449.

Indiana. — See Shaeffer *v.* Sleade, 7 Blackf. (Ind.) 178.

Iowa. — See Relf *v.* Eberly, 23 Iowa 467; Hosleton *v.* Dickinson, 51 Iowa 249.

Kentucky. — Cocke *v.* Hardin, Litt. Sel. Cas. (Ky.) 374, *per* Owsley, J.; Caldwell *v.* Caldwell, 1 J. J. Marsh. (Ky.) 53.

is entitled to any equitable relief as to the contract in which he has been defrauded, and if it is necessary for him to establish the fraud in order to obtain this relief, the court will grant him full and entire relief, notwithstanding that as to a part thereof he has a perfect remedy in an action for damages at law.[1]

bbb. **Denying Rescission but Giving Damages.** — Although in a given case a court of equity refuses to grant rescission of a contract procured by fraud because this relief would, under the circumstances, be inequitable (as where the parties cannot be placed *in statu quo*), still as the court has jurisdiction of the cause for the purpose of granting purely equitable relief it may proceed to do complete justice between the parties by making such a decree as the merits of the case will warrant, and thus it may give damages for the fraud, though this relief is purely legal.[2] Such a course is appropriate where the court of equity can grant the legal relief more expeditiously than a court of law; as where the complainant would have to bring separate actions at law to obtain the same relief that he can obtain by the single proceeding in equity.[3]

ccc. **Denying Both Rescission and Damages.** — It has been held, however, that where the court refuses to grant rescission it should not retain jurisdiction for the purpose of awarding damages, but should remit the complainant to his action at law unless it appears that his remedy in that tribunal would be inadequate.[4]

(d) **As Affected by Defense at Law** — *aa.* Rule that Defense at Law Is Ground for Denying Relief. — The principle that where courts of equity have concurrent jurisdiction with courts of law over matters of fraud, the existence of an adequate remedy at law will not prevent a court of chancery from granting relief, has in some decisions apparently been limited in its application to those cases where the remedy at law can be had only by an action or some other affirmative proceeding. Where the complainant in equity can successfully set up the fraud as a defense to the enforcement of the instrument or contract at law, it is held that a court of equity will not entertain jurisdiction, but will leave the complainant to his defense, unless it appears that the defense may not be as adequate and satisfactory as the remedy in equity.[5]

Maryland.— Taymon *v.* Mitchell, 1 Md. Ch. 496.

Massachusetts.— Davis *v.* Peabody, 170 Mass. 397.

Minnesota.— See Crump *v.* Ingersoll, 44 Minn. 84, 47 Minn. 179.

New York.— Bradley *v.* Bosley, 1 Barb. Ch. (N. Y.) 125, *per* Walworth, Ch.; Mayne *v.* Griswold, 3 Sandf. (N. Y.) 463; Cohen *v.* Ellis, (Supm. Ct. Spec. T.) 16 Abb. N. Cas. (N. Y.) 320, *reversed* on other grounds, 4 N. Y. St. Rep. 721; Bosley *v.* National Mach. Co., 123 N. Y. 555. See also Higgins *v.* Crouse, 63 Hun (N. Y.) 134; Bruner *v.* Meigs, 64 N. Y. 515.

Oregon.— Smith *v.* Griswold, 6 Oregon 440.

Texas.— See Moore *v.* Cross, (Tex. Civ. App. 1894) 26 S. W. Rep. 122.

Concurrent Jurisdiction under Massachusetts Statute.— Under Mass. Pub. Stat., c. 151, the remedy in equity to set aside and cancel a contract procured by fraud seems to be concurrent with the remedy at law so far as any plain and adequate legal remedy exists. Hence the fact that there is a remedy at law appears to be no longer any ground for refusing equitable relief. Nathan *v.* Nathan, 166 Mass. 294.

Where an Accounting Is Necessary to the complete administration of justice, the remedy in equity is more adequate than any which can be had at law, and the exercise of equitable jurisdiction is peculiarly appropriate. Waddell *v.* Lanier, 62 Ala. 348.

1. Ferson *v.* Sanger, 2 Ware (U. S.) 256, 8 Fed. Cas. No. 4,751; Bradley *v.* Bosley, 1 Barb. Ch. (N. Y.) 125.

2. Denying Equitable Relief but Retaining Jurisdiction to Give Damages. — Betts *v.* Gunn, 31 Ala. 219, Shaffeer *v.* Sleade, 7 Blackf. (Ind.) 184; Carroll *v.* Rice, Walk. (Mich.) 374; Holland *v.* Anderson, 38 Mo. 55. See generally the title Equity, vol. 11, p. 201.

3. Carroll *v.* Rice, Walk. (Mich.) 374.

4. Rescission Denied, Bill Not Retained for Damages. — Colyer *v.* Thompson, 2 T. B. Mon. (Ky.) 16; McCulloch *v.* Scott, 13 B. Mon. (Ky.) 172, 56 Am. Dec. 561; Robertson *v.* Hogshead, 3 Leigh (Va.) 667. But see Edwards *v.* Hanna, 5 J. J. Marsh. (Ky.) 18, which is in accord with the rule stated in the preceding subdivision.

5. Fraud Available as Defense at Law — Equitable Relief Denied — *England.*— Hoare *v.* Bremridge, L. R. 14 Eq. 522, *affirmed* L. R. 8 Ch. 22. *Compare* London, etc., Ins. Co. *v.* Seymour, L. R. 17 Eq. 85.

United States. — Phœnix Mut. L. Ins. Co. *v.* Bailey, 13 Wall. (U. S.) 623; Manchester F. Assur. Co. *v.* Stockton Combined Harvester, etc., Works, 38 Fed. Rep. 378.

Alabama. — Dickinson *v.* Lewis, 34 Ala. 638.

Minnesota. — Turnbull *v.* Crick, 63 Minn. 91.

New York. — Terry *v.* Horne, 59 Hun (N. Y.) 492.

Action Pending. — The denial of relief in such a case is considered even more appropriate where an action at law is pending upon the instrument against which relief is asked, since by interposing his defense to the action the complainant can have adequate protection.[1]

bb. Rule that Defense at Law Is No Ground for Denying Relief. — But although the fraud may be successfully pleaded as a defense to an action at law brought to enforce the contract, it has been held in a number of cases that the person defrauded is not confined to this mode of protection, but may maintain a bill in equity to rescind the contract and cancel the instrument.[2] And even where an action at law is pending to enforce the contract and the defense of fraud can be successfully interposed, it is held in cases of this class that the complainant in equity is not obliged to avail himself of this mode of protection, but is entitled to have the action enjoined.[3]

cc. Where Both Discovery and Relief Are Sought. — While there are cases in which a party's right to relief in equity depends upon his right to a discovery, and in which, when the discovery is waived, the whole foundation of equitable relief is taken away; yet the relief sought by way of rescission and cancellation in cases of fraud does not depend on discovery, but belongs to the original jurisdiction of the court of chancery.[4] On the other hand, although in cases of fraud the court of chancery has concurrent jurisdiction with courts of law, and where the complainant files a bill for relief against a fraudulent contract and for a discovery of the fraud, the court may proceed to grant relief, and make a final decree between the parties after such discovery has been obtained, yet the court will not, in a case of concurrent jurisdiction, grant an injunction against a pending action for the mere purpose of transferring the jurisdiction from a court of law, where no discovery is necessary, or after the defendant has fully answered the complainant's bill.[5] Likewise, although a court of equity may have jurisdiction to decree the surrender or cancellation of a promissory note, yet, where an action has been brought upon it and a bill is filed to aid the discovery, and such discovery is given, and the case appears to be such that the complainant has a defense at law and evidence to support it, an injunction which restrained such action will be dissolved, although the bill prays relief as well as discovery.[6]

(e) **Not Affected by Character of Property Involved — Sales of Chattels.** — While the aid of equity is sought most frequently where the contract relates to realty [7] or creates a mere personal liability unconnected with any particular property, yet, upon a proper case being made, equity will also rescind contracts relating

1. *England.* — Hoare *v.* Bremridge, L. R. 14 Eq. 522, *affirmed* L. R. 8 Ch. 22.

United States. — Phœnix Mut. L. Ins. Co. *v.* Bailey, 13 Wall. (U. S.) 616; Grand Chute *v.* Winegar, 15 Wall. (U. S.) 373; Manchester F. Assur. Co. *v.* Stockton Combined Harvester, etc., Works, 38 Fed. Rep. 378.

Alabama. — Dickinson *v.* Lewis, 34 Ala. 638.

Minnesota. — Turnbull *v.* Crick, 63 Minn. 91.

New York. — Crane *v.* Bunnell, 10 Paige (N. Y.) 341.

2. Relief Granted Notwithstanding Defense at Law. — Walker *v.* Hunter, 27 Ga. 336; Elder *v.* Allison, 45 Ga. 14, *approved* in Walters *v.* Eaves, 105 Ga. 587; John Hancock Mut. L. Ins. Co. *v.* Dick, 114 Mich. 337; Mactavish *v.* Kent Circuit Judge, 122 Mich. 242; Monmouth County Mut. F. Ins. Co. *v.* Hutchinson, 21 N. J. Eq. 107. See also Wright *v.* Hake, 38 Mich. 525; Crump *v.* Ingersoll, 44 Minn. 84, 47 Minn. 179.

3. Enjoining Pending Action. — Elder *v.* Allison, 45 Ga. 13 (action of ejectment by obligor in bond for title, enjoined at suit of obligee); John Hancock Mut. L. Ins. Co. *v.* Dick, 114 Mich. 337; Mactavish *v.* Kent Circuit Judge, 122 Mich. 242. See also Wright *v.* Hake, 38 Mich. 525.

In Elder *v.* Allison, 45 Ga. 16, it was said by the court, "While a defendant at law may, by his plea, set up any equitable defense he has to the action at law, he is not obliged to do so. If the rule that where there is an adequate remedy at law, equity has no jurisdiction, be applied to this extent, courts of equity would be abolished in Georgia."

4. Relief Not Dependent on Discovery. — Jones *v.* Bolles, 9 Wall. (U. S.) 364; Mayne *v.* Griswold, 3 Sandf. (N. Y.) 481.

5. Denying Injunction. — Crane *v.* Bunnell, 10 Paige (N. Y.) 333. See also Geer *v.* Kissam, 3 Edw. (N. Y.) 129; Russell *v.* Clark, 7 Cranch (U. S.) 89, *per* Marshall, C. J.

6. Geer *v.* Kissam, 3 Edw. (N. Y.) 129.

7. See the title Vendor and Purchaser.

to personal property, as, for instance, sales of chattels.[1] In cases of this character, however, the remedy at law is ordinarily adequate and complete, and rescission is generally effected by act of party which is frequently followed by an action at law.[2]

(7) *In Cases of Mistake* — (a) **General Principles.** — Where parties have apparently entered into a contract evidenced by a writing, but owing to a mistake their minds did not meet as to all the essential elements of the transaction, so that no real contract was made by them, then a court of equity will interpose to rescind and cancel the apparent contract as written, and to restore the parties to their former positions.[3] This relief may be granted although the apparent obligations of the parties have been fully performed.[4]

Mistake as to Authority of Agent. — The foregoing principle applies where one of the parties is acting as an agent, and prior to the transaction his authority is terminated by the death of his principal, this being unknown to both parties.[5]

Granting Legal Relief as Incident to Rescission for Mistake. — Where the jurisdiction of a court of equity has properly attached for the purpose of granting rescission for mistake, the court will proceed to do complete justice between the parties, although as to a part of the relief granted there may be an adequate remedy at law,[6] as, for instance, to recover purchase money paid under the supposed contract.[7]

(b) **Mistake by One Party Ground for Rescission, Not for Reformation** — *aa.* General Principles. — Where a contract in writing is executed under a mistake by only one of the parties as to a fact which is of the essence of the contract, the mistake constitutes a ground for a court of equity to rescind and cancel the apparent contract as written, and place the parties *in statu quo;*[8] but it does not constitute a ground for reformation; the reason being that by the mistake of one of the parties there was no mutual assent to all the terms of the contract — no meeting of the minds — and hence there is no prior contract to which the writing may be made to conform.[9] Where such a state of facts

1. Contracts of Sale Rescinded for Fraud. — Waters *v.* Mattingly, 1 Bibb (Ky.) 244, 4 Am. Dec. 631; Bradberry *v.* Keas, 5 J. J. Marsh. (Ky.) 446; Taymon *v.* Mitchell, 1 Md. Ch. 496. See also Hardwick *v.* Forbes, 1 Bibb (Ky.) 212.

2. See Hardwick *v.* Forbes, 1 Bibb (Ky.) 212; Teft *v.* Stewart, 31 Mich. 367. See generally the titles Fraud and Deceit, pp. 158, 164, 166 *et seq.*; Sales, *post.*

3. Rescission for Mistake Which Prevents Assent — *United States.* — Daniel *v.* Mitchell, 1 Story (U. S.) 172; Allen *v.* Hammond, 11 Pet. (U. S.) 63; Mutual L. Ins. Co. *v.* Pearson, 114 Fed. Rep. 395.

Alabama. — Scruggs *v.* Driver, 31 Ala. 274.

California. — Barfield *v.* Price, 40 Cal. 535; Goodrich *v.* Lathrop, 94 Cal. 56, 28 Am. St. Rep. 91.

Connecticut. — Callender *v.* Colegrove, 17 Conn. 1.

Mississippi. — Harrison *v.* Stowers, Walk. (Miss.) 165.

New York. — Belknap *v.* Sealey, 14 N. Y. 143, *affirming* 2 Duer. (N. Y.) 570; Paine *v.* Upton, 87 N. Y. 327, 41 Am. Rep. 371; Garrett Co. *v.* Halsey, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 438. See also Barnes *v.* Camack, 1 Barb. (N. Y.) 392.

Pennsylvania. — Whelen's Appeal, 70 Pa. St. 410.

Virginia. — Glassell *v.* Thomas, 3 Leigh (Va.) 113.

Wisconsin. — Hurd *v.* Hall, 12 Wis. 112.

Complainant Mistaken as to Legal Rights — Defendant Guilty of Inequitable Conduct — Relief Granted. — Clark *v.* Clark, 55 N. J. Eq. 814.

See also *infra*, this title, *Reformation — Limits of Power to Reform.* See generally the title Mistake, vol. 20, p. 805.

4. Performance No Bar to Relief. — Garrett Co. *v.* Halsey, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 438; Paine *v.* Upton, 87 N. Y. 327, 41 Am. Rep. 371; Glassell *v.* Thomas, 3 Leigh (Va.) 113.

5. Death of Principal Unknown to Agent and Other Party. — Scruggs *v.* Driver, 31 Ala. 274.

6. Legal Relief as Incident to Rescission. — Scruggs *v.* Driver, 31 Ala. 274.

The Civil Code of California, § 3408, makes provision for legal relief under such circumstances. Goodrich *v.* Lathrop, 94 Cal. 56, 28 Am. St. Rep. 91.

7. Decreeing Repayment of Purchase Money. — Scruggs *v.* Driver, 31 Ala. 274. See also the title Vendor and Purchaser.

8. Equity Will Rescind for Unilateral Mistake. — Werner *v.* Rawson, 89 Ga. 619; Rackemann *v.* Riverbank Imp. Co., 167 Mass. 1, 57 Am. St. Rep. 427; Keene *v.* Demelman, 172 Mass. 17; Nelson *v.* Carlson, 54 Minn. 90; Smith *v.* Mackin, 4 Lans. (N. Y.) 41; Crowe *v.* Lewin, 95 N. Y. 423; Ellison *v.* Beannabia, 4 Okla. 353. And see the cases the next note but one *infra.*

9. Werner *v.* Rawson, 89 Ga. 619; Smith *v.* Mackin, 4 Lans. (N. Y.) 41; Crowe *v.* Lewin, 95 N. Y. 423. And see the cases in the following note.

exists, and the mistaken party is seeking reformation of the written instrument, the court at the instance of the other party will treat the case as though no writing ever existed and will restore the parties to their original positions.[1] Sometimes, however, before granting this relief the court affords the party not mistaken the option to accept an alteration in the agreement — or, more accurately, a contract in the terms understood by the other party — instead of an annulment of the writing.[2]

bb. Mistake Subsequent to Inception of Contract. — Where the contract is complete before the mistake occurs, a different rule applies. Thus, where parties have entered into a valid oral contract, but in reducing it to writing, through the fraud of one party, and the mistake of the other, induced thereby, the writing fails to express their actual agreement, these matters may be ground for reforming the written instrument, but not for rescinding the contract; the reason being that the elements of fraud and mistake do not inhere in the contract itself, but only in the simulated written evidence thereof.[3]

(8) *In Cases of Breach of Contract* — (a) **General Principles.** — A bill for rescission cannot ordinarily be maintained where the ground of relief is merely a breach of contract for which the complainant can obtain adequate compensation in an action at law.[4] Courts of equity sometimes, however, exercise jurisdiction to rescind contracts upon the ground of a breach or nonperformance by the defendant, in cases where the plaintiff's remedy at law would be inadequate.[5] Cases of this class arise perhaps with the greatest frequency

1. *England.* — Paget *v.* Marshall, 28 Ch. D. 255. See also Harris *v.* Pepperell, L. R. 5, Eq. 1.

United States. — Hearne *v.* Marine Ins. Co., 20 Wall. (U. S.) 491; Moffett, etc., Co. *v.* Rochester, 178 U. S. 373, *reversing* (C. C. A.) 91 Fed. Rep. 28, and *affirming* 82 Fed. Rep. 255, which *cited* and *followed* 15 Am. and Eng. Encyc. of Law (1st ed.), p. 647.

Georgia. — Werner *v.* Rawson, 89 Ga. 619.

Illinois. — See Sutherland *v.* Sutherland, 69 Ill. 481; Douglas *v.* Grant, 12 Ill. App. 273.

Maryland. — Dulany *v.* Rogers, 50 Md. 524.

Rhode Island. — Diman *v.* Providence, etc., R. Co., 5 R. I. 130; Fehlberg *v.* Cosine, 16 R. I. 162.

Vermont. — Brown *v.* Lamphear, 35 Vt. 252.

2. Option to Accept Contract in Altered Terms. — Paget *v.* Marshall, 28 Ch. D. 255; Brown *v.* Lamphear, 35 Vt. 252. See also Keene *v.* Demelman, 172 Mass. 17; Harris *v.* Pepperell, L. R. 5 Eq. 1.

3. Mistake Merely in the Writing Not Ground for Rescission. — Stanek *v.* Libera, 73 Minn. 171.

4. Breach of Contract Not a Ground of Equitable Jurisdiction — *Alabama.* — Birmingham Warehouse, etc., Co. *v.* Elyton Land Co., 93 Ala. 549; Piedmont Land Imp. Co. *v.* Piedmont Foundry, etc., Co., 96 Ala. 389.

Colorado. — Shaw *v.* Horner, 7 Colo. App. 83.

Georgia. — See Davis *v.* Moorefield, 40 Ga. 185.

Florida. — Harrington *v.* Rutherford, 38 Fla. 321.

Indiana. — Shoup *v.* Cook, 1 Ind. 135.

Iowa. — Brainard *v.* Holsaple, 4 Greene (Iowa) 485; Leonard *v.* Smith, 80 Iowa 194. *Compare* McCorkell *v.* Karhoff, 90 Iowa 545.

Kansas. — Missouri River, etc., R. Co. *v.* Miami County, 12 Kan. 482.

New Jersey. — Young Lock Nut Co. *v.* Brownley Mfg. Co., (N. J. 1896) 34 Atl. Rep. 947.

Pennsylvania. — Bird's Appeal, 91 Pa. St. 70.

Tennessee. — Farrar *v.* Bridges, 3 Humph. (Tenn.) 566.

Texas. — Moore *v.* Cross, 87 Tex. 557.

Vermont. — Deveraux *v.* Cooper, 15 Vt. 88.

Virginia. — Robertson *v.* Hogshead, 3 Leigh (Va.) 667.

But see Kirby *v.* Harrison, 2 Ohio St. 326, 59 Am. Dec. 677; Wilson *v.* Roots, 119 Ill. 379.

Failure of Obligor to Comply with Condition of Title-bond. — Where a bond is executed for a conveyance of land, the failure of the obligor to comply with the conditions thereof constitutes no ground for the interference of a court of equity to cancel the instrument, since the penalty in the bond provides a remedy enforceable at law, and in all respects as full and complete as any that can be afforded in equity. Shoup *v.* Cook, 1 Ind. 135.

5. Rescission for Breach of Contract where Legal Remedy Inadequate — *United States.* — Farmers' L. & T. Co. *v.* Galesburg, 133 U. S. 156.

Georgia. — Savannah, etc., R. Co. *v.* Atkinson, 94 Ga. 780.

Illinois. — Frazier *v.* Miller, 16 Ill. 48; Wilson *v.* Roots, 119 Ill. 379; McClelland *v.* McClelland, 176 Ill. 83.

Kentucky. — Reeder *v.* Reeder, 89 Ky. 529; Harris *v.* Calmes, 100 Ky. 272.

Missouri. — Callahan *v.* Shotwell, 60 Mo. 398.

Nebraska. — Willard *v.* Ford, 16 Neb. 543.

New York. — Michel *v.* Hallheimer, 56 Hun (N. Y.) 416.

Oregon. — Anderson *v.* Hammon, 19 Oregon 446, 20 Am. St. Rep. 832.

Tennessee. — Steele *v.* Nashville, 10 Yerg. (Tenn.) 296.

Wisconsin. — Douglas County *v.* Walbridge, 38 Wis. 179.

See also *infra*, this section, *Adequacy of Legal Remedy or Defense.*

where the contract involves real estate. A full discussion of this branch of the law will be found elsewhere in this work.[1]

(b) **Conveyance in Consideration of Promise to Support Grantor.** — Where a person makes a conveyance of real estate in consideration of a promise by the grantee to support the grantor for life, it has frequently been held that upon the failure or refusal of the grantee to perform the agreement, a court of equity will grant relief by rescinding the contract and directing the cancellation of the deed, or a reconveyance.[2] But where the conditions of the conveyance are such as to give the grantor an adequate remedy at law, the court of chancery will decline to exercise jurisdiction.[3] And it has been held that where the agreement for support does not constitute a condition subsequent upon the breach of which the conveyance becomes void or voidable, the case presents nothing more than a plain breach of contract for which the grantor has a complete and adequate remedy by an action at law.[4]

b. CONDITIONS OF RELIEF — (1) *Introductory.* — There are a number of rules whereby courts of equity are guided and governed in granting the rescission of contracts. These rules are strongly analogous, and in fact some of them in the last analysis are merely repetitions in different language of others; all of them being founded upon the obvious principle that in granting rescission the court endeavors to undo what has been done by the parties, and to administer absolute justice and equity between them in so far as the circumstances of each particular case will permit.[5]

(2) *Whether Notice of Disaffirmance Necessary.* — It has been said in several cases that the party seeking the aid of a court of chancery to rescind a contract must have acted promptly in communicating to the other party the grounds of disaffirmance and his intention to take advantage thereof, and that such action on his part is a condition precedent to equitable relief.[6] While it is conceded that the foregoing rule is applicable to cases where the party has a right to rescind by his own act, and without the aid of equity,[7] yet where rescission is sought in equity, the rule of the best considered cases is that notice of disaffirmance by the complainant is not a prerequisite to relief, but that the institution of the suit constitutes sufficient notice of the complainant's election to rescind the contract, and no prior notice need be given.[8]

(3) *Placing Parties in Statu Quo* — (a) **General Principle.** — In decreeing the

1. See the title VENDOR AND PURCHASER.

2. **Agreement to Support Grantor for Life — Rescission for Breach by Grantee.** — Frazier *v.* Miller, 16 Ill. 48; Oard *v.* Oard, 59 Ill. 46; Kusch *v.* Kusch, 143 Ill. 353; Cooper *v.* Gum, 152 Ill. 471; McClelland *v.* McClelland, 176 Ill. 83; Fabrice *v.* Von der Brelie, 190 Ill. 460; Reeder *v.* Reeder, 89 Ky. 529; Lowman *v.* Crawford, 99 Va. 688; Morgan *v.* Loomis, 78 Wis. 594. See also Jenkins *v.* Jenkins, 3 T. B. Mon. (Ky.) 327. *Compare* Keltner *v.* Keltner, 45 Ky. 40.

3. **Adequate Legal Remedy.** — Davison *v.* Davison, 71 N. H. 180. *Compare* Lowman *v.* Crawford, 99 Va. 688.

4. Gardiner *v.* Knight, 124 Ala. 273.

Cases of the character indicated in the text are quite numerous and will be found fully discussed elsewhere in this work. See the title VENDOR AND PURCHASER.

5. See 2 Pomeroy Eq. Jur., § 910; Engeman *v.* Taylor, 46 W. Va. 713; Brown *v.* Norman, 65 Miss. 369, 7 Am. St. Rep. 663.

6. **Statement that Complainant Must Give Notice of Disaffirmance.** — Boyce *v.* Grundy, 3 Pet. (U. S.) 215; Stephenson *v.* Allison, 123 Ala. 447; Abel *v.* Cave, 3 B. Mon. (Ky.) 159; Disbrow *v.* Jones, Harr. (Mich.) 102; Carroll *v.* Rice, Walk. (Mich.) 373.

It is to be observed that in none of the cases just cited was the decision of the court based upon the statement mentioned. Thus in Boyce *v.* Grundy, 3 Pet. (U. S.) 215, rescission was granted; while in Carroll *v.* Rice, Walk. (Mich.) 373, and Disbrow *v.* Jones, Harr. (Mich.) 102, it appears that rescission was denied because, by the delay of the complainant in each case, the condition of the property involved had so changed that a restitution of the *status quo* was impossible; while in Stephenson *v.* Allison, 123 Ala. 447, it appears that the complainant had elected to affirm the contract after discovery of the fraud; and in Abel *v.* Cave, 3 B. Mon. (Ky.) 159, no ground of equitable jusisdiction was presented.

7. Higby *v.* Whittaker, 8 Ohio 201. And see *infra*, this section, *Rescission at Law or by Act of Party — Duties of Party Rescinding — To Give Notice of Disaffirmance.*

8. **Beginning of Suit Sufficient Notice of Disaffirmance.** — Herbert *v.* Stanford, 12 Ind. 503; Parker *v.* Simpson, 180 Mass. 334; Knappen *v.* Freeman, 47 Minn. 491; Nelson *v.* Carlson, 54 Minn. 90; Kirby *v.* Harrison, 2 Ohio St.

rescission of a contract the court endeavors to place the parties in the situation they occupied before the contract. So if no restitution has been made by the plaintiff, the court will, and indeed must, provide for it in the decree, so that the parties can be placed *in statu quo* so far as the merits of the case demand.[1]

(b) **Duty of Complainant to Make or Offer Restitution** — *aa.* In General. — It is generally held that the complainant in a suit for rescission must restore or offer to restore all benefits or things of value that he has received under the contract, to the end that the parties may be put *in statu quo;* this being required upon the principle that " he who seeks equity must do equity." [2]

bb. Whether Tender Is a Prerequisite to Suit. — Whether the complainant in a suit for rescission must, as a condition precedent to relief, have offered or tendered restitution to the defendant prior to the beginning of the suit, is a matter upon which the authorities are conflicting. The rule of the better considered cases is, that it is sufficient that the plaintiff makes his offer to restore or to do equity, in his bill or complaint, and shows therein that he has substantially preserved the *status quo* on his part so as to be able to fulfil his offer. This rule proceeds upon the principle that it is always within the power of a court of equity to require that the person invoking its aid shall submit to equitable terms as a condition of relief, and that the parties being properly before the court, the court may impose upon them any terms which may be just and equitable in the premises, and may enforce compliance therewith. It is conceded that the rule is different in actions at law based upon a rescission by the act of the party, but the distinction taken is based upon the difference in the powers of the two courts.[3] Similarly it has been

326, 59 Am. Dec. 677, *distinguishing* Higby *v.* Whittaker, 8 Ohio 201.

1. Placing Parties in Statu Quo — *Georgia.* — Miller *v.* Cotten, 5 Ga. 341.

Illinois. — Edmunds *v.* Myers, 16 Ill. 207; Wickiser *v.* Cook, 85 Ill. 68.

Kentucky. — Camplin *v.* Burton, 2 J. J. Marsh. (Ky.) 216; Keltner *v.* Keltner, 45 Ky. 40.

Maryland. — Griffith *v.* Frederick County Bank, 6 G. & J. (Md.) 424.

Minnesota. — Carlton *v.* Hulett, 49 Minn. 308.

Mississippi. — Powell *v.* Plant, (Miss. 1898) 23 So. Rep. 399; Johnson *v.* Jones, 13 Smed. & M. (Miss.) 580; White *v.* Trotter, 22 Miss. 30, 53 Am. Dec. 112.

Nebraska. — Miller *v.* Gunderson, 48 Neb. 715.

New York. — Mumford *v.* American L. Ins., etc., Co., 4 N. Y. 463; Harris *v.* Equitable L. Assur. Soc., 64 N. Y. 200; Kley *v.* Healy, 149 N. Y. 346, *affirming* 9 Misc. (N. Y.) 93, *reargument denied* 150 N. Y. 565; Halpin *v.* Mutual Brewing Co., 20 N. Y. App. Div. 583; Wilson *v.* Lawrence, 8 Hun (N. Y.) 593.

Ohio. — Williamson *v.* Moore, 2 Disney (Ohio) 30; Columbus, etc., R. Co. *v.* Steinfeld, 42 Ohio St. 449.

South Carolina. — McKenzie *v.* Sifford, 52 S. Car. 104.

Tennessee. — Wiley *v.* Heidell, 12 Heisk. (Tenn.) 98.

Wisconsin. — Grant *v.* Law, 29 Wis. 99.

See also the cases cited *infra*, this subdivision, *Whether Tender Is a Prerequisite to Suit.*

Where the Consideration Was Paid in Currency Which Has Depreciated in Value, restitution should be decreed in value, not in kind. Bodley *v.* McChord, 4 J. J. Marsh. (Ky.) 475, where the payment was made in "commonwealth paper."

2. Plaintiff Must Restore or Offer to Restore Benefits — *California.* — More *v.* Calkins, 85 Cal. 177; Barry *v.* St. Joseph's Hospital, (Cal. 1897) 48 Pac. Rep. 68.

Georgia. — Bowden *v.* Achor, 95 Ga. 243.

Illinois. — Maugle *v.* Yerkes, 187 Ill. 358, *affirming* 83 Ill. App. 310.

Indiana. — Teter *v.* Hinders, 19 Ind. 93.

Kansas. — State *v.* Williams, 39 Kan. 517.

Louisiana. — Walden *v.* City Bank, 2 Rob. (La.) 165; Tippett *v.* Jett, 3 Rob. (La.) 313; Latham *v.* Hickey, 21 La. Ann. 425; Lee *v.* Taylor, 21 La. Ann. 514; Ackerman *v.* McShane, 43 La. Ann. 507; Bryant *v.* Stothart, 46 La. Ann. 485.

Montana. — Waite *v.* Vinson, 14 Mont. 405.

New Hampshire. — Sanborn *v.* Batchelder, 51 N. H. 426.

New Jersey. — Doughten *v.* Camden Bldg., etc., Assoc., 41 N. J. Eq. 556; Henninger *v.* Heald, 52 N. J. Eq. 431.

New York. — Weill *v.* Malone, 91 Hun (N. Y.) 261, *affirmed* 159 N. Y. 523. See also Mumford *v.* American L. Ins., etc., Co., 4 N. Y. 463.

South Dakota. — Lovell *v.* McCaughey, 8 S. Dak. 471.

Texas. — Coddington *v.* Wells, 59 Tex. 49.

A Statute in South Dakota, Comp. Laws, § 3591, embodies the rule of the text. Lovell *v.* McCaughey, 8 S. Dak. 475.

3. Offer to Make Restitution Is Sufficient if Contained in Bill or Complaint — Distinction Between Rule at Law and Rule in Equity — *Alabama.* — Bailey *v.* Jordan, 32 Ala. 50; Garner *v.* Leverett, 32 Ala. 410; Martin *v.* Martin, 35 Ala. 560.

held that an offer of restitution in the bill or complaint is unnecessary, since the court may require restitution as a condition of relief.[1] In brief, restitution is not a condition precedent to the complainant's right to institute proceedings for rescission, but is a condition imposed by the court in granting relief and is based upon the equitable maxim that "he who seeks equity must do equity."[2] The distinction indicated has, however, sometimes been lost sight of, and it has been held accordingly that in order for a plaintiff to maintain a bill for rescission he must make restitution or an offer thereof before beginning his suit,[3] and that an offer at the trial does not constitute a compliance with this condition;[4] the rule in equity being held to be the same as at law.[5]

(c) **Where Parties Cannot Be Placed in Statu Quo** — *aa.* General Principle. — Since the object of rescission is to undo what the parties to the contract have done, and to restore them to their former positions, it may be stated as a general rule that a court of equity will not grant the rescission of a contract where the circumstances of the case are such that the parties cannot be placed in substantially the same situations they occupied when the contract was made.[6]

Indiana. — Shuee *v.* Shuee, 100 Ind. 477; Higham *v.* Harris, 108 Ind. 254. But see Teter *v.* Hinders, 19 Ind. 93.

Kansas. — Thayer *v.* Knote, 59 Kan. 181.

Massachusetts. — See Thomas *v.* Beals, 154 Mass. 51.

Minnesota. — Knappen *v.* Freeman, 47 Minn. 491; Nelson *v.* Carlson, 54 Minn. 90. See also Carlton *v.* Hulett, 49 Minn. 320.

Missouri. — Whelan *v.* Reilly, 61 Mo. 565; Paquin *v.* Milliken, 163 Mo. 79.

Montana. — Maloy *v.* Berkin, 11 Mont. 138.

New York. — Allerton *v.* Allerton, 50 N. Y. 670; Gould *v.* Cayuga County Nat. Bank, 86 N. Y. 79; Fisher *v.* Bishop, 108 N. Y. 30; Smith *v.* Howlett, 29 N. Y. App. Div. 182, *affirming* 21 Misc. (N. Y.) 386; Halpin *v.* Mutual Brewing Co., 20 N. Y. App. Div. 583; Littlejohn *v.* Leffingwell, 40 N. Y. App. Div. 13.

Texas.—Garza *v.* Scott, 5 Tex. Civ. App. 289.

Wisconsin. — O'Dell *v.* Burnham, 61 Wis. 562; Ludington *v.* Patton, 111 Wis. 211, *reviewing* earlier decisions.

The distinction indicated in the text remains unaffected by the New York Code. Gould *v.* Cayuga County Nat. Bank, 86 N. Y. 83.

Payment into Court Not a Prerequisite. — Whelan *v.* Reilly, 61 Mo. 565. But see Ackerman *v.* McShane, 43 La. Ann. 507.

For the Rule in Actions at Law, see *infra*, this section, *Rescission at Law or by Act of Party, — Duties of Party Rescinding — To Place Other Party in Statu Quo.*

Distinction as to Sales and Conveyances of Land. — In cases of conveyances of land where the question is whether the purchaser seeking rescission must first abandon possession, a distinction has been taken between cases where the ground of rescission is mistake or want of or defect in title, and those where fraud is the basis of relief. In the first class of cases, abandonment of possession is held essential unless retention is necessary for the reimbursement or indemnity of the plaintiff; but in the latter class, the purchaser need not abandon possession, but may simply submit to the jurisdiction of the court of chancery, which will properly adjust the equities between the parties. Bailey *v.* Jordan, 32 Ala. 50; Garner *v.* Leverett, 32 Ala. 410.

For a Full Discussion of this point, see the title Vendor and Purchaser.

1. Offer in Bill Not Essential — *England.* — Jervis *v.* Berridge, L. R. 8 Ch. 351; Barker *v.* Walters, 8 Beav. 92.

Massachusetts. — Thomas *v.* Beals, 154 Mass. 51.

Minnesota. — Knappen *v.* Freeman, 47 Minn. 491; Nelson *v.* Carlson, 54 Minn. 90.

New York. — Halpin *v.* Mutual Brewing Co., 20 N. Y. App. Div. 583; Daiker *v.* Strelinger, 28 N. Y. App. Div. 220.

Tennessee. — Wiley *v.* Heidell, 12 Heisk. (Tenn.) 98.

West Virginia. — Engeman *v.* Taylor, 46 W. Va. 714.

2. Brown *v.* Norman, 65 Miss. 369, 7 Am. St. Rep. 663; Paquin *v.* Milliken, 163 Mo. 105; Wiley *v.* Heidell, 12 Heisk. (Tenn.) 98; Engeman *v.* Taylor, 46 W. Va. 713.

3. Offer to Restore Held Condition Precedent. — State *v.* McCauley, 15 Cal. 458; Herman *v.* Haffenegger, 54 Cal. 161 (*following* Gifford *v.* Carvill, 29 Cal. 589, which was an action at law); Buena Vista Fruit, etc., Co. *v.* Tuohy, 107 Cal. 243; Kelley *v.* Owens, 120 Cal. 502; Latham *v.* Hicky, 21 La. Ann. 425; Lee *v.* Taylor, 21 La. Ann. 514; Bryant *v.* Stothart, 46 La. Ann. 485.

Bill or Complaint Must Allege or Contain Offer. — More *v.* Calkins, 85 Cal. 177; Buena Vista Fruit, etc., Co. *v.* Tuohy, 107 Cal. 243; Kelley *v.* Owens, 120 Cal. 502; Travelers Ins. Co. *v.* Redfield, 6 Colo. App. 190; Walden *v.* City Bank, 2 Rob. (La.) 165; Ackerman *v.* McShane, 43 La. Ann. 507.

4. Offer at Trial Insufficient. — Herman *v.* Haffenegger, 54 Cal. 161.

5. Distinction Between Rescission at Law and in Equity Disregarded. — Herman *v.* Haffenegger, 54 Cal. 161; Kelley *v.* Owens, 120 Cal. 510.

The rule of the *California* cases may be to some extent influenced by the provisions of the civil code relating to rescission of contracts. Cal. Civ. Code, §§ 1689, 1691. See Barry *v.* St. Joseph's Hospital, (Cal. 1897) 48 Pac. Rep. 68.

6. Placing in Statu Quo Impossible — *England.* — Sutherland *v.* Heathcote, (1892) 1 Ch. 475.

United States. — McNett *v.* Cooper, 13 Fed. Rep. 586.

If this cannot be done, the court will grant relief only where the clearest and strongest equity imperatively demands it.[1]

bb. Restitution Rendered Impossible by Act of Complainant. — Where the party seeking relief has by his own acts rendered restoration of the subject-matter or consideration impossible, rescission will generally be denied.[2] But where his inability to make restitution is not the result of his deliberate and wilful act, but occurs without any fault on his part, and justice can be done without requiring him to restore what he received, then rescission will be granted and the equities of the parties will be adjusted by the final decree.[3]

cc. Restitution Rendered Impossible by Act of Defendant. — The same considerations for denying relief do not apply in full force where complete restitution of the *status quo* has been rendered impossible by the act of the defendant. Under such circumstances rescission will be granted, and by compelling compensation or otherwise, justice will be done between the parties as the merits of the case may demand and the circumstances permit.[4] Where the impossibility of restoring the *status quo* results from the fraud or other wrongful act of the defendant without any fault attributable to the complainant, the application of the foregoing principle is peculiarly appropriate.[5]

Alabama. — Piedmont Land Imp. Co. *v.* Piedmont Foundry, etc., Co., 96 Ala. 393.

California. — State *v.* McCauley, 15 Cal. 431.

Illinois. — Naugle *v.* Yerkes, 187 Ill. 358, *affirming* 83 Ill. App. 310.

Indiana. — Shaeffer *v.* Sleade, 7 Blackf. (Ind.) 184; Watson Coal, etc., Co. *v.* Casteel, 68 Ind. 476.

Iowa. — Rynear *v.* Neilin, 3 Greene (Iowa) 315.

Kentucky. — Johnston *v.* Mitchell, 1 A. K. Marsh. (Ky.) 225; Lacey *v.* McMillen, 9 B. Mon. (Ky.) 525; Turner *v.* Clay, 3 Bibb (Ky.) 52.

Michigan. — Carroll *v.* Rice, Walk. (Mich.) 374; Merrill *v.* Wilson, 66 Mich. 232.

Minnesota. — Eastman *v.* St. Anthony Falls Water-Power Co., 24 Minn. 437.

Montana. — See Waite *v.* Vinson, 14 Mont. 405.

New Jersey. — Doughten *v.* Camden Bldg., etc., Assoc., 41 N. J. Eq. 556.

New York. — Daiker *v.* Strelinger, 28 N. Y. App. Div. 220.

North Carolina. — Stanton *v.* Hughes, 97 N. Car. 318.

Texas. — Navarro Pub. Co. *v.* Fishburn, 2 Tex. Unrep. Cas. 587. See also Kesler *v.* Zimmerschitte, 1 Tex. 50.

Under the Civil Code of California, sec. 3407, "rescission cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made." The words "same position," found in the section, are used with reference to the subject-matter of the contract, and the fact that the market value of the property may have depreciated while out of the possession of the vendor does not defeat the vendee's right of rescission. Goodrich *v.* Lathrop, 94 Cal. 58, 28 Am. St. Rep. 91. See also the title Vendor and Purchaser.

1. Grymes *v.* Sanders, 93 U. S. 55; Moore *v.* Reed, 2 Ired. Eq. (37 N. Car.) 580; Stearns *v.* Beckham, 31 Gratt. (Va.) 417.

2. Restitution Rendered Impossible by Act of Complainant — *Alabama.* — Betts *v.* Gunn, 31 Ala. 219.

Kentucky. — Durrett *v.* Simpson, 3 T. B. Mon. (Ky.) 525; Edwards *v.* Hanna, 5 J. J. Marsh. (Ky.) 27; Blackwell *v.* Oldham, 4 Dana (Ky.) 195.

Louisiana. — Blake *v.* Nelson, 29 La. Ann. 245.

Minnesota. — Whitcomb *v.* Hardy, 73 Minn. 285.

Mississippi. — Johnson *v.* Jones, 13 Smed. & M. (Miss.) 580.

New York. — Bruen *v.* Hone, 2 Barb. (N. Y.) 586; Myers *v.* King, 48 Hun (N. Y.) 106.

Pennsylvania. — Fryer *v.* Lishell, 84 Pa. St. 521.

Virginia. — Nalle *v.* Virginia Midland R. Co., 88 Va. 948.

3. Thackrah *v.* Haas, 119 U. S. 499; Hale *v.* Kobbert, 109 Iowa 128; Cohen *v.* Ellis, (Supm. Ct. Spec. T.) 16 Abb. N. Cas. (N. Y.) 320, *reversed* on other grounds, 4 N. Y. St. Rep. 721; Dawson *v.* Sparks, 1 Tex. Unrep. Cas. 735.

Lands Washed Away by River. — Where the contract sought to be rescinded was an exchange of lands, and a portion of the land for which the complainant traded had meanwhile been washed away by a river, it was held that the complainant's inability to make complete restitution was no bar to a rescission. Hale *v.* Kobbert, 109 Iowa 128.

4. Where Defendant Has Rendered Restitution Impossible. — Hopkins *v.* Snedaker, 71 Ill. 449; Durrett *v.* Simpson, 3 T. B. Mon. (Ky.) 525; Edwards *v.* Hanna, 5 J. J. Marsh. (Ky.) 27; Erickson *v.* Fisher, 51 Minn. 300; Brown *v.* Norman, 65 Miss. 369, 7 Am. St. Rep. 663; Hammond *v.* Pennock, 61 N. Y. 145; Cohen *v.* Ellis, (Supm. Ct. Spec. T.) 16 Abb. N. Cas. (N. Y.) 320, *reversed* on other grounds 4 N. Y. St. Rep. 721.

5. *Arkansas.* — Myrick *v.* Jacks, 33 Ark. 425.

Mississippi. — Brown *v.* Norman, 65 Miss. 369, 7 Am. St. Rep. 663.

Missouri. — Paquin *v.* Milliken, 163 Mo. 79.

New York. — Hammond *v.* Pennock, 61 N. Y. 145.

Oklahoma. — Ellison *v.* Beannabia, 4 Okla. 347.

(d) **When Restitution Unnecessary.** — The rule that a plaintiff seeking rescission must, as a condition of relief, restore to the defendant all benefits received under the contract is founded obviously upon the principle that "he who asks equity must do equity." Conversely, wherever under the circumstances of the particular case, restitution by the plaintiff is not essential to the complete administration of justice between the parties, it will not be required.[1] Thus, things of no value need not be restored.[2]

(4) *Rescinding Contract in Toto* — (a) **Where Contract Is Entire.** — Unless the contract in question is separable or divisible, it will be rescinded, as a general rule, only in its entirety. The court will not grant to a complainant rescission of so much of the contract as militates against his interest and allow him to retain the benefit of that portion which inures to his benefit or profit. This rule proceeds upon the same principle that requires that the parties be put *in statu quo*.[3] It is only extreme circumstances which will justify a court of equity in granting a partial rescission of an entire contract, and the case must be one in which the court can see that no possible injustice will be done by granting this relief.[4]

(b) **Where Contract Is Separable.** — Where the contract is divisible or separable into distinct parts, the injured party may maintain a suit in equity to rescind one part upon equitable terms, while adhering to another independent part.[5]

(5) *Coming into Equity with Clean Hands.* — A person seeking equitable relief by way of rescission and cancellation "must come into equity with clean hands," and if it appears that he was guilty of fraud in the transaction concerning which he asks relief, equity will give him no aid.[6] Although the

South Dakota. — Hilton *v.* Advance Thresher Co., 8 S. Dak. 413.

Under the circumstances indicated, tender of the value of the property received has been held sufficient. Meyer *v.* Fishburn, (Neb.) 91 N. W. 534.

1. Restitution Held Unnecessary. — Merritt *v.* Ehrman, 116 Ala. 278; Walling *v.* Thomas, 133 Ala. 426; Freeman *v.* Reagan, 26 Ark. 373; More *v.* More, 133 Cal. 489; Hale *v.* Kobbert, 109 Iowa 128; Pidcock *v.* Swift, 51 N. J. Eq. 405; Winter *v.* Kansas City Cable R. Co., 73 Mo. App. 173; Butler *v.* Prentiss, 158 N. Y. 49, *modifying* 91 Hun (N. Y.) 643; Coffee *v.* Ruffin, 4 Coldw. (Tenn.) 516. See also Campbell Printing Press, etc., Co. *v.* Marsh, 20 Colo. 22; Dawson *v.* Sparks, 1 Tex. Unrep. Cas. 750.

Thus, restitution of the consideration by the complainant is unnecessary where the defendant held out that he gave the consideration for one thing, but by fraud obtained an agreement (the contract in question) that the consideration was given for another thing. Ellison *v.* Beannabia, 4 Okla. 347.

2. Things of No Value. — Bishop *v.* Thompson, 196 Ill. 210. See also Freeman *v.* Reagan, 26 Ark. 373.

3. Rescission Must Be in Toto — *Alabama.* — Stephenson *v.* Allison, 123 Ala. 447.

California. — Buena Vista Fruit, etc., Co. *v.* Tuohy, 107 Cal. 243.

Illinois. — Stromberg *v.* Western Telephone Constr. Co., 86 Ill. App. 270.

Indiana. — Higham *v.* Harris, 108 Ind. 256.

Kentucky. — Johnston *v.* Mitchell, 1 A. K. Marsh. (Ky.) 225.

Michigan. — Merrill *v.* Wilson, 66 Mich. 232.

Minnesota.—Carlton *v.* Hulett, 49 Minn. 308.

Mississippi. — Commercial Bank *v.* Lewis, 13 Smed. & M. (Miss.) 226.

Missouri. — Fleckenstein *v.* Waters, 160 Mo. 249.

New Jersey. — Doughten *v.* Camden B. & L. Assoc., 41 N. J. Eq. 556.

New York. — Fisher *v.* Conant, 3 E. D. Smith (N. Y.) 199; Rosenbaum *v.* Gunter, 3 E. D. Smith (N. Y.) 205; Clarkson *v.* Mitchell, 3 E. D. Smith (N. Y.) 269; Francis *v.* New York, etc., El. R. Co., 108 N. Y. 93; Yeomans *v.* Bell, 151 N. Y. 230.

Pennsylvania. — Bird's Appeal, 91 Pa. St. 70.

Texas. — Coddington *v.* Wells, 59 Tex. 49.

Virginia. — Glassell *v.* Thomas, 3 Leigh (Va.) 113; Nalle *v.* Virginia Midland R. Co., 88 Va. 948.

Wisconsin. — Grant *v.* Law, 29 Wis. 99.

Rescission of Contract for Services. — Where a plaintiff in equity sues to rescind a contract calling for a performance of services by him, some of which services he has rendered, he cannot obtain a decree for the rescission of the contract and at the same time recover for the services rendered upon the express terms of the contract; he cannot rescind the contract in part, and affirm it in part. But in such a proceeding he is entitled to recover the reasonable value of his services in analogy to a count *quantum meruit*; provided, of course, that he makes the proper allegations in his complaint. Foster *v.* Landon, 71 Minn. 494.

4. Blackwell *v.* Oldham, 4 Dana (Ky.) 195; Lacey *v.* McMillen, 9 B. Mon. (Ky.) 523; Carlton *v.* Hulett, 49 Minn. 308; Bradley *v.* Bosley, 1 Barb. Ch. (N. Y.) 125. For cases of partial rescission, see Prewit *v.* Graves, 5 J. J. Marsh. (Ky.) 114; Ware *v.* Nesbit, 94 N. Car. 664; Fereber *v.* Hinton, 102 N. Car. 99.

5. Separable Contract May Be Partially Rescinded. — Higham *v.* Harris, 108 Ind. 256. See also Dawson *v.* Sparks, 1 Tex. Unrep. Cas. 735.

6. Complainant Guilty of Fraud — Relief Denied. — Barnes *v.* Starr, 64 Conn. 136; Fitzgerald *v.* Forristal, 48 Ill. 228; Farrow *v.* Hol-

party against whom rescission of a contract is asked may have been guilty of unfair dealing or fraud in inducing the other party to enter into the contract, yet if the party seeking relief has also been guilty of unfair dealing, a court of equity will not interfere on behalf of either, but will leave them in the condition in which it found them.[1]

c. INTERVENING RIGHTS OF THIRD PERSONS. — A court of equity will not, of course, rescind a contract as against the intervening rights of innocent third persons; such, for instance, as purchasers for value and without notice.[2] But the intervention of persons who have no equity superior to that of the complainant or who do not occupy the positions of purchasers for value and without notice, will not defeat the complainant's right to relief.[3]

d. WAIVER AND LACHES. — The general principles of waiver and laches apply in suits for rescission.[4] The complainant must have been diligent in seeking his remedy, and must not have slept upon his rights; and if with knowledge of the facts which give him a right to seek rescission he has been guilty of an unreasonable and unnecessary delay in availing himself of his remedy, a court of equity will deny him relief.[5] Similarly any conduct of the complainant sufficient to show an election by him to affirm the contract or abide by its obligations will ordinarily be sufficient to bar his right to rescission.[6] The waiver of the right to rescind may be implied from conduct inconsistent with an intention to exercise the right; such as acquiescence in the transaction for an unreasonable length of time.[7]

land Trust Co., 74 Hun (N. Y.) 585; Bolt *v.* Rogers, 3 Paige (N. Y.) 54.

1. Lynch's Appeal, 97 Pa. St. 349; Bolt *v.* Rogers, 3 Paige (N. Y.) 54; Wilson *v.* Watts, 9 Md. 356; Overshiner *v.* Wisehart, 59 Ind. 135.

2. Rights of Innocent Third Persons. — Lawson *v.* Conolly, 51 La. Ann. 1753; Navarro Pub. Co. *v.* Fishburn, 2 Tex. Unrep. Cas. 587; Kesler *v.* Zimmerschitte, 1 Tex. 50. See also Travis's Appeal, (Pa.) 8 Atl. Rep. 601; Deitra *v.* Kestner, 147 Pa. St. 566; Meyers *v.* Merrillion, 118 Cal. 352; and the titles FRAUD AND DECEIT, vol. 14, p. 163; VENDOR AND PURCHASER.

3. Persons Not Bona Fide Purchasers.—Baker *v.* Lever, 67 N. Y. 304, 23 Am. Rep. 117; Thomas *v.* Sweet, (Ky. 1901) 63 S. W. Rep. 787; Taylor *v.* National Bank, 6 S. Dak. 511. See also Woolson *v.* Kelley, 73 Minn. 513. As to who are *bona fide* purchasers, see the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 472, and cross-references there given.

4. See the titles LACHES, vol. 18, p. 95; WAIVER AND ABANDONMENT.

5. Relief Denied for Laches — *United States.* — Hayward *v.* Eliot Nat. Bank, 96 U. S. 611.

Alabama. — Foster *v.* Gressett, 29 Ala. 393; Betts *v.* Gunn, 31 Ala. 219; Manning *v.* Pippen, 95 Ala. 537; Coleman *v.* Decatur First Nat. Bank, 115 Ala. 307; Allgood *v.* Piedmont Bank, 115 Ala. 418; Dean *v.* Oliver, 131 Ala. 634.

California. — Barfield *v.* Price, 40 Cal. 535.

Connecticut. — Barnes *v.* Starr, 64 Conn. 158.

District of Columbia. — Warner *v.* Jackson, 7 App. Cas. (D. C.) 211.

Indiana. — Shaeffer *v.* Sleade, 7 Blackf. (Ind.) 185; Cain *v.* Guthrie, 8 Blackf. (Ind.) 409; Watson Coal, etc., Co. *v.* Casteel, 68 Ind. 476.

Kentucky. — Lacey *v.* McMillen, 9 B. Mon. (Ky.) 525.

Michigan.—Carroll *v.* Rice, Walk. (Mich. 374.

Rhode Island. — Diman *v.* Providence, etc., R. Co., 5 R. I. 130.

Washington. — Thomas *v.* McCue, 19 Wash. 293.

Wisconsin. — Booth *v.* Ryan, 31 Wis. 45.

This rule is peculiarly applicable where the ground of rescission is a mistake of the complainant which was unknown to the defendant, and the complainant by his neglect and delay suffers the defendant to incur obligations upon the faith of the contract. Diman *v.* Providence, etc., R. Co., 5 R. I. 130.

6. Conduct Showing Affirmance — *United States.* — Grymes *v.* Sanders, 93 U. S. 55; Hayward *v.* Eliot Nat. Bank, 96 U. S. 611; McLean *v.* Clapp, 141 U. S. 429.

Alabama. — Foster *v.* Gressett, 29 Ala. 393; Betts *v.* Gunn, 31 Ala. 219; Stephenson *v.* Allison, 123 Ala. 439; Walling *v.* Thomas, 133 Ala. 430.

Illinois. — Naugle *v.* Yerkes, 187 Ill. 358.

Kentucky. — Colyer *v.* Thompson, 2 T. B. Mon. (Ky.) 18; Blackwall *v.* Oldham, 4 Dana (Ky.) 195; McCulloch *v.* Scott, 13 B. Mon. (Ky.) 172, 56 Am. Dec. 561.

Michigan. — Bedier *v.* Reaume, 95 Mich 518.

Minnesota. — Whitcomb *v.* Hardy, 73 Minn. 285.

New York. — Rosenbaum *v.* Gunter, 3 E. D. Smith, (N. Y.) 203.

Washington. — Thomas *v.* McCue, 19 Wash. 293.

Wisconsin. — Booth *v.* Ryan, 31 Wis. 45.

Bringing Suit for Specific Performance.—Where a vendor in his lifetime brought suit for specific performance, it was held that he had elected to affirm the sale and that after his death his heirs could not maintain a suit for rescission. Coddington *v.* Wells, 59 Tex. 49.

Bringing Action for Unpaid Purchase Money Held an Affirmance. — Merrill *v.* Wilson, 66 Mich. 232.

7. Walling *v.* Thomas, 133 Ala. 430; Thomas *v.* McCue, 19 Wash. 293.

What Is "Reasonable Time" for Disaffirmance. — What is a reasonable time within which the party must manifest his election to disaffirm a contract cannot be definitely stated as a matter of law, but it is a question of fact which must be determined in the light of the circumstances of each particular case in which the question arises.[1]

Explaining Delay. — Mere delay in seeking to enforce the right to rescind may be so explained as to show that it was not an acquiescence.[2]

Knowledge of Right Essential. — Neither laches, waiver, nor acquiescence can be predicated upon mere delay where the complainant did not have knowledge of the facts giving him the right to ask rescission; and no conduct of his which otherwise might be sufficient to show an election to abide by the contract can be so construed if at the time he was ignorant of his rights.[3]

The Burden of Proving Knowledge by the complainant of the facts giving rise to his right of relief, and of proving the time when he acquired this knowledge, so as to show an acquiescence, rests upon the defendant.[4]

e. EFFECT OF RESCISSION. — The effect of the rescission of a contract is to place the parties in the same position as if it had never been made; and all rights which are transferred, released, or created by the agreement are revested, restored, or discharged by the avoidance.[5]

2. Cancellation in Equity Quia Timet — *a.* JURISDICTION. — The jurisdiction of courts of equity to grant the rescission of contracts has already been adverted to.[6] Very similar in its nature is the jurisdiction exercised in decreeing the surrender and cancellation of written instruments on the principle *quia timet*. The power of courts of equity, or of courts exercising equitable powers, to grant relief of this character, is well settled, and is a branch of the preventive or protective jurisdiction of chancery.[7] Indeed, the cancellation

1. Reasonable Time for Disaffirmance a Question of Fact. — Foster *v.* Gressett, 29 Ala. 393; Walling *v.* Thomas, 133 Ala. 430.

The Nature of the Property Involved in the transaction is an important consideration in this connection; as where the property is subject to fluctuations in value. Grymes *v.* Saunders, 93 U. S. 55; Thomas *v.* McCue, 19 Wash. 294.

2. Delay May Be Explained. — Walling *v.* Thomas, 133 Ala. 430.

3. Delay Without Knowledge of Right to Rescind. — Bishop *v.* Thompson, 196 Ill. 209; Paquin *v.* Milliken, 163 Mo. 79; Baker *v.* Lever, 67 N. Y. 304, 23 Am. Rep. 117; Smith *v.* Howlett, 29 N. Y. App. Div. 182, *affirming* 21 Misc. (N. Y.) 386; Cohen *v.* Ellis, (Supm. Ct. Spec. T.) 16 Abb. N. Cas. (N. Y.) 320, *reversed* on other grounds 4 N. Y. St. Rep. 721; Dawson *v.* Sparks, 1 Tex. Unrep. Cas. 736; Engeman *v.* Taylor, 46 W. Va. 715. See also Mankin *v.* Mankin, 91 Iowa 406.

4. Burden of Proof. — Engeman *v.* Taylor, 46 W. Va. 715.

5. Effect of Rescission. — Whelan *v.* Whelan, 3 Cow. (N. Y.) 577; Gould *v.* Cayuga County Nat. Bank, 86 N. Y. 80.

6. See *supra*, this section, *Rescission in Equity — Jurisdiction and Its Exercise — Principle Stated.*

7. Jurisdiction of Equity to Cancel Instruments Quia Timet — *England.* — Bromley *v.* Holland, Coop. t. Eld. 9; Cooper *v.* Joel, 27 Beav. 313, *affirmed* 1 De G. F. & J. 240; Hoare *v.* Bremridge, L. R. 14 Eq. 522, *affirmed* L. R. 8 Ch. 22.

United States. — Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552; Mutual L. Ins. Co. *v.* Pearson, 114 Fed. Rep. 395.

Alabama. — Merritt *v.* Ehrman, 116 Ala. 278.

California. — Lewis *v.* Tobias, 10 Cal. 574.

Connecticut. — Ferguson *v.* Fisk, 28 Conn. 501.

Georgia. — Butler *v.* Durham, 2 Ga. 413.

Indiana. — Fitzmaurice *v.* Mosier, 116 Ind. 363, 9 Am. St. Rep. 854.

Massachusetts. — Commercial Mut. Ins. Co. *v.* McLoon, 14 Allen (Mass.) 351; Fuller *v.* Percival, 126 Mass. 383; Nathan *v.* Nathan, 166 Mass. 294.

Missouri. — Barrington *v.* Ryan, 88 Mo. App. 85.

New Jersey. — Cornish *v.* Bryan, 10 N. J. Eq. 151; Metler *v.* Metler, 18 N. J. Eq. 270, *affirmed* 19 N. J. Eq. 457; Monmouth County Mut. F. Ins. Co. *v.* Hutchinson, 21 N. J. Eq. 107; Paterson *v.* Baker, 51 N. J. Eq. 49; Smith *v.* Smith, 30 N. J. Eq. 564; Young Lock Nut Co. *v.* Brownley Mfg. Co., (N. J. 1896) 34 Atl. Rep. 947.

New York. — Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 517; Thompson *v.* Graham, 1 Paige (N. Y.) 384; McEvers *v.* Lawrence, Hoffm. (N. Y.) 176, *affirmed* 2 Ch. Sent. (N. Y.) 25; Wilkes *v.* Wilkes, 4 Edw. (N. Y.) 634; McHenry *v.* Hazard, 45 N. Y. 580; Becker *v.* Church, 115 N. Y. 562, *affirmed* 42 Hun (N. Y.) 258; Livingston *v.* Moore, 15 N. Y. App. Div. 15, *appeal dismissed*, 161 N. Y. 602.

Pennsylvania. — Wilson *v.* Getty, 57 Pa. St. 266; Ginsberg *v.* Rubinowitz, 20 Pa. Co. Ct. 230.

Wisconsin. — Douglas County *v.* Walbridge, 38 Wis. 179.

See also the cases *infra* throughout this subsection.

of a written instrument evidencing a contract or other civil obligation can be compelled by no other tribunal than a court of chancery, and this power has always been considered as belonging to the exclusive jurisdiction of equity.[1]

b. PRINCIPLES GOVERNING EXERCISE OF JURISDICTION — (1) *General Principle of Equitable Relief* — (a) **Principle Stated.** — Where a written instrument is apparently valid upon its face, but by reason of extrinsic matters its enforcement would be inequitable, and it appears that these matters would not constitute a valid defense to the instrument at law, but would in equity; or if the defense is available at law but is inadequate, or actions are likely to be brought upon the instrument at some future time when by reason of the intentional delay of the plaintiff at law or otherwise, the evidence to support the defense may be impaired or lost, and the person apparently liable on the instrument may thus be subjected to unjust and vexatious demands or litigations; then a court of equity will interfere and order the instrument to be delivered up for cancellation, this relief being granted upon the principle *quia timet*.[2]

(b) **Fundamental Basis of Relief.** — Although it is obvious that the exercise of equitable jurisdiction to cancel an instrument *quia timet* may, in a given case, be rendered more appropriate by reason of the fact that the instrument was procured by fraud,[3] yet the granting of relief is not dependent upon the

1. Cancellation Within Exclusive Jurisdiction of Equity — *United States.* — Jones *v.* Bolles, 9 Wall. (U. S.) 369; Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552; Smythe *v.* Henry, 41 Fed. Rep. 710.

Alabama. — Luffboro *v.* Foster, 92 Ala. 479; Merritt *v.* Ehrman, 116 Ala. 278.

Massachusetts. — Nathan *v.* Nathan, 166 Mass. 295.

Missouri. — Barrington *v.* Ryan, 88 Mo. App. 85.

New Jersey. — Metler *v.* Metler, 18 N. J. Eq. 270, *affirmed* 19 N. J. Eq. 457.

New York. — Apthorpe *v.* Comstock, Hopk. (N. Y.) 143, *affirmed* 8 Cow. (N. Y.) 386.

Under Pub. Gen. Laws Md. (1900), art. 75, § 83, allowing equitable defenses to be interposed to actions at law, the distinction between courts of law and courts of equity is not destroyed; and where an action at law is brought upon a written instrument, the court has no power to cancel the instrument even upon the ground of fraud. Conner *v.* Groh, 90 Md. 674.

But under the California Code of Civil Procedure, § 307, the cancellation of an instrument procured by fraud may be obtained in an action of deceit upon the transaction in which the instrument was given. Barbour *v.* Flick, 126 Cal. 629.

2. General Grounds for Cancellation Quia Timet — *England.* — Bromley *v.* Holland, 7 Ves. Jr. 3, Coop. t. Eld. 9; Cooper *v.* Joel, 27 Beav. 313, *affirmed* 1 De G. F. & J. 240; Winchester *v.* Fournier, 2 Ves. 445.

United States. — Mutual L. Ins. Co. *v.* Pearson, 114 Fed. Rep. 395; U. S. Life Ins. Co. *v.* Cable, (C. C. A.) 98 Fed. Rep. 761.

Alabama. — Luffboro *v.* Foster, 92 Ala. 497; Merritt *v.* Ehrman, 116 Ala. 278.

Connecticut.—Ferguson *v.* Fisk, 28 Conn. 501.

Georgia. — Walker *v.* Hunter, 27 Ga. 336.

Massachusetts. — Fuller *v.* Percival, 126 Mass. 382.

Michigan. — Maclean *v.* Fitzsimons, 80 Mich. 336.

New Jersey. — Cornish *v.* Bryan, 10 N. J. Eq. 151; Metler *v.* Metler, 18 N. J. Eq. 270, *affirmed* 19 N. J. Eq. 457; Smith *v.* Smith, 30 N. J. Eq. 564; Paterson *v.* Baker, 51 N. J. Eq. 49.

New York. — Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 517; McEvers *v.* Lawrence, Hoffm. (N. Y.) 176, *affirmed* 2 Ch. Sent. (N. Y.) 25; McHenry *v.* Hazard, 45 N. Y. 580; Mentz *v.* Cook, 108 N. Y. 504; Becker *v.* Church, 115 N. Y. 562, *affirming* 42 Hun (N. Y.) 258.

Ohio. — Duhme *v.* Mehner, 6 Ohio Cir. Dec. 79.

Pennsylvania. — Wilson *v.* Getty, 57 Pa. St. 266; Ginsberg *v.* Rubinowitz, 20 Pa. Co. Ct. 230.

Tennessee. — Maise *v.* Garner, Mart. & Y. (Tenn.) 383, 17 Am. Dec. 817; Craig *v.* McKnight, 108 Tenn. 690.

In California the cancellation of instruments is now regulated by express statutory provisions. Civil Code Cal., §§ 3412, 3413, 3414. For construction, see Ingram *v.* Smith, 83 Cal. 234; Bradley *v.* Anglo-American Gas Control Co., 102 Cal. 627.

Nature of Bill Quia Timet. — See in the ENCYCLOPÆDIA OF PLEADING AND PRACTICE the title BILLS QUIA TIMET, vol. 3, p. 599.

Cancellation to Prevent Inequitable Use of Mortgage Contrary to Will of Equitable Owner. — Where a *cestui que trust* directed in his will that a mortgage held in trust by a nominal mortgagee should be canceled, and after the testator's death the mortgage was assigned to a person having knowledge of the foregoing facts, it was held that this attempt to put the mortgage in circulation was contrary to equity, and that a decree directing the cancellation and discharge of the mortgage was right and proper. Gibbins *v.* Campbell, 148 N. Y. 410, *affirming* (Supm. Ct. Gen. T.) 50 N. Y. St. Rep. 855.

Instrument Need Not Be Signed by Defendant. — Cancellation of an instrument may be decreed though it has not been signed by the defendant. Roy *v.* Haviland, 12 Ind. 364.

3. Where Fraud an Element of Ground for Relief. — See *infra*, this section, (*hh*) *Where Instrument Was Procured by Fraud.*

existence of either fraud, accident, or mistake, but has its foundation in the broad principle that a court of equity will not permit the unconscientious and unjust exercise of a legal right available at the common law.[1]

(2) *Case Presented Must Conform to Bill Quia Timet.* — The principle upon which a court of equity grants relief in cases of this character being that of a bill *quia timet*, the grounds of relief in a given case must be sufficient within this principle or relief will be denied.[2]

(3) *Relief Discretionary* — (a) **Principle Stated.** — While the general jurisdiction of courts of equity to grant relief by way of cancellation is unquestionable, yet whether the court in a given case will exercise jurisdiction is a matter not always free from doubt. It is a fundamental principle, however, that the exercise of jurisdiction in cases of this character does not depend upon the absolute right of the party seeking relief, as in case of an action at law upon a contract or for a tort, but rests primarily in the sound discretion of the court;[3] and upon this principle many apparently conflicting decisions may be reconciled.[4]

(b) **Nature of the Discretion.** — The discretion indicated is not arbitrary and capricious, but is a sound and reasonable discretion, *secundum arbitrium boni judicis*,[5] and should be exercised with great caution.[6]

(c) **Exercise of Discretion as a Matter of Precedent.** — The exercise of this discretionary power being invoked with frequency and under varieties of circumstances, the courts of chancery, in determining whether relief ought to be granted in particular cases, have in the main proceeded upon the general principles of equity jurisprudence, with the result that the precedents established in cases where relief by way of cancellation was sought have become a body of rules whereby the courts are guided and controlled in administering this kind of equitable relief; and these rules are perhaps in substantial conformity to the principles obtaining in other branches of equity

1. Relief Not Dependent upon Existence of Fraud, etc. — Butler *v.* Durham, 2 Ga. 413; Cornish *v.* Bryan, 10 N. J. Eq. 146. See also Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 517; Mutual L. Ins. Co. *v.* Pearson, 114 Fed. Rep. 395; Dull's Appeal, 113 Pa. St. 510; Slegel *v.* Lauer, 148 Pa. St. 236; O'Connell *v.* O'Conor, 191 Ill. 215.

2. Cancellation Granted Only on Ground Quia Timet — *California* — Lewis *v.* Tobias, 10 Cal. 576; Shain *v.* Belvin, 79 Cal. 262.

Georgia. — Butler *v.* Durham, 2 Ga. 413.

Massachusetts. — Anthony *v.* Valentine, 130 Mass. 119.

New Jersey. — Metler *v.* Metler, 18 N. J. Eq. 270, *affirmed* 19 N. J. Eq. 457; Shotwell *v.* Shotwell, 24 N. J. Eq. 378.

New York. — Field *v.* Holbrook, (N. Y. Super. Ct. Gen. T.) 14 How. Pr. (N. Y.) 103.

Ohio. — Quebec Bank *v.* Weyand, 30 Ohio St. 131.

Vermont. — Bellows Falls Bank *v.* Rutland, etc., R. Co., 28 Vt. 481.

3. Exercise of Jurisdiction Discretionary — *England.* — Clifford *v.* Brooke, 13 Ves. Jr. 134, *per* Erskine, L. Ch.; Hoare *v.* Bremridge, L. R. 14 Eq. 522, *affirmed* L. R. 8 Ch. 22.

United States. — Home Ins. Co. *v.* Stanchfield, 2 Abb. (U. S.) 1, 12 Fed. Cas. No. 6,660; Mutual L. Ins. Co. *v.* Pearson, 114 Fed. Rep. 395.

California. — Lewis *v.* Tobias, 10 Cal. 574; Smith *v.* Sparrow, 13 Cal. 597.

Georgia. — Butler *v.* Durham, 2 Ga. 413.

Illinois. — O'Connell *v.* O'Conor, 191 Ill. 215.

Maine. — Farmington *v.* Sandy River Nat. Bank, 85 Me. 46; Loggie *v.* Chandler, 95 Me. 220.

New Jersey. — Cornish *v.* Bryan, 10 N. J. Eq. 151.

New York. — Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 517; Venice *v.* Woodruff, 62 N. Y. 467, 20 Am. Rep. 495; Fowler *v* Palmer, 62 N. Y. 533; Springport *v.* Teutonia Sav. Bank, 75 N. Y. 397; Globe Mut. L. Ins. Co. *v.* Reals, 79 N. Y. 202; Becker *v.* Church, 115 N. Y. 562; Calhoun *v.* Millard, 121 N. Y. 69.

Vermont. — Bellows Falls Bank *v.* Rutland, etc., R. Co., 28 Vt. 470.

Wisconsin. — Douglas County *v.* Walbridge, 38 Wis. 101.

General Rules of Equity Not Controlling. — It has been said that the exercise of jurisdiction in cases of this character is not controlled by any general rules. Becker *v.* Church, 115 N. Y. 566, *per* Gray, J.

4. Conflicting Decisions Reconcilable on Ground of Judicial Discretion. — Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 517, *per* Chancellor Kent. See also Home Ins. Co. *v.* Stanchfield, 2 Abb. (U. S.) 1, 12 Fed. Cas. No. 6,660.

5. Discretion Not Arbitrary or Capricious. — Butler *v.* Durham, 2 Ga. 422; Calhoun *v.* Millard, 121 N. Y. 77; Bellows Falls Bank *v.* Rutland, etc., R. Co., 28 Vt. 470; Douglass County *v.* Walbridge, 38 Wis. 191.

6. Discretionary Power Should Be Exercised with Caution. — Butler *v.* Durham, 2 Ga. 413; Farmington *v.* Sandy River Nat. Bank, 85 Me. 46; Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 517,

jurisprudence.[1] But in the application of these rules to particular cases the element of judicial discretion has played no unimportant part, with the result that in many instances the precedents established by various courts are in apparent conflict and perhaps can be reconciled on no other theory than that the granting or denying of relief was based not so much on principle as on discretion.[2] These instances are discussed in their appropriate places throughout this section.

(4) *Particular Grounds for Granting or Denying Relief* — (a) **Defense Available Only in Equity.** — Where a written instrument is upon its face apparently valid, but by reason of matters *dehors* the writing its enforcement at law would be inequitable, and the facts which are relied upon to show its invalidity would not constitute a valid defense to an action on the instrument at law, a court of equity clearly has jurisdiction to decree the cancellation of the instrument at the suit of the party who would be affected by its enforcement, and the granting of such relief is right and proper.[3]

(b) **Defense Available at Law** — *aa.* Apparent Conflict of Authority. — The exercise of jurisdiction by a court of equity in setting aside and cancelling instruments to the enforcement of which at law some valid defense exists is a matter apparently involved in some confusion.[4]

bb. Distinction Between Instruments Affecting Title to Land and Those Creating Mere Personal Liability. — A distinction has been pointed out, however, between the exercise of jurisdiction as to those instruments which create merely a personal claim against the complainant in equity, and as to those which affect his property, especially his real estate.[5] In a suit to cancel an instrument which creates a mere personal claim the question whether the court will grant relief where there is a complete defense to the enforcement of the instrument at law, was formerly the subject of considerable diversity of opinion. In some cases the court refused to exercise jurisdiction;[6] but in several other cases relief was granted.[7] In cases where the instrument sought to be canceled affects or may affect the title to the complainant's real estate, the fact that a valid legal defense might be established to the enforcement of the instrument at law appears never to have been regarded as a sufficient reason for refusing to grant equitable relief.[8] This line of cases will be found fully discussed elsewhere in this work.[9] The distinction between the two classes of instruments in respect to granting relief was recognized at a comparatively early

1. Calhoun *v.* Millard, 121 N. Y. 77, *per* Andrews, J. And see generally the discussion *infra* throughout this section.

2. See the remarks of Chancellor Kent in Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 517. See also Home Ins. Co. *v.* Stanchfield, 2 Abb. (U. S.) 1, 12 Fed. Cas. No. 6,660.

3. **Cancellation Where Defense Available Only in Equity.** — Cooper *v.* Joel, 27 Beav. 313, *affirmed* 1 De G. F. & J. 240; Bromley *v.* Holland, Coop. t. Eld. 9; Hamilton *v.* Cummings, 1 Johns Ch. (N. Y.) 517; Reed *v.* Newburgh Bank, 1 Paige (N. Y.) 215.

Action on Bond — Receipt Not Admissible in Evidence at Law. — So where the matter which is relied upon as the defense to a bond is a receipt which cannot be admitted in evidence as a defense to an action at law, but which forms a matter of defense *dehors* the bond and is good in equity, and an action at law is pending on the bond, the court will order the bond to be delivered up to be canceled, and thus protect the plaintiff from the claim set up at law. Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 517.

4. See the remarks of Selden, J., in Ward *v.* Dewey, 16 N. Y. 525.

See also Home Ins. Co. *v.* Stanchfield, 2 Abb. (U. S.) 1, 12 Fed. Cas. No. 6,660, where it is said, *per* Dillon, J., that the early cases on this point "are entitled to very little respect as authority."

5. See Ward *v.* Dewey, 16 N. Y. 525, *per* Selden, J.

6. **Early Decisions — Instruments Creating Mere Personal Claim — Cancellation Refused.** — Ryan *v.* Mackmath, 3 Bro. C. C. 15; Colman *v.* Sarrel, 1 Ves. Jr. 50.

7. **Same — Cancellation Granted.** — Chennel *v.* Churchman, 3 Bro. C. C. 16, note; Minshaw *v.* Jordan, 3 Bro. C. C. 18, note; Newman *v.* Milner, 2 Ves. Jr. 483. See also Jervis *v.* White, 7 Ves. Jr. 413; Duncan *v.* Worrall, 10 Price 31 (relief granted only after verdict at law establishing the defense).

8. **Instrument Affecting Title to Land — Defense at Law No Bar to Relief.** — Smythe *v.* Henry, 41 Fed. Rep. 710; Fish *v.* French, 15 Gray (Mass.) 520; Ward *v.* Dewey, 16 N. Y. 525 (*per* Selden, J.); Fonda *v.* Sage, 48 N. Y. 184; Becker *v.* Church, 115 N. Y. 562, *affirming* 42 Hun (N. Y.) 258. But see Hilton *v.* Barrow, 1 Ves. Jr. 284.

9. See the titles Cloud on Title, vol. 6, pp. 149, 150; Vendor and Purchaser.

date, the question arising in a class of *English* cases known as the annuity cases, which involved the cancellation of annuity bonds. In these cases, while the court refused to set aside an annuity bond that did not affect the title to land, the reason being that a defense to its enforcement was available at law,[1] yet where the bond was secured upon real estate, the court granted relief, notwithstanding the existence of a valid legal remedy or defense.[2] The principle of the cases last mentioned is established at the present day in the rule that where an instrument purports to affect the title to real estate and will cast a cloud upon it, a court of equity will direct that the instrument be delivered up to be canceled although a valid defense may exist to its enforcement at law; provided the invalidity of the instrument does not appear on its face, and would not necessarily be shown by evidence which the party claiming under it must produce in order to establish his claim.[3] But even in cases of this character it is essential to the granting of this relief that, under all the circumstances of the particular case, it is clearly against conscience that the instrument in question should be permitted to remain outstanding and uncanceled; and this must appear free from all reasonable doubt.[4]

cc. Relief Granted Only under Special Circumstances — (*aa*) *Principle Stated.* — Although the earlier cases are in conflict upon the question whether the court of equity will decree the cancellation of an instrument to the enforcement of which, at law, a valid defense exists, yet there seems to be no question as to the jurisdiction of the court in the premises.[5] The fundamental principle, however, upon which the early decisions may be reconciled is that while the jurisdiction clearly exists, its exercise under the circumstances indicated is a matter to be regulated by the sound discretion of the court as the circumstances of the individual case may dictate; and that a resort to equity, in order to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defense, not arising on its face, may be difficult or uncertain at law, or because there exists some other special circumstance rendering a resort to equity highly proper, clear of suspicion, and not designed to promote expense and litigation.[6] This principle is now firmly established in the equity jurisprudence both of *England* and the *United States*. Therefore, where the complainant seeks the aid of the court to cancel an instrument to the enforcement of which at law there exists a valid defense, relief will generally be denied unless by reason of probable loss of testimony by lapse of time, or through some other circumstance peculiar to the particular case, the defense is not an adequate and sufficient protection to the complainant's rights.[7] And where neither fraud, accident,

1. English Annuity Cases. — Franco *v.* Bolton, 3 Ves. Jr. 368.

2. Byne *v.* Vivian, 5 Ves. Jr. 604; Byne *v.* Potter, 5 Ves. Jr. 609; Bromley *v.* Holland, 5 Ves. Jr. 610, 7 Ves. Jr. 3. See also Hoffman *v.* Cooke, 5 Ves. Jr. 623.

3. Removal of Cloud on Title. — Ward *v.* Dewey, 16 N. Y. 528. See also Fish *v.* French, 15 Gray (Mass.) 520.

For a Full Discussion of this particular branch of equity, jurisprudence, see the title Cloud on Title, vol. 6, p. 149.

4. Shotwell *v.* Shotwell, 24 N. J. Eq. 378.

5. General Principle Stated. — Simpson *v.* Howden, 3 Myl. & C. 99, *reviewing* earlier English cases; Hoare *v.* Bremridge, L. R. 8 Ch. 22, *affirming* L. R. 14 Eq. 522; Home Ins. Co. *v.* Stanchfield, 2 Abb. (U. S.), 1, 12 Fed. Cas. No. 6,660; Lewis *v.* Tobias, 10 Cal. 575; Butler *v.* Durham, 2 Ga. 413; Cornish *v.* Bryan, 10 N. J. Eq. 151; Schenck *v.* O'Neill, 23 Hun (N. Y.) 209; Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 517; Wilkes *v.* Wilkes, 4 Edw. (N. Y.) 630. And see the cases *infra*, the next note but one.

6. Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y). 517, *per* Kent, Ch., *reviewing* earlier decisions.

In many of the *American* cases in the following note the opinion of Chancellor Kent in the foregoing case is expressly approved.

7. *England.* — Simpson *v.* Howden, 3 Myl. & C. 99, *per* Cottenham, L. Ch., *reviewing* earlier English decisions; Hoare *v.* Bremridge, L. R. 14 Eq. 522, *affirmed* L. R. 8 Ch. 22. See also Hilton *v.* Barrow, 1 Ves. Jr. 284.

United States. — Peirsoll *v.* Elliott, 6 Pet. (U. S.) 99; Phœnix Mut. L. Ins. Co. *v.* Bailey, 13 Wall. (U. S.) 616; Grand Chute *v.* Winegar, 15 Wall. (U. S.) 373; Home Ins. Co. *v.* Stanchfield, 2 Abb. (U. S.) 11, 12 Fed. Cas. No. 6,660; Morse Arms Mfg. Co. *v.* Winchester Repeating Arms Co , 33 Fed. Rep. 170. See also Deweese *v.* Reinhard, 165 U. S. 389.

Alabama. — Dickinson *v.* Lewis, 34 Ala. 638.

nor mistake is involved, it is essential to the granting of relief that the instrument be held for some unconscientious purpose.[1]

(*bb*) *Rule in Federal Courts under Judiciary Act.* — The Federal Judiciary Act of 1789, section 16, declares that "suits in equity shall not be sustained in either of the courts of the United States in any case where adequate and complete remedy may be had at law."[2] This enactment is declaratory of the pre-existing rule in courts of equity, and applies with full force to cases where it is sought in the equity side of a federal court to obtain the cancellation of an instrument to the enforcement of which at law there exists a complete and adequate defense. In such cases equitable relief will not be granted unless it appears that through some special circumstance the defense may become difficult, uncertain, or unavailable, so as to constitute grounds for equitable interference *quia timet.*[3]

(*cc*) *Irreparable Injury Essential.* — It has been frequently held that to justify a court of equity in decreeing the cancellation of a written instrument it must appear that a necessity exists to prevent an irreparable injury which only a court of equity can avert.[4]

California. — Lewis *v.* Tobias, 10 Cal. 574; Smith *v.* Sparrow, 13 Cal. 597; Shain *v.* Belvin, 79 Cal. 262. See also Stephenson *v.* Hawkins, 67 Cal. 106. *Compare* Bradley *v.* Anglo-American Gas Control Co., 102 Cal. 627.

Georgia. — Butler *v.* Durham, 2 Ga. 413; Hairalson *v.* Carson, 111 Ga. 57. See also Johnson *v.* Johnson, 59 Ga. 613.

Idaho. — Ada County *v.* Bullen Bridge Co., (Idaho 1896) 47 Pac. Rep. 818.

Illinois. — Reedy *v.* Chicago Vinegar, etc., Co., 30 Ill. App. 153; Black *v.* Miller, 173 Ill. 489; Vannatta *v.* Lindley, 98 Ill. App. 327, *affirmed* 198 Ill. 40.

Kansas. — Missouri River, etc., R. Co. *v.* Miami County, 12 Kan. 482; Burlington Tp. *v.* Cross, 15 Kan. 74.

Maine. — Farmington *v.* Sandy River Nat. Bank, 85 Me. 46; Loggie *v.* Chandler, 95 Me. 220.

Massachusetts. — Fuller *v.* Percival, 126 Mass. 382; Anthony *v.* Valentine, 130 Mass. 119; Gale *v.* Nickerson, 151 Mass. 428.

New Jersey. — See Sweeney *v.* Williams, 36 N. J. Eq. 467.

New York. — Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 517, *per* Kent, Ch.; Wilkes *v.* Wilkes, 4 Edw. (N. Y.) 630, Field *v.* Holbrook, (Super. Ct. Gen. T.) 14 How. Pr. (N. Y.) 108; Metropolitan El. R. Co. *v.* Manhattan R. Co., (C. Pl. Spec. T.) 14 Abb. N. Cas. (N. Y.) 206; Hoffman *v.* Treadwell, 39 N. Y. Super. Ct. 183; Venice *v.* Woodruff, 62 N. Y. 466, 20 Am. Rep. 495; Fowler *v.* Palmer, 62 N. Y. 533; Springport *v.* Teutonia Sav. Bank, 75 N. Y. 397; Globe Mut. L. Ins. Co. *v.* Reals, 79 N. Y. 202; Balestier *v.* Mechanics' Nat. Bank, (Supm. Ct. Gen. T.) 15 N. Y. St. Rep. 48, *affirmed* 117 N. Y. 640.

Ohio. — Quebec Bank *v.* Weyand, 30 Ohio St. 126.

Oklahoma. — Trimble *v.* Minnesota Thresher Mfg. Co., 10 Okla. 578.

Pennsylvania. — Stewart's Appeal, 78 Pa. St. 88; Andrews *v.* Emery, 24 Pa. Co. Ct. 210.

Tennessee. — McLin *v.* Marshall, 1 Heisk. (Tenn.) 678.

Vermont. — Bellows Falls Bank *v.* Rutland, etc., R. Co., 28 Vt. 470. See also Glastenbury *v.* McDonald, 44 Vt. 450.

Compare Beland *v.* Anheuser-Busch Brewing Assoc., 157 Mo. 593.

Where the cancellation of an instrument is sought upon the ground that a defense to its enforcement exists at law, if the existence of the facts alleged to constitute the defense would afford the complainant adequate and complete protection in the action at law, and if the nonexistence of these facts would exclude the defense entirely and enable the plaintiff at law to enforce the instrument, a court of equity will refuse to interfere. Grand Chute *v.* Winegar, 15 Wall. (U. S.) 373; Fuller *v.* Percival, 126 Mass. 382; Anthony *v.* Valentine, 130 Mass. 119.

Contra — Instrument Void Both at Law and in Equity. — In *Indiana* and *Mississippi* it has been held that an instrument may be decreed to be canceled although it is absolutely void both at law and in equity. Hays *v.* Hays, 2 Ind. 28; Otis *v.* Gregory, 111 Ind. 511; Sessions *v.* Jones, 6 How. (Miss.) 123.

1. Instrument Must Be Held for Unconscientious Purpose. — Schenck *v.* O'Neill, 23 Hun (N. Y.) 209.

2. Federal Judiciary Act. — 1 U. S. Stat. at L., p. 82, § 16.

3. Rule in Federal Courts — Cancellation Decreed Only under Special Circumstances. — Phœnix Mut L. Ins. Co. *v.* Bailey, 13 Wall. (U. S.) 620; Grand Chute *v.* Winegar, 15 Wall. (U. S.) 373; Ætna L. Ins. Co. *v.* Smith, 73 Fed. Rep. 318; Home Ins. Co. *v.* Stanchfield, 2 Abb. (U. S.) 1, 12 Fed. Cas. No. 6,660; Manchester F. Assur. Co. *v.* Stockton Combined Harvester, etc., Works, 38 Fed. Rep. 378.

4. Cancellation Granted Only to Prevent Irreparable Injury — *United States.* — Phœnix Mut. L. Ins. Co. *v.* Bailey, 13 Wall. (U. S.) 616; San Diego Flume Co. *v.* Souther, 90 Fed. Rep. 164, 61 U. S. App. 134, *affirmed* 104 Fed. Rep. 706, 44 C. C. A. 143. See also Deweese *v.* Reinhard, 165 U. S. 389.

California. — Lewis *v.* Tobias, 10 Cal. 574.

Idaho. — Ada County *v.* Bullen Bridge Co., (Idaho 1896) 47 Pac. Rep. 818.

Maine. — Farmington *v.* Sandy River Nat. Bank, 85 Me. 53.

dd. PARTICULAR CIRCUMSTANCES CONSIDERED — (*aa*) *Where Action at Law Is Pending* — aaa. General Rule. — The denial of equitable relief is peculiarly appropriate where an action at law is pending upon the instrument, for then there is ordinarily no danger of loss of testimony through delay, and by interposing the defense to the action the party seeking equitable relief can have protection as adequate and complete as that which can be afforded in equity. In many instances also the denial of relief is proper for the additional reason that the matters at issue can be more conveniently and effectively determined by a jury than by the chancellor. Under such circumstances, of course, a prayer for an injunction against the further prosecution of the pending action will be denied.[1]

bbb. Exceptions to Rule — (*aaa*) *Pending Action Likely to Be Withdrawn and Other Actions Begun.* — Although it is generally held that where there exists a valid defense to the enforcement of the instrument at law, and an action on the instrument is pending, a court of equity will not grant relief, yet where it appears that the pending action is likely to be withdrawn and other actions brought upon the instrument at some future time, when by reason of the delay the evidence to maintain the defense may be impaired or lost and the party to be affected by the instrument would thus be harassed by unjust and vexatious litigation, then a court of equity will decree the cancellation of the instrument.[2] In such a case the holder of the instrument has been perpetually enjoined from enforcing it at law.[3]

Rule Changed by Statute. — In some jurisdictions, however, the foregoing

New York. — Field *v.* Holbrook, (Super. Ct. Gen. T.) 14 How. Pr. (N. Y.) 103; Balestier *v.* Mechanics Nat. Bank, (Supm. Ct. Gen. T.) 15 N. Y. St. Rep. 46, *affirmed* 117 N. Y. 640; Venice *v.* Woodruff, 62 N. Y. 467, 20 Am. Rep. 495; Globe Mut. L. Ins. Co. *v.* Reals, 79 N. Y. 202; Hoffman *v.* Treadwell, 39 N. Y. Super. Ct. 183.

1. Where Defense Can Be Interposed to Pending Action — *England.* — Hoare *v.* Bremridge, L. R. 14 Eq. 522, *affirmed* L. R. 8 Ch. 22.

United States. — Grand Chute *v.* Winegar, 15 Wall. (U. S.) 373; Home Ins. Co. *v.* Stanchfield, 2 Abb. (U. S.) 1, 12 Fed. Cas. No. 6,660. See also Phœnix Mut. L. Ins. Co. *v.* Bailey, 13 Wall. (U. S.) 616.

Alabama. — Dickinson *v.* Lewis, 34 Ala. 638.

Connecticut. — Strong *v.* M'Donald, 1 Root (Conn.) 364.

Georgia. — Butler *v.* Durham, 2 Ga. 413.

Illinois. — Reedy *v.* Chicago Vinegar, etc., Co., 30 Ill. App. 153.

Massachusetts. — Anthony *v.* Valentine, 130 Mass. 119.

New Jersey. — Cornish *v.* Bryan, 10 N. J. Eq. 151; Sweeney *v.* Williams, 36 N. J. Eq. 459.

New York. — Hoffman *v.* Treadwell, 39 N. Y. Super. Ct. 183.

Ohio. — Quebec Bank *v.* Weyand, 30 Ohio St. 126.

Tennessee. — McLin *v.* Marshall, 1 Heisk. (Tenn.) 678.

Vermont. — Bellows Falls Bank *v.* Rutland, etc., R. Co., 28 Vt. 470.

Compare Glastenbury *v.* McDonald, 44 Vt. 450.

Where the Action Was Pending in Another State, equitable relief has been denied. Strong *v.* M'Donald, 1 Root (Conn.) 364; Bellows Falls Bank *v.* Rutland, etc., R. Co., 28 Vt. 470.

2. Pending Action Likely to Be Withdrawn and Other Actions Instituted. — Cooper *v.* Joel, 27 Beav. 313, *affirmed* 1 De G. F. & J. 240; Ferguson *v.* Fisk, 28 Conn. 501; Buxton *v.* Broadway, 45 Conn. 540; Metler *v.* Metler, 18 N. J. Eq. 270, *affirmed* 19 N. J. Eq. 457; Smith *v.* Smith, 30 N. J. Eq. 567. See also Mutual L. Ins. Co. *v.* Pearson, 114 Fed. Rep. 395.

A court of equity will direct the cancellation of a negotiable instrument the consideration of which has entirely failed, although there may exist a valid defense to the enforcement of the instrument at law, if it appears that the complainant under the circumstances of the case may be harassed by repeated actions upon the instrument; as where an action pending upon the instrument may be withdrawn, and other actions brought upon it by other parties and at different times. Ferguson *v.* Fisk, 28 Conn. 501.

3. Enjoining Pending Action. — Ferguson *v.* Fisk, 28 Conn. 501; Buxton *v.* Broadway, 45 Conn. 540; Metler *v.* Metler, 18 N. J. Eq. 270, *affirmed* 19 N. J. Eq. 457; Bell *v.* Gamble, 9 Humph. (Tenn.) 117.

Illustrations. — Where a negotiable instrument, by want of proper authority or assent to its execution, is void in the hands of holders with notice of this defect, but if negotiated to a *bona fide* holder would in his hand be valid and enforceable, and the defect does not appear upon the face of the instrument, a proper case is presented for a court of equity to grant relief by restraining suits upon the instrument and directing it to be delivered up to be canceled; in such a case adequate remedy can be afforded only by a court of equity. Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552 (case of a great number of negotiable bonds issued by a corporation and bearing upon them a guarantee of another corporation; the guarantee being defective as having been made without the authority or assent of the majority of the stockholders).

It was held in the foregoing case, however, that relief would not be granted as against a

principle has been materially altered by statutes governing matters of procedure.[1]

(bbb) Instrument Likely to Be Used Inequitably in Pending Action. — While a court of equity will not arbitrarily or causelessly change the forum of litigation when an action at law is already pending, and adequate protection can be given in that forum, yet if adequate relief cannot be given at law, or the character of the instrument is such that the court can see that, if used in a trial at law, it will be liable to cause embarrassment, or create uncertainty, or put the party against whom it may be used in great hazard of losing his just rights, then the court will assume jurisdiction and compel the surrender of the instrument, or limit its use to such purposes as may seem to be equitable. All that is required to justify a resort to equity, when an action at law is already pending, is that it shall appear that it is doubtful whether the instrument may not be used in such action for a dishonest or inequitable purpose. Under such circumstances the court will not hesitate to enjoin the further prosecution of the pending action if this relief is necessary to protect the rights of the complainant in equity.[2]

(ccc) Right to Defend Resting Solely in Person Other than Plaintiff in Equity. — Where a plaintiff seeking cancellation of an instrument *quia timet* has not the right to defend an action brought to enforce it, but that right rests solely in another person who is under a strong bias in favor of the validity of the instrument and the rights of the holder and is likely to fail in properly defending the action; and the action, if successful, will conclude the plaintiff in equity; then the defense at law is inadequate and hazardous, and the court of equity will not only direct the cancellation of the instrument, but will enjoin a pending action brought to enforce it.[3]

(bb) Where Instruments Are Numerous and Defense Is Common to All. — In a case where there are numerous outstanding instruments to the enforcement of which at

bona fide purchaser who held the bonds, but that relief would be granted as against a holder who was not a *bona fide* purchaser.

Where a negotiable note, valid upon its face, is given without consideration and upon an agreement that it shall be given up to the maker upon a contingency which has happened, and notwithstanding this an action at law has been brought upon the note by the payee against the maker or his personal representative, a court of equity will enjoin the pending action and direct that the note be delivered up to be canceled; in such a case the only jurisdiction competent to afford valid and adequate relief is a court of equity; for the payee of the note, though defeated in the action at law, could afterward negotiate the note to a *bona fide* purchaser against whom the defense might not be available; and, moreover, he might discontinue the pending suit and at some later time bring another action when it might be that through loss of testimony or the like, the facts which rendered the notes invalid could not be established. Metler *v.* Metler, 18 N. J. Eq. 270, *affirmed* 19 N. J. Eq. 457. In this case it was conceded that as a general rule equity will not cancel an instrument to the enforcement of which at law a valid defense exists, but it was held that the particular circumstances mentioned afforded grounds for equitable relief. *Compare* Anthony *v.* Valentine, 130 Mass. 119.

Where a note is executed by two parties, and the execution by one of them is procured upon the stipulation that the note shall not be enforced against him, his signature being required for another purpose, a court of equity will enjoin a pending action upon the note, the reason being that the attempt to enforce an obligation thus procured would be a gross fraud. Bell *v.* Gamble, 9 Humph. (Tenn.) 117. In this case the payee who procured the signature had died, and the action at law was begun by his administrators.

The Mere Possibility that the Action Will Be Withdrawn and other actions begun has been held sufficient to justify equitable interference. Ferguson *v.* Fisk, 28 Conn. 501; Buxton *v.* Broadway, 45 Conn. 540. See also Smith *v.* Smith, 30 N. J. Eq. 567.

But the contrary has been held a strong probability of that course of action being deemed essential. Butler *v.* Durham, 2 Ga. 413. See also Anthony *v.* Valentine, 130 Mass. 119.

1. See *infra*, this section, (*f*) *Effect of Statutes Reforming Procedure — Codes and Practice Acts.*

Thus the law of the *Connecticut* cases cited in the two preceding notes has been abrogated by the Practice Act in that state. See the cross-reference above.

2. Preventing Inequitable Use of Instrument. — Foley *v.* Kirk, 33 N. J. Eq 170; Metler *v.* Metler, 18 N. J. Eq. 270, *affirmed* 19 N. J. Eq. 457; Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 517; Barrington *v.* Ryan, 88 Mo. App. 85. See also Thompson *v.* Graham, 1 Paige (N. Y.) 384; Cornish *v.* Bryan, 10 N. J. Eq. 146.

3. Plaintiff in Equity Without Right to Defend at Law. — Smith *v.* Smith, 30 N. J. Eq. 565,

law a valid defense exists common to all, and the matter of defense can be established only by proof of facts *dehors* the instruments; while the existence of this defense, or the risk of losing the evidence to support it, or the apprehension of a multiplicity of suits upon these instruments may not separately constitute a sufficient ground for the interposition of a court of equity to restrain the actions at law or to decree the cancellation of the instruments;[1] yet when all these circumstances are combined, a proper case is presented for equitable relief,[2] provided, of course, that prompt application is made.[3]

(*cc*) *Where Invalidity Appears on Face of Instrument.* — Although equity has jurisdiction to cancel an instrument the invalidity of which appears from its own terms, and the granting of relief is a matter of expediency and rests in the sound discretion of the court,[4] yet it is now well settled that in the absence of some forceful circumstance peculiar to the particular case the court will not exercise its jurisdiction in the premises; the reason being that the complainant is in no danger or hazard from the enforcement of the instrument at law.[5] But where the defendant refuses to produce the instrument, and the plaintiff seeks to have it discovered and surrendered for cancellation, the court will not presume that it is void on its face.[6]

(*dd*) *Where Evidence of Plaintiff at Law Would Reveal Invalidity of Instrument.* — Where the burden of proving the validity of the instrument rests upon the person seeking its enforcement at law, and upon such proof the invalidity of the instrument must inevitably appear, it is held that no reason exists for granting equitable relief by cancellation, even though the instrument is not invalid on its face and the proof must consist in extrinsic matters; the reason being that the complainant in equity is exposed to no hazard from future litigation.[7] And this rule is especially applicable where the instrument would be invalid in the hands of even a *bona fide* holder.[8] The same rule applies where a person who would seek the enforcement of the instrument at law must, in order to recover, establish certain facts, and he is unable to do so by reason of the nonexistence of such facts.[9]

(*ee*) *Where Instrument Is Functus Officio.* — Upon the principle of a bill *quia timet* a court of equity has jurisdiction to direct the cancellation of a bond, promis-

where the defendant at law was an administrator who would have been protected by a recovery against him.

1. Multiplicity of Suits. — Venice *v.* Woodruff, 62 N. Y. 462, 20 Am. Rep. 495, holding that where there are numerous instruments held by different persons, the plaintiff must show facts that would justify relief against one of such persons alone. See also Farmington *v.* Sandy River Nat. Bank, 85 Me. 46.

2. Springport *v.* Teutonia Sav. Bank, 75 N. Y. 397, *distinguishing* Venice *v.* Woodruff, 62 N. Y. 462, 20 Am. Rep. 495. See also McHenry *v.* Hazard, 45 N. Y. 580; Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552; Louisville, etc., R. Co. *v.* Ohio Valley Imp. Co., 57 Fed. Rep. 42. *Compare* Scott *v.* McFarland, 70 Fed. Rep. 280. And see in the ENCYC. OF PL. AND PR., the titles BILLS OF PEACE, vol. 3, p. 556; MULTIPLICITY OF SUITS, vol. 14, p. 217.

3. See Calhoun *v.* Millard, 121 N. Y. 78, *distinguishing* Springport *v.* Teutonia Sav. Bank, 75 N. Y. 397.

4. Jurisdiction to Cancel Instrument Void on Its Face. — Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 523; Johnson *v.* Wetmore, 12 Barb (N Y.) 433. See also Simpson *v.* Howden, 3 Myl. & C. 99, *per* Cottenham, L. Ch.; Peirsoll *v.* Elliott, 6 Pet. (U. S.) 95.

5. Instrument Invalid on Its Face — Cancellation Denied. — Simpson *v.* Howden, 3 Myl. & C. 99; Peirsoll *v.* Elliott, 6 Pet. (U. S.) 95; O'Connell *v.* Noonan, 1 App. Cas (D. C.) 332; Field *v.* Holbrook, (Super. Ct. Gen. T.) 14 How. Pr. (N. Y.) 107, *per* Duer, J.; Springport *v.* Teutonia Sav. Bank, 75 N. Y. 402.

In *Indiana*, however, the contrary has been held, the court saying that "it is settled by the modern decisions that in such cases jurisdiction will be entertained." Hays *v.* Hays, 2 Ind. 28, *citing* 2 Story's Eq. Jur., c. 17, § 700. It is to be observed that the section cited from Story does not relate to an instrument void on its face, while the section immediately following (§ 700*a*) is directly contrary to the holding of the court and is in full accordance with the proposition stated in the text above. See also Thompson *v.* Norris, (Supm. Ct. Spec. T.) 11 Abb. N. Cas. (N. Y.) 163.

6. Johnson *v.* Wetmore, 12 Barb. (N. Y.) 433.

7. Where Action on Instrument Must Reveal the Invalidity. — Venice *v.* Woodruff, 62 N. Y. 462, 20 Am. Rep. 495. See also Springport *v.* Teutonia Sav. Bank, 75 N. Y. 402.

8. Venice *v.* Woodruff, 62 N. Y. 462, 20 Am. Rep. 495.

9. Field *v.* Holbrook, (Super. Ct. Gen. T.) 14 How. Pr. (N. Y.) 103.

sory note, or other written instrument which, although originally valid, has, by payment, satisfaction, or some other cause legal or equitable, become invalid or *functus officio*,[1] and in a proper case this relief will be granted;[2] as where the evidence to show the invalidity of the instrument is of a character available only in equity, and irreparable injury would result from the enforcement of the instrument at law.[3] But where the defense to the enforcement of the instrument at law is not difficult or uncertain, and there exist no circumstances calling for equitable relief other than the invalidity of the instrument and the wrong that would result from its enforcement, courts of equity uniformly refuse to interfere, but remit the complainant to his defense at law, upon the ground that this defense will afford him adequate and complete protection. Thus, where cancellation of an instrument is sought upon the ground that it has been paid or otherwise discharged, it is held that since that fact is a good and practical defense in both courts, relief by cancellation will not be granted, the defense at law being adequate and complete.[4]

(*ff*) *Where Transfer of Instrument Is Contemplated for Purpose of Enforcement in Federal Court.* — A state court with equitable powers will not exercise jurisdiction to cancel an instrument to the enforcement of which there exists a valid legal defense in the tribunals of the state, upon the ground that, by transfer or otherwise, an action to enforce the instrument may be brought in a federal court where the defense under the state law would not be valid or available. The wrong sought to be prevented in such a case is not a wrongful act of any party, but is merely a possible decision of another court, and this is not regarded as a wrong of such a character as to justify a court of equity in preventing its commission. Indeed, the powers of a court of equity to enforce the surrender and cancellation of instruments apparently have never been

1. Jurisdiction to Cancel Instrument Functus Officio — *England.* — Bromley *v.* Holland, 1 Coop. t. Eld. 9.

California. — Lewis *v.* Tobias, 10 Cal. 574.

Georgia. — Butler *v.* Durham, 2 Ga. 413.

Indiana. — Fitzmaurice *v.* Mosier, 116 Ind. 363, 9 Am. St. Rep. 854.

New Jersey. — Cornish *v.* Bryan, 10 N. J. Eq. 146; Paterson *v.* Baker, 51 N. J. Eq. 49.

New York. — Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 517; Wilkes *v.* Wilkes, 4 Edw. (N. Y.) 634; Livingston *v.* Moore, 15 N. Y. App. Div. 15, *appeal dismissed* 161 N. Y. 602.

Pennsylvania. — Ginsberg *v.* Rubinowitz, 20 Pa. Co. Ct. 230; Wilson *v.* Getty, 57 Pa. St. 266.

2. Instrument Functus Officio Canceled Quia Timet. — Fitzmaurice *v.* Mosier, 116 Ind. 363, 9 Am. St. Rep. 854; Garrett *v.* Mississippi, etc., R. Co., Freem. (Miss.) 70; Stevens *v.* Ryerson, 6 N. J. Eq. 477; Cornish *v.* Bryan, 10 N. J. Eq. 146; Paterson *v.* Baker, 51 N. J. Eq. 49; Livingston *v.* Moore, 15 N. Y. App. Div. 15, *appeal dismissed* 161 N. Y. 602; Ginsberg *v.* Rubinowitz, 20 Pa. Co. Ct. 230; Wilson *v.* Getty, 57 Pa. St. 266.

3. Relief Granted Where Defense Not Available at Law. — Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 517.

4. Relief Denied, Defense at Law Being Adequate. — Threlfall *v.* Lunt, 7 Sim. 627; Lewis *v.* Tobias, 10 Cal. 574; Smith *v.* Sparrow, 13 Cal. 597; Strong *v.* M'Donald, 1 Root (Conn.) 364; Butler *v.* Durham, 2 Ga. 413; Wilkes *v.* Wilkes, 4 Edw. (N. Y.) 630; Fowler *v.* Palmer, 62 N. Y. 533; Mercantile Bank *v.* Pettigrew, 74 N. Car. 326. But see Fitzmaurice *v.* Mosier, 116 Ind. 363, 9 Am. St. Rep. 854.

Where the defendant in equity had recovered a judgment at law against the plaintiff upon a bill of exchange, and the amount of the judgment had been paid but the bill had not been delivered up, it was held that a bill in equity to compel the surrender of the instrument could not be maintained even upon the principles of a bill *quia timet;* Vice-Chancellor Shadwell being of the opinion that there was no precedent for such relief. Threlfall *v.* Lunt, 7 Sim. 627 (decided in 1836).

But in an earlier case, where the plaintiff filed a bill for discovery, for an injunction to restrain an action upon certain promissory notes which had been obtained by fraud, and for a surrender of the notes, and the injunction being dissolved the parties went to trial and the plaintiff in equity (defendant at law) had a verdict, and the plaintiff thereafter proceeded with the case in equity, it was held that the plaintiff was entitled to have the note surrendered to be canceled, and that the verdict in his favor in the action at law did not bar his claim to relief. Lisle *v.* Liddle, 3 Anstr. 649 (decided in 1796).

The facts of this case were considered by Thompson, Baron, to be the same as if the case had gone on to a decree on the original bill in equity, and the court had directed an issue which had been found for the plaintiff.

Where a Note Which Has Been Paid Is Negotiated After Maturity, the defense of payment is available at law as against the holder, and if no reasonable apprehension appears that litigation may be postponed and evidence of payment be lost, equity will deny relief. Butler *v.* Durham, 2 Ga. 413. See also Lewis *v.* Tobias, 10 Cal. 574.

exercised upon the grounds indicated; and in such a case neither justice nor propriety will warrant the granting of equitable relief.[1] And *á fortiori* a court of equity of a state will not, for the reason indicated, direct the cancellation of an instrument where an action to enforce it is pending in a federal court of concurrent jurisdiction.[2]

(*gg*) *Where Instrument Is Negotiable* — aaa. In General. — Courts of equity very frequently exercise jurisdiction to decree the surrender and cancellation, *quia timet*, of negotiable instruments to the enforcement of which there exist valid defenses, which, however, are likely to be rendered ineffectual by the threatened transfer of the instruments to *bona fide* holders. A negotiable instrument outstanding under the circumstances indicated may indeed be said to furnish a typical case for equitable relief of the kind under discussion.[3] It is not always necessary, however, that the entire instrument be canceled or declared invalid; if the complainant's apparent liability rests only on a part of the instrument, as, for instance, an indorsement, this part alone may be canceled.[4] But even where the instrument is negotiable, it must be shown that a transfer is actually threatened; mere possibility of negotiation is insufficient.[5]

bbb. After Maturity. — A court of equity will generally refuse to cancel *quia timet* a negotiable instrument which is overdue, and to the enforcement of which at law there exists a valid and adequate defense, since the defense cannot be rendered unavailable by any negotiation of the instrument. In such a case exceptional circumstances must exist to justify the court in granting relief.[6] But where other grounds exist for relief *quia timet*, cancellation will be decreed notwithstanding that the instrument is overdue.[7]

(*hh*) *Where Instrument Was Procured by Fraud* — aaa. Principle Stated. — Where cancellation of an instrument is sought on the ground that the instrument has been procured by fraud and it appears that it can be successfully resisted on that ground in an action at law brought to enforce it, but only by proof of extrinsic facts, the fraud not appearing on the face of the instrument, the mere fact that such a defense can be made is not of itself ground for refusing equitable relief; and

1. Cancellation Not Granted to Prevent Transfer and Enforcement in Federal Court. — Farmington *v.* Sandy River Nat. Bank, 85 Me. 55; Venice *v.* Woodruff, 62 N. Y. 462, 20 Am. Rep. 495. See also Thompson *v.* Norris (Supm. Ct. Spec. T.), 11 Abb. N. Cas. (N. Y.) 163; and the titles Injunctions, vol. 16, p. 420; United States Courts.

A Possible Exception to This Rule has been considered to exist where the holder contemplating the transfer of the instrument is not a *bona fide* holder. Venice *v.* Woodruff, 62 N. Y. 468, 20 Am. Rep. 495, *per* Rapallo, J.

2. Action Pending in Federal Court. — Quebec Bank *v.* Weyand, 30 Ohio St. 126. See also Thompson *v.* Norris, (Supm. Ct. Spec. T.) 11 Abb. N. Cas. (N. Y.) 163.

3. Cancellation of Negotiable Instruments to Prevent Transfer to Bona Fide Holders — *England.* — Chennel *v.* Churchman, 3 Bro. C. C. 16, note; Minshaw *v.* Jordan, 3 Bro. C. C. 18, note.

United States. — Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552; White *v.* Clarke, 5 Cranch (C. C.) 102, 29 Fed. Cas. No. 17,540, *affirmed* 12 Pet. (U. S.) 178; Schmidt *v.* West, 104 Fed. Rep. 272.

Alabama. — Scruggs *v.* Driver, 31 Ala. 274.

Arkansas. — Breathwit *v.* Rogers, 32 Ark. 758.

California. — Ingram *v.* Smith, 83 Cal. 234.

Connecticut. — Ferguson *v.* Fisk, 28 Conn. 501.

Georgia. — See Hairalson *v.* Carson, 111 Ga. 57, where the application of the principle was conceded, but relief denied for defect in pleading.

Kansas. — Bowman *v.* Germy, 23 Kan. 306.

Massachusetts. — Fuller *v.* Percival, 126 Mass. 381.

Michigan. — Maclean *v.* Fitzsimons, 80 Mich. 336.

New Jersey. — Metler *v.* Metler, 18 N. J. Eq. 270, *affirmed* 19 N. J. Eq. 457. See also Paterson *v.* Baker, 51 N. J. Eq. 49.

New York. — See Springport *v.* Teutonia Sav. Bank, 75 N. Y. 397.

Wisconsin. — Douglas County *v.* Walbridge, 38 Wis. 179.

Compare Hester *v.* Hooker, 7 Smed. & M. (Miss.) 768.

4. Cancellation of Indorsements. — Maclean *v.* Fitzsimons, 80 Mich. 336.

5. Trimble *v.* Minnesota Thresher Mfg. Co., 10 Okla. 578.

6. Cancellation Denied After Maturity of Instrument. — Shain *v.* Belvin, 79 Cal. 262; Black *v.* Miller, 173 Ill. 489; Geer *v.* Kissam, 3 Edw. (N. Y.) 130; Cowman *v.* Kingsman, 4 Edw. (N. Y.) 629; Quebec Bank *v.* Weyand, 30 Ohio St. 126.

7. Same — Cancellation Decreed. — Ferguson *v.* Fisk, 28 Conn. 511; Fuller *v.* Percival, 126 Mass. 381; Glastenbury *v.* McDonald, 44 Vt. 454.

if it appears that by intentional delay to enforce the demand the instrument may be used to harass and annoy by future litigation, when evidence to show the fraud may be lost by lapse of time, the defense at law is not adequate and complete, and therefore a court of equity will generally decree cancellation upon the principle *quia timet*.[1]

bbb. Denying Relief Where Defense at Law Adequate. — But where the fraud and consequent invalidity of the instrument in question can be established in defense to an action involving it, and there appears no apprehension of delay in instituting such an action, then, the remedy at law being adequate and complete, a court of equity will generally refuse to exercise jurisdiction.[2]

Action Pending. — In such a case denial of equitable relief is held to be peculiarly appropriate where an action to enforce the instrument is pending

1. Cancellation of Instruments Procured by Fraud — *England*. — London, etc., Ins. Co. *v.* Seymour, L. R. 17 Eq. 85. See also Hoare *v.* Bremridge, L. R. 8 Ch. 26, *per* Selborne, L. Ch., *affirming* L. R. 14 Eq. 522.

United States. — U. S. Life Ins. Co. *v.* Cable, (C. C. A.) 98 Fed. Rep. 761; Mutual L. Ins. Co. *v.* Pearson, 114 Fed. Rep. 395.

Alabama. — Merritt *v.* Ehrman, 116 Ala. 278.

Illinois. — Security Trust Co. *v.* Tarpey, 66 Ill. App. 589.

Massachusetts. — Commercial Mut. Ins. Co. *v.* McLoon, 14 Allen (Mass.) 351; Fuller *v.* Percival, 126 Mass. 381.

Michigan. — Cogswell *v.* Mitts, 90 Mich. 355; John Hancock Mut. L. Ins. Co. *v.* Dick, 114 Mich. 337; Mactavish *v.* Kent Circuit Judge, 122 Mich. 242.

Missouri. — Barrington *v.* Ryan, 88 Mo. App. 85.

New York. — Johnson *v.* Wetmore, 12 Barb. (N. Y.) 433; Becker *v.* Church, 115 N. Y. 562, *affirming* 42 Hun (N. Y.) 258. See also Thompson *v.* Graham, 1 Paige (N. Y.) 384.

Ohio. — See Duhm *v.* Mehner, 6 Ohio Cir. Dec. 79.

Tennessee. — Craig *v.* McKnight, 108 Tenn. 690.

Vermont. — Glastonbury *v.* McDonald, 44 Vt. 450.

Illustrations — Cancellation of Insurance Policies Procured by Fraud. — London, etc., Ins. Co. *v.* Seymour, L. R. 17 Eq. 85; U. S. Life Ins. Co. *v.* Cable, (C. C. A.) 98 Fed. Rep 761; Mutual L. Ins. Co. *v.* Pearson, 114 Fed. Rep. 395; Security Trust Co. *v.* Tarpey, 66 Ill. App. 589; Commercial Mut. Ins. Co. *v.* McLoon, 14 Allen (Mass.) 351; John Hancock Mut. L. Ins. Co. *v.* Dick, 114 Mich. 337; Mactavish *v.* Kent Circuit Judge, 122 Mich. 242.

Where a Contract or Obligation Procured by Fraud Is Perpetual in Its Nature, the only effectual relief against it, where the keeping of it on foot is a fraud against parties, is the annulment of it. This cannot be decreed by a court of law, but can by a court of equity, and such relief is properly granted. Jones *v.* Bolles, 9 Wall. (U. S.) 364. See also Thompson *v.* Graham, 1 Paige (N. Y.) 384.

The Hazard of Double Recovery at Law against the plaintiff in equity, where the fraudulent instrument is claimed by two persons adversely to each other, constitutes ground for equitable relief, for the defense at law is not adequate. McHenry *v.* Hazard, 45 N. Y. 580. See also London, etc., Ins. Co. *v.* Seymour, L. R. 17 Eq. 85.

Where a Bond Procured by Fraud Is Payable in Instalments, the last of which will not fall due for a number of years, and the proof of fraud at law may then be difficult and questions may arise as to the statute of limitations, a proper case is presented for cancellation of the bond and a mortgage given to secure it; and it is immaterial that no actual money damage has yet been sustained. Ranney *v.* Warren, 13 Hun (N. Y.) 11.

2. Fraud an Adequate Defense at Law — Cancellation Denied. — *England*. — Hoare *v.* Bremridge, L. R. 14 Eq. 522, *affirmed* L. R. 8 Ch. 22.

United States. — Ætna L. Ins. Co. *v.* Smith, 73 Fed. Rep. 318; Phœnix Mut. L. Ins. Co. *v.* Bailey, 13 Wall. (U. S.) 616; Grand Chute *v.* Winegar, 15 Wall. (U. S.) 373; Home Ins. Co. *v.* Stanchfield, 2 Abb. (U. S.) 1, 12 Fed. Cas. No. 6,660; Manchester F. Assur. Co. *v.* Stockton Combined Harvester, etc., Works, 38 Fed. Rep. 378.

Illinois. — Black *v.* Miller, 173 Ill. 489; Vannatta *v.* Lindley, 98 Ill. App. 327, *affirmed* 198 Ill. 40; Shenehon *v.* Illinois L. Ins. Co., 100 Ill. App. 281.

Minnesota. — Turnbull *v.* Crick, 63 Minn. 91.

New York. — Crane *v.* Bunnell, 10 Paige (N. Y.) 333; Terry *v.* Horne, 59 Hun (N. Y.) 492.

Oklahoma. — Trimble *v.* Minnesota Thresher Mfg. Co., 10 Okla. 578.

Tennessee. — See McLinn *v.* Marshall, 1 Heisk. (Tenn.) 678.

Federal Judiciary Act. — The rule of the text applies under the Judiciary Act of 1789, § 16. Phœnix Mut. L. Ins. Co. *v.* Bailey, 13 Wall (U. S.) 623; Grand Chute *v.* Winegar, 15 Wall (U. S.) 373; Manchester F. Assur. Co. *v.* Stockton Combined Harvester, etc., Works, 38 Fed. Rep. 378; Home Ins. Co. *v.* Stanchfield, 2 Abb. (U. S.) 1, 12 Fed. Cas. No. 6,660. See also the title UNITED STATES COURTS.

Negotiable Note Procured by Fraud — Defense Available as Against Bona Fide Holder. — Although a negotiable promissory note has been procured by fraud, yet if by statute the fraud is available as a defense to an action on the note even by a *bona fide* holder, a court of equity will not exercise jurisdiction to decree the cancellation of the instrument at the suit of the defrauded party, for the defense at law is adequate and complete. Vannatta *v.* Lindley, 198 Ill. 40, *affirming* 98 Ill. App. 327.

when the bill for cancellation is filed; since adequate protection may be had by interposing the defense to the action, and since the matters in issue can often be better determined by a jury than by a chancellor.[1]

Plaintiff Must Show Irreparable Injury. — Where the fraud alleged as a ground for cancellation will constitute a complete defense to an action brought to enforce the instrument, it has been held that the plaintiff in equity must prove the existence of some special circumstance to show that he may suffer irreparable injury if he is denied a preventive remedy.[2]

ccc. Granting Relief though Defense at Law Adequate. — On the other hand, although the fraud might have been successfully pleaded in defense to an action brought to enforce the instrument, and there did not appear any likelihood of delay in beginning the action, or any other circumstance whereby the defense might have been rendered inadequate, cancellation of the instrument has nevertheless been decreed;[3] the reasons assigned being that in cases of fraud a court of equity has concurrent jurisdiction with courts of law, and that no remedy available at law can be quite so effective as the purely equitable remedy of cancellation,[4] and also that the propriety of granting relief rests in the sound discretion of the court, and is not controlled by any general rules.[5] Under such circumstances a pending action to enforce the instrument has been enjoined.[6]

(*ii*) *Where Instrument Is Forged.* — A person whose name has been forged to a written obligation can generally maintain a bill *quia timet* for the cancellation of the instrument, so far at least as it purports to bind him.[7]

(c) **Affirmative Remedy Available at Law** — *aa.* General Rule. — It is a well-settled doctrine of equity jurisprudence that a court of chancery will not grant relief in cases where the complainant has a plain adequate and complete remedy at law.[8]

bb. By Bringing Action and Rebutting Instrument Set Up in Defense. — An action of an equitable nature cannot be maintained to cancel an instrument if the

1. Action at Law Pending — Cancellation Denied. — Hoare *v.* Bremridge, L. R. 14 Eq. 522, *affirmed* L. R. 8. Ch. 22; Grand Chute *v.* Winegar, 15 Wall. (U. S.) 373; Manchester F. Assur. Co *v.* Stockton Combined Harvester, etc., Works, 38 Fed. Rep. 378; Ætna L. Ins. Co. *v.* Smith, 73 Fed. Rep. 318; Home Ins. Co. *v.* Stanchfield, 2 Abb. (U. S. 1), 12 Fed. Cas. No. 6,660; Turnbull *v.* Crick, 63 Minn. 91; Crane *v.* Bunnell, 10 Paige (N. Y.) 333. See also McLin *v.* Marshall, 1 Heisk. (Tenn.) 678, and *supra*, this section, 2. *dd. Particular Circumstances Considered — Where Action at Law Is Pending.*

Where the Action at Law Was Begun After the Bill in Equity Was Filed, the same result was reached. Phœnix Mut. L. Ins. Co. *v.* Bailey, 13 Wall. (U. S.) 616.

2. Probability of Irreparable Injury Essential to Relief. — Phœnix Mut. L. Ins. Co. *v.* Bailey, 13 Wall. (U. S.) 623; Balestier *v.* Mechanics' Nat. Bank (Supm. Ct. Gen. T.) 15 N. Y. St. Rep 46, *affirmed* 117 N. Y. 640.

3. Cancellation Decreed Although Defense of Fraud Adequate. — Fitzmaurice *v.* Mosier, 116 Ind. 363, 9 Am. St. Rep. 854; John Hancock Mut. L. Ins. Co. *v.* Dick, 114 Mich. 337; Mactavish *v.* Kent Circuit Judge, 122 Mich. 242; Becker *v.* Church, 115 N. Y. 562, *affirming* 42 Hun (N. Y.) 258.

4. Reasons for Granting Relief. — John Hancock Mut. L. Ins. Co. *v.* Dick, 114 Mich. 337; Mactavish *v.* Kent Circuit Judge, 122 Mich. 242.

The case first cited in this note, while expressly *approved* and *followed* by the case last cited, was *disapproved* in Mack *v.* Frankfort, 123 Mich. 426 (involving a slightly different point of equity jurisdiction) and was there characterized by Moore, J., as a "border-line case."

5. Becker *v.* Church, 115 N. Y. 566.

6. Enjoining Pending Action. — John Hancock Mut. L. Ins. Co. *v.* Dick, 114 Mich. 337; Mactavish *v.* Kent Circuit Judge, 122 Mich. 242; Becker *v.* Church, 115 N. Y. 562, *affirming* 42 Hun (N. Y.) 258.

7. Cancellation of Forged Instruments — *England.* — Peake *v.* Highfield, 1 Russ. 559; Johnston *v.* Renton, L. R. 9 Eq. 181. See also Cottam *v.* Eastern Counties R. Co., 1 Johns. & H. 243.

United States. — Sharon *v.* Hill, 20 Fed. Rep. 1; Schmidt *v.* West, 104 Fed. Rep. 272.

Illinois. — Ehrler *v.* Braun, 22 Ill. App. 391, *affirmed* 120 Ill. 503.

Indiana. — Huston *v.* Roosa, 43 Ind. 517; Huston *v.* Schindler, 46 Ind. 38; Hardy *v.* Brier, 91 Ind. 91.

Kentucky. — Patterson *v.* Smith, 4 Dana (Ky.) 153.

Maryland. — Singery *v.* Att.-Gen., 2 Har. & J. (Md.) 487.

See, however, in the following subdivision, *By Bringing Action and Rebutting Instrument Set Up in Defense.*

8. No Relief in Equity Where Legal Remedy Is Adequate. — See the title Equity, vol. 11, p. 199 *et seq.*

circumstances are such that the plaintiff might bring a common-law action, and then if the instrument should be interposed as a defense, avail himself of the grounds for cancellation in rebuttal.[1]

cc. Absence of Defense, but Existence of Affirmative Legal Remedy. — In a case where there is no defense at law to the enforcement of the instrument sought to be canceled, or the defense has become unavailing, but a speedy and effectual remedy exists by way of an affirmative action at law, a court of equity will not exercise jurisdiction. Thus, where a negotiable instrument procured by fraud has been negotiated to a *bona fide* holder, and the defense of fraud is thereby cut off, a court of equity will not cancel the instrument at the suit of the defrauded party, but will remit him to his action for damages at law against the party guilty of the fraud.[2]

(d) **Right to Trial by Jury.** — Where the complainant in equity can obtain adequate protection at law either by instituting an affirmative action or by interposing a defense, a material consideration for refusing equitable interference by way of cancellation is, that by the bringing of the case into equity the defendant would be deprived of his constitutional right to have a trial by jury.[3] But this principle has been denied upon the ground that a complainant's right to equitable relief is paramount to a defendant's right to a jury trial.[4]

(e) **Statutory Remedy at Law** — *aa.* General Principles. — It is well settled that where, from the want or inadequacy of a legal remedy, a court of equity has acquired original jurisdiction to grant relief in certain classes of cases, the fact that subsequent statutes have conferred upon courts of law jurisdiction to grant the same or similar relief does not oust the jurisdiction of equity unless by the express terms of the statutes; but such jurisdiction is thereafter concurrent with that conferred upon the common-law courts.[5] This principle has been applied where cancellation was sought, relief being granted notwithstanding that by aid of a statute the plaintiff in equity might have been able to impeach the instrument in an action at law.[6] But while this concurrent equitable jurisdiction clearly exists, the fact that adequate and complete relief may be obtained at law by the proceeding authorized by the statute, constitutes in many cases a sufficient ground for a court of equity to refuse to interfere.[7]

bb. Particular Statutory Remedies — (*aa*) *Proceeding to Determine Adverse Claim.* — In some jurisdictions statutes have been enacted providing that an action may be brought by one person against another for the purpose of determining an adverse claim which the latter makes against the former for money or property upon an alleged obligation.[8] Under these statutes it has been held in *Cali-*

1. Where Complainant May Bring Action and Impeach Instrument Set Up in Defense. — Gale *v.* Nickerson, 151 Mass. 428 (forged release); Balestier *v.* Mechanics' Nat. Bank, (Supm. Ct. Gen. T.) 15 N. Y. St. Rep. 48, *affirmed* 117 N. Y. 640. *Compare* Roberts *v.* Central Lead Co., (Mo. App. 1902) 69 S. W. Rep. 630; Duhme *v.* Mehner, 6 Ohio Cir. Dec. 79.

A Plaintiff in Pending Action of Ejectment Cannot Have Defendant's Deeds Canceled in Equity for Fraud, since the fraud can be successfully availed of in the action; and for the additional reason that one decree in equity ought not to determine matters which by statute would be settled only by several trials at law, as in the event of balancing verdicts. Buck Mountain Coal Co. *v.* Conrad, 6 Phila. (Pa.) 111, 22 Leg. Int. (Pa.) 373. See also the title Ejectment, vol. 10, pp. 520, 533, 534.

2. Negotiable Note Issued by Partner in Firm Name and Transferred to Bona Fide Holder. — Fuller *v.* Percival, 126 Mass. 381.

3. Right to Have Jury Trial a Ground for Denying Relief. — Phœnix Mut. L. Ins. Co. *v.* Bailey, 13 Wall. (U. S.) 621; Grand Chute *v.* Winegar, 15 Wall. (U. S.) 375; Shain *v.* Belvin, 79 Cal. 263; Ada County *v.* Bullen Bridge Co., (Idaho 1896) 47 Pac. Rep. 818; Shenehon *v.* Illinois L. Ins. Co., 100 Ill. App. 281.

4. Contra. — Mactavish *v.* Kent Circuit Judge 122 Mich. 247.

5. Jurisdiction of Equity Not Ousted by Statute Giving Remedy at Law. — See the title Statutes.

6. Release Canceled Although Impeachable at Law. — Roberts *v.* Central Lead Co., (Mo. App. 1902) 69 S. W. Rep. 630.

7. This principle as applied to cases where cancellation was sought is illustrated in the following paragraphs of text.

8. Statutes Providing for Action to Determine Adverse Demand. — Cal. Practice Act, § 527, Code Civ. Pro. Cal., § 1050; Rev. Stat. Idaho, § 4928; Comp. Stat. Minn. 629, § 35; N. Y. Code of Civ. Proced., §§ 1638, 1639 (as to real property).

fornia and *Idaho* that a court of equity will not direct the cancellation *quia timet* of an outstanding instrument to which a valid legal defense exists, but will remit the complainant to his remedy under the statute; the reason being not that there is lack of equitable jurisdiction, but that the statutory remedy being adequate and complete there is no occasion for granting equitable relief.[1] But in *Minnesota*[2] and *New York*[3] equitable relief by way of cancellation has been granted in proceedings instituted under the statutes.

(*bb*) *Proceeding to Perpetuate Testimony.* — Where statutes prevail under which testimony can be perpetuated, cancellation of a written instrument *quia timet* is generally refused on the ground that the remedy under the statute being sufficient, there is no reason for equitable interference to prevent irreparable injury through loss of testimony.[4] But it is clear that relief will not be denied where under the circumstances of the particular case the statutory remedy would not afford adequate protection.[5] And since the equity jurisdiction of a federal court cannot be abridged by a state statute giving a remedy at law,[6] it is held that the existence of a state statute providing for the perpetuation of testimony constitutes no ground for a federal court of equity to deny relief by cancellation *quia timet*.[7]

(f) **Effect of Statutes Reforming Procedure — Codes and Practice Acts.** — Under statutes providing that legal and equitable causes of action or matters of defense may be joined in the same action, so that the legal and equitable rights of the parties may be enforced and protected in one proceeding,[8] and providing that the withdrawal of an action after a cross-complaint or counterclaim, whether for legal or equitable relief, has been filed, shall not impair the right of the defendant to prosecute such cross-complaint or counterclaim as fully as if such action had not been withdrawn,[9] it is held that since a defendant in an action to enforce an instrument can have full control of the proceedings to enforce his equitable rights, he thus has an adequate remedy in a single action; and therefore it is no longer a ground for a separate suit for cancellation of the instrument that the plaintiff may withdraw the pending suit and bring other actions at some future time.[10]

New York Code of Civil Procedure. — The provisions of the New York Code of Civil Procedure combining courts of law and courts of equity in a single tribunal, allowing causes of action legal and equitable growing out of the same transaction to be united in a single suit, and legal and equitable defenses to be interposed in the same answer, and authorizing affirmative relief to be granted to a party defendant, have very much narrowed the scope of equitable jurisdiction in that state as regards the remedy of cancellation. Indeed, it has been stated to be a general rule under the code that if the party seeking this mode of relief can be divested of his rights only by some legal proceeding instituted by his adversary, and if he has a valid defense thereto, whether of a legal or an equitable nature, he must wait until this proceeding is

1. **Statutory Remedy Being Adequate, Cancellation Refused.** — Lewis *v.* Tobias, 10 Cal. 578; Ada County *v.* Bullen Bridge Co., (Idaho 1896) 47 Pac. Rep. 818.

2. Miller *v.* Rouse, 8 Minn. 124.

3. Livingston *v.* Moore, 15 N. Y. App. Div. 15, *appeal dismissed* 161 N. Y. 602. It was considered in this case that this relief might have been granted in the absence of the statutory provisions mentioned and under the general equitable jurisdiction of the court.

4. **Perpetuation of Testimony under Statute an Adequate Remedy.** — Shenehon *v.* Illinois L. Ins. Co., 100 Ill. App. 281; Brown *v.* Boyd, 158 Mass. 470; Venice *v.* Woodruff, 62 N. Y. 462, 20 Am. Rep. 495; Fowler *v.* Palmer, 62 N. Y. 533; Globe Mut. L. Ins. Co. *v.* Reals, 79 N. Y. 202. *Contra*, Hardy *v.* Brier, 91 Ind. 93.

For statutory proceedings to perpetuate testimony see the title PERPETUATION OF TESTIMONY, ENCYC. OF PL. AND PR., vol. 16, p. 364 *et seq.*

5. **Where Statutory Remedy Inadequate.** — Springport *v.* Teutonia Sav. Bank, 75 N. Y. 403.

6. See the title UNITED STATES COURTS.

7. **State Statute No Bar to Relief in Federal Court.** —Schmidt *v.* West, 104 Fed. Rep. 272.

8. *Connecticut* Practice Act of 1879, § 6 (Gen. Stat. of Conn., § 877); Rule III., § 8, and Rule V., § 1, of the same act.

9. *Connecticut* Practice Act of 1879, Rule V., § 3.

10. Welles *v.* Rhodes, 59 Conn. 498.

instituted and then interpose his defense.[1] Similarly, where in an action brought against him the defendant may obtain the equitable relief to which he is entitled, it is clear that he cannot, during the pendency of such an action, bring another proceeding in his own behalf to accomplish the same result.[2] These rules, however, are subject to exceptions. Thus, where the circumstances of the particular case are such that under the established practice the defendant cannot obtain the desired equitable relief in the one action, as where there are two adverse claimants to the instrument in question, each claiming adversely to him and in hostility to the other, so that a judgment in the defendant's favor in an action by one of them would not be conclusive upon the other, then, if the defendant has a valid defense to the instrument and in the absence of the code provisions would be entitled to invoke the aid of the court in a separate proceeding to have the instrument canceled *quia timet*, he may still obtain that relief; for, under these circumstances, his defensive remedy is neither adequate nor complete.[3]

Under the Judicature Acts in England and Canada, the general rule appears to be similar to that prevailing under the New York Code as stated above.[4]

(g) **Where Rights of Third Persons Would Be Affected.** — It has been stated that before the court will decree the cancellation of an instrument, it must appear that no person but the parties to the suit can sustain a claim under the instrument; that otherwise the remedy should be a perpetual injunction against the parties defendant.[5] And the court will not direct the cancellation of an instrument in the hands of a *bona fide* holder for value.[6]

(5) *Conditions of Relief.* — In granting cancellation of an instrument the court proceeds wholly upon equitable principles, and as a condition of relief may impose such terms and conditions as it may deem just and equitable in the premises.[7] The equitable maxim, "he who asks equity must do equity," applies in suits for cancellation. Thus, if there is anything due the defendant from the plaintiff in the transaction to which the instrument relates, the court will grant relief only on the condition that full justice be done between the parties by payment of the amount due;[8] and this principle has been held to apply not only to the sums for which the instrument stands as security, but also to other demands which the defendant has against the plaintiff, though they are enforceable only in equity.[9] In brief, if the plaintiff has received from the defendant anything which in good conscience he ought not to retain if relief should be granted, cancellation will be decreed only upon

1. General Rule under New York Code. — Scott *v.* Onderdonk, 14 N. Y. 13. In this case it was said by Denio, C. J.: "That there is a certain degree of inconvenience in this rule, in many cases which may be supposed, is admitted; but the evil would be much greater if every person who could show that what he claimed to be his rights was questioned by some other person, could call such person into court and compel him to disclaim or to litigate the matter in advance. Courts have commonly occupation enough in determining controversies which have become practical, without spending time in hearing discussions such as are merely speculative or potential. The most prominent of the inconveniences referred to have been remedied by legislation, or by the settled practice of the courts."

2. McHenry *v.* Hazard, 45 N. Y. 587, *per* Andrews, J.

3. Exception to Rule. — McHenry *v.* Hazard, 45 N. Y. 580.

4. Rule Under Judicature Acts in England and Ontario. — Brophy *v.* North American L. Assur. Co., 32 Can. Sup. Ct. 273, *per* Sedgewick, J.

5. Where Rights of Third Persons Intervene Injunction the Proper Remedy. — McEvers *v.* Lawrence, Hoffm. (N. Y.) 177, *affirmed* 2 Ch. Sent. (N. Y.) 25.

6. Bona Fide Holders — *Of Bonds.*—Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552; Cherry Creek *v.* Becker, 123 N. Y. 161.

Of Negotiable Notes. — Fuller *v.* Percival, 126 Mass. 381; Mayes *v.* Robinson, 93 Mo. 114.

7. Court May Impose Conditions in Granting Relief. — Venice *v.* Woodruff, 62 N. Y. 462, 20 Am. Rep. 495; O'Connell *v.* O'Conor, 191 Ill. 215. See also Burlington Tp. *v.* Cross, 15 Kan. 74.

8. Miller *v.* Gunderson, 48 Neb. 715; Crandall *v.* Grow, 41 N. J. Eq. 482; M'Donald *v.* Neilson, 2 Cow. (N. Y.) 139; Tuthill *v.* Morris, 81 N. Y. 94; Hayes *v.* Southern Home Bldg., etc., Assoc., 124 Ala. 663; O'Connell *v.* O'Conor, 191 Ill. 215; Fleckenstein *v.* Waters, 160 Mo. 649.

9. M'Donald *v.* Neilson, 2 Cow. (N. Y.) 139.

condition that the plaintiff surrender or restore it.[1] But this condition will be imposed only where it will work equity between the parties.[2]

(6) *Laches and Acquiescence.* — Where a party seeks the aid of equity to obtain the cancellation of an instrument embodying an obligation for the payment of money, long and unreasonable delay in seeking relief, and repeated recognition of the validity of the instrument, as by making payments upon it, are pertinent considerations for denying equitable relief and leaving the plaintiff to his legal remedy or defense.[3] The general equitable principles of laches, estoppel, and waiver appear to apply in cases of cancellation *quia timet*, as well as where other equitable remedies are sought.[4]

3. Adequacy of Legal Remedy or Defense. — To justify a court of equity in denying relief by way of rescission or cancellation it is not enough that the complainant can avail himself of some remedy or defense in a court of law; but such remedy or defense must meet all the requirements of justice and of its prompt administration, and be in all respects as adequate and satisfactory as the relief furnished by a court of equity; and if it is in any way defective, relief in equity will not be denied.[5]

Discretion of Court. — Where there is a legal remedy or defense available to the complainant in equity, the exercise of equity jurisdiction rests in the sound discretion of the court influenced by the circumstances of the particular case.[6]

Insolvency — Inadequacy of Indemnity Bond. — Where a complainant seeking the rescission of a contract and the cancellation of instruments relating to it has a remedy by an action at law against other parties to the contract and also against sureties in an indemnity bond, but the parties are insolvent and the amount of the bond is much less than the amount recoverable under the contract, then the remedy at law is manifestly inadequate and constitutes no ground for denying equitable relief.[7]

1. Venice *v.* Woodruff, 62 N. Y. 462, 20 Am. Rep. 495.

2. Brophy *v.* North American L. Assur. Co., 32 Can. Sup. Ct. 261.

3. Remedy Denied for Delay and Acquiescence. — Calhoun *v.* Millard, 121 N. Y. 69; Cherry Creek *v.* Becker, 123 N. Y. 161.

4. See generally the titles ESTOPPEL, vol. 11, pp. 385, 428 *et seq.*; LACHES, vol. 18, p. 95; WAIVER AND ABANDONMENT.

5. Principles Governing Adequacy of Legal Remedy — *England.* — London & Provincial Ins. Co. *v.* Seymour, L. R. 17 Eq. 85. See also Hood *v.* Aston, 1 Russ. 415.

United States. — Boyce *v.* Grundy, 3 Pet. (U. S.) 210; Jones *v.* Bolles, 9 Wall. (U. S.) 364; Tyler *v.* Savage, 143 U. S. 95; Rich *v.* Braxton, 158 U. S. 406; Herrick *v.* Throop, 24 Fed. Rep. 532; Patton *v.* Glatz, 56 Fed. Rep. 367; Southern R. Co. *v.* North Carolina R. Co., 81 Fed. Rep. 597; U. S. Life Ins. Co. *v.* Cable, (C. C. A.) 98 Fed. Rep. 761; Schmidt *v.* West, 104 Fed. Rep. 272; Mutual L. Ins. Co. *v.* Pearson, 114 Fed. Rep. 395.

Alabama. — Merritt *v.* Ehrman, 116 Ala. 278.

California. — Duff *v.* Duff, 71 Cal. 514, *affirmed* 87 Cal. 104.

Connecticut. — Ferguson *v.* Fisk, 28 Conn. 511.

Indiana. — Fitzmaurice *v.* Mosier, 116 Ind. 365, 9 Am. St. Rep. 854.

Kentucky. — Patterson *v.* Smith, 4 Dana (Ky.) 153.

Massachusetts.—Fuller *v.* Percival, 126 Mass. 383; Holden *v.* Hoyt, 134 Mass. 185; Nathan *v.* Nathan, 166 Mass. 295; Rackemann *v.* Riverbank Imp. Co., 167 Mass. 1, 57 Am. St. Rep. 427.

Michigan. — Wyckoff *v.* Victor Sewing Mach. Co., 43 Mich. 309; McKinney *v.* Curtiss, 60 Mich. 611; Maclean *v.* Fitzsimons, 80 Mich. 336.

Missouri. — Barrington *v.* Ryan, 88 Mo. App. 85.

New Jersey. — Cornish *v.* Bryan, 10 N. J. Eq. 152; Smith *v.* Smith, 30 N. J. Eq. 564.

New York. — Bosley *v.* National Mach. Co., 123 N. Y. 555.

Rhode Island. — Gorman *v.* McCabe, (R. I. 1902) 52 Atl. Rep. 989.

Tennessee. — Maise *v.* Garner, Mart. & Y. (Tenn.) 383, 17 Am. Dec. 817.

Virginia. — Lowman *v.* Crawford, 99 Va. 688.

Wisconsin. — Douglas County *v.* Walbridge, 38 Wis. 179.

The rule of the text is applicable under the sixteenth section of the Federal Judiciary Act of 1789. See the federal cases cited *supra* this note.

For a General Discussion of this doctrine see the title EQUITY, vol. 11, p. 200. See also in the ENCYC. OF PL. AND PR., the title REMEDY AT LAW, vol. 18, p. 108.

Recent Cases containing an exhaustive discussion of the doctrine, and a critical review of many authorities, are those cited in the following note.

6. Mutual L. Ins. Co. *v.* Pearson, 114 Fed. Rep. 395; U. S. Life Ins. Co. *v.* Cable, (C. C. A.) 98 Fed. Rep. 761.

7. Douglas County *v.* Walbridge, 38 Wis.

Uncertainty of Legal Right upon the Evidence. — Where the remedy at law is adequate, the uncertainty of the legal right asserted by the plaintiff in equity is no ground of equity jurisdiction; so if the real difficulty of the plaintiff is his inability to determine accurately in advance of a legal investigation and trial whether, in reference to the effect of the evidence, he can maintain an action at law, and the question is not as to the efficiency and completeness of the legal remedy itself, a court of equity will not interfere.[1]

Equitable Remedy Merely More Convenient. — Where the defense at law to the enforcement of an instrument is adequate and complete, the mere fact that it may be more convenient for the party to whom the defense is available to maintain a suit in equity than to interpose his defense at law will not justify a court of equity in exercising jurisdiction by way of cancellation.[2]

4. Rescission at Law or by Act of Party — *a.* IN GENERAL. — Contracts are frequently made containing terms whereby an election to terminate the contract is reserved to one or both of the parties upon the expiration of a certain length of time or the happening of a specified event. Under such circumstances, of course, rescission may be effected simply by the act of the party having the right, and this may be done whenever the right accrues according to the terms of the contract.[3] Performance of a contract may be rendered impossible by force of the terms of another contract subsequently entered into by the same parties and relating to the same subject-matter; the later contract thus working a virtual rescission of the other.[4] An executory contract may be discharged by an agreement of the parties that it shall no longer constitute a binding obligation upon them.[5]

b. GROUNDS FOR RESCISSION — (1) *Fraud, Misrepresentation, and Deceit.* — Where a contract is procured by fraud, misrepresentation, or deceit, the defrauded party is entitled to rescind without invoking the aid of a court of equity; that is, he may by his own act disaffirm and repudiate the contract and thereafter either maintain an action at law against the party guilty of the fraud, or plead the fraud as a defense to an action to enforce the contract or to recover damages for the breach.[6]

(2) *Nonperformance.* — Where one of the parties to a contract fails or refuses to perform his obligations thereunder, the other party thereupon generally becomes entitled to cease further performance on his part, and treat the contract as at an end,[7] unless, perhaps, full performance by him is a con-

179. See also Ferguson *v.* Fisk, 28 Conn. 501.

1. Allen *v.* Storer, 132 Mass. 372 (suit by lessee to rescind and annul a lease); see also Clark *v.* Jones, 5 Allen (Mass.) 381.

2. Vannatta *v.* Lindley, 98 Ill. App. 327, *affirmed* 198 Ill. 40.

3. **Election to Terminate Contract Reserved by Terms of Instrument.** — See the title WAIVER AND ABANDONMENT.

4. **Conflicting Obligations of Different Contracts.** — Paul *v.* Meservey, 58 Me. 419. See generally the titles referred to in the following note.

5. **Discharge of Contract by Subsequent Agreement.** — See the titles ACCORD AND SATISFACTION, vol 1, p. 408; WAIVER AND ABANDONMENT.

6. **Rescission for Fraud.** — See the title FRAUD AND DECEIT, vol. 14, p. 158 *et seq.*

7. **Discharge of Contract by Nonperformance or Breach** — *United States.* — Farmers' L. & T. Co. *v.* Galesburg, 133 U. S. 156.

Alabama. — Mobley *v.* Pickett, 9 Ala. 97.

Arkansas. — Rector *v.* McDermott, (Ark. 1890) 13 S. W. Rep. 334.

Colorado. — Murley *v.* Ennis 2 Colo. 300.

Florida. — Bacon *v.* Green, 36 Fla. 328.

Illinois. — Bannister *v.* Read, 6 Ill. 92; Webster *v.* Enfield, 10 Ill. 299; Carney *v.* Newberry, 24 Ill. 203; Brewster *v.* Van Liew, 20 Ill. App. 43; Rowe *v.* Rowe, 5 Ill. App. 331; Mamero *v.* Henschel, 20 Ill. 346; Lincoln *v.* Schwartz, 70 Ill. 134; Shaffner *v.* Killian, 7 Ill. App. 620.

Indiana. — Cromwell *v.* Wilkinson, 18 Ind. 365; Laboyteaux *v.* Swigart, 103 Ind. 596.

Iowa. — Anderson *v.* Haskell, 45 Iowa 45; Patterson *v.* Patterson, 81 Iowa 626.

Kentucky. — Reeder *v.* Reeder, 89 Ky. 529.

Maine. — Dodge *v.* Greeley, 31 Me. 343.

Massachusetts. — Brown *v.* Harris, 2 Gray (Mass.) 359; Goodrich *v.* Laflin, 1 Pick. (Mass.) 57; Rowe *v.* Smith, 16 Mass. 306; Moore *v.* Curry, 112 Mass. 13.

Michigan. — Seymour *v.* Detroit Copper, etc., Rolling Mills, 56 Mich. 117; Shepardson *v.* Stevens, 77 Mich. 256.

Minnesota. — Pinger *v.* Pinger, 40 Minn. 417; Nelson *v.* Hanson, 45 Minn. 543.

Mississippi. — Townsend *v.* Hurst, 37 Miss. 679; Gullich *v.* Alford, 61 Miss. 224.

New Hampshire. — Fuller *v.* Little, 7 N. H. 535; Pierce *v.* Duncan, 22 N. H. 18.

New Jersey. — Titus *v.* Cairo, etc., R. Co., 46 N. J. L. 393; Doughten *v.* Camden Bldg.,

dition precedent to or concurrent with performance by the party in default.[1] This right to rescind arises where the other party is simply unable to perform.[2] Where, however, the party insisting upon rescission has by his own act prevented performance by the other party, he will not be allowed to rescind, since he would thereby take advantage of his own wrong; but under such circumstances the other party is entitled to treat the contract as rescinded.[3] Generally the failure of performance, in order to constitute a ground for rescission, must be total; such as to defeat the object of the contract or render it unattainable.[4] The right to rescission does not exist where there has been a substantial though not literally a complete performance.[5] Where both parties are in default neither can rescind on the ground of nonperformance by the other.[6]

(3) *Failure of Consideration.* — A total or substantial failure of the consideration in reliance upon which a party has entered into a contract constitutes grounds for him to abandon the contract or treat it as rescinded.[7] This

etc., Assoc., 41 N. J. Eq. 556; Pironi *v.* Corrigan, 47 N. J. Eq. 135.

New York. — Wheeler *v.* Board, 12 Johns. (N. Y.) 363; Briggs *v.* Vanderbilt, 19 Barb. (N. Y.) 222.

Ohio. — See Higby *v.* Whittaker, 8 Ohio 201.

Pennsylvania. — Miller *v.* Phillips, 31 Pa. St. 218.

South Carolina. — Suber *v.* Pullin, 1 S. Car. 273; Heller *v.* Charleston Phosphate Co., 28 S. Car. 224.

Wisconsin. — Morgan *v.* Loomis 78 Wis. 594.

1. The right of one party to rescind or abandon for breach or nonperformance by the other frequently depends upon the question whether performance by one is a condition precedent to performance by the other or whether performance by each constitutes concurrent conditions. These questions and others of like nature must be determined by interpretation of the contracts in connection with which they arise. A discussion of them will be found under more appropriate titles in this work, it being intended to present here only the leading principles and to discuss more the exercise than the acquisition of the right. See the titles CONTRACTS, vol. 7, pp. 95 *et seq.*, 117 *et seq.*, 149 *et seq.*; WAIVER AND ABANDONMENT. See also the title INTERPRETATION AND CONSTRUCTION, vol. 17, p. 1.

2. Farrer *v.* Nightingal, 2 Esp. 639; Jones *v.* Anderson, 82 Ala. 302; Shaffner *v.* Killian, 7 Ill. App. 620; Bonner *v.* Herrick, 99 Pa. St. 220. See also Briggs *v.* Vanderbilt, 19 Barb. (N. Y.) 222.

It is not essential that the breach be wilful. Bacon *v.* Green, 36 Fla. 328.

3. Preventing Performance by Other Party. — Connelly *v.* Devoe, 37 Conn. 570; Leonard *v.* Smith, 80 Iowa 194; Wright *v.* Haskell, 45 Me. 489; Seipel *v.* International L. Ins., etc., Co., 84 Pa. St. 47.

4. Failure Must Be Total. — Selby *v.* Hutchinson, 9 Ill. 319; Weintz *v.* Hafner, 78 Ill. 27.

5. Selby *v.* Hutchinson, 9 Ill. 319; Weintz *v.* Hafner, 78 Ill. 27. In Lauman *v.* Young 31 Pa. St. 306, it was held that if the failure is total, the contract may be rescinded; that if there is a substantial performance, it may not be, and that a defective, negligent, and worthless performance is the same as none at all.

So in Burge *v.* Cedar Rapids, etc., R. Co., 32 Iowa 101, it was said: "A party cannot rescind if the failure of the other party be but partial, leaving a distinct part as a subsisting and executed consideration, and leaving also to the other party his action for damages for the part not performed." See also Carmody *v.* Powers, 60 Mich. 26.

Separable Contract. — But if a contract consists of distinct parts, any one of which can be performed without reference to the others, the refusal of a party to perform one does not authorize the other party to decline the subsequently offered performance of the others. Morgan *v.* McKee, 77 Pa. St. 228. See also Cannon Coal Co. *v.* Taggart, 1 Colo. App. 60. But where work was to be done by sections, to be paid for as each section was completed, it was held that failure to pay for one was ground for rescinding the contract. Bennett *v.* Shaughnessy, 6 Utah 273. See also South Fork Canal Co. *v.* Gordon, 6 Wall. (U. S.) 561.

Whether Contract Is Entire or Divisible, see the title CONTRACTS, vol. 7, p. 150.

6. Both Parties in Default. — Missouri River, etc., R. Co. *v.* Miami County, 12 Kan. 482; Hatton *v.* Johnson, 83 Pa. St. 219. See also *infra*, this subdivision, *Loss of Right — By Default of Party Seeking to Rescind.*

7. Failure of Consideration — *England.* — See Farrer *v.* Nightingal, 2 Esp. 639.

Illinois. — Anderson *v.* Armstead, 69 Ill. 452.

Indiana. — Strahn *v.* Hamilton, 38 Ind. 57.

Kentucky. — Robinson *v.* Bright, 3 Met. (Ky.) 30.

Louisiana. — Woods *v.* Schlater, 24 La. Ann. 284.

Massachusetts. — Dickinson *v.* Hall, 14 Pick. (Mass.) 217, 25 Am. Dec. 390; Curtis *v.* Clark, 133 Mass. 509.

Missouri. — Barr *v.* Baker, 9 Mo. 850.

New Hampshire. — Wentworth *v.* Wentworth, 5 N. H. 410.

New Jersey. — Pironi *v.* Corrigan, 47 N. J. Eq. 135.

New York. — Cross *v.* Huntley, 13 Wend. (N. Y.) 385; Ehle *v.* Judson, 24 Wend. (N. Y.) 97; Chapman *v.* Brooklyn, 40 N. Y. 372. See also Briggs *v.* Vanderbilt, 19 Barb. (N. Y.) 222.

Pennsylvania. — Bonner *v.* Herrick, 99 Pa. St. 220.

Tennessee. — Winfrey *v.* Drake, 4 Lea (Tenn.) 293.

Vermont. — Clough *v.* Patrick, 37 Vt. 421.

ground of rescission or abandonment is strongly analogous to that of non-performance, and it is obvious that the two may frequently be identical.[1]

Partial Failure of Consideration. — When a party wishes to rescind a contract on the ground of failure of consideration, if the failure has been partial only and a subsisting executed part performance is in his hands and there has been no fraud on the part of the other, rescission will not be allowed.[2]

c. METHOD OF EFFECTING RESCISSION. — Where sufficient grounds exist for rescinding a contract, the party entitled to rescind need not generally invoke the aid of a court of equity; but rescission may be had at law where it is not necessary to ask for a judgment of rescission, which indeed cannot be granted by a common-law court; but the effects of such a judgment are obtained indirectly.[3] This rescission at law, as it is termed, may be effected by the party who has the right thereto by simply notifying the other party of his intention to avoid the contract.[4] The notice need not be conveyed in express terms, but the intention to repudiate sufficiently appears where the party seeking to rescind institutes against the other legal proceedings based upon a disaffirmance of the contract.[5] And it seems that other acts of the party which show clearly an intention on his part to repudiate the contract may, if known to the other party, constitute sufficient acts of rescission or abandonment.[6]

d. DUTIES OF PARTY RESCINDING — (1) *To Give Notice of Disaffirmance.* — A party who intends to rescind a contract must, within a reasonable time, give to the other party notice of disaffirmance or must in some way communicate to him his intention to rescind.[7]

(2) *To Place Other Party in Statu Quo.* — Where a contract is sought to be rescinded by one of the parties thereto, the rule of law is that he must restore or offer to restore everything of value that he has received under the

1. Failure of consideration may result from nonperformance by one party, and thus entitle the other to rescind on either theory. See Chapman *v.* Brooklyn, 40 N. Y. 372; Wheeler *v.* Board, 12 Johns. (N. Y.) 363; Bonner *v.* Herrick, 99 Pa. St. 220. And see the foregoing subdivision.

2. Partial Failure. — Desha *v.* Robinson, 17 Ark. 228. See also Case *v.* Grim, 77 Ind. 565; Hodgdon *v.* Golder, 75 Me. 293.

3. Bishop on Contracts, § 831. See also Gould *v.* Cayuga County Nat. Bank, 86 N. Y. 75; Ludington *v.* Patton, 111 Wis. 208.

4. Rescission by Notice of Disaffirmance — *United States.* — McKay *v.* Carrington, 1 McLean (U. S.) 50.

California. — Henderson *v.* Hicks, 58 Cal. 364.

Illinois. — Horr *v.* Slavik, 35 Ill. App. 140.

Iowa. — Mullin *v.* Bloomer, 11 Iowa 360.

Maryland. — Textor *v.* Hutchings, 62 Md. 150.

Mississippi. — Butler *v.* Smith, 35 Miss. 457; Jagers *v.* Griffin, 43 Miss. 13; Vicksburg Liquor, etc., Co. *v.* U. S. Express Co., 68 Miss. 149.

New York. — De Gellert *v.* Poole, (N. Y. City Ct. Gen. T.) 2 N. Y. Supp. 651; Ackerman *v.* Voorhies, 33 N. Y. Super. Ct. 487.

Ohio. — Parmlee *v.* Adolph, 28 Ohio St. 10.

Pennsylvania. — Dick *v.* Ireland, 130 Pa. St. 299.

5. Bringing Action Shows a Sufficient Disaffirmance — *Illinois.* — Moore *v.* Rogers, 19 Ill. 347.

Indiana. — Thompson *v.* Peck, 115 Ind. 512; Mahoney *v.* Gano, 2 Ind. App. 107.

New Hampshire. — Howard *v.* Hunt, 57 N. H. 467.

New Jersey. — Skillman Hardware Mfg. Co. *v.* Davis, 53 N. J. L. 144.

New York. — Thompson *v.* Fuller, (Supm. Ct. Gen. T.) 16 N. Y. Supp 486.

Action to Recover Consideration.—Where there has been a breach by one party the bringing of an action by the other to recover the consideration or money paid under the contract, is equivalent to an express disaffirmance. Mobley *v.* Pickett, 9 Ala. 97; Herrington *v.* Hubbard, 2 Ill. 569; Smith *v.* Smith, 19 Ill. 351; Huey *v.* Grinnell, 50 Ill. 179; Rowe *v.* Rowe, 5 Ill. App. 335; Laboyteaux *v.* Swigart, 103 Ind. 596.

6. See Dallas *v.* Hollingsworth, 3 Ind. 537; Pyne *v.* Wood, 145 Mass. 558; Ballantyne *v.* Appleton, 82 Me. 570; Suber *v.* Pullin, 1 S. Car. 277. *Compare* Wilber *v.* Leonard, 56 Hun (N. Y.) 364.

7. Duty to Give Notice of Disaffirmance. — Carney *v.* Newberry, 24 Ill. 203; Cain *v.* Guthrie, 8 Blackf. (Ind.) 409; Memphis, etc., R. Co. *v.* Neighbors, 51 Miss. 412; Webb *v.* Stone, 24 N. H. 282; Jay *v.* De Groot, (Supm. Ct. Gen. T.) 28 How. Pr. (N. Y.) 107; Higby *v.* Whittaker, 8 Ohio 198; Parmlee *v.* Adolph, 28 Ohio St. 10; Beetem *v.* Burkholder, 69 Pa. St. 249; Morgan *v.* McKee, 77 Pa. St. 228. See also the preceding subdivision.

What Is a Reasonable Time for Disaffirmance has been held, where the facts are undisputed, to be a question of law for the court. Bacon *v.* Green, 36 Fla. 328; Morgan *v.* McKee, 77 Pa. St. 228.

contract, to the end that the other party may be put *in statu quo.*[1] As a general rule, the fact that the circumstances of the case are such that the parties cannot be placed *in statu quo* precludes the right to rescind.[2]

(3) *To Rescind in Toto.* — Upon the same principle that requires a restoration of the *status quo* by the party seeking to rescind[3] is based the rule that the rescission must be of the entire contract. The party will not be allowed to avoid the contract as to those parts which would work him an injury, and affirm it as to those which would inure to his profit.[4]

1. Restoration of Status Quo Necessary — *United States.* — Garland *v.* Bowling, Hempst. (U. S.) 710; Farmers' Bank *v.* Groves, 12 How. (U. S.) 51; Gay *v.* Alter, 102 U. S. 79; Latham *v.* Davis, 44 Fed. Rep. 862.

Arkansas. — Desha *v.* Robinson, 17 Ark. 228; Johnson *v.* Walker, 25 Ark. 196; Smade *v.* Mann, (Ark. 1890) 14 S. W. Rep. 1095

California. — Herman *v.* Haffenegger, 54 Cal. 161; Red Jacket Tribe No. 28 *v.* Gibson, 70 Cal. 128; Newman *v.* Smith, 77 Cal. 22; Wainwright *v.* Weske, 82 Cal. 193; More *v.* Calkins, 85 Cal. 177.

Idaho. — Bowman *v.* Ayers, 2 Idaho 431.

Illinois. — Buchenau *v.* Horney, 12 Ill. 336; Ellington *v.* King, 49 Ill. 449; Underwood *v.* West, 52 Ill. 397; Wolf *v.* Dietzsch, 75 Ill. 205; Prickett *v.* McFadden, 8 Ill. App. 197.

Indiana. — Buell *v.* Tate, 7 Blackf. (Ind.) 55; Calhoun *v.* Davis, 2 Ind. 532; Joest *v.* Williams, 42 Ind. 565, 13 Am. Rep. 377.

Iowa. — Moore *v.* Bare, 11 Iowa 198; Burge *v.* Cedar Rapids, etc., R. Co., 32 Iowa 101.

Massachusetts. — Conner *v.* Henderson, 15 Mass. 319; Snow *v.* Alley, 144 Mass. 546, 59 Am. Rep. 119; Handforth *v.* Jackson, 150 Mass. 149.

Mississippi. — Cocke *v.* Rucks, 34 Miss. 105; Jagers *v.* Griffin, 43 Miss. 134.

Missouri. — Jarrett *v.* Morton, 44 Mo. 275; Cahn *v.* Reid, 18 Mo. App. 115; Seen *v.* Springfield Engine, etc., Co., 34 Mo. App. 485.

New Hampshire. — Young *v.* Stevens, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; Manahan *v.* Noyes, 52 N. H. 232; Spencer *v.* St. Clair, 57 N. H. 9.

New Jersey. — Doughten *v.* Camden Bldg., etc., Assoc., 41 N. J. Eq. 556.

New York. — Howell *v.* Earp, 21 Hun (N. Y.) 393; Moyer *v.* Shoemaker, 5 Barb. (N. Y.) 319; Utter *v.* Stuart, 30 Barb. (N. Y.) 20; Stoddard *v.* Graham, (Supm. Ct. Gen. T.) 23 How. Pr. (N. Y.) 518; Jay *v.* DeGroot, (Supm. Ct. Gen. T.) 28 How. Pr. (N. Y.) 107.

North Carolina. — Stanton *v.* Hughes, 97 N. Car. 318; Wood *v.* Wheeler, 106 N. Car. 512.

Ohio. — Williamson *v.* Moore, 2 Disney (Ohio) 30; Waters *v.* Lemmon, 4 Ohio 229; Brown *v.* Witter, 10 Ohio 142.

Pennsylvania. — Bell *v.* Hartman, 9 Phila. (Pa.) 1, 29 Leg. Int. (Pa.) 44; Beetem *v.* Burkholder, 69 Pa. St. 249.

Even Where There Has Been a Partial Performance of a Contract, by one party, yet if the other refuses to perform some essential part, then notwithstanding such partial performance, the contract may be rescinded if the parties can be placed *in statu quo.* Lucy *v.* Bundy, 9 N. H. 298; Preble *v.* Bottom, 27 Vt. 249.

Knowledge of Repudiation. — The doctrine that, where a party has done some act in respect to the subject-matter of the contract which cannot be undone, he cannot demand rescission, does not apply where the thing was left undone with the knowledge that the contract was repudiated. Metropolitan El. R. Co. *v.* Manhattan El. R. Co., 11 Daly (N. Y.) 373.

Worthless Things Need Not Be Restored. — A party attempting to rescind a contract need not restore things which are absolutely worthless. Pettus *v.* Roberts, 6 Ala. 811; Babcock *v.* Case, 61 Pa. St. 427. See also Flynn *v.* Allen, 57 Pa. St. 482. *Compare* Beetem *v.* Burkholder, 69 Pa. St. 249. But he must return a note taken as consideration even though the maker thereof be insolvent. Spencer *v.* St. Clair, 57 N. H. 9.

A Forged Promissory Note, however, need not be returned, since it is worthless. Haase *v.* Mitchell, 58 Ind. 213.

2. Restitution Impossible. — Burnett *v.* Stanton, 2 Ala. 181; Bailey *v.* Fox, 78 Cal. 389; Burge *v.* Cedar Rapids, etc., R. Co., 32 Iowa 101; Neal *v.* Reynolds, 38 Kan. 432; Handforth *v.* Jackson, 150 Mass. 149; Gullich *v.* Alford, 61 Miss. 224; Kelly *v* Kershaw, 5 Utah 295; Hammond *v.* Buckmaster, 22 Vt. 375; McCrillis *v.* Carlton, 37 Vt. 139, 86 Am. Dec. 700. But *compare* Bell *v.* Keepers, 39 Kan. 105. See the notes to the preceding paragraph of text.

3. See the preceding subdivision.

4. Rescission Must Be of Entire Contract — *England.* — Sheffield Nickel, etc., Plating Co. *v.* Unwin, 2 Q. B. D. 214; Alexander *v.* Owen, 1 T. R. 225.

California. — California Steam Nav. Co. *v.* Wright, 8 Cal. 585; Purdy *v.* Bullard, 41 Cal. 444.

Idaho. — Bowman *v.* Ayers, 2 Idaho 431.

Illinois. — Wolf *v.* Dietzsch, 75 Ill. 205; Wolcott *v.* Heath, 78 Ill. 433; Kellogg *v.* Turpie, 93 Ill. 269, 34 Am. Rep. 163; Kimball *v.* Lincoln, 7 Ill. App. 470.

Iowa. — Burge *v.* Cedar Rapids, etc., R. Co., 32 Iowa 101.

Kansas. — Bell *v.* Keepers, 39 Kan. 105.

Maine. — Potter *v.* Titcomb, 22 Me. 300.

Michigan. — Jewett *v.* Petit, 4 Mich. 508.

Mississippi. — Martin *v.* Broadus, Freem. (Miss.) 35; Commercial Bank *v.* Lewis, 13 Smed. & M. (Miss.) 226.

Missouri. — Estes *v.* Reynolds, 75 Mo. 563; Lapp *v.* Ryan, 23 Mo. App. 437.

Nebraska. — Alfree Mfg. Co. *v.* Grape, 59 Neb. 777.

Nevada. — Bishop *v.* Stewart, 13 Nev. 25.

New Hampshire. — Evans *v.* Gale, 17 N. H. 573, 43 Am. Dec. 614; Sumner *v.* Parker, 36 N. H. 449.

New York. — Raymond *v.* Bearnard, 12 Johns. (N. Y.) 274, 7 Am. Dec. 317; Utter *v.* Stuart, 30 Barb. (N. Y.) 20; Clarkson *v.* Mitchell, 3 E. D. Smith (N. Y.) 269; Jay *v.*

e. LOSS OF RIGHT — (1) *By Default of Party Seeking to Rescind.* — It is obvious that the right to rescind a contract belongs only to the party who is himself without default. Even if he has sufficient grounds for rescission, if he has done some act which hinders performance by the other party, or has failed in any way to perform his own part of the contract, his right to rescind is forfeited.[1]

(2) *By Waiver* — (a) **Affirmance.** — Although a party may have sufficient ground for repudiating a contract, he may by certain acts waive the right. This may be done by affirmance, which may be express, or may be implied by conduct amounting to ratification after knowledge of the facts which entitle him to rescind.[2]

(b) **Bringing Action for Damages.** — After the right to rescind a contract has accrued, the party having the right may waive it by instituting an action to recover damages for the breach of the other party, since such an action is based upon an affirmance of the contract.[3]

(3) *By Intervention of Third Persons.* — The right to rescind may become unavailable by reason of the intervention of innocent third persons. This occurs most frequently where the contract is one of sale. Cases of this character will be found fully discussed elsewhere in this work.[4]

IV. REFORMATION — 1. Jurisdiction — *a.* OF COURTS OF EQUITY. — The reformation of instruments is a subject which has always been within the cognizance of courts of equity.[5]

DeGroot, (Supm. Ct. Gen. T.) 28 How. Pr. (N. Y.) 107.

North Carolina. — Wood *v.* Wheeler, 106 N. Car. 512.

Utah. — Kelly *v.* Kershaw, 5 Utah 295.

Wisconsin. — Hendricks *v.* Goodrich, 15 Wis. 679.

1. Loss of Right by Default — *England.* — Hughes *v.* Palmer, 19 C. B. N. S. 393, 115 E. C. L. 393; Doe *v.* Bancks, 4 B. & Ald. 401, 6 E. C. L. 535.

California. — Salmon *v.* Hoffman, 2 Cal. 138, 56 Am. Dec. 322; State *v.* McCauley, 15 Cal. 429.

Iowa. — Leonard *v.* Smith, 80 Iowa 194.

Kansas. — Missouri River, etc., R. Co. *v.* Miami County, 12 Kan. 482.

Nebraska. — Pryor *v.* Hunter, 31 Neb. 678.

New York. — Smith *v.* Gugerty, 4 Barb. (N. Y.) 614.

Pennsylvania. — Piper *v.* Sloneker, 2 Grant Cas. (Pa.) 113; Hatton *v.* Johnson, 83 Pa. St. 219.

South Carolina. — Prothro *v.* Smith, 6 Rich. Eq. (S. Car.) 324.

2. Waiver of Right — *England.* — Ormes *v.* Beadel, 2 De G. F. & J. 333; Morrison *v.* Universal Marine Ins. Co., L. R. 8 Exch. 197, 21 W. R. 774.

United States. — Martinez *v.* Moll, 46 Fed. Rep. 724.

Alabama. — See Lockwood *v.* Fitts, 90 Ala. 150.

Arkansas. — Bryan-Brown Shoe Co. *v.* Block, 52 Ark. 458.

Colorado. — Wheeler *v.* Dunn, 13 Colo. 428.

Georgia. — Green *v.* Jackson, 66 Ga. 250.

Illinois. — Wolf *v.* Dietzsch, 75 Ill. 205.

Iowa. — Evans *v.* Montgomery, 50 Iowa 325.

Kansas. — Gale Sulky Harrow Mfg. Co. *v.* Moore, 46 Kan. 324.

Kentucky. — Edwards *v.* Handley, Hard. (Ky.) 611.

Maine. — Brinley *v.* Tibbets, 7 Me. 70.

Massachusetts. — Flagg *v.* Dryden, 7 Pick. (Mass.) 52.

New Hampshire. — Allen *v.* Webb, 24 N. H. 278; Webb *v.* Stone, 24 N. H. 282.

New York. — Lawrence *v.* Dale, 3 Johns. Ch. (N. Y.) 23; Myers *v.* King, 48 Hun (N. Y.) 106; Cohen *v.* Ellis, 52 Hun (N. Y.) 133; Bach *v.* Tuck, 126 N. Y. 53.

Pennsylvania. — Morgan *v.* McKee, 77 Pa. St., 228.

Rhode Island. — Whitford *v.* Chace, 7 R. I. 322.

Acts Must Be Unequivocal. — Kuhns *v.* Gates, 92 Ind. 66; Tarkington *v.* Purvis, 128 Ind. 182; Cortland Mfg. Co. *v.* Platt, 83 Mich. 419.

3. Action for Damages. — Wheeler *v.* Dunn, 13 Colo. 428; Sanger *v.* Wood, 3 Johns Ch. (N. Y.) 416; Nelson *v.* Carrington, 4 Munf. (Va.) 332, 6 Am. Dec. 519. But see Graham *v.* Holloway, 44 Ill. 385. See generally the title WAIVER AND ABANDONMENT.

4. See the title SALES, *post.*

5. Jurisdiction of Courts of Equity — *England.* — Townshend *v.* Stangroom, 6 Ves. Jr. 328; Henkle *v.* Royal Exch. Assur. Co., 1 Ves. 317; Simpson *v.* Vaughan, 2 Atk. 33.

United States. — Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417; Bowers *v.* New York L. Ins. Co., 68 Fed. Rep. 785; Trenton Terra Cotta Co. *v.* Clay Shingle Co., 80 Fed. Rep. 46; Thompson *v.* Phenix Ins. Co., 136 U. S. 296; Hunt *v.* Rhodes, 1 Pet. (U. S.) 1; Chicago, etc., R. Co. *v.* Green, 114 Fed. Rep. 676; Hearne *v.* Marine Ins. Co., 20 Wall. (U. S.) 490; Adams *v.* Henderson, 168 U. S. 578, *affirming* 11 Utah 480; Snell *v.* Atlantic F. & M. Ins. Co., 98 U. S. 85.

Alabama. — Bieler *v.* Dreher, 129 Ala. 384; Larkins *v.* Biddle, 21 Ala. 252; Clark *v.* Hart, 57 Ala. 390; Clopton *v.* Martin, 11 Ala. 187; Moore *v.* Tate, 114 Ala 582; Tillis *v.* Smith, 108 Ala. 264; Tyson *v.* Chestnut, 100 Ala. 571. See also Stevens *v.* Hertzler, 114 Ala. 563.

Arkansas. — Webb *v.* Nease, 66 Ark. 155;

b. OF COURTS OF LAW. — At common law courts of law had no power to reform a written contract,[1] but since the abolition of the sharp distinction between courts of law and of equity, an instrument may, under some circumstances, be reformed in an action at law.[2]

2. Grounds of Reformation — *a.* MISTAKE — (1) *Rule Stated.* — The most usual ground for granting the reformation of an instrument is that through a mistake it does not correctly set forth the true intent of the parties.[3] Thus,

Pickett *v.* Merchants' Nat. Bank, 32 Ark. 346; Ft. Smith Milling Co. *v.* Mikles, 61 Ark. 123.

California. — Murphy *v.* Rooney, 45 Cal. 78.

Connecticut. — Holabird *v.* Burr, 17 Conn. 559; Sanford *v.* Washburn, 2 Root (Conn.) 503; Knapp *v.* White, 23 Conn. 539; Thompsonville Scale Mfg. Co. *v.* Osgood, 26 Conn. 19; West *v.* Suda, 69 Conn. 60.

Florida. — Herring *v.* Fitts, (Fla. 1901) 30 So. Rep. 804.

Georgia. — Wyche *v.* Greene, 11 Ga. 159.

Illinois. — Way *v.* Roth, 159 Ill. 162, *reversing* 58 Ill. App. 198; Henkleman *v.* Peterson, 154 Ill. 419, *reversing* 50 Ill. App. 601; Palmer *v.* Converse, 60 Ill. 313; McCloskey *v.* McCormick, 44 Ill. 336; Clearwater *v.* Kimler, 43 Ill. 272; Mills *v.* Lockwood, 42 Ill. 111; Kuchenbeiser *v.* Beckert, 41 Ill. 172; Hunter *v.* Bilyeu, 30 Ill. 228; Lindsay *v.* Davenport, 18 Ill. 375; Broadwell *v.* Broadwell, 6 Ill. 599.

Indiana. — Citizens' Nat. Bank *v.* Judy, 146 Ind. 322.

Kentucky. — Vaughn *v.* Digman, (Ky. 1897) 43 S. W. Rep. 251; Inskoe *v.* Proctor, 6 T. B. Mon. (Ky.) 311.

Maine. — Lewiston *v.* Gagne, 89 Me. 395, 56 Am. St. Rep. 432; Jordan *v.* Stevens, 51 Me. 78, 81 Am. Dec. 556; Adams *v.* Stevens, 49 Me. 362.

Maryland. — Wesley *v.* Thomas, 6 Har. & J. (Md.) 24.

Mississippi. — Wise *v.* Brooks, 69 Miss. 891.

Missouri. — Miller *v.* St. Louis, etc., R. Co., 162 Mo. 424; Parker *v.* Vanhoozer, 142 Mo. 621; Henderson *v.* Beasley, 137 Mo. 199; Tapley *v.* Herman, (Mo. App. 1902) 69 S. W. Rep. 482; Michigan Buggy Co. *v.* Woodson, 59 Mo. App. 550.

Nebraska. — Beall *v.* Martin, 48 Neb. 479.

New Hampshire. — Winnipiseogee Paper Co. *v.* Eaton, 64 N. H. 234.

New Jersey. — Morris *v.* Kettle, 56 N. J. Eq. 826; Hendrickson *v.* Ivins, 1 N. J. Eq. 562; Wintermute *v.* Snyder, 3 N. J. Eq. 489.

New York. — Quick *v.* Stuyvesant, 2 Paige (N. Y.) 84; Gillespie *v.* Moon, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559; Keisselbrack *v.* Livingston, 4 Johns. Ch. (N. Y.) 144.

North Carolina. — Brady *v.* Parker, 4 Ired. Eq. (39 N. Car.) 430; Newsom *v.* Bufferlow, 1 Dev. Eq. (16 N. Car.) 383.

Pennsylvania. — Jackson *v.* Pennsylvania Co., 2 Pa. Dist. 225.

Rhode Island. — Ryder *v.* Ryder, 19 R. I. 188.

Tennessee. — Bailey *v.* Bailey, 8 Humph. (Tenn.) 233.

Utah. — Marks *v.* Taylor, 23 Utah 152.

Vermont. — Lockwood *v.* White, 65 Vt. 466.

Virginia. — Snyder *v.* Grandstaff, 96 Va. 473; Donaldson *v.* Levine, 93 Va. 472; Persinger *v.* Chapman, 93 Va. 349; French *v.* Chapman, 88 Va. 317.

West Virginia. — Creigh *v.* Boggs, 19 W. Va. 240.

Wisconsin. — Elofrson *v.* Lindsay, 90 Wis. 203.

Jurisdiction of Equity Exclusive. — Miller *v.* Morris, 123 Ala. 164; Winnipiseogee Paper Co. *v.* Eaton, 64 N. H. 234.

Jurisdiction of Probate Court. — See Adlard *v.* Stockstill, 5 Ohio Dec. 493, 5 Ohio N. P. 487.

Alteration. — The authority of a court of equity to reform an instrument does not extend to any alteration of it, but only to correcting one in which a mistake has been made, by conforming it to what was actually agreed upon. Garnar *v.* Bird, 57 Barb. (N. Y.) 277.

Relief to Party Defendant. — Reformation of an instrument will be granted to a defendant who sets up a mistake therein, as well as at the instance of the plaintiff. Phœnix F. Ins. Co. *v.* Hoffheimer, 46 Miss. 645. See also the title MISTAKE, vol. 20, p. 825.

Proceeding Must Be for Purpose of Reformation. — Leavitt *v.* Palmer, 3 N. Y. 19.

1. Ivinson *v.* Hutton, 98 U. S. 79; Trout *v.* Goodman, 7 Ga. 383; Cunningham *v.* Wrenn, 23 Ill. 64; Jordan *v.* Stevens, 51 Me. 78; Hammel *v.* Queens Ins. Co., 50 Wis. 240.

2. Gray *v.* Roden, 24 Miss. 667. See also Sparta School Tp. *v* Mendell, 138 Ind. 188.

3. Mistake — *England.* — Henkle *v.* Royal Exch. Assur. Co., 1 Ves. 317. See also Townshend *v.* Stangroom, 6 Ves. Jr. 328.

United States. — Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 174, 1 Pet. (U. S.) 1; Trenton Terra Cotta Co. *v.* Clay Shingle Co., 80 Fed. Rep. 46; Thompson *v.* Phenix Ins. Co., 136 U. S. 296.

Alabama. — Tillis *v.* Smith, 108 Ala. 264; Clark *v.* Hart, 57 Ala. 390; Larkins *v.* Biddle, 21 Ala. 252. See also Stevens *v.* Hertzler, 114 Ala. 563.

Arkansas. — Pickett *v.* Merchants' Nat. Bank, 32 Ark. 346.

California. — Kee *v.* Davis, 137 Cal. 456.

Connecticut. — Thompsonville Scale Mfg. Co. *v.* Osgood, 26 Conn. 19; Holabird *v.* Burr, 17 Conn. 559; Sanford *v.* Washburn, 2 Root (Conn.) 503; Knapp *v.* White, 23 Conn. 539.

Idaho. — Christensen *v.* Hollingsworth, (Idaho, 1898) 53 Pac. Rep. 211.

Illinois. — McCloskey *v.* McCormick, 44 Ill. 336; Sanner *v.* Smith, 51 Ill. App. 671; Fisher *v.* Barnett, 56 Ill. App. 649.

Indiana. — Citizens' Nat. Bank *v.* Judy, 146 Ind. 322; Parish *v.* Camplin, 139 Ind. 1; Sparta School Tp. *v.* Mendell, 138 Ind. 188; Gray *v.* Woods, 4 Blackf. (Ind.) 432; Conwell *v.* Evill, 4 Blackf. (Ind.) 67.

Iowa. — Smith *v.* Watson, 88 Iowa 73.

Kansas. — Critchfield *v.* Kline, 39 Kan. 721.

Kentucky. — Rice *v.* Hall, (Ky. 1897) 42 S. W. Rep. 99; Vaughn *v.* Digman, (Ky. 1897) 43 S. W. Rep. 251.

Maine. — Lewiston *v.* Gagne, 89 Me. 395, 56 Am. St. Rep. 432.

a clerical mistake of the scrivener who drew up the instrument may be corrected.[1]

(2) *Must Be Mutual.* — In order to grant relief on the ground of mistake, the mistake must have been mutual;[2] the minds of the parties must have

Michigan. — Perkins *v.* Canine, 113 Mich. 72; Burns *v.* Caskey, 100 Mich. 94.

Minnesota. — Smith *v.* Jordan, 13 Minn. 264, 97 Am. Dec. 232.

Mississippi. — Mosby *v.* Wall, 23 Miss. 81, 55 Am. Dec. 71.

Missouri. — Miller *v.* St. Louis, etc., R. Co., 162 Mo. 424; Parker *v.* Vanhoozer, 142 Mo. 621; Henderson *v* Beasley, 137 Mo. 199; Ezell *v.* Peyton, 134 Mo. 484; Michigan Buggy Co. *v.* Woodson, 59 Mo. App. 550.

Nebraska. — Pinkham *v.* Pinkham, 60 Neb. 600; Carpenter Paper Co. *v.* Wilcox, 50 Neb. 659.

New Jersey. — Stines *v.* Hays, 36 N. J. Eq. 364, 38 N. J. Eq. 654; Green *v.* Morris, etc., R. Co., 12 N. J. Eq. 165; Morris *v.* Kettle, 56 N. J. Eq. 826; Wintermute *v.* Snyder, 3 N. J Eq. 489; Hendrickson *v.* Ivins 1 N. J. Eq. 562.

New York. — Garnar *v.* Bird, 57 Barb. (N. Y.) 277; Penfield *v.* New Rochelle, 18 N. Y. App. Div. 83; Quick *v.* Stuyvesant, 2 Paige N. Y. 84; Heert *v.* Cruger, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 508; Hebler *v.* Brown, (Supm. Ct. Tr. T.) 18 Misc. (N. Y.) 395; Darmour *v.* Chapman, 2 N. Y. App. Div. 112.

North Dakota. — Merchant *v.* Pielke, 9 N. Dak. 182.

Rhode Island. — Ryder *v.* Ryder, 19 R. I. 188.

Tennessee. — Perry *v.* Pearson, 1 Humph. (Tenn.) 431; Hancock *v.* Dodd, (Tenn. Ch. 1896) 36 S. W. Rep. 742; Sawyers *v.* Sawyers, 106 Tenn. 597.

Texas. — American Freehold Land Mortg. Co. *v.* Pace, 23 Tex. Civ. App. 222; Yarzombeck *v.* Grier, (Tex. Civ. App. 1895) 32 S. W. Rep. 236.

Utah. — Marks *v.* Taylor, 23 Utah 152.

Vermont. — Lockwood *v.* White, 65 Vt. 466.

Virginia. — French *v.* Chapman, 88 Va. 317; Donaldson *v.* Levine, 93 Va. 472.

Washington. — Murdoch *v.* Leonard, 15 Wash. 142.

Wisconsin. — Newton *v.* Holley, 6 Wis. 592. See also Grossbach *v.* Brown, 72 Wis. 458.

There Must Be Some Actual Mistake. — Robertson *v.* Walker, 51 Ala. 484; Consolidated Electric Storage Co. *v.* Atlantic Trust Co., 24 N. Y. App. Div. 172.

A Deed Which Correctly Expresses What the Parties Intended at the time cannot be reformed merely because but for a misapprehension they would have proceeded differently. The question is not what the parties would have intended if they had known better, but what did they intend at the time, informed as they were. Wise *v.* Brooks, 69 Miss. 891.

For a Full Treatment of all questions relating to mistake, see the title MISTAKE, vol. 20, p. 805.

Surprise. — See Townshend *v.* Stangroom, 6 Ves. Jr. 328.

1. Mistake of Scrivener—*California.*—Murphy *v.* Rooney, 45 Cal. 78.

Connecticut. — West *v.* Suda, 69 Conn. 60.

Georgia. — Reese *v.* Wyman, 9 Ga. 430; Stricker *v.* Tinkham, 35 Ga. 177; Rogers *v.* Atkinson, 1 Ga. 12; Collier *v.* Lanier, 1 Ga. 238.

Idaho. — Christensen *v.* Hollingsworth, (Idaho, 1898) 53 Pac. Rep. 211.

Illinois. — Sanner *v.* Smith, 51 Ill. App. 671.

Indiana. — Parish *v.* Camplin, 139 Ind. 1.

New Jersey. — Hendrickson *v.* Ivins, 1 N. J. Eq. 562; Wintermute *v.* Snyder, 3 N. J. Eq. 489.

New York. — Hebler *v.* Brown, (Supm. Ct. Tr. T.) 18 Misc. (N. Y.) 395.

Pennsylvania. — Schotte *v.* Meredith, 197 Pa. St. 496.

West Virginia. — Lough *v.* Michael, 37 W. Va. 679.

2. Mistake Must Be Mutual — *United States.* — Trenton Terra Cotta Co. *v.* Clay Shingle Co., 80 Fed. Rep. 46.

Alabama. — *Compare* Dulo *v.* Miller, 112 Ala. 687.

California. — Eureka *v.* Gates, 137 Cal. 89; Hochstein *v.* Berghauser, 123 Cal. 681. See also Kee *v.* Davis, 137 Cal. 456.

Georgia. — Bell *v.* Americus, etc., R. Co., 76 Ga. 754.

Illinois. — Seeley *v.* Baldwin, 185 Ill. 211; Sanner *v.* Smith, 51 Ill. App. 671; Fisher *v.* Barnett, 56 Ill. App. 649. See also Way *v.* Roth, 159 Ill. 162, *reversing* 58 Ill. App. 198.

Indiana. — Citizens' Nat. Bank *v.* Judy, 146 Ind. 322; Parish *v.* Camplin, 139 Ind. 1; Sparta School Tp. *v.* Mendell, 138 Ind. 188.

Iowa. — Nielander *v.* Chicago, etc., R. Co., 114 Iowa 421; Simpson *v.* Kane, 98 Iowa 271; Smith *v.* Watson, 88 Iowa 73; Des Moines County Agricultural Soc. *v.* Tubbessing, 87 Iowa 138.

Kentucky. — Royer Wheel Co. *v.* Miller, (Ky. 1899) 50 S. W. Rep. 62.

Maine. — Lewiston *v.* Gagne, 89 Me. 395; 56 Am. St. Rep. 432.

Maryland. — Delany *v.* Rodgers, 50 Md. 525.

Michigan. — Burns *v.* Caskey, 100 Mich. 94.

Minnesota. — Martini *v.* Christensen, 60 Minn. 491.

Missouri. — Parker *v.* Vanhoozer, 142 Mo. 621; Henderson *v.* Beasley, 137 Mo. 199; Miller *v.* St. Louis, etc., R. Co., 162 Mo. 424.

Nebraska. — Carpenter Paper Co. *v.* Wilcox, 50 Neb. 659.

New Jersey. — Whelen *v.* Osgoodby, 62 N. J. Eq. 571; Green *v.* Stone, 54 N. J. Eq. 387, 55 Am. St. Rep. 577.

New York. — Nevius *v.* Dunlap, 33 N. Y. 677; Ranney *v.* McMullen, (N. Y. Super. Ct. Spec. T.) 5 Abb. N. Cas. (N. Y.) 246; Allison Bros. Co. *v.* Allison, 144 N. Y. 21; Kelley *v.* Root, (Supm. Ct. Spec. T.) 37 Misc. (N. Y) 207; Sternback *v.* Friedman, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 173; Christopher, etc., St. R. Co. *v.* Twenty-third St. R. Co., 149 N. Y. 51, *affirming* 78 Hun (N. Y.) 462. See also Curtis *v.* Giles, (N. Y. Super. Ct. Eq. T.) 7 Misc. (N. Y.) 590.

Ohio. — Stewart *v.* Gordon, 60 Ohio St. 170.

Oregon. — Archer *v.* California Lumber Co., 24 Oregon 341.

Tennessee. — Clack *v.* Hadley, (Tenn. Ch. 1901) 64 S. W. Rep. 403.

Texas. — Willis *v.* Munger Improved Cotton

met upon some agreement other than that which the instrument expresses.[1]

(3) *Whether Relief May Be Granted in Case of Mistake of Law.* — In some jurisdictions the court will grant reformation in all cases of mistake, even though the mistake be one of law, such as, for example, the legal effect of terms employed in the writing.[2] But in other jurisdictions the courts hold that relief can be granted only in case of a mistake of fact.[3]

(4) *Presumption and Burden of Proof.* — The presumption always is that a written instrument expresses the true intent of the parties,[4] and hence the burden of proof is upon the party seeking reformation,[5] who must, in order

Mach. Mfg. Co., 13 Tex. Civ. App. 677; Yarzombeck *v.* Grier, (Tex. Civ. App. 1895) 32 S. W. Rep. 236.

Utah. — Deseret Nat. Bank *v.* Dinwoodey, 17 Utah 43.

Virginia. — Donaldson *v.* Levine, 93 Va. 472; Snyder *v.* Grandstaff, 96 Va. 473; Persinger *v.* Chapman, 93 Va. 349.

Washington. — Murdoch *v.* Leonard, 15 Wash. 142.

1. Minds of Parties Must Have Met. — Banchard *v.* Patterson, 64 Minn. 454; Greditzer *v.* Continental Ins. Co., 91 Mo. App. 534.

Agreement Must Have Been Definite and Complete. — To authorize the reformation of a written instrument on the basis of a preceding parol agreement, a part of which has been omitted by mistake, it is essential that the agreement should be definite and complete, well understood and agreed to by both parties. Sharp *v.* Behr, 117 Fed. Rep. 864.

2. Mistake of Law — *United States.* — Hunt *v.* Rousmaniere, 8 Wheat. (U. S.) 174; Snell *v.* Atlantic F. & M. Ins. Co., 98 U. S. 85; Chicago, etc., R. Co. *v.* Green, 114 Fed. Rep. 676.

Alabama. — Moore *v.* Tate. 114 Ala. 582; Orr *v.* Echols, 119 Ala. 340; Berry *v.* Sowell, 72 Ala. 14; Hemphill *v.* Moody, 64 Ala. 468; Larkins *v.* Biddle, 21 Ala. 252.

Connecticut. — Park *v.* Blodgett, etc., Co., 64 Conn. 28.

Maine. — Jordan *v.* Stevens, 51 Me. 78, 81 Am. Dec. 556.

Maryland. — Cooke *v.* Husbands, 11 Md. 492.

Minnesota. — Smith *v.* Jordan, 13 Minn. 264, 97 Am. Dec. 232; Benson *v.* Markoe, 37 Minn. 30, 5 Am. St. Rep. 816.

Missouri. — Corrigan *v.* Tiernay, 100 Mo. 281; Michigan Buggy Co. *v.* Woodson, 59 Mo. App. 550. But *compare* Miller *v.* St. Louis, etc., R. Co., 162 Mo. 424.

New Hampshire. — Eastman *v.* Provident Mut. Relief Assoc., 65 N. H. 176, 23 Am. St. Rep. 29; Kennard *v.* George, 44 N. H. 440.

New Jersey. — Trusdell *v.* Lehman, 47 N. J. Eq. 218.

New York. — Pitcher *v.* Hennessey, 48 N.Y. 415.

Ohio. — Clayton *v.* Freet, 10 Ohio St. 544.

Rhode Island. — Ryder *v.* Ryder, 19 R. I. 188.

Vermont. — Beardsley *v.* Knight, 10 Vt. 185, 33 Am. Dec. 193.

3. *England.* — Worrall *v.* Jacob, 3 Meriv. 271; Irnham *v.* Child, 1 Bro. C. C. 92.

Arkansas. — Rector *v.* Collins, 46 Ark. 167, 55 Am. Rep. 571.

Illinois. — Fowler *v.* Black, 136 Ill. 363; Wood *v.* Price, 46 Ill. 439; Gordere *v.* Downing, 18 Ill. 492; Sibert *v.* McAvoy, 15 Ill. 106; Wolsey *v.* Neeley, 46 Ill. App. 387.

Indiana. — Easter *v.* Severin, 78 Ind. 540; Heavenridge *v.* Mondy, 49 Ind. 434; Allen *v.* Anderson, 44 Ind. 395.

Iowa. — Marshall *v.* Westrope, 98 Iowa 324.

Michigan. — Burns *v.* Caskey, 100 Mich. 94.

Utah. — Deseret Nat. Bank *v.* Dinwoodey, 17 Utah 43.

In Hunt *v.* Rhodes, 1 Pet. (U. S.) 1, the court said: "The question, then, is, ought the court to grant the relief which is asked for, upon the ground of mistake arising from any ignorance of law? We hold the general rule to be, that a mistake of this character is not a ground for reforming a deed founded on such mistake; and whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their characters."

It Is a Mistake of Fact when through ignorance, inadvertence, negligence, or otherwise the description in a deed does not in fact embrace the lands which the parties intended it should, and which they supposed it did. And hence in such case the description can be reformed though it was inserted exactly as the parties intended it should be. Calton *v.* Lewis, 119 Ind. 181; Earl *v.* Van Natta, (Ind. App. 1902) 64 N. E. Rep. 901; Parish *v.* Camplin, 139 Ind. 1; Goode *v.* Riley, 153 Mass. 585.

4. Presumption — *United States.* — Pope *v.* Hoopes, (C. C. A.) 90 Fed. Rep. 451.

Alabama. — Kilgore *v.* Redmill, 121 Ala. 485.

Massachusetts. — Stockbridge Iron Co. *v.* Hudson Iron Co., 102 Mass. 48.

New York. — Kelley *v.* Root, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 207.

Virginia. — Donaldson *v.* Levine, 93 Va. 472.

West Virginia. — Koen *v.* Kerns, 47 W. Va. 575.

5. Burden of Proof — *Alabama.* — Hough *v.* Smith, 132 Ala. 204; Hertzler *v.* Stevens, 119 Ala. 333; Moore *v.* Tate, 114 Ala. 582; Smith *v.* Allen, 102 Ala. 406; Tyson *v.* Chestnut, 100 Ala. 571.

California. — Hochstein *v.* Berghauser, 123 Cal. 681.

Colorado. — Connecticut F. Ins. Co. *v.* Smith, 10 Colo. App. 121.

Georgia. — Bell *v.* Americus, etc., R. Co., 76 Ga. 754.

Iowa. — Breja *v.* Pryne, 94 Iowa 755; Holmes *v.* Rogers, (Iowa 1899) 80 N. W. Rep. 522.

Missouri. — Parker *v.* Vanhoozer, 142 Mo. 621.

New York. — Nevius *v.* Dunlap, 33 N. Y. 677; Husted *v.* Van Ness, 1 N. Y. App. Div. 120

Virginia. — Donaldson *v.* Levine, 93 Va. 472.

See also cases cited in next note.

to obtain the relief, furnish clear and satisfactory evidence that the circumstances are such as to warrant the interposition of a court of equity to grant the relief asked for.[1]

1. Evidence Must Be Clear and Satisfactory — *England.* — Townshend *v.* Stangroom, 6 Ves. Jr. 328; Henkle *v.* Royal Exch. Assur. Co., 1 Ves. 317. See also Bold *v.* Hutchinson, 5 DeG. M. & G. 558.

United States. — U. S. *v.* Munroe, 5 Mason (U. S.) 572; Andrews *v.* Essex F. & M. Ins. Co., 3 Mason (U. S.) 6; Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417; Shipman *v.* District of Columbia, 119 U. S. 148; Trenton Terra Cotta Co. *v.* Clay Shingle Co., 80 Fed. Rep. 46; Pope *v.* Hoopes, (C. C. A.) 90 Fed. Rep. 451; Baltzer *v.* Raleigh, etc., R. Co., 115 U. S. 645; Baldwin *v.* National Hedge, etc., Co., (C. C. A.) 73 Fed. Rep. 574, *reversing* 67 Fed. Rep. 853; Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417; U. S. *v.* Budd, 144 U. S. 154; Bowers *v.* New York L. Ins. Co., 68 Fed. Rep. 785, Sharp *v.* Behr, 117 Fed. Rep. 864; Thallmann *v.* Thomas, (C. C. A.) 111 Fed. Rep. 277, *affirming* 102 Fed. Rep. 935.

Alabama. — Hough *v.* Smith, 132 Ala. 204; Miller *v.* Morris, 123 Ala. 164; Kilgore *v.* Redmill, 121 Ala. 485; Hertzler *v.* Stevens, 119 Ala. 333; Moore *v.* Tate, 114 Ala. 582; Smith *v.* Allen, 102 Ala. 406; Tyson *v.* Chestnut, 100 Ala. 571; Guilmartin *v.* Urquhart, 82 Ala. 571; Berry *v.* Sowell, 72 Ala. 17; Hinton *v.* Citizens' Mut. Ins. Co., 63 Ala. 488; Dexter *v.* Ohlander, 95 Ala. 467; Houston *v.* Faul, 86 Ala. 232; Clark *v.* Hart, 57 Ala. 390; Larkins *v.* Biddle, 21 Ala. 252; Campbell *v.* Hatchett, 55 Ala. 551; Alexander *v.* Caldwell, 55 Ala. 522.

Arkansas. — Webb *v.* Nease, 66 Ark. 155.

California. — Eureka *v.* Gates, 137 Cal. 89; Hochstein *v.* Berghauser, 123 Cal. 681.

Colorado. — Connecticut F. Ins. Co. *v.* Smith, 10 Colo. App. 121.

Connecticut. — Knapp *v.* White, 23 Conn. 539; Holabird *v.* Burr, 17 Conn. 559.

Florida. — Peck *v.* Osteen, 37 Fla. 427; Franklin *v.* Jones, 22 Fla. 526; Jackson *v.* Magbee, 21 Fla. 622. See also Herring *v.* Fitts, (Fla. 1901) 30 So. Rep. 804.

Georgia. — Bell *v.* Americus, etc., R. Co., 76 Ga. 754.

Illinois. — Seeley *v.* Baldwin, 185 Ill. 211; Sutherland *v.* Sutherland, 69 Ill. 481; Miner *v.* Hess, 47 Ill. 170; McCloskey *v.* McCormick, 44 Ill. 336; Douglas *v.* Grant, 12 Ill. App. 276; Northfield Farmers' Tp. Mut. F. Ins. Co. *v.* Sweet, 46 Ill. App. 598.

Indiana. — Linn *v.* Barkey, 7 Ind. 69.

Iowa. — Nielander *v.* Chicago, etc., R. Co., 114 Iowa 421; Simpson *v.* Kane, 98 Iowa 271; Moore *v.* Graves, 97 Iowa 4; Osmundson *v.* Thompson, 90 Iowa 755, Des Moines County Agricultural Soc. *v.* Tubbessing, 87 Iowa 138; Tufts *v.* Larned, 27 Iowa 330; Stroupe *v.* Bridger, (Iowa 1902) 90 N. W. Rep. 704; Chapman *v.* Dunwell, 115 Iowa 533; Schrimper *v.* Chicago, etc., R. Co., 115 Iowa 35; Holmes *v.* Rogers, (Iowa 1899) 80 N. W. Rep. 522.

Kansas. — McCormick Harvesting Mach. Co. *v.* Hayes, 7 Kan. App. 141.

Kentucky. — Royer Wheel Co. *v.* Miller, (Ky. 1899) 50 S. W. Rep. 62; Vaughn *v.* Digman, (Ky. 1897) 43 S. W. Rep. 251.

Maryland. — Dulany *v.* Rogers, 50 Md. 525; Coale *v.* Merryman, 35 Md. 382.

Massachusetts. — Sawyer *v.* Hovey, 3 Allen (Mass.) 331; Stockbridge Iron Co. *v.* Hudson Iron Co., 102 Mass. 45; Richardson *v.* Adams, 171 Mass. 447.

Michigan. — Burns *v.* Caskey, 100 Mich. 94.

Minnesota. — Martini *v.* Christensen, 60 Minn. 491.

Missouri. — Parker *v.* Vanhoozer, 142 Mo. 621; Henderson *v.* Beasley, 137 Mo. 199; Sweet *v.* Owens, 109 Mo. 1.

Nebraska. — Slobodisky *v.* Phenix Ins. Co., 52 Neb. 395; Carpenter Paper Co. *v.* Wilcox, 50 Neb. 659.

New Jersey. — Whelen *v.* Osgoodby, 62 N. J. Eq. 571; Morris *v.* Kettle, 56 N. J. Eq. 826; Green *v.* Stone, 54 N. J. Eq. 387, 55 Am. St. Rep. 577; Rowley *v.* Flannelly, 30 N. J. Eq. 614; Burgin *v.* Gibberson, 26 N. J. Eq. 72; Loss *v.* Obry, 22 N. J. Eq. 52; Zane *v.* Cawley, 21 N. J. Eq. 130; Graham *v.* Berryman, 19 N. J. Eq. 29.

New York. — Southard *v.* Curley, 134 N. Y. 148; Christopher, etc., St. R. Co. *v.* Twenty-third St. R. Co., 149 N. Y. 51, *affirming* 78 Hun (N. Y.) 462; Allison Bros. Co. *v.* Allison, 144 N. Y. 21; Mead *v.* Westchester F. Ins. Co., 64 N. Y. 455; Sternback *v.* Freidman, (Supm. Ct, Spec. T.) 23 Misc. (N. Y.) 173; Kelly *v.* Root, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 207; Ford *v.* Joyce, 78 N. Y. 618; Nevius *v.* Dunlap, 33 N. Y. 676; White *v.* Williams, 48 Barb. (N. Y.) 222; Devereux *v.* Sun Fire Office, 51 Hun (N. Y.) 147; Boardman *v.* Davidson, (N. Y. Super. Ct. Spec. T.) 7 Abb. Pr. N. S. (N. Y.) 439; Little *v.* Webster, (Supm. Ct Gen. T.) 16 N. Y. St. Rep. 107; Hill *v.* Hill, 10 N. Y. Wkly. Dig. 239; Jamaica Sav. Bank *v.* Taylor, 72 N. Y. App. Div. 567. See also Gillespie *v.* Moon, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559.

North Carolina. — Lehew *v.* Hewett, 130 N. Car. 22.

North Dakota. — Merchant *v.* Pielke, 9 N. Dak. 182.

Ohio. — Stewart *v.* Gordon, 60 Ohio St. 170; Northwestern Ohio Natural Gas Co. *v.* Tiffin, 59 Ohio St. 420; Markey *v.* Waldo, 9 Ohio Cir. Dec. 762, 18 Ohio Cir. Ct. 849.

Oregon. — Newsom *v.* Greenwood, 4 Oregon 119.

Pennsylvania. — Sutch's Estate, 201 Pa. St. 305; Schotte *v.* Meredith, 197 Pa. St. 496; Boyertown Nat. Bank *v.* Hartman, 147 Pa. St. 558, 30 Am. St. Rep. 759, 30 W. N. C. (Pa.) 42; Bierman *v.* Lebanon Valley College, 20 Pa. Super. Ct 133.

Rhode Island. — Cranston Print Works *v.* Dyer, 19 R. I. 208.

Tennessee. — Sawyers *v.* Sawyers, 106 Tenn. 597; Clack *v.* Hadley, (Tenn. Ch. 1901) 64 S. W. Rep. 403; Rogers *v.* Smith, (Tenn. Ch. 1898) 48 S. W. Rep. 700; Ferring *v.* Fleischman, (Tenn. Ch. 1896) 39 S. W. Rep. 19; Perry *v.* Pearson, 1 Humph. (Tenn.) 431.

Texas. — Waco Tap R. Co. *v.* Shirley, 45 Tex. 357; American Freehold Land Mortg. Co. *v.* Pace, 23 Tex. Civ. App. 222.

Conflicting Testimony. — But where the proofs are satisfactory and the mistake is made entirely plain, relief will not be denied merely because there is conflicting testimony.[1]

(5) *Evidence.* — The existence of a mistake may be shown by parol evidence.[2]

b. FRAUD. — It has been asserted that while fraud is a ground for rescission it is not a ground for reformation,[3] but the better rule is that fraud may be a ground for reformation,[4] especially where it is accompanied by mistake,[5] as where there is a mistake of one of the parties accompanied by fraud on the part of the other.[6]

c. INADEQUACY OF PRICE. — While inadequacy of price, however gross, is not of itself sufficient ground to set aside or reform a contract between parties standing on an equality, it is a material fact, and, in connection with other facts, may amount to proof of fraud or mistake.[7]

3. Instruments Which May Be Reformed — *a.* IN GENERAL. — The power of reformation extends to practically every kind of written instrument. Thus, there may be a reformation of a conveyance,[8] a mortgage[9] or deed of trust,[10]

Utah. — Deseret Nat. Bank *v.* Dinwoodey, 17 Utah 43.

Vermont. — Lyman *v.* Little, 15 Vt. 576; Beardsley *v.* Knight, 10 Vt. 185, 33 Am. Dec. 193.

Virginia. — Donaldson *v.* Levine, 93 Va. 472; French *v.* Chapman, 88 Va. 317; Shirley *v.* Rice, 79 Va. 442.

West Virginia. — Koen *v.* Kerns, 47 W. Va. 575.

Wisconsin. — Kropp *v.* Kropp, 97 Wis. 137; Newton *v.* Holley, 6 Wis. 592.

1. Baldwin *v.* National Hedge, etc., Co., (C. C. A.) 73 Fed. Rep. 574, *reversing* 67 Fed. Rep. 853.

2. Parol Evidence — *California.* — Kee *v.* Davis, 137 Cal. 456.

Indiana. — Gray *v.* Woods, 4 Blackf. (Ind.) 432; Conwell *v.* Evill, 4 Blackf. (Ind.) 67.

Indian Territory. — Byrne *v.* Ft. Smith Nat. Bank, 1 Indian Ter. 680.

Iowa. — Lee *v.* Percival, 85 Iowa 639.

Kentucky. — Vaughn *v.* Digman, (Ky. 1897) 43 S. W. Rep. 251; Thomas *v.* McCormack, 9 Dana (Ky.) 108.

Massachusetts. — Goode *v.* Riley, 153 Mass. 585; Canedy *v.* Marcy, 13 Gray (Mass.) 373.

Nebraska. — Slobodisky *v.* Phenix Ins. Co., 52 Neb. 395.

New Hampshire. — Kennard *v.* George, 44 N. H. 440.

New York. — Moses *v.* Murgatroyd, 1 Johns. Ch. (N. Y.) 119, 7 Am. Dec. 478.

Vermont. — Lockwood *v.* White, 65 Vt. 466.

Virginia. — French *v.* Chapman, 88 Va. 317.

3. Rescission Is the Remedy. — Norris *v.* Colorado Turkey Honestone Co., 22 Colo. 162.

4. Reformation — *England.* — Henkle *v.* Royal Exch. Assur. Co., 1 Ves. 317; Townshend *v.* Stangroom, 6 Ves. Jr. 328.

United States. — Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 174.

Georgia. — Prater *v.* Bennett, 98 Ga. 413.

Minnesota. — Smith *v.* Jordan, 13 Minn. 264, 97 Am. Dec. 232.

Missouri. — Miller *v.* St. Louis, etc., R. Co., 162 Mo. 424.

Montana. — Sanford *v.* Gates, 21 Mont 277.

Oregon. — Archer *v.* California Lumber Co., 24 Oregon 341.

Texas. — Conn *v.* Hagan, 93 Tex. 334.

Vermont. — Beardsley *v.* Knight, 10 Vt. 185, 33 Am. Dec. 193.

Wisconsin. — Newton *v.* Holley, 6 Wis. 592.

See also the title FRAUD AND DECEIT, vol. 14, p. 175, note 2.

5. Fraud Accompanied by Mistake. — Hochstein *v.* Berghauser, 123 Cal. 681.

6. Citizens' Nat. Bank *v.* Judy, 146 Ind. 322; Martini *v.* Christensen, 60 Minn. 491; Clack *v.* Hadley, (Tenn. Ch. 1901) 64 S. W. Rep. 403; Clemens *v.* Clemens, 28 Wis. 637, 9 Am. Rep. 520.

7. Inadequacy of Price. — Baldwin *v.* National Hedge, etc., Co., (C. C. A.) 73 Fed. Rep. 574, *reversing* 67 Fed. Rep. 853.

8. Conveyance — *Florida.* — Franklin *v.* Jones, 22 Fla. 526; Jackson *v.* Magbee, 21 Fla. 622.

Illinois. — Rich *v.* School Trustees, 158 Ill. 242.

Indiana. — Popijoy *v.* Miller, 133 Ind. 19.

Kansas. — Critchfield *v.* Kline, 39 Kan. 721.

Kentucky. — Rice *v.* Hall, (Ky. 1897) 42 S. W. Rep. 99,

Michigan. — Perkins *v.* Canine, 113 Mich. 72.

Mississippi. — Wise *v.* Brooks, 69 Miss. 891.

Nebraska. — Beall *v.* Martin, 48 Neb. 479; Pinkham *v.* Pinkham, 60 Neb. 600.

New Hampshire. — Kennard *v.* George, 44 N. H. 440.

New Jersey. — Hendrickson *v.* Ivins, 1 N. J. Eq. 562; Wintermute *v.* Snyder, 3 N. J. Eq. 489.

Tennessee. — Sawyers *v.* Sawyers, 106 Tenn 597.

Washington. — Murdoch *v.* Leonard, 15 Wash. 142.

Conveyance of Homestead. — Tillis *v.* Smith, 108 Ala. 264. See also Gardner *v.* Moore, 75 Ala. 394, 51 Am. Rep. 454; Parker *v.* Parker, 88 Ala. 362, 16 Am. St. Rep. 52.

A Deed from a Husband to His Wife executed in good faith for a valuable consideration may be reformed so as to correct a mistake in the description of the property. Merchants, etc., Bldg. Assoc *v.* Scanlan, 144 Ind. 11.

9. Mortgage. — Citizens' Nat. Bank *v.* Judy, 146 Ind. 322; Lockwood *v.* White, 65 Vt. 466.

Chattel Mortgage. — Willis *v.* Munger Improved Cotton Mach. Mfg. Co., 13 Tex. Civ. App. 677.

10. Deed of Trust. — Michigan Buggy Co. *v.* Woodson, 59 Mo. App. 550.

a bond,[1] an insurance policy,[2] a promissory note,[3] lease,[4] power of attorney,[5] contract of sale,[6] or any character of contract in writing.[7]

Will. — But courts of chancery have no power to add to or reform a will on the ground of mistake.[8]

b. NECESSITY FOR CONSIDERATION. — In order to warrant the reformation of a deed or mortgage it must be based upon a consideration,[9] or all the parties must consent to the reformation.[10]

c. VOID INSTRUMENTS. — Where a contract or deed is void, and there is no evidence of accident or mutual mistake in the execution thereof, a court of equity has no power to reform the instrument so as to make it valid.[11]

d. SERIES OF INSTRUMENTS. — If there is a mistake in the description of property in a mortgage, and the same mistake exists in the decree of foreclosure and the sheriff's deed, equity will go back to the original transaction

1. Bond. — Olmsted *v.* Olmsted, 38 Conn. 309; Lewiston *v.* Gagne, 89 Me. 395, 56 Am. St. Rep. 432; Wiser *v.* Blachly, 1 Johns. Ch. (N. Y.) 437.

Official Bonds. — Montville *v.* Haughton, 7 Conn. 543; Henkleman *v.* Peterson, 154 Ill. 419, *reversing* 50 Ill. App. 601; Rutland *v.* Paige, 24 Vt. 181.

Township Bonds. — Bernards Tp. *v.* Stebbins, 109 U. S. 341.

Guardian's Bond. — Wiser *v.* Blachly, 1 Johns. Ch. (N. Y.) 437.

Administrator's Bond. — Probate Ct. *v.* May, 52 Vt. 182.

Injunction Bond. — Keith *v.* Henkleman, 68 Ill. App. 623, *affirmed* 173 Ill. 137.

2. Insurance Policies — *England.* — Motteux *v.* London Assur. Co., 1 Atk. 545; Collett *v.* Morrison, 9 Hare 162, 12 Eng. L. & Eq. 171.

United States. — Thompson *v.* Phenix Ins. Co., 136 U. S. 295; Hearne *v.* Marine Ins. Co., 20 Wall. (U. S.) 491; Oliver *v.* Mutual Commercial Marine Ins. Co., 2 Curt. (U. S.) 277; Western Assur. Co. *v.* Ward, (C. C. A.) 75 Fed. Rep. 338.

Kentucky. — Lancashire Ins. Co. *v.* Lucas, (Ky. 1896) 34 S. W. Rep. 899.

Missouri. — Greditzer *v.* Continental Ins. Co., 91 Mo. App. 534.

Nebraska. — Slobodisky *v.* Phenix Ins. Co., 52 Neb. 395.

New York. — Phœnix F. Ins. Co. *v.* Gurnee, 1 Paige (N. Y.) 278, 19 Am. Dec. 431.

3. Promissory Note. — Lee *v.* Percival, 85 Iowa 639; German Nat. Bank *v.* Butchers' Hide, etc., Co., 97 Ky. 34; Graham *v.* Guinn, (Tenn. Ch. 1897) 43 S. W. Rep. 749.

4. Lease. — Nielander *v.* Chicago, etc., R. Co., 114 Iowa 421; Holmes *v.* Rogers, (Iowa 1899) 80 N. W. Rep. 522.

5. Power of Attorney. — Michelson *v.* Hyde, 34 Neb. 60.

6. Contract of Sale. — Creigh *v.* Boggs, 19 W. Va. 240.

7. Contracts in General. — Smith *v.* Watson, 88 Iowa 73; Burns *v.* Caskey, 100 Mich. 94; Southard *v.* Curley, 134 N. Y. 148; Murdoch *v.* Leonard, 15 Wash. 142.

8. Wills. — Engelthaler *v.* Engelthaler, 196 Ill. 230

9. Necessity for Consideration.— Comstock *v.* Coon, 135 Ind. 640; Mason *v.* Moulden, 58 Ind. 1; German Mut. Ins. Co. *v.* Grim, 32 Ind. 249, 2 Am. Rep. 341; Randall *v.* Ghent, 19 Ind. 271; Froman *v.* Froman, 13 Ind. 317; Andrews *v.* Andrews, 12 Ind. 348; Mudd *v.* Dillon, 166 Mo. 110; Willey *v.* Hodge, 104 Wis. 81, 76 Am. St. Rep. 852.

But if There Is Any Consideration at All for the conveyance or mortgage, a mistake therein may be corrected. Comstock *v.* Coon, 135 Ind. 640; Citizens' Nat. Bank *v.* Judy, 146 Ind. 322; Mason *v.* Moulden, 58 Ind. 1.

A Deed Founded Partly on Love and Affection, and partly upon a binding promise by the grantees to pay off all the existing indebtedness of the grautor, is not one based on a purely voluntary consideration, and when by mistake the description of the premises intended to be conveyed is erroneously set forth in such deed, the same may be reformed. Smith *v.* Barksdale, 110 Ga. 278.

A Past Consideration, such as an existing indebtedness, for a deed from a husband to his wife through a third person, is sufficient to warrant the reformation of the deed. Comstock *v.* Coon, 135 Ind. 640.

Consideration Paid to Third Person. — A deed of conveyance founded upon a consideration to be paid to a third party therein named, and for labor expended on the premises conveyed, and for care and support of the grantor, is not a voluntary instrument, and mistakes in its execution may be corrected in a court of equity. Pinkham *v.* Pinkham, 60 Neb. 600.

Trust Mortgage to Secure Creditors. — Equity will not refuse to reform a trust mortgage executed to secure creditors of an insolvent corporation because voluntary, since such a mortgage is not purely voluntary, in the sense of being a gift. Miller *v.* Savage, 60 N. J. Eq. 204.

For a Full Treatment of all questions relating to consideration, see the title CONSIDERATION, vol. 6 p. 667.

10. Consent of All Parties. — Shears *v.* Westover, 110 Mich. 505; Redding *v.* Rozell, 59 Mich. 476.

11. Void Instruments. — Hedges *v.* Dixon County, 150 U. S. 192; Brazoria County *v.* Youngstown Bridge Co., (C. C. A.) 80 Fed. Rep. 10; Parish *v.* Camplin, 139 Ind. 1. See also Litchfield *v.* Ballou, 114 U. S. 192.

Equity Will Not Contravene Positive Enactments or Requirements of Law, or defeat its policy by supplying, under the guise of amending a defective instrument, deficient elements of form, without which the instrument is void. Dickinson *v.* Glenney, 27 Conn. 111. See also White *v.* Port Huron, etc., R. Co., 13 Mich. 356.

and reform all three instruments so as to make them conform to the original intention of the parties.[1]

e. REFORMATION AFTER RECORDING. — The rule that, in the absence of a statute, equity will reform a mortgage after record so as properly to describe land which, by mistake, had been misdescribed therein, and thereby render it superior to a judgment lien or to the title of a purchaser with notice at an execution sale thereunder, although the judgment was rendered and the sale made after the mortgage was recorded and before it was reformed, has not been changed by the *Arkansas* statute providing that every mortgage shall be a lien only from the time it is filed in the recorder's office.[2]

4. Matters Which May Be Corrected. — A written instrument may be corrected by supplying the omission of the name of a party,[3] or inserting provisions which have been omitted.[4] Similarly, where a part of the consideration is omitted, it may be inserted,[5] or the omission of a seal may be supplied.[6] Where the name of a party is incorrectly set forth, the correct name may be substituted,[7] or the name of the true party may be substituted for a name inserted by mistake.[8] And where an instrument contains an erroneous description of the property to which it relates, such description may be corrected or a true description substituted therefor.[9]

5. Who May Obtain Reformation — *a.* GRANTEE. — The grantee in a deed may, of course, obtain a reformation thereof upon making the proper showing;[10] and it has been held that the last vendee in a series of conveyances may have a mistake in the series corrected,[11] though this does not deprive an intermediate grantee of the right to have such reformation.[12]

b. GRANTOR. — A grantor, also, is entitled to have a deed reformed for mistake.[13]

c. COTENANT OF GRANTOR. — Where one of two cotenants has conveyed a part of the joint property, and through the fraud of the grantee the description includes more land than it was intended to convey, the other cotenant may obtain a reformation of the deed.[14]

d. ASSIGNEE. — It has been considered that where a party to a contract, who has a right to obtain a reformation of the same on account of fraud or

1. Series of Instruments. — Quivey *v.* Baker, 37 Cal. 465; Busey *v.* Moraga, 130 Cal. 586. See also Donald *v* Beals, 57 Cal. 399.

2. Reformation After Recording. — Ft. Smith Milling Co. *v.* Mikles, 61 Ark. 123.

3. Name of Party. — Parlin *v.* Stone, 48 Fed. Rep. 808; Fisher *v.* Barnett, 56 Ill. App. 649; Collins *v.* Cornwell, 131 Ind. 20; Parish *v.* Camplin, 139 Ind. 1.

4. Omitted Provisions. — Sanner *v.* Smith, 51 Ill. App. 671; Rice *v.* Hall, (Ky. 1897) 42 S. W. Rep. 99.

5. Consideration. — Chicago, etc., R. Co. *v.* Green, 114 Fed. Rep. 676.

6. Omission of Seal — *United States.*— Bernards Tp. *v.* Stebbins, 109 U. S. 341.

California. — Love *v.* Sierra Nevada Lake Water, etc., Co., 32 Cal. 639, 91 Am. Dec. 602.

Connecticut. — Montville *v.* Haughton, 7 Conn. 543.

Georgia. — Allen *v.* Elder, 76 Ga. 674, 2 Am. St. Rep. 63.

Illinois. — Keith *v.* Henkleman, 68 Ill. App. 623, *affirmed* 173 Ill. 137; Henkleman *v.* Peterson, 154 Ill. 419, *reversing* 50 Ill. App. 601.

Missouri. — Michel *v.* Tinsley, 69 Mo. 442.

New York. — Wadsworth *v.* Wendell, 5 Johns. Ch. (N. Y.) 224.

Vermont. — Probate Ct. *v.* May, 52 Vt. 182; Colchester *v.* Culver, 29 Vt. 111; Rutland *v.* Paige, 24 Vt. 181.

7. Name of Party. — Chicago, etc., R. Co. *v.* Green, 114 Fed. Rep. 676.

8. Sparta School Tp. *v.* Mendell, 138 Ind. 188.

9. Description of Property — *Indiana.*—Parish *v.* Camplin, 139 Ind. 1.

Kansas. — Critchfield *v.* Kline, 39 Kan. 721.

Michigan. — Rowley *v.* Towsley, 53 Mich. 329; Perkins *v.* Canine, 113 Mich. 72.

New York. — Penfield *v.* New Rochelle, 18 N. Y. App. Div. 83.

Washington. — Jenkins *v.* Jenkins University, 17 Wash. 160.

10. Possession Not Necessary. — Bieler *v.* Dreher, 129 Ala. 384.

11. Last Vendee.—Tillis *v.* Smith, 108 Ala. 264; Blackburn *v.* Randolph, 33 Ark. 119; Greeley *v.* De Cottes, 24 Fla. 475; Parker *v.* Starr, 21 Neb. 680; May *v.* Adams, 58 Vt. 74. But *compare* Norris *v.* Colorado Turkey Honestone Co., 22 Colo. 162.

12. See Tillis *v.* Smith, 108 Ala. 264.

13. Grantor. — Dulo *v.* Miller, 112 Ark. 687. See also Stone *v.* Hale, 17 Ala. 562, 52 Am. Dec. 185; Burnell *v.* Morris, 106 Ala. 349; Turner *v.* Kelly, 70 Ala. 85; Johnson *v.* Crutcher, 48 Ala. 368; Trapp *v.* Moore, 21 Ala. 607

14. Cotenant of Grantor. — Prater *v.* Bennett, 98 Ga. 413.

mutual mistake, assigns such contract to another person who shares in the mistake, the assignee may obtain a reformation.[1]

6. Against Whom Relief Will Be Granted — *a.* PARTIES AND PRIVIES — PERSONS WITH NOTICE. — In all cases of mistake in written instruments courts of equity will interfere and grant a reformation, upon a proper showing being made, as between the original parties or those claiming under them in privity, such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors, or purchasers from the original parties with actual or constructive notice of the facts.[2]

b. PERSONS WITHOUT NOTICE. — But equity will not grant the reformation of an instrument where this would affect intervening rights of third persons acquired without notice of the circumstances.[3] So, *bona fide* pur-

1. Assignee. — Bentley *v.* Smith, 2 Keyes (N. Y.) 342, 1 Abb. App. Dec. (N. Y.) 126.

2. Parties and Privies — Persons with Notice — *United States.* — American Mortg. Co. *v.* O'Harra, (C. C. A.) 56 Fed. Rep. 278; Cordova *v.* Hood, 17 Wall. (U. S.) 1, 13 Am. L. Reg. N. S. 334.

Alabama. — Orr *v.* Echols, 119 Ala. 340; Berry *v.* Sowell, 72 Ala. 14; Baskins *v.* Calhoun, 45 Ala. 582; Williams *v.* Hatch, 38 Ala. 338; Stone *v.* Hale, 17 Ala. 557, 52 Am. Dec. 185. See also Bailey *v.* Timberlake, 74 Ala. 224; Early *v.* Ownes, 68 Ala. 171; Whitehead *v.* Brown, 18 Ala. 682.

Arkansas. — Ft. Smith Milling Co. *v.* Mikles, 61 Ark. 123; Blackburn *v.* Randolph, 33 Ark. 119; Simpson *v.* Montgomery, 25 Ark. 365, 99 Am. Dec. 228.

District of Columbia. — Manogue *v.* Bryant, 15 App. Cas. (D. C.) 245; Shoemaker *v.* Chappell, 4 Mackey (D. C.) 413.

Florida. — Herring *v.* Fitts, (Fla. 1901) 30 So. Rep. 804.

Georgia. — Macon *v.* Dasher, 90 Ga. 195; Lowe *v.* Allen, 68 Ga. 225; Burke *v.* Anderson, 40 Ga. 535; Wall *v.* Arrington, 13 Ga. 88; Wyche *v.* Greene, 11 Ga. 159.

Illinois. — Way *v.* Roth, 159 Ill. 162, *reversing* 58 Ill. App. 198; Milmine *v.* Burnham, 76 Ill. 362; Warren *v.* Richmond, 53 Ill. 52.

Indiana. — Citizens' Nat. Bank *v.* Judy, 146 Ind. 322; White *v.* Wilson, 6 Blackf. (Ind.) 448, 39 Am. Dec. 437; Smith *v.* Schweigerer, 129 Ind. 363; Lewis *v.* Phillips, 17 Ind. 108, 79 Am. Dec. 457; Moreland *v.* Lemasters, 4 Blackf. (Ind.) 383.

Indian Territory. — Byrne *v.* Ft. Smith Nat. Bank, 1 Indian Ter. 680.

Iowa. — Warburton *v.* Lauman, 2 Greene (Iowa) 420; Loomis *v.* Hudson, 18 Iowa 416; Haynes *v.* Seachrest, 13 Iowa 455. See also Welton *v.* Tizzard, 15 Iowa 495; Vannice *v.* Bergen, 16 Iowa 555, 85 Am. Dec. 531.

Kentucky. — Simms *v.* Richardson, 2 Litt. (Ky.) 274.

Maine. — Adams *v.* Stevens, 49 Me. 362.

Michigan. — Perkins *v.* Canine, 113 Mich. 72.

Mississippi. — Goodbar *v.* Dunn, 61 Miss. 618; Nugent *v.* Priebatsch, 61 Miss. 402.

Missouri. — Memphis Loan, etc., Assoc. *v.* Arnett, 169 Mo. 201; Martin *v.* Nixon, 92 Mo. 26; Pike *v.* Martindale, 91 Mo. 268; Young *v.* Cason, 48 Mo. 259; Rhodes *v.* Outcalt, 48 Mo. 367; Young *v.* Coleman, 43 Mo. 179.

Nebraska. — Carpenter Paper Co. *v.* Wilcox, 50 Neb. 659.

Nevada. — Adams *v.* Baker, 24 Nev. 162, 77 Am. St. Rep. 799; Ruhling *v.* Hackett, 1 Nev. 360.

New Hampshire. — Prescott *v.* Hawkins, 16 N. H. 122.

New York. — Jewett *v.* Palmer, 7 Johns. Ch. (N. Y.) 65, 11 Am. Dec. 401; Gillespie *v.* Moon, 2 Johns. Ch. (N. Y.) 599, 7 Am. Dec. 559; Penfield *v.* New Rochelle, 18 N. Y. App. Div. 83.

North Carolina. — See Day *v.* Day, 84 N. Car. 408.

Ohio. — Strang *v.* Beach, 11 Ohio St. 283, 78 Am. Dec. 308.

South Dakota. — Peters *v.* Fell, 15 S. Dak. 391.

Texas. — Yarzombeck *v.* Grier, (Tex. Civ. App. 1895) 32 S. W. Rep. 236.

Virginia. — Blair *v.* Owles, 1 Munf. (Va.) 38; Hoover *v.* Donally, 3 Hen. & M. (Va.) 316; Alexander *v.* Newton, 2 Gratt. (Va.) 266.

Wisconsin. — Carver *v.* Lassallette, 57 Wis. 232.

3. Intervening Rights Acquired Without Notice — *England.* — Warrick *v.* Warrick, 3 Atk. 291; Malden *v.* Menill, 2 Atk. 8.

United States. — Woodworth *v.* Cook, 2 Blatchf. (U. S.) 151; Gibson *v.* Cook, 2 Blatchf. (U. S.) 144.

Arkansas. — Davidson *v.* Davidson, 42 Ark. 362.

California. — El Dorado County *v.* Elstner, 18 Cal. 144.

Georgia. — Kilpatrick *v.* Strozier, 67 Ga. 247; Boardman *v.* Taylor, 66 Ga. 638; Burke *v.* Anderson, 40 Ga. 535; Wall *v.* Arrington, 13 Ga. 88; Ligon *v.* Rogers, 12 Ga. 281.

Illinois. — School Trustees v. Otis, 85 Ill. 179; Mills *v.* Lockwood, 42 Ill. 111; Lindsay *v.* Davenport, 18 Ill. 375.

Indiana. — Gray *v.* Robinson, 90 Ind. 527. But see Pence *v.* Armstrong, 95 Ind. 191.

Maine. — Burr *v.* Hutchinson, 61 Me. 514; Davis *v.* Rogers, 33 Me. 222; Farley *v.* Bryant, 32 Me. 474.

Massachusetts. — Molony *v.* Rourke, 100 Mass. 190.

Mississippi. — Kilpatrick *v.* Kilpatrick, 23 Miss. 124, 55 Am. Dec. 79.

Missouri. — Martin *v.* Nixon, 92 Mo. 26; Young *v.* Coleman, 43 Mo. 179.

New Jersey. — Trenton Banking Co. *v.* Woodruff, 2 N. J. Eq. 117.

New York. — Fassett *v.* Smith, 23 N. Y

chasers for value will be protected,[1] and it has been held that this protection will be extended to the grantee of a *bona fide* purchaser, even though he had notice of the mistake.[2]

c. SURETIES. — Equity may reform instruments against sureties as well as against principals.[3]

7. Necessity of Demand for Reformation. — It has been held that where the only relief sought is the reformation of a deed, mortgage, contract, or other instrument, a previous demand for a correction is necessary; but where, in addition to the reformation, a recovery or other relief is asked, no prior demand is necessary.[4]

8. Grounds for Refusing Reformation — *a.* LACHES. — A court may refuse to reform an instrument where the party invoking its power has been guilty of laches in the premises.[5] Whether or not there has been such laches as to warrant the court in refusing to interfere is a question to be governed by the general rules on the subject, which are fully discussed elsewhere in this work.[6]

b. NEGLIGENCE OF COMPLAINING PARTY. — The party who seeks the equitable relief must show that he was without negligence in the matter, for equity does not interfere to relieve men of the consequences of their own

252; Real Estate Trust Co. *v.* Balch, 45 N. Y. Super. Ct. 528.

North Carolina. — Henry *v.* Smith, 76 N. Car. 311.

Ohio. — Goldsmith *v.* Cincinnati, 7 Ohio Cir. Dec. 712, 14 Ohio Cir. Ct. 342.

Tennessee. — Lally *v.* Holland, 1 Swan (Tenn.) 396.

Vermont. — Tabor *v.* Cilley, 53 Vt. 487; Blodgett *v.* Hobart, 18 Vt. 414; Langdon *v.* Keith, 9 Vt. 299.

West Virginia. — Lough *v.* Michael, 37 W. Va. 679; Western Min., etc., Co. *v.* Peytona Cannel Coal Co., 8 W. Va. 406.

1. Bona Fide Purchasers — *United States.* — American Mortg. Co. *v.* O'Harra, (C. C. A.) 56 Fed. Rep. 278.

Arizona. — See Stevens *v.* Wadleigh, (Ariz. 1899) 57 Pac. Rep. 622.

Georgia. — Macon *v.* Dasher, 90 Ga. 195; Kilpatrick *v.* Strozier, 67 Ga. 247.

Illinois. — Harms *v.* Coryell, 177 Ill. 496; Way *v.* Roth, 159 Ill. 162, *reversing* 58 Ill. App. 198; Palmer *v.* Converse, 60 Ill. 313; Clearwater *v.* Kimler, 43 Ill. 272; Mills *v.* Lockwood, 42 Ill. 111; Kuchenbeiser *v.* Beckert, 41 Ill. 172; Hunter *v.* Bilyeu, 30 Ill. 228; Lindsay *v.* Davenport, 18 Ill. 375; Broadwell *v.* Broadwell, 6 Ill. 599.

Indian Territory. — Byrne *v* Ft. Smith Nat. Bank, 1 Indian Ter. 680.

Louisiana. — Sentell *v.* Randolph, 52 La. Ann. 52.

Michigan. — Dunham *v.* Steele Packing, etc , Co., 100 Mich. 75.

Nebraska. — Carter *v.* Leonard, (Neb. 1902), 91 N. W. Rep. 574. See also Carpenter Paper Co. *v.* Wilcox, 50 Neb. 659.

Vermont. — Lockwood *v.* White, 65 Vt. 466.

Virginia. — Snyder *v.* Grandstaff, 96 Va. 473. *Compare* Klatt *v.* Dummert, 70 Minn. 467.

See also the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 472.

Where Reformation Would Not Injure Purchaser. — When subsequent purchasers are not harmed by a correction in the original deed it may be corrected. Parker *v.* Starr, 21 Neb. 680.

2. American Mortg. Co. *v.* O'Harra, (C. C. A.) 56 Fed. Rep. 278.

3. Sureties — *Connecticut.* — Olmsted *v.* Olmsted, 38 Conn. 309.

Illinois. — Keith *v.* Henkleman, 68 Ill. App. 623, *affirmed* 173 Ill. 137; Henkleman *v.* Peterson, 154 Ill. 419, *reversing* 50 Ill. App. 601, and *overruling* School Trustees *v.* Otis, 85 Ill. 179.

Missouri. — State *v.* Frank, 51 Mo. 98.

New Jersey. — Smith *v.* Allen, 1 N. J. Eq. 55.

New York. — Clute *v.* Knies, 102 N. Y. 377; Prior *v.* Williams, 3 Abb. App. Dec. (N. Y.) 624; Wiser *v.* Blachly, 1 Johns. Ch. (N. Y.) 437.

North Carolina. — Sikes *v.* Truitt, 4 Jones Eq. (57 N. Car.) 361; Butler *v.* Durham, 3 Ired. Eq. (38 N. Car.) 589; Armistead, *v.* Bozman, 1 Ired. Eq. (36 N. Car.) 117; Huson *v.* Pittman, 2 Hayw. (3 N. Car.) 331.

Ohio. — Meininger *v.* State, 50 Ohio St. 394, 40 Am. St. Rep. 674.

See also the title SURETYSHIP.

4. Necessity for Demand.—Citizens' Nat. Bank *v.* Judy, 146 Ind. 322; Sparta School Tp. *v.* Mendell, 138 Ind. 188; Popijoy *v.* Miller, 133 Ind. 19; Axtel *v.* Chase, 77 Ind. 74; Earl *v.* Van Natta, (Ind. App. 1902) 64 N. E. Rep. 901. See also Beck *v.* Simmons, 7 Ala. 71; Long *v.* Brown, 4 Ala. 622.

5. Laches. — Fisher *v.* Barnett, 56 Ill. App. 649; Citizens' Nat. Bank *v.* Judy, 146 Ind. 322; Davidson *v.* Mayhew, 169 Mo. 258. See also Sharp *v.* Behr, 117 Fed. Rep. 864.

Circumstances Not Showing Laches. — Providence Steam-Engine Co. *v.* Hathaway Mfg. Co., 79 Fed. Rep. 512; Wabash R. Co. *v.* Lumley, 96 Fed. Rep. 773, 37 C. C. A. 584; Harris *v.* Ivey, 114 Ala. 363; Stevens *v.* Hertzler, 114 Ala. 563; Byrne *v.* Ft. Smith Nat. Bank, 1 Indian Ter. 680; Sutton *v.* Risser, 104 Iowa 631; Eberle *v.* Heaton, 124 Mich. 205; Graham, *v.* Guinn, (Tenn. Ch. 1897) 43 S. W. Rep. 749; Owen *v.* Williams, (Tenn. Ch. 1899) 55 S. W. Rep. 18. See also Earl *v.* Van Natta, (Ind. App. 1902) 64 N. E. Rep. 901.

6. See the title LACHES, vol. 18, p. 95.

carelessness.[1]

c. ADEQUATE REMEDY AT LAW. — Reformation may also be denied in equity where the applicant has an adequate remedy at law,[2] which is as full and complete as that in equity.[3]

d. COLLATERAL AGREEMENTS. — The reformation of a conveyance will not be precluded by the existence of a collateral agreement between the parties by which the conveyance was to operate as a mortgage, for a decree of reformation would not prevent the defendants from availing themselves of all proper remedies to secure whatever rights they might have by virtue of such agreement.[4]

e. FUTILITY OF REFORMATION. — Where the reformation asked for would be entirely futile, as the effect and operation of the deed would remain the same after the reformation was made, it will be refused, for there can be no equity in a bill which invokes the power of the court to do a vain and useless thing.[5] For the same reason, where a mortgage is void, the court will not decree reformation thereof as to the description of the property, since if the mortgage were corrected it would still be inoperative.[6]

f. ILLEGALITY OF CONTRACT. — Equity will not interfere to reform a contract which is illegal or contrary to good morals, or a deed executed pursuant to such contract.[7]

g. WHERE PARTIES CANNOT BE PUT IN STATU QUO. — The right to reform a contract supposes that the situation has remained substantially unchanged. If, on the contrary, the parties cannot be put *in statu quo*, substantially, equity will generally refuse relief.[8]

9. Limits of Power to Reform. — While a court of equity will reform contracts under many varying circumstances, still it has no power to make a new contract. Its power is simply to reform a contract already made, and it can neither add additional parties nor substitute other parties for those already appearing upon the face of the writing.[9] Similarly, equity cannot reform an instrument where there is no agreement to reform by, as where the mistake involves a fundamental error, an error as to the existence of the thing concerning which the writing was entered into. In such case the minds of the parties did not meet because of the mutual mistake as to the subject of the agreement, and an attempted reformation would result only in making an agreement for the parties, in ascertaining and stating the agreement which they would have made had they not mistaken the subject of the agreement.[10]

10. Relation Back of Reformation. — As between the immediate parties to a contract executed in mistake, and afterwards reformed by decree of the

1. **Negligence.** — Miller *v.* St. Louis, etc., R. Co. 162 Mo. 424; Persinger *v.* Chapman, 93 Va. 349.

Circumstances Not Showing Negligence. — Where the party seeking to have an instrument reformed had directed the scrivener to make certain erasures therefrom, the fact that he did not reread the instrument after the erasures were made does not necessarily show such negligence on his part as will deprive him of relief. West *v.* Suda, 69 Conn. 60.

2. **Adequate Remedy at Law.** — Jordan *v.* Stevens, 51 Me. 78, 81 Am. Dec. 556; Mackenzie *v.* Schmidt, 13 Am. L. Reg. N. S. 448.

3. Western Assur. Co. *v.* Ward, (C. C. A.) 75 Fed. Rep. 338.

4. **Collateral Agreements.** — Tillis *v.* Smith; 108 Ala. 264.

5. **Futility of Reformation.** — Gardner *v.* Knight, 124 Ala. 273; Harm *v.* Voss, (Iowa 1900) 82 N. W. Rep. 753.

6. McCrary *v.* Williams, 127 Ala. 251. See also Langmede *v.* Weaver, 65 Ohio St. 17.

7. **Illegality.** — Phillips *v.* Thorp, 10 Oregon 494.

8. **Where Parties Cannot Be Put in Status Quo.** — Crosier *v.* Acer, 7 Paige (N. Y.) 137. See also Grymes *v.* Sanders, 93 U. S. 55; Beauchamp *v.* Winn. L. R. 6 H. L. 223.

9. **Limits of Power.** — Hunt *v.* Rhodes, 1 Pet. (U. S.) 1; Mabb *v.* Merriam, 129 Cal. 663. See also Hochstein *v.* Berghauser, 123 Cal. 681.

10. Phillip Zorn Brewing Co. *v.* Malott, 151 Ind. 371.

Before a mortgage executed by the defendants can be reformed so as properly to describe the land which the plaintiffs intended to sell, and which the defendants intended to buy and mortgage back, it must appear that the plaintiffs have such title as they represented themselves to have when selling the land. Adams *v.* Henderson, 168 U. S. 578, *affirming* 11 Utah 480.

Chancery Court, the reformation takes effect as of the day of the first execution of the instrument, for many purposes. So, creditors at large, or purchasers with notice, can assert no rights which they could not have asserted if there had been no mistake and had the instrument truly set forth the contract intended to be made.[1] And this rule has been applied even as against the wife of a party, who was married after the execution of the instrument.[2] But a court has refused to apply it as against the wife of a mortgagor, who was his wife at the time of the execution of the mortgage, where the application would defeat her right of dower and she was not a party to the suit in which the reformation was made, nor charged with notice of the mistake.[3]

11. How Reformation Effected. — The correction of a mistake in a deed should be made, not by erasures or interlineations, but by a decree stating the reformation required, with such orders for injunctions and releases as may be necessary and proper to carry the decree into effect.[4]

12. Granting of Further Relief. — Where equity has acquired jurisdiction to reform an instrument it may retain it and grant full relief.[5] Thus, in the same suit in which the reformation is made, specific performance may be decreed,[6] or a foreclosure had,[7] or a contract may be enforced,[8] or damages awarded for a breach thereof.[9]

RES COMMUNES. — See note 10.

RESCRIPT. (See also COUNTERPART, vol. 7, p. 897.) — At common law, a counterpart. In *Massachusetts*, the statement of the decision of the Supreme Judicial Court in its appellate capacity, together with a brief statement of the reasons for the decision, which is sent to the court *a quo*, is called a rescript.

RESCUE. (See also the title ESCAPE, vol. 11, p. 258.) — Rescue is a deliverance of a prisoner from lawful custody by any third person.[11]

RESERVATION. (See also the titles CONDITIONS, vol. 6, p. 515; FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 210; REMAINDERS AND EXECUTORY INTERESTS, *ante*, p. 374; and see EXCEPT — EXCEPTION, vol. 11, p. 554.) — 1. A clause in a deed or other instrument of conveyance by which the grantor creates and reserves to himself some right, interest, or profit in the estate granted which had no previous existence as such, but is first called into

1. Relation Back of Reformation. — Chapman *v.* Fields, 70 Ala. 403; Hawkins *v.* Pearson, 96 Ala. 369.

2. Hawkins *v.* Pearson, 96 Ala. 369.

3. Execution in Favor of Widow Whose Dower Would Otherwise Be Lost. — Chapman *v.* Fields, 70 Ala. 403.

4. How Reformation Effected. — Smith *v.* Greeley, 14 N. H. 378; Craig *v.* Kittredge, 23 N. H. 236.

5. Court Will Grant Full Relief. — Bieler *v.* Dreher, 129 Ala. 384; McMullen *v.* Lockwood, 4 Del. Ch. 568. See also cases cited in preceeding section.

6. Specific Performance. — Kee *v.* Davis, 137 Cal. 456; O'Keefe *v.* Irvington Real Estate Co., 87 Md. 196; Mosby *v.* Wall, 23 Miss. 81, 55 Am. Dec. 71; Laub *v.* Buckmiller, 17 N. Y. 620; Bartlett *v.* Judd, 21 N. Y. 200; Creigh *v.* Boggs, 19 W. Va. 240. See also the title MISTAKE, vol. 20, p. 825.

Since the English Judicature Act of 1873, the court has jurisdiction, in one and the same action, to rectify a written agreement, upon parol evidence of mistake, and to order the instrument as rectified to be specially performed. Olley *v.* Fisher, 34 Ch. D. 367.

7. Foreclosure. — Christensen *v.* Hollingsworth, (Idaho 1898) 53 Pac. Rep. 211.

8. Enforcement of Contract. — Murphy *v.* Rooney, 45 Cal. 78.

9. Damages for Breach of Contract. — West *v.* Suda, 69 Conn. 60.

10. Res Communes. — In Geer *v.* Connecticut, 161 U. S. 525, *quoting* Pothier's Traité du Droit de Propriété, it was said: "These things are those which the jurisconsults called *res communes*. Marcien refers to several kinds — the air, the water which runs in the rivers, the sea, and its shores. * * * As regards wild animals, *feræ naturæ*, they have remained in the ancient state of negative community."

11. Rescue. — 2 Bishop's New Crim. Law, § 1065.

"A *rescue* is defined to be 'when a man, lawfully arrested and taken, is set at large wrongfully.'" State *v.* Mazyck, 3 Rich. L. (S.Car.) 292, *quoting* Com. Dig., tit. Rescous, A.

"The same offense as a voluntary escape by a jailer. Not criminal unless the rescuer knew that the person was held on a charge of crime, or that he was in charge of a public officer." And. L. Dict., *citing* 2 Bish. Crim. Law, § 1065; and Findlay *v.* McAllister, 113 U. S. 114.

Rescue and Pound Breach. — See the title IMPOUNDING, vol. 16, p. 8.

being by the instrument reserving it; such as rent, or an easement.[1] 2. In the public land laws, a reservation or reserve is a tract of the public lands withheld from sale or settlement and appropriated to some public use, such as a park, military post, Indian reservation, etc.[2] 3. The sum of money which the National Banking Acts require national banks to have always on hand.[3] 4. Where the trial court decides a point of law provisionally, setting it aside for further consideration by the court *in banc*, the judgment being subject to alteration if the court *in banc* arrives at a different decision, this is called a reservation of a point of law, or the point is said to be a "point reserved."[4]

RESERVE. (*Compare* RESERVATION, *ante.*) — To hold; to keep for future use; to retain; to withhold; to keep back.[5]

RESERVED CASE. — See ENCYC. OF PL. AND PR., titles CERTIFIED CASES, vol. 3, p. 918; REPORT AND CASE MADE, vol. 18, p. 725.

RESERVOIR. — See POND, vol. 22, p. 942, and see the titles LAKES AND PONDS, vol. 18, p. 129; WATERWORKS AND WATER COMPANIES.

RESETTLE. — See note 6.

1. Reservation — Conveyances. — Black's L. Dict.

"A *reservation* is the creation of a right or interest, which had no prior existence as such, in a thing or part of a thing granted." Kister *v.* Reeser, 98 Pa. St. 5, 42 Am. Rep. 608.

"A *reservation* is a clause of a deed, whereby the * * * grantor * * * doth reserve some new thing to himself out of that which he granted before. * * * This doth differ from an exception, which is ever of part of the thing granted, and of a thing *in esse* at the time; but this is of a thing newly created or reserved out of a thing demised that was not *in esse* before." Shep. Touch. 80, *quoted* in Fischer *v.* Laack, 76 Wis. 320, and in Craig *v.* Wells, 11 N. Y. 315.

2. Public Lands. — See the titles INDIANS, vol. 16, p. 212; PARKS AND PUBLIC SQUARES, vol. 21, p. 1065; STATE AND PUBLIC LANDS.

"The word *reservation* does not imply an absolute disposition of the lands, in all cases, but a withholding of them from some other disposition, such as sale, or for the use of schools and other objects, while, on the contrary, the term 'appropriation' would imply most clearly a setting apart or application to some particular use." McConnell *v.* Wilcox, 2 Ill. 359.

"The *reservation* of lands for any specific purpose by the government, if expressed in the most accurate, concise, and precise form of words, is but an expression of a desire of the government to use them for that purpose. It does not part with its title by reserving them, but simply gives notice to all the world that it desires them for a certain purpose; therefore the same precision and accuracy are not required as in case of a conveyance." U. S. *v.* Payne, 2 McCrary (U. S.) 301.

3. National Banks. — See the title NATIONAL BANKS, vol. 21, p. 319.

4. See the title CERTIFIED CASES, 3 ENCYC. OF PL. AND PR. 918.

5. Reserve. — Myers *v.* Conway, 90 Ala. 111; Lay *v.* Seago, 47 Ga. 88; Metropolitan Exhibition Co. *v.* Ward, (Supm. Ct.) 24 Abb. N. Cas. (N. Y.) 407.

Without Reserve. — See the title AUCTIONS AND AUCTIONEERS, vol. 3, p. 492, and see WITHOUT RESERVE.

Point Reserved. — See the title CERTIFIED CASES, 3 ENCYC. OF PL. AND PR. 918.

Reserved. — A lease was made by the United States of a certain lot in the District of Columbia from month to month, but the government *reserved* the right to sell or otherwise dispose of the temporary buildings which had been erected on the premises. In construing this lease in Morgan's Case, 14 Ct. Cl. 328, the court said: "To *reserve* was to retain something which the defendants already possessed; a 'right' in the premises was in no sense a favor dependent upon the will of the other party, and was directly opposed to the very definition of a license."

Reserve Dividends Plan. — See Fuller *v.* Metropolitan L. Ins. Co., 70 Conn. 647.

Reserve or Take — Usury. — See the title USURY.

6. Resettle. — Where, by written contract, a physician sold his practice and agreed not to *resettle* in the same town, it was held (construing the contract strictly, as one in restraint of trade) that he was bound thereby not again to take up his residence in such town for the practice of his profession, but that he might remain or *resettle* in the town if he did not practice his profession, or that he might practice in that locality while residing elsewhere. Haldeman *v.* Simonton, 55 Iowa 144. See also the title RESTRAINT OF TRADE, *post.*

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CROSS-REFERENCE.

See the title EVIDENCE, vol. 11, p. 487, *and references there given.*

I. DEFINITION. — The term *res gesta* or *res gestæ* means literally a thing or things done.[1] In the law of evidence the plural form *res gestæ*, which has received more general use, is often employed to denote the contemporaneous facts, circumstances, acts, or declarations which grow out of the main fact and which serve to illustrate and explain it.[2] But there is authority in favor of the use of the singular form *res gesta*, and this as indicating either the thing itself, the principal fact in issue, or some other fact evidentiary of the principal fact,[3] and the term as used in this sense will be adopted in this article.

1. See Friend *v.* Burleigh, 53 Neb. 674.

2. **Res Gestæ as Defining the Circumstances Surrounding the Main Fact.** — Stirling *v.* Buckingham, 46 Conn. 461; Pinney *v.* Jones, 64 Conn. 545, 42 Am. St. Rep. 209; Carter *v.* Buchannon, 3 Ga. 513; Eagon *v.* Eagon, 60 Kan. 697; Schulz *v.* Schulz, 113 Mich. 502; Lund *v.* Tyngsborough, 9 Cush. (Mass.) 36. See also McLeod *v.* Johnson, 96 Me. 278.

3. **Res Gesta as Indicating the Principal Fact.** — Enos *v.* Tuttle, 3 Conn. 247; Miller *v.* State, 8 Gill (Md.) 141; Waldele *v.* New York

II. Statement of General Rule. — The difficulty of formulating a precise rule by which the admissibility of evidence under the doctrine of *res gesta* shall be determined is admitted by all the authorities, but it may be stated generally that wherever it becomes important to show upon the trial of a cause a particular fact or event it is competent and proper also to show any accompanying facts and circumstances which are actually or substantially contemporaneous with it and calculated to elucidate and explain its quality and character, and so connected with it as to constitute one transaction, the rule including accompanying declarations, as well as acts, although such declarations would, apart from this doctrine, be excluded as hearsay.[1]

Theory of Admission of Accompanying Declarations. — Unsworn declarations admitted on this principle do not depend for their effect upon the credit of the person making them, but the credit which the principal act or fact gives to the accompanying declarations as a part of the transaction and the tendency of the accompanying declarations as a part of the transaction to explain the particular fact, distinguish this class of declarations from mere hearsay.[2]

Whether Original Evidence or Exception to Hearsay. — According to some of the authorities such evidence does not come under the head of hearsay, but is admissible as original evidence.[3] There is other authority to the effect, how-

Cent., etc., R. Co., 95 N. Y. 274, 47 Am. Rep. 41; Bedingfield's Case, 15 Am. L. Rev. 107.

In Felt *v.* Amidon, 43 Wis. 467, the plural form was used in this sense.

1. General Doctrine of Res Gesta Stated — *United States.* — St. Clair *v.* U. S., 154 U. S. 149.

Arizona. — U. S. *v.* Tidball, (Ariz. 1892) 29 Pac. Rep. 385.

Connecticut. — Pinney *v.* Jones, 64 Conn. 545, 42 Am. St. Rep. 209.

Georgia. — Printup *v.* Mitchell, 17 Ga. 558, 63 Am. Dec. 258.

Illinois. — Lander *v.* People, 104 Ill. 248; Pickel *v.* Luetgert, 59 Ill. App. 378.

Indian Territory. — Dorrance *v.* McAlester, 1 Indian Ter. 473.

Maine. — State *v.* Walker, 77 Me. 488.

Massachusetts. —O'Connell *v.* Cox, 179 Mass. 250.

Michigan. — People *v.* Foley, 64 Mich. 148; Jansen *v.* McQueen, 112 Mich. 254; Schaub *v.* Welded-Barrel Co., 125 Mich. 591, 7 Detroit Leg. N. 625.

New Hampshire. — Sessions *v.* Little, 9 N. H. 271; Tenney *v.* Evans, 14 N. H. 351.

New York. — Hine *v.* New York El. R. Co., 149 N. Y. 162; Tibbits *v.* Phipps, 30 N. Y. App. Div. 274, *affirmed* 163 N. Y. 580.

North Carolina. — State *v.* Behrman, 114 N. Car. 797.

Ohio. — Lake Shore, etc., R. Co. *v.* Herrick, 49 Ohio St. 25.

Texas. — Davis *v.* State, 3 Tex. App. 91.

Washington. — Dormitzer *v.* German Sav., etc., Soc., 23 Wash. 132.

In St. Clair *v.* U. S., 154 U. S. 149, the court said: "Circumstances attending a particular transaction under investigation by a jury, if so interwoven with each other and with the principal fact that they cannot well be separated without depriving the jury of proof that is essential in order to reach a just conclusion, are admissible in evidence."

Absence of Street Lamps at Crossing as Part of Res Gesta of Negligence of Village. — Jefferson *v.* Chapman, 127 Ill. 438, 11 Am. St. Rep. 136.

Manner of Declarant Accompanying Alleged Slanderous Communication. — Hereford *v.* Combs, 126 Ala 369.

Speed and Movement of Train on Issue of Negligence. — Louisville, etc., R. Co. *v.* Stewart, 128 Ala. 313; Chicago, etc., R. Co. *v.* Kinnare, 76 Ill. App. 394.

Statements Themselves Without Probative Force to Show Res Gesta Connection. — The facts by and from which the admissibility of declarations of a person as part of the *res gesta* are to be tested, are to be established by the testimony of persons cognizant of them. The admissibility of the statements themselves being the very question at issue for decision, no part of them can be used as furnishing the basis or foundation on which they are to be admitted. State *v.* Williams, 108 La. 222.

Bona Fides of Declaration a Question for the Jury. — The rule is generally stated that it is for the jury to judge whether declarations offered as a part of the *res gesta* are made *bona fide*, or are a mere ruse on the part of the declarant to manufacture evidence in his own behalf. Travellers' Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 397; Eagon *v.* Eagon, 60 Kan. 697; Danforth *v.* Streeter, 28 Vt. 491. On the other hand, it has been held that if, from the experienced connection between the circumstances and situation in which the declarant was placed at the time the declarations were made, and of human conduct and motives under like circumstances generally, the declarations are most likely the result of contrivance and a fraudulent design to conceal the truth, they are inadmissible in evidence as a part of the *res gesta*. Meek *v.* Perry, 36 Miss. 190.

2. Theory of Admission of Accompanying Declarations. — Kyle *v.* Craig, 125 Cal. 107; Marler *v.* Texas, etc., R Co., 52 La. Ann. 736; Lund *v.* Tyngsborough, 9 Cush. (Mass.) 36; Waldele *v.* New York Cent., etc., R. Co., 95 N. Y. 274, 47 Am. Rep. 41; State *v.* Marsh, 70 Vt. 288.

3. 1 Greenleaf on Ev. (16th ed.), § 108; Lund *v.* Tyngsborough, 9 Cush. (Mass.) 36.

ever, that it is an exception to the hearsay rule.[1]

Under Statute in some jurisdictions it is provided that where the declaration, act, or omission forms part of the transaction which is itself the fact in dispute or evidence of the fact, such declaration, act, or omission is evidence as a part of that transaction.[2]

III. The Main or Principal Fact — 1. Necessity. — There must be a main fact or transaction[3] which may, however, be the ultimate fact to be proved or some fact evidentiary of that fact.[4]

2. Admissibility. — Moreover, it is essential that this act or fact should itself be relevant and admissible.[5] Thus, if a declaration is material, but the act which it accompanies is important only as furnishing the occasion for making the statement, the evidence will be inadmissible.[6] If it is not admissible, its actual admission, without objection, does not render an accompanying declaration competent.[7]

3. Equivocalness. — It is only when the thing done is equivocal, and it is necessary to render its meaning clear or expressive of a motive or an object, that it is competent to prove declarations accompanying it, as falling within the class of *res gesta*.[8]

4. Duration or Extent. — The main transaction is not necessarily confined to a particular point of time, but may extend over a longer or shorter period, according to the nature and character of the transaction.[9]

1. Waldele *v.* New York Cent., etc., R. Co., 95 N. Y. 274, 47 Am. Rep. 41; Thayer's Pre. Trea. on Evidence at Common Law, p. 523.

2. **Statutory Recognition of Doctrine.** — Lewis *v.* Burns, 106 Cal. 381; Burns *v.* Smith, 21 Mont. 251; Humphrey *v.* Chilcat Canning Co., 20 Oregon 213. See also Savannah, etc., R. Co. *v.* Holland, 82 Ga. 257, 14 Am. St. Rep. 158.

3. **Necessity of Main Fact.** — Shauver *v.* Phillips, 7 Ind. App. 12; Atkinson *v.* Orneville, 96 Me. 311; Lund *v.* Tyngsborough, 9 Cush. (Mass.) 36; Marvin *v.* Dutcher, 26 Minn. 391; Huth *v.* Huth, 10 Tex. Civ. App. 184; Ehrlinger *v.* Douglas, 81 Wis. 59, 29 Am. St. Rep. 863.

4. See Hunter *v.* State, 40 N. J. L. 495; Lund *v.* Tyngsborough, 9 Cush. (Mass.) 36.

5. **Admissibility of Main Fact Essential** — *England.* — Wright *v.* Doe, 4 Bing. N. Cas. 489, 33 E. C. L. 426.

Alabama. — Gilbert *v.* Gilbert, 22 Ala. 529, 58 Am. Dec. 268; Fail *v.* McArthur, 31 Ala. 26; Powell *v.* Henry, 96 Ala. 412; Louisville, etc., R. Co. *v.* Pearson, 97 Ala. 211.

California. — People *v.* Shattuck, 109 Cal. 673.

Connecticut. — Pinney *v.* Jones, 64 Conn. 545, 42 Am. St. Rep. 209.

Kentucky. — Oder *v.* Com., 80 Ky. 32.

Massachusetts. — Kingsford *v.* Hood, 105 Mass. 497; Lund *v.* Tyngsborough, 9 Cush. (Mass.) 36.

New Hampshire. — Downs *v.* Lyman, 3 N. H. 486; Barker *v.* Clark, 4 N. H. 380, 17 Am. Dec. 428; Hadley *v.* Carter, 8 N. H. 40; Blake *v.* White, 13 N. H. 273; Woods *v.* Banks, 14 N. H. 114; Tenney *v.* Evans, 14 N. H. 349; Plumer *v.* French, 22 N. H. 452; Carlton *v.* Patterson, 29 N. H. 580; Morrill *v.* Foster, 32 N. H. 361; Currier *v.* Boston, etc., R. Co., 34 N. H. 498; Ordway *v.* Sanders, 58 N. H. 132.

Virginia. — Scott *v.* Shelor, 28 Gratt. (Va.) 891.

West Virginia. — Corder *v.* Talbott, 14 W. Va. 277.

6. Morrill *v.* Foster, 32 N. H. 361.

7. Pinney *v.* Jones, 64 Conn. 545, 42 Am. St. Rep. 209.

8. **Necessity of Equivocalness of Act.** — Nutting *v.* Page, 4 Gray (Mass.) 581; Corder *v.* Talbott, 14 W. Va. 277.

9. **Duration and Extent of Principal Fact.** — Lund *v.* Tyngsborough, 9 Cush. (Mass.) 36; Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781; Ahern *v.* Goodspeed, 72 N. Y. 108; Matter of Taylor, 9 Paige (N. Y.) 611; McGowen *v.* McGowen, 52 Tex. 657; Fifield *v.* Richardson, 34 Vt. 410; Felt *v.* Amidon, 43 Wis. 467. *Compare* Eagon *v.* Eagon, 60 Kan. 697.

Illustrations. — Thus, if a man and woman are cohabiting together, and the question to be decided is, whether the character of her intercourse with him is matrimonial or meretricious, the declarations of the parties during the existence of such intercourse, the facts of their appearing in public with each other as man and wife, of their visiting in respectable families, and of their being treated by their acquaintances and spoken of by them as sustaining that relation to each other, constitute a part of the *res gesta*, showing the character of that intercourse to be matrimonial and virtuous. And contemporaneous declarations and attending circumstances of a different character would be legal evidence from which the conclusion might legitimately be drawn, that the intercourse between the parties was illicit and dishonorable. Matter of Taylor, 9 Paige (N. Y.) 617.

So it has been held on the trial of an indictment for the larceny of sheep where the transaction was made up of a variety of incidents extending over a period of several days and was not at an end until the sheep were branded, all acts and words which occurred or were uttered during that period of time tending to elucidate the principal fact in dis-

5. Making of Declaration as Constituting Main Fact. — Where the making of a declaration, either oral or in writing, and not its truth or falsity, is the fact in issue, such declaration is itself the *res gesta*, and is, of course, admissible.[1] So, a letter or declaration may be admitted in evidence for the purpose of showing knowledge of a fact communicated on the part of the addressee or the information upon which he acted, and not for the purpose of proving the facts contained therein.[2]

IV. The Accompanying Facts and Circumstances — 1. In General. — As has been heretofore pointed out, the surrounding facts which are admissible under the doctrine of *res gesta* may consist of unsworn declarations as well as acts or other facts.[3]

2. Expressions of Opinion. — Statements or declarations of opinion, however, are not admissible in evidence on this principle,[4] and this, though they were accompanied by acts tending to show that the declarant really entertained the opinion so expressed.[5]

V. Relation Between Main Fact and Accompanying Facts — 1. Contemporaneousness. — The rule is often stated that a declaration, to be admissible under the *res gesta* rule, must be contemporaneous with the main fact, otherwise, it is said, it is but a narrative of what has been or an assertion of what will be.[6] But, according to the great weight of authority, while the question of concurrence of time is important to be considered, declarations or acts in order to be contemporaneous are not required to be exactly coincident in point of time with the main fact.

Antecedent Declarations. — Thus, while prior disconnected declarations will be excluded,[7] a declaration, though antecedent, may be admissible if immediately preparatory to the main fact.[8]

Subsequent Declarations. — So though, as a general rule, statements that are

pute, namely, the motive with which the sheep were branded, were admissible as parts of the *res gesta*. State *v.* Gabriel, 88 Mo. 631.

In Fifield *v.* Richardson, 34 Vt. 410, it was held that a transaction could not be considered as ended so long as, on the occasion of the payment and before the parties had separated, anything, according to the usual course of business, remained to be done in regard to it, and that the giving of a receipt on the payment of money or on the settlement of a claim, is according to the usual course of business, and accordingly, that conversations at this stage of the transaction were admissible as part of the *res gesta*.

1. Declaration Constituting the Res Gesta. — Shott *v.* Strealfield, 1 M. & Rob. 8; Tillman *v.* Fontaine, 98 Ga. 672; Welch *v.* Spies, 103 Iowa 389.

Letter Making Demand of Deed as Evidence of Demand. — Whitehead *v.* Scott, 1 M. & Rob. 2.

Correspondence Constituting Demand and Refusal to Pay Check. — Wallace *v.* Bernheim, 63 Ark. 108.

Statement Constituting Person an Agent Held to Be Res Gesta. — Moore *v.* Machen, 124 Mich. 216.

2. Riggs *v.* Thorpe, 67 Minn. 217.

To Show Probable Cause in Action for Malicious Prosecution. — Taylor *v.* Willans, 2 B. & Ad. 845, 22 E. C. L. 195; Bacon *v.* Towne, 4 Cush. (Mass.) 240.

3. See *supra*, this title, *Statement of General Rule*.

4. Expressions of Opinion Inadmissible as Parts of Res Gesta. — Griffith *v.* State, 90 Ala. 583; Carr *v.* State, 76 Ga. 593; Lane *v.* Bryant, 9 Gray (Mass.) 245, 69 Am. Dec. 282; Bradford *v.* Cunard Steamship Co., 147 Mass. 57; Borden *v.* State, (Tex. Crim. 1901) 62 S. W. Rep. 1064; De Walt *v.* Houston East, etc., R. Co., 22 Tex. Civ. App. 403. See also Lund *v.* Tyngsborough, 9 Cush. (Mass.) 36.

5. Wright *v.* Doe, 4 Bing. N. Cas. 489, 33 E. C. L. 426, 5 Cl. & F. 670; Gresham Hotel Co. *v.* Manning, Ir. R. 1 C. L. 125.

6. Authorities Holding that Accompanying Declarations Must Be Contemporaneous — *Connecticut.* — Enos *v.* Tuttle, 3 Conn. 250; Rockwell *v.* Taylor, 41 Conn. 55; Stirling *v.* Buckingham, 46 Conn. 461; State *v.* Bradnack, 69 Conn. 212; McCarrick *v.* Kealy, 70 Conn. 642.

Kansas. — State *v.* Montgomery, 8 Kan. 351; Tennis *v.* Inter-State Consol. Rapid Transit R. Co., 45 Kan. 509. *Compare* Ott *v.* Cunningham, 9 Kan. App. 886, 58 Pac. Rep. 126.

Maine. — State *v.* Maddox, 92 Me. 353.

New York. — See also Tilson *v.* Terwilliger, 56 N. Y. 273. *Compare* Waldele *v.* New York Cent., etc., R. Co., 95 N. Y. 274, 47 Am. Rep. 41, and Butler *v.* Manhattan R. Co., 143 N. Y. 417, 42 Am. St. Rep. 738, to the effect that *res gesta* in cases of action for personal injuries implies substantial coincidence in time.

7. Montag *v.* People, 141 Ill. 75; Coxe *v.* Milbrath, 110 Wis. 499.

8. Hinchcliffe *v.* Koontz, 121 Ind. 424, 16 Am. St. Rep. 403.

Declarations Explanatory of Cause of Separation or Divorce. — In an action by a husband for divorce on the ground of abandonment, it has been held that the declarations of the wife, made a short time before the separation and

merely narrative of a past transaction will not be received in evidence,[1] the rule is now almost universally recognized that, to some extent at least, subsequent statements if made under the immediate influence of a transaction or event, are admissible as a legitimate part of the transaction itself. The principle upon which the admission of such evidence rests is that the declarations may be made so soon after the happening of the principal fact, and be so intimately interwoven therewith by the surrounding circumstances as to raise a reasonable presumption that they are the spontaneous utterance of thoughts created by and springing out of the transaction itself and to exclude the presumption that they are the result of premeditation or design.[2]

when she was crying and seemed to be in great distress, were admissible as being a part of the final act of separation and explanatory of its cause. McGowen *v.* McGowen, 52 Tex. 657.

1. Narrative of Past Transaction Inadmissible —*Alabama.* — Alabama G. S. R. Co. *v.* Hawk, 72 Ala. 112, 47 Am. Rep. 403; Louisville, etc., R. Co. *v.* Pearson, 97 Ala. 211.

Arkansas. — Clinton *v.* Estes, 20 Ark. 225.

California. — Williams *v.* Southern Pac. Co., 133 Cal. 550.

Colorado. — Graves *v.* People, 18 Colo. 170.

Illinois. — Chicago West Div. R. Co. *v.* Becker, 128 Ill. 545, 15 Am. St. Rep. 144.

Indiana. — Binns *v.* State, 57 Ind. 46, 26 Am. Rep. 48.

Massachusetts. — Haynes *v.* Rutter, 24 Pick. (Mass.) 245.

New York. — People *v.* Davis, 56 N. Y. 95; Waldele *v.* New York Cent., etc., R. Co., 95 N. Y. 274, 47 Am. Rep. 41.

Tennessee. — Riggs *v.* State, 6 Coldw. (Tenn.) 517.

Texas. — Clay *v.* State, 41 Tex. Crim. 653.

Wisconsin. — Sorenson *v.* Dundas, 42 Wis. 642; Felt *v.* Amidon, 43 Wis. 467.

Where Declarant Is a Witness. — Especially is this rule true, it has been held, where the party making a declaration is a witness at the trial testifying to the facts. State *v.* Maddox, 92 Me. 348.

Declarations Referring to Past Transaction as Reason for Present Act. — But while mere narratives of past events will not be admissible, declarations accompanying an act may be admissible though they refer to a past transaction as the reason of the present act. Stewart *v.* Hanson, 35 Me. 506; Clinton *v.* Estes, 20 Ark. 225.

2. Subsequent Declaration Admissible though Not Precisely Coincident — *England.* — Thompson *v.* Trevanion, Skin. 402; Rouch *v.* Great Western R. Co., 1 Q. B. 51, 41 E. C. L. 432; Rawson *v.* Haig, 9 Moo. 217. *Compare* Reg. *v.* Bedingfield, 14 Cox C. C. 341.

United States. — Slavens *v.* Northern Pac. R. Co., 97 Fed. Rep. 255, 38 C. C. A. 151; Travellers' Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 397.

Alabama. — Louisville, etc., R. Co. *v.* Pearson, 97 Ala. 211.

Arkansas. — Carr *v.* State, 43 Ark. 102; Flynn *v.* State, 43 Ark. 292.

Georgia. — Mitchum *v.* State, 11 Ga. 615; Monday *v.* State, 32 Ga. 672, 79 Am. Dec. 314.

Indiana. — Louisville, etc., R. Co. *v.* Berry, 2 Ind. App. 427; Louisville, etc., R. Co. *v.* Buck, 116 Ind. 566, 9 Am. St. Rep. 883.

Kentucky. — Burton *v.* Com., (Ky. 1901) 60 S. W. Rep. 527.

Louisiana. — State *v.* Harris, 45 La. Ann. 842, 40 Am. St. Rep. 259.

Massachusetts. — Com. *v.* M'Pike, 3 Cush. (Mass.) 181, 50 Am. Dec. 727.

Minnesota. — State *v.* Horan, 32 Minn. 396, 50 Am. Rep. 583.

Mississippi. — Archer *v.* Helm, 70 Miss. 874. *Compare* Mayes *v.* State, 64 Miss. 333, 60 Am. Rep. 58.

Missouri. — Harriman *v.* Stowe, 57 Mo. 93; Stevens *v.* Walpole, 76 Mo. App. 220; Leahey *v.* Cass. Ave., etc., R. Co., 97 Mo. 165, 10 Am. St. Rep. 300; State *v.* Hudspeth, 159 Mo. 178.

Nebraska. — Friend *v.* Burleigh, 53 Neb. 674; Sullivan *v.* State, 58 Neb. 796.

Nevada. — State *v.* Ah Loi, 5 Nev. 99.

Oregon. — State *v.* Garrand, 5 Oregon 216.

Pennsylvania. — Hanover R. Co. *v.* Coyle, 55 Pa. St. 396; Elkins *v.* McKean, 79 Pa. St. 493.

Rhode Island. — State *v.* Murphy, 16 R. I. 528.

Texas. — International, etc., R. Co. *v.* Anderson, 82 Tex. 516, 27 Am. St. Rep. 902; Huth *v.* Huth, 10 Tex. Civ. App. 184; Boothe *v.* State, 4 Tex. App. 202; Galveston *v.* Barbour, 62 Tex. 172, 50 Am. Rep. 519.

Virginia. — Little *v.* Com., 25 Gratt. (Va.) 921.

Extreme Cases Favoring Admissibility of Subsequent Declarations. — The cases of Com. *v.* M'Pike, 3 Cush. (Mass.) 181, 50 Am. Dec. 727, and Travellers' Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 397, are extreme cases on the side favoring the admissibility of such evidence and have often been criticised as authorizing the admission of mere narratives of past transactions. See Elmer *v.* Fessenden, 151 Mass. 359; Waldele *v.* New York Cent., etc., R. Co., 95 N. Y. 274, 47 Am. Rep. 41; State *v.* Maddox, 92 Me. 353; Mayes *v.* State, 64 Miss. 329, 60 Am. Rep. 58.

Under the Georgia Code it is provided that a declaration accompanying an act or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, is admissible as part of the *res gesta.* Savannah, etc., R. Co. *v.* Holland, 82 Ga. 257, 14 Am. St. Rep. 158.

Immediately Subsequent Act. — Nugent *v.* Breuchard, (N. Y. 1898) 51 N. E. Rep. 1092.

Declarations as to Cause of Divorce. — In an action by a husband for divorce on the ground of abandonment declarations made by the wife immediately on reaching the home of her mother after the separation, and explana-

2. Explanatory Character of Accompanying Facts. — Although there is a substantial coincidence in the time of the principal fact and the time of the declaration or accompanying fact, that alone is insufficient to render the declaration or accompanying fact admissible as a part of the *res gesta;* it must be well calculated to unfold the nature and quality of the main fact and so to harmonize with it as obviously to constitute one transaction.[1]

VI. By Whom Acts May Be Performed — 1. In General. — An act, by whomsoever done, may be a part of the *res gesta*, if relevant to the matter in issue.[2]

2. Third Persons. — Thus, the doctrine applies to acts and declarations of strangers to the controversy as well as to acts and declarations of the parties.[3]

3. Agents. — A discussion of the admissibility under the *res gesta* rule of declarations made by an agent or employee will be found elsewhere in this work.[4]

4. Partners. — So the admissibility of the declarations of one partner against another will be found treated elsewhere.[5]

5. Principal and Surety. — The admissibility of declarations of a principal against his surety is also discussed elsewhere.[6]

6. Co-conspirators. — A discussion of the application of the doctrine of *res gesta* to the acts and declarations of co-conspirators will be found elsewhere in this work.[7]

tory of it, have been held admissible. But declarations made some time after reaching her mother's home and after the act of separation had been completed, have been held inadmissible as part of the *res gesta.* McGowen *v.* McGowen, 52 Tex. 657.

So, in an action for divorce on the ground of cruelty, it has been held that the statements of the wife made in explanation of appearances upon her person and clothing which seemed to be the result of recent causes, were held to be inadmissible as *res gesta.* Meyer *v.* Meyer, 64 Ill. App. 175. But see Hanna *v.* Hanna, 3 Tex. Civ. App. 51.

1. Explanatory Character of Surrounding Facts Necessary. — Mutual L. Ins. Co. *v.* Logan, (C. C. A.) 87 Fed. Rep. 637; Domingus *v.* State, 94 Ala. 9; Enos *v.* Tuttle, 3 Conn. 250; Rutherford *v.* Com., 76 Ky. 608; Marler *v.* Texas, etc., R. Co., 52 La. Ann. 736; Butler *v.* Manhattan R. Co., 143 N. Y. 417, 42 Am. St. Rep. 738; Spreckels *v.* Bender, 30 Oregon 577; Spokane, etc., Gold, etc., Co. *v.* Colfelt, 24 Wash. 568. See also Ehrlinger *v.* Douglas, 81 Wis. 59, 29 Am. St. Rep. 863.

2. By Whom Acts Forming Parts of Res Gesta May Be Performed. — Wright *v.* Doe, 7 Ad. & El. 353, 34 E. C. L. 95. See also reference to this case in Steph. Dig. of Evi., note *v.*

3. Admissibility of Acts or Declarations of Third Person — *Alabama.* — Robertson *v.* Smith, 18 Ala. 220.

California. — Gillam *v.* Sigman, 29 Cal. 637.

Maine. — Stewart *v.* Hanson, 35 Me. 506.

Mississippi. — Stovall *v.* Farmers, etc., Bank, 8 Smed. & M. (Miss.) 305, 47 Am. Dec. 85.

Missouri. — Crowther *v* Gibson, 19 Mo. 365; State *v.* Gabriel, 88 Mo. 631; State *v.* Kaiser, 124 Mo. 651.

New Hampshire. — Woods *v.* Banks, 14 N. H. 101; Ordway *v.* Sanders, 58 N. H. 132.

New Jersey. — Castner *v.* Sliker, 33 N. J. L. 95.

Pennsylvania. — Walter *v.* Gernant, 13 Pa. St. 515, 53 Am. Dec. 491.

Tennessee. — Morton *v.* State, 91 Tenn. 437.

Where, in an action of damages against a railroad, the fact that the plaintiff was obliged to reduce rents after the construction of the railway in order to retain his tenants, was competent, the refusal of the tenant to remain unless the reduction was made and his reasons for such refusal, all communicated to the landlord when the actual reduction was made, characterized the act and constituted a part of the *res gesta.* Hine *v.* New York El. R. Co., 149 N. Y. 162.

4. See the title Admissions, vol. 1, p. 691 *et seq.*

Jocular Remark Made by Agent Inadmissible as Part of Res Gesta. — Holmes *v.* Washington Real Estate Co., 20 R. I. 289.

5. See the title Admissions, vol. 1, p. 708 *et seq.* And see People *v.* McBride, 120 Mich. 166.

6. See the title Admissions, vol. 1, p. 702. See also the following cases: Lancashire Ins. Co. *v.* Callahan, 68 Minn. 277, 64 Am. St. Rep. 475; Capital F. Ins. Co. *v.* Watson, 76 Minn. 387, 77 Am. St. Rep. 657; Singer Mfg. Co. *v.* Coon, (C. Pl. Gen. T.) 9 Misc. (N. Y.) 465; Eichhold *v.* Tiffany, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 627.

7. See the titles Confessions, vol. 6, p. 571 *et seq.;* Conspiracy, vol. 6, p. 866 *et seq.* And see the following cases:

Alabama. — Williams *v.* State, 81 Ala. 1, 60 Am. Rep. 133; Wood *v.* State, 128 Ala. 27.

California. — People *v.* Gonzales, 71 Cal. 569; People *v.* Lee Chuck, 78 Cal. 317.

Georgia. — McDaniel *v.* State, 103 Ga. 268.

Illinois. — Lyons *v.* People, 137 Ill. 602.

Iowa. — State *v.* McCahill, 72 Iowa 111; State *v.* Munchrath, 78 Iowa 268; State *v.* Smith, 106 Iowa 701.

Kentucky. — Jackson *v.* Com., 100 Ky. 239; Morris *v.* Com., 11 S. W. Rep. 295, 10 Ky. L. Rep. 1004; Turner *v.* Com., (Ky. 1896) 34 S. W. Rep. 526; Shotwell *v.* Com., 24 Ky. L. Rep. 255, 68 S. W. Rep. 403.

7. Co-defendants. — Where two or more persons are charged jointly with an offense, though not as co-conspirators, the acts, appearances, and declarations of any one of them, if part of the *res gesta*, are admissible for the purpose of presenting to the jury an accurate view of the situation as it was at the time the alleged offense was committed.[1]

8. Persons Incompetent to Testify. — Where declarations form part of the thing done, they are, it is held, admissible in evidence, whether the person by whom they were made is or is not a competent witness.[2] Thus, the declarations of an infant [3] or a slave [4] have been admitted under this rule.

VII. Application of Doctrine to Specific Issues — 1. Bodily Feelings — *a.* In General. — Wherever the bodily condition or feelings of an individual are material to be proved, the usual and natural expressions of those feelings made at the time are generally held to be competent evidence. These expressions are sometimes admitted as an application of the doctrine of *res gesta*, and sometimes on the ground of necessity, as being the natural reflexes of what it might be impossible to show by other evidence.[5]

b. Instinctive Expressions of Pain or Malady. — Complaints, expressions, and exclamations of a person, to whomsoever made, which are apparently the natural and instinctive manifestations of present existing pain or malady, are competent evidence to prove his physical condition, whether arising from sickness or from an injury by accident or violence,[6] especially

Michigan. — People *v.* Newton, 96 Mich. 586.

Minnesota. — Nicolay *v.* Mallery, 62 Minn. 119.

New York. — People *v.* Pavlik, (Supm. Ct. Gen. T.) 7 N. Y. Crim. 30. See also Ormsby *v.* People, 53 N. Y. 472; Jones *v.* Hurlburt, 39 Barb. (N. Y.) 403.

Ohio. — Donald *v.* State, 11 Ohio Cir. Dec. 483, 21 Ohio Cir. Ct. 124.

Pennsylvania. — Wagner *v.* Aulenbach, 170 Pa. St. 495.

Texas. — Cook *v.* State, 22 Tex. App. 511; Estes *v.* State, 23 Tex. App. 600.

1. St. Clair *v.* U. S., 154 U. S. 134.

2. Declaration of Person Incompetent to Testify. — Kenney *v.* Phillipy, 91 Ind. 511.

3. Declarations of Infant. — Croomes *v.* State, 40 Tex. Crim. 672.

But in Adams *v.* State, 34 Fla. 186, it was held that where a little child, who, at three and a half years of age, was a bystanding spectator of a homicide, proves, nearly two years subsequent to the occurrence, not to be possessed of sufficient comprehension and intelligence to be competent then to testify as a witness, its exclamations and utterances at the time of the homicide, even though they may have been part of the *res gesta*, are not admissible in evidence through the mouth of a third person who heard such exclamations at the time; and this upon the ground that a child of such tender years, so lacking in intelligence and discrimination, cannot comprehend passing events with anything like such accuracy as to render its exclamations or observations in reference thereto at all reliable or admissible as evidence.

4. Declarations of Slave. — Yeatman *v.* Hart, 6 Humph. (Tenn.) 375; Rogers *v.* Crain, 30 Tex. 284.

5. Expressions of Bodily Feelings. — Aveson *v.* Kinnaird, 6 East 197; Travellers' Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 397; Cleveland, etc., R. Co. *v.* Newell, 104 Ind. 264, 54 Am. Rep. 312; Bacon *v.* Charlton, 7 Cush. (Mass.) 586; Field *v.* State, 57 Miss. 474, 34 Am. Rep. 476; Reed *v.* New York Cent. R. Co., 45 N. Y. 574; Caldwell *v.* Murphy, 11 N. Y. 416; Werely *v.* Persons, 28 N. Y. 344, 84 Am. Dec. 346.

Complaints of Person Suffering from Nuisance. — Kearney *v.* Farrell, 28 Conn. 317, 73 Am. Dec 677.

Declaration as to Peculiar Tooth in Declarant's Mouth, Admitted to Identify the Skull After Declarant's Death. — Edmonds *v.* State, 34 Ark. 720.

Statement as to Pregnancy by Woman Since Deceased. — State *v.* Alcorn, (Idaho 1901) 64 Pac. Rep. 1014.

Declarations as to Good State of Health. — Reg. *v.* Johnson, 2 C. & K. 354, 61 E. C. L. 354; Morrison *v.* State, 40 Tex. Crim. 473.

As to the admissibility of declarations of insured upon the question of his health, see the title Life Insurance, vol. 19, p. 107.

6. Instinctive Expressions of Pain or Malady — *United States.* — Travellers' Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 397; Delaware, etc., R. Co. *v.* Ashley, (C. C. A.) 67 Fed. Rep. 209. See also Northern Pac. R. Co. *v.* Urlin, 158 U. S. 271.

Alabama. — Phillips *v.* Kelly, 29 Ala. 628; Helton *v.* Alabama Midland R. Co., 97 Ala. 275; Postal Tel. Cable Co. *v.* Jones, 133 Ala. 217.

California. — Green *v.* Pacific Lumber Co., 130 Cal. 435.

Dakota. — Sanders *v.* Reister, 1 Dak. 145.

Illinois. — West Chicago St. R. Co. *v.* Kennelly, 170 Ill. 508; Cicero, etc., St. R. Co. *v.* Priest, 190 Ill. 592.

Indiana. — Elkhart *v.* Ritter, 66 Ind. 136; Carthage Turnpike Co. *v.* Andrews, 102 Ind. 138, 52 Am. Rep. 653.

Iowa. — Gray *v.* McLaughlin, 26 Iowa 279; Armstrong *v.* Ackley, 71 Iowa 76; Blair *v.* Madison County, 81 Iowa 313; Aryman *v.* Marshalltown, 90 Iowa 350; McDonald *v.*

where there are other indications of such condition which the expression or complaint accompanies and serves to explain.[1]

c. DESCRIPTIVE STATEMENTS OF PRESENT PAIN. — The question as to when mere descriptive statements of present pain or other subjective symptoms of malady, as distinguished from exclamations or complaints which are apparently the instinctive manifestations of distress, are admissible in evidence, is a subject of some discussion. In many of the decisions this distinction is either expressly repudiated or is apparently not recognized, and statements or representations descriptive of present existing pain or malady, its symptoms, and effects, are held to be admissible.[2] The abuses resulting from receiving such statements in evidence and the fact that the necessity for their admission

Tranchere, 102 Iowa 496; Rupp *v.* Howard, 114 Iowa 65.

Maine. — Kennard *v.* Burton, 25 Me. 39, 43 Am. Dec. 249.

Massachusetts. — Bacon *v.* Charlton, 7 Cush. (Mass.) 581; Hatch *v.* Fuller, 131 Mass. 574; Com. *v.* Leach, 156 Mass. 99.

Michigan. — Hyatt *v.* Adams, 16 Mich. 180; Johnson *v.* McKee, 27 Mich. 471; Elliott *v.* Van Buren, 33 Mich. 49, 20 Am. Rep. 668; Maclean *v.* Scripps, 52 Mich. 239; Mayo *v.* Wright, 63 Mich. 40; Harris *v.* Detroit City R. Co., 76 Mich. 227; Kelley *v.* Detroit, etc., R. Co., 80 Mich. 237, 20 Am. St. Rep. 514; Lacas *v.* Detroit City R. Co., 92 Mich. 412; Girard *v.* Kalamazoo, 92 Mich. 610; Strudgeon *v.* Sand Beach, 107 Mich. 496; Will *v.* Mendon, 108 Mich. 251; Burleson *v.* Reading, 110 Mich. 512; Butts *v.* Eaton Rapids, 116 Mich. 539.

Minnesota. — Williams *v.* Great Northern R. Co., 68 Minn. 55.

Mississippi. — Field *v.* State, 57 Miss. 476, 34 Am. Rep. 476.

Missouri. — Brown *v.* Hannibal, etc., R. Co., 66 Mo. 588; State *v.* Thompson, 132 Mo. 301.

New Hampshire. — Plummer *v.* Ossipee, 59 N. H. 55.

New York. — Hagenlocher *v.* Coney Island, etc., R. Co., 99 N. Y. 136; Kelly *v.* Cohoes Knitting Co., 8 N. Y. App. Div. 156; Jones *v.* Niagara Junction R. Co., 63 N. Y. App. Div. 607.

Texas. — Missouri, etc., R. Co. *v.* Sanders, 12 Tex. Civ. App. 5; Missouri, etc., R. Co. *v.* Zwiener, (Tex. Civ. App. 1896) 38 S. W. Rep. 375; Wheeler *v.* Tyler Southeastern R. Co., 91 Tex. 358; Jackson *v.* Missouri, etc., R. Co., 23 Tex. Civ. App. 319; St. Louis, etc., R. Co. *v.* Gill, (Tex. Civ. App. 1900) 55 S. W. Rep. 386; Gulf, etc., R. Co. *v.* Bell, 24 Tex. Civ. App. 579; St. Louis, etc., R. Co. *v.* Martin, (Tex. Civ. App. 1901) 63 S. W. Rep. 1089.

Vermont. — Bagley *v.* Mason, 69 Vt. 175; Brown *v.* Mt. Holly, 69 Vt. 364.

Virginia. — Livingston *v.* Com., 14 Gratt. (Va.) 592.

Washington. — Bothell *v.* Seattle, 17 Wash. 263.

Wisconsin. — McKeigue *v.* Janesville, 68 Wis. 50; Keller *v.* Gilman, 93 Wis. 9.

See also the title CARRIERS OF PASSENGERS, vol. 5, p. 639.

Exclamations and Complaints of Slave. — Barker *v.* Coleman, 35 Ala. 221; Stone *v.* Watson, 37 Ala. 279; Tilman *v.* Stringer, 26 Ga. 171; Marr *v.* Hill, 10 Mo. 320; Gray *v.* Young, Harp. L. (S. Car.) 38; Welch *v.* Brooks, 10 Rich. L. (S. Car.) 123; Lewis *v.* Moses, 6 Coldw. (Tenn.) 193.

1. Hagenlocher *v.* Coney Island, etc., R. Co., 99 N. Y. 136. See also Roche *v.* Brooklyn City, etc., R. Co., 105 N. Y. 294, 59 Am. Rep. 506; Davidson *v.* Cornell, 132 N. Y. 228.

2. Descriptive Statements of Present Pain Held Admissible — *England.* — Aveson *v.* Kinnaird, 6 East 188.

United States. — Travellers' Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 397.

Alabama. — Phillips *v.* Kelly, 29 Ala. 628.

Arkansas. — St. Louis, etc., R. Co. *v.* Murray, 55 Ark. 248, 29 Am. St. Rep. 32.

Kansas. — Atchison, etc., R. Co. *v.* Johns, 36 Kan. 769, 59 Am. Rep. 609; St. Louis, etc., R. Co. *v.* Burrows, 62 Kan. 89; Topeka *v.* High, 6 Kan. App. 162.

Michigan. — Hyatt *v.* Adams, 16 Mich. 180; Johnson *v.* McKee, 27 Mich. 472; Lacas *v.* Detroit City R. Co., 92 Mich. 416; Will *v.* Mendon, 108 Mich. 251. *Compare* Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 544, 31 Am. Rep. 321.

New Hampshire. — Howe *v.* Plainfield, 41 N. H. 135; Perkins *v.* Concord R. Co., 44 N. H. 223; Towle *v.* Blake, 48 N. H. 92; Taylor *v.* Grand Trunk R. Co., 48 N. H. 304.

North Carolina. — State *v.* Harris, 63 N. Car. 1. See also State *v.* Whitt, 113 N. Car. 716.

Texas. — Houston, etc., R. Co. *v.* Shafer, 54 Tex. 641. *Compare* Gulf, etc., R. Co. *v.* Ross, 11 Tex. Civ. App. 201.

Vermont. — See State *v.* Howard, 32 Vt. 380; Hawkes *v.* Chester, 70 Vt. 271. *Compare* State *v.* Fournier, 68 Vt. 262.

Statements as to Locality of Malady Held Admissible. — Crippen *v.* Des Moines, (Iowa 1899) 78 N. W. Rep. 688; Keyes *v.* Cedar Falls, 107 Iowa 509, (*overruling* Ferguson *v.* Davis County, 57 Iowa 601); Mulliken *v.* Corunna, 110 Mich. 212; Thomas *v.* Herrall, 18 Oregon 546; Drew *v.* Sutton, 55 Vt. 586.

Declarations as to Physical Condition Explanatory of Inability to Work, Held Admissible. — Hewitt *v.* Eisenbart, 36 Neb. 794. But see Winter *v.* Central Iowa R. Co., 74 Iowa 448.

Description of Condition in Response to Question. — Texas, etc., R. Co. *v.* Barron, 78 Tex. 421. See also Hewitt *v.* Eisenbart, 36 Neb. 794; Hawkes *v.* Chester, 70 Vt. 271.

Declarations of Sick Slave. — It was frequently held in actions on warranties of the soundness of a slave that the statement of a sick slave as to the seat of his pain, the nature, symptoms, and effects of his malady, was as admissible for the purpose of showing the character of his

has been mainly removed by statutes making parties, if living and able to be shown and examined, competent witnesses in their own behalf, have led, however, to a re-examination and material limitation of the rule in some jurisdictions where it is held that the mere descriptive statements of a sick or injured person as to the symptoms and effects of his malady are only admissible when made to a medical attendant for the purposes of medical treatment,[1] unless at least they are made at the time of an injury received so as to be a part of the *res gesta* of the injury.[2]

d. PAST SUFFERING OR PHYSICAL CONDITION. — It seems to be well settled that proof of the declaration of a person, with regard to past suffering or pain, or past bodily condition, is not competent.[3]

e. STATEMENTS TO PHYSICIAN — (1) *In General.* — Exclamations of pain

disease as would be the statement of any other person. Rowland *v.* Walker, 18 Ala. 749; Eckles *v.* Bates, 26 Ala. 659; Stein *v.* State, 37 Ala. 123; Wallace *v.* McIntosh, 4 Jones L. (49 N. Car.) 434; Henderson *v.* Crouse, 7 Jones L. (52 N. Car.) 623; Biles *v.* Holmes, 11 Ired. L. (33 N. Car.) 16; Bell *v.* Morrisett, 6 Jones L. (51 N. Car.) 178; Yeatman *v.* Hart, 6 Humph. (Tenn.) 375.

Distinction Between Descriptive Statements and Instinctive Manifestations Expressly Repudiated. — Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380; Alexandria *v.* Young, 20 Ind. App. 627; Huntington *v.* Burke, 21 Ind. App. 655; Porter County *v.* Dombke, 94 Ind. 72; Carthage Turnpike Co. *v.* Andrews, 102 Ind. 138, 52 Am. Rep. 653; Hancock County *v.* Leggett, 115 Ind. 544; Keyes *v.* Cedar Falls, 107 Iowa 509; Crippen *v.* Des Moines, (Iowa 1899) 78 N. W. Rep. 688.

Ground of Admissibility. — In Travellers' Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 397, the court said: "Where sickness or affection is the subject of inquiry, the sickness or affection is the principal fact. The *res gestæ* are the declarations tending to show the reality of its existence and its extent and character."

It frequently appears from the evidence that there were other indications of pain or suffering, such as appearance or conduct, at the time the declaration was made, and the declaration in such case is receivable as explanatory and corroborative of the condition thus exhibited. Aveson *v.* Kinnaird, 6 East 197; Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 397; Hawkes *v.* Chester, 70 Vt. 271. On the other hand, it has been said that the declarations of the party are admitted to show the extent of latent injuries upon the general ground that such injuries are incapable of being shown in any other mode except by such declarations as to their effect, but they are not admitted as part of the *res gestæ*. State *v.* Davidson, 30 Vt. 377. See also Williams *v.* Great Northern R. Co., 68 Minn. 55; Caldwell *v.* Murphy, 11 N. Y. 416; Werely *v.* Persons, 28 N. Y. 344, 84 Am. Dec. 346; Reed *v.* New York Cent. R. Co., 45 N. Y. 574.

1. Jurisdictions Holding Descriptive Statements of Pain Inadmissible. — Williams *v.* Great Northern R. Co., 68 Minn. 55; Uransky *v.* Dry Dock, etc., R. Co., 44 Hun (N. Y.) 119; Olp *v.* Gardner, 48 Hun (N. Y.) 169; Reed *v.* New York Cent. R. Co., 45 N. Y. 574, (*distinguishing* Caldwell *v.* Murphy, 11 N. Y. 416; Werely *v.* Persons, 28 N. Y. 344); Roche *v.* Brooklyn City, etc., R. Co., 105 N. Y. 294, 59 Am. Rep. 506, (*distinguishing* Hagenlocher *v.* Coney Island, etc., R. Co., 99 N. Y. 136); Lake Shore, etc., R. Co. *v.* Yokes, 5 Ohio Cir. Dec. 599; Cleveland City R. Co. *v.* Roebuck, 12 Ohio Cir. Dec. 262; Tebo *v.* Augusta, 90 Wis. 408; Keller *v.* Gilman, 93 Wis. 9, (*distinguishing* Bridge *v.* Oshkosh, 71 Wis. 363). See also Bacon *v.* Charlton, 7 Cush. (Mass.) 581; Com. *v.* Leach, 156 Mass. 99; Davidson *v.* Cornell, 132 N. Y. 228.

Statement as to Locality of Pains. — Atlanta St. R. Co. *v.* Walker, 93 Ga. 462; West Chicago St. R. Co. *v.* Kennelly, 170 Ill. 508; Kennedy *v.* Rochester City, etc., R. Co., 130 N. Y. 654; Keller *v.* Gilman, 93 Wis. 9. *Compare* Hall *v.* American Masonic Acc. Assoc., 86 Wis. 518.

Opinion as to Extent of Injury at Time Remote from Accident and in Response to Question. — Firkins *v.* Chicago Great Western R. Co., 61 Minn. 31.

2. Springfield Consol. R. Co. *v.* Hoeffner, 175 Ill. 634. See West Chicago St. R. Co. *v.* Kennelly, 170 Ill. 512; Atlanta St. R. Co. *v.* Walker, 93 Ga. 462.

Statement that Declarant Was Hurt Made Immediately After Accident. — Springfield Consol. R. Co. *v.* Hoeffner, 175 Ill. 634; Hall *v.* American Masonic Acc. Assoc., 86 Wis. 518.

3. Declarations as to Past Suffering or Symptoms Inadmissible — *United States.* — Travellers' Insurance Co. *v.* Mosley, 8 Wall. (U. S.) 397.

Alabama. — Eckles *v.* Bates, 26 Ala. 659; Holloway *v.* Cotten, 33 Ala. 529; Barker *v.* Coleman, 35 Ala. 221; Kelly *v.* Cunningham, 36 Ala. 78.

Connecticut. — State *v.* Dart, 29 Conn. 153, 76 Am. Dec. 596.

Illinois. — Weyrich *v.* People, 89 Ill. 90.

Iowa. — Winter *v.* Central Iowa R. Co., 74 Iowa 448.

Maine. — Ashbury L. Ins. Co. *v.* Warren, 66 Me. 523, 22 Am. Rep. 590.

Maryland. — McCeney *v.* Devall, 21 Md. 166.

Massachusetts. — Chapin *v.* Marlborough, 9 Gray (Mass.) 244, 69 Am. Dec. 281; Rowell *v.* Lowell, 11 Gray (Mass.) 420; Emerson *v.* Lowell Gas Light Co., 6 Allen (Mass.) 146, 83 Am. Dec. 621; Ashland *v.* Marlborough, 99 Mass. 48.

Michigan. — Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 545, 31 Am. Rep. 321; Lacas *v.* Detroit City R. Co., 92 Mich. 412.

Missouri. — *Compare* State *v.* Moxley, 102 Mo. 374.

New Hampshire. — Taylor *v.* Grand Trunk R. Co., 48 N. H. 304.

Texas. — *Compare* Morrison *v.* State, 40 Tex. Crim. 473.

and statements and declarations of a patient as to the nature, symptoms, and effects of his malady, and as to his present physical condition generally, may be given in evidence when made to a physician for the purpose of treatment.[1] But it is held that mere descriptive statements are only admissible when the medical attendant is called upon to give an expert opinion based in part upon them, and that he cannot merely testify to the statements. This latter rule is based upon the ground that a physician has both the ability and the opportunity of observing and ascertaining whether the patient's statements of subjective symptoms correspond with the objective symptoms, and hence of forming a fairly accurate opinion as to whether such statements are true or false, and when he comes to give his expert opinion he will presumably base it on such statements only so far as he believes them to be true.[2]

(2) *Past Symptoms.* — In some jurisdictions the rule obtains that a physician may testify as to a statement or narrative given by his patient as to his past condition, symptoms, and sensations.[3] In other jurisdictions, however, it is held that in order that the mere descriptive statements of a sick or injured person as to the symptoms and effects of his malady may be admissible when made to a medical attendant for the purposes of medical treatment, they must relate to existing pain or other symptoms from which the patient is suffering at the time, and must not relate to past symptoms, however closely related to the present sickness.[4]

(3) *Cause of Illness or Injury.* — Nor, as a general rule, will statements by a patient to his physician as to the cause of his injury or malady be admissible in evidence;[5] at least if such declarations were not necessary to enable the

1. Statements to Physician — *United States.* — Northern Pac. R. Co. *v.* Urlin, 158 U. S. 273.

Alabama. — Stone *v.* Watson, 37 Ala. 279.

Georgia. — Feagin *v.* Beasley, 23 Ga. 17.

Illinois. — Collins *v.* Waters, 54 Ill. 485; West Chicago St. R. Co. *v.* Kennelly, 170 Ill. 508; Bloomington *v.* Osterle, 139 Ill. 120.

Indiana. — Carthage Turnpike Co. *v.* Andrews, 107 Ind. 138, 52 Am. Rep. 653; Cleveland, etc., R. Co. *v.* Newell, 104 Ind. 264, 54 Am. Rep. 312; Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544; Wabash County *v.* Pearson, 120 Ind. 426, 16 Am. St. Rep. 325.

Massachusetts. — Fay *v.* Harlan, 128 Mass. 244, 35 Am. Rep. 372; Fleming *v.* Springfield, 154 Mass. 520, 26 Am. St. Rep. 268.

Michigan. — Mulliken *v.* Corunna, 110 Mich. 212; Heddle *v.* City Electric R. Co., 112 Mich. 547; Butts *v.* Eaton Rapids, 116 Mich. 539.

Minnesota. — Jones *v.* Chicago, etc., R. Co., 43 Minn. 279; Johnson *v.* Northern Pac. R. Co., 47 Minn. 430; Brusch *v.* St. Paul City R. Co., 52 Minn. 512; Cooper *v.* St. Paul City R. Co., 54 Minn. 379; Miller *v.* St. Paul City R. Co., 62 Minn. 216.

New Hampshire. — Howe *v.* Plainfield, 41 N. H. 135; Perkins *v.* Concord R. Co., 44 N. H. 223; Towle *v.* Blake, 48 N. H. 92; Norris *v.* Haverhill, 65 N. H. 89.

New Jersey.—State *v.* Gedicke, 43 N. J. L. 86.

New York. — Meigs *v.* Buffalo, (Supm. Ct. Gen. T.) 7 N. Y. St. Rep. 855; Murphy *v.* New York Cent. R. Co., 66 Barb. (N. Y.) 125.

Tennessee. — Yeatman *v.* Hart, 6 Humph. (Tenn.) 375; Denton *v.* State, 1 Swan. (Tenn.) 282.

Texas. — Newman *v.* Dodson, 61 Tex. 95; Wheeler *v.* Tyler Southeastern R. Co., 91 Tex. 356; Missouri, etc., R. Co. *v.* Sanders, 12 Tex. Civ. App. 5; Gulf, etc., R. Co. *v.* Brown, 16 Tex. Civ. App. 93.

Vermont. — Earl *v.* Tupper, 45 Vt. 275.

Wisconsin. — Curran *v.* A. H. Stange Co., 98 Wis. 598; Keller *v.* Gilman, 93 Wis. 9.

Statement as to Locality of Injury. — Wilson *v.* Granby, 47 Conn. 59, 36 Am. Rep. 51; Denton *v.* State, 1 Swan. (Tenn.) 282; Kent *v.* Lincoln, 32 Vt. 591.

2. Williams *v.* Great Northern R. Co., 68 Minn. 55.

3. Statement to Physician as to Past Symptoms Held Admissible. — People *v.* Shattuck, 109 Cal. 673; Barber *v.* Merriam, 11 Allen (Mass.) 322. See also Allen *v.* Vancleave, 15 B. Mon. (Ky.) 236; Roosa *v.* Boston Loan Co., 132 Mass. 439; Missouri, etc., R. Co. *v.* Rose, 19 Tex. Civ. App. 470; Hathaway *v.* National L. Ins. Co., 48 Vt. 335. *Compare* Rogers *v.* Crain, 30 Tex. 284.

Declaration of Slave. — Eckles *v.* Bates, 26 Ala. 659; Looper *v.* Bell, 1 Head (Tenn.) 373.

4. Statements as to Past Symptoms Held Inadmissible. — Atchison, etc., R. Co. *v.* Frazier, 27 Kan. 463; People *v.* Foglesong, 116 Mich. 556; Williams *v.* Great Northern R. Co., 68 Minn. 55; People *v.* Hawkins, 109 N. Y. 408; Davidson *v.* Cornell, 132 N. Y. 228.

Statement that Person Had Lost His Sexual Powers. — Williams *v.* Great Northern R. Co., 68 Minn. 55.

Statement as to Prior Distinct Illness or Injury Held Inadmissible. — Equitable Mut. Acc. Assoc. *v.* McCluskey, 1 Colo. App. 473; M'Clintock *v.* Hunter, Dudley L. (S. Car.) 327; Allen *v.* Vancleave, 15 B. Mon. (Ky.) 236.

Statements Made After Recovery. — Rowland *v.* Philadelphia, etc., R. Co., 63 Conn. 415; Winnebago County *v.* Rockford, 61 Ill. App. 656.

5. Statement as to Cause of Illness Inadmissible — *United States.* — Park Bank *v.* Remsen, 158 U. S. 337.

physician to correctly diagnose the case.[1]

(4) *Statements Made at Medical Examination for Purpose of Preparing Testimony.* — Notwithstanding some authority to the contrary,[2] it is the prevailing rule that statements as to present or past suffering made after a controversy has arisen, *i. e.*, after suit is brought or is in contemplation, to a medical expert for the sole purpose of enabling the latter to testify as a witness for the declarant at the trial, are inadmissible,[3] unless the medical examination be had at the instance of both parties to the controversy.[4] A different rule, however, has been applied to complaints of pain which are made on such occasions in response to manipulation of the person, or exclamations which otherwise appear to be natural and instinctive expressions of present pain.[5] But in *Michigan* it has been held that such evidence is to be closely scrutinized and will not be admitted unless it clearly appears to be involuntary.[6]

f. EXPRESSIONS OF PAIN SUBSEQUENT TO INJURY. — Expressions or declarations of pain, in order to be admissible in evidence, need not, it has been held, be contemporaneous with an alleged injury. Where it becomes important to show the physical condition of an individual subsequent to the time an injury is received, expressions or declarations of present existing pain or malady are admissible under the same rule as expressions or declarations made at the time of the injury.[7]

g. DECLARATIONS POST LITEM MOTAM. — And, indeed, the mere fact that the declarations were made after suit was commenced and while it was

Arkansas. — Fordyce *v.* McCants, 51 Ark. 509, 14 Am. St. Rep. 69.

Georgia. — Fink *v.* Ash, 99 Ga. 106.

Illinois. — Illinois Cent. R. Co. *v.* Sutton, 42 Ill. 438, 92 Am. Dec. 81, Globe Acc. Ins. Co. *v.* Gerisch, 163 Ill. 625, 54 Am. St. Rep. 486.

Indiana. — Citizens' St. R. Co. *v.* Stoddard, 10 Ind. App. 278.

Massachusetts. — Chapin *v.* Marlborough, 9 Gray (Mass.) 244, 69 Am. Dec. 281.

Michigan. — Merkle *v.* Bennington Tp., 58 Mich. 156, 55 Am. Rep. 666; Dundas *v.* Lansing, 75 Mich. 499, 13 Am. St. Rep. 457; People *v.* O'Brien, 92 Mich. 17.

Minnesota. — Weber *v.* St. Paul City R. Co., 67 Minn. 155.

New Hampshire. — Plummer *v.* Ossipee, 59 N. H. 55.

Texas. — Reddick *v.* State, (Tex. Crim. 1898) 47 S. W. Rep. 993.

1. Equitable Mut. Acc. Assoc. *v.* McCluskey, 1 Colo. App. 473; Morrissey *v.* Ingham, 111 Mass. 65; Dundas *v.* Lansing, 75 Mich. 499, 13 Am. St. Rep. 457; Denton *v.* State, 1 Swan (Tenn.) 282. See also Barber *v.* Merriam, 11 Allen (Mass.) 322.

Declarations as to Past Exposure as Cause of Sickness Held Admissible. — Pullman Palace Car Co. *v.* Smith, 79 Tex. 468, 23 Am. St. Rep. 356.

Declaration that Injury Was Result of Mosquito Bite Held Admissible. — Omberg *v.* U. S. Mutual Acc. Assoc., 101 Ky. 303.

2. Kent *v.* Lincoln, 32 Vt. 591. See also Cleveland, etc , R. Co. *v.* Newell, 104 Ind. 264, 54 Am. Rep. 312; Bagley *v.* Mason, 69 Vt. 175.

3. **Statement to Medical Expert for Purpose of Preparing Testimony Inadmissible.** — Delaware, etc., R. Co. *v.* Roalefs, (C. C. A.) 70 Fed. Rep. 21; Rowland *v.* Philadelphia, etc., R. Co., 63 Conn. 415; Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321; Jones *v.* Portland, 88 Mich. 598; Consolidated Traction Co. *v.* Lambertson, 60 N. J. L. 452; Lake Shore, etc., R. Co. *v.* Yokes, 5 Ohio Cir. Dec. 599, 12 Ohio Cir. Ct. 499; Stewart *v.* Everts, 76 Wis. 40; Stone *v.* Chicago, etc., R. Co., 88 Wis. 98; Abbot *v.* Heath, 84 Wis. 314, *distinguishing* Quaife *v.* Chicago, etc., R. Co., 48 Wis. 524, 33 Am. Rep. 821. See also Tyler Southeastern R. Co. *v.* Wheeler, (Tex. Civ. App. 1897) 41 S. W. Rep. 517.

Statement as to Past Suffering Excluded. — St. Louis, etc., R. Co. *v.* Martin, (Tex. Civ. App. 1901) 63 S. W. Rep. 1089.

4. See West Chicago St. R. Co. *v.* Carr, 170 Ill. 478; Quaife *v.* Chicago, etc., R. Co., 48 Wis. 524, 33 Am. Rep. 821.

5. Broyles *v.* Prisock, 97 Ga. 643; Matteson *v.* New York Cent. R. Co., 35 N. Y. 487, 91 Am. Dec. 67; Missouri, etc., R. Co. *v.* Johnson, (Tex. 1902) 67 S. W. Rep. 768. See also Consolidated Traction Co. *v.* Lambertson, 60 N. J. L. 452.

6. McKormic *v.* West Bay City, 110 Mich. 265. See also Laughlin *v.* Grand Rapids St. R. Co., 80 Mich. 154.

7. **Expression of Pain Need Not Be Concurrent with Injury.** — Cleveland, etc., R. Co. *v.* Newell, 104 Ind. 264, 54 Am. Rep. 312; Thomas *v.* Herrall, 18 Oregon 546; Texas R. Co. *v.* Barron, 78 Tex. 421; St. Louis, etc., R. Co. *v.* Gill, (Tex. Civ. App. 1900) 55 S. W. Rep. 386; International, etc., R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210. See also Kansas City, etc., R. Co. *v.* Stoner, (C. C. A.) 51 Fed. Rep. 649; Hagenlocher *v.* Coney Island, etc., R. Co., 99 N. Y. 136; Roche *v.* Brooklyn City, etc., R. Co., 105 N. Y. 294, 59 Am. Rep. 506.

But for authority making descriptive statements of present pain dependent on their proximity to the injury causing them, see *supra*, this section, *Descriptive Statements of Present Pain.*

pending, is not sufficient to exclude them from evidence, though this fact may detract from their weight.[1]

2. Mental State or Feelings — *a.* IN GENERAL. — The usual and natural expressions of a man's mental state or feelings, including his declarations, like the expressions of his physical condition, are admitted in evidence sometimes under the doctrine of *res gesta* and sometimes on the theory of necessity arising from the fact that a man's state of mind or feeling can only be manifested to others by countenance, attitude, or gesture or by sounds or words, spoken or written.[2]

b. MOTIVE OR INTENTION — (1) *In General.* — Where it is necessary or material to inquire into the motive or intent with which an act is done, declarations made at the time of doing the act from which the motive and purpose of the actor may be collected, are admissible in evidence as a part of the *res gesta*.[3] There are authorities to the effect that such declarations are admis-

1. Declarations Post Litem Motam. — Atchison, etc., R. Co. *v.* Johns, 36 Kan. 769, 59 Am. Rep. 609; Barber *v.* Merriam, 11 Allen (Mass.) 322; Roosa *v.* Boston Loan Co., 132 Mass. 439; Strudgeon *v.* Sand Beach, 107 Mich. 496; Norris *v.* Haverhill, 65 N. H. 89; Murphy *v.* New York Cent. R. Co., 66 Barb. (N. Y.) 125; Jackson *v.* Missouri, etc., R. Co., 23 Tex. Civ. App. 319; Quaife *v.* Chicago, etc., R. Co., 48 Wis. 513, 33 Am. Rep. 821; McKeigue *v.* Janesville, 68 Wis. 50. *Compare* Laughlin *v.* Grand Rapids St. R. Co., 80 Mich. 154.

2. Expressions of Mental State or Feelings. — Sugden *v.* St. Leonards, 1 P. D. 154; Woodward *v.* Goulstone, 11 App. Cas. 469; Travellers' Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 397; Mutual L. Ins. Co. *v.* Hillmon, 145 U. S. 285; Kyle *v.* Craig, 125 Cal. 107; Jenkin *v.* Pacific Mut. L. Ins. Co., 131 Cal. 121; Spencer *v.* New York, etc., R. Co., 62 Conn. 242; Chattanooga, etc., R. Co. *v.* Clowdis, 90 Ga. 258; Siebert *v.* People, 143 Ill. 571; Chase *v.* Lowell, 151 Mass. 422; Com. *v.* Trefethen, 157 Mass. 188; State *v.* Fitzgerald, 130 Mo. 407; Wetmore *v.* Mell, 1 Ohio St. 26, 59 Am. Dec. 607; Darby *v* Rice, 2 Nott. & M. (S. Car.) 596.

The Exclamation, "Oh, my God!" at Time Person Is Shot. — People *v.* Brown, 59 Cal. 345.

Manifestations of Mental Pain and Anguish. — McDonald *v.* Franchere, 102 Iowa 496; Kidder *v.* Bacon, (Vt. 1902) 52 Atl. Rep. 322.

Exclamations Showing Injured Feelings in Action for Failure to Deliver Telegram. — Western Union Tel. Co. *v.* Davis, 24 Tex. Civ. App. 427.

Declarations of Insured to Show Knowledge of Infirmity. — Schwartz *v.* Berkshire L. Ins. Co., 91 Ill. App. 494. And see the title LIFE INSURANCE, vol. 19, p. 107.

Letter Showing Cheerful Condition of Mind admissible on the issue of suicide. State *v.* Baldwin, 36 Kan. 1.

Criminal Conversation. — So in actions for criminal conversation, letters by the wife to her husband, or to third persons, are competent to show her affection towards her husband and her reasons for living apart from him, if written before any misconduct on her part, and if there is no ground to suspect collusion. See Mutual L. Ins. Co. *v.* Hillmon, 145 U. S. 285. And see the title CRIMINAL CONVERSATION, vol. 8, p. 272.

Action for Alienation of Husband's or Wife's Affections. — See the title HUSBAND AND WIFE, vol. 15, p. 864. And see Whitman *v.* Egbert, 27 N. Y. App. Div. 374; Lyon *v.* Lyon, 197 Pa. St. 212. *Compare* Eagon *v.* Eagon, 60 Kan. 697.

Abduction. — See the title ABDUCTION, vol. 1, p. 179 *et seq.* See also Long *v.* Rogers, 17 Ala. 540; Felt *v.* Amidon, 43 Wis. 467.

Acts and Declaration on the Issue of Insanity. — See the title INSANITY, vol. 16, p. 609 *et seq.* See also Jumpertz *v.* People, 21 Ill. 375; Fitzgerald *v.* Shelton, 95 N. Car. 519; Rouch *v.* Zehring, 59 Pa. St. 74.

3. Declarations of Intention Admissible under Res Gesta Rule — *California.* — Kyle *v.* Craig, 125 Cal. 107; Draper *v.* Douglass, 23 Cal. 347; Tait *v.* Hall, 71 Cal. 149; Lewis *v.* Burns, 106 Cal. 381.

Connecticut. — Bartram *v.* Stone, 31 Conn. 159; Spencer *v.* New York, etc., R. Co., 62 Conn. 242.

Delaware. — Redden *v.* Spruance, 4 Harr. (Del.) 217.

Georgia. — Monroe *v.* State, 5 Ga. 85.

Illinois. — Cron *v.* Ballinger, 18 Ill. 203.

Indiana. — Strange *v.* Donohue, 4 Ind. 329.

Iowa. — State *v.* Shelledy, 8 Iowa 506.

Maine. — Baring *v.* Calais, 11 Me. 463; Corinth *v.* Lincoln, 34 Me. 310; Gorham *v.* Canton, 5 Me. 266, 17 Am. Dec. 231.

Maryland. — Curtis *v.* Moore, 20 Md. 93.

Massachusetts. — Elmer *v.* Fessenden, 151 Mass. 359; Deveney *v.* Baxter, 157 Mass. 9; Lund *v.* Tyngsborough, 9 Cush. (Mass.) 36.

Missouri. — State *v.* Mason, 112 Mo. 374, 34 Am. St. Rep. 390.

New York. — Hine *v.* New York El. R. Co., 149 N. Y. 154.

North Carolina. — Evans *v.* Howell, 84 N. Car. 460.

Pennsylvania. — Jones *v.* Brownfield, 2 Pa. St. 55.

Vermont. — Danforth *v.* Streeter, 28 Vt. 490. See also State *v.* Marsh, 70 Vt. 288.

West Virginia. — Beckwith *v.* Mollohan, 2 W. Va. 477.

Thus, on the issue as to whether a certain sum of money was paid or was held in readiness for payment, the declaration of the alleged payor at the time of drawing money from bank or receiving it from any other source as to the purpose for which it was to be used, has been held admissible. Deveney *v.* Baxter, 157 Mass. 9; Planters' Bank *v.* Massey, 2 Heisk. (Tenn.) 360. But see Schulz *v.* Schulz, 113 Mich. 502.

sible only on the principle of *res gesta*.[1] But other authorities, while admitting that when the intention to be proved is important only as qualifying an act, its connections with that act must be shown in order to warrant the admission of the declarations of the intention, yet hold that whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party,[2] especially where the declarant is dead at the time of the trial and the declaration is made under circumstances which preclude any suspicion of an intention to make evidence to be used at the trial.[3] It is said in support of this view that the existence of a particular intention in the mind of a person at a certain time being a material fact to be proved, and being provable only by some external manifestation, evidence that he expressed that intention at that time is as direct evidence of the fact as his own testimony that he then had that intention would be; that after his death there can hardly be any other way of proving it, and while he is still alive his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than a letter written by him at the very time and under circumstances precluding a suspicion of misrepresentation.[4]

(2) *Commission of Suicide.* — On this principle the declaration of an intention to commit suicide, though made some time before the death of the declarant, has been held to be admissible.[5] On the other hand, such statements have been excluded from evidence, where they were unaccompanied by any attempt at the time to carry them into execution, or any act tending to show an intent to commit suicide.[6]

(3) *Departure or Absence* — **In General.** — When it is material to show the purpose or reason for the departure of a person, his declarations of his purpose made at or about the time of his departure, are admissible.[7] This evidence has been admitted in some instances on the principle of *res gesta* as being explanatory of the act of departure,[8] and in other cases it has been admitted

Statement as to Whether Erection on Land Is Intended to Be a Fixture. — Nelson *v.* Howison, 122 Ala. 573; Kelley *v.* Kelley, 20 Wis. 443. See also Taylor *v.* Collins, 51 Wis. 123.

Declarations Explanatory of Object of Passenger in Going from One Coach to Another. — Means *v.* Carolina Cent. R. Co., 124 N. Car. 574.

Statement as to Intention in Suing Out Attachment. — Wood *v.* Barker, 37 Ala. 60. 76 Am. Dec. 346. *Compare* Shuck *v.* Vanderventer, 4 Greene (Iowa) 264.

1. Res Gesta or Principal Act Held Necessary. — Jenkin *v.* Pacific Mut. L. Ins. Co., 131 Cal. 121; Siebert *v.* People, 143 Ill. 571; Chicago, etc., R. Co. *v.* Chancellor, 165 Ill. 438; State *v.* Fitzgerald, 130 Mo. 407; State *v.* Punshon, 133 Mo. 44.

2. Declaration of Intention Admitted Apart from Res Gesta Rule. — Mutual L. Ins. Co. *v.* Hillmon, 145 U. S. 285; Com. *v.* Trefethen, 157 Mass. 188 (*overruling* Com. *v.* Felch, 132 Mass. 22).

3. Com. *v.* Trefethen, 157 Mass. 188.

4. Mutual L. Ins. Co. *v.* Hillmon, 145 U. S. 285; Com. *v.* Trefethen, 157 Mass. 180.

5. Declaration of Intention to Commit Suicide. — Com. *v.* Trefethen, 157 Mass. 180; People *v.* Gehmele, Sheldon (N. Y.) 256; Blackburn *v.* State, 23 Ohio St. 146; Boyd *v.* State, 14 Lea (Tenn.) 161. See also State *v.* Marsh, 70 Vt. 288.

6. Jenkin *v.* Pacific Mut. L. Ins. Co., 131 Cal. 121; Siebert *v.* People, 143 Ill. 571; State *v.* Fitzgerald, 130 Mo. 407.

7. Declaration Explanatory of Departure. — Mutual L. Ins. Co. *v.* Hillmon, 145 U. S. 285; Burns *v.* State, 49 Ala. 370; State *v.* Hayward, 62 Minn. 474; Mathews *v.* Great Northern R. Co., 81 Minn. 363. *Compare* Reg. *v.* Pook, 13 Cox C. C. 172, note; Reg. *v.* Wainwright, 13 Cox C. C. 171.

8. Statements Admitted on Principle of Res Gesta — *Alabama.* — Harris *v.* State, 96 Ala. 24.
Connecticut.—Douglas *v.* Chapin, 26 Conn. 76.
Georgia. — Brady *v.* Parker, 67 Ga. 636.
Iowa. — State *v.* Peffers, 80 Iowa 580.
Kentucky. — See Walling *v.* Com., (Ky. 1896) 38 S. W. Rep. 429.
Massachusetts. — Shrewsbury *v.* Smith, 12 Cush. (Mass.) 177.
Minnesota. — State *v.* Hayward, 62 Minn. 474.
Missouri. — State *v.* Young, 119 Mo. 495.
Montana. — See State *v.* Lucey, 24 Mont. 295.
New Hampshire. — Ordway *v.* Sanders, 58 N. H. 132.
New Jersey. — Hunter *v.* State, 40 N. J. L. 495.
Tennessee. — Garber *v.* State, 4 Coldw. (Tenn.) 161; Irvine *v.* State, 104 Tenn. 132. See also Kirby *v.* State, 7 Yerg. (Tenn.) 259, 9 Yerg. (Tenn.) 385, 30 Am. Dec. 420; Sawyers *v.* State, 15 Lea (Tenn.) 694.
Texas. — West *v.* State, 2 Tex. App. 460; Wallace *v.* Byers, 14 Tex. Civ. App. 574; Kol-

in proof of the intention as a distinct and material fact.[1]

The Declarations of a Servant at the Time of Leaving His Master's Service have been held competent evidence of his reasons for doing so, in actions between third persons.[2]

Declaration of Intention to Take Passage on Train. — It has been held that for the purpose of proving that a person was at a railway station intending to take passage on a train, previous declarations made by him at the time of leaving his hotel, are admissible.[3]

Declaration of Bankrupt upon Leaving Home. — In accordance with the rule also, a bankrupt's declarations, oral or by letter, at or about the time of leaving or during his absence from home, as to his reason for going abroad, have been held to be competent in an action by his assignees against a creditor, as evidence that his departure was with intent to defraud his creditors, and therefore an act of bankruptcy.[4]

(4) *Payment or Delivery of Property.* — At the time of making a payment[5]

ler *v.* State, 36 Tex. Crim. 496; Merritt *v.* State, 39 Tex. Crim. 70. *Compare* Ball *v.* State, 29 Tex. App. 107.

Vermont. — State *v.* Howard, 32 Vt. 380; Rudd *v.* Rounds, 64 Vt. 432.

Virginia. — Tilley *v.* Com., 89 Va. 136.

Wisconsin. — See State *v.* Dickinson, 41 Wis. 299.

Declarations of Physician on Leaving Home as to Patient to Be Visited. — Autauga County *v.* Davis, 32 Ala. 703.

Statement During Journey as to Places of Departure and Destination. — State *v.* Vincent, 24 Iowa 570, 95 Am. Dec. 753; Carroll *v.* State, 3 Humph. (Tenn.) 315

Prior Declarations Held Too Remote from Time of Departure. — Cook *v.* State, (Ala. 1902) 32 So. Rep. 696; McBride *v.* Com., 95 Va. 818.

Homicide. — For a discussion of the admissibility of declarations of a person accused of homicide, at or about the time of his departure for the place of homicide, see *infra*, *Application of Doctrine to Specific Issues — Crimes — Homicide — Acts and Declarations of Accused.*

For a discussion of the admissibility of statements by the deceased under similar circumstances, see *infra*, this section, *Crimes — Homicide — Acts and Declarations of Deceased.*

Mortgage — Fraud or Duress. — Pertinent declarations, made by a person while on his way to procure the execution of a mortgage to secure an antecedent debt or liability, the expedition having resulted in its procurement, are admissible in evidence, as part of the *res gesta*, against the mortgagee, on the question whether the mortgage was procured by fraud or duress, irrespective of the relation of agency between the mortgagee and the person making the declaration. Small *v.* Williams, 87 Ga. 681. See also Hannawalt *v.* Equitable L. Assur. Soc., 102 Iowa 667.

1. Mutual L. Ins. Co. *v.* Hillmon, 145 U. S. 285; Mathews *v.* Great Northern R. Co., 81 Minn. 363. *Compare* State *v.* Hayward, 62 Minn. 474, in which the evidence was admitted on the principle of *res gesta*.

2. **Declaration of Servant upon Leaving Service.** — Elmer *v.* Fessenden, 151 Mass. 359; Hadley *v.* Carter, 8 N. H. 40.

3. **Declaration of Intention to Take Passage on Train.** — Baltimore, etc., R. Co. *v.* State, 81 Md. 371; Lake Shore, etc., R. Co. *v.* Herrick, 49 Ohio St. 25.

Prior Declaration Held Too Remote from Act of Departure. — Chicago, etc., R. Co. *v.* Chancellor, 165 Ill. 438.

But in Denver, etc., R. Co. *v.* Spencer, 25 Colo. 9, 27 Colo. 313, it was held that the conversations of a father and daughter by which it was arranged that the father should meet the daughter at a railroad station some days later, were admissible under the doctrine of *res gesta* as explanatory of the father's act in going upon the depot grounds.

4. **Declaration of Bankrupt upon Leaving Home.** — Bateman *v.* Bailey, 5 T. R. 512; Rawson *v.* Haigh, 9 Moo. 217, 2 Bing. 99, 9 E. C. L. 335; Smith *v.* Cramer, 1 Scott 541, 1 Bing. N. Cas. 585, 27 E. C. L. 498.

Letters Written During Bankrupt's Absence. — Rawson *v.* Haig, 9 Moo. 217; Rouch *v.* Great Western R. Co., 1 Q. B. 51, 41 E. C. L. 432.

Declarations Made by Bankrupt Immediately on His Return Home. — Bateman *v.* Bailey, 5 T. R. 512; Ridley *v.* Gyde, 9 Bing. 349, 23 E. C. L. 304.

But in Lees *v.* Marton, 1 M. & Rob. 210, it was held that a declaration was inadmissible in the absence of proof that it was made by the bankrupt whilst he was absenting himself, or immediately upon his return.

5. **Statements Made at Time of Payment.** — Hart *v.* Freeman, 42 Ala. 567; Hood *v.* French, 37 Fla. 117; Richerson *v.* Sternburg, 65 Ill. 272; Gay *v.* Gay, 5 Allen (Mass.) 157; Sheeley *v.* Lash, 14 Minn. 498; Hall *v.* Young, 37 N. H. 134; Carter *v.* Beals, 44 N. H. 408; Kelly *v.* Campbell, 2 Abb. App. Dec. (N. Y.) 492; Barber *v.* Bennett, 58 Vt. 481. *Compare* Mueller's Estate, 159 Pa. St. 590.

Statement Accompanying Payment of Rent. — Rigg *v.* Cook, 9 Ill. 336, 46 Am. Dec. 462.

Statement of Father in Paying Son's Debt Showing Intention to Make Advance. — West *v.* Beck, 95 Iowa 520.

To Show Application or Appropriation of Money Paid. — Gay *v.* Gay, 5 Allen (Mass.) 157; Woodstock Bank *v.* Clark, 25 Vt. 308.

Statement Explanatory of Deposit in Bank. — Lee *v.* Kennedy, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 140; Scott *v.* Berkshire County Sav. Bank, 140 Mass. 157.

or a delivery of property,[1] the statements of a person, if qualifying and explanatory of the act of payment or delivery and showing the intention and purpose of the actor, are admissible as a part of the *res gesta.*

(5) *Taking Possession of Property.* — So, declarations accompanying the act of taking possession of either real or personal property showing the intent or purpose of such taking or otherwise qualifying the act, may be admissible as part of the *res gesta.*[2]

(6) *Abandonment.* — On the same principle, declarations made at the time of abandoning the possession of property may be admitted.[3]

(7) *Domicil.* — The admissibility of declarations for the purpose of proving the intention of a person as to his domicil, has been fully discussed elsewhere.[4]

(8) *Writing or Sending Letter.* — The declarations of a person explanatory of the object of his writing a letter, made at the time of writing, are admissible.[5]

(9) *Testamentary Intention* — In General. — The admissibility of the declarations and conduct of a testator to show his real intention where his will is questioned for want of mental capacity,[6] or by reason of fraud or undue influence,[7] or where the will is lost and it becomes necessary to prove its contents,[8] will be found treated elsewhere in this work.

Revocation. — So a discussion of the admissibility of the declarations of a testator contemporaneous with, prior or subsequent to, an alleged act of revocation, will be found discussed elsewhere in this work.[9]

(10) *Inadmissibility of Narrative Statements.* — Mere narrative statements as to the object in doing a past act are inadmissible.[10]

3. Crimes — *a.* In General. — The surrounding facts and circumstances constituting parts of the *res gesta* of the commission of a crime may always be shown to the jury along with the principal fact.[11]

b. Occurrences Leading Up to Crime. — Where an offense is the ter-

Declarations Explanatory of Failure or Refusal to Pay at Certain Time and Place. — Thorp *v.* Goeway, 85 Ill. 611; Webster *v.* Canmann, 40 Mo. 156.

1. Statements Accompanying Delivery of Property. — Sanders *v.* Knox, 57 Ala. 80; Myers *v.* Bernstein, 102 Ga. 579; Hall *v.* Young, 37 N. H. 134; Kelly *v.* Forty-Second St., etc., R. Co., 48 N. Y. App. Div. 627; Evans *v.* Howell, 84 N. Car. 460; Banks *v.* Hatton, 1 Nott & M. (S. Car.) 221.

Statement Accompanying Gift. — Miller *v.* Clark, 40 Fed. Rep. 15; Bragg *v.* Massie, 38 Ala. 89, 79 Am. Dec. 82; Tuck *v.* Bowie, 1 Md. 87; Wambold *v.* Vick, 50 Wis. 456.

2. Statements at Time of Taking Possession of Property. — Stephens *v.* McCloy, 36 Iowa 659; Bennett *v.* Hethington, 16 S. & R. (Pa.) 193; Grim *v.* Bonnell, 78 Pa. St. 152; Allen *v.* Seyfried, 43 Wis. 414.

As Showing under What Right Property Is Claimed. — Resch *v.* Senn, 28 Wis. 286.

Declarations at Time of Entry of Land to Show Adverse Possession. — Miles *v.* Miles, 8 W. & S. (Pa.) 135; Hood *v.* Hood, 2 Grant Cas. (Pa.) 229.

To Show Intention in Action for Forcible Entry and Detainer. — Hardisty *v.* Glenn, 32 Ill. 62; Stephens *v.* McCloy, 36 Iowa 659; Rowley *v.* Hughes, 40 Ill. 316.

3. Statement Showing Removal from Land to Be Involuntary. — Evans *v.* Jones, 8 Yerg. (Tenn.) 461.

Declaration of Agent. — Kercheval *v.* Ambler, 4 Dana (Ky.) 166.

Declarations at Time of Removal of Fence to Show Abandonment of Property. — Welch *v.* Louis, 31 Ill. 446. See also the title Homestead, vol. 15, p. 649.

4. See the title Domicil, vol. 10, p. 27.

5. Duvall *v.* Medtart, 4 Har. & J. (Md.) 14. *Compare* Home Ins. Co. *v.* Marple, 1 Ind. App. 411.

6. See the title Testamentary Capacity.

7. See the title Undue Influence.

8. See the title Secondary Evidence.

9. See the title Wills.

10. Mere Narrative Statements Inadmissible. — Jackson *v.* State, 52 Ala. 305; Thistlewaite *v.* Thistlewaite, 132 Ind. 355; Heft *v.* Masden, (Ky. 1899) 51 S. W. Rep. 574; Hester *v.* Com., 85 Pa. St. 139.

11. Circumstances Surrounding Commission of a Crime. — People *v.* Taylor, 136 Cal. xix, 69 Pac. Rep. 292; Territory *v.* Rehberg, 6 Mont. 467; Logston *v.* State, 3 Heisk. (Tenn.) 414, Jones *v.* State, 38 Tex. Crim. 87, 70 Am. St. Rep. 719; State *v.* Hayes, 14 Utah 118; People *v.* Coughlin, 13 Utah 58.

Character of Place of Homicide as Part of Res Gesta. — Gibson *v.* State, 23 Tex. App. 414.

Subsequent Condition of Body and Clothing. — People *v.* Majors, 65 Cal. 138, 52 Am. Rep. 295; Mott *v.* State, (Tex. Crim. 1899) 51 S. W. Rep. 368. See also State *v.* Harris, 45 La. Ann. 842, 40 Am. St. Rep. 259.

Thus though the homicide was charged to have been committed with a knife, evidence that on the day of the killing deceased's head and face were found to be bruised, and that later such bruises turned black, has been held admissible as part of the *res gesta.* Mott *v.* State, (Tex. Crim. 1899) 51 S. W. Rep. 368.

mination of a continuous transaction it is admissible to show the entire train of connected facts leading up to and forming a part of the preparation for the commission of the offense, whether consisting of conduct, declarations, or other occurrences.[1]

c. HOMICIDE — (1) *In General.* — Thus, acts are pertinent as a part of the *res gesta* of a homicide if they are done pending the hostile enterprise whilst it is in continuous progress to its catastrophe, and if they bear upon it, and are of a nature to promote or obstruct, advance or retard it, or to evince essential motive of purpose in reference to it; and declarations are pertinent if they are uttered contemporaneously with pertinent acts, and serve to account for, qualify, or explain them, and are apparently natural and spontaneous.[2]

(2) *Previous Quarrels or Altercations.* — Thus, on an indictment for homicide, previous quarrels or difficulties between the accused and the deceased (including all the conversation that took place at the time), which are so connected with the main fact of killing as to constitute one continuous transaction, are admissible as a part of the *res gesta.*[3] And prior difficulties even with third persons have been admitted on the same principle.[4]

(3) *Acts and Declarations of Accused.* — The *res gesta* of a homicide is made up of the act of killing and the intent with which it was committed, and therefore it has been stated generally that actions of the accused which

1. Prior Occurrences Leading Up to Crime. — Jordan *v.* State, 81 Ala. 20; People *v.* Potter, 5 Mich. 1, 71 Am. Dec. 763; People *v.* Knapp, 26 Mich. 112; State *v.* Gabriel, 88 Mo. 631; State *v.* Elvins, 101 Mo. 243; State *v.* Ellis, 101 N. Car. 765, 9 Am. St. Rep. 49.

Securing Signature of Person Whose Name Is Subsequently Forged. — State *v.* Bigelow, 101 Iowa 430.

Attempts to Entice Person to Suitable Place for Robbery. — People *v.* Winthrop, 118 Cal. 85. See also State *v.* Lucey, 24 Mont. 295.

2. Application of Rule in Trials for Homicide. — Cox *v.* State, 64 Ga. 374, 37 Am. Rep. 80; Renfro *v.* Com., 11 Ky. L. Rep. 246, 11 S. W. Rep. 815; Hardin *v.* State, 40 Tex. Crim. 208.

Series of Beatings Resulting in Death. — Medina *v.* State, (Tex. Crim. 1899) 49 S. W. Rep. 380.

3. Admissibility of Previous Quarrels or Altercations. — Stitt *v.* State, 91 Ala. 10, 24 Am. St. Rep. 853; Walker *v.* State, 34 Fla. 167, 43 Am. St. Rep. 186; State *v.* Mitchell, 41 La. Ann. 1073; State *v.* Elvins, 101 Mo. 243; Turner *v.* State, (Tex. Crim. 1898) 46 S. W. Rep. 830; Mitchell *v.* State, 38 Tex. Crim. 170; Mack *v.* State, 48 Wis. 271. See also Hannabalson *v.* Sessions, (Iowa 1902) 90 N. W. Rep. 93; Turner *v.* Com., (Ky. 1896) 34 S. W. Rep. 526.

Where two persons consent to fight with deadly weapons, and by agreement separate to arm themselves, both intending to return presently and begin the combat, and they do in fact arm themselves and meet, though not at the place appointed, but near it, in the same city and on the same street, and only a little later than the time contemplated, and actually fight with the weapons thus prepared, and one of them is slain by the other, the *res gestæ* of the transaction comprehend all pertinent acts and declarations of the parties (either or both), which take place in the interval between the agreement to fight and the consummation of the homicide, such interval being very brief. Cox *v.* State, 64 Ga. 374, 37 Am. Rep. 76.

Failure of Witness to Catch Entire Conversation Immaterial. — State *v.* Daniels, 49 La. Ann. 954.

Where a Quarrel in Which Several Persons Take Part results in a homicide, what is said or done, by all the participants during the progress of the difficulty is competent to show the nature of the difficulty and the attitude of the parties towards each other. Ferrill *v.* Com., (Ky. 1893) 23 S. W. Rep. 344; Shumate *v.* State, 38 Tex. Crim. 266.

Thus it has been held that the fact that, in a quarrel between the deceased and the defendant and his brother, the defendant's brother struck the deceased the first blow, is admissible. Byrd *v.* State, 69 Ark. 537.

Proceedings of Riotous Assembly. — So all the proceedings of a riotous assembly gathered about the defendant's house have been held admissible as part of the *res gesta*, where the homicide was committed under the provocation of a similar riotous assembly on the following night which grew out of and was directly connected with the former assembly. Patten *v.* People, 18 Mich. 314, 100 Am. Dec. 173.

Prior Difficulty Between Two Gangs to Which Defendant and Deceased Belonged Respectively. — Mitchell *v.* State, 38 Tex. Crim. 170.

Prior Altercations Held Too Remote. — People *v.* Smith, 26 Cal. 665; Sewell *v.* Com., 3 Ky. L. Rep. 86; State *v.* Swain, 68 Mo. 605; Webber *v.* Com., 119 Pa. St. 223, 4 Am. St. Rep. 634.

4. Armor *v.* State, 63 Ala. 173.

Difficulty with Another Whom Defendant Was Pursuing. — Where the defendant had had a difficulty with a negro at a saloon, and, upon the negro running, the defendant had pursued him, and under the impression that he was in the deceased's house, had demanded admission, which, being refused, he shot and killed the deceased, it was held that it was not error to admit evidence as to what happened in the saloon just a few moments before the homi-

seem to demonstrate the *quo animo* are a part of the *res gesta*, and words which are a part of these actions are admissible.[1] Thus the appearance, conduct or declarations of the accused at the time of the commission of the act are admissible for the purpose of showing whether the act was under the sudden excitement of fear, passion, or provocation.[2]

Antecedent Acts or Declarations. — So prior acts and declarations are sometimes admitted on the question of motive or intent.[3]

Subsequent Declarations. — In some cases statements of the defendant as to the cause and circumstances of the homicide, though made after its commission and though made in his own favor, have been admitted as being parts of the *res gesta*.[4] But while there is considerable conflict as to the application of the principle to the specific cases it is very generally held that to be admissible such declarations must exclude all idea of a narrative of past events.[5]

cide, as that illustrated the subsequent criminal transactions and gave to them the proper application and expression, and constituted part of the *res gesta*. State *v.* Kennade, 121 Mo. 405.

Distinct Altercation Between Accused and Third Person Inadmissible as Part of Res Gesta. — Whitaker *v.* State, 79 Ga. 87; Joyce *v.* Com., 78 Va. 287. *Compare* Kernan *v.* State, 65 Md. 253.

1. Acts and Declarations of Accused Generally. — Cornwell *v.* State, Mart. & Y. (Tenn.) 147; Garber *v.* State, 4 Coldw. (Tenn.) 161.

2. Dukes *v.* State, 11 Ind 557, 71 Am. Dec. 370; State *v.* Walker, 77 Me. 488; Sullivan *v.* State, (Miss. 1902) 32 So. Rep. 2; State *v.* Abbott, 8 W. Va. 741.

3. Declarations of Accused Prior to Homicide Held Admissible to Show Quo Animo. — State *v.* Ridgely, 2 Harr. & M. (Md.) 120, 1 Am. Dec. 372; Ortiz *v.* State, 30 Fla. 256.

Declaration of Accused Prior to Homicide to Show Belief that Gun Was Unloaded. — Jones *v.* State, 103 Ala. 1.

Fact that Accused Was Sharpening Knife Just Prior to Killing. — State *v.* Ellis, 101 N. Car. 765, 9 Am. St. Rep. 49.

Statement Explanatory of Departure to Place of Homicide. — So the statement of the defendant on starting to the place of homicide as to his intentions in going there have been held admissible as part of the *res gesta*. Campbell *v.* State, 133 Ala. 88; State *v.* Cross, 68 Iowa 180; State *v.* Young, 119 Mo. 495; Garber *v.* State, 4 Coldw. (Tenn.) 161. *Compare* Irvine *v.* State, 104 Tenn. 132; Koller *v.* State, 36 Tex. Crim. 496. But see State *v.* Ching Ling, 16 Oregon 419; Oder *v.* Com., 80 Ky. 32; Cook *v.* State, (Ala. 1902) 32 So. Rep. 696.

Prior Statements Expressive of Fear. — But it has been held that a declaration of the accused shortly before the homicide expressing fear of injury from the deceased was inadmissible where no hostile demonstration on the part of the deceased was shown. State *v.* Carey, 56 Kan. 84; State *v.* Evans, 65 Mo. 574; State *v.* Shafer, 22 Mont. 17. See also State *v.* Umfried, 76 Mo. 404.

Prior Self-serving Statement as to Intended Use of Instrument at Time of Borrowing Held Inadmissible. — People *v.* Wyman, 15 Cal. 70.

In Terrell *v.* Com., 76 Ky. 246, it was held that the declarations of the accused explanatory of his reasons for carrying arms are inadmissible as part of the *res gesta* where they are made at an indefinite time before the homicide and it is not shown that he was armed at the time the declarations were made.

Threats Made Shortly Before Homicide. — State *v.* Vallery, 47 La. Ann. 182, 49 Am. St. Rep. 363; State *v.* Crawford, 115 Mo. 620; State *v.* King, 9 Mont. 445.

In Burton *v.* Com., (Ky. 1901) 60 S. W. Rep. 527, threats made against a third person shortly before the homicide were held admissible where the third person and not the deceased was the intended victim. See also People *v.* McKay, 122 Cal. 628.

As to the admissibility of threats generally, see the title MURDER AND MANSLAUGHTER, vol. 21, p. 219 *et seq.*

Prior Act Unaccompanied by Explanatory Declaration Held Inadmissible to Show Intent. — Reg. *v.* Mobbs, 6 Cox C. C. 223.

4. Declarations Subsequent to Homicide Held Admissible. — Mitchum *v.* State, 11 Ga. 615; Thomas *v.* State, 27 Ga. 287; State *v.* Harris, 45 La. Ann. 842, 40 Am St. Rep. 259; Scaggs *v.* State, 8 Smed. & M. (Miss.) 722; Sullivan *v.* State, (Miss. 1902) 32 So. Rep. 2; State *v.* Lockett, 168 Mo. 480; Griffin *v.* State, 40 Tex. Crim. 312, 76 Am. St. Rep. 718; Honeycutt *v.* State, (Tex. Crim. 1900) 57 S. W. Rep. 806; Nelson *v.* State, (Tex. Crim. 1900) 58 S. W. Rep. 107; Teel *v.* State, (Tex. Crim. 1902) 69 S. W. Rep. 531; Little *v.* Com., 25 Gratt. (Va.) 921.

Declarations Immediately after Homicide to Show Malicious State of Mind. — State *v.* Brown, 28 Oregon 147; Jennings *v.* State, (Tex. Crim. 1900) 57 S. W. Rep. 642.

Statement by One Participant to Another. — On the trial of an indictment for murder, it is admissible to prove that when the deceased was killed two persons ran rapidly away in the same direction, and that one said in a jerky voice to the other as they both ran past a bystander: "Will, you have killed him." Briggs *v.* Com., 82 Va. 554.

Evidence in Behalf of Codefendant. — Galloway *v.* Com., 5 Ky. L. Rep. 213.

5. Mere Narratives Inadmissible — *Alabama.* — Birdsong *v.* State, 47 Ala. 68; Steele *v.* State, 61 Ala. 213; Billingslea *v.* State, 68 Ala. 486; Roberts *v.* State, 68 Ala. 515.

Arkansas. — Evans *v.* State, 58 Ark. 47.

California. — People *v.* Wyman, 15 Cal. 70.

Delaware. — State *v.* Seymour, Houst. Crim. Cas. (Del.) 508.

Thus, statements made by the accused after he has not only had time to consider, but has actually considered the anticipated litigation, will not be admissible as part of the *res gesta*.[1]

Declarations Against Interest. — While confessions or admissions of facts from which guilt may be inferred, made at any time, are, as a general rule, admissible,[2] declarations of the accused against his interest may be admissible as parts of the *res gesta*,[3] even though they are inadmissible as confessions or admissions, because made under circumstances which render them involuntary.[4]

Subsequent Acts of Accused. — Evidence that the accused immediately after the homicide in question attempted to strike or pointed his pistol at, and threatened to kill, a third person who was seeking to prevent the homicide, has been held admissible as part of the *res gesta*.[5]

(4) *Acts and Declarations of Deceased* — (a) **Antecedent Declarations.** — The declarations of the deceased prior to the homicide and unconnected with any act leading up to the homicide, are, as a general rule, inadmissible under the *res gesta* rule against the accused, especially if such declarations are not shown to have been communicated to the accused and hence could not have influenced him in the commission of the homicide.[6] Nor are such declarations generally admissible in the defendant's favor.[7] But where the antecedent

District of Columbia. — U. S. *v.* Neverson, 1 Mackey (D. C.) 152.

Georgia. — Everett *v.* State, 62 Ga. 65; Williams *v.* State, 108 Ga. 748; Thornton *v.* State, 107 Ga. 683.

Illinois. — Gardner *v.* People, 4 Ill. 83.

Indiana. — Doles *v.* State, 97 Ind. 555.

Kentucky. — Rutherford *v.* Com., 76 Ky. 608.

Louisiana. — State *v.* Johnson, 35 La. Ann. 968; State *v.* Rutledge, 37 La. Ann. 378; State *v.* Blanchard, 108 La. 110.

Maryland. — Wright *v.* State, 88 Md. 705.

Missouri. — State *v.* Christian, 66 Mo. 138; State *v.* Rider, 95 Mo. 474; State *v.* Smith, 114 Mo. 406; State *v.* Nocton, 121 Mo. 537; State *v.* Beard, 126 Mo. 548; State *v.* Punshon, 133 Mo. 44. See also State *v.* Brown, 64 Mo. 367.

Montana. — Territory *v.* Clayton, 8 Mont. 1; State *v.* Pugh, 16 Mont. 343.

North Carolina. — State *v.* Scott, 1 Hawks (8 N. Car.) 24.

Ohio. — Forrest *v.* State, 21 Ohio St. 641.

Oklahoma. — Smith *v.* Territory, (Okla. 1902) 69 Pac. Rep. 805.

Tennessee. — State *v.* Davis, 104 Tenn. 501; Turner *v.* State, 89 Tenn. 547.

Texas. — Crow *v.* State, (Tex. Crim. 1893) 21 S. W. Rep. 543; Chalk *v.* State, 35 Tex. Crim. 116; Morris *v.* State, 35 Tex. Crim. 313; Ray *v.* State, (Tex. Crim. 1896) 36 S. W. Rep. 446; Ford *v.* State, 40 Tex. Crim. 280; Little *v.* State, (Tex. Crim. 1901) 61 S. W. Rep. 483; Beckham *v.* State, (Tex. Crim. 1902) 69 S. W. Rep. 534.

Utah. — People *v.* Callaghan, 4 Utah 49.

Declaration Made After Arrest and One Minute After Shooting as to Cause of Shooting, Held Inadmissible. — King *v.* State, 65 Miss. 576, 7 Am. St. Rep. 681.

Declarations to Show Condition of Mind of Accused. — Evidence of a conversation with the accused some time after the homicide, not constituting a part of the act nor a contemporaneous explanation of it, is not admissible for the accused, as part of the *res gesta*, to show the condition of his mind. North *v.* People, 139 Ill. 81.

1. Jackson *v.* Com., (Ky. 1896) 37 S. W. Rep. 847.

2. Dukes *v.* State, 11 Ind. 557, 71 Am. Dec. 370. See also the title CONFESSIONS, vol. 6, p. 525.

3. O'Shields *v.* State, 55 Ga. 696; Keyes *v.* State, 122 Ind. 527; Sullivan *v.* State, 58 Neb. 796.

Admissions of Third Person Participating in Fight. — Flanagan *v.* State, 64 Ga. 52.

4. Miller *v.* State, 31 Tex. Crim. 609, 37 Am. St. Rep. 836; Gantier *v.* State, (Tex. Crim. 1893) 21 S. W. Rep. 255; Powers *v.* State, 23 Tex. App. 42.

5. **Subsequent Acts of Accused.** — State *v.* Gainor, 84 Iowa 209; Powers *v.* People, 42 Ill. App. 427; State *v.* Ramsey, 82 Mo. 133.

6. **Antecedent Declarations of Deceased Generally Inadmissible** — *California.* — People *v.* Carkhuff, 24 Cal. 640; People *v.* Carlton, 57 Cal. 84; People *v.* Dailey, 59 Cal. 600; People *v.* Irwin, 77 Cal. 494; People *v.* Gress, 107 Cal. 461; People *v.* Shattuck, 109 Cal. 673.

Illinois. — Weyrich *v.* People, 89 Ill. 90.

Indiana. — Cheek *v.* State, 35 Ind. 492.

Iowa. — State *v.* Sullivan, 51 Iowa 142. See also State *v.* Moelchen, 53 Iowa 310.

Kansas. — State *v.* Reed, 53 Kan. 767, 42 Am. St. Rep. 322.

Maryland. — State *v.* Ridgely, 2 Har. & M. (Md.) 120, 1 Am. Dec. 372.

Montana. — State *v.* Shafer, 22 Mont. 17.

Texas. — Fuller *v.* State, 30 Tex. App. 559.

7. People *v.* Renfrow, 41 Cal. 37; Combs *v.* State, 75 Ind. 215; State *v.* Vincent, 24 Iowa 570, 95 Am. Dec. 753; Macklin *v.* Com., 93 Ky. 294; Pence *v.* Com., (Ky. 1899) 51 S. W. Rep. 801.

Prior Statement of Deceased Wife Tending to Show Pleasant Domestic Relations. — State *v.* Punshon, 124 Mo. 448.

Prior Statements of Deceased to Accused as to Habit of Carrying Firearms. — What the deceased said to the accused months prior to the homicide in regard to his carrying firearms has been held inadmissible on the question of self-defense. State *v.* Yokum, 11 S. Dak. 544.

declaration of the deceased is connected with and explanatory of an act leading up to the homicide and forming a part of one continuous transaction, it is admissible as part of the *res gesta*.[1]

Threats by Deceased. — Threats made by the deceased against the accused, whether communicated or not, may be admitted when they form a part of the *res gesta*.[2] But such threats, when made after the completion of the act which results in death, are inadmissible on this principle.[3]

(b) **Subsequent Declarations.** — The declarations of the deceased as to the cause and circumstances of the homicide will not be admissible if they are made at such a time subsequent to the occurrence of the main fact in issue and under such circumstances as clearly render them mere narratives of a past event.[4] And there has been a disposition on the part of some of the courts

But in Boyle *v.* State, 97 Ind. 322, it was held that what the deceased had said to the accused on the night prior to the homicide as to previous felonious assaults committed by him and as to his habit of carrying a knife for this purpose, was admissible as part of the *res gesta*.

1. State *v.* Healy, 105 Iowa 162; Gibson *v.* State, (Miss. 1894) 16 So. Rep. 298; State *v.* Henderson, 24 Oregon 100. See also Reg. *v.* Edwards, 12 Cox C. C. 230.

Declaration of Deceased Explanatory of Departure to Place of Homicide. — Burns *v.* State, 49 Ala 370; Harris *v.* State, 96 Ala 24; State *v.* Peffers, 80 Iowa 580; West *v.* State, 2 Tex. App. 460; Merritt *v.* State, 39 Tex. Crim. 70; State *v.* Howard, 32 Vt. 380; Tilley *v.* Com., 89 Va. 136; State *v.* Dickinson, 41 Wis. 299. *Compare* Reg. *v.* Pook, 13 Cox C. C. 172, note; Reg. *v.* Wainwright, 13 Cox C. C. 171.

In Ball *v.* State, 29 Tex. App 107, such evidence was held to be inadmissible as throwing no light on the homicide. To the same effect see Johnson *v.* State, 22 Tex. App. 206; Parker *v.* Com., (Ky. 1899) 51 S. W. Rep. 573.

In some cases in trials for homicide the declarations of the deceased before starting from one place to another have been admitted to show that he intended to meet the accused or to have him as a companion on the journey. Territory *v.* Couk, 2 Dak. 188; State *v.* Hayward, 62 Minn. 474; Hunter *v.* State, 40 N. J. L. 495; State *v.* Garrington, 11 S. Dak. 178. *Compare* Cheek *v.* State, 35 Ind. 492; Lamar *v.* State, 63 Miss. 265; People *v.* Williams, 3 Abb. App. Dec. (N. Y.) 596; State *v.* Dula, Phil. L. (61 N. Car.) 211; Kirby *v.* State, 9 Yerg. (Tenn.) 383, 30 Am. Dec. 420.

Declaration of Deceased to Show Criminal Intent on Part of Accused. — In State *v.* Hayden, (Conn. 1880) 9 Rep. 237, the declaration of the deceased that she was going to Big Rock to take "quick medicine" to be given to her by the accused in order to procure an abortion on her, was admissible in a trial for murder for the purpose of characterizing her act of going, and when admitted, the declaration and the act became a fact in the case to be considered by the jury in connection with all the other facts and circumstances in determining the question whether the accused was guilty of the crime charged or not. In State *v.* Dickinson, 41 Wis. 299, similar declarations were held to be admissible for the purpose of showing the intention of the deceased, but not to show that the accused actually produced the abortion or had engaged to do it.

Declaration as to Object in Procuring Pistol. — People *v.* Arnold, 15 Cal. 476.

Statements Showing that Deceased was Acting on Defensive. — Wilson *v.* People, 94 Ill. 299.

Exclamation or Outcry upon Approach of Assailant.—Wesley *v.* State, 52 Ala. 182; State *v.* Wagner, 61 Me. 194; State *v.* Biggerstaff, 17 Mont. 510; Means *v.* State, 10 Tex. App. 16, 38 Am. Rep. 640. See also Washington *v.* State, 19 Tex. App. 521, 53 Am. Rep. 387.

So a remark by the deceased addressed to the prisoner and referring to him by name just before the homicide, has been held admissible for the purpose of identifying the accused. Trulock *v.* State, 70 Ark. 558.

Declaration of Deceased Identifying Members of Band Arresting Him.—Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746.

2. See the title MURDER AND MANSLAUGHTER, vol. 21, p. 223.

3. People *v.* Westlake, 62 Cal. 303; Caw *v.* People, 3 Neb. 357.

4. **Mere Narrative by Deceased of Past Event** — *Alabama.* — Smith *v.* State, 53 Ala. 486.

Colorado. — Graves *v.* People, 18 Colo. 170.

Delaware. — State *v.* Frazier, Houst. Crim. Cas. (Del.) 182; State *v.* Trusty, 1 Penn. (Del.) 319.

Florida. — Lambright *v.* State, 34 Fla. 564.

Indiana. — Binns *v.* State, 57 Ind. 46, 26 Am. Rep. 48; Stephenson *v.* State, 110 Ind. 358, 59 Am. Rep. 216; Hall *v.* State, 132 Ind. 317; Parker *v.* State, 136 Ind. 284.

Michigan. — People *v.* O'Brien, 92 Mich. 17.

Mississippi. — Field *v.* State, 57 Miss. 474, 34 Am. Rep. 476; Brown *v.* State, 78 Miss. 637.

Missouri. — State *v.* Snell, 78 Mo. 240; State *v.* Rider, 90 Mo. 54; State *v.* Raven, 115 Mo. 419.

Nevada. — State *v.* Daugherty, 17 Nev. 376.

New Mexico. — Territory *v.* Armijo, 7 N. Mex. 428.

New York. — *Compare* People *v.* Benham, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 466.

Tennessee. — Denton *v.* State, 1 Swan (Tenn.) 279; Mayfield *v.* State, 101 Tenn. 673.

Texas. — Tomerlin *v.* State, (Tex. Crim. 1894) 26 S. W. Rep. 66; Reddick *v.* State, (Tex. Crim. 1898) 47 S. W. Rep. 993; Foster *v.* State, 28 Tex. App. 45.

Utah. — People *v.* Kessler, 13 Utah 69.

Interval of One Week. — State *v.* Raven, 115 Mo. 419.

Interval of One Day. — Tomerlin *v.* State, (Tex. Crim. 1894) 26 S. W. Rep. 66.

to lay down the strict rule that statements by the deceased after all action on the part of the accused, actual or constructive, has ceased through the completion of the principal act, or through determination of it by its prevention or its abandonment by the wrongdoer, do not form part of the *res gesta* and should be excluded.[1] But according to the great weight of authority the true test of the competency of the evidence is not whether the declarations were made after the act of homicide was done, but they will be admissible as part of the *res gesta* if made after the lapse of so brief an interval and in such connection with the principal transaction as to form a legitimate part of it and to preclude the presumption that they are the result of premeditation and design. According to this rule no fixed measure of time or distance from the main occurrence can be established as a rule to determine what shall be part of the *res gesta*. Each case must necessarily depend on its own circumstances to determine whether the facts offered are really part of the same continuous transaction.[2]

Constitutionality of Rule. — The admission of such evidence does not violate

Interval of Twelve Hours. — Lambright *v.* State, 34 Fla. 564.

Interval of Two Hours. — Reddick *v.* State, (Tex. Crim. 1898) 47 S. W. Rep. 993.

Interval of One Hour. — Field *v.* State, 57 Miss. 474, 34 Am. Rep. 476.

Interval of Three-Quarters of Hour. — People *v.* Kessler, 13 Utah 69.

Interval of Thirty Minutes. — Mayfield *v.* State, 101 Tenn. 673.

Where Length of Time Is Not Shown. — Territory *v.* Armijo, 7 N. Mex. 428.

Declaration in Defendant's Favor. — Stewart *v.* State, 78 Ala. 436; Com. *v.* Densmore, 12 Allen (Mass.) 535.

Declaration in Response to Question. — Herren *v.* People, 28 Colo. 23; State *v.* Deuble, 74 Iowa 509.

1. Reg. *v.* McMahon, 18 Ont. 502; Reg. *v.* Bedingfield, 14 Cox C. C. 341; People *v.* Ah Lee, 60 Cal. 85; People *v.* Wong Ark, 96 Cal. 125. See also Mayes *v.* State, 64 Miss. 329, 60 Am. Rep. 58; Lloyd *v.* State, 70 Miss. 251; Estell *v.* State, 51 N. J. L. 182. *Compare* Reg. *v.* Lunny, 6 Cox C. C. 477; Rex *v.* Foster, 6 C. & P. 325, 25 E. C. L. 421; People *v.* Vernon, 35 Cal. 49, 95 Am. Dec. 49; People *v.* Wong Ah Foo, 69 Cal. 180.

2. Precise Concurrence in Point of Time Unnecessary — *Georgia.* — Stevenson *v.* State, 69 Ga. 68; Von Pollnitz *v.* State, 92 Ga. 16, 44 Am. St. Rep. 72.

Idaho. — State *v.* Gilbert, (Idaho 1902) 69 Pac. Rep. 62.

Indiana. — Green *v.* State, 154 Ind. 655.

Iowa. — See also State *v.* Porter, 34 Iowa 131.

Kentucky. — Norfleet *v.* Com , (Ky. 1896) 33 S. W. Rep. 938; Hughes *v.* Com., (Ky. 1897) 41 S. W. Rep. 294; Shotwell *v.* Com., (Ky. 1892) 68 S. W. Rep. 403.

Louisiana. — State *v.* Molisse, 38 La. Ann. 381, 58 Am. Rep. 181; State *v.* Euzebe, 42 La. Ann. 727; State *v.* Sadler, 51 La. Ann. 1397; State *v.* Maxey, 107 La. 799. *Compare* State *v.* Estoup, 39 La. Ann. 219.

Massachusetts. — Com. *v.* M'Pike, 3 Cush. (Mass.) 181, 50 Am. Dec. 727; Com. *v.* Hackett, 2 Allen (Mass.) 136.

Missouri. — State *v.* Banks, 10 Mo. App. 111; State *v.* Sloan, 47 Mo. 604; State *v.* Martin, 124 Mo. 514; State *v.* Hudspeth, 150 Mo. 12, 159 Mo. 178.

Pennsylvania. — Com. *v.* Werntz, 161 Pa. St. 591.

Rhode Island. — State *v.* Murphy, 16 R. I. 528.

South Carolina. — State *v.* Talbert, 41 S. Car. 526; State *v.* Arnold, 47 S. Car. 9.

Texas. — Bejarano *v.* State, 6 Tex. App. 265; Warren *v.* State, 9 Tex. App. 619, 35 Am. Rep. 745; Lewis *v.* State, 29 Tex. App. 201, 25 Am. St. Rep. 720; Johnson *v.* State, 30 Tex. App. 419, 28 Am. St. Rep. 930; Irby *v.* State, 25 Tex. App. 203; Fulcher *v.* State, 28 Tex. App. 465; Drake *v.* State, 29 Tex. App. 265; Weathersby *v.* State, 29 Tex. App. 278; Moore *v.* State, 31 Tex. Crim. 234; Smith *v.* State, 21 Tex. App. 277; Pierson *v.* State, 21 Tex. App. 14; Chalk *v.* State, 35 Tex. Crim. 116; Lindsey *v.* State, 35 Tex. Crim. 164; Beckham *v.* State, (Tex. Crim. 1902) 69 S. W. Rep. 534; Benson *v.* State, 38 Tex. Crim. 487; Freeman *v.* State, 40 Tex. Crim. 545; Fuller *v.* State, (Tex. Crim. 1898) 48 S. W. Rep. 183; McKinney *v.* State, 40 Tex. Crim. 372, Farris *v.* State, (Tex. Crim. 1900) 56 S. W. Rep. 336; Neely *v.* State, (Tex. Crim. 1900) 56 S. W. Rep. 625. See also Tooney *v.* State, 8 Tex. App. 452.

Utah. — People *v.* Callaghan, 4 Utah 49.

Virginia. — Kirby *v.* Com., 77 Va. 681, 46 Am. Rep. 747; Puryear *v.* Com., 83 Va. 51.

Statement Made in the Act of Falling by Person Shot. — Shotwell *v.* Com., (Ky. 1902) 68 S. W. Rep. 403.

Sign Made in Response to Question by Person Unable to Speak. — State *v.* Maxey, 107 La. 799.

Declarations Made Immediately After Regaining Consciousness. — Johnson *v.* State, 65 Ga. 94; Freeman *v.* State, 40 Tex. Crim. 545.

Declarations of Persons While Eating Poisoned Food as to Who Had Sent It. — State *v.* Thompson, 132 Mo. 301, *affirmed* 141 Mo. 408.

Declaration of Person in Fit Intimating Poison as Cause. — Johnson *v.* State, 30 Tex. App. 419, 28 Am. St. Rep. 930.

Statement Made in Act of Fleeing under Apprehension of Danger. — Com. *v* Van Horn, 188 Pa. St. 143.

Statements Made While Asking for Assistance. — State *v.* Murphy, 16 R. I. 528.

the constitutional right of the defendant to be confronted by witnesses.[1]

d. ASSAULT. — What is said and done by the assailant[2] and the assailed[3] at the time of an assault and in explanation thereof, is admissible as part of the *res gesta*. But declarations both of the assailant[4] and the assailed[5] subsequent to the ending of the difficulty have been excluded as narratives, and this, in some instances, though a very brief interval of time intervened between the difficulty and the declaration.[6]

Remark of Bystander. — What a disinterested bystander, who witnesses the conflict going on between the defendant and the party assailed, may say during the heat of the engagement, has been held inadmissible in evidence, especially when the declaration amounts to nothing more than the declarant's opinion as to the defendant's motive for engaging in and prosecuting the fight.[7]

e. LARCENY. — Under an indictment for larceny the acts and declarations of the accused at the time of taking possession of the property in controversy which are indicative of the *quo animo* of the accused, are admissible as parts of the *res gesta*.[8]

Statements of Accused Explanatory of Possession. — The admissibility of statements of the accused explanatory of the possession of the goods alleged to have been stolen, has been discussed elsewhere in this work.[9]

f. ROBBERY — **Statements of Person Robbed.** — Statements or complaints made by a person robbed, to a policeman or other person immediately after the robbery and explanatory thereof, and with a view to the pursuit and arrest of the robbers, have been held admissible as parts of the *res gesta*.[10] But where the statements are so separated from the act as to be merely narrative of what occurred they will not be admissible.[11]

Statements of Accused. — Declarations of the accused immediately after and explanatory of the robbery, have been held admissible in his favor.[12]

1. State *v.* Murphy, 16 R. I. 528; State *v.* Saunders, 14 Oregon 300.

2. **Acts and Declarations of Assailant.** — People *v.* Roach, 17 Cal. 298; State *v.* Taylor, 70 Vt. 1, 67 Am. St. Rep. 648. See also Baker *v.* Gausin, 76 Ind. 317.

Repetition of Assault. — Sargent *v.* Carnes, 84 Tex. 156.

Proof of Seizure of Gun under Indictment for Assault with Knife. — Weaver *v.* State, 24 Tex. 387.

3. **Declaration of Person Assailed.** — See Baker *v.* Gausin, 76 Ind. 317.

4. Bodine *v.* State, 129 Ala. 106.

5. Pool *v.* State, (Tex. Crim. 1893) 23 S. W. Rep. 891.

6. State *v.* Maddox, 92 Me. 348; State *v.* Daugherty, 17 Nev. 376. *Compare* Gaines *v.* State, 108 Ga. 772; Pool *v.* State, (Tex. Crim. 1893) 23 S. W. Rep. 891.

7. Carr *v.* State, 76 Ga. 593. *Compare* Baker *v.* Gausin, 76 Ind. 317.

8. **Declarations of Person Accused of Larceny.** — Maddox *v.* State, 41 Tex. 205; People *v.* De Graff, (Supm. Ct. Gen. T.) 6 N. Y. St. Rep. 412. See also the title LARCENY, vol. 18, p. 510.

Prior Acts and Declarations Constituting Parts of a Continuous Transaction. — State *v.* Gabriel, 88 Mo. 631.

9. See the title LARCENY, vol. 18, pp. 492, 493. And see the following cases: Maynard *v.* State, 46 Ala. 85; Williams *v.* State, 105 Ala. 96; Mitchell *v.* Territory, 7 Okla. 527; State *v.* Weaver, 104 N. Car. 758; State *v.* Slack, 1 Bailey L. (S. Car.) 330; McCulloch *v.* State, 35 Tex. Crim. 268.

10. **Statements and Complaints of Person Robbed.** — State *v.* Driscoll, 72 Iowa 583; Lampkin *v.* State, 87 Ga. 516; Lambert *v.* People, 29 Mich. 71; Driscoll *v.* People, 47 Mich. 413; State *v.* Horan, 32 Minn. 394, 50 Am. Rep. 583; State *v.* Ah Loi, 5 Nev. 99. See also Rex *v.* Wink, 6 C. & P. 397, 25 E. C. L. 456.

Testimony as to Particulars of Complaint Unnecessary. — People *v.* Murphy, 56 Mich. 546. See also People *v.* Wallin, 55 Mich. 497.

In *Vermont* it has been held that the declarations of a party injured when no one is present are not evidence on a trial for robbery to show the manner in which the injury occurred, however nearly contemporaneous with the occurrence. State *v.* Davidson, 30 Vt. 377.

11. **Narrative Statements Inadmissible.** — People *v.* Ehring, 65 Cal. 135; Shoecraft *v.* State, 137 Ind. 433. See also State *v.* Pomeroy, 25 Kan. 349.

12. Driscoll *v.* People, 47 Mich. 413.

Statements Held to Be Narrative. — Statements by the accused accompanying the production and display of money after a robbery, showing the manner in which it was acquired, have been held to be inadmissible as not characterizing the possession otherwise than by stating its origin and therefore as being mere recitals of a past transaction. State *v.* Totten, 72 Vt. 73.

Exhibits of Articles from Place of Robbery. — Articles produced from the house where a robbery was committed and shown to have been used by the defendant in connection with the offense have been held admissible as a part of the transaction. People *v.* Winthrop, 118 Cal. 85.

g. BURGLARY. — A discussion of the admissibility of evidence under this doctrine in an indictment for burglary will be found elsewhere in this work.[1]

h. RAPE. — The admissibility of the complaints of the prosecutrix on a trial for rape, on the principle of *res gesta*, will be found discussed elsewhere in this work.[2]

i. ABORTION. — So a discussion of the admissibility of evidence under the doctrine of *res gesta* in trials for abortion will be found elsewhere in this work.[3]

j. RIOTS. — The acts and declarations of persons in the commission of a riot are admissible against them as parts of the *res gesta*.[4]

k. ACTS AND DECLARATIONS OF THIRD PERSONS — **Mere Narratives Inadmissible.** — The rule excluding mere narratives of past transactions applies, of course, to the declarations of third persons, though they were present at the time of the commission of the alleged crime.[5]

Exclamations of Bystanders. — The rule laid down in some of the authorities is that the exclamations made at the time of the occurrence of the main fact in issue, or immediately thereafter and immediately and naturally connected therewith, form part of the *res gesta*, though they proceed from a bystander, and are admissible for the purpose of identifying the accused and showing the manner and circumstances of the homicide.[6] But according to other authorities the statements or exclamations of mere bystanders not participating in the act under investigation though contemporaneous with the event are not as a general rule admissible as parts of the *res gesta*,[7] especially if the state-

1. See the title BURGLARY, vol. 5, p. 65.

2. See the title RAPE, vol. 23, p. 878. And see Cooksey *v.* State, (Tex. Crim. 1900) 58 S. W. Rep. 103; Johnson *v.* Com., (Ky. 1901) 61 S. W. Rep. 1005.

3. See the title ABORTION, vol. 1, p. 193.

4. Gallaher *v.* State, 101 Ind. 411.

5. **Narratives by Strangers Inadmissible** — *Alabama.* — Hall *v.* State, 86 Ala. 11; Dean *v.* State, 105 Ala. 21; Burton *v.* State, 118 Ala. 109.

California. — People *v.* Gonzales, 71 Cal. 569.

Georgia. — Beck *v.* State, 76 Ga. 452; Woolfolk *v.* State 81 Ga. 551.

Indiana. — Davidson *v.* State, 135 Ind. 254.

Kentucky. — Bush *v.* Com., 6 Ky. L. Rep. 50; Twyman *v.* Com., (Ky. 1895) 33 S. W. Rep. 409.

Louisiana. — State *v.* Oliver, 39 La. Ann. 470.

Minnesota. — State *v.* Gut, 13 Minn. 341.

Missouri. — State *v.* Brown, 64 Mo. 371; State *v.* Walker, 78 Mo. 388; State *v.* Day, 100 Mo. 242; State *v.* Beard, 126 Mo. 548; State *v.* Elkins, 101 Mo. 344.

Texas. — *Ex p.* Kennedy, (Tex. Crim. 1900) 57 S. W. Rep. 648; Felder *v.* State, 23 Tex. App. 477, 59 Am. Rep. 777. See also Carlisle *v.* State, (Tex. Crim. 1900) 56 S. W. Rep. 365.

Washington. — *Compare* State *v.* Robinson, 12 Wash. 491.

Rule Applicable to Wife's Declarations. — People *v.* Simonds, 19 Cal. 275.

Statement as to Ownership of Weapon or Article of Clothing. — Hall *v.* State, 86 Ala. 11; Woolfolk *v.* State, 81 Ga. 551.

Threats of Mob to Lynch Defendant Subsequent to Homicide, Held Inadmissible. — State *v.* Sneed, 88 Mo. 138; Cortez *v.* State, (Tex. Crim. 1902) 69 S. W. Rep. 536.

Conduct of Party Arresting the Accused Subsequent to Homicide, Inadmissible. — Carroll *v.* State, 130 Ala. 99.

6. **Exclamations of Bystander at Time of Homicide Held Admissible.** — Barrow *v.* State, 80 Ga. 191; State *v.* Schmidt, 73 Iowa 469; People *v.* McArron, 121 Mich. 1; State *v.* Walker, 78 Mo. 380; State *v.* Elkins, 101 Mo. 344; State *v.* Duncan, 116 Mo. 288; State *v.* Kaiser, 124 Mo. 651; State *v.* Sexton, 147 Mo. 89; State *v.* McCourry, 128 N. Car. 594. See also Newton *v.* Mutual Ben. L. Ins. Co., 2 Dill. (U. S.) 154; Gerick *v.* State, (Tex. Crim. 1898) 45 S.W. Rep. 717.

Exclamation of Bystander upon Approach of Assailant. — State *v.* Biggerstaff, 17 Mont. 510.

Exclamation During Encounter by Person in Crowd Showing Hostility to Accused. — Morton *v.* State, 91 Tenn. 437.

Firing of Shot by Third Person Admitted as Part of Res Gesta. — Cardwell *v.* Com., (Ky. 1898) 46 S. W. Rep. 705.

Cry of Mob Accompanying Accused in Unlawful Enterprise. — Proceedings against Gordon's Case, 21 How. St. Tr. 486; Ferrill *v.* Com., (Ky. 1893) 23 S. W. Rep. 344.

Effect of Circumstances Showing Premeditation. — Under the *Georgia* Code it has been held that where a witness testified that on the night of the homicide he was in a house about twenty-five or thirty steps distant from the point where the deceased was shot, that he heard the report of the gun and cries of distress, it was not allowable to him to testify further that about a minute after the shot another person ran into the house and whispered to him that there was nothing to hurt him, that the accused had shot the deceased, since the whispering indicated premeditation. Futch *v.* State, 90 Ga. 472.

7. **Exclamations of Bystanders Held Inadmissible.** — French *v.* Com., 7 Ky. L. Rep. 747; Bradshaw *v.* Com., 10 Bush (Ky.) 576; State *v.* Riley, 42 La. Ann. 995; State *v.* Bellard, 50 La. Ann. 594, 69 Am. St. Rep. 461. *Compare* State *v.* Horton, 33 La. Ann. 290; State *v.* Vines,

ments are mere expressions of opinions.[1]

l. PROOF OF OTHER CRIMES. — The admissibility of evidence of other crimes under the doctrine of *res gesta*, has been discussed elsewhere in this work.[2]

4. Torts — *a.* IN GENERAL. — The principles controlling the admissibility of evidence under the *res gesta* rule generally are applicable in actions of tort.[3]

b. PERSONAL INJURIES — (1) *Statements or Acts of Person Injured* — **Narrative Statements.** — Statements made by a person injured as to the cause, manner, or circumstances of the injury, are inadmissible as parts of the *res gesta* if they are manifestly a mere narrative or history of a past transaction.[4]

34 La. Ann. 1083; State *v.* Corcoran, 38 La. Ann. 949; State *v.* Moore, 38 La. Ann. 66; State *v.* Desroches, 48 La. Ann. 428.

Furnishing Information upon Which Action is Taken. — In Werner *v.* Com., 80 Ky. 387, it was held that on the trial of one who resisted and wounded a peace officer while attempting to arrest him for a felony, the declaration of persons present at the time of the attempted arrest and indicating the parties supposed to be guilty, was competent upon the question as to whether the officer had reasonable grounds to believe that a felony had been committed.

So, if an outcry to the effect that the accused was about to be attacked was made in the hearing of the accused, it may become competent as conducing to show the *bona fides* of the acts of the accused during the difficulty and as affording a reasonable ground to believe he was in danger. Stroud *v.* Com., 19 S. W. Rep. 976, 14 Ky. L. Rep. 179.

1. Jones *v.* Com., (Ky. 1898) 46 S. W. Rep. 217; State *v.* Ramsey, 48 La. Ann. 1407. In these cases the statements were to the effect that the accused had killed the deceased "for nothing."

So as to the statement that the prisoner ought to be hanged. Kaelin *v.* Com., 84 Ky. 354.

2. See the title PROOF OF OTHER CRIMES, vol. 23, p. 255 *et seq.* And see the following cases:

Alabama. — Smith *v.* State, 88 Ala. 76; Crittenden *v.* State, (Ala. 1902) 32 So. Rep. 273.

California. — People *v.* Teixeira, 123 Cal. 297.

Florida. — Killins *v.* State, 28 Fla. 313; Oliver *v.* State, 38 Fla. 46.

Idaho. — State *v.* Taylor, (Idaho 1900) 61 Pac. Rep. 288.

Louisiana. — State *v.* Donelon, 45 La. Ann. 744; State *v.* Bates, 46 La. Ann. 849; State *v.* Fontenot, 48 La. Ann. 305; State *v.* Desroches, 48 La. Ann. 428.

Nebraska. — Morgan *v.* State, 56 Neb. 696.

New York. — People *v.* Coombs, 36 N. Y. App. Div. 284; People *v.* Lewis, 62 Hun (N. Y.) 622, 16 N. Y. Supp. 881.

Oregon. — State *v.* Porter, 32 Oregon 135.

Texas. — Davis *v.* State, 32 Tex. Crim. 377; Willingham *v.* State, (Tex. Crim. 1894) 26 S. W. Rep. 834; Robinson *v.* State, (Tex. Crim. 1898) 48 S. W. Rep. 176; Fielder *v.* State, 40 Tex. Crim. 184; Vincent *v.* State, (Tex. Crim. 1900) 55 S. W. Rep. 819; Hamilton *v.* State, 41 Tex. Crim. 644; Thompson *v.* State, (Tex. Crim. 1900) 57 S.W. Rep. 805; Alvarez *v.* State, (Tex. Crim. 1900) 58 S. W. Rep. 1013; Williams *v.* State, (Tex. Crim. 1901) 61 S. W. Rep. 395; Adams *v.* State, (Tex. Crim. 1901) 62 S. W. Rep. 1058.

Vermont. — State *v.* Kelley, 65 Vt. 531, 36 Am. St. Rep. 884.

Virginia. — Reed *v.* Com., 98 Va. 817.

3. Application of Doctrine to Torts. — See Scott *v.* McKinnish, 15 Ala. 662; Louisville Gas Co. *v.* Gutenkuntz, 6 Ky. L. Rep. 444.

Altercation Leading up to Alleged Slanderous Communication Admissible. — Provost *v.* Brueck, 110 Mich. 136.

Contemporaneous Exclamation as to Cause of Injury to Horse Admissible. — Trenton Pass. R. Co. *v.* Cooper, 60 N. J. L. 219, 64 Am. St. Rep. 592.

Narrative as to Cause of Mental Distress Inadmissible in Action for Slander. — Kidder *v.* Bacon, (Vt. 1902) 52 Atl. Rep. 322.

4. Narrative Statement Inadmissible. — *United States.* — Boston, etc., R. Co. *v.* O'Reilly, 158 U. S. 334; National Masonic Acc. Assoc. *v.* Shryock, (C. C. A.) 73 Fed. Rep. 774; Travelers' Protective Assoc. *v.* West, (C. C. A.) 102 Fed. Rep. 226.

Georgia. — Poole *v.* East Tennessee, etc., R. Co., 92 Ga. 337; Fink *v.* Ash, 99 Ga. 106; East Tennessee, etc., R. Co. *v.* Maloy, 77 Ga. 237; Savannah, etc., R. Co. *v.* Holland, 82 Ga. 257, 14 Am. St. Rep. 158; Roach *v.* Western, etc., R. Co., 93 Ga. 785; Western, etc., R. Co. *v.* Beason, 112 Ga. 553.

Illinois. — Ohio, etc., R. Co. *v.* Cullison, 40 Ill. App. 67.

Indiana. — Cleveland, etc., R. Co. *v.* Sloan, 11 Ind. App. 401; Ohio, etc., R. Co. *v.* Hammersley, 28 Ind. 371.

Kentucky. — O'Donnell *v.* Louisville Electric Light Co.. (Ky. 1900) 55 S. W. Rep. 202.

Louisiana. — Marler *v.* Texas, etc., R. Co., 52 La. Ann. 727.

Maryland. — Baltimore *v.* Lobe, 90 Md. 310.

Massachusetts. — Roosa *v.* Boston Loan Co., 132 Mass. 439; Eastman *v.* Boston, etc., R. Co., 165 Mass. 342.

Michigan. — Dundas *v.* Lansing, 75 Mich. 499, 13 Am. St. Rep. 457.

Mississippi. — Johnson *v.* State, 63 Miss. 313.

Nebraska. — Friend *v.* Burleigh, 53 Neb. 674.

New York. — Waldele *v.* New York Cent., etc., R. Co., 95 N. Y. 274, 47 Am. Rep. 41; Martin *v.* New York, etc., R. Co., 103 N. Y. 626.

Oregon. — Sullivan *v.* Oregon R., etc., Co., 12 Oregon 392, 53 Am. Rep. 364; Johnston *v.* Oregon Short Line R. Co., 23 Oregon 94.

Pennsylvania. — Bradford *v.* Downs, 126 Pa. St. 622.

Declaration in Response to Question. — This rule is often applied where the declaration is made in response to a question.[1]

Contemporaneous Declarations or Acts. — But a declaration will be admissible if made at the time when the injury was inflicted,[2] or while the wrong complained of was still incomplete, as where the declarant who had been run over was still under the car or was at the time being extricated.[3] Moreover, it is very generally held that a declaration as to the cause, manner, and circumstances of an injury, to be admissible as a part of the *res gesta* need not be coincident in point of time with the main fact proved, and that it is enough that the two are so clearly connected that the declaration can in the ordinary course of affairs be said to be a spontaneous explanation of the real cause.[4]

Tennessee. — Parkey *v.* Yeary, 1 Heisk. (Tenn.) 157; Williams *v.* Bowdon, 1 Swan (Tenn.) 283.

Texas. — Texas, etc., R. Co. *v.* Crowder, 70 Tex. 222; Pilkinton *v.* Gulf, etc., R. Co., 70 Tex. 226; Gulf, etc., R. Co. *v.* Bruce, (Tex. Civ. App. 1893) 24 S. W. Rep. 927; Ft. Worth, etc., R. Co. *v.* Stone, (Tex. Civ. App. 1894) 25 S. W. Rep. 808; St. Louis, etc., R. Co. *v.* Gill, (Tex. Civ. App. 1900) 55 S. W. Rep. 386.

Virginia. — Norfolk, etc., R. Co. *v.* Suffolk Lumber Co., 92 Va. 413.

Wisconsin. — Mutcha *v.* Pierce, 49 Wis. 231, 35 Am. Rep. 776; Fitzgerald *v.* Weston, 52 Wis. 354; Schillinger *v.* Verona, 88 Wis. 317; Steinhofel *v.* Chicago, etc., R. Co., 92 Wis. 123.

Narrative Statement During Time of Principal Occurrence. — It has been said that a narrative, even if given during the occurrence which constitutes the principal fact, as, for instance, the narrative remarks of a person injured by a railway accident while under the carwheels, is inadmissible. Heckle *v.* Southern Pac. R. Co., 123 Cal. 441; Williams *v.* Southern Pac. R. Co., 133 Cal. 550.

1. Statement in Response to Question — *Alabama.* — Richmond, etc., R. Co. *v.* Hammond, 93 Ala. 181; Louisville, etc., R. Co. *v.* Pearson, 97 Ala. 211.

Arkansas. — Ft. Smith Oil Co. *v.* Slover, 58 Ark. 168.

District of Columbia. — Washington, etc., R. Co. *v.* McLane, 11 App. Cas. (D. C.) 220.

Illinois. — Chicago West Div. R. Co. *v.* Becker, 128 Ill. 545, 15 Am. St. Rep. 144; Elguth *v.* Grueszka, 57 Ill. App. 193.

Iowa. — *Compare* Fish *v.* Illinois Cent. R. Co., 96 Iowa 702; Keyes *v.* Cedar Falls, 107 Iowa 509.

Kentucky. — Louisville, etc., R. Co. *v.* Shaw, (Ky. 1899) 53 S. W. Rep. 1048.

Massachusetts. — Leistritz *v.* American Zylonite Co., 154 Mass. 382.

Missouri. — Parsons *v.* Yeager Milling Co., 7 Mo. App. 594; Leahey *v.* Cass Ave., etc., R. Co., 97 Mo. 165, 10 Am. St Rep. 300. *Compare* Stevens *v.* Walpole, 76 Mo. App. 213.

New York. — Lahey *v.* Ottmann, 73 Hun (N. Y.) 61.

Ohio. — Atkinson *v.* Bond Hill, 2 Ohio Dec. 48, 1 Ohio N. P. 166; Cleveland, etc., R. Co. *v.* Mara, 26 Ohio St. 185.

Texas. — See Ft. Worth, etc., R. Co. *v.* Stone, (Tex. Civ. App. 1894) 25 S. W. Rep. 808. *Compare* Houston, etc., R. Co. *v.* Loeffler, (Tex. Civ. App. 1899) 51 S. W. Rep. 536.

2. Acts and Declarations at Time of Injury. — Piper *v.* Spokane, 22 Wash. 147. See Waldele *v.* New York Cent., etc., R. Co., 95 N. Y. 274, 47 Am. Rep. 41.

Intoxication of Person Injured. — Evidence as to the plaintiff's intoxication at the time of receiving an injury is competent as a part of the *res gesta* in a civil action for the injury. Williams *v.* Edmunds, 75 Mich. 92; Herrick *v.* Wixom, 121 Mich. 384.

3. Statements Made While Wrong Is Incomplete. — Little Rock, etc., R. Co. *v.* Leverett, 48 Ark. 333, 3 Am. St. Rep. 230; Hechle *v.* Southern Pac. Co., 123 Cal. 441; Louisville, etc., R. Co. *v.* Buck, 116 Ind. 566, 9 Am. St. Rep. 883; Missouri Pac. R. Co. *v.* Bond, 2 Tex. Civ. App. 104; Texas, etc., R. Co. *v.* Robertson, 82 Tex. 657, 27 Am. St. Rep. 929; Sullivan *v.* Salt Lake City, 13 Utah 122. *Compare* Patterson *v.* Hochster, 38 N. Y. App. Div. 398.

So the statements of a person injured by an explosion of oil when he is found enveloped in the flames of the oil are admissible. Elkins *v.* McKean, 79 Pa. St. 493.

4. Declarations Need Not Be Precisely Coincident — *United States.*— North American Acc. Assoc. *v.* Woodson, (C. C. A.) 64 Fed. Rep. 689; Cross Lake Logging Co. *v.* Joyce, (C. C. A.) 83 Fed. Rep. 989.

Connecticut. — But see McCarrick *v.* Kealy, 70 Conn. 642.

Iowa. — Armil *v.* Chicago, etc., R. Co., 70 Iowa 130; McMurrin *v.* Rigby, 80 Iowa 322; Keyes *v.* Cedar Falls, 107 Iowa 509; Frink *v.* Coe, 4 Greene (Iowa) 555, 61 Am. Dec. 141.

Kansas. — Ott *v.* Cunningham, 9 Kan. App. 886, 58 Pac. Rep. 126.

Kentucky. — Louisville, etc., R. Co. *v.* Earl, 94 Ky. 368; Brown *v.* Louisville R. Co., (Ky. 1899) 53 S. W. Rep. 1041.

Michigan. — Cleveland *v.* Newsom, 45 Mich. 62; Herrick *v.* Wixom, 121 Mich. 384.

Missouri. — Entwhistle *v.* Feighner, 60 Mo. 214.

Nebraska. — Missouri Pac. R. Co. *v.* Baier, 37 Neb. 235.

Pennsylvania. — Pennsylvania R. Co. *v.* Lyons, 129 Pa. St. 113, 15 Am. St. Rep. 701.

Texas. — Galveston *v.* Barbour, 62 Tex. 172, 50 Am. Rep. 519; International, etc., R. Co. *v.* Anderson, 82 Tex. 516, 27 Am. St. Rep. 902; Texas, etc., R. Co. *v.* Robertson, 82 Tex. 657, 27 Am. St. Rep. 929; Texas, etc., R. Co. *v.* Hall, 83 Tex. 675.

Wisconsin. — Hooker *v.* Chicago, etc., R. Co., 76 Wis. 542; Hermes *v.* Chicago, etc., R. Co., 80 Wis. 590, 27 Am. St. Rep. 69; Reed *v.* Madison, 85 Wis. 667; Christianson *v.* Pioneer Furniture Co., 92 Wis. 649.

Some of the cases[1] have so far extended the scope of this doctrine that if they do not amount to exceptions to the general rule against narrative statements, they at least mark the limit of admissibility.[2]

Constructive Extension of Time of Occurrence of the Principal Act. — The time of the occurrence of the principal act is sometimes, by reason of some special circumstance, extended forward so as to make it coincident and connected with subsequent declarations by constructive continuity of time, as, for instance, when the party making the declarations having become unconscious at the very moment of the occurrence of the principal act, the declarations are made by him at the very moment of his regaining consciousness; under such conditions the act and the declarations are said to be simultaneous by relation, the declarations being spontaneous.[3]

Declarations Made While Suffering from Pain. — It is sometimes held that the mental and physical condition of the person injured resulting directly from the injuries, furnishes the necessary connection between the transaction and the statement, and that although a statement was made at a different place from that at which the injury occurred, and after an interval of time had elapsed, the fact that the declarant was at the time in great suffering from the injury has been held to be material in favor of the admissibility of the statement.[4]

Concurrence as to Place. — It has been stated to be an important though not necessarily a controlling circumstance connected with declarations admissible as parts of the *res gesta* that they be made at the place of occurrence of the principal act.[5]

(2) *Conduct or Statements of Tortfeasor.* — Evidence of the conduct of the tortfeasor at the time of,[6] or immediately prior to[7] or subsequent to[8] the injury in controversy, has been admitted as part of the *res gesta*. The admissibility of the declarations of the tortfeasor's agents has been discussed elsewhere in this work.[9]

(3) *Statements or Acts of Third Persons.* — Sudden exclamations and other

See also the title CARRIERS OF PASSENGERS, vol. 5, p. 641.

Declarations Against Interest. — While as a general rule declarations of the person injured, against his interest, are not dependent on the doctrine of *res gesta* for their admissibility, Lord *v.* Pueblo Smelting, etc., Co., 12 Colo. 390, such declarations at the time of the accident or injury have sometimes been held admissible on the principle of *res gesta*, De Mahy *v.* Morgan's Louisiana, etc., R., etc., Co., 45 La. Ann. 1329; Chielinsky *v.* Hoopes, etc., Co., 1 Marv. (Del.) 273; and this, though they were inadmissible as admissions, as in the case of an action against a railroad by a father for the loss of the services of his minor son killed in a railroad accident. Louisville, etc., R. Co. *v.* Berry, 2 Ind. App. 427.

1. **Extreme Cases.** — Travellers' Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 397; Travelers' Protective Assoc. *v.* West, (C. C. A.) 102 Fed. Rep. 226; Louisville, etc., R. Co. *v.* Shaw, (Ky. 1899) 53 S. W. Rep. 1049; Harriman *v.* Stowe, 57 Mo. 93; Stoeckman *v.* Terre Haute, etc., R. Co., 15 Mo. App. 503; International, etc., R. Co. *v.* Anderson, 82 Tex. 516, 27 Am. St. Rep. 902; International, etc., R. Co. *v.* Smith, (Tex. 1890) 14 S. W. Rep. 642.

2. See Waldele *v.* New York Cent., etc., R. Co., 95 N. Y. 274, 47 Am. Rep. 41; Elmer *v.* Fessenden, 151 Mass. 359.

3. **Statements Made upon Regaining Consciousness.** — Marler *v.* Texas, etc., R. Co., 52 La. Ann. 727; Missouri, etc., R. Co. *v.* Moore, 24 Tex. Civ. App. 489.

4. **Subsequent Declarations Made While Suffering from Pain.** — Augusta Factory *v.* Barnes, 72 Ga. 217, 53 Am. Rep. 838. See also Travellers' Ins. Co. *v.* Mosley, 8 Wall. (U. S.) 397; Hinchman *v.* Keener, 5 Colo. App. 300. But see McCarrick *v.* Kealy, 70 Conn. 642.

5. See Prideaux *v.* Mineral Point, 43 Wis. 513, 28 Am. Rep. 558; Mutcha *v.* Pierce, 49 Wis. 231, 35 Am. Rep. 776; Marler *v.* Texas, etc., R. Co., 52 La. Ann. 727; Merkle *v.* Bennington Tp., 58 Mich. 160, 55 Am. Rep. 666.

Declarations Made After Change from Place of Occurrence of Principal Act and in Condition of Parties, Inadmissible. — Chicago, etc., R. Co. *v.* Chancellor, 165 Ill. 438.

6. **Conduct of Tortfeasor at Time of Injury.** — Louisville, etc., R. Co. *v.* Stewart, 128 Ala. 313; Chicago, etc., R. Co. *v.* Kinnare, 76 Ill. App. 394; Jefferson *v.* Chapman, 127 Ill. 438, 11 Am. St. Rep. 136.

7. **Acts of Defendant Towards Person Injured Immediately Prior to Principal Occurrence.** — Knoxville, etc., R. Co *v.* Wyrick, 99 Tenn. 500.

8. **Acts of Tortfeasor Subsequent to Injury.** — Nugent *v.* Breuchard, 91 Hun (N. Y.) 12, *affirmed* 157 N. Y. 687.

Repairs Subsequent to Accident Held Inadmissible as to Res Gestæ to Show Negligence. — Howe *v.* Medaris, 183 Ill. 295; Alabaster Co. *v.* Lonergan, 90 Ill. App. 353. See on this question the title NEGLIGENCE, vol. 21, p. 521 *et seq.*

9. See the title ADMISSIONS, vol. 1, p. 690.

instinctive acts of bystanders, at or immediately before the happening of an accident or other event which results in a personal injury, are parts of the *res gesta*, and as such may properly be brought forward in evidence whenever the occurrence producing them is undergoing judicial investigation.[1] Thus in an action against a railroad company by a passenger for injuries received from jumping off a moving car in anticipation of a collision or other calamity, the contemporaneous acts and exclamations of other passengers[2] or of persons on the street[3] are admitted as parts of the *res gesta*, and as tending to show the state of mind naturally produced by the apprehended danger, upon the issue as to whether the passenger was guilty of contributory negligence.

Mere Narrative Statements. — But statements of a bystander or third person that are merely narrative in their nature are inadmissible.[4]

5. Contracts — *a.* IN GENERAL. — Oral declarations, letters or other written instruments passing between the parties to an alleged contract while the negotiations are in progress *et dum fervet opus* and shedding light thereon, are admissible as parts of the *res gesta* to show whether the parties have actually entered into a contract or not,[5] or to show the circumstances under which it was made and to explain its character,[6] the doctrine applying to written as

1. Exclamation of Bystanders at Accident. — Galena, etc., R. Co. *v.* Fay, 16 Ill. 558, 63 Am. Dec. 323; Baker *v.* Gausin, 76 Ind. 317; Louisville, etc., Packet Co. *v.* Samuels, (Ky. 1900) 59 S. W. Rep. 3; Twomley *v.* Central Park, etc., R. Co., 69 N. Y. 158, 25 Am. Rep. 163; Oliver *v.* Columbia, etc., R. Co., (S. Car. 1902) 43 S. E. Rep. 307; Missouri, etc., R. Co. *v.* Vance, (Tex. Civ. App. 1897) 41 S. W. Rep. 167; Kleiber *v.* People's R. Co., 107 Mo. 240. *Compare* Wilkins *v.* Ferrell, 10 Tex. Civ. App. 231.

Hence the crying and alarm of the plaintiff's children, at the time of his expulsion from a street car, are admissible in his behalf as part of the *res gesta*, in his suit against the company for damages. O'Rourke *v.* Citizens' St. R. Co., 103 Tenn. 124, 76 Am. St. Rep. 639.

Exclamations of Witnesses of an Assault. — Brockett *v.* New Jersey Steam Boat Co., 18 Fed. Rep. 156; Baker *v.* Gausin, 76 Ind. 317; Castner *v.* Sliker, 33 N. J. L. 95.

Exclamation of Person Riding with Motorman. — Coll *v.* Easton Transit Co., 180 Pa. St. 618.

Statement of Bystanders at Surgical Operation as to Grating Sound upon Manipulation of Limb. — Hitchcock *v.* Stillwell, 38 Mich. 501.

Exclamation of Third Person Not a Bystander. — In Chicago, etc., R. Co. *v.* Cummings, 24 Ind. App. 192, it was held in an action against a railroad to recover damages for an alleged wrongful death, that the statement of a third person upon hearing the whistle of a train to the effect that "it was brutish the way they whistled," was inadmissible as a part of the *res gesta*, where it appeared that he was at home away from the place of the accident and did not know of it until some time after it occurred.

Proof of Other Deaths as Result of Railroad Collision. — Louisville, etc., R. Co. *v.* Mothershed, 121 Ala. 650.

2. Mobile, etc., R. Co. *v.* Ashcraft, 48 Ala. 15; St. Louis, etc., R. Co. *v.* Murray, 55 Ark. 248, 29 Am. St. Rep. 32; Holman *v.* Union St. R. Co., 114 Mich. 208; Spohn *v.* Missouri Pac. R. Co., 122 Mo. 1. See also the title CARRIERS OF PASSENGERS, vol. 5, p. 644.

3. Atlanta Consol. St. R. Co. *v.* Bagwell, 107 Ga. 157.

4. Mere Narrative Statements Inadmissible. — Louisville, etc., Packet Co. *v.* Samuels, (Ky. 1900) 59 S. W. Rep. 3; Senn *v.* Southern R. Co., 108 Mo. 152; Leahey *v.* Cass Ave., etc., R. Co., 97 Mo. 165, 10 Am. St. Rep. 300; Missouri Pac. R. Co. *v.* Ivy, 71 Tex. 409, 10 Am. St. Rep. 758; Gulf, etc., R. Co. *v.* Moore, 69 Tex. 157; Eddy *v.* Lowry, (Tex. Civ. App. 1894) 24 S. W. Rep. 1076. See also Dwyer *v.* Continental Ins. Co., 63 Tex. 354; Kentucky Cent. R. Co. *v.* Smith, 93 Ky. 449.

Pointing Out Place of Accident. — The pointing out by a third person of the place where an accident occurred a few minutes after the accident, has been held to be admissible as a part of the *res gesta* where the locality of the accident is a matter to be shown. Reed *v.* Madison, 85 Wis. 667.

Statement as to Exact Time of Occurrence of Death. — And the same rule has been applied to a statement by a witness of a death for which a civil action for damages is brought, as to the exact time of the occurrence of the death where the statement is made shortly afterwards. Western Union Tel. Co. *v.* Neel, (Tex. Civ. App. 1894) 25 S. W. Rep. 661.

5. Where Existence of Verbal Contract Is in Issue. — Long-Bell Lumber Co. *v.* Thomas, 1 Indian Ter. 225; Murray *v.* East End Imp. Co., (Ky. 1901) 60 S. W. Rep. 648; Archer *v.* Helm, 70 Miss. 874. See also Guntersville Bank *v.* Webb, 108 Ala. 132.

Delivery or Acceptance of Deed. — Stevens *v.* Miles, 142 Mass. 571; Stevens *v.* Castel, 63 Mich. 118; Chick *v.* Sisson, 95 Mich. 412; Fischer Leaf Co. *v.* Whipple, 51 Mo. App. 181; Smith *v.* T. M. Richardson Lumber Co., 92 Tex. 448. And see the title PAROL EVIDENCE, vol. 21, p. 1098 *et seq.*

Execution of Bond. — So, it has been held in an action upon a bond when a plea of *non est factum* was interposed, that what was said and done at the time the bond was signed, was admissible. State *v.* Gregory, 132 Ind. 387.

Sales. — Elliott *v.* Stoddard, 98 Mass. 145. See also Heflin *v.* Slay, 78 Ala. 180.

6. Contemporaneous Declarations to Explain Contract — *United States.* — Holmes *v.* Goldsmith, 147 U. S. 150; National Bank of Metropolis *v.* Kennedy, 17 Wall. (U. S.) 19.

well as oral contracts, subject to the general rule restricting the admissibility of parol evidence to vary or control the operation of written instruments.[1] On this principle the declarations of the parties at the time of the transaction have been admitted to show the consideration on which the contract is founded,[2] or the person for whose benefit the contract was made or to whom credit was given.[3]

b. STATEMENTS OR REPRESENTATIONS LEADING UP TO CONTRACT. — Where there is a series of transactions, bound together and resulting in one consummated contract, all that is said and done by the parties in the course of their negotiations, and as part of the consummated agreement, is admissible as part of the *res gesta*.[4] Thus, though at the hour, or during the day, of the making of representations as to property offered for sale, the subsequent vendee, then negotiating for it, does not conclude a bargain for it, if he afterwards, as a continuation of the negotiation, becomes a

Alabama. — Hooper *v.* Edwards, 25 Ala. 531; Vincent *v.* State, 74 Ala. 274.

Georgia. — Cook *v.* Pinkerton, 81 Ga. 89, 12 Am. St. Rep. 297.

Indiana. — Fox *v.* Cox, 20 Ind. App. 61.

Massachusetts. — Allen *v.* Duncan, 11 Pick. (Mass.) 308.

New Hampshire. — Johnson *v.* Elliot, 26 N. H. 67.

New York. — Sistare *v.* Heckscher, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 475.

Texas. — Goldman *v.* Blum, 58 Tex. 641.

Letters. — Clark *v.* Carrington, 7 Cranch (U. S.) 308; Conde *v.* Hall, 92 Hun (N. Y.) 335; Moore *v.* Hamilton, 44 N. Y. 666; Leakey *v.* Gunter, 25 Tex. 400.

Admissibility on Issue of Fraud in Making Sale or Conveyance. — A discussion of the admissibility of the acts and declarations of a vendor upon inquiry into the intent of the grantor in the execution of a conveyance alleged to be fraudulent, will be found elsewhere in this work. See the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 494 *et seq*. And see the following cases: Eppinger *v.* Scott, 112 Cal. 369, 53 Am. St. Rep. 220; Haskett *v.* Auhl, 3 Kan. App. 744; Newman *v.* Bean, 21 N. H. 93; Banfield *v.* Parker, 36 N. H. 354; Robson *v.* Hamilton, 41 Oregon 239.

Statement of Agent During Negotiation Admissible in Principal's Favor. — Kimball *v.* Vroman, 35 Mich. 310, 24 Am. Rep. 558. See also Ray *v.* Isbell, 64 Conn. 307.

Declaration Must Illustrate Character of Contract. — McLeod *v.* Johnson, 96 Me. 271.

1. Contemporaneous Declarations Admissible to Explain Writings. — Cross *v.* Zellerbach, (Cal. 1895) 8 Pac. Rep. 714; Spencer *v.* New York, etc., R. Co., 62 Conn. 242; Black *v.* Wabash, etc., R. Co., 111 Ill. 351, 53 Am. Rep. 628; Akers *v.* Demond, 103 Mass. 321.

Thus the Declaration of a Mortgagor at the time of the execution of a real estate mortgage, is admissible in evidence as a part of the *res gesta* for the purpose of showing the mortgagor's intent. Albion State Bank *v.* Knickerbocker, 125 Mich. 311.

So, also, in the case of Bushnell *v.* Wood, 85 Ill. 88, it was held that declarations made by the mortgagor at the time of executing a chattel mortgage are a part of the *res gesta*, and admissible in evidence. To the same effect see State *v.* Andrews, 39 W. Va. 40. See also Potts *v.* Hart, 99 N. Y. 168.

Declaration to Show Whether Deed Was Made in Expectation of Immediate Death. — Kyle *v.* Craig, 125 Cal. 107.

Declaration of Grantor Explanatory of Paper Attached to Deed. — Lambe *v.* Manning, 171 Ill. 612.

For a General Discussion of Parol Evidence, see the title PAROL EVIDENCE, vol. 21, p. 1077 *et seq*.

2. Declaration Admissible to Show Consideration. — Martin *v.* Tucker, 35 Ark. 279; Kenney *v.* Phillipy, 91 Ind. 511; Porter *v.* Waltz, 108 Ind. 40; Colt *v.* McConnell, 116 Ind. 255; Mitchell *v.* Colglazier, 106 Ind. 464; Blood *v.* Rideout, 13 Met. (Mass.) 237.

3. Declaration to Show for Whose Benefit Contract Was Made. — National Bank of Metropolis *v.* Kennedy, 17 Wall. (U. S.) 19; Mobile, etc., R. Co. *v.* Worthington, 95 Ala. 598; Evans *v.* Montgomery, 95 Mich. 497; Atherton *v.* Tilton, 44 N. H. 452; Richardson *v.* Cato, 10 Humph. (Tenn.) 138.

Especially where the declaration was made in the ordinary course of the declarant's business before any question or controversy arose which would render the fact material to himself and it was apparently against his interest at the time. Allen *v.* Duncan, 11 Pick. (Mass.) 308.

Where Declaration Is Too Remote. — But a different rule is applied where the declaration was not a part of the transaction. Calderon *v.* O'Donahue, 47 Fed. Rep. 39; Whitney *v.* Durkin, 48 Cal. 462; Wilson *v.* Sherlock, 36 Me. 295.

4. Representations Leading Up to Contract. — Colt *v.* McConnell, 116 Ind. 255; Bolds *v.* Woods, 9 Ind. App. 657; Allen *v.* Duncan, 11 Pick. (Mass.) 308; Rinesmith *v.* Peoples' Freight R. Co., 90 Pa. St. 262.

So where, in an action for an alleged breach of contract of hiring, it is in dispute whether the hiring was for a year or an indefinite period, a letter written by the defendants to the plaintiff the day before the hiring, expressing a wish by one of them to see the plaintiff the next day at a place appointed, with reference to securing his services "as foreman for the coming year," though not received by the plaintiff till the day after the contract was completed, is admissible in evidence. Hinchcliffe *v.* Koontz, 121 Ind. 422, 16 Am. St. Rep. 403.

purchaser, the representations are still a part of the *res gesta*, and bind the maker of them.[1] But the declarations of one of the parties pending negotiations, if made to a third person and unconnected with any act forming a part of the transaction and tending only to exhibit the disposition of the mind of the declarant towards it, will not be received under the doctrine of *res gesta* to establish or overthrow the contract.[2]

c. DECLARATIONS AFTER COMPLETION OF NEGOTIATIONS.— Declarations made by one of the parties to a third person after the transaction has been concluded and constituting strictly a narrative of what had occurred between the parties, are inadmissible, and this is true whether the contract is oral or in writing.[3]

d. MEMORANDA AS PARS REI GESTÆ. — A memorandum made at the time of negotiating a verbal contract and relating to its terms may be admitted as *pars rei gestæ*.[4]

Res Inter Alios Acta. — An instrument of writing, though *res inter alios acta*, may be admitted in evidence as a part of the transaction in controversy or as a contemporaneous memorandum to be read in connection with the oral evidence.[5]

In Actions on Written Contract. — And even in an action on a written instrument other contemporaneous writings between the parties, or unsigned memoranda relating to the same subject, may be admitted on the principle of *res gesta*.[6]

6. Declarations Explanatory of Possession — *a.* IN GENERAL. — The rule is often stated that the declarations of a party in possession either of real or personal property, explanatory of his possession, constitute a part of the *res gesta* and may properly be allowed in evidence.[7]

1. Ahern *v.* Goodspeed, 72 N. Y. 108.

Declaration Showing Refusal to Make Warranty of Quality. — Cunningham *v.* Parks, 97 Mass. 172.

2. Mack *v.* Porter, (C. C. A.) 72 Fed. Rep. 236; Diffenderfer *v.* Scott, 5 Ind. App. 243; Eichhold *v.* Tiffany, 28 N. Y. App. Div. 60.

But in Garrison *v.* Goodale, 23 Oregon 307, it was held that an expression of intention to enter into a contract, made a few hours before the alleged contract was consummated, was admissible as a part of the *res gesta* for the purpose of illustrating the subsequent agreement.

3. **Declarations After Completion of Negotiations** — *United States.* — Mutual L. Ins. Co. *v.* Logan, (C. C. A.) 87 Fed. Rep. 637.

Connecticut. — Rockwell *v.* Taylor, 41 Conn. 56; Stirling *v.* Buckingham, 46 Conn. 461; Baxter *v.* Camp, 71 Conn. 245.

Iowa. — Hoover *v.* Cary, 86 Iowa 494.

Kansas. — Jenkins *v.* Levis, 25 Kan. 479.

Maryland. — Miller *v.* State, 8 Gill (Md.) 141.

Massachusetts. — Haynes *v.* Rutter, 24 Pick. (Mass.) 244; Hubbard *v.* Barker, 1 Allen (Mass.) 99.

New Hampshire. — Banfield *v.* Parker, 36 N. H. 354.

New Jersey. — See Wilson *v.* Hillyer, 1 N. J. Eq 63

New York. — Smith *v.* Webb, 1 Barb. (N. Y.) 230; Moore *v.* Meacham, 10 N. Y. 207; Kimball *v.* Huntington, 10 Wend. (N. Y.) 675, 25 Am. Dec. 590; Tilson *v.* Terwilliger, 56 N. Y. 273.

Texas. — Emerson *v.* Mills, 83 Tex. 385; Ellis *v.* Randle, 24 Tex. Civ. App. 475.

Virginia. — Southern R. Co. *v.* Wilcox, 99 Va. 394.

West Virginia. — Corder *v.* Talbott, 14 W. Va. 277.

Declaration as to Refusal to Enter into Contract. — Bailey *v.* State, (Tex. Crim. 1897) 38 S. W. Rep. 992.

Narrative Statements of Agent Not Binding on Principal. — Clunie *v.* Sacramento Lumber Co., 67 Cal. 313; Druecker *v.* Sandusky Portland Cement Co., 93 Ill. App. 406; Richardson *v.* Cato, 10 Humph. (Tenn.) 138.

4. **Memoranda as Pars Rei Gestæ of Verbal Contract.** — St. Joseph Hydraulic Co. *v.* Globe Tissue Paper Co., 156 Ind. 665; Humphrey *v.* Chilcat Canning Co., 20 Oregon 209; Watson *v.* Winston, (Tex. Civ. App. 1897) 43 S. W. Rep. 852.

5. Pharr *v.* Gall, 108 La. 307.

Where an instrument in writing is admitted as part of the transaction for what it is worth, and not as making full proof of the contract of the parties, its presence cannot serve as a ground for objection to parol evidence. Pharr *v.* Gall, 108 La. 307.

6. Wolf *v.* Di Lorenzo, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 323; Eager *v.* Crawford, 76 N. Y. 97. See also Millsaps *v.* Merchants, etc., Bank, 71 Miss. 361. And see the title PAROL EVIDENCE, vol. 21, p. 1115 *et seq.*

7. **Declarations Explanatory of Possession.**— Abney *v.* Kingsland, 10 Ala. 355, 44 Am. Dec. 491; Thomas *v.* Degraffenreid, 17 Ala. 602; Perry *v.* Graham, 18 Ala. 822; Fontaine *v.* Beers, 19 Ala. 722; Taylor *v.* Lusk, 9 Iowa 444; Hardy *v.* Moore, 62 Iowa 69; Sweet *v.* Wright, 57 Iowa 510; Stephens *v.* Williams, 46 Iowa 540; Ross *v.* Hayne, 3 Greene (Iowa) 211.

Vendor Remaining in Possession After Alleged Fraudulent Sale. — For a discussion of the admissibility of the declarations of a vendor re-

b. DECLARATIONS IN DISPARAGEMENT OF TITLE. — Thus, the declaration of a party in possession is often admitted to rebut the common presumption of property in the possessor and to show that the latter was a tenant or agent, or that he had only a life estate or other less interest, even in actions between third persons.[1]

Inadmissibility for Purpose of Destroying Record Title. — But such declarations are inadmissible for the purpose of destroying a record title.[2]

Death of Declarant as Prerequisite to Admissibility. — In *Massachusetts* it seems that declarations of a person in the possession of land to the effect that he was only a tenant for another, will be admissible in actions between the landlord and a third person only where the declarant was deceased at the time the proof was given.[3]

c. DECLARATIONS IN DECLARANT'S FAVOR — (1) *Personalty.* — In some jurisdictions it is held, that where the title to personal property is involved, the declarations of a person in possession indicating the character of the possession, are admissible in evidence on the issue of ownership, though the declarations operate in the declarant's own favor.[4] This doctrine is generally

maining in possession after an alleged fraudulent sale, see the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 497.

1. Declarations in Disparagement of Title — *Alabama.* — Bliss *v.* Winston, 1 Ala. 344; Fontaine *v.* Beers, 19 Ala. 722; Thomas *v.* De Graffenreid, 27 Ala. 651; Kirkland *v.* Trott, 66 Ala. 417. See also Jones *v.* Chenault, 124 Ala. 610.

Minnesota. — Elwood *v.* Saterlie, 68 Minn. 173; Rosenberg *v.* Burnstein, 60 Minn. 18.

New Hampshire. — Woods *v.* Blodgett, 18 N. H. 249, Spence *v.* Smith, 18 N. H. 587; Bell *v.* Woodward, 46 N. H. 315.

North Carolina. — Swindell *v.* Warden, 7 Jones L. (52 N. Car.) 575.

Pennsylvania. — Sheaffer *v.* Eakman, 56 Pa. St. 144; Garber *v.* Doersom, 117 Pa. St. 162.

Tennessee. — Stranahan *v.* Terry, 9 Lea (Tenn.) 560.

Texas. — Harnage *v.* Berry, 43 Tex. 567. *Compare* McClure *v.* Sheek, 68 Tex. 426.

Virginia. — See Dooley *v.* Baynes, 86 Va. 644.

Declaration that Third Person Is Joint Owner. — Darling *v.* Bryant, 17 Ala. 10, 52 Am. Dec. 160.

Declaration Accompanying Specific Act With Regard to Goods by Person in Possession. — Pool *v.* Bridges, 4 Pick. (Mass.) 377.

The declaration of a guardian, made at the time of lending out money in his hands, that it belonged to his ward's estate, is competent evidence for him, on settlement of his accounts, as tending to prove that fact. Beasley *v.* Watson, 41 Ala. 234.

Declaration Inadmissible in Action Not Involving the Property in Reference to which the Declarations Were Made. — Coldwater Nat. Bank *v.* Buggie, 117 Mich. 416, *distinguishing* Jacobs *v.* Callaghan, 57 Mich. 11.

2. Declarations Not Admissible to Destroy Record Title. — Dodge *v.* Freedman's Sav., etc., Co., 93 U. S. 379; Smith *v.* McClain, 146 Ind. 77; Gibney *v.* Marchay, 34 N. Y. 303; Ray *v.* Pearce, 84 N. Car. 485.

3. Currier *v.* Gale, 14 Gray (Mass.) 504, 77 Am. Dec. 343.

Declarations Admitted After Declarant's Decease. — The rule making declarations of a person while in the possession of real estate and in disparagement of his title, admissible, even in actions between third persons, if the declarant was deceased at the time the proof was given, is supported by numerous authorities. Peaceable *v.* Watson, 4 Taunt. 16; Davies *v.* Pierce, 2 T. R. 53; Bowen *v.* Chase, 98 U. S. 254; Williams *v.* Ensign, 4 Conn. 456; Lamar *v.* Pearre, 90 Ga. 377; Marcy *v.* Stone, 8 Cush. (Mass.) 4, 54 Am. Dec. 736; Rand *v.* Dodge, 17 N. H. 343; Lyon *v.* Ricker, 141 N. Y. 231. See also the title DECLARATIONS (IN EVIDENCE), vol. 9, p. 8.

4. Declarations Accompanying Possession of Personalty Admitted in Declarant's Favor — *England.* — Willies *v.* Farley, 3 C. & P. 395, 14 E. C. L. 366.

Alabama. — Perry *v.* Graham, 18 Ala. 822; Nelson *v.* Iverson, 24 Ala. 9, 60 Am. Dec. 442; Upson *v.* Raiford, 29 Ala. 188; Humes *v.* O'Bryan, 74 Ala. 65; Larkin *v.* Baty, 111 Ala. 303.

Arkansas. — Yarbrough *v.* Arnold, 20 Ark. 592.

Illinois. — Amick *v.* Young, 69 Ill. 542; Martin *v.* Martin, 174 Ill. 371, 66 Am. St. Rep. 290.

Indiana. — McConnell *v.* Hannah, 96 Ind. 102; Maus *v.* Bome, 123 Ind. 522; Garr *v.* Shaffer, 139 Ind. 191; Remy *v.* Lilly, 22 Ind. App. 109.

Iowa. — Nodle *v.* Hawthorn, 107 Iowa 380; Blake *v.* Graves, 18 Iowa 312.

Kansas. — Stone *v.* Bird, 16 Kan. 488; Reiley *v.* Haynes, 38 Kan. 259, 5 Am. St. Rep. 737; Wiggins *v.* Foster, 8 Kan. App. 579.

Minnesota. — Rollofson *v.* Nash, 75 Minn. 237, 73 Am. St. Rep. 343. *Compare* King *v.* Frost, 28 Minn. 417.

Nevada. — Hanson *v.* Chiatovich, 13 Nev. 395.

Tennessee. — Brooks *v.* Lowenstein, 95 Tenn. 262.

Wisconsin. — Roebke *v.* Andrews, 26 Wis. 311.

Declaration of Holder of Unindorsed Note. — Martin *v.* Martin, 174 Ill. 371, 66 Am. St. Rep. 290.

Declarations Accompanying Acts Indicative of Ownership. — In Avery *v.* Clemons, 18 Conn.

based on the ground that the mere fact of possession is *prima facie* evidence of title, and hence the act of possession being proved, the declarations of a person while in possession are admissible as explanatory of the act. But this rule is not recognized in other jurisdictions.[1]

(2) *Realty.* — The declarations of one in possession of real estate explanatory of the character of his possession and of his claim of ownership, are admissible for the purpose of showing the character and extent of his claim.[2] And it has been held that if the declarations of the possessor are made while he is in possession, they need not be contemporaneous with any distinct or particular act of possession.[3] But according to the prevailing rule such declarations are inadmissible for the purpose of showing title.[4]

306, 46 Am. Dec. 323, it was held that the declarations of a person in possession of property to the effect that he was the owner thereof, were admissible in evidence when accompanying acts which naturally and usually flow from the ownership of property, such as making repairs at his own expense and offering to sell it as his own.

Declaration of Person Not Party or Privy Held Inadmissible. — Oberholtzer *v.* Hazen, 101 Iowa 340.

1. Declarations Held Inadmissible to Show Title to Personalty. — Stone *v.* O'Brien, 7 Colo. 458; Michigan Paneling Mach., etc., Co. *v.* Parsell, 38 Mich. 479; Turner *v.* Belden, 9 Mo. 797; Carter *v.* Feland, 17 Mo. 383; Criddle *v.* Criddle, 21 Mo. 522; Salmons *v.* Davis, 29 Mo. 176; State *v.* Groschke, 16 Mo. App. 557; Diel *v.* Stegner, 56 Mo. App. 535; Waring *v.* Warren, 1 Johns. (N. Y.) 340; Swindell *v.* Warden, 7 Jones L. (52 N. Car.) 575. See also McGough *v.* Wellington, 4 Allen (Mass.) 502; Fellows *v.* Smith, 130 Mass. 378; Slocum *v.* Putnam, (Tex. Civ. App. 1894) 25 S. W. Rep. 52; Smith *v.* Merchants', etc., Nat. Bank, (Tex. Civ. App. 1897) 40 S. W. Rep. 1038.

In Stone *v.* O'Brien, 7 Colo. 460, the court said: "'Declarations of the party in possession, explanatory of the possession, or explanatory of the title he is claiming,' may be given in evidence by himself or those holding under him, where either of these matters is properly in issue. But they are 'proof only that such was the character of the possession, or such was the title claimed;' they are no evidence of the title actually held; and where the issue is, not what was the nature of the possession, nor what was the title claimed, but which party, plaintiff or defendant, was the actual owner, such declarations are not admissible."

2. Declarations to Show Character and Extent of Claim to Realty — *United States.* — Ward *v.* Cochran, 71 Fed. Rep. 127, 36 U. S. App. 307.

Alabama. — Turnley *v.* Hanna, 82 Ala. 139; Wisdom *v.* Reeves, 110 Ala. 418.

California. — Stockton Sav. Bank *v.* Staples, 98 Cal. 189.

Connecticut. — Comins *v.* Comins, 21 Conn. 413.

Georgia. — Ozmore *v.* Hood, 53 Ga. 114; Brown *v.* Cantrell, 62 Ga. 257; Huggins *v.* Huggins, 71 Ga. 66; Wood *v.* Crawford, 75 Ga. 733; Ogden *v.* Dodge County, 97 Ga. 461.

Illinois. — Kotz *v.* Belz, 178 Ill. 434; Knight *v.* Knight, 178 Ill. 553.

Kentucky. — Mann *v.* Cavanaugh, (Ky. 1901) 62 S. W. Rep. 854.

Massachusetts. — *Compare* Osgood *v.* Coates, 1 Allen (Mass.) 77.

Missouri. — Hannibal, etc., R. Co. *v.* Clark, 68 Mo. 371; Mississippi County *v.* Vowels, 101 Mo. 225; Dunlap *v.* Griffith, 146 Mo. 283; Harper *v.* Morse, 114 Mo. 317.

New Hampshire. — Hodgdon *v.* Shannon, 44 N. H. 572; Hunt *v.* Haven, 56 N. H. 87; Smith *v.* Putnam, 62 N. H. 369.

New York. — Morss *v.* Salisbury, 48 N. Y. 636.

Pennsylvania. — Von Storch *v.* Von Storch, 4 Lack. Leg. N. (Pa.) 25. See also Sheaffer *v.* Eakman, 56 Pa. St. 144.

South Carolina. — Ellen *v.* Ellen, 16 S. Car. 132.

Texas. — Hickman *v.* Gillum, 66 Tex. 314; Trinity County Lumber Co. *v.* Pinckard, 4 Tex. Civ. App. 671.

West Virginia. — High *v.* Pancake, 42 W. Va. 602; Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470.

See also on this question the title ADVERSE POSSESSION, vol. 1, p. 891.

3. Knight *v.* Knight, 178 Ill. 556.

4. Not Admissible to Show Title to Realty in Favor of Declarant. — Smith *v.* Martin, 17 Conn. 399; Morrill *v.* Titcomb, 8 Allen (Mass.) 100; McMullen *v.* Mayo, 8 Smed. & M. (Miss.) 298; Watson *v.* Bissell, 27 Mo. 220; Mooring *v.* McBride, 62 Tex. 309; Gilbert *v.* Odum, 69 Tex. 670. But see McDaneld *v.* McDaneld, 136 Ind. 603; State *v.* Gurnee, 14 Kan. 111; Lamoreux *v.* Huntley, 68 Wis. 24.

Declaration of Decedent. — And the same rule has been applied though the declarations were made by a person who had since died. Watson *v.* Bissell, 27 Mo. 220; Hays *v.* Hays, 66 Tex. 606.

Declaration of Person Out of Possession. — The mere naked declaration of the owner of land standing on his own land, in favor of himself and his estate, claiming an easement from land in the possession of another, is not admissible evidence. Ware *v.* Brookhouse, 7 Gray (Mass.) 454.

Declaration Showing Deed Absolute on Its Face to Be Mortgage. — In *Indiana* it has been held that on the issue whether a deed absolute on its face is a mortgage, the acts of the grantor in possession evidencing ownership and his declarations accompanying and explaining those acts, are competent in his favor. Creighton *v.* Hoppis, 99 Ind. 369.

Where Act of Possession Is Not Material. — If the act of possession is not a matter which is material to the issue in controversy, declarations explanatory of the possession, it has

d. FACT OF POSSESSION TO BE ESTABLISHED. — Before the declarations of a party can be received in evidence as explanatory of his possession, the main fact, the possession, must be shown to the satisfaction of the court, otherwise the declarations would be made evidence of possession and title, rather than explanatory of possession.[1]

e. DECLARATIONS NOT EXPLANATORY OF POSSESSION.—The declarations of a person in possession going beyond an explanation of his possession, and hence constituting no part of the *res gesta*, are inadmissible.[2]

f. DECLARATIONS AS TO SOURCE OR MANNER OF ACQUIRING TITLE. — Declarations as to the source or manner of acquiring title, as for instance the contract under which title was acquired, are narrations of past transactions and are inadmissible.[3]

7. Declarations, Entries, or Memoranda in the Course of Business. — The discussion of the admissibility of original entries in books of accounts, and other memoranda made in the usual course of business, whether by a party in his own interest or by a third person, is often based on the principle of *res gesta*, and will be found elsewhere in this work.[4]

Oral Declarations. — Oral declarations when made in the ordinary course of duty, as, for instance, statements of opinion by a physician while in attendance upon a patient as to the cause or character of his sickness, have also been admitted upon the principle of *res gesta*.[5] But the foundation for the admission of such evidence must be laid by showing that the statement was made in the ordinary course of business.[6] It is not sufficient that the declaration was made by a person while in the discharge of a duty, but it must be such as enters into and forms a part of the ordinary course and routine of the particular business as it is usually conducted and carried on.[7]

been held, will not be admissible. Robbins *v.* Spencer, 140 Ind. 483.

Declarations as to Boundaries. — For a discussion of this matter, see the title BOUNDARIES, vol. 4, p. 851.

1. Fact of Possession to Be Established. — Thomas *v* Degraffenreid, 17 Ala. 602; Comins *v.* Comins, 21 Conn. 413; Parrott *v.* Baker, 82 Ga. 364; Walker *v.* Hughes, 90 Ga. 52; Wickliffe *v.* Enson, 9 B. Mon. (Ky.) 253.

2. Declarations Not Explanatory of Possession. — Nelson *v.* Iverson, 17 Ala. 216; Walker *v.* Blassingame, 17 Ala. 810; Hadden *v.* Powell, 17 Ala. 314.

3. Declarations as to Source of Title Inadmissible — *Alabama.* — McBride *v.* Thompson, 8 Ala. 650; Thompson *v.* Mawhinney, 17 Ala. 362, 52 Am. Dec. 176; Perry *v.* Graham, 18 Ala. 822; Mims *v.* Sturdevant, 23 Ala. 664; Allen *v.* Prater, 30 Ala. 458; Rawles *v.* James, 49 Ala. 183; Daffron *v.* Crump, 69 Ala. 77; Dothard *v.* Denson, 72 Ala. 541; Vincent *v.* State, 74 Ala. 274; Doe *v.* Clayton, 81 Ala. 391; Ray *v.* Jackson, 90 Ala. 513; McLeod *v.* Bishop, 110 Ala. 640.

Illinois. — Martin *v.* Martin, 174 Ill. 371, 66 Am. St. Rep. 290.

Iowa. — Murray *v.* Cone, 26 Iowa 276.

Kansas. — Crawford *v.* Crawford, 60 Kan. 126.

Missouri. — Darrett *v.* Donnelly, 38 Mo. 492; Hannibal, etc., R. Co. *v.* Clark, 68 Mo. 371; Bagnell *v.* Chemical Bank, 76 Mo. App. 121.

See Low *v.* Schaffer, 24 Oregon 239; Slocum *v.* Putnam, (Tex. Civ. App. 1894) 25 S. W. Rep. 52; Smith *v.* Merchants', etc., Nat. Bank, (Tex. Civ. App. 1897) 40 S. W. Rep. 1038. See also Hood *v.* Hood, 2 Grant Cas. (Pa.) 229.

Declarations as to Payment of Purchase Money for Land. — Feig *v.* Meyers, 102 Pa. St. 10; Gilbert *v.* Odum, 69 Tex. 670; Siebert *v.* Lott, 20 Tex. Civ. App. 191.

Declarations as to Price Paid. — Dothard *v.* Denson, 72 Ala. 541.

4. See the title DOCUMENTARY EVIDENCE, vol. 9, p. 903 *et seq.*, and p. 938. And see the following cases: Cody *v.* Gainesville First Nat. Bank, 103 Ga. 789; Pennsylvania Co *v.* McCaffrey, 173 Ill. 169; State *v.* Desforges, 48 La. Ann. 73; Stephan *v.* Metzger, (Mo App. 1902) 69 S. W. Rep. 625; Spellman *v.* Muehlfeld, etc., Piano Co., 48 N. Y. App. Div. 262; Cable *v.* Jackson, 16 Tex. Civ. App. 579; Henry *v.* Bounds, (Tex. Civ. App. 1898) 46 S. W. Rep. 120.

5. Oral Declarations in the Course of Business. — McNair *v.* National L. Ins. Co., 13 Hun (N. Y.) 144; Mutual L. Ins. Co. *v.* Tillman, 84 Tex. 31. See also Reg. *v.* Buckley, 13 Cox C. C. 293.

6. Stapylton *v.* Clough, 2 El. & Bl. 933, 75 E. C. L. 933; Western Maryland R. Co. *v.* Manro, 32 Md. 280.

7. Western Maryland R. Co. *v.* Manro, 32 Md. 280.

RESIDENCE, RESIDENT, ETC.

By Thomas Johnson Michie.

I. **Definitions**, 692.
II. **Intent**, 696.
III. **Acquisition and Change of Residence**, 697.
IV. **Temporary Sojourn**, 698.
V. **Two Places of Residence**, 699.
VI. **Family**, 699.
VII. **Residence and Citizenship**, 700.
VIII. **Corporation and State**, 700.

CROSS-REFERENCES.

For matters of PROCEDURE, see the Encyclopædia of Pleading and Practice, *titles ABATEMENT IN PLEADING*, vol. 1, p. 7; *APPEALS*, vol. 2, p. 157; *ATTACHMENT*, vol. 3, pp. 26, 29, 37; *PUBLICATION*, vol. 17, pp. 32, 67; *SERVICE OF PROCESS AND PAPERS*, vol. 19, p. 567.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see in this work the titles ARREST, vol. 2, p. 853; *ATTACHMENT*, vol. 3, p. 198; *CHATTEL MORTGAGES*, vol. 5, p. 1012; *CITIZENSHIP*, vol. 6, p. 14; *CONSIDERATION*, vol. 6, p. 738; *COPYRIGHT*, vol. 7, pp. 543, 548; *CORONERS*, vol. 7, p. 600; *CORPORATIONS* (*PRIVATE*), vol. 7, p. 694; *COUNTY COMMISSIONERS*, vol. 7, p. 978; *DE FACTO OFFICERS*, vol. 8, p. 775; *DEPOSITIONS*, vol. 9, pp. 308, 354; *DIVORCE*, vol. 9, p. 723; *DOMICIL*, vol. 10, p. 6; *ELECTIONS*, vol. 10, p. 596; *EMINENT DOMAIN*, vol. 10, p. 1162; *EXEMPTIONS* (*FROM EXECUTION*), vol. 12, p. 97; *FIRE INSURANCE*, vol. 13, p. 86; *FOREIGN CORPORATIONS*, vol. 13, p. 834; *HOMESTEAD*, vol. 15, pp. 554, 575; *HUSBAND AND WIFE*, vol. 15, p. 812; *LIFE INSURANCE*, vol. 19, p. 70; *LIMITATION OF ACTIONS*, vol. 19, p. 136; *MARITIME LIENS*, vol. 19, p. 1079; *OCCUPATION, BUSINESS, AND PRIVILEGE TAXES*, vol. 21, p. 770; *POOR AND POOR LAWS*, vol. 22, p. 944; *PRESUMPTIONS*, vol. 22, p. 1241; *PROBATE AND LETTERS OF ADMINISTRATION*, vol. 23, p. 114; *PUBLIC OFFICERS*, vol. 23, p. 331; *RAILROADS*, vol. 23, p. 679; *SCHOOLS; TAXATION; TAXATION* (*CORPORATE*).

And see ACTUAL — ACTUALLY, vol. 1, p. 605; *COMMORANCY*, vol. 6, p. 291; *FREEHOLD — FREEHOLDER*, vol. 14, p. 530; *HOME*, vol. 15, p. 513; *INHABIT — INHABITANT*, vol. 16, p. 328; *OCCUPANCY, ETC.*, vol. 21, p. 765; *PLACE OF ABODE*, vol. 22, p. 831; *USUAL PLACE OF ABODE; VISIT.*

As to the residence and domicil of infants, see the title DOMICIL, vol. 10, pp. 10, 29.

1. **Definitions — Reside.** — To "reside" means: "(1) To dwell permanently or for a considerable time; to have a settled abode for a time; to abide continuously; to have one's domicil or home; to remain for a long time. (2) To have a seat or fixed position; to inhere; to lie or to be an attribute or element. (3) To sink; to settle, as sediment." [1]

1. **Reside.** — Shuman *v.* Heldman, 63 S. Car. 474, *quoting* Webst. Int. Dict. See also Graham *v.* Com., 51 Pa. St. 258; Kennedy *v.* Wiggins, 5 Humph. (Tenn.) 126; Parker *v.* State, 18 Tex. App. 90.

Other Definitions. — In Worcester *v.* East

Residence. — "Residence" is defined to be the abiding or dwelling in a place for some continuance of time.[1] There must be a settled, fixed abode or intention to remain permanently, at least for a time, for business or other purposes, to constitute a residence.[2]

Dwelling House, Place of Abode, Etc. — The term "residence" is sometimes used as synonymous with dwelling house or usual place of abode.[3] But it has

Montpelier, 61 Vt. 142, it was said: "The popular signification of the word 'reside' is to live in a place; to dwell; to sojourn; to stay."

"Reside means to live, to dwell, to be present." Lask *v.* U. S., 1 Pin. (Wis.) 79.

Reside Held to Mean to Live in State. — Middlebury *v.* Waltham, 6 Vt. 200.

Different Meanings. — The term "reside" may have different meanings as used in different parts of the same instrument. People *v.* Owers, 29 Colo. 535.

Means of Living. — A testator gave his estate to his wife and directed that one-half of his estate should pass to his niece if she should reside with his wife for the balance of her life. It was held that reside in this sense meant dwell for some time; that although it might include the idea that a person with whom another resides should furnish the latter with food, it did not necessarily include such idea; and that the will in question did not mean that the testator's wife should furnish his niece after his death with all the means of living. Shuman *v.* Heldman, 63 S. Car. 474.

1. Residence. — Lawson *v.* Adlard, 46 Minn. 245; Matter of Thompson, 1 Wend. (N. Y.) 43; Matter of Wrigley, 8 Wend. (N. Y.) 134; Chaine *v.* Wilson, (N. Y. Super. Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 78; Bartlett *v.* New York, 5 Sandf. (N. Y.) 44; Foster *v.* Hall, 4 Humph. (Tenn.) 346; Andrews *v.* Mundy, 36 W. Va. 22; Hall *v.* Hall, 25 Wis. 607.

2. Fixed Abode. — Barney *v.* Oelrichs, 138 U. S. 529; Matter of Austen, 13 N. Y. App. Div. 247. And see *infra*, this title, *Temporary Sojourn.*

"Residence has been defined to be the place where a person's habitation is fixed, without any present intention of removing therefrom." Tracy *v.* Tracy, 62 N. J. Eq. 807.

Seated or Settled in Place. — In Matter of Collins, (N. Y. Super. Ct. Spec. T.) 64 How. Pr. (N. Y.) 63, it was said: "Residence means the act or state of being seated or settled in a place. It imports not only personal presence in a place, but an attachment to it by those acts or habits which express the closest connection between a person and a place, as by usually sitting or lying there."

Physical Presence. — In *In re* Banff Election, 4 N. W. Ter. 140, it was said: "According to the best authorities I can find, 'residence' means a person's habitual physical presence in a place or country, which may or may not be his home." See also Chinese Tax Cases, 14 Fed. Rep. 344; Warren *v.* Tomason, 43 Me. 406, 69 Am. Dec. 69; Lee *v.* Moseley, 101 N. Car. 311.

Residence Distinguished from Settlement. — See Waterbury *v.* Bethany, 18 Conn. 429; Colchester *v.* East-Lyme, 18 Conn. 480; and see the title POOR AND POOR LAWS, vol. 22, p. 949.

Military Post. — In State *v.* Griffey, 5 Neb. 161, it was held that a military post in Valley county, of that state, was not a military reservation reserved by the United States on the admission of Nebraska as a state, nor land ceded by the state to the Unitd States since its admission, but was a part of and subject to the operation of the laws of the state; and persons who with their families removed to the post *sine animo revertendi* became residents of the county and were entitled to the right of suffrage therein.

Residence and Address. — An affidavit of publication stated that the defendant resided out of the state of California, his last known address being Stockton Springs, Maine. It was contended that the term "address," in this connection, was not equivalent to "residence," which was the statutory word. In refusing to sustain this contention, the court said: "The trial court treated the designation of the term used as giving the residence of the defendant, and designated the place as the residence. The Century Dictionary defines 'address' to be: 'A direction for guidance, as to a person's abode; hence, the place at which a person resides, or the name or place of destination, with any other details necessary for the direction of a letter or package; as, what is your present address? Syn. — Residence, superscription.'" San Diego Sav. Bank *v.* Goodsell, 137 Cal. 420.

Residence Mixed Question of Law and Fact. — Munroe *v.* Williams, 37 S. Car. 81.

3. Residence in Sense of Dwelling House or Usual Place of Abode. — Water Lot Co. *v.* Brunswick Bank, 30 Ga. 685; Leonard *v.* Stout, 36 N. J. L. 371; Foot *v.* Harris, (Supm. Ct. Spec. T.) 2 Abb. Pr. (N. Y.) 454; Middlebury *v.* Waltham, 6 Vt. 200; Griffin *v.* Woolford, (Va. 1902) 41 S. E. Rep. 951; Smithson *v.* Briggs, 33 Gratt. (Va.) 180. See also DWELLING, DWELLING HOUSE, ETC., vol. 10, p. 353; PLACE OF ABODE, vol. 22, p. 831. And see the title POOR AND POOR LAWS, vol 22, p. 954.

"Residence necessarily involves the idea of a local habitation or place of abode." Pells *v.* Snell, 130 Ill. 379.

But in Lewis *v.* Botkin, 4 W. Va. 538, it was held that a return stating that service was made by posting an office copy on the front door of the defendant's residence was defective, because the statute required service at the usual place of abode.

Residence and Home. — In Boucicault *v.* Wood, 2 Biss. (U. S.) 39, it was said: "In order to constitute residence, it is necessary that a man should go to a place, and take up his abode there with the intention of remaining, making it his home."

In Shaeffer *v.* Gilbert, 73 Md. 66, the court, in defining "residence," as used in a constitutional provision prescribing the qualifications of electors, said: "It does not mean * * * one's permanent place of abode,

been said that the term is a much more indefinite one than dwelling house.[1]

Resident. — A resident of a place is one whose place of abode is there, and where he intends to live all his days, or for an indefinite or unlimited time; nor does it mean one's residence for a temporary purpose, with the intention of returning to his former residence when that purpose shall have been accomplished, but means, as we understand it, one's actual home, in the sense of having no other home, whether he intends to reside there permanently or for a definite or indefinite length of time." See also Powers *v.* Bryant, 7 Port. (Ala.) 15; McLane *v.* Hobbs, 74 Md. 170; and see HOME, vol. 15, p. 513. *Compare In re* Banff Election, 4 N. W. Ter. 140.

Place Where Person Lives. — The place where a person lives is *prima facie* taken to be his residence, unless the fact is established to the contrary. Tracy *v.* Tracy, 62 N. J. Eq. 807.

"Residence" means the place where one actually lives. Hanover Nat. Bank *v.* Stebbins, 69 Hun (N. Y.) 308.

In Rex *v.* North Curry, 4 B. & C. 959, it was said: "The question is, what is the meaning of the word 'resides?' I take it that that word, where there is nothing to show that it is used in a more extensive sense, denotes the place where an individual eats, drinks, and sleeps, or where his family or his servants eat, drink, and sleep."

Manner of Living. — "Residence does not depend upon the manner of living, which may be at housekeeping or lodging." Tracy *v.* Tracy, 62 N. J. Eq. 807.

Place of Lodging or Place of Boarding. — In Warren *v.* Board of Registration, 72 Mich. 398, where a man lodged in one place and boarded in another, it was held that he should be registered where he boarded.

Place of Business — Office. — As between a man's place of business and his dwelling house, his residence is his dwelling house. Abington *v.* North Bridgewater, 23 Pick. (Mass.) 170.

In *Ex p.* Breull, 16 Ch. D. 487, James, L. J., said: "Having regard to the object and intent of the rule, and to the fact that the words 'residence' and 'business' are elastic words, and that it is only necessary that the case should be brought within one of the two alternatives — residence or carrying on business within the district — I am of opinion that a man may fairly be said to reside where he is to be found daily. Certainly this would be so if he had no fixed sleeping place. And I think it is not the less so if he happens to sleep always at his mother's house or elsewhere."

Where a statute provided that process might be served upon a corporation in any town in which the secretary resided, it was held that the words "the town in which the secretary * * * resides" might properly be regarded as meaning his official residence, or the town where he performed his duties as secretary or clerk. Adams *v.* Willimantic Linen Co., 46 Conn. 322.

A person who had a bedroom kept for his exclusive use in his father's house in a certain city was absent serving under articles of a solicitor in another city. It was held that, being bound by the articles, he could not be deemed to have had either the liberty or intention to return to the room whenever he liked, and therefore did not reside within the city. Ford *v.* Drew, 5 C. P. D. 59. See also Lewis *v.* Graham, 20 Q. B. D. 780.

Seamen. — In Howard *v.* Skinner, 87 Md. 556, it was held that an unmarried clerk who resided on a steamer did not obtain a residence for voting purposes at the steamer's home port. See also the title SEAMEN.

Next Adjoining Residence. — Where the language "town * * * next adjoining the residence of the plaintiff or defendant" was used in a statute, the word "residence" was considered to mean the town in which the party resided. Holmes *v.* Catley, 32 Barb. (N. Y.) 440.

Suburban or Residence Portion of City. — A statute authorized a municipality to prohibit the sale of intoxicating liquors in the "suburban or residence portion" of the city. In construing this statute, the court said: "It is proper to suggest in this connection that the words 'residence' and 'suburban,' as used in the statute and ordinance, do not mean the same thing. The suburban portion of the city is the outlying part; that portion which is remote from the centre of trade and population; where the houses are generally more or less scattered, and where many of the improvements and advantages enjoyed by the central and more densely populated parts of the city are wanting. The suburban part of a city may be used for business, or it may be occupied by residences, or it may be used both for residence and business purposes." Rowland *v.* Greencastle, 157 Ind. 591.

1. More Indefinite than Dwelling House. — Lewis *v.* Botkin, 4 W. Va. 538.

Open Air. — In Reg. *v.* St. Leonard, L. R. 1 Q. B. 23, Cockburn, C. J., said: "I start with the assumption that in order to constitute residence within the meaning of the statute, it need not necessarily be in a house. There are unfortunate persons who constantly sleep in such temporary shelter as the dry arches of a bridge afford. If a person were thus to reside three years in a parish, there cannot be the slightest doubt that he would be irremovable. A man resides where, to use the common expression, he lives."

Several Parcels of Land. — A person's residence is not confined to his dwelling house; he is considered to reside on all parcels of land which are actually appurtenant to his house. Hedley *v.* Leonard, 35 Mich. 76 (settlement on public lands).

In Ashton *v.* Ingle, 20 Kan. 670, 27 Am. Rep. 197, it was held that the word "residence" was not confined merely to the dwelling house, but might also include everything connected therewith used to make the home more comfortable and enjoyable. See also Morrissey *v.* Donohue, 32 Kan. 648. *Compare* Pitney *v.* Eldridge, 58 Kan. 215. And see generally the title HOMESTEAD, vol. 15, p. 516.

In Wharton *v.* Bunting, 73 Ill. 16, it was held that where several tracts of land adjoined

who has no present intention of removing therefrom.[1]

Nonresident. — A nonresident is one who does not reside in or is not a resident of a particular place. One may be a nonresident of the United States, or of a state, or of a county, or of any particular place.[2]

each other and were all in one inclosure, and no one but the owner resided thereon, such a residence was an actual residence upon all the tracts, although the owner derived his title to the tracts from different sources.

Description of Residence. — An affidavit stated that the maker of a bill of sale resided at Dynevor Lodge. This description was held to be insufficient. Cockburn, C. J., said: "I agree, therefore, that the description of 'Dynevor Lodge,' without any thing further to fix the locality or certain area within which the house may be situate, is not enough." Jones *v.* Harris, L. R. 7 Q. B. 161.

1. Resident. — Dorsey *v.* Brigham, 177 Ill. 250, 69 Am. St. Rep. 228. See also Abbott's Trial Evidence, c. 5, §§ 35, 55; Greenham *v.* Child, 24 Q. B. D. 29; Reg. *v.* Oxford University, L. R. 7 Q. B. 471; Penfield *v.* Chesapeake, etc., R. Co., 29 Fed. Rep. 494, 134 U. S. 351; Tazewell County *v.* Davenport, 40 Ill. 197; Hinds *v.* Hinds, 1 Iowa 42; Mann *v.* Taylor, 78 Iowa 363; Jefferson *v.* Washington, 19 Me. 293; Reeder *v.* Holcomb, 105 Mass. 93; Venable *v.* Paulding, 19 Minn. 488; Chaine *v.* Wilson, 1 Bosw. (N. Y.) 673; Matter of Wrigley, 8 Wend. (N. Y.) 140; People *v.* Platt, 117 N. Y. 159; Guardianship of Hughes, Tuck. (N. Y.) 38; Wolf's Appeal, (Pa. 1888) 13 Atl. Rep. 760; *Ex p.* Blumer, 27 Tex. 734. And see *infra*, this title, *Temporary Sojourn*.

In Lawson *v.* Adlard, 46 Minn. 243, it was said: "To put it concisely, a 'resident' of a place is one who dwells in that place for some continuance of time for business or other purposes, although his domicil may be elsewhere."

Resident and Inhabitant. — See INHABIT — INHABITANT, vol. 16, p. 331, note, and see Ewing *v.* Mallison, (Kan. 1902) 70 Pac. Rep. 371; Griffin *v.* Woolford, (Va. 1902) 41 S. E. Rep. 951.

Voters and Taxpayers. — In Claybrook *v.* Rockingham County, 114 N. Car. 453, it was said: "We are also of the opinion that the petition styling the petitioners 'voters and taxpayers' instead of 'resident taxpayers,' as required by the statute, is an immaterial variance, for to be a voter it is necessary to be a resident."

So in Nevil *v.* Clifford, 55 Wis. 161, it was held that an averment that the plaintiffs were "resident taxpayers and voters" in a certain district meant that they owned taxable property in such district.

Known Resident Owner. — In Long *v.* Emporia, 59 Kan. 46, in construing the term "known resident owner," as used in a statute relating to condemnation proceedings, the court said: "The term 'resident owner' would seem to mean the owner residing on the land sought to be taken; otherwise there is nothing to indicate what the word 'resident' would signify. Where the owner resides on the land we think it must be presumed that he is known, and that it is not for the city or the commissioners it appoints to make condemnation to say that although he resided on the land they did not know it."

Resident Freeholder. — See FREEHOLD — FREEHOLDER, vol. 14, p. 530.

2. Nonresident. — Gardner *v.* Meeker, 169 Ill. 40. In this case it was held that the term, as used in a statute providing for the taking of evidence of a nonresident witness, was not confined to a witness not residing in the state.

The word "nonresident," in its broad sense, is applicable to every one who does not reside at a particular place named. Pacific R. Co. *v.* Perkins, 36 Neb. 456. And see generally NONRESIDENT, vol. 21, p. 547.

Nonresident and Absent Distinguished. — "Nonresident" may indicate a person who resides out of the state, although at a given time he may be in the state, or it may indicate not only that the person does not reside in the state, but that he is also absent from it. Clark *v.* Arnold, 9 Dana (Ky.) 307; Bentley *v.* Clark, 3 Dana (Ky.) 565. See further ABSENT — ABSENCE, ETC., vol. 1, p. 204, note.

Not Resident and Absent Equivalent. — See Leonard *v.* Stout, 36 N. J. L. 370.

Nonresident in Sense of Person Existing Outside of State. — See Dorsey *v.* Dorsey, 30 Md. 531.

In Lindsey *v.* Dixon, 52 Mo. App. 291, it was held that a defendant could abscond or absent himself from his usual place of abode without becoming a nonresident of the state.

In Burroughs *v.* Bloomer, 5 Den. (N. Y.) 535, it was said: "The expressions 'and reside out of the state' and 'the time of his absence' have the same meaning; they are correlative expressions. So that while the defendant in this case resided out of, he was absent from, the state."

Nonresident Alien. — In State *v* Smith, 70 Cal. 156, it was said: "The words 'nonresident alien' are severely criticised by counsel for appellant. We find no difficulty in interpreting them as indicating those who are neither citizens of the United States nor residents of the state."

Nonresident of State and Not Resident of State. — The words "not a resident of the state" and "a nonresident of the state" mean the same thing. Nagel *v.* Loomis, 33 Neb. 499.

In Graham *v.* Ruff, 8 Ala. 171, it was held that an affidavit for an attachment alleging that the defendant was a "nonresident" was sufficient under a statute providing for attachment where the defendant "resides out of this state."

State or County. — In Thompson *v.* Rogers, 4 La. 9, it was held that the term "nonresident," in the *Louisiana* tax law, included those who resided in the state, but out of the parish in which the land was situated and the taxes were assessed. *Compare* Graham *v.* Ruff, 8 Ala. 172.

In Pacific R. Co. *v.* Perkins, 36 Neb. 456, it was held that the word "nonresident," in a statute relating to condemnation proceedings for a right of way for a railroad, meant a non-

II. INTENT. — It has been said that the word "residence" is an elastic word of which an exhaustive definition cannot be given, but that it must be construed in every case in accordance with the object and intent of the statute in which it occurs.[1]

Actual and Legal Residence. — Thus, in a number of cases the term is used in the sense of actual residence as contradistinguished from legal or constructive residence, *i. e.*, domicil,[2] while in other cases the term has been held to be

resident of the state, and not of the land affected nor of the county where it was sitated.

Occupancy. — In a suit to impeach a sale of land for taxes, it appeared that about twenty acres of the lot were cleared and a barn was erected thereon, into which hay made on those twenty acres by a person occupying the adjoining lot was stored in winter. No one resided on the twenty acres, the owner being resident out of the country and never having given notice to the assessor of the township to have his name inserted on the roll of the township. It was held that this was not such an occupancy of the twenty acres as exempted the lot from assessment as the land of a nonresident. Toronto Bank *v.* Fanning, 17 Grant Ch. (U. C.) 514.

1. Intent. — Lewis *v.* Graham, 20 Q. B. D. 780, *quoting Ex p.* Breull, 16 Ch. D. 487. See to the same effect Shaeffer *v.* Gilbert, 73 Md. 69; and see *infra*, this title, *Temporary Sojourn*.

Elasticity of Term. — In People *v.* Tax Com'rs, (Supm. Ct. Spec. T.) 16 N. Y. Supp. 835, it was said: "Many courts and judges have attempted to define 'residence,' but the difficulty about such definitions is that they generally require further definitions to make their meaning clear and certain. The consequence is that it is almost impossible to deduce from the cases a rule of law by which it can be determined in any particular case whether, upon the facts proved, a person is or is not a resident."

Context and Object. — The meaning of the term "residence" depends upon the connection in which it is used. Isham *v.* Gibbons, 1 Bradf. (N. Y.) 84.

In Rindge *v.* Green, 52 Vt. 208, it was said: "It is difficult to define in precise language what constitutes a residence, or makes one a resident of a place. It depends upon the circumstances then surrounding the person, upon the character of the work to be performed, upon whether he has a family or a home in another place, and largely upon his present intention."

In Mellish *v.* Van Norman, 13 U. C. Q. B. 455, it was said: "The term 'resident,' or 'resident inhabitant,' is differently construed in courts of justice, according to the purposes for which inquiry is made into the meaning of the term. The sense in which it should be used is controlled by reference to the object."

Technical Signification. — The term "residence" has no technical signification. Waterbury *v.* Bethany, 18 Conn. 430.

Intent as Element of Residence. — See *infra*, this title, *Acquisition and Change of Residence*.

2. Residence Held to Mean Actual Residence and Not Legal or Constructive Residence — *Arkansas.* — Krone *v.* Cooper, 43 Ark. 547.

California. — Rix *v.* McHenry, 7 Cal. 91; Hanson *v.* Graham, 82 Cal. 631.

Kentucky. — Tipton *v.* Tipton, 87 Ky. 245.

Minnesota. — Keller *v.* Carr, 40 Minn. 428; Lawson *v.* Adlard, 46 Minn. 243.

Missouri. — Chariton County *v.* Moberly, 59 Mo. 238.

Nebraska. — Swaney *v.* Hutchins, 13 Neb. 266.

New Jersey. — City Bank *v.* Merrit, 13 N. J. L. 134; Brundred *v.* Del Hoyo, 20 N. J. L. 328; Hackettstown Bank *v.* Mitchell, 28 N. J. L. 516; Stout *v.* Leonard, 37 N. J. L. 495; McPherson *v.* Housel, 13 N. J. Eq. 35.

North Carolina. — Lee *v.* Moseley, 101 N. Car. 311; Fulton *v.* Roberts, 113 N. Car. 426; Jones *v.* Alsbrook, 115 N. Car. 52.

Pennsylvania. — Nailor *v.* French, 4 Yeates (Pa.) 241.

Virginia. — Long *v.* Ryan, 30 Gratt. (Va.) 720.

Judge. — Where a statute required a district judge to reside in his district, it was held that the residence contemplated meant an actual as distinguished from a legal or constructive residence. People *v.* Owers, 29 Colo. 535.

Attachment. — "Residence," in attachment acts, has been held to refer to an actual as contradistinguished from a constructive or legal residence. Penfield *v.* Chesapeake, etc., R. Co., 134 U. S. 358; Hanson *v.* Graham, 82 Cal. 631; Egener *v.* Juch, 101 Cal. 105; Weitkamp *v.* Loehr, 53 N. Y. Super. Ct. 79.

Resident Brothers — Absent Brothers. — The by-laws of a beneficial association divided its members into two classes, resident brothers and absent brothers, and provided appropriate methods for establishing the claims of each class. Upon the meaning of these terms, as thus used, the court said: "The term 'resident brother' is simply intended to designate one who, at the time of his claiming benefits, is within the jurisdiction of the tribe. An 'absent brother' is one who happens at the time to be either permanently or temporarily without the jurisdiction. The language is employed solely in this sense, and does not involve in any way the question of the legal residence of a member." Walsh *v.* Cosumnes Tribe No. 14, 108 Cal. 496.

Resident Distinguished from Possessor of Land. — See Kennedy *v.* Wiggins, 5 Humph. (Tenn.) 125.

Actual Resident Defined. — In State *v.* Mote, 48 Neb. 683, it was held that an actual resident, within the meaning of a statute in relation to the incorporation of villages, is one who is in a place with the intent to establish there his domicil or permanent residence, or who has done so.

Unlawfully Acquired Possession. — A statute provided that actions brought for the recovery of any land of which any person might be possessed by actual residence thereon for seven successive years, having a connected title in law or equity, deducible by record, from any

equivalent to legal residence.[1]

Temporary or Permanent Sojourn. — So the terms "residence" and "resident" may refer to either a temporary or a permanent sojourn.[2]

III. Acquisition and Change of Residence. — Residence is lost by leaving the place where one has acquired a permanent home and removing to another place without a present intention of returning, and is gained by remaining in such new place. Whether a party's removal constitutes a change of residence depends upon the party's intention in making such removal.[3]

Mere Preparation to Change, coupled with an intent to change, one's residence has been held not to be equivalent to an actual change, and in order to lose a residence when once acquired there must be a removal in fact with the intent that it is not merely temporary.[4]

Floating Intention. — So a man's floating intention at some indefinite time to return to a former place of abode, or to remove, does not affect his residence.[5]

public officer or other person authorized by law to sell such land for the nonpayment of taxes, should be brought within seven years next after possession had been taken. In construing this provision the court said: "We are of the opinion, from a careful examination of the evidence, that McCaffrey obtained the possession which he pleads as an actual residence by either forcing or persuading a party who was holding possession under Burton to abandon Burton, or those holding under him, and to attorn to McCaffrey. The actual residence specified in section 4 is not an unlawfully acquired possession." Burton *v.* Perry, 146 Ill. 126.

1. Legal Residence. — In statutes relating to settlement, taxation, right of suffrage, divorce, limitation of actions, etc., the term "residence" is used in the sense of the legal residence. 4 Min. Inst. (2d ed.) 336; McShane *v.* McShane, 45 N. J. Eq. 342; Brundred *v.* Del Hoyo, 20 N. J. L. 328; Crawford *v.* Wilson, 4 Barb. (N. Y.) 505; Houghton *v.* Ault, (Supm. Ct.) 16 How. Pr. (N. Y.) 77; de Meli *v.* de Meli, 120 N. Y. 485, 17 Am. St. Rep. 652.

2. See *infra*, this title, *Temporary Sojourn.*

3. Change of Residence — Question of Intent. — Boucicault *v.* Wood, 2 Biss. (U. S.) 34; Penfield *v.* Chesapeake, etc., R. Co., 134 U. S. 358; State *v.* Minnick, 15 Iowa 126; Tracy *v.* Tracy, 62 N. J. Eq. 807; Jones *v.* Alsbrook, 115 N. Car. 52; Chitty *v.* Chitty, 118 N. Car. 647; Barton *v.* Irasburgh, 33 Vt. 159; Rindge *v.* Green, 52 Vt. 208.

In People *v.* Peralta, 4 Cal. 175, it was said: "Residence depends upon intention as well as fact, and mere inhabitancy for a short period, against the intention of acquiring a domicil, would not make a resident."

In Swaney *v.* Hutchins, 13 Neb. 268, it was said: "The test of residence, when a party removes from one state to another, seems to be, did he remove from his former residence with the intention of abandoning the same? If a party, in pursuance of that intention, actually went beyond the borders of the state, he will become a nonresident of that state, and upon going into another state with the intention of residing there, he will become a resident thereof."

Pol. Code Cal., § 52, provides: "In determining the place of residence the following rules are to be observed: 1. It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose. 2. There can only be one residence. 3. A residence cannot be lost until another is gained. * * * 7. The residence can be changed only by the union of act and intent." See Hanson *v.* Graham, 82 Cal. 631.

Length of Time. — In Boucicault *v.* Wood, 2 Biss. (U. S.) 39, it was said: "This question of residence is not to be determined by the length of time that the person may remain in a particular place. For example, a man may go into a place and take up his abode there with the intention of remaining, and if so, he becomes a resident there, although he may afterwards change his mind and within a short time remove." See also State *v.* Minnick, 15 Iowa 126; People *v.* Tax Com'rs, (Supm. Ct. Spec. T.) 16 N. Y. Supp. 834, and see *infra*, this title, *Temporary Sojourn.*

In Hinds *v.* Hinds, 1 Iowa 42, it was said: "Bouvier defines the word 'resident' as follows: 'A person coming into a place with an intention to establish his domicil or permanent residence, and who in consequence actually remains there. Time is not so essential as the intent.'"

Where a woman came into a town as a servant hired for no definite time, and lived with her master's family three or four days, when she was taken sick with fever and died, it was held that she resided in the town. Middlebury *v.* Waltham, 6 Vt. 200. See also Sharon *v.* Cabot, 29 Vt. 396; Stamford *v.* Readsboro, 46 Vt. 606; Pittsford *v.* Chittenden, 44 Vt. 382.

4. Change of Mind Not Alone Sufficient. — Herzfeld *v.* Beasley, 106 Ala. 449. See also Talmadge *v.* Talmadge, 66 Ala. 199; Bragg *v.* State, 69 Ala. 204; Davis *v.* Allen, 11 Ala. 165.

In Frost *v.* Brisbin, 19 Wend. (N. Y.) 11, 32 Am. Dec. 423, it was said: "Change of mind may lead to change of residence, but cannot with any propriety be deemed such of itself."

Intention to remove permanently not followed by actual removal will not work a change of residence. Fry's Election Case, 71 Pa. St. 302, 10 Am. Rep. 698.

In State *v.* Minnick, 15 Iowa 126, it was said: "A mere present intention of removing from the place where a person may reside does not change such residence."

5. Floating Intention to Return or Remove — *Maryland.* — Ringgold *v.* Barley, 5 Md. 187; Lancaster *v.* Herbert, 74 Md. 334; Thomas *v.*

Presumption of Continuance. — Where a residence is once shown to have been established it is presumed to continue until it is clearly shown to have been abandoned.[1]

IV. TEMPORARY SOJOURN. — In general it may be said that the term "resident" or "residence" imports a fixed abode for the time being, as contradistinguished from a place of temporary sojourn, and that a mere transient is not a resident.[2] But although this is the ordinary meaning of the terms, yet they

Warner, 83 Md. 20; Turner *v.* Crosby, 85 Md. 178.

Mississippi. — Morgan *v.* Nunes, 54 Miss. 308.

Nebraska. — Berry *v.* Wilcox, 44 Neb. 82, 48 Am. St. Rep. 706; State *v.* School Dist., 55 Neb. 320.

North Carolina. — Wheeler *v.* Cobb, 75 N. Car. 21; Lee *v.* Moseley, 101 N. Car. 311; Carden *v.* Carden, 107 N. Car. 216, 22 Am. St. Rep. 876.

Vermont. — Hartford *v.* Hartland, 19 Vt. 392; Barton *v.* Irasburgh, 33 Vt. 159; Stamford *v.* Readsboro, 46 Vt. 606.

It has been held that where a person actually removes to another place with an intention of remaining there for an indefinite time, such place becomes his residence notwithstanding he has a floating intention to return to his old residence at some future time. Matter of Weed, 120 Cal. 634.

1. Presumption of Continuance. — Hatch *v.* Smith, 6 Kan. App. 645; Chaine *v.* Wilson, 1 Bosw. (N. Y.) 673.

2. Temporary Sojourn Not Sufficient — *England.* — Reg. *v.* St. Leonard, L. R. 1 Q. B. 23.

United States. — U. S. *v.* The Schooner Penelope, 2 Pet. Adm. 450; Chinese Tax Cases, 14 Fed. Rep. 344; Barney *v.* Oelrichs, 138 U. S. 529.

Alabama. — Moore *v.* Coker, 2 Port. (Ala.) 349.

Connecticut. — Salem *v.* Lyme, 29 Conn. 81.

Georgia. — Hickson *v.* Brown, 92 Ga. 225.

Illinois. — Spragins *v.* Houghton, 3 Ill. 377; Johnson *v.* People, 94 Ill. 505; Pells *v.* Snell, 130 Ill. 379.

Indiana. — Pedigo *v.* Grimes, 113 Ind. 153, *quoting* Cooley's Const. Lim. (5th ed.) 754.

Iowa. — Hinds *v.* Hinds, 1 Iowa 36; State *v.* Minnick, 15 Iowa 126; Cawker City State Bank *v.* Jennings, 89 Iowa 230.

Maine. — Thomas *v.* Thomas, 96 Me. 223.

Maryland. — Shaeffer *v.* Gilbert, 73 Md. 69.

Massachusetts. — Reeder *v.* Holcomb, 105 Mass. 93.

Minnesota. — Keller *v.* Carr, 40 Minn. 428; Fitzgerald *v.* McMurran, 57 Minn. 312.

Missouri. — Orr *v.* Wilmarth, 95 Mo. 212, *overruling* Whittelsey *v.* Robert, 51 Mo. 120.

New Jersey. — Clark *v.* Likens, 26 N. J. L. 207.

New York. — Bartlett *v.* New York, 5 Sandf. (N. Y.) 44; People *v.* Tax Com'rs, (Supm. Ct. Spec. T.) 16 N. Y. Supp. 834; Eaves Costume Co. *v.* Pratt, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 420; Williamson *v.* Parisien, 1 Johns. Ch. (N. Y.) 389; Matter of Fitzgerald, 2 Cai. (N. Y.) 318; Matter of Dimock, 4 N. Y. App. Div. 304; Matter of Austen, 13 N. Y. App. Div. 247; Matter of Wrigley, 4 Wend. (N. Y.) 602, 8 Wend. (N. Y.) 134; Frost *v.* Brisbin, 19 Wend. (N. Y.) 11, 32 Am. Dec. 423.

Pennsylvania. — Fry's Election Case, 71 Pa. St. 302, 10 Am. Rep. 698.

Tennessee. — Stratton *v.* Brigham, 2 Sneed (Tenn.) 422.

Virginia. — Griffin *v.* Woolford, (Va. 1902) 41 S. E. Rep. 951; Long *v.* Ryan, 30 Gratt. (Va.) 718.

Wisconsin. — Dutcher *v.* Dutcher, 39 Wis. 658; State *v.* Dodge County, 56 Wis. 79.

A temporary sojourn within a state for either pleasure or business, accompanied by an intention to return to the state of one's former habitation, does not constitute a residence. Pells *v.* Snell, 130 Ill. 379.

A man's legal residence is not changed when he leaves it for temporary purposes and transient objects, meaning to return when those purposes are answered and those objects attained. Cadwalader *v.* Howell, 18 N. J. L. 138; State *v.* Camden, 39 N. J. L. 59.

Agency. — In Hayward *v.* Board of Review, 189 Ill. 234, it was held that the fact that a party had an agent in the state to receive applications for loans and transact other business, and that he came to the state at regular intervals, but only temporarily, for the purpose of transacting business with reference to these credits, did not constitute him a resident of the state, within the meaning of that word.

Telegraph Company. — In Moore *v.* Western Union Tel. Co., 87 Ga. 613, it was held that a transient visitor to a town or city who furnished to the company no definite address was not a person residing therein, within the meaning of a statute subjecting telegraph companies to a forfeiture for failure to deliver dispatches to residents. See generally the title TELEGRAPHS AND TELEPHONES.

A Mere Traveler does not obtain a residence in the countries through which he is traveling. Hart *v.* Kip, 148 N. Y. 306.

Transients. — In Matter of Austen, 13 N. Y. App. Div. 247, it was held that a person residing for several years in a town cannot be said to be a transient. The court said: "The word 'permanently' is used in Frost *v.* Brisbin, 19 Wend. (N. Y.) 11, 32 Am. Dec. 423, as the converse of 'transient.' It expresses the idea of an abode, which may be temporary, but is not transient; that is, an abode where one settles down with some business or other object which requires it, and with the intention of remaining steadily in the place until such object is accomplished." See also PERMANENT — PERMANENTLY, ETC., vol. 22, p. 698; TRANSIENT.

Special Purpose. — The term "resident" has been held not to include one sojourning in a place for a special purpose. Fry's Election Case, 71 Pa. St. 302, 10 Am. Rep. 698.

So in Chitty *v.* Chitty, 118 N. Car. 647, where a person left the state to avoid a warrant, with the intention of returning as soon

may refer to any temporary sojourn where such appears to have been the intent with which they were used.[1]

V. Two Places of Residence. — It may happen that one may have two places of residence, in one of which he resides during one portion of the year, in the other during the remaining portion. In such case, the place at which he happens to be constitutes his "residence" so long as he is there, and ceases to be such as soon as he leaves it for the other place.[2] But one cannot at the same time have more than one "residence" when the term is used in the sense of domicil.[3]

VI. Family. — "The residence of a man who has a family which he maintains, and which has an established home, is *prima facie* with that family. Wherever he locates that family in anything like a fixed and permanent residence, it is presumptively his chosen place of residence. Wherever he may go for business or pleasure, he resides at home, and home is where the family dwell."[4] But the presumption that a man's residence is where his family

as the case against him should be thrown out of court, his wife and children remaining in the state, it was held that he did not lose his residence in the state.

Same — Performance of Single Piece of Work. — In Rindge *v.* Green, 52 Vt. 208, it was said: "The words 'residence' or 'resident' import more than a temporary stay in a place for the performance of a single piece or job of work, especially when the workman at the same time has a home, a permanent place of abode, in another place."

Same — Contractor. — But in Munroe *v.* Williams, 37 S. Car. 85, it was held that where a party came into a state and entered into a contract which required several months of continuous residence to perform, and acquired property and intended to engage in other business in the state, he became a resident of the state.

Same — Public Officer. — In Ross *v.* Banta, 140 Ind. 120, it was held, where a person was appointed to a government office in a territory and left Indiana to fill such office, taking his family with him, with the intention of returning at the expiration of his term of office, that he lost his residence in Indiana. See also Wheeler *v.* Cobb, 75 N. Car. 21; Carden *v.* Carden, 107 N. Car. 216, 22 Am. St. Rep. 876.

Same — Search of Health. — Where a person went abroad for a special purpose, namely, the recovery of his son's health, and his intention was to remain abroad until that purpose was accomplished, it was held that he was no longer a resident of his domicil. Bennett *v.* Watson, 21 N. Y. App. Div. 410.

1. Temporary Sojourn Sometimes Sufficient. — Shaeffer *v.* Gilbert, 73 Md. 69; Fouke *v.* Fleming, 13 Md. 411; Carroll *v.* Tyler, 2 Har. & G. (Md.) 54; Hanover Nat. Bank *v.* Stebbins, 69 Hun (N. Y.) 308; Horton *v.* Horner, 16 Ohio 145; La Pointe *v.* Grand Trunk R. Co., 26 U. C. Q. B. 479.

Poor and Poor Laws. — Trumbull *v.* Moss, 28 Conn. 256. See also New-Milford *v.* Sherman, 21 Conn. 116, where Judge Ellsworth said that being in the town, and in necessitous circumstances, was a residing therein within the meaning of the law.

Kidnapping. — Where a statute provided that a person who carried off or decoyed any person from his place of residence should be guilty of kidnapping, it was held that a child's residence was any place where he had a right to be, whether that place was a place of his temporary sojourn or permanent domicil. Wallace *v.* State, 147 Ind. 621.

Habeas Corpus. — A statute provided that applications for habeas corpus should be made to certain officers in the county where the prisoner was detained, or if there was no such officer within such county, then to some officer having such authority residing in an adjoining county. In construing this provision the court said: "The term 'residing in' is not to be restricted to an actual permanent residence in the county, but [is] to be held as including the case of presence in the county for the purpose of transacting judicial business therein." Matter of Doll, 47 Minn. 518.

2. Two Places of Residence. — Walcot *v.* Botfield, 1 Kay 534, 18 Jur. 570; Stout *v.* Leonard, 37 N. J. L. 492; People *v.* Tax Com'rs, (Supm. Ct. Spec. T.) 16 N. Y. Supp. 834.

3. Domicil. — Hanson *v.* Graham 82 Cal. 631; People *v.* Schoonmaker, 63 Barb. (N. Y.) 51; Houghton *v.* Ault, (Supm. Ct.) 16 How. Pr. (N. Y.) 84; Chaine *v.* Wilson, (Super. Ct. Spec. T.) 16 How. Pr. (N. Y.) 552; Kranshaar *v.* New Haven Steamboat Co., 7 Robt. (N. Y.) 356. See also the title Domicil, vol. 10, pp. 9, 10.

4. Person's Residence Prima Facie with His Family. — Keith *v.* Stetter, 25 Kan. 103. To the same effect see Cawker City State Bank *v.* Jennings, 89 Iowa 230; Hatch *v.* Smith, 6 Kan. App. 645; Waterborough *v.* Newfield, 8 Me. 203; Tiller *v.* Abernathy, 37 Mo. 196; Chitty *v.* Chitty, 118 N. Car. 647; Penman *v.* Wayne, 1 Dall. (Pa.) 348; Kennedy *v.* Wiggins, 5 Humph. (Tenn.) 126; Andrews *v.* Mundy, 36 W. Va. 22.

In Matter of Hawley, 1 Daly (N. Y.) 533, it was said: "The best definition that I have ever been able to find, or which my own experience could suggest, and I have had a great deal, is that to be deduced from the Roman law; that a man's residence is the place where his family dwells, or which he makes the chief seat of his affairs and interests. Dig. 50, tit. I, 16, 20, 27, 203; Code, tit. 39, 7."

Where it appeared that the defendant, at the time of the issuing of an attachment against him, kept a house in Bradford, New Hampshire, in which his wife and children lived, and in which he entertained his friends,

resides is not conclusive, and may be rebutted by other circumstances.[1]

VII. Residence and Citizenship. — Residence and citizenship are by no means synonymous terms; one may be a resident without being a citizen.[2] So the word "residents" may comprehend aliens, or it may be restricted to residents who are citizens, according to the subject-matter to which it is applied.[3]

VIII. Corporation and State. — The word "resident" occurring in a constitution or a statute ordinarily means an individual — a citizen — and does not include a corporation[4] or a state,[5] though for certain purposes — *e. g.*,

and which was frequently called by him his "home," it was held that such place was his residence, notwithstanding his positive statement that he had for more than eighteen months, and then had, a store of goods, and was doing business as a merchant, and had actually resided, in Franklin county, New York, with the honest intention of making the latter place his permanent residence. Lee *v.* Stanley, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 272.

1. Rebuttable Presumption. — In Lask *v.* U. S., 1 Pin. (Wis.) 79, it was held that a party who has resided for six months in a territory with the *bona fide* intention of becoming a citizen is a resident thereof, although he may have a family residing elsewhere and keeping house.

Where a man left his family, consisting of a wife and children, in one state and went to another, and there engaged in business, voted at elections, sat upon juries, and discharged other duties as a citizen, but did not remove his family, although continually intending to do so, it was held that he was a resident of the latter state. The court distinguished Love *v.* Cherry, 24 Iowa 204, "because of absence of intention to make the residence in question permanent, and a continual purpose to return to a prior place of residence." Schlawig *v.* De Peyster, 83 Iowa 323, 32 Am. St. Rep. 308. In People *v.* McClay, 2 Neb. 7, it was held that a person who came to Nebraska with the intention of becoming a resident, and who had no intention of removing therefrom, thereby became a resident of Nebraska, and the fact that his family did not accompany him was held to be of no consequence, so long as he came with the settled purpose of abandoning his foreign residence and of bringing his family to Nebraska. See also Wells *v.* People, 44 Ill. 40; Swaney *v.* Hutchins, 13 Neb. 266; Brown *v.* Ashbough, (Supm. Ct. Spec. T.) 40 How. Pr. (N. Y.) 260.

Sending Family to Another State. — In Penfield *v.* Chesapeake, etc., R. Co., 134 U. S. 351, it was held, where a person residing in another state sent his family to the state of New York with the intent that they should reside there, but remained himself in the other state, that he did not become a resident of the state of New York.

Failure to Keep House Together as Family. — Under a *Vermont* statute a settlement was acquired by a year's residence in any town. It was held that the residence of a man could not be continued by his wife and family in his absence from the state so as to confer upon him a legal settlement, unless they continued together, keeping house as a family. Middletown *v.* Poultney, 2 Vt. 437.

2. Residence and Citizenship Distinguished. — Everhart *v.* Huntsville Female College, 120 U. S. 223; Sharon *v.* Hill, 26 Fed. Rep. 377; McDonald *v.* Salem Capital Flour-Mills Co., 31 Fed. Rep. 577; Collins *v.* Ashland, 112 Fed. Rep. 178; Baldwin *v.* Franks, 120 U. S. 678; Darst *v.* Bates, 51 Ill. 439; Cleveland, etc., R. Co. *v.* Monaghan, 140 Ill. 474; Morgan *v.* Nunes, 54 Miss. 308; Union Hotel Co. *v.* Hersee, 79 N. Y. 454, 35 Am. Rep. 536. And see generally the title Citizenship, vol. 6, p. 14.

The term "residence" does not imply citizenship, and cannot be substituted for it. Grace *v.* American Cent. Ins. Co., 109 U. S. 278; Wrisley Co. *v.* Rouse Soap Co., (C. C. A.) 90 Fed. Rep. 6.

An Allegation that one is a resident of a certain state is not equivalent to an allegation that he is a citizen of such state. Cooper *v.* Newell, 155 U. S. 532; Gale *v.* Southern Bldg., etc., Assoc., 117 Fed. Rep. 733; Denny *v.* Pironi, 141 U. S. 123; Shaw *v.* Quincy Min. Co., 145 U. S. 447; Wolfe *v.* Hartford L., etc., Ins. Co., 148 U. S. 389; Oxley Stave Co. *v.* Butler County, 166 U. S. 655, Cleveland, etc., R. Co. *v.* Doerr, 41 Ill. App. 530.

But in Cooper *v.* Galbraith, 3 Wash. (U. S.) 553, it was said: "Citizenship, when spoken of in the constitution in reference to the jurisdiction of the courts of the United States, means nothing more than residence."

3. Citizens or Aliens. — Opinion of Justices, 7 Mass. 525.

But Residence Is Prima Facie Evidence of Citizenship. McDonald *v.* Salem Capital Flour-Mills Co., 31 Fed. Rep. 577; Collins *v.* Ashland, 112 Fed. Rep. 178.

4. Corporations. — People *v.* Schoonmaker, 63 Barb. (N. Y.) 51. See also Westover *v.* Turner, 26 U. C. C. P. 510; U. S. Bank *v.* Deveaux, 5 Cranch (U. S.) 90; Clarke *v.* Mississippi Bank, 10 Ark. 516, 52 Am. Dec. 248. And see the title Person, vol. 22, p. 741.

5. State. — Under a statute of *New Jersey* it was required that the assessor of taxes should deduct from the valuation of one's property any debt or debts *bona fide* due and owing from such individual to "creditors residing within the state." In State *v.* Trenton, 40 N. J. L. 89, it appeared that a debt of ten thousand dollars was due to the state, and it was held that the act did not apply, the court saying that the word "reside" relates to individual abode, and though sometimes figuratively used, will not apply to the state in its representative and governmental relation to its citizens and people as individuals residing in the state, and that the political body called the state cannot be said, in the proper use of language, to reside anywhere.

those of jurisdiction, or of determining the venue of suits — a corporation is considered as residing within a certain locality.[1]

RESIDUE — RESIDUARY. (See also the titles LEGACIES AND DEVISES, vol. 18, p. 723; WILLS.) — Residue is that which remains of something after taking away a part of it.[2] As used in wills, its ordinary meaning is that portion of the estate which is left after the payment of charges, debts, and particular legacies. The presumption is that a testator uses the term in this sense, unless a contrary intention clearly appears.[3] A gift in a will of the

1. Residence of Corporations. — Rundle *v.* Delaware, etc., Canal Co., 14 How. (U. S.) 80; Clarke *v.* Mississippi Bank, 10 Ark. 516, 52 Am. Dec. 248; Tatem *v.* Wright, 23 N. J. L. 429; State *v.* Haight, 35 N. J. L. 281; State *v.* Scudder, 32 N. J. L. 204; Stevens *v.* Phœnix Ins. Co., 41 N. Y. 154; Merrick *v.* Van Santvoord, 34 N. Y. 218; Conroe *v.* National Protection Ins. Co., (Supm. Ct. Spec. T.) 10 How. Pr. (N. Y.) 404; Crawford *v.* Wilson, 4 Barb. (N. Y.) 522; People *v.* Pierce, 31 Barb. (N. Y.) 138.

As to the Place in Which a Corporation May Be Said to Have Its Residence, see generally the titles CORPORATIONS (PRIVATE), vol. 7, p. 694; FOREIGN CORPORATIONS, vol. 13, p. 834; RAILROADS, vol. 23, p. 679; TAXATION (CORPORATE).

2. Residue. — Bouv. L. Dict., *quoted* in Morgan *v.* Huggins, 48 Fed. Rep. 5, and in Phelps *v.* Robbins, 40 Conn. 264. See also Stokes *v.* Prance, (1898) 1 Ch. 212, 67 L. J. Ch. 69.

In Johnson *v.* Poulson, 32 N. J. Eq. 393, it was said: "It signifies what is left of a number or a quantity after something has been abstracted. The *residue* of a farm is what remains of it after something has been taken away. The *residue* of a blended mass of real and personal estate is what remains after the mass has been diminished by something subtracted."

"Residue" Equivalent to "Balance." — Hulin *v.* Squires, 63 Hun (N. Y.) 359. And see BALANCE, vol. 3, p. 767, note 1.

3. Residue of Estate. — Phelps *v.* Robbins, 40 Conn. 264; Stevens *v.* Underhill, 67 N. H. 68; Brearley *v.* Brearley, 9 N. J. Eq. 21; Graves *v.* Howard, 3 Jones Eq. (56 N. Car.) 302; Leahy *v.* Cardwell, 14 Oregon 172; Gallagher's Appeal, 48 Pa. St. 122; Bennett's Estate, 148 Pa. St. 141.

In Graves *v.* Howard, 3 Jones Eq. (56 N. Car.) 305, it was said that the *residue* of a testator's estate means "what is left after all liabilities are discharged and all the purposes of the testator are carried into effect."

"Residue means *ex vi termini* what may be left after satisfying the debts, legacies, etc." Choat *v.* Yeats, 1 Jac. & W. 105.

Residuum. — *Residuum* is defined as "the surplus of a testator's or intestate's estate after discharging all his liabilities." Morgan *v.* Huggins, 48 Fed. Rep. 5.

All Property Not Otherwise Specifically Devised or Bequeathed. — "The *residue* of a man's estate, in testamentary language, means whatever is not specifically devised or bequeathed, and in whatever part of a will it may happen to be found it ought to have that meaning, unless the whole will, taken together, shows clearly that it was not so intended. A will bequeathing the *residue* of personalty passes everything not otherwise effectually disposed of." Willard's Estate, 68 Pa. St. 332. See also Le Breton *v.* Cook, 107 Cal 410; Sturgis *v.* Work, 122 Ind. 134; Hofius *v.* Hofius, 92 Pa. St. 307; Sproul's Appeal, 105 Pa. St. 441.

"Residue means all of which no effectual disposition is made by will other than [by] the *residuary* clause." Skrymsher *v.* Northcote, 1 Swanst. 570; Morton *v.* Woodbury, 153 N. Y. 257.

Applies to Whole of Estate. — "When a doubt arises as to the extent of the application of the word *residue*, as used in a will, whether it was intended to apply to the *residue* of the whole estate or to be confined to a particular part of the estate, the courts generally incline to extend it to the whole estate where there is no other *residuary* clause." Carr *v.* Dings, 58 Mo. 406.

An Administrator's Bond provided that "all the rest and *residue* of the said goods, chattels, and credits" which should be found remaining upon the account of the administration should be paid to the persons entitled to receive them. It was held that the term *residue* meant what remained after the payment of debts and administration expenses. Ordinary *v.* Cooley, 30. N J. L. 273.

Definite Fund. — Where definite portions of a definite fund are given to various persons and then the *residue* of that definite fund is given to some one else, the *residue* is as much a definite fund as any other part of the whole fund so given, and is not a *residue* in the ordinary meaning of that term. Bjorkman *v.* Kimberley, 57 L. J. Ch. 744; Page *v.* Leapingwell, 18 Ves. Jr. 463; Sykes *v.* Van Bibber, 88 Md. 109.

Residue and Half. — A testator by his will gave to each of his sons one-half of his share at a certain time, and left the *residue* of each share in strict trust. In construing this will in Baeder's Estate, 190 Pa. St. 611, the court said: "*Prima facie*, this *residue* must mean the other half — the portion left after the distribution of the half which the first clause has provided for."

Void Devise. — Where A devised land to the Philadelphia Academy in trust, etc., and devised the *residue* of his estate, real and personal, not before disposed of, one moiety to L. and the other moiety to M., and the devise to the Academy was void, it was held that the heir of A, and not the *residuary* devisees under the will, was entitled to the land devised to the Academy. Lingan *v.* Carroll, 3 Har. & M. (Md.) 333.

Legal Title. — A testator gave and bequeathed all his property in trust for the payment of certain annuities and legacies, and then said: "And to my two aforesaid

"residue" may include real as well as personal property.[1]

Residuary means relating to the residue; as, residuary legatee, residuary devisee, etc.[2]

RESIDUUM. — See RESIDUE — RESIDUARY, *ante.*

RESIGNATION. (See also ABDICATE, vol. 1, p. 161, and see the titles

daughters I give and bequeath the ***residue*** of all my estates, real and personal." It was held that the legal title to the ***residue*** passed by the will to the daughters. The court said: "What ***residue***? Undoubtedly that which remained after all the trusts of the will are disposed of." Hunt *v.* Hunt, 10 N. J. Eq. 317.

Fee. — But in Page *v.* Wright, 4 Wash. (U. S.) 196, it was held that the term ***residue*** in a will was not enough alone to pass the fee in land without words of limitation.

Power of Disposition. — In Matter of Miller, 11 N. Y. App. Div. 343, *affirmed* 161 N. Y. 71, where a testator gave his property to his daughter and her heirs forever, and appointed his executors for guardians, "upon condition, however, that in case of the death of my said daughter prior to her attaining the age of twenty-one years, or without issue her surviving, then, and in that case, I devise and bequeath the whole of the ***residue*** of my said estate, then in the hands of my said executors," to A. and E., share and share alike. It was held that the bequest over was not void for repugnancy.

Residue of Residue. — In Morton *v.* Woodbury, 153 N. Y. 256, it was said: "Where there is a disposition of a part of the ***residue***, and it fails, it will not go in augmentation of the remaining parts as a ***residue*** of a ***residue***, but will devolve as undisposed of."

Rest and Residue of an estate signifies what remains after some prior purpose is thereout satisfied. Cole *v.* Turner, 4 Russ. 381. See also Ordinary *v.* Cooley, 30 N. J. L. 273.

Rest and Residue of Property Belonging to Furnace. — See Shriver *v.* Nimick, 41 Pa. St. 91.

1. May Include Real as Well as Personal Property. — Smyth *v.* Smyth, 8 Ch. D. 561; Attree *v.* Attree, L. R. 11 Eq. 280; Chapman *v.* Chick, 81 Me. 109; Wood *v.* Myrick, 16 Minn. 495; Graecen *v.* Allen, 14 N. J. L. 74; Atkins *v.* Kron, 1 Ired. Eq. (37 N. Car.) 58; Gallagher's Appeal, 48 Pa. St. 122; Hofius *v.* Hofius, 92 Pa. St. 307; Seekright *v.* Carrington, 1 Wash. (Va.) 45; Smith *v.* Smith, 17 Gratt. (Va.) 268. And see the title LEGACIES AND DEVISES, vol. 18, p. 725.

Residue Confined to Personal Property. — But where such appears to have been the testator's intention, ***residue*** has been confined to personal and mixed property. Miller *v.* Worrall, 62 N. J. Eq. 776. See also Bullard *v.* Goffe, 20 Pick. (Mass.) 252; Birdsall *v.* Den, 20 N. J. L. 244.

Charging Legacies upon Land. — In Johnson *v.* Poulson, 32 N. J. Eq. 394, it was said: "When pecuniary legacies are first given, and afterwards the ***residue*** of the testator's estate, real as well as personal, his intention to have the legacies payable out of the real, if the personal estate be insufficient, appears, in the absence of any inconsistent words or provisions in the will, by necessary implication, from the words ***residue*** or 'remainder,' when applied to the two kinds of property combined." See also Corwine *v.* Corwine, 24 N. J. Eq. 579; Johnson *v.* Poulson, 32 N. J. Eq. 394; Blake's Estate, 134 Pa. St. 240; Bennett's Estate, 148 Pa. St. 141; Gallagher's Appeal, 48 Pa. St. 121.

Residue of Two Mortgage Debts. — A testator, after directing payment of his debts and funeral and testamentary expenses, bequeathed a number of pecuniary legacies, and then gave "all the ***residue*** and remainder" of two specified mortgage debts then due to him, after payment of his debts and funeral and testamentary expenses (but not adding "and legacies"), to three persons named. It was held that "the ***residue*** and remainder" of the two mortgage debts meant what was left after payment thereout of the general pecuniary legacies as well as of the debts, etc. *In re* Grainger, (1900) 2 Ch. 756.

Residue and Estate Held to Mean Same Thing. — See Sherman *v.* Baker, 20 R. I. 446.

Residue and Surplus. — A testator gave his property to his wife, and further provided that at her death "what I may have left her, that is to say, the ***residue***, is to be divided in equal shares among our children." In construing this will the court said: "The fourth article, * * * in giving the ***residue*** over to the children, implied the right of consumption in the wife. This word ***residue***, as used in this place, does not imply a residuum of estate or interest like a remainder, but a residuum of the property — or, in the testator's own language, of 'what I may have left her,' and in this sense is exactly equivalent to 'surplus.'" Jauretche *v.* Proctor, 48 Pa. St. 471. See also Matter of Pennock, 20 Pa. St. 274.

2. Residuary — Realty and Personalty. — Like legacy, "***residuary*** legatee" has *prima facie* reference only to personalty. Windus *v.* Windus, 6 De G. M. & G. 549; Gethin *v.* Allen, 23 L. R. Ir. 236. It may, however, be extended by the context to realty. Hughes *v.* Pritchard, 6 Ch. D. 24. See also Evans *v.* Crosbie, 15 Sim. 600; Wildes *v.* Davies, 1 Smale & G. 475. In Hughes *v.* Pritchard, 6 Ch. D. 24, however, there was a prior gift of the realty, and it has been said that where there is no such gift the case is not in point. *In re* Methuen, 16 Ch. D. 696.

Residuary Clause. (See also the title WILLS.) — A ***residuary*** clause in a will is one which, together with the other clauses of the will, completely exhausts the estate — disposes of all the property of the estate. Morgan *v.* Huggins, 48 Fed. Rep. 5, wherein it was also said that the term "***residuary*** clause" in a statute regulating the order in which the debts of a testator should be paid "seems to contemplate former provisions in the will to carry into effect the wishes of the testator as to the disposition of his estate, and this expression is used to cover all that remains after such former dispositions of property have been carried out."

Residuary Executors. — See Berry *v.* Usher, 11 Ves. Jr. 87.

OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 21, p. 848; PUBLIC OFFICERS, vol. 23, p. 421.) — Resignation is the act by which an officer renounces the further exercise of his office; the surrender, relinquishment, etc., of an office.[1]

RESILIATION. — See the title LANDLORD AND TENANT, vol. 18, p. 379.

RESIST. (See also references under RESISTING OFFICER, *post.*) — To resist is to oppose by direct, active, and *quasi*-forcible means.[2]

RESISTING OFFICER. — See the titles ARREST, vol. 2, p. 906; MURDER AND MANSLAUGHTER, vol. 21, p. 141; SELF-DEFENSE.

1. Resignation — **A Man Cannot Resign What He Is Not Entitled To.** — "A *resignation* implies that the person resigning has been elected into the office which he resigns. A man cannot resign that which he is not entitled to, and which he has no right to occupy." Reg. *v.* Blizard, L. R. 2 Q. B. 57.

Resignation and Nonacceptance. — See Johnston *v.* Wilson, 2 N. H. 204.

2. **Resist.** — State *v.* Welch, 37 Wis. 201.

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CROSS-REFERENCES.

For matters of PROCEDURE, *see the title* *FORMER ADJUDICATION*, 9 ENCYCLOPÆDIA OF PLEADING AND PRACTICE, p. 611.

For other matters of SUBSTANTIVE LAW *and* EVIDENCE *related to this subject, see the following titles in this work:* *BOUNDARIES*, vol. 4, p. 756; *COUPONS*, vol. 8, p. 1; *COURTS*, vol. 8, p. 21; *DAMAGES*, vol. 8, p. 537; *DIVORCE*, vol. 9, p. 723; *ESTOPPEL*, vol. 11, p. 385; *FINAL JUDGMENTS AND DECREES*, vol. 13, p. 23; *FOREIGN JUDGMENTS*, vol. 13, p. 974; *GARNISHMENT*, vol. 14, p. 731; *GUARDIAN AND WARD*, vol. 15, p. 16; *HABEAS CORPUS*, vol. 15, p. 125; *HOMESTEAD*, vol. 15, p. 516; *JEOPARDY*, vol. 17, p. 580; *JUDGMENTS AND DECREES*, vol. 17, p. 756; *JURISDICTION*, vol. 17, p. 1039; *MANDAMUS*, vol. 19, p. 709; *MASTER AND SERVANT*, vol. 20, p. 3; *MERGER*, vol. 20, p. 587; *NOTICE OF PENDENCY AND LIS PENDENS*, vol. 21, p. 591; *NUISANCES*, vol. 21, p. 679; *PARTITION*, vol. 21, p. 1126; *PATENTS*, vol. 22, p. 260; *PROHIBITION*, vol. 23, p. 193; *QUO WARRANTO*, vol. 23, p. 594; *REPLEVIN*, *ante*, p. 475; *SET-OFF, RECOUPMENT, AND COUNTERCLAIM; STARE DECISIS; STOCK AND STOCKHOLDERS; SURETYSHIP; TRESPASS; TROVER AND CONVERSION; TRUSTS AND TRUSTEES; VENDOR AND PURCHASER.*

I. SCOPE OF TITLE. — The legal principles of the doctrine of *res judicata* [1] are few in number and well settled, and all the authorities agree as to their utility and necessity; but there is much difference of opinion as to their precise limits and application in particular cases.[2] From the standpoint of a particular action or subject-matter these principles have been discussed elsewhere in this work to a considerable extent. It is the purpose of this article to treat of them in a general way, noting and illustrating their various ramifications and exceptions specifically or by reference to other titles.

II. NATURE AND STATEMENT OF PRINCIPLES — 1. Duchess of Kingston's Case. — The statement of the law governing the force and effect of judgments and decrees was first definitely formulated in the early case of Rex *v.* The Duchess of Kingston, as follows: "From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: First, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. But neither the judgment of a [court of] concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." [3] State-

1. **Res Judicata.** — A matter adjudged; a thing judicially acted upon or decided. Burr. L. Dict.

2. **Difficulty Lies in Application of Principles.** — Werlein *v.* New Orleans, 177 U. S. 390; Norton *v.* House of Mercy, (C. C. A.) 101 Fed. Rep. 382; Eastern Bldg., etc., Assoc. *v.* Welling, 116 Fed. Rep. 100; Stannard *v.* Hubbell, 123 N. Y. 520; House *v.* Lockwood, 137 N. Y. 259; Hart *v.* Bates, 17 S. Car. 35.

"**The Whole Philosophy of the Doctrine** of *res adjudicata* is summed up in the simple statement that a matter once decided is finally decided; and all the learning that has been bestowed, and all the rules that have been laid down, have been for the purpose of enforcing that one proposition." *Per* Brewer, J., in Smith *v.* Auld, 31 Kan. 262, *approved* McDowell *v.* Gibson, 58 Kan. 607.

All Instances Varying from the Doctrine are merely cases of exceptions which, depending on peculiar reasons or particular circumstances, are consistent with the acknowledgment of its truth generally. Waters *v.* Waters, 2 De G. & Sm. 591.

3. Rex *v.* Kingston, 20 How. St. Tr. 538, 2 Smith Lead. Cas. (8th ed.) 784. *Quoted* in Barrs *v.* Jackson, 1 Y. & C. Ch. 585, *reversed* on other grounds 1 Phil. 582; Coffey *v.* U. S., 116 U. S. 436; Spicer's Case, 5 Ct. Cl. 34; Tompkins *v.* Tompkins, 1 Story (U. S.) 547, 24 Fed. Cas. No. 14,091; Bradley *v.* Johnson, 49 Ga.

ments of the law of *res judicata* made since the Duchess of Kingston's Case have been couched in language substantially similar. The first of the different propositions laid down therein, particularly, has received frequent approval.[1] It has been adopted both by text writers and judicial tribunals, and has come to be recognized as a judicial axiom.[2]

2. Other Statements of the Law. — Unless reversed, or annulled on equitable or statutory grounds, in some proceeding or suit authorized by law for that purpose,[3] the judgment or decree of a court of competent jurisdiction, upon the merits, concludes the parties and privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action, either before the same or any other tribunal;[4] and further, any right, fact, or matter in issue and directly adjudicated upon, or necessarily involved in, the determi-

412; Lord *v.* Chadbourne, 42 Me. 429, 66 Am. Dec. 290; Offutt *v.* John, 8 Mo. 120, 40 Am. Dec. 125; Sherman *v.* Dilley, 3 Nev. 21; King *v.* Chase, 15 N. H. 9, 41 Am. Dec. 675; Jackson *v.* Wood, 3 Wend. (N. Y.) 27, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; Man *v.* Drexel, 2 Pa. St. 202; Hibshman *v.* Dulleban, 4 Watts (Pa.) 183; Hart *v.* Bates, 17 S. Car. 35; *Ex p.* Roberts, 19 S. Car. 150; Williams *v.* Williams, 63 Wis. 58, 53 Am. Rep. 253; Frame *v.* Thormann, 102 Wis. 653, *affirmed* 176 U. S. 350.

For Other Cases relating to the general principles of the law of *res judicata* than those cited in this subdivision, see the title ESTOPPEL, vol. 11, pp. 390, 391. See also the cases cited *infra*, this section, *Res Judicata and Estoppel.*

1. First Proposition in Duchess of Kingston's Case Approved — *England.* — Routledge *v.* Hislop, 2 El. & El. 549, 105 E. C. L. 549, 6 Jur. N. S. 398.

United States. — Aurora *v.* West, 7 Wall. (U. S.) 90; Soderberg *v.* Armstrong, 116 Fed. Rep. 709; Tyler Min. Co. *v.* Last Chance Min. Co., 7 U. S. App. 463.

Alabama. — Cannon *v.* Brame, 45 Ala. 262; Gilbreath *v.* Jones, 66 Ala 129.

Arkansas. — Peay *v.* Duncan, 20 Ark. 85.

Connecticut. — Bell *v.* Raymond, 18 Conn. 92.

Kentucky. — Hayden *v.* Boothe, 2 A. K. Marsh. (Ky.) 353.

Missouri. — Missouri Pac. R. Co. *v.* Levy, 17 Mo. App. 501.

Nevada. — McLeod *v.* Lee, 17 Nev. 103.

New Hampshire. — Claggett *v.* Simes, 25 N. H. 402.

New York. — White *v.* Coatsworth, 6 N. Y. 138; Gates *v.* Preston, 41 N. Y. 113; Stowell *v.* Chamerlain, 60 N. Y. 272, *affirming* 3 Thomp. & C. (N. Y.) 374; Lawrence *v.* Hun, 10 Wend. (N. Y.) 81, 25 Am. Dec. 539; Gardner *v.* Buckbee, 3 Cow. (N. Y.) 120, 15 Am. Dec. 256; Burt *v.* Sternburgh, 4 Cow. (N. Y.) 559, 15 Am. Dec. 402; Aldridge *v.* Walker, 73 Hun (N. Y.) 281; Harris *v.* Harris, 36 Barb. (N. Y.) 88, *reversed* on other grounds 26 N. Y. 433.

Oklahoma. — Pratt *v.* Ratliff, 10 Okla. 168.

Pennsylvania. — Marsh *v.* Pier, 4 Rawle (Pa.) 273, 26 Am. Dec. 131; Kilheffer *v.* Herr, 17 S. & R. (Pa.) 319, 17 Am. Dec. 658; Kelsey *v.* Murphy, 26 Pa. St. 78; Finley *v.* Hanbest, 30 Pa. St. 190; Schriver *v.* Eckenrode, 87 Pa. St. 213; Allen *v.* International Text Book Co., 201 Pa. St. 579.

South Carolina. — Starke *v.* Woodward, 1 Nott & M. (S. Car.) 329.

Wisconsin. — Emmons *v.* Dowe, 2 Wis. 322.

2. Gilbreath *v.* Jones, 66 Ala. 129.

3. See generally cases cited *infra*, this section, *Res Judicata and Collateral Attack.*

4. Judgment or Decree as a Bar — *England.* — Greathead *v.* Bromley, 7 T. R. 451; Lockyer *v.* Ferryman, 2 App. Cas. 519.

United States. — New Orleans *v.* Citizens Bank, 167 U. S. 371; Ball *v.* Trenholm, 45 Fed. Rep. 588; Casey *v.* Pennsylvania Asphalt Pav. Co., 109 Fed. Rep. 744, *affirmed* (C. C. A.) 114 Fed. Rep. 189.

Alabama. — Tankersly *v.* Pettis, 71 Ala. 179.

Arizona. — Reilly *v.* Perkins, (Ariz. 1899) 56 Pac. Rep. 734.

Florida. — Moore *v.* Felkel, 7 Fla. 44.

Illinois. — Stickney *v.* Goudy, 132 Ill. 213.

Kentucky. — Wallace *v.* Usher, 4 Bibb (Ky.) 508.

Louisiana. — Heroman *v.* Louisiana Deaf, etc., Institute, 34 La. Ann. 805.

Maine. — Walker *v.* Chase, 53 Me. 258.

Maryland. — Shafer *v.* Stonebraker, 4 Gill & J. (Md.) 346; Walsh *v.* Chesapeake, etc., Canal Co., 59 Md. 423.

Massachusetts. — Bigelow *v.* Winsor, 1 Gray (Mass.) 299; Foster *v.* Busteed, 100 Mass. 409; Jamaica Pond Aqueduct Corp. *v.* Chandler, 121 Mass. 3.

Michigan. — Sayers *v.* Auditor Gen., 124 Mich. 259, *followed* in Hanchett *v.* Auditor Gen., 124 Mich. 424.

Minnesota. — Wisconsin *v.* Torinus, 28 Minn. 175.

Mississippi. — Agnew *v.* McElroy, 10 Smed. & M. (Miss.) 552, 48 Am. Dec. 772; Perry *v.* Lewis, 49 Miss. 443.

Missouri. — McKinney *v.* Davis, 6 Mo. 501.

Nebraska. — Spear *v.* Tidball, 40 Neb. 107; Creighton *v.* Keith, 50 Neb. 810; Dillon *v.* Chicago, etc., R. Co., 58 Neb. 472.

New Hampshire. — King *v.* Chase, 15 N. H. 9, 41 Am. Dec. 675.

New York. — Reynolds *v.* Garner, 66 Barb. (N. Y.) 310.

North Carolina. — Brunhild *v.* Freeman, 80 N. Car. 212.

Pennsylvania. — Marsh *v.* Pier, 4 Rawle (Pa.) 273, 26 Am. Dec. 131; Cist *v.* Zeigler, 16 S. & R. (Pa.) 283, 16 Am. Dec. 573; Bolton *v.* Hey, 168 Pa. St. 418; Bell *v.* Allegheny County, 184 Pa. St. 296, 63 Am. St. Rep. 795; Devine's Estate, 199 Pa. St. 250.

South Carolina. — Manigault *v.* Holmes, Bailey Eq. (S. Car.) 283; Tate *v.* Hunter, 3 Strobh. Eq. (S. Car.) 136.

Vermont. — Hall *v.* Dana, 2 Aik. (Vt.) 382; Porter *v.* Gile, 47 Vt. 620.

Virginia. — Howison *v.* Weeden, 77 Va. 704.

nation of an action before a competent court in which a judgment or decree is rendered upon the merits cannot again be litigated between the parties and privies, whether the claim or demand, purpose, or subject-matter of the two suits be the same or not.[1] The doctrine of *res judicata* applies and treats the final determination of the action as speaking the infallible truth as

West Virginia. — Burner *v.* Hevener, 34 W. Va. 774, 26 Am. St. Rep. 948; Kinports *v.* Rawson, 36 W. Va. 237.

Wisconsin. — Dick *v.* Webster, 6 Wis. 481; Rosenow *v.* Gardner, 99 Wis. 358.

Statutory Declaration of Res Judicata. — Many of the codes define a judgment as "the final determination of the rights of the parties in an action" (see the title JUDGMENTS AND DECREES, vol. 17, p. 762). By such a provision the state declares the legal effect and consequence of a judgment; that it shall end the controversy as between the parties and end it forever. State *v.* Savage, (Neb. 1902) 90 N. W. Rep. 898, 91 N. W. Rep. 557.

Form and Measure of Relief. — Where the facts averred and relied on are substantially the same, the fact that a different form or measure of relief is asked in the subsequent action will not deprive parties of the protection of the prior findings and judgment in their favor. Green *v.* Bogue, 158 U. S. 478, *approved* National Foundry, etc., Works *v.* Oconto City Water Supply Co., (C. C. A.) 113 Fed. Rep. 793. To a similar effect see Broussard *v.* Broussard, 43 La. Ann. 921; McNeely *v.* Hyde, 46 La. Ann. 1083.

1. Adjudication upon Any Fact or Matter in Issue as Res Judicata — *England.* — Meadows *v.* Kingston, Ambl. 756; Langmead *v.* Maple, 18 C. B. N. S. 255, 114 E. C. L. 255, 11 Jur. N. S. 177; Waters *v.* Waters, 2 De G. & Sm. 591; Spencer *v.* Williams, L. R. 2 P. & D. 230.

United States. — U. S. Bank *v.* Beverly, 1 How. (U. S.) 134; New Orleans *v.* Citizens' Bank, 167 U. S. 371, *reversing* 54 Fed. Rep. 73; Southern Pac. R. Co. *v.* U. S., 168 U. S. 1; Mitchell *v.* Chicago First Nat. Bank, 180 U. S. 471; Southern Pac. R. Co. *v.* U. S., 183 U. S. 519, *reversing* (C. C. A.) 98 Fed. Rep. 27, 86 Fed. Rep. 962; Lander *v.* Mercantile Bank, 186 U. S. 458; Russell *v.* Lamb, 49 Fed. Rep. 770; Norton *v.* House of Mercy, (C. C. A.) 101 Fed. Rep. 384; Estill County *v.* Embry, (C. C. A.) 112 Fed. Rep. 882; Eastern Bldg., etc., Assoc. *v.* Welling, 116 Fed. Rep. 100, reversing Mercantile Nat. Bank *v.* Lander, 109 Fed. Rep. 21, *affirming* Mercantile Nat. Bank *v.* Hubbard, 98 Fed. Rep. 465; Ætna L. Ins. Co. *v.* Hamilton County, (C. C. A.) 117 Fed. Rep. 82; Murray *v.* Lovejoy, 2 Cliff. (U. S.) 191, 17 Fed. Cas. No. 9,963.

California. — Green *v.* Thornton, 130 Cal. 482.

Connecticut. — Betts *v.* Starr, 5 Conn. 550, 13 Am. Dec. 94.

Illinois. — Knowlton *v.* Hanbury, 117 Ill. 471; Umlauf *v.* Umlauf, 117 Ill. 580, 57 Am. Rep. 880; People *v.* Hill, 182 Ill. 425.

Indiana. — Campbell *v.* Cross, 39 Ind. 155; Parker *v.* Obenchain, 140 Ind. 211; Moore *v.* Horner, 146 Ind. 287.

Iowa. — Goodenow *v.* Litchfield, 59 Iowa 228; Hahn *v.* Miller, 68 Iowa 745; Watson *v.* Richardson, 110 Iowa 698; Madison *v.* Garfield Coal Co., 114 Iowa 56.

Kansas. — Whitaker *v.* Hawley, 30 Kan. 317; Smith *v.* Auld, 31 Kan. 262; Redden *v.* Metzger, 46 Kan. 285, 26 Am. St. Rep. 97.

Kentucky. — Cave *v.* Davis, 5 T. B. Mon. (Ky.) 392.

Maryland. — Whitehurst *v.* Rogers, 38 Md. 503; Trayhern *v.* Colburn, 66 Md. 277; Barrick *v.* Horner, 78 Md. 253, 44 Am. St. Rep. 283; Martin *v.* Evans, 85 Md. 8, 60 Am. St. Rep. 292; Johnson *v.* Stockham, 89 Md. 368; Tifel *v.* Jenkins, 95 Md. 665.

Massachusetts. — Baxter *v.* New England Marine Ins. Co., 6 Mass. 277, 4 Am. Dec. 125; Burke *v.* Miller, 4 Gray (Mass.) 114; Chamberlain *v.* Preble, 11 Allen (Mass.) 370; Burlen *v.* Shannon, 99 Mass. 200, 96 Am. Dec. 733; Stockwell *v.* Silloway, 113 Mass. 384; Sly *v.* Hunt, 159 Mass. 151, 38 Am. St. Rep. 403.

Missouri. — Hickerson *v.* Mexico, 58 Mo. 61; Chouteau *v.* Gibson, 76 Mo. 38; Missouri Pac. R. Co. *v.* Levy, 17 Mo. App. 501.

Nebraska. — State *v.* Savage, (Neb. 1902) 90 N. W. Rep. 898, 91 N. W. Rep. 557.

New Hampshire. — King *v.* Chase, 15 N. H. 9, 41 Am. Dec. 675; Lomas *v.* Hilliard, 60 N. H. 148.

New Jersey. — Phillips *v.* Pullen, 45 N. J. Eq. 830.

New York. — Hawley *v.* Mancius, 7 Johns. Ch. (N. Y.) 174; Doty *v.* Brown, 4 N. Y. 71, 53 Am. Dec. 350; White *v.* Coatsworth, 6 N. Y. 138; Castle *v.* Noyes, 14 N. Y. 329; Brown *v.* New York, 66 N. Y. 386, *affirming* 5 Daly (N. Y.) 481; Culross *v.* Gibbons, 130 N. Y. 447; House *v.* Lockwood, 137 N. Y. 259; Williams *v.* Barkley, 165 N. Y. 48; Matter of Nottingham, 88 Hun (N. Y.) 443; Bouchaud *v.* Dias, 3 Den. (N. Y.) 238; Hudson *v.* Smith, 39 N. Y. Super. Ct. 452; Harris *v.* Burdett, 43 N. Y. Super. Ct. 57, *affirmed* 76 N. Y. 582; Birckhead *v.* Brown, 5 Sandf. (N. Y.) 134.

North Carolina. — Armfield *v.* Moore, Busb. L. (44 N. Car.) 157; Gay *v.* Stancell, 76 N. Car. 369; Brunhild *v.* Freeman, 80 N. Car. 212.

Oklahoma. — Territory *v.* Hopkins, 9 Okla. 133.

Oregon. — Glenn *v.* Savage, 14 Oregon 567; Hall *v.* Zeller, 17 Oregon 381.

Pennsylvania. — Kilheffer *v.* Herr, 17 S. & R. (Pa.) 319, 17 Am. Dec. 658; Kerr *v.* Chess, 7 Watts (Pa.) 367; Orr *v.* Mercer County Mut. F. Ins. Co., 114 Pa. St. 387; Amrhein *v.* Quaker City Dye Works, 192 Pa. St. 253; McClelland *v.* Patterson, (Pa. 1886) 10 Atl. Rep. 475.

Vermont. — Pierson *v.* Catlin, 18 Vt. 77; Gilson *v.* Bingham, 43 Vt. 411, 5 Am. Rep. 289.

West Virginia. — Western Min., etc., Co. *v.* Virginia Cannel Coal Co., 10 W. Va. 250; Henry *v.* Davis, 13 W. Va. 230; Coville *v.* Gilman, 13 W. Va. 314; Corrothers *v.* Sargent, 20 W. Va. 356; McCoy *v.* McCoy, 29 W. Va. 794; State *v.* Irwin, 51 W. Va. 192.

Wisconsin. — Van Valkenburgh *v.* Mil-

to the rights of the parties as to the entire subject of the controversy, and such controversy and every part of it must stand irrevocably closed by such determination.[1]

3. Res Judicata and Estoppel — *a.* IN GENERAL. — The law of *res judicata* is frequently treated by writers and the courts as a branch of the law of estoppel, and both terms are used indiscriminately to indicate the force and effect of judgments and decrees.[2] But while estoppel has sometimes been defined as an admission or determination under circumstances of such solemnity that the law will not allow the fact so admitted or established to be afterwards drawn in question between the same parties or their privies, with a view to include *res judicata*,[3] the judgment of a court, especially when rendered against the parties who did not instigate the litigation, can hardly be said to be their act, within the usual and approved definitions;[4] and such treatment has been criticised as a confusing and erroneous misapplication of terms.[5]

waukee, 43 Wis. 574; Lawrence *v.* Milwaukee, 45 Wis. 306; Wolf River Lumber Co. *v.* Brown, 88 Wis. 638; Rosenow *v.* Gardner, 99 Wis. 358.

Facts Settled. — The rule of *res judicata* applies as well to facts settled and adjudicated as to causes of action. Whitaker *v.* Hawley, 30 Kan. 317; Redden *v.* Metzger, 46 Kan. 285, 26 Am. St. Rep. 97; Chicago, etc., R. Co. *v.* Anderson County, 47 Kan. 766.

If the Same Matter or Cause of Action has already been finally adjudicated on between the parties by a court of competent jurisdiction, the plaintiff has lost his right to put it in suit either before that or any other court. Langmead *v.* Maple, 18 C. B. N. S. 255, 114 E. C. L. 255, 11 Jur. N. S. 177.

Res Judicata and Judicial Admissions as Evidence. — Boileau *v.* Rutlin, 2 Exch. 665. See the title ESTOPPEL, vol. 11, p. 447 *et seq.*

Constitutional Provision Requiring Every Point to Be Considered and Passed Upon. — A constitutional provision making it the duty of the court to consider and decide every point fairly arising upon the record, and give its reasons therefor in writing, is merely directory, and matters essential to or involved in the judgment are *res judicata* although the record does not show that they were considered. Henry *v.* Davis, 13 W. Va. 230.

1. Foster *v.* Posson, 105 Wis. 99. To a similar effect, see Case *v.* Hoffman, 100 Wis. 314, *per* Marshall, J., *citing* Lathrop *v.* Knapp, 37 Wis. 312.

Commentators upon Res Judicata have said that it "renders white that which is black, and straight that which is crooked. *Facit excurvo rectum, ex albo nigrum.* No other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy." Jeter *v.* Hewitt, 22 How. (U. S.) 352.

However Numerous the Questions Involved in a Suit, if they were tried and decided, the renewal of litigation for any one of the same causes violates these cardinal principles of public policy, as much as if the suit presented but one single issue. Whitehurst *v.* Rogers, 38 Md. 503.

2. **Res Judicata as Estoppel.** — See, for example, Cheney *v.* Selman, 71 Ga. 384; Sawyer *v.* Woodbury, 7 Gray (Mass.) 499, 66 Am. Dec. 518; Reynolds *v.* Garner, 66 Barb. (N. Y.) 310; Armfield *v.* Moore, Busb. L. (44 N. Car.) 157; Durham Consol. Land, etc., Imp. Co. *v.* Guthrie, 123 N. Car. 185; Martin *v.* Ives, 17 S. & R. (Pa.) 364.

Judgments and Decisions upon Particular Facts or Matters. — The distinction is sometimes taken that the judgment is a bar to further proceedings upon the same cause of action, but the adjudication upon a particular fact or matter is an estoppel. Outram *v.* Morewood, 3 East 346; Spicer's Case, 5 Ct. Cl. 34; McWhorter *v.* Andrews, 53 Ark. 307; Caperton *v.* Schmidt, 26 Cal. 479, 85 Am. Dec. 187; Young *v.* Pritchard, 75 Me. 513; Jackson *v.* Wood, 3 Wend. (N. Y.) 27, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; Burt *v.* Sternburgh, 4 Cow. (N. Y.) 562; Birckhead *v.* Brown, 5 Sandf. (N. Y.) 134; Falls *v.* Gamble, 66 N. Car. 455; Hall *v.* Zeller, 17 Oregon 381; Gray *v.* Pingry, 17 Vt. 419, 44 Am. Dec. 345.

3. **Estoppel Defined to Include Res Judicata.** — Burlen *v.* Shannon, 99 Mass. 200, 96 Am. Dec. 733, *approved* Sly *v.* Hunt, 159 Mass. 151, 38 Am. St. Rep. 403, and Orr *v.* Mercer County Mut. F. Ins. Co., 114 Pa. St. 387.

There Are Legal and Equitable Estoppels; legal where the law estops a man to falsify a judicial act to which he is a party, and from which he has received a benefit. McPherson *v.* Cunliff, 11 S. & R. (Pa.) 427, 14 Am. Dec. 642.

4. **Usual and Approved Definitions of Estoppel.** — "An estoppel * * * happens where a man hath done some act or executed some deed which estops or precludes him from averring anything to the contrary." 3 Bl. Com. 308. To the same effect, see Steph. Pl. (Tyler's ed.) 204.

5. **Res Judicata and Estoppel Distinguished.** — Ball *v.* Trenholm, 45 Fed. Rep. 588 [*citing* Wells, Res. Adj., § 1]; Offutt *v.* John, 8 Mo. 120, 40 Am. Dec. 125; Horn *v.* Cole, 51 N. H. 287, 12 Am. Rep. 111; Kilheffer *v.* Herr, 17 S. & R. (Pa.) 319, 17 Am. Dec. 658; Marsh *v.* Pier, 4 Rawle (Pa.) 273, 26 Am. Dec. 131. See also Boileau *v.* Rutlin, 2 Exch. 665, 12 Jur. 899; Shafer *v.* Stonebraker, 4 Gill & J. (Md.) 345 [*cited* in Whitehurst *v.* Rogers, 38 Md. 503]; Cist *v.* Zeigler, 16 S. & R. (Pa.) 283, 16 Am. Dec. 573.

The rule of *res judicata* does not rest wholly on the narrow ground of a technical estoppel, nor on the presumption that the former judgment was right and just, but on the broad ground of public policy, that requires a limit

Res Judicata is a rule of universal law pervading every well-regulated system of jurisprudence, and is put upon two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the state that there should be an end to litigation — *interest republicæ ut sit finis litium;* the other, the hardship on the individual that he should be vexed twice for the same cause — *nemo debet bis vexari pro eadem causa.*[1] A contrary doctrine would subject the public peace and quiet to the

to litigation, a curb to the litigiousness of the obstinate litigant. Like the statute of limitations, it is a rule of rest. Sargent *v.* New Haven Steam Boat Co., 65 Conn. 116.

1. Res Judicata a Rule Founded on Public Policy and Necessity — Maxims — *England.* — Ferrer's Case, 6 Coke 7*a*, Cro. Eliz. 668; Kitchen *v.* Campbell, 3 Wils. C. Pl. 304, 2 W. Bl. 827; Schumann *v.* Weatherhead, 1 East 537; Marriott *v.* Hampton, 7 T. R. 265; Great Northern R. Co. *v.* Mossop, 17 C. B. 130, 84 E. C. L. 130; Commings *v.* Heard, L. R. 4 Q. B. 669; Brunsden *v.* Humphrey, 14 Q. B. D. 141, *reversing* on other grounds 11 Q. B. D. 712; *In re* May, 28 Ch. D. 516.

United States. — Jeter *v.* Hewitt, 22 How. (U. S.) 352; Washington, etc., Steam Packet Co. *v.* Sickles, 24 How. (U. S.) 333, 5 Wall. (U. S.) 580; U. S. *v.* Throckmorton, 98 U. S. 61; Union Mill, etc., Co. *v.* Dangberg, 81 Fed. Rep. 73; Fayerweather *v.* Ritch, (C. C. A.) 91 Fed. Rep. 721, *reversing* 89 Fed. Rep. 385; Spicer's Case, 5 Ct. Cl. 34.

Alabama. — Wyman *v.* Campbell, 6 Port. (Ala.) 219, 31 Am. Dec. 677; Davis *v.* Bedsole, 69 Ala. 362; Strang *v.* Moog, 72 Ala. 460.

California. — Sunkler *v.* McKenzie, 127 Cal. 554, 78 Am. St. Rep. 86; Bingham *v.* Kearney, 136 Cal. 175.

Colorado. — Denver *v.* Lobenstein, 3 Colo. 216.

Connecticut. — Burritt *v.* Belfy, 47 Conn. 323, 36 Am. Rep. 79.

Florida. — Lake *v.* Hancock, 38 Fla. 53, 56 Am. St. Rep. 159.

Illinois. — Hanna *v.* Read, 102 Ill. 596, 40 Am. Rep. 608.

Indiana. — Fischli *v.* Fischli, 1 Blackf. (Ind.) 360, 12 Am. Dec. 251; State *v.* Krug, 94 Ind. 366; Thomas *v.* Merry, 113 Ind. 83; Hoover *v.* Kilander, 135 Ind. 600.

Kentucky. — Allin *v.* Hall, 1 A. K. Marsh. (Ky.) 525; Hall *v.* Forman, 82 Ky. 505; Davis *v.* McCorkle, 14 Bush (Ky.) 746; Locke *v.* Com., (Ky. 1902) 69 S. W. Rep. 763, 24 Ky. L. Rep. 654.

Louisiana. — Slocomb *v.* De Lizardi, 21 La. Ann. 355, 99 Am. Dec. 740; Hoggatt *v.* Crandall, 39 La. Ann. 976; State *v.* McGuire, 40 La. Ann. 378.

Maryland. — Strike *v.* McDonald, 2 Har. & G (Md.) 191, 1 Bland (Md.) 57; Whitehurst *v.* Rogers, 38 Md. 503; Streeks *v.* Dyer, 39 Md. 424; Walsh *v.* Chesapeake, etc., Canal Co., 59 Md. 423.

Massachusetts. — Burlen *v.* Shannon, 99 Mass. 200, 96 Am. Dec. 733.

Missouri. — Moran *v.* Plankinton, 64 Mo. 337; Hope *v.* Blair, 105 Mo. 85, 24 Am. St. Rep. 366.

Nebraska. — Battle Creek Valley Bank *v.* Collins, (Neb. 1902) 90 N. W. Rep. 921.

Nevada. — McLeod *v.* Lee, 17 Nev. 103.

New Hampshire. — Claggett *v.* Simes, 25 N. H. 402.

New Jersey. — Putnam *v.* Clark, 34 N. J. Eq. 532.

New York. — Simpson *v.* Hart, 1 Johns. Ch. (N. Y.) 91, *reversed* on other grounds 14 Johns. (N. Y.) 63; Gelston *v.* Codwise, 1 Johns. Ch. (N. Y.) 189; King *v.* Baldwin, 17 Johns. (N. Y.) 385, 8 Am. Dec. 415; Le Guen *v.* Gouverneur, 1 Johns. Cas. (N. Y.) 436; Webb *v.* Buckelew, 82 N. Y. 555; Cluff *v.* Day, 141 N. Y. 580; Boller *v.* New York, 40 N. Y. Super. Ct. 523.

North Carolina. — Albertson *v.* Williams, 97 N. Car. 264; Farrar *v.* Staton, 101 N. Car. 78; Bear *v.* Brunswick County, 122 N. Car. 434, 65 Am. St. Rep. 711.

Ohio. — Bell *v.* McCulloch, 31 Ohio St. 397.

Pennsylvania. — Gilchrist *v.* Bale, 8 Watts (Pa.) 355, 34 Am. Dec. 469; Wilson *v.* Hamilton, 9 S. & R. (Pa.) 424; Garvin *v.* Dawson, 13 S. & R. (Pa.) 246; Man *v.* Drexel, 2 Pa. St. 202; Com. *v.* Shuman, 18 Pa. St. 343; Kelsey *v.* Murphy, 26 Pa. St. 78; Cleveland, etc., R. Co. *v.* Erie, 27 Pa. St. 380, 1 Grant Cas. (Pa.) 212; Gordinier's Appeal, 89 Pa. St. 528; Marsteller *v.* Marsteller, 132 Pa. St. 517, 19 Am. St. Rep. 604.

Rhode Island. — Curry *v.* Swett, 13 R. I. 476.

South Carolina. — Starke *v.* Woodward, 1 Nott & M. (S. Car.) 329; Pratt *v.* Weyman, 1 McCord Eq. (S. Car.) 156; Hart *v.* Bates, 17 S. Car. 35; *Ex p.* Roberts, 19 S. Car. 150.

Tennessee. — Ellis *v.* Staples, 9 Humph. (Tenn.) 238.

Texas. — Crane *v.* Blum, 56 Tex. 325.

Vermont. — Gray *v.* Pingry, 17 Vt. 419, 44 Am. Dec. 345; Dunham *v.* Downer, 31 Vt. 250.

Virginia. — Price *v.* Campbell, 5 Call (Va.) 115; Lancaster *v.* Wilson, 27 Gratt. (Va.) 624; Findlay *v.* Trigg, 83 Va. 539.

Wisconsin. — Pierce *v.* Kneeland, 9 Wis. 23.

See generally cases cited *supra*, this subdivision; and the title NOTICE OF PENDENCY AND LIS PENDENS, vol. 21, p. 601 *et seq.*

Maxim, Judicium (or Res Judicata) pro Veritate Accipitur, a judgment (or matter adjudged) is taken for the truth. Co. Litt. 39*a*, 168*a*, 236*b;* Barrs *v.* Jackson, 1 Y. & C. Ch. 585, *reversed* on other grounds 1 Phil. 582; Ralston *v.* Rowat, 1 Cl. & F. 424; Wallace *v.* Usher, 4 Bibb (Ky.) 508; Grivot *v.* Louisiana State Bank, 31 La. Ann. 467; State *v.* Orleans R. Co., 38 La. Ann. 312; Hoggatt *v.* Crandall, 39 La. Ann. 976; Police Jury *v.* Police Jury, 49 La. Ann. 1331.

The Doctrine Is an Old Axiom of the Law, dictated by wisdom and "sanctified by age," and is founded on the broad principle that it is to the interest of the public that there should be an end of litigation by the same parties and their privies over a subject once fully and fairly adjudicated. Martin *v.* Evans, 85 Md.

will or neglect of individuals, and prefer the gratification of a litigious disposition on the part of suitors to the preservation of the public tranquillity and happiness.[1]

b. ESTOPPEL BY JUDGMENT AND BY VERDICT — (1) *In General.* — The difference between the effect of a judgment as a bar to the prosecution of a second action upon the same claim or demand, and its effect where the subsequent action involves a different cause of action or claim, is often overlooked, with the result that the law is sometimes misapplied.[2] In an action upon the same claim or demand the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim, but also as to every matter which might and should have been litigated in the first suit; while in an action upon a different claim or demand only those facts or matters are conclusively established by the former adjudication which are essential to, or shown to be involved in, the judgment or decree rendered. These two phases of the subject are often denominated estoppel by judgment and estoppel by verdict respectively.[3]

8, 60 Am. St. Rep. 292, *citing* Warwick *v.* Underwood, 3 Head (Tenn.) 238, 75 Am. Dec. 767, *approved* Tifel *v.* Jenkins, 95 Md. 665.

"**The Very Object of Instituting Courts of Justice** is, that litigation should be decided, and decided finally. That has been felt by all jurists. It is long since a reason was assigned why judgments should be considered final, and should not be ripped up again, — *Ne lites sint immortales, dum litantes sunt mortales.* Human life is not long enough to allow of matters once disposed of being brought under discussion again; and for this reason it has always been considered a fundamental rule that, when a matter has once become *res judicata*, there shall be an end of question about it." *Per* Willes, J., in Great Northern R. Co. *v.* Mossop, 17 C. B. 130, 84 E. C. L. 130.

1. Marsh *v.* Pier, 4 Rawle (Pa.) 273, 26 Am. Dec. 131, *approved* Bell *v.* Allegheny County, 184 Pa. St. 296, 63 Am. St. Rep. 795.

"**It Is More Important** that an end should be put to litigation than that justice should be done in every case; the truth is, that owing to the inattention of parties and several other causes, exact justice can very seldom be done." *Per* Lord Redesdale, Ch., in Bateman *v.* Willoe, 1 Sch. & Lef. 201, *approved* Dunham *v.* Downer, 31 Vt. 250. To same effect Schumann *v.* Weatherhead, 1 East 537; Hall *v.* Forman, 82 Ky. 505; Claggett *v.* Simes, 25 N. H. 402.

2. Distinction Between Different Phases of Subject Often Overlooked. — Bell *v.* Raymond, 18 Conn. 92; Applegate *v.* Dowell, 15 Oregon 513.

The Estoppel. — It is not the fruit of the litigation that constitutes the estoppel, but the facts put in issue and found, upon which the recovery is based. Bazille *v.* Murray, 40 Minn. 48.

3. Estoppel by Judgment and by Verdict — *United States.* — Cromwell *v.* Sac County, 94 U. S. 351, 16 Am. L. Reg. N. S. 721; Wilson *v.* Deen, 121 U. S. 525; Bissell *v.* Spring Valley Tp., 124 U. S. 225; Roberts *v.* Northern Pac. R. Co., 158 U. S. 1; New Orleans *v.* Citizens' Bank, 167 U. S. 371; Southern Pac. R. Co. *v* U. S., 168 U. S. 1; Werlein *v.* New Orleans, 177 U. S. 390; The Tubal Cain, 9 Fed. Rep. 834; Sharon *v.* Hill, 26 Fed. Rep. 371; U. S. *v.* Schneider, 35 Fed. Rep. 107, *citing* Bigelow, Estop. (4th ed.) 84; David Bradley Mfg. Co. *v.* Eagle Mfg. Co., (C. C. A.) 57 Fed. Rep. 980; Fish Bros. Wagon Co. *v.* Fish Bros. Mfg. Co., (C. C. A.) 95 Fed. Rep. 457; Linton *v.* National L. Ins. Co., (C. C. A.) 104 Fed. Rep. 584; Eastern Bldg., etc., Assoc. *v.* Welling, 116 Fed. Rep. 100; Ætna L. Ins. Co. *v.* Hamilton County, (C. C. A.) 117 Fed. Rep. 82; Tyler Min. Co. *v.* Last Chance Min. Co., 7 U. S. App. 463.

California. — McDonald *v.* Bear River, etc., Water, etc., Co , 15 Cal. 145.

Illinois. — Hanna *v.* Read, 102 Ill. 596, 40 Am. Rep. 608; Tilley *v.* Bridges, 105 Ill. 336; Atty.-Gen. *v.* Chicago, etc., R. Co., 112 Ill. 520; Riverside Co. *v.* Townshend, 120 Ill. 9; Wright *v.* Griffey, 147 Ill. 496; Leopold *v.* Chicago, 150 Ill. 568; Markley *v.* People, 171 Ill. 260, 63 Am. St. Rep. 234; Chicago Theological Seminary *v.* People, 189 Ill. 439.

Indiana. — Kilander *v.* Hoover, 111 Ind. 10.

Kentucky. — Jones *v.* Commercial Bank, 78 Ky. 413; Hardwicke *v.* Young, (Ky. 1901) 62 S. W. Rep. 10.

Massachusetts. — Burlen *v.* Shannon, 99 Mass. 200, 96 Am. Dec. 733, *cited* Hawks *v.* Truesdell, 99 Mass. 557; Foye *v.* Patch, 132 Mass. 105.

Mississippi. — Adams *v.* Yazoo, etc., R. Co., 77 Miss. 266, *affirmed* 180 U. S. 1.

Nebraska. — Slater *v.* Skirving, 51 Neb. 108, 65 Am. St. Rep. 444.

New York. — Robinson *v.* New York, etc., R. Co., 64 Hun (N. Y.) 41.

Oregon. — Applegate *v.* Dowell, 15 Oregon 513; White *v.* Ladd, 41 Oregon 324.

Pennsylvania. — Philadelphia *v.* Ridge Ave. R. Co., 142 Pa. St. 484, 24 Am. St. Rep. 512; Morehouse *v.* Morehouse, 7 Pa. Super. Ct. 287, 42 W. N. C. (Pa.) 345.

South Dakota. — Howard *v.* Huron, 6 S. Dak. 189.

Vermont. — Hodges *v.* Eddy, 52 Vt. 434.

Wisconsin. — Grunert *v.* Spalding, 104 Wis. 193.

See *infra*, this title, V. *Matters Concluded.*

Where the Cause or Object of Two Actions is Different, though the matter or point in dispute is the same in both, a prior judgment is no bar to a subsequent action; but the verdict may be matter of evidence to prove such point in dispute. Betts *v.* Starr, 5 Conn. 550, 13 Am. Dec. 94.

(2) *Res Judicata and Stare Decisis.* — A statement often met with in discussions of the law of *res judicata* is, in effect, that the judgment operates between parties and privies as a conclusive adjudication of all questions, both of law and of fact, determined by the court;[1] and this is undoubtedly true of estoppel by judgment, where the former adjudication is not void, no matter how erroneous or irregular it may be.[2] But where the former adjudication, invoked as a bar or estoppel, is a decision on a point of law, as, for example, the construction or constitutionality of a statute, the law of *res judicata* trenches upon that of precedent or *stare decisis;*[3] and in at least two instances the authorities differ as to the proper line of demarcation between these two doctrines. On the one hand the law of *res judicata* has been held to apply to decisions on points of law, as well where the estoppel is by verdict as where it is by judgment;[4] and what is known as the "law of the case," that

Duchess of Kingston's Case. — This has been said to be the doctrine laid down in the Duchess of Kingston's case, discussed *supra*, this section, *Duchess of Kingston's Case.* Adams *v.* Yazoo, etc., R. Co., 77 Miss. 266, *affirmed* on other grounds 180 U. S. 1.

Character of Judgment Immaterial. — The fact that the judgment is one of a limited nature, as a judgment for damages, will not prevent its operation as an estoppel upon all questions the determination of which was essential to its rendition. Casler *v.* Shipman, 35 N. Y. 533.

Verdicts in Equity. — Burlen *v.* Shannon, 99 Mass. 200, 96 Am. Dec. 733.

1. Determination Both of Law and of Fact Res Judicata. — See Bigelow on Estoppel (4th ed.) 37; Beloit *v.* Morgan, 7 Wall. (U. S.) 619, *approved* National Marine Bank *v.* Heller, 94 Md. 213; St. Joseph Union Depot Co. *v.* Chicago, etc., R. Co., 89 Fed. Rep. 648; South, etc., R. Co. *v.* Henlein, 56 Ala. 368; State *v.* Brown, 64 Md. 199; Trayhern *v.* Colburn, 66 Md. 277; Nebraska L. & T. Co. *v.* Dorman, (Neb. 1903) 93 N. W. Rep. 1022; Pray *v.* Hegeman, 98 N. Y. 351; Lorillard *v.* Clyde, 122 N. Y. 41, 19 Am. St. Rep. 470; Hellebush *v.* Richter, 37 Ohio St. 222; Lawrence *v.* Milwaukee, 45 Wis. 306.

As Conversely Stated a judgment is conclusive upon the parties thereto only in respect of the grounds covered by it, and the law and facts necessary to uphold it. Woodgate *v.* Fleet, 44 N. Y. 1; Hardy *v.* Mills, 35 Wis. 141; Lathrop *v.* Knapp, 37 Wis. 307; Ressequie *v.* Byers, 52 Wis. 652.

Decisions by a Divided Court. — A judgment rendered by a mere majority is just as effective in all respects as if it were a unanimous decision. Every legal consequence, including that of *res judicata*, that belongs to any judgment follows a judgment so rendered, except that it has not the same authority as a precedent in analogous cases. Stanstead Election Case, 20 Can. Sup. Ct. 12; Washington Bridge Co. *v.* Stewart, 3 How. (U. S.) 413; Durant *v.* Essex Co., 7 Wall. (U. S.) 107, 101 U. S. 555; Leslie *v.* Urbana, 9 U. S. App. 578; Kolb *v.* Swann, 68 Md. 516; Durant *v.* Essex Co., 8 Allen (Mass.) 103, 85 Am. Dec. 685; Lyon *v.* Circuit Judge, 37 Mich. 378; People *v.* New York, 25 Wend. (N. Y.) 252, 35 Am. Dec. 669; Birckhead *v.* Brown, 5 Sandf. (N. Y.) 134; McAlister *v.* Hamilton, 61 S. Car. 6; Lathrop *v.* Knapp, 37 Wis. 307; Case *v.* Hoffman, 100 Wis. 314. *Contra*, by virtue of a constitutional provision, Const. W. Va., art. 8, § 4, *cited* Bruff *v.* Thompson, 31 W. Va. 16. See also the title STARE DECISIS.

2. Estoppel by Judgment Extends to Findings of Law as Well as of Fact. — See Van Kleeck *v.* Miller, 19 Nat. Bankr. Reg. 485, 28 Fed. Cas. No. 16,860; Covington First Nat. Bank *v.* Covington, 103 Fed. Rep. 523, *appeal dismissed* 185 U. S. 270; Eckert *v.* Binkley, 134 Ind. 614; Missouri, etc., R. Co. *v.* Labette County, 62 Kan. 550; McEntire *v.* Williamson, 63 Kan. 275; Chouteau *v.* Gibson, 76 Mo. 38; State *v.* Broach, (Neb. 1903) 94 N. W. Rep. 1016; Bolton *v.* Hey, 168 Pa. St. 418.

Assessments Payable in Instalments — Validity of Ordinance. — Markley *v.* People, 171 Ill. 260, 63 Am. St. Rep. 234; Gross *v.* People, 193 Ill. 260, *citing* Hurd. Stat. Ill. 1899, p. 376.

Void and Voidable Judgments and Res Judicata. — See *infra*, this section, *Res Judicata and Collateral Attack.*

3. General Distinction Between Res Judicata and Stare Decisis. — Denney *v.* State, 144 Ind. 537, *citing* 5 Chicago L. J. 863; Matter of Laudy, 161 N. Y. 429, *reversing* 31 N. Y. App. Div. 630; Moore *v.* Albany, 98 N. Y. 396; McGill *v.* Holmes, 54 N. Y. App. Div. 630, *affirmed* without opinion 168 N. Y. 647; Stacy *v.* Vermont Cent. R. Co., 32 Vt. 551; Wilkes *v.* Davies, 8 Wash. 112, opinion of Hoyt, J. See also Freeman *v.* Clay, 2 U. S. App. 254; Loague *v.* Taxing Dist., 36 Fed. Rep. 149; title STARE DECISIS; articles "The Principle of Stare Decisis," 25 Am. L. Reg. N. S. 745; "Stare Decisis," 14 Am. L. Rev. 609; "Stare Decisis," 52 Alb. L. J. 73.

There Is a Clear Distinction between a decree and the law declared by the court which produces the decree, and though a person may not be bound by a decree as a party or privy, he may be bound, so to speak, by the law which produces that decree. That is to say, his rights are affected, as all other citizens' rights are affected, by the declaration of the law made by the courts in the due administration of justice. Newark City Nat. Bank *v.* Crane, 60 N. J. Eq. 121.

4. Estoppel by Verdict Extends to Findings of Law as Well as of Fact. — New Orleans *v.* Citizens' Bank, 167 U. S. 371, *reversing* 54 Fed. Rep. 73, the chief justice and two justices *dissenting;* Kentucky Bank *v.* Stone, 88 Fed. Rep. 383, *affirmed* without opinion by a divided court, 174 U. S. 799; Southern Minn, etc., Co. *v.* St. Paul, etc., R. Co., 55 Fed. Rep. 690; Goodenow *v.* Litchfield, 59 Iowa 226, two judges *dissenting;*

is, the effect and conclusiveness of a former decision, on appeal in the subsequent proceedings in the same cause, has been generally put upon the ground of *res judicata,*[1] without any distinction being taken between a decision which is final so far as it goes, as where it determines an appeal taken from an interlocutory order or sends back a cause merely for some ancillary purpose, as an accounting, and a decision which remands a cause generally for a trial *de novo.*[2] On the other hand, the law of *stare decisis* and not that of *res judicata* has been held to apply to findings on questions of law, where the estoppel is by verdict, or the doctrine invoked is that of the " law of the case " and the decision on the former appeal did not have the requisites of a final judgment; and it would seem with better reason.[3]

Keokuk Gaslight, etc., Co. *v.* Keokuk, 80 Iowa 137; Baltimore, etc., R. Co. *v.* Wicomico County, 93 Md. 113; Hancock *v.* Singer Mfg. Co., 62 N. J. L. 289; Birckhead *v.* Brown, 5 Sandf. (N. Y.) 134; Grunert *v.* Spalding, 104 Wis. 193, *criticising* Boyd *v.* Alabama, 94 U. S. 645. See also Keokuk, etc., R. Co. *v.* Missouri, 152 U. S. 301, *affirming* 99 Mo. 30; Lander *v.* Mercantile Bank, 186 U. S. 458, *reversing sub nom.* Mercantile Nat. Bank *v.* Hubbard, (C. C. A.) 105 Fed. Rep. 809, *affirming* 98 Fed. Rep. 465; People *v.* Holladay, 93 Cal. 241; Chicago Theological Seminary *v.* People, 189 Ill. 439.

1. Res Judicata Basis of Doctrine of " Law of the Case." — When the law governing a case has been once declared by the opinion of an appellate court on a direct appeal or writ of error, such opinion, on the retrial of the same case, upon the same state of facts, is higher authority than the rule of *stare decisis;* it is generally regarded as *res judicata,* so far as the particular action is concerned. Lee *v.* Stahl, 13 Colo. 174. To the same effect Union Gold Min. Co. *v.* Rocky Mt. Nat. Bank, 2 Colo. 248, opinion of Bedford, J.; Phelan *v.* San Francisco, 20 Cal. 39; Leese *v.* Clark, 20 Cal. 388; Wilkes *v.* Davies, 8 Wash. 112, *citing* Dugan *v.* Hollins, 13 Md. 149, Hoyt, J., *dissenting.*

For a full treatment of the doctrine of the " law of the case " and citation of decisions, see the title STARE DECISIS. See also the title MANDATE AND PROCEEDINGS THEREON, ENCYC. OF PL. AND PR., vol. 13, p. 835.

In Maryland it is provided by statute that where further proceedings are necessary to do substantial justice between the parties to an equity cause, the cause may be remanded for that purpose without an affirmance or reversal of the order or decree appealed from; in which event the order or decree of the Court of Appeals shall be conclusive on all points finally decided thereby. Pub. Gen. Laws Md., art. 5, § 36; Young *v.* Frost, 1 Md. 377; Thomas *v.* Doub, 1 Md. 252; Eyler *v.* Hoover, 8 Md. 1; Dennis *v.* Dennis, 15 Md. 149; Williams *v.* Banks, 19 Md. 22; Johnson *v.* Robertson, 34 Md. 165.

2. Finality of Judgments. — Hastings *v.* Foxworthy, 45 Neb. 676. See for illustrations of judgments having the character of final judgments, the cause being remanded for some further proceedings, Wilson *v.* Wilson, 5 H. L. Cas. 40, *following* decision in 1 H. L. Cas. 538, which *affirmed* 14 Sim. 405; Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 1, *affirming* 77 Miss. 315; Strike *v.* McDonald, 2 Har. & G. (Md.) 191, 1 Bland (Md.) 57; McClellan *v.* Crook, 7 Gill (Md.) 333; Union Trust Co. *v.* Atchison, etc., R. Co., 8 N. Mex. 159; Cralle *v.* Cralle, 84 Va. 198; Mowry *v.* Baraboo First Nat. Bank, 66 Wis. 539.

Status of References Had Prior to Appeal. — McCurdy *v.* Middleton, 90 Ala. 99; Pinneo *v.* Goodspeed, 120 Ill. 524.

3. Estoppel by Verdict. — Bigelow, Estoppel (4th ed.) 95.

United States. — Mercantile Nat. Bank *v.* Lander, 109 Fed. Rep. 21; Union, etc., Bank *v.* Memphis, (C. C. A.) 111 Fed. Rep. 561.

Alabama. — Boyd *v.* State, 53 Ala. 601, Brickell, C. J., *dissenting, affirmed* 94 U. S. 645.

Iowa. — Davenport *v.* Chicago, etc., R. Co., 38 Iowa 633, Cole, J., *dissenting.*

Kentucky. — Newport *v.* Com., 106 Ky. 434, *approved* Negley *v.* Henderson, (Ky. 1900) 59 S. W. Rep. 19, 22 Ky. L. Rep. 912; Bell County Coke, etc., Co. *v.* Pineville, (Ky. 1901) 64 S. W. Rep. 525, 23 Ky. L. Rep. 933, and Louisville Bridge Co. *v.* Louisville, (Ky. 1901) 65 S. W. Rep. 814, 23 Ky. L. Rep. 1655.

Louisiana. — State *v.* American Sugar Refining Co., 108 La. 603.

Michigan. — Michigan Southern, etc., R. Co. *v.* Auditor-Gen., 9 Mich. 448; Lake Shore, etc., R. Co. *v.* People, 46 Mich. 193.

Mississippi. — Adams *v.* Yazoo, etc., R. Co., 77 Miss. 266, *affirmed* on other grounds 180 U. S. 1; Yazoo, etc., R. Co. *v.* Adams, (Miss. 1902) 32 So. Rep. 937.

Nebraska. — State *v.* Savage, (Neb. 1902) 91 N. W. Rep. 557; State *v.* Broach, (Neb. 1903) 94 N. W. Rep. 1016.

New Jersey. — Bernard *v.* Hoboken, 27 N. J. L. 412; Water Com'rs *v.* Cramer, 61 N. J. L. 270, 68 Am. St. Rep. 707.

New York. — Carter *v.* Bloodgood, 3 Sandf. Ch. (N. Y.) 293.

Tennessee. — Union, etc., Bank *v.* Memphis, 101 Tenn. 154, *citing* State *v.* Bank of Commerce, 95 Tenn. 231.

See also Covington First Nat. Bank *v.* Covington, 103 Fed. Rep. 523, *appeal dismissed* 185 U. S 270; Buchanan *v.* Knoxville, etc., R. Co., (C. C. A.) 71 Fed. Rep. 324; *dissenting* opinion of Adams, J., in Goodenow *v.* Litchfield, 59 Iowa 226; Gittings *v.* Baltimore, 95 Md. 419; Hall *v.* Godwyn, 4 McCord L. (S. Car.) 443; Justice *v.* Com., 81 Va. 209.

In *Louisiana* estoppel by verdict is not within the law of *res judicata,* which is defined by the Civil Code as follows: " The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality." 2 Merrick Civil

c. ESTOPPEL AGAINST ESTOPPEL. — Where there have been two former actions in which the claim or demand, fact or matter sought to be relitigated has been decided contrarily, the rule that where there is an estoppel against an estoppel it "setteth the matter at large"[1] has no application, at least where there was opportunity to set up the first judgment as a bar or estoppel in the other action; but it is held that such failure or neglect constitutes a waiver and the last former adjudication in point of time will control.[2]

4. Res Judicata and Merger. — The doctrine of merger whereby a cause of action reduced to judgment is changed into matter of record, which being of a higher nature absorbs or merges it so that it cannot be made the basis of another suit, while much less extensive in scope than *res judicata*, has the same effect so far as it goes and is included within it;[3] except in the instances of judgments against one of several joint contractors or joint wrongdoers, when, in some jurisdictions, the effect of the merger extends also to persons not parties or privies.[4]

5. Res Judicata and Collateral Attack — *a.* IN GENERAL. — An attack made upon a judgment or decree set up as *res judicata* on the ground that it is erroneous or invalid is necessarily a collateral attack, concerning which there are certain well-settled rules of law.[5] Where a court has jurisdiction over the person and the subject-matter, its decision can only be reversed, annulled, or set aside in some direct proceeding authorized by law for the purpose,[6] in

Code La., art. 2286; State *v.* American Sugar Refining Co., 108 La. 603. See also Carré *v.* New Orleans, 41 La. Ann. 996.

Law of the Case. — Bird *v.* Sellers, 122 Mo. 23; Hastings *v.* Foxworthy, 45 Neb. 676; Cluff *v.* Day, 141 N. Y. 580; Bynum *v.* Apperson, 9 Heisk. (Tenn.) 632; Bomar *v.* Parker, 68 Tex. 435. See also Matter of Laudy, 161 N. Y. 429, *reversing* 31 N. Y. App. Div. 630; Aubrey *v.* Almy, 4 Ohio St. 524; Case *v.* Hoffman, 100 Wis. 314, two judges *dissenting*.

In *Alabama* this view of the law is declared by statute. Civil Code Ala., § 3840; Moulton *v.* Reid, 54 Ala. 320; Stoudenmire *v.* De Bardelaben, 85 Ala. 85; National Commercial Bank *v.* McDonnell, 92 Ala. 387; McQueen *v.* Whetstone, 127 Ala. 417.

1. See the title ESTOPPEL, vol. 11, p. 392.

2. Estoppel Against Estoppel. — Bissell *v.* Henshaw, 1 Sawy. (U. S.) 553, 3 Fed. Cas. No. 1,447, *affirmed* 18 Wall. (U. S.) 255; Semple *v.* Wright, 32 Cal. 659, *followed* Semple *v.* Ware, 42 Cal. 619, and Hagar *v.* Spect, 48 Cal. 406; Chicago Theological Seminary *v.* People, 189 Ill. 439; Cooley *v.* Brayton, 16 Iowa 10; Bateman *v.* Grand Rapids, etc., R. Co., 96 Mich. 441; Shaw *v.* Broadbent, 129 N. Y. 114, *citing* Mersereau *v.* Pearsall, 19 N. Y. 108.

3. Res Judicata and Merger. — See the title MERGER, vol. 20, pp. 599, 600; Buckland *v.* Johnson, 15 C. B. 145, 80 E. C. L. 145; Lockyer *v.* Ferryman, 2 App. Cas. 519; Ries *v.* Rowland, 11 Fed. Rep. 657; Wilkinson *v.* Culver, 25 Fed. Rep. 639; Ferrall *v.* Bradford, 2 Fla. 508, 50 Am. Dec. 293; Pressler *v.* Turner, 57 Ind. 56; White *v.* Philbrick, 5 Me. 147, 17 Am. Dec. 214; Wisconsin *v.* Torinus, 28 Minn. 175; Oil Well Supply Co. *v.* Koen, 64 Ohio St. 422; Rudolph *v.* Sturgis, 17 Montg. Co. Rep. (Pa.) 13; Gibson *v.* Hale, 57 Tex. 405.

To Sustain a Plea of Res Judicata either an actual merger or proof that the same point has already been decided between the same parties must be shown. Nelson *v.* Couch, 15 C. B. N. S. 100, 109 E. C. L. 100.

4. See *infra*, this title, IV. *Persons Concluded.*

5. Collateral Attack and Res Judicata. — See Elliott *v.* Peirsol, 1 Pet. (U. S.) 340; Thompson *v.* Tolmie, 2 Pet. (U. S.) 157; Atkinson *v.* Purdy, Crabbe (U. S.) 551, 2 Fed. Cas. No. 616; Beauregard *v.* New Orleans, 18 How. (U. S.) 497; Swiggart *v.* Harber, 5 Ill. 364, 39 Am. Dec. 418; Cockey *v.* Cole, 28 Md. 276, 92 Am. Dec. 683; Bear *v.* Brunswick County, 122 N. Car. 434, 65 Am. St. Rep. 711; Stafford *v.* Gallops, 123 N. Car. 19, 68 Am. St. Rep. 815; *In re* Christiansen, 17 Utah 412; Porter *v.* Gile, 47 Vt. 620. See generally for collateral attack on judgments and decrees, titles JUDGMENTS AND DECREES, vol. 17, p. 848 *et seq.*; JURISDICTION, vol. 17, p. 1039.

6. Direct Attack, Equitable or Statutory Relief, and Res Judicata — *England.* — Bateman *v.* Willoe, 1 Sch. & Lef. 201; Waters *v.* Waters, 2 De G. & Sm. 591.

United States. — U. S. *v.* Throckmorton, 98 U. S. 61, *affirming* 4 Sawy. (U. S.) 42, 25 Fed. Cas. No. 15,121.

Iowa. — Geyer *v.* Douglass, 85 Iowa 93; Fulliam *v.* Drake, 105 Iowa 615.

Kentucky. — Tharp *v.* Cotton, 7 B. Mon. (Ky.) 636; Breckenridge *v.* Ormsby, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71; Sanders *v.* Gatewood, 5 J. J. Marsh. (Ky.) 327.

Maryland. — Strike *v.* McDonald, 2 Har. & G. (Md.) 191, 1 Bland (Md.) 57.

Nebraska. — Chase *v.* Miles, 43 Neb. 686; Dillon *v.* Chicago, etc., R. Co., 58 Neb. 472.

New Hampshire. — Hollister *v.* Abbott, 31 N. H. 442, 64 Am. Dec. 342.

New York. — Simpson *v.* Hart, 1 Johns. Ch. (N. Y.) 91, *reversed* on other grounds 14 Johns. (N. Y.) 63; Anderson *v.* Roberts, 18 Johns. (N. Y.) 516, 9 Am. Dec. 235.

Oklahoma. — Pratt *v.* Ratliff, 10 Okla. 168.

South Carolina. — Tate *v.* Hunter, 3 Strobh. Eq. (S. Car.) 136.

Vermont. — Dunham *v.* Downer, 31 Vt. 250.

West Virginia. — Sayre *v.* Harpold, 33 W. Va. 553.

which, of course, the judgment or decree cannot be set up as *res judicata*, otherwise the existence of the judgment would be at one and the same time the foundation and the destruction of the right of action;[1] and not collaterally. However erroneous or irregular it may be, it is nevertheless *res judicata* between parties and privies.[2] If, however, the court acted without authority

For a discussion of the subject of direct attack upon judgments or decrees and proceedings to annul or set them aside on equitable or statutory grounds, see the titles JUDGMENTS AND DECREES, vol. 17, pp. 808 *et seq.*; 850 *et seq.*; INJUNCTIONS, vol. 16, pp. 374 *et seq.*; JUDGMENTS, ENCYC. OF PL. AND PR., vol. 11, pp. 1168 *et seq.*

Proceedings in Execution of Judgments. — On proceedings in an action after judgment, relating to its execution, the judgment is conclusive and cannot be annulled or altered. Jackson *v.* Maner, 95 Ga. 702; Anderson's Succession, 33 La. Ann. 581; Gerrish *v.* Pope, 39 La. Ann. 517; Schulhoefer *v.* New Orleans, 40 La. Ann. 512; Campbell *v.* Western Electric Co., 113 Mich. 333; Peters *v.* Youngs, 122 Mich. 484; Henderson *v.* Moss, 82 Tex. 69. Otherwise in chancery where it is sought to carry a decree into execution by an original bill. 2 Daniell Ch. Pl. & Pr. (6th Am. ed.) 1586; Gay *v.* Parpart, 106 U. S. 679; Lancaster *v.* Snow, 184 Ill. 534.

Relief Against Judgments by Audita Querela. — See the title AUDITA QUERELA, ENCYC. OF PL. AND PR., vol. 3, p. 113; Matthews *v.* Robinson, 20 Ala. 130; Shackleford *v.* Cunningham, 41 Ala. 203.

Newly Discovered Evidence. — A judgment or decree is none the less *res judicata* because of newly discovered evidence which might change the result. Advantage of such evidence can only be taken in a direct proceeding, and not by a new action for the same cause. *In re* May, 28 Ch. D. 516; Quirk *v.* Rooney, 130 Cal. 505; Gusman *v.* De Poret, 33 La. Ann. 333; Police Jury *v.* Police Jury, 49 La. Ann. 1331; Wisconsin *v.* Torinus, 28 Minn. 175. See also Armfield *v.* Moore, Busb. L. (41 N. Car.) 157.

Jurisdiction of United States Courts. — Des Moines Nav., etc., Co. *v.* Iowa Homestead Co., 123 U. S. 552, *reversing* 63 Iowa 285; Dowell *v.* Applegate, 152 U. S. 327; Reed *v.* Vaughan, 15 Mo. 137, 55 Am. Dec. 133; Levey *v.* Norton, 10 Pa. Co. Ct. 278. See the title UNITED STATES COURTS.

Jurisdiction of Inferior Courts. — See the title JURISDICTION, vol. 17, pp. 1082 *et seq.*; Pease *v.* Chaytor, 3 B. & S. 620 113 E. C. L. 620, 9 Jur. N. S. 664.

Presumption of Jurisdiction. — See the title JURISDICTION, vol. 17, pp. 1073 *et seq.*

1. Judgment or Decree Not Res Judicata in Direct Proceeding to Reverse, Annul, or Set It Aside. — Edwards *v.* Edwards, 29 La. Ann. 597; Grivot *v.* Louisiana State Bank, 31 La. Ann. 467; Davidson *v.* New Orleans, 32 La. Ann. 1245; Heroman *v.* Louisiana Deaf, etc., Institute, 34 La. Ann. 805; Hoggatt *v.* Crandall, 39 La. Ann. 976; Schweitzer *v.* Bonn, 55 N. J. Eq. 107; Blank *v.* Blank, 107 N. Y. 91. See also Ellis *v.* Soper, 111 Iowa 631; Hanna *v.* Read, 102 Ill. 596, 40 Am Rep. 608; Atty.-Gen. *v.* Chicago, etc., R. Co., 112 Ill. 520; Thomas *v.* Merry, 113 Ind. 83.

2. Erroneous or Irregular Judgments Res Judicata — *England.* — Ralston *v.* Rowat, 1 Cl. & F. 424; Reg. *v.* Haughton, 1 El. & Bl. 501, 72 E. C. L. 501; Clanmorris *v.* Clanmorris, 14 Ir. Ch. 420.

United States. — Voorhees *v.* Jackson, 10 Pet. (U. S.) 449; Case *v.* Beauregard, 101 U. S. 688; Wilson *v.* Deen, 121 U. S. 525, Adams *v.* Crittenden, 133 U. S. 296; New Orleans *v.* Citizens' Bank, 167 U. S. 371; Billing *v.* Gilmer, (C. C. A.) 60 Fed. Rep. 332; Union Mill, etc., Co. *v.* Dangberg, 81 Fed. Rep. 73; Fayerweather *v.* Ritch, (C. C. A.) 91 Fed. Rep. 721, *reversing* 89 Fed. Rep. 385; Norton *v.* House of Mercy, (C. C. A.) 101 Fed. Rep. 382; Warburton *v.* Aken, 1 McLean (U. S.) 460, 29 Fed. Cas. No. 17,143; Claflin *v.* Fletcher, 10 Biss. (U. S.) 281.

Alabama. — Wyman *v.* Campbell, 6 Port. (Ala.) 219, 31 Am. Dec. 677; Tankersly *v.* Pettis, 71 Ala. 179; Penny *v.* British, etc., Mortg. Co., 132 Ala. 357.

California. — Gray *v.* Dougherty, 25 Cal. 266; Wolverton *v.* Baker, 86 Cal. 591; People *v.* Holladay, 93 Cal. 241, 27 Am. St. Rep. 186; Keech *v.* Beatty, 127 Cal. 177.

Colorado. — Cochrane *v.* Parker, 12 Colo. App. 169; Smith *v.* Schlink, 15 Colo. App. 325.

Delaware. — Solomon *v.* Loper, 4 Harr. (Del.) 187.

Florida. — Thornton *v.* Eppes, 6 Fla. 546.

Georgia. — Kenan *v.* Miller, 2 Ga. 325; Rodgers *v.* Evans, 8 Ga. 143, 52 Am. Dec. 390; Crutchfield *v.* State, 24 Ga. 335; Russel *v.* Slaton, 38 Ga. 195; Grubb *v.* Kolb, 55 Ga. 630; Girardey *v.* Bessman, 77 Ga. 483; Pritchett *v.* Bartow County, 93 Ga. 736.

Illinois. — Graceland Cemetery Co. *v.* People, 92 Ill. 619; Equitable Trust Co. *v.* Fisher, 106 Ill. 189; Jenkins *v.* International Bank, 111 Ill. 462; Millard *v.* Marmon, 116 Ill. 649; Culver *v.* Phelps, 130 Ill. 217; Stoff *v.* McGinn, 178 Ill. 46; Mulligan *v.* Lambe, 178 Ill. 130; Taylor *v.* Seiter, 100 Ill. App. 643, *affirmed* 199 Ill. 555; Anderson *v.* West Chicago St. R. Co., 200 Ill. 329, *affirming* 102 Ill. App. 310.

Indiana. — State *v.* Krug, 94 Ind. 366; Parker *v.* Wright, 62 Ind. 398; Farrar *v.* Clark, 97 Ind. 447; Phillips *v.* Lewis, 109 Ind. 62; Ballew *v.* Roler, 124 Ind. 557; Thomas *v.* Thompson, 149 Ind. 391; Bruce *v.* Osgood, 154 Ind. 375; Hord *v.* Bradbury, 156 Ind. 20.

Iowa. — Webster *v.* Reid, 1 Morr. (Iowa) 467; Hart *v.* Jewett, 11 Iowa 276.

Kansas. — Santa Fe Bank *v.* Haskell County Bank, 51 Kan. 50.

Kentucky. — Wallace *v.* Usher, 4 Bibb (Ky.) 508; Com. *v.* Louisville Water Co., (Ky. 1896) 37 S. W. Rep. 576; Murrell *v.* Citizens' Sav. Bank, (Ky. 1897) 41 S. W. Rep. 564; Holliday *v.* Fields, (Ky. 1902) 68 S. W. Rep. 624; Hurst *v.* Combs (Ky. 1890) 14 S. W. Rep. 378.

Louisiana. — Fluker *v.* Herbert, 27 La. Ann. 284; Grivot *v.* Louisiana State Bank, 31 La. Ann. 467; Anderson's Succession, 33 La. Ann. 581; Heroman *v.* Louisiana Deaf, etc., Insti-

in the premises, its decision is not merely voidable, but void, affords no protection to those claiming or acting under it, and cannot be successfully set up as *res judicata* against objection, whether in a suit upon the same or a different cause of action.[1]

tute, 34 La. Ann. 805; State *v.* Judge, 35 La. Ann. 214; State *v.* McGuire, 40 La. Ann. 378; Schulhoefer *v.* New Orleans, 40 La. Ann. 512; Singer *v.* McGuire, 40 La. Ann. 638; Police Jury *v.* Police Jury, 49 La. Ann. 1331, *citing* State *v.* Orleans R. Co., 38 La. Ann. 312.

Maryland. — Beall *v.* Pearre, 12 Md. 550; Groome *v.* Lewis, 23 Md. 137; Cone *v.* East Baltimore Permanent Land, etc., Soc., 40 Md. 380; State *v.* Ramsburg, 43 Md. 325; Trayhern *v.* Colburn, 66 Md. 277; Barrick *v.* Horner, 78 Md. 253, 44 Am. St. Rep. 283.

Massachusetts. — Smith *v.* Whiting, 11 Mass. 445; Chamberlain *v.* Preble, 11 Allen (Mass.) 370.

Michigan. — Town *v.* Smith, 14 Mich. 348; Carr *v.* Brick, 113 Mich. 664.

Mississippi. — Agnew *v.* McElroy, 10 Smed. & M. (Miss.) 552, 48 Am. Dec. 772; Wall *v.* Wall, 28 Miss. 409.

Missouri. — Wickersham *v.* Whedon, 33 Mo. 361; Hendrickson *v.* St. Louis, etc., R. Co., 34 Mo. 188, 84 Am. Dec. 76; Chouteau *v.* Gibson, 76 Mo. 38; Hope *v.* Blair, 105 Mo. 85, 24 Am. St. Rep. 366.

Nevada. — Gulling *v.* Washoe County Bank, 24 Nev. 477.

New Jersey. — Manley *v.* Mickle, 53 N. J. Eq. 155, *affirming* 52 N. J. Eq. 712.

New York. — Onondaga County *v.* Briggs, 2 Den. (N. Y.) 26; Gregory *v.* Burrall, 2 Edw. (N. Y.) 418; Grant *v.* Button, 14 Johns. (N. Y.) 377; Brintnall *v.* Foster, 7 Wend. (N. Y.) 103; Collins *v.* Bennett, 46 N. Y. 490; Steinbach *v.* Relief F. Ins. Co., 77 N. Y. 498, 33 Am. Rep. 655; Livingston *v.* Tucker, 107 N. Y. 549; Lorillard *v.* Clyde, 122 N. Y. 41, 19 Am. St. Rep. 470; Colburn *v.* Woodworth, 31 Barb. (N. Y.) 381; Bancroft *v.* Winspear, 44 Barb. (N. Y.) 209; Birckhead *v.* Brown, 5 Sandf. (N. Y.) 134; Yonkers, etc., F. Ins. Co. *v.* Bishop, 1 Daly (N. Y.) 449; Post *v.* Haight, (Supm. Ct. Spec. T.) 2 How. Pr. (N. Y.) 32; Standfast *v.* Crotty, (N. Y. City Ct. Gen. T.) 13 N. Y. Supp. 584.

North Carolina. — Winslow *v.* Stokes, 3 Jones L. (48 N. Car.) 285, 67 Am. Dec. 242; Ladd *v.* Byrd, 113 N. Car. 466.

Ohio. — Berry *v.* Greenfield, Wright (Ohio) 348; Weyer *v.* Zane, 3 Ohio 305; Moore *v.* Robison, 6 Ohio St. 302; La Grange *v.* Ward, 11 Ohio 258; Hellebush *v.* Richter, 37 Ohio St. 222.

Oregon. — Nicklin *v.* Hobin, 13 Oregon 406; Crabill *v.* Crabill, 22 Oregon 588

Pennsylvania. — Marsteller *v.* Marsteller, 132 Pa. St. 517, 19 Am. St. Rep. 604; Haneman *v.* Pile, 161 Pa. St. 599; McClelland *v.* Patterson, (Pa. 1886) 10 Atl. Rep. 475.

South Carolina. — State *v.* Deliesseline, 1 McCord L. (S. Car.) 52; Crenshaw *v.* Julian, 26 S. Car. 283, 4 Am. St. Rep. 719.

Tennessee. — Kelley *v.* Mize, 3 Sneed (Tenn.) 59; McNairy *v.* Nashville, 2 Baxt. (Tenn.) 251.

Texas. — Hopkins *v.* Howard, 12 Tex. 8; Watson *v.* Hopkins, 27 Tex. 637; State *v.* Hodges, 25 Tex. Supp. 63; Cook *v.* Burnley, 45 Tex. 97; Buchanan *v.* Park, (Tex. Civ. App. 1896) 36 S. W. Rep. 807.

Vermont. — Leavins *v.* Ewins, 67 Vt. 256.

Virginia. — Lancaster *v.* Wilson, 27 Gratt. (Va.) 624; Howison *v.* Weeden, 77 Va. 704.

Washington. — Parker *v* Dacres, 1 Wash. 190.

West Virginia. — Sayre *v.* Harpold, 33 W. Va. 553; Davis *v.* Trump, 43 W. Va. 191, 64 Am. St. Rep. 849.

Wisconsin. — Van Valkenburgh *v.* Milwaukee, 43 Wis. 574; Baker *v* Baker, 57 Wis. 382; State *v.* Helms, 101 Wis. 280.

Wyoming. — Price *v.* Bonnifield, 2 Wyo. 80.

A Maxim of the Law. — The proposition that the judgment of a court having jurisdiction over the controversy and the parties to it cannot be impeached for error, either of law or of fact, except in a direct proceeding for that purpose, is so well settled that it may be considered one of the maxims of the law. *In re* Gut Lun, 83 Fed. Rep. 141, *citing* Cooper *v.* Reynolds, 10 Wall. (U. S.) 308.

Judgment Denying Jurisdiction. — A judgment rendered against the plaintiff for want of jurisdiction and not revised in a direct proceeding, is a bar to another suit in that court upon the same cause of action, although it be erroneous. Kase *v.* Best, 15 Pa. St. 101, 53 Am. Dec. 573. See also State *v.* McGuire, 40 La. Ann. 378; Singer *v.* McGuire, 40 La. Ann. 638; Peck *v.* Culberson, 104 N. Car. 425.

1. Void Judgments Not Res Judicata — *Arkansas.* — Kansas City, etc., R. Co. *v.* Moon, 66 Ark. 409.

California. — Dickey *v.* Gibson, 121 Cal. 276; Matter of Smith, 122 Cal. 462.

Delaware. — Green *v.* Clawson, 5 Houst. (Del.) 159.

Georgia. — Howell *v.* Gordon, 40 Ga. 302; Yon *v.* Baldwin, 76 Ga. 769.

Illinois. — Equitable Trust Co. *v.* Fisher, 106 Ill. 189; Dinsmoor *v.* Bressler, 164 Ill. 211; West Chicago Park Com'rs *v.* Farber, 171 Ill. 146.

Indiana. — Joyce *v.* Whitney, 57 Ind. 550; Voss *v.* Lewis, 126 Ind. 155; McCarty *v.* Kinsey, 154 Ind. 447.

Iowa. — Zalesky *v.* Iowa State Ins. Co., 102 Iowa 512.

Kansas. — Masterman *v.* Masterman, 58 Kan. 748.

Louisiana. — Thompson *v.* Mylne, 4 La. Ann. 206; Wamsley *v.* Robinson, 28 La. Ann. 793; Labauve *v.* Slack, 31 La. Ann. 134; Huyghe *v.* Brinkman, 34 La. Ann. 1179.

Maryland. — Winchester *v.* Cecil County, 78 Md. 266.

Massachusetts. — Mercier *v.* Chace, 9 Allen (Mass.) 242.

Michigan. — Wixom *v.* Stephens, 17 Mich. 519; Basom *v.* Taylor, 39 Mich. 682.

Missouri. — St. Louis *v.* Wiggins Ferry Co., 88 Mo. 615; Dailey *v.* Sharkey, 29 Mo. App. 518; Horn *v.* Mississippi River, etc., R. Co., 88 Mo. App. 469.

b. FRAUD AND COLLUSION. — By the great weight of authority a judgment or decree obtained by fraud or collusion, at least where it is not such fraud or collusion as goes to the jurisdiction of the court,[1] is not void as between the parties to the action or suit and their privies, but merely voidable, and becomes *res judicata* unless annulled or set aside in a direct proceeding.[2] An exception to this rule exists in the case of penal actions and criminal prosecutions.[3]

III. COURTS AND TRIBUNALS — 1. General Rule. — It is a universal principle that, where power or jurisdiction over a subject is delegated to any public officer or tribunal, whether executive, legislative, judicial, or special, and its exercise is confided to his or their discretion, the decisions made or acts done are binding as to the subject-matter, and cannot be questioned collaterally;

Nebraska. — Sackett *v.* Montgomery, 57 Neb. 424, 73 Am. St. Rep. 522.

New York. — Sweeney *v.* Warren, 127 N. Y. 426, 24 Am. St. Rep. 468, *reversing* 52 Hun (N. Y.) 246; Reed *v.* Chilson, 142 N. Y. 152; Gage *v.* Hill, 43 Barb. (N. Y.) 44; Hancock *v.* Flynn, 5 Silv. Sup. (N. Y.) 122; Boller *v.* New York, 40 N. Y. Super. Ct. 523; People *v.* Eggleston, (Supm. Ct. Spec. T.) 13 How. Pr. (N. Y.) 123.

North Carolina. — Springer *v.* Shavender, 118 N. Car. 33, 54 Am. St. Rep. 708.

North Dakota. — Arnegaard *v.* Arnegaard, 7 N. Dak. 475.

Ohio. — Oil Well Supply Co. *v.* Koen, 64 Ohio St. 422.

Pennsylvania. — Fisher *v.* Longnecker, 8 Pa. St. 410; Devlin *v.* Com., 101 Pa. St. 273, 47 Am. Rep. 710; Enterline *v.* Comrey, 15 Pa. Co. Ct. 627.

South Carolina. — Anderson *v.* Cave, 49 S. Car. 505.

Tennessee. — Clark *v.* Stroud, 1 Swan (Tenn.) 274.

Texas. — Thaxton *v.* Smith, (Tex. Civ. App. 1896) 38 S. W. Rep. 820; Kopf *v.* Huckins, 11 Tex. Civ. App. 86.

Canada. — Creelman *v.* Stewart, 28 Nova Scotia 185.

Judgment Entirely Aside of the Issues. — A decree or a judgment which is not appropriate to issues before the court is *coram non judice* and void, and can have no force or effect even in a collateral proceeding. Munday *v.* Vail, 34 N. J. L. 418, *approved* Reynolds *v.* Stockton, 140 U. S. 254, *cited* Manley *v.* Mickle, 53 N. J. Eq. 155, which *affirmed* 52 N. J. Eq. 712.

Judgment Against Married Woman — Revivor. — Where a judgment, void because rendered against a married woman, is revived on notice after the disability has been removed, its validity is thereby established and it becomes *res judicata.* Crenshaw *v.* Julian, 26 S. Car. 283, 4 Am. St. Rep. 719. See the title REVIVAL OF JUDGMENTS, ENCYC. OF PL. AND PR., vol. 18, p. 1059.

1. Fraud Going to the Jurisdiction of the Court. — There are two kinds of fraud as applied to this subject — fraud in obtaining the decree, and fraud which gives a court colorable jurisdiction. In case of a fraud of the former kind a decree cannot be impeached in a separate and independent proceeding, though it is otherwise in the case of a fraud of the latter kind. Caswell *v.* Caswell, 120 Ill. 377, *citing* Edson *v.* Edson, 108 Mass. 590, 11 Am. Rep. 393; Burton *v.* Perry, 146 Ill. 71. See also Mount *v.* Scholes, 21 Ill. App. 192, *affirmed* 120 Ill. 394; article "Fraud in Legal Proceedings," 4 Am. L. Reg. 1.

2. Judgments Obtained by Fraud Res Judicata. — Carpentier *v.* Oakland, 30 Cal. 439; O'Connor *v.* Irvine, 74 Cal. 435; Bruce *v.* Osgood, 154 Ind. 375; Webster *v.* Reid, 1 Morr. (Iowa) 467; Com. *v.* Louisville Water Co., (Ky. 1896) 37 S. W. Rep. 576; Greene *v.* Greene, 2 Gray (Mass.) 361, 61 Am. Dec. 454, 4 Am. L. Reg. 42; Edson *v.* Edson, 108 Mass. 590, 11 Am. Rep. 393; Nichols *v.* Nichols, 25 N. J. Eq. 60; Morrill *v.* Morrill, 20 Oregon 96, 23 Am. St. Rep. 95; Crabill *v.* Crabill, 22 Oregon 588; Maddox *v.* Summerlin, 92 Tex. 483, *reversing* on other grounds (Tex. Civ. App. 1898) 47 S. W. Rep. 1020. For other cases see the title JUDGMENTS AND DECREES, vol. 17, pp. 848, 849. *Compare* Loyd *v.* Mansell, 2 P. Wms. 74; Rex *v.* Kingston, 20 How. St. Tr. 544, 2 Smith Lead. Cas. (8th ed.) 784; Webster *v.* Reid, 11 How. (U. S.) 437, *explained* Mason *v.* Messenger, 17 Iowa 261; Sammis *v.* Poole, 188 Ill. 396, *affirming* 89 Ill. App. 118.

Fraud Apparent from Record of Former Adjudication or Admitted. — Ferrall *v.* Bradford, 2 Fla. 508, 50 Am. Dec. 293; Mason *v.* Messenger, 17 Iowa 261.

Under Many of the Codes a separate suit to avoid the judgment for fraud is not necessary, but a direct attack can be made upon it in the action in which it is set up as *res judicata.* Hallack *v.* Loft, 19 Colo. 74; Hogg *v.* Link, 90 Ind. 346; Mandeville *v.* Reynolds, 68 N. Y. 528, *distinguished* Morrill *v.* Morrill, 20 Oregon 96, 23 Am. St. Rep. 95. See also Spencer *v.* Vigneaux, 20 Cal. 442.

3. Penal Actions. — A judgment obtained in an action to recover a penalty is of no effect as a bar to an action brought to recover a penalty for the same offense, where the first judgment was recovered by covin and collusion between the parties thereto. Girdlestone *v.* Brighton Aquarium Co., 4 Ex. D. 107, *affirming* 3 Ex. D. 137.

Criminal Prosecutions. — In a criminal prosecution if the proceeding is really managed by the defendant, either directly or through the agency of another, and the state, while a party in name, is not so in fact, and has no actual agency in the matter, the judgment thus procured is void and affords no protection to a further prosecution for the same offense. Shideler *v.* State, 129 Ind. 523, 28 Am. St. Rep. 206.

provided they are within the scope of the authority and power conferred. If not void for want of authority, they are final and conclusive except on appeal or other mode of revision, if any such is prescribed by law, or proceedings to annul for fraud.[1]

2. Courts — *a.* IN GENERAL. — A sentence, judgment, or decree of a court acting within its jurisdiction is *res judicata*, preventing the cause of action, fact, or matter adjudicated from being relitigated in any other court between the parties and privies, whether the court rendering it had general or inferior, concurrent or exclusive jurisdiction.[2] Judgments are, as it were, the words of the law and are received as truth. Such words are infallible between the parties, and for the case and court, and for all courts.[3]

b. PARTICULAR COURTS. — Thus, the doctrine of *res judicata* applies alike to the decrees of courts exercising equity jurisdiction and to the judgments of courts of law; and a final determination in either court may be invoked as a bar or estoppel in the other.[4] It extends to sentences and decrees in

1. General Rule. — U. S. *v.* Arredondo, 6 Pet. (U. S.) 691; Bartlett *v.* Kane, 16 How. (U. S.) 263; Belcher *v.* Linn, 24 How. (U. S.) 508; U. S. *v.* California, etc., Land Co., 148 U. S. 31, *affirming* 7 U. S. App. 128; U. S. *v.* Leng, 18 Fed. Rep. 15; U. S. *v.* McDowell, 21 Fed. Rep. 563; Buchanan *v.* Knoxville, etc., R. Co., (C. C. A.) 71 Fed. Rep. 324; Allen *v.* Blunt, 3 Story (U. S.) 742, 1 Fed. Cas. No. 216; Salisbury Permanent Bldg., etc., Assoc. *v.* Wicomico County, 86 Md. 615; Hancock *v.* McKinney, 7 Tex. 384.

2. Courts — In General — *England.* — Rex *v.* Grundon, 1 Cowp. 315; Ralston *v.* Rowat, 1 Cl. & F. 424.

United States. — Hopkins *v.* Lee, 6 Wheat. (U. S.) 109.

Connecticut. — Bell *v.* Raymond, 18 Conn. 92; Gallup *v.* Fox, 64 Conn. 491.

Illinois. — Gray *v.* Gillilan, 15 Ill. 454, 60 Am. Dec. 761.

Massachusetts. — Baxter *v.* New England Marine Ins. Co., 6 Mass. 277, 4 Am. Dec. 125; Bigelow *v.* Winsor, 1 Gray (Mass.) 299.

New York. — Embury *v.* Conner, 3 N. Y. 511, 53 Am. Dec. 325; Nicholl *v.* Mason, 21 Wend. (N. Y.) 340; Simpson *v.* Hart, 1 Johns. Ch. (N. Y.) 91; Smith *v.* Hemstreet, 54 N. Y. 644; Blair *v.* Bartlett, 75 N. Y. 150, 31 Am. Rep. 455.

Pennsylvania. — Billings *v.* Russell, 23 Pa. St. 189, 62 Am. Dec. 330; Marsteller *v.* Marsteller, 132 Pa. St. 517, 19 Am. St. Rep. 604. See also Dyer's Appeal, 3 Grant Cas. (Pa.) 326; McKinney *v.* Davis, 6 Mo. 501; Foster *v.* Wells, 4 Tex. 101.

Tennessee. — Pinson *v.* Ivey, 1 Yerg. (Tenn.) 303.

Supreme and Superior Courts. — Where the Supreme Court of a state has original concurrent jurisdiction with the Superior Courts, as is frequently the case in mandamus, certiorari, prohibition, and like proceedings, an adjudication upon the merits by a Superior Court is as conclusive upon the Supreme Court as it is upon any other court. Santa Cruz Gap Turnpike Joint Stock Co. *v.* Santa Clara County, 62 Cal. 42.

Courts Having Co-ordinate Divisions. — The fact that a court is divided into two or more co-ordinate divisions presided over by different judges does not deprive it of its judicial character; but the judgments of each when final are *res judicata*. New Orleans *v.* Citizens' Bank, 167 U. S. 371; Williamsburgh Sav. Bank *v.* Solon, 136 N. Y. 465; Cluff *v.* Day, 141 N. Y. 580. See also Stelle *v.* Shannon, 62 Tex. 198.

Statutory and Common-law Courts. — There is no distinction in the application of the doctrine of *res judicata* between tribunals created by statute and common-law courts. Billings *v.* Russell, 23 Pa. St. 189, 62 Am. Dec. 330.

Judgments Not Appealable. — A matter directly put in issue in an action and actually determined cannot be relitigated, although, owing to the smallness of the amount in dispute, no appeal lay from the judgment in the first action. Johnson Co. *v.* Wharton, 152 U. S. 252; Dolan *v.* Scott, 25 Wash. 214.

A Judgment or Decree in a proceeding before persons not forming any court known to the laws of the country, or having any competent authority to decide the matter in issue, has no force and effect whatever. Rogers *v.* Wood, 2 B. & Ad. 245, 22 E. C. L. 64.

3. *Per* Marshall, J., in Case *v.* Hoffman, 100 Wis. 314. To the same effect Rosenow *v.* Gardner, 99 Wis. 358.

Estoppel. — A point once adjudicated by a court of competent jurisdiction may be relied upon as an estoppel in any subsequent suit, in the same or any other court, at law or in chancery, where either party or the privies of either party allege anything inconsistent with it. Hurd *v.* McClellan, 1 Colo. App. 327, *affirmed* 21 Colo. 197; Godding *v.* Colorado Springs Live Stock Co., 4 Colo. App. 14, *appeal dismissed* 20 Colo. 249.

4. Courts of Law and Equity — *England.* — Pearce *v.* Gray, 2 Y. & C. Ch. 322; Bateman *v.* Willoe, 1 Sch. & Lef. 201.

United States. — Hopkins *v.* Lee, 6 Wheat. (U. S.) 109; U. S. Bank *v.* Beverly, 1 How. (U. S.) 134; Smith *v.* Kernochen, 7 How. (U. S.) 198; Miles *v.* Caldwell, 2 Wall. (U. S.) 35; Society, etc., *v.* Hartland, 2 Paine (U. S.) 536, 22 Fed. Cas. No. 13,155; Price *v.* Dewey, 6 Sawy. (U. S.) 493, 11 Fed. Rep. 104; Kilham *v.* Wilson, (C. C. A.) 112 Fed. Rep. 565. See also Smith *v.* M'Iver, 9 Wheat. (U. S.) 532.

Alabama. — Wilkins *v.* Judge, 14 Ala. 135; Tankersly *v.* Pettis, 71 Ala. 179; Strang *v.* Moog, 72 Ala. 460.

Arkansas. — Hempstead *v.* Watkins, 6 Ark. 317, 42 Am. Dec. 696.

admiralty,[1] and, as a general rule, the same reciprocity of adjudication existing between courts of law and equity exist between those courts and courts exercising admiralty jurisdiction.[2] The law of *res judicata* also has application to decisions of appellate courts;[3] to sentences or decrees of courts of special or limited jurisdiction;[4] and to judgments of courts created for the

California. — Fulton *v.* Hanlow, 20 Cal. 450; San Francisco *v.* Spring Valley Water Works, 39 Cal. 473; Wolverton *v.* Baker, 86 Cal. 591.

Connecticut. — Munson *v.* Munson, 30 Conn. 433; Huntley *v.* Holt, 59 Conn. 102; Perkins *v.* Brazos, 66 Conn. 242; Cox *v.* McClure, 73 Conn. 486.

Florida. — Thornton *v.* Eppes, 6 Fla. 546; Moore *v.* Felkel, 7 Fla. 44.

Georgia. — Grubb *v.* Kolb, 55 Ga. 630.

Illinois. — Hawley *v.* Simons, 102 Ill. 115; Stickney *v.* Goudy, 132 Ill. 213; Moore *v.* Williams, 132 Ill. 589, 22 Am. St. Rep. 563; People *v.* Rickert, 159 Ill. 496; Telford *v.* Brinkerhoff, 163 Ill. 439, *affirming* 58 Ill. App. 56; Meyer *v.* Meyer, 40 Ill. App. 94; Terre Haute, etc., R. Co. *v.* Peoria, etc., R. Co., 81 Ill. App. 435, *affirmed* 182 Ill. 501.

Indiana. — Farrar *v.* Clark, 97 Ind. 447.

Kentucky. — Hunt *v.* Terril, 7 J. J. Marsh. (Ky.) 67; Cameron *v.* Bell, 2 Dana (Ky.) 328.

Maine. — Alley *v.* Chase, 83 Me. 537; Jordan *v.* Chase, 83 Me. 540.

Maryland. — Tifel *v.* Jenkins, 95 Md. 665, *citing* Martin *v.* Evans, 85 Md. 8, 60 Am. St. Rep. 292.

Massachusetts. — Foster *v.* Busteed, 100 Mass. 409; Powers *v.* Chelsea Sav. Bank, 129 Mass. 44.

Mississippi. — McAlexander *v.* Coopwood, (Miss. 1899) 25 So. Rep. 488.

Missouri. — Donnell *v.* Wright, 147 Mo. 639.

Nebraska. — Nebraska L. & T. Co. *v.* Doman, (Neb. 1903) 93 N. W. Rep. 1022.

New Hampshire. — Hollister *v.* Barkley, 11 N. H. 501; Claggett *v.* Simes, 25 N. H. 402; Hollister *v.* Abbott, 31 N. H. 442, 64 Am. Dec. 342; Divoll *v.* Atwood, 41 N. H. 443.

New Jersey. — Putnam *v.* Clark, 34 N. J. Eq. 532; Phillips *v.* Pullen, 45 N. J. Eq. 830; Ruckelschaus *v.* Oehme, 48 N. J. Eq. 436, *affirmed* 49 N. J. Eq. 340; Delaware, etc., R. Co. *v.* Breckenridge, 57 N. J. Eq. 154, *affirmed* without opinion 58 N. J. Eq. 581; Mershon *v.* Williams, (N. J. 1895) 31 Atl. Rep. 778.

New York. — Le Guen *v.* Gouverneur, 1 Johns. Cas. (N. Y.) 436; Simpson *v.* Hart, 1 Johns. Ch. (N. Y.) 91, *reversed* on other grounds 14 Johns. (N. Y.) 63; Gregory *v.* Burrall, 2 Edw. (N. Y.) 417; Orcutt *v.* Orms, 3 Paige (N. Y.) 459; Hawley *v.* Mancius, 7 Johns. Ch. (N. Y.) 174; Anderson *v.* Roberts, 18 Johns. (N. Y.) 516, 9 Am. Dec. 235; Tuska *v.* O'Brien, 68 N. Y. 446; Williamsburgh Sav. Bank *v.* Solon, 136 N. Y. 465; Young *v.* Farwell, 165 N Y. 341, *affirming* 30 N. Y. App. Div. 489.

Ohio. — Babcock *v.* Camp, 12 Ohio St. 11.

Oklahoma. — Pratt *v.* Ratliff, 10 Okla. 168.

Pennsylvania. — Kelsey *v.* Murphy, 26 Pa. St. 78; Haneman *v.* Pile, 161 Pa. St. 599.

South Carolina. — Starke *v.* Woodward, 1 Nott & M. (S. Car.) 329; Edings *v.* Whaley, 1 Rich. Eq. (S. Car.) 301.

Vermont. — Hall *v.* Dana, 2 Aik. (Vt.) 382; Dunham *v.* Downer, 31 Vt. 250; Continental L. Ins. Co. *v.* Currier, 58 Vt. 229.

West Virginia. — Western Min., etc., Co. *v.* Virginia Cannel Coal Co., 10 W. Va. 250; Coville *v.* Gilman, 13 W. Va. 314; Corrothers *v.* Sargent, 20 W. Va. 351.

1. Sentences and Decrees in Admiralty. — See The Benefactor, 103 U. S. 239; Providence Washington Ins. Co. *v.* Morse, 35 Fed. Rep. 363, *affirmed* 150 U. S. 99; Oregon R., etc., Co. *v.* Balfour, 90 Fed. Rep. 295, *appeal dismissed* 179 U. S. 55. See also Morris *v.* Bartlett, (C. C. A.) 108 Fed. Rep. 675, *reversing* 99 Fed. Rep. 786. See generally cases cited in next note, and *infra*, this title, *Actions and Proceedings, Orders and Judgments — Proceedings in Rem.*

2. Courts of Law or Equity and Those Exercising Admiralty Jurisdiction. — The Griefswald, Swabey 430; Goodrich *v.* Chicago, 5 Wall. (U. S.) 566, *affirming* 4 Biss. (U. S.) 18, 10 Fed. Cas. No. 5,542; The Tubal Cain, 9 Fed. Rep. 834; The City of Lincoln, 25 Fed. Rep. 835.

Concurrent Remedies in Rem and in Personam. — In cases where a lien on a ship arises and there is also a personal liability on the part of the master and the owner, the creditor may pursue each of these remedies in succession, until he obtains satisfaction. The Bengal, Swabey 468; The John and Mary, Swabey 471; Nelson *v.* Couch, 15 C. B. N. S. 99, 109 E. C. L. 99, 10 Jur. N. S. 366; The Brothers Apap, 34 Fed. Rep. 352; The Cerro Gordo, 54 Fed. Rep. 391; Toby *v.* Brown, 11 Ark. 308; Murphy *v.* Granger, 32 Mich. 358, 27 Mich. 406, 15 Am. Rep. 195. See the title MARITIME LIENS, vol. 19, p. 1136.

Proceedings in Admiralty by Ship Owners to Limit Their Liability. — Rounds *v.* Providence, etc., Steamship Co., 14 R. I. 344, *citing* Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578; *In re* Old Dominion Steamship Co., 115 Fed. Rep. 845; Gleason *v.* Duffy, (C. C. A.) 116 Fed. Rep. 298.

Questions of Navigation. — In cases turning upon questions of navigation, a verdict in a common-law court has been held not to be binding in a court of admiralty, on account of the superior means of determining such questions supposed to belong to admiralty tribunals. The City of Lincoln, 25 Fed. Rep. 835, *citing* The Ann and Mary, 2 W. Rob. 189.

3. Appellate Courts. — Russel *v.* Slaton, 38 Ga. 195; Mitchell *v.* Mitchell, 6 Md. 224; Chouteau *v.* Gibson, 76 Mo. 38; Gibson *v.* Chouteau, 7 Mo. App. 1; Walker Tp. *v.* West Buffalo Tp., 11 Pa. St. 95; Crane *v.* Blum, 56 Tex. 325.

4. Ecclesiastical Courts. — Meadows *v.* Kingston, Ambl. 756; Blackham's Case, 1 Salk. 291; Barrs *v.* Jackson, 1 Phil. 582, 9 Jur. 609, *reversing* 1 Y. & C. Ch. 585, *discussing* Bouchier *v.* Taylor, 4 Bro. P. C. (Toml. ed.) 708.

Probate Courts — *England.* — Noell *v.* Wells, 1 Lev. 236.

United States. — Herron *v.* Dater, 120 U. S. 464. See also Wilson *v.* Smith, 117 Fed. Rep. 707.

trial of small causes.[1]

3. Public Officers and Boards. — The rule which forbids the reopening of a matter once judicially determined by competent authority applies as well to the judicial and *quasi*-judicial acts of public officers and boards as to the judgments of courts having general judicial powers.[2] Instances of the application of this principle to the acts of public officers, boards, and like governmental agencies exercising some judicial functions incidental to the performance of their duties are numerous; but the decisions of the courts as to the character of particular acts have not always been uniform.[3] It is often

Georgia. — Bradley *v.* Johnson, 49 Ga. 412; Langston *v.* Marks, 68 Ga. 435.

Maryland. — Raborg *v.* Hammond, 2 Har. & G. (Md.) 42; Cecil *v.* Cecil, 19 Md. 72, 81 Am. Dec. 626.

Massachusetts. — Watts *v.* Watts, 160 Mass. 464, 39 Am. St. Rep. 509.

Minnesota. — Dayton *v.* Mintzer, 22 Minn. 393.

Mississippi. — Ward *v.* State, 40 Miss. 108.

Missouri. — McKinney *v.* Davis, 6 Mo. 501; Sheetz *v.* Kirtley, 62 Mo. 417; Johnson *v.* Beazley, 65 Mo. 250, 27 Am. Rep. 276; Smith *v.* Sims, 77 Mo. 269; Covington *v.* Chamblin, 156 Mo. 574.

New Hampshire. — Tebbetts *v.* Tilton, 31 N. H. 273; Jones *v.* Chase, 55 N. H. 234; Davis *v.* Durgin, 64 N. H. 51.

Oklahoma. — Greer *v.* McNeal, 11 Okla. 526.

Pennsylvania. — McPherson *v.* Cunliff, 11 S. & R. (Pa.) 422, 14 Am. Dec. 642.

South Carolina. — Brown *v.* Gibson, 1 Nott & M. (S. Car.) 326.

Texas. — Shannon *v.* Taylor, 16 Tex. 413.

Vermont. — Probate Judge *v.* Fillmore, 1 D. Chip. (Vt.) 420.

County Courts. — Proceedings for the issuance of municipal bonds, Lyons *v.* Munson, 99 U. S. 684; Andes *v.* Ely, 158 U. S. 312; for the incorporation of a city or town, State *v.* Fleming, 158 Mo. 558; Thompson *v.* State, 23 Tex. Civ. App. 370; for the listing, assessment or collection of taxes, Graceland Cemetery Co. *v.* People, 92 Ill. 619; Warren *v.* Cook, 116 Ill. 199; Pells *v.* People, 159 Ill. 580; Courier-Journal Job Printing Co. *v.* Columbia F. Ins. Co., (Ky. 1900) 54 S. W. Rep. 966. See the title TAXATION.

Courts of Bankruptcy or Insolvency. — See the title INSOLVENCY AND BANKRUPTCY, vol. 16, pp. 654, 655.

Courts-martial. — See the title MILITARY LAW, vol. 20, p. 658.

Consular Courts. — See the title CONSULS, vol. 7, p. 21.

Civil Courts of Military Occupation. — Hefferman *v.* Porter, 6 Coldw. (Tenn.) 391, 98 Am. Dec. 459, *overruled* on other grounds Walt *v.* Thomasson, 10 Heisk. (Tenn.) 151.

Court Commissioners. — State *v.* Bechdel, 38 Minn. 278; Gaster *v.* State, (Wis. 1903) 94 N. W. Rep. 787.

1. Justice of the Peace — *California.* — Wiese *v.* San Francisco Musical Soc., 82 Cal. 645.

Illinois. — Hess *v.* Miller, 99 Ill. App. 225.

Indiana. — Pressler *v.* Turner, 57 Ind. 56; Reed *v.* Whitton, 78 Ind. 579.

Missouri. — Jones *v.* Silver, (Mo. App. 1902) 70 S. W. Rep. 1109.

New York. — Brintnall *v.* Foster, 7 Wend. (N. Y.) 103; Mitchell *v.* Hawley, 4 Den. (N. Y.) 414, 47 Am. Dec 260; Hallock *v.* Dominy, 69 N. Y. 239, *reversing* 7 Hun (N. Y.) 52; Bowyer *v.* Schofield, 1 Abb. App. Dec. (N. Y.) 177, 2 Keyes (N. Y.) 631; O'Neil *v.* Martin, 1 E. D. Smith (N. Y.) 404; Bellinger *v.* Craigue, 31 Barb. (N. Y.) 534.

North Carolina. — Durham *v.* Wilson, 104 N. Car. 595; Springs *v.* Schenck, 106 N. Car. 153.

Ohio. — McCurdy *v.* Baughman, 43 Ohio St. 78, *citing* State *v.* Daily, 14 Ohio 91; Cavanaugh *v.* Bloom, 10 Ohio Dec. 222, 8 Ohio N. P. 6.

Pennsylvania. — Miller *v.* Warden, 111 Pa. St. 300; McClelland *v.* Patterson, (Pa. 1886) 10 Atl. Rep. 475; Nalen *v.* Burke, 12 Pa. Co. Ct. 490.

Vermont. — Farr *v.* Ladd, 37 Vt. 157.

County Courts. — Great Northern R. Co. *v.* Mossop, 17 C. B. 130, 84 E. C. L. 130; Routledge *v.* Hislop, 2 El. & El. 549, 105 E. C. L. 549, 5 Jur. N. S. 398; Flitters *v.* Allfrey, L. R. 10 C. P. 29; Webster *v.* Armstrong, 1 Cab. & El. 471, 54 L. J. Q. B. 236.

This is especially necessary in the case of county courts, which are intended principally to deal with matters of small amount. Of all others it is manifest that they should have that most important of all attributes of a court of justice, viz., that their decisions should be final. Great Northern R. Co. *v.* Mossop, 17 C. B. 130, 84 E. C. L. 130.

Police Magistrate having civil jurisdiction. Wright *v.* London Gen. Omnibus Co., 2 Q. B. D. 271.

Lord Mayor's Court. — Behrens *v.* Pauli, 1 Keen 456.

2. Public Officers and Boards — General Rule. — Delphi *v.* Startzman, 104 Ind. 343; Onondaga County *v.* Briggs, 2 Den. (N. Y.) 26; White *v.* Coatsworth, 6 N. Y. 138; Brown *v.* New York, 66 N. Y. 386, *affirming* 5 Daly (N. Y.) 481; People *v.* Hall, 80 N. Y. 117; Leavitt *v.* Wolcott, 95 N. Y. 212; Osterhoudt *v.* Rigney, 98 N. Y. 222, *affirming* 27 Hun (N. Y.) 167; Culross *v.* Gibbons, 130 N. Y. 447; People *v.* Preston, 62 Hun (N. Y.) 185, *affirmed* without opinion 131 N. Y. 644; School Dist. No. Two *v.* Lambert, 28 Oregon 209; Longinette *v.* Shelton, (Tenn. Ch. 1898) 52 S. W. Rep. 1078. See generally cases cited in the next note.

Judicial and Quasi-judicial Action Defined and Distinguished. — School Dist. No. Two *v.* Lambert, 28 Oregon 209.

3. Commissioners of Highways. — Webb *v.* Rocky Hill, 21 Conn. 468; Terry *v.* Waterbury, 35 Conn. 526; Longfellow *v.* Quimby, 29 Me. 196, 48 Am. Dec. 525; Stone *v.* Augusta, 46 Me. 127; Winchester *v.* Cecil County, 78 Md. 266; Spaulding *v.* Groton, 68 N. H. 77; State

a difficult matter to draw the line between judicial action which concludes parties and privies unless reversed, vacated or set aside in some direct proceeding authorized by law, and ministerial action which, if erroneous, may be revised by the courts in a collateral proceeding.[1] The power and jurisdiction of such officers and boards rests upon statute, and the decisions in each state must necessarily depend upon the peculiarities of its laws and the policy of the state in enacting them.[2]

4. Boards of Colleges, Private Corporations, Churches. — Analogous to the discussion of the conclusiveness of acts of public officers and boards is that of the force and effect in the courts and elsewhere of decisions of the governing boards of colleges, churches, and private corporations.[3]

IV. PERSONS CONCLUDED — 1. General Rule. — The persons between whom a judgment or decree in a suit is conclusive in a subsequent suit are the parties to the prior suit and their privies, and as a general rule it is conclusive only between them. The mere fact that a person had an interest in the

v. Briggs, 50 N. J. L. 114; Hyatt *v.* Bates, 35 Barb. (N. Y.) 308, *affirmed* 40 N. Y. 164. See the title HIGHWAYS, vol. 15, pp. 387 *et seq.*

Boards of Audit. — Lincoln County *v.* Simmons, 39 Ark. 485; Colusa County *v.* De Jarnett, 55 Cal. 375; McFarland *v.* McCowen, 98 Cal. 329; Levee Dist. No. 9 *v.* Farmer, 101 Cal. 178; Santa Cruz County *v.* McPherson, 133 Cal. 282; Cook County *v.* Ryan, 51 Ill. App. 190; Jackson County *v.* Applewhite, 62 Ind. 464; Maxwell *v.* Fulton County, 119 Ind. 20; Carroll *v.* Board of Police, 28 Miss. 38; Onondaga County *v.* Briggs, 2 Den. (N. Y.) 26; Osterhoudt *v.* Rigney, 98 N. Y. 222, *affirming* 27 Hun (N. Y.) 167; People *v.* Barnes, 114 N. Y. 323; Barber *v.* New Scotland, 64 N. Y. App. Div. 229. *Contra*, Huntington County *v.* Heaston, 144 Ind. 583, 55 Am. St. Rep. 192, *cited* Myers *v.* Gibson, 152 Ind. 500; Marion County *v.* Phillips, 45 Mo. 75; Sears *v.* Stone County, 105 Mo. 236, 24 Am. St. Rep. 378; Scott County *v.* Leftwich, 145 Mo. 26; State *v.* Gideon, 158 Mo. 327. See the title COUNTIES, vol. 7, pp. 957 *et seq.*

County Boards. — Waugh *v.* Chauncey, 13 Cal. 11; Jones *v.* Cullen, 142 Ind. 335; Brewer *v.* Boston, etc., R. Co., 113 Mass. 52; State *v.* Nelson, 21 Neb. 572; Burke *v.* Perry, 26 Neb. 414.

Tax Assessors and Boards. — Yazoo, etc., R. Co. *v.* Adams, (Miss. 1902) 32 So. Rep. 937. See the title TAXATION.

Patent Office Decisions. — See the title PATENTS, vol. 22, pp. 373 *et seq.*, 397, 398, 488, 489.

Land Department Decisions. — See the title STATE AND PUBLIC LANDS.

Miscellaneous. — For various other cases illustrating the application of the doctrine of *res judicata* to the decisions of public officers and boards, see Casey *v.* Galli, 94 U. S. 673; Lavalette's Case, 1 Ct. Cl. 147; Queen *v.* Atlanta, 59 Ga. 318; Brunswick *v.* Fahm, 60 Ga. 109; Oliver *v.* Americus, 69 Ga. 165; Gordon *v.* Farrar, 2 Dougl. (Mich.) 411; State *v.* Hynes, 82 Minn. 34; People *v.* Hall, 80 N. Y. 117; People *v.* Preston, 62 Hun (N. Y.) 185, *affirmed* without opinion 131 N. Y. 644; Crandall *v.* James, 6 R. I. 144; Longinette *v.* Shelton, (Tenn. Ch. 1898) 52 S. W. Rep. 1078.

1. Administrative and Judicial. — See U. S. *v.* Bank of Metropolis, 15 Pet. (U. S.) 377, *discussed* People *v.* Preston, 62 Hun (N. Y.) 185, (*affirmed* without opinion 131 N. Y. 644); Wisconsin Cent. R. Co. *v.* U. S., 164 U. S. 190, *affirming* 27 Ct. Cl. 440; Harmon *v.* U. S., 43 Fed. Rep. 560, *affirmed* 147 U. S. 268; *Ex p.* Randolph, 2 Brock. (U. S.) 447; State Tax Com'rs *v.* Quinn, 125 Mich. 128, 7 Detroit Leg. N. 449; Custer County *v.* Chicago, etc., R. Co., 62 Neb. 657; Weston *v.* Syracuse, 158 N. Y. 274, 70 Am. St. Rep. 472; People *v.* Manhattan Real Estate, etc., Co., (N. Y. 1903) 67 N. E. Rep. 219, *reversing* 74 N. Y. App. Div. 535. See also the title PUBLIC OFFICERS, vol. 23, pp. 375 *et seq.*

Right of Review in the Courts as a Test. — It has been held that whenever a final adjudication of an inferior court, or of persons invested with power to decide on the property and rights of the citizen, is examinable by writ of error or certiorari, such final adjudication may be pleaded as *res judicata*. Mercein *v.* People, 25 Wend. (N. Y.) 64, 35 Am. Dec. 653, *approved* Selz *v.* Presburger, 49 N. J. L. 396, and Matter of Thomas, (C. Pl. Spec. T.) 10 Abb. Pr. N. S. (N. Y.) 114.

The fact that an appeal from the decisions of a county board is granted by statute lends no force to the contention that the board acts judicially. Huntington County *v.* Heaston, 144 Ind. 583, 55 Am. St. Rep. 192.

Ministerial Act of Court. — An order that the return by a guardian of a sale of his ward's land shall be recorded in pursuance of a statute requiring it, although by a court, is not judicial but ministerial, and has not the force of a judgment. Holbrook *v.* Brooks, 33 Conn. 347.

2. Sears *v.* Stone County, 105 Mo. 236, 24 Am. St. Rep. 378.

3. Boards of Colleges, Private Corporations, Churches. — See Rex *v.* Grundon, 1 Cowp. 315; Chase *v.* Cheney, 58 Ill. 509, 11 Am. Rep. 95; Anacosta Tribe No. 12 *v.* Murbach, 13 Md. 91, 71 Am. Dec. 625; Osceola Tribe No. 11 *v.* Schmidt, 57 Md. 98; Triesler *v.* Wilson, 89 Md. 169; Watson *v.* Garvin, 54 Mo. 353; Landis *v.* Campbell, 79 Mo. 433, 49 Am. Rep. 239; Connitt *v.* Reformed Protestant Dutch Church, 54 N. Y. 551; Baxter *v.* McDonnell, 155 N. Y. 83. See generally the titles MANDAMUS, vol. 19, pp. 884 *et seq.*; RELIGIOUS SOCIETIES, *ante*, p. 323; article "Res Adjudicata in Church Courts," 30 Cent. L. J. 73.

subject-matter of the prior suit will not render the judgment or decree therein conclusive upon him.[1]

1. Persons Concluded — In General — *England.* — Muskerry *v.* Skeffington, L. R. 3 H. L. 144; De Mora *v.* Concha, 29 Ch. D. 268; Spencer *v.* Williams, L. R. 2 P. & D. 230, 40 L. J. P. 45, 24 L. T. N. S. 513, 19 W. R. 703; Reeve *v.* Dalby, 2 Sim. & St. 464; Ford *v.* Tynte, 3 N. R. 559; Reg. *v.* Hartington Middle Quarter Tp., 4 El. & Bl. 780, 82 E. C. L. 780; Outram *v.* Morewood, 3 East 356; Natal Land, etc., Co. *v.* Good, 5 Moo. P. C. C. N. S. 132, L. R. 2 P. C. 121, 16 W. R. 1086; Thirveton *v.* Collier, Ch. Cas. (pt. i.) 48; Anonymous, 3 Ch. Rep. 13, Nelson 79; Evans *v.* Evans, 1 Rob. Ecc. 165; Rex *v.* Kingston, 20 How. St. Tr. 355, 2 Smith Lead. Cas. (8th ed.) 784.

Canada.—Wood *v.* Davis, 4 Quebec Q. B. 453.

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Montana. — Finch *v.* Kent, 24 Mont. 268.

Nebraska. — White *v.* Bartlett, 14 Neb. 320; Helprey *v.* Redick, 21 Neb. 80; Tarkington *v.* Link, 27 Neb. 826; Connell *v.* Galligher, 36 Neb. 749; Belknap *v.* Stewart, 38 Neb. 304, 41 Am. St. Rep. 729; Fuller *v.* Brownell, 48 Neb. 145; Lederer *v.* Union Sav. Bank, 52 Neb. 133; Sarpy County State Bank *v.* Hinkle, 53 Neb. 108; Hanson *v.* Hanson, (Neb. 1902) 90 N. W. Rep. 208; State *v.* Savage, (Neb. 1902) 90 N. W. Rep. 898; Western Land Co. *v.* Buckley, (Neb. 1902) 92 N. W. Rep. 1052.

New Hampshire. — Thrasher *v.* Haines, 2 N. H. 443; King *v.* Chase, 15 N. H. 9, 41 Am. Dec. 675; Stevens *v.* Thompson, 17 N. H. 103; Fogg *v.* Plumer, 17 N. H. 112; Hollister *v.* Abbott, 31 N. H. 442, 64 Am. Dec. 342; Wingate *v.* Haywood, 40 N. H. 437; Harrington *v.* Wadsworth, 63 N. H. 400; Ham *v.* Ayers, 22 N. H. 412; Chamberlain *v.* Carlisle, 26 N. H. 540.

New Jersey. — Gardner *v.* Raisbeck, 28 N. J. Eq. 71; Buckingham *v.* Ludlum, 37 N. J. Eq. 137; Ransom *v.* Brinkerhoff, 56 N. J. Eq. 149; Prall *v.* Patton, 3 N. J. L. 157; Lehigh Zinc, etc., Co. *v.* New Jersey Zinc, etc., Co., 55 N. J. L. 350; Cox *v.* Flanagan, (N. J. 1885) 2 Atl. Rep. 33; Steward *v.* Middleton, (N. J. 1889) 17 Atl. Rep. 294; Lawson *v.* Dunn, (N. J. 1901) 49 Atl. Rep. 1087.

New York. — Burhans *v.* Van Zandt, 7 N. Y. 523; Castle *v.* Noyes, 14 N. Y. 329; Forbes *v.* Halsey, 26 N. Y. 53; Boerum *v.* Schenck, 41 N. Y. 182; Atlantic Dock Co. *v.* New York, 53 N. Y. 64; Excelsior Petroleum Co. *v.* Lacey, 63 N. Y. 422, *affirming* 4 Hun (N. Y.) 648; Becker *v.* Howard, 66 N. Y. 5; People *v.* Murray, 73 N. Y. 535; Springport *v.* Teutonia Sav. Bank, 75 N. Y. 397; Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474; Schrauth *v.* Dry Dock Sav. Bank, 86 N. Y. 390; Shipman *v.* Rollins, 98 N. Y. 311, 15 Abb. N. Cas. (N. Y.) 288; Moores *v.* Townshend, 102 N. Y. 387; Herring *v.* New York, etc., R. Co., 105 N. Y. 340, *affirming* (Supm. Ct. Spec. T.) 63 How. Pr. (N. Y.) 497; Dodge *v.* Zimmer, 110 N. Y. 43; Beveridge *v.* New York El. R. Co., 112 N. Y. 1; Wing *v.* De La Rionda, 125 N. Y. 678, *affirming* (Brooklyn City Ct. Gen. T.) 5 N. Y. Supp. 550; Dyett *v.* Hyman, 129 N. Y. 351, 26 Am. St. Rep. 533, *affirming* (C. Pl. Gen. T.) 13 N. Y. Supp. 895; Dingley *v.* Bon, 130 N. Y. 607; Tauziede *v.* Jumel, 133 N. Y. 614, *affirming* 60 Hun (N. Y.) 583; Chard *v.* Holt, 136 N. Y. 30; Blair *v.* Flack, 141 N. Y. 53; Russell *v.* McCall, 141 N. Y. 437, 38 Am. St. Rep. 807; Matter of Patterson, 146 N. Y. 327, *affirming* 79 Hun (N. Y.) 371; McNaney *v.* Hall, 159 N. Y. 544, *affirming* 86 Hun (N. Y.) 415; Reynolds *v.* Ætna L. Ins. Co., 160 N. Y. 635, *affirming* 28 N. Y. App. Div. 591; Williams *v.* Barkley, 165 N. Y. 48; Bush *v.* Knox, 2 Hun (N. Y.) 576, 5 Thomp. & C. (N. Y.) 130; Hirsch *v.* Livingston, 3 Hun (N. Y.) 9, 5 Thomp. & C. (N. Y.) 263; O'Brien *v.* Browning, 11 Hun (N. Y.) 179, *affirmed* 77 N. Y. 630; Pray *v.* Hegeman, 33 Hun (N. Y.) 358; Hoopes *v.* Auburn Water-Works Co., 37 Hun (N. Y.) 568, *affirmed* 109 N. Y. 635; Flagler *v.* Schoeffel, 40 Hun (N. Y.) 178; Gilman *v.* Healy, 46 Hun (N. Y.) 310; Hoguet *v.* Berkman, 53 Hun (N. Y.) 636, 6 N. Y. Supp. 214; Ostrander *v.* Hart, 55 Hun (N. Y.) 611, 8 N. Y. Supp. 809; King *v.* Buffalo, 57 Hun (N. Y.) 586, 10 N. Y. Supp. 564; Williams *v.* Hays, 64 Hun (N. Y.) 202; *In re* Mellen, 67 Hun (N. Y.) 648, 21 N. Y. Supp. 811; Shultes *v.* Sickles, 70 Hun (N. Y.) 479; Stanton *v.* Hennessey, 78 Hun (N. Y.) 287, *affirmed* 150 N. Y. 564; Furlong *v.* Banta, 80 Hun (N. Y.) 248; Fletcher *v.* Barber, 82 Hun (N. Y.) 405; Reliance Marine Ins. Co. *v.* Herbert, 87 Hun (N. Y.) 285; Clarke *v.* Baird, 7 Barb. (N. Y.) 64; Reynolds *v.* Brown, 15 Barb. (N. Y.) 24; Johnson, J., in Deck *v.* Johnson, 30 Barb. (N. Y.) 283; Knauth *v.* Bassett, 34 Barb. (N. Y.) 31; Vanbuskirk *v.* Warren, 34 Barb. (N. Y.) 457; Benjamin *v.* Elmira, etc., R. Co., 49 Barb. (N. Y.) 441; Gray *v.* Daniels, 18 N. Y. App. Div. 465; Fox *v.* Fee, 24 N. Y. App. Div. 314; Sweetser *v.* Davis, 26 N. Y. App. Div. 398; Park Hill Co. *v.* Herriot, 41 N. Y. App. Div. 324; Matter of McCusker, 47 N. Y. App. Div. 111; Kager *v.* Brenneman, 47 N. Y. App. Div. 63, 30 Civ. Pro. (N. Y.) 168; Livingston *v.* Livingston, 56 N. Y. App. Div. 484, *affirmed* 166 N. Y. 601; Pratt *v.* Johnston, 59 N. Y. App. Div. 52; O'Donohue *v.* Cronin, 62 N. Y. App. Div. 379; Cameron *v.* United Traction Co., 67 N. Y. App. Div. 557; Paff *v.* Kinney, 5 Sandf. (N. Y.) 380; Brower *v.* Bowers, 1 Abb. App. Dec. (N. Y.) 214; Craig *v.* Ward, 1 Abb. App. Dec. (N. Y.) 454; Horn's Case, (Supm. Ct. Spec. T.) 12 Abb. Pr. (N. Y.) 124; Goddard *v.* Benson, (C. Pl. Gen. T.) 15 Abb. Pr. (N. Y.) 191; Clark's Case, (Supm. Ct.) 15 Abb. Pr. (N. Y.) 227; O'Brien *v.* Browning, (Supm. Ct. Spec. T.) 49 How. Pr. (N. Y.) 109; People *v.* Stephens, (Supm. Ct.) 51 How. Pr. (N. Y.) 235, *affirmed* 71 N. Y. 527; Preston *v.* Fitch, 64 Hun (N. Y.) 636, 19 N. Y. Supp. 849; Manolt *v.* Petrie, (N. Y. Super. Ct. Spec. T.) 65 How. Pr. (N. Y.) 206; Cooper *v.* Platt, 45 N. Y. Super. Ct. 242; Beyer *v.* Schultze, 54 N. Y. Super. Ct. 212; Brennan *v.* Blath, 3 Daly (N. Y.) 478; Bissick *v.* McKenzie, 4 Daly (N. Y.) 265; Cornell *v.* Donovan, 14 Daly (N. Y.) 295; Chapman *v.* Frank, 15 Daly (N. Y.) 282; Matter of Wright, 1 Connoly (N. Y.) 287; Lawrence *v.* Hunt, 10 Wend. (N. Y.) 81, 25 Am. Dec. 539; Davis *v.* Anable 2 Hill (N. Y.) 339; Fuller *v.* Van Geesen, 4 Hill (N. Y.) 171, *affirmed* How. App. Cas. (N. Y.) 240; Jackson *v.* Vedder, 3 Johns. (N. Y.) 8; Maybee *v.* Avery, 18 Johns. (N. Y.) 352; St. Nicholas Bank *v.* De Rivera, (Supm. Ct. Spec.

T.) 3 N. Y. Supp. 666; Southgate *v.* Montgomery, 1 Paige (N. Y.) 41; McVity *v.* Stanton, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 105; Davis *v.* Bonn, (N. Y. City Ct. Gen. T.) 13 Misc. (N. Y.) 331; Johnson *v.* Gillette, (County Ct.) 16 Misc. (N. Y.) 431; Stimmel *v.* Swan, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 354, *affirming* (N. Y. City Ct. Gen. T.) 16 Misc. (N. Y.) 495; Carter *v.* Howard, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 381; Matter of Fritts, (Surrogate Ct.) 19 Misc. (N. Y.) 402; Hardy *v.* Eagle, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 471, *affirming* (N. Y. City Ct. Gen. T.) 23 Misc. (N. Y.) 441; Eberle *v.* Bryant, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 814; Cahnmann *v.* Metropolitan St. R. Co., (Supm. Ct. App. T.) 37 Misc. (N. Y.) 475; Greenwood *v.* Marvin, (Supm. Ct. Gen. T.) 11 N. Y. St. Rep. 235, *affirmed* 111 N. Y. 423, 19 N. Y. St. Rep. 612; *In re* Willett, (Surrogate Ct.) 15 N. Y. St. Rep. 445; Thorp *v.* Philbin, (N. Y. City Ct. Gen. T.) 2 N. Y. Supp. 732, *affirmed* 15 Daly (N. Y.) 155.

North Carolina. — Armfield *v.* Moore, Busb. L. (44 N. Car.) 157; Owens *v.* Alexander, 78 N. Car. 1; Wood *v.* Sugg, 91 N. Car. 93, 49 Am. Rep. 639; Vickers *v.* Henry, 110 N. Car. 371; Fowler *v.* Osborne, 111 N. Car. 404; Turner *v.* Rosenthal, 116 N. Car. 437; Causey *v.* Snow, 122 N. Car. 326; Weeks *v.* McPhail, 128 N. Car. 130; Finch *v.* Finch, 131 N. Car. 271; Bennett *v.* Holmes, 1 Dev. & B. L. (18 N. Car.) 486; Miller *v.* Twitty, 3 Dev. & B. L. (20 N. Car. 14; Howerton *v.* Wimbish, 2 Jones Eq. (55 N. Car.) 328.

Ohio. — Irvin *v.* Smith, 17 Ohio 226; State *v.* Cincinnati Gas Light, etc., Co., 18 Ohio St. 262; Roby *v.* Rainsberger, 27 Ohio St. 674; Rammelsberg *v.* Mitchell, 29 Ohio St. 22; State *v.* Cincinnati Tin, etc. Co., 66 Ohio St. 182; McKinzie *v.* Bailie, 7 Ohio Dec. (Reprint) 607, 4 Cinc. L. Bul. 209; Block *v.* Peebles, 10 Ohio Dec. (Reprint) 3, 18 Cinc. L. Bul. 36; Atlas Nat. Bank *v.* Rheinstrom, 6 Ohio Dec. 215, 4 Ohio N. P. 15; Ermston *v.* Cincinnati, 9 Ohio Dec. 657, 7 Ohio N. P. 635.

Oregon. — Morrison *v.* Holladay, 27 Oregon 175; Nickum *v.* Burckhardt, 30 Oregon 464, 60 Am. St. Rep. 822; Maffett *v.* Thompson, 32 Oregon 546.

Pennsylvania. — Hayes *v.* Gudykunst, 11 Pa. St. 221; Peterson *v.* Lothrop, 34 Pa. St. 223; Robinett's Appeal, 36 Pa. St. 174; Megee *v.* Beirne, 39 Pa. St. 50; Hatch *v.* Bartle, 45 Pa. St. 166, 84 Am. Dec. 484; King *v.* Faber, 51 Pa. St. 387; Youngman *v.* Linn, 52 Pa. St. 413; Davidson *v.* Barclay, 63 Pa. St. 406; Pittsburgh, etc., R. Co. *v.* Marshall, 85 Pa. St. 187; Miller *v.* Springer, 88 Pa. St. 203; Otterson *v.* Gallagher, 88 Pa. St. 355; Chandler's Appeal, 100 Pa. St. 262; Rittispaugh *v.* Lewis, 103 Pa. St. 1; Ætna Ins. Co. *v.* Confer, 158 Pa. St. 598; Ahl *v.* Goodhart, 161 Pa. St. 455; Fifth Mut. Bldg. Soc. *v.* Holt, 184 Pa. St. 572; *In re* Lightner, 187 Pa. St. 237; Crawford *v.* Pyle, 190 Pa. St. 263; Timbers *v.* Katz, 6 W. & S. (Pa.) 290; Rose *v.* Klinger, 8 W. & S. (Pa.) 178; Betts *v.* Death, Add. (Pa.) 265; Com. *v.* Keystone El., etc., Co., 4 Lack. Leg. N. (Pa.) 353; Mahon *v.* Luzerene County, 9 Kulp (Pa.) 453; Pounder *v.* Foss, 1 Walk. (Pa.) 27; Building Assoc. *v.* O'Connor, 3 Phila. (Pa.) 453, 16 Leg. Int. (Pa.) 300; Himes *v.* Jacobs, 1 P. & W. (Pa.) 152; Slayman *v.* Clark, 15 Pa. Super. Ct. 591; Rhodes *v.* Rhodes, 18 Pa. Super. Ct. 231; Snyder *v.* Berger, (Pa. 1886) 6 Atl. Rep. 733.

Rhode Island. — Hill *v.* Bain, 15 R. I. 75, 2 Am. St. Rep. 873; Gardner *v.* Whitford, 23 R. I. 396.

South Carolina. — Warren *v.* Simon, 16 S. Car. 362; Hyatt *v.* McBurney, 18 S. Car. 199; *Ex p.* Roberts, 19 S. Car. 150; Earle *v.* Earle, 33 S. Car. 498; Clyburn *v.* Reynolds, 31 S. Car. 91; Hardin *v.* Clark, 32 S. Car. 480; Patterson *v.* Rabb, 38 S. Car. 138; Rabb *v.* Patterson, 42 S. Car. 528, 46 Am. St. Rep. 743; Anderson *v.* Fowler, 48 S. Car. 8; Reese *v.* Meetze, 51 S. Car. 333; Marshall *v.* Drayton, 2 Nott & M. (S. Car.) 25; M'Kinnie *v.* Crews, 2 Nott & M. (S. Car.) 52; M'Eachern *v.* Cochran, 1 McCord L. (S. Car.) 338; Miller *v.* Alexander, 1 Hill Eq. (S. Car.) 25; Day *v.* Hill, 2 Spears L. (S. Car.) 628, 42 Am. Dec. 390; Whitmore *v.* Casey, 2 Brev. (S. Car.) 422; Simson *v.* Kennedy, Harp. L. (S. Car.) 238; Manigault *v.* Deas, Bailey Eq. (S. Car.) 283; Alexander *v.* Maxwell, Rich. Eq. Cas. (S. Car.) 302; Long *v.* Cason, 4 Rich. Eq. (S. Car.) 60; Pettus *v.* Smith, 4 Rich. Eq. (S. Car.) 197; Dorn *v.* Beasley, 7 Rich. Eq. (S. Car.) 84; Wardlaw *v.* Hammond, 9 Rich. L. (S. Car.) 454; Parker *v.* Legett, 12 Rich. L. (S. Car.) 198.

Tennessee. — Simpson *v* Jones, 2 Sneed (Tenn.) 36; Estill *v.* Deckerd, 4 Baxt. (Tenn.) 497; Browder *v.* Jackson, 3 Lea (Tenn.) 151; Deming *v.* Merchants' Cotton-press, etc., Co., 90 Tenn. 306; Melton *v.* Pace, 103 Tenn. 484; Davis *v.* Reaves, 7 Lea (Tenn.) 585; Stephens *v.* Jack, 3 Yerg. (Tenn.) 403, 24 Am. Dec. 583; Edwards *v.* M'Connel, Cooke (Tenn.) 305; Boles *v.* Smith, 5 Sneed (Tenn.) 105; Ward *v.* West, (Tenn. Ch. 1895) 35 S. W. Rep. 563; Blair *v.* Blair, (Tenn. Ch. 1896) 41 S. W. Rep. 1078.

Texas. — Howard *v.* North, 5 Tex. 290, 51 Am. Dec. 769; McCoy *v.* Crawford, 9 Tex. 353; Hall *v.* Harris, 11 Tex. 300; Bertrand *v.* Bingham, 13 Tex. 266; Chapman *v.* Lacour, 25 Tex. 94; Johns *v.* Northcutt, 49 Tex. 444; Spring *v.* Eisenach, 51 Tex. 432; Hanrick *v.* Dodd, 62 Tex. 75; Hair *v.* Wood, 58 Tex. 77; Henderson *v.* Terry, 62 Tex. 281; Black *v.* Black, 62 Tex. 296; Foster *v.* Powers, 64 Tex. 247; Pratt *v.* Jones, 64 Tex. 694; Allen *v.* Read, 66 Tex. 13; Brown *v.* Hearon, 66 Tex. 63; Read *v.* Allen, 56 Tex. 182; McCamant *v.* Roberts, 66 Tex. 260; Freeman *v.* Hawkins, 77 Tex. 498, 19 Am. St. Rep. 769; Bradford *v.* Knowles, 78 Tex. 109; Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 105, 27 Am. St. Rep. 861; McDonald *v.* Miller, 90 Tex. 309; Miller *v.* Gist, 91 Tex. 335; Cooper *v.* Mayfield, 94 Tex. 107, *affirming* (Tex. Civ. App. 1900) 57 S. W. Rep. 48; Frankel *v.* Heidenheimer, 1 Tex. App. Civ. Cas., § 807; Wilson *v.* Casey, 3 Tex. Civ. App. 141; Jackson *v.* Andrews, 3 Tex. Civ. App. 563; Thiele *v.* Axell, 5 Tex. Civ. App. 548; Still *v.* Lombardi, 8 Tex. Civ. App. 315; Beer *v.* Thomas, 13 Tex. Civ. App. 30; Bassett *v.* Sherrod, 13 Tex. Civ. App. 327; Gulf City Trust Co. *v.* Hartley, 20 Tex. Civ. App. 180; Groesbeck *v.* Golden, (Tex. 1887) 7 S. W. Rep. 362; Morrill *v.* Smith County, (Tex. Civ. App. 1895) 33 S. W. Rep. 899; McCollum *v.* Wood, (Tex. Civ. App. 1896) 33 S. W. Rep. 1087; Colman *v.* Reavis, (Tex. Civ. App. 1896) 34 S.

Estoppel Must Be Mutual. — The judgment or decree must conclude both parties or it will conclude neither. The estoppel must be mutual. No person can take advantage of a judgment or decree if he would not have been prejudiced by it if it had been otherwise.[1] A person who was not a party to an

W. Rep. 645; House *v.* Reavis, (Tex. Civ. App. 1896) 34 S. W. Rep. 646; Coleman *v.* Davis, (Tex. Civ. App. 1896) 36 S. W. Rep. 103; Yochum *v.* McCurdy, (Tex. Civ. App. 1897) 39 S. W. Rep. 210; Settegast *v.* Blount, (Tex. Civ. App. 1898) 46 S. W. Rep. 268; Oaks *v.* West, (Tex. Civ. App. 1901) 64 S. W. Rep. 1033; Citizens Nat. Bank *v.* Strauss, (Tex. Civ. App. 1902) 69 S. W. Rep. 86; Sullivan *v.* Texas Briquette, etc., Co., (Tex. Civ. App. 1900) 60 S. W. Rep. 330; Leary *v.* Interstate Nat. Bank, (Tex. Civ. App. 1901) 63 S. W. Rep. 149.

Vermont. — Clark *v.* Lyman, 8 Vt. 290; Bramble *v.* Poultney, 11 Vt. 208; Nason *v.* Blaisdell, 12 Vt. 165, 36 Am. Dec. 331; Pierson *v.* Catlin, 18 Vt. 77; Eaton *v.* Cooper, 29 Vt. 444; Willey *v.* Laraway, 64 Vt. 559; Hazen *v.* Lyndonville Nat. Bank, 70 Vt. 543, 67 Am. St. Rep. 680.

Virginia. — Kent *v.* Kent, 82 Va. 205; Gibson *v.* Green, 89 Va. 524, 37 Am. St. Rep. 888; Gardner *v.* Stratton, 89 Va. 900; Peters *v.* Anderson, 88 Va. 1051; Fishburne *v.* Engledove, 91 Va. 548; Dillard *v.* Dillard, 97 Va. 434; Loop *v.* Summers, 3 Rand. (Va.) 511; Kitty *v.* Fitzhugh, 4 Rand. (Va.) 600; Payne *v.* Coles, 1 Munf. (Va.) 373; Lovell *v.* Arnold, 2 Munf. (Va.) 167; Blakey *v.* Newby, 6 Munf. (Va.) 64; Erskine *v.* Henry, 9 Leigh (Va.) 188; Pegram *v.* Isabell, 2 Hen. & M. (Va.) 193; Shelton *v.* Barbour, 2 Wash. (Va.) 64; Pollard *v.* Coleman, 4 Call (Va.) 245; Downer *v.* Morrison, 2 Gratt. (Va.) 250; Duncan *v.* Helms, 8 Gratt. (Va.) 68; Winston *v.* Starke, 12 Gratt. (Va.) 317; Stinchcomb *v.* Marsh, 15 Gratt. (Va.) 202; Omohundro *v.* Omohundro, 27 Gratt. (Va.) 824; Reusens *v.* Cassell, (Va. 1902) 40 S. E. Rep. 616, 4 Va. Sup. Ct. Rep. 82; Williams *v.* Tomlin, (Va. 1898) 28 S. E. Rep. 883.

West Virginia. — Cady *v.* Gale, 5 W. Va. 505; Western Min., etc., Co. *v.* Virginia Cannel Coal Co., 10 W. Va. 250; Renick *v.* Ludington, 20 W. Va. 511; Robrecht *v.* Marling, 29 W. Va. 765; McCoy *v.* McCoy, 29 W. Va. 794; Bensimer *v.* Fell, 35 W. Va. 15, 29 Am. St. Rep. 774; Mann *v.* Peck, 45 W. Va. 18; Eakin *v.* Hawkins, 48 W. Va. 364; Long *v.* Willis, 50 W. Va. 341; St. Lawrence Boom, etc., Co. *v.* Price, 49 W. Va. 432.

Wisconsin. — Emmons *v.* Dowe, 2 Wis. 322; Carney *v.* Emmons, 9 Wis. 114; Green *v.* Dixon, 9 Wis. 532; Cameron *v.* Cameron, 15 Wis. 1, 82 Am. Dec. 652; Smith *v.* Milwaukee, 18 Wis. 369; Smith *v.* Pretty, 22 Wis. 655; Iowa County *v.* Mineral Point R. Co., 24 Wis. 93; Finney *v.* Boyd, 26 Wis. 366; Saveland *v.* Green, 36 Wis. 612; Sanger *v.* Mellon, 51 Wis. 560; Mabbett *v.* Vick, 53 Wis. 158; Daskam *v.* Ullman, 74 Wis. 474; Logan *v.* Trayser, 77 Wis. 579; Goodwin *v.* Snyder, 75 Wis. 450; Shores *v.* Doherty, 75 Wis. 616; Bailey *v.* O'Donnel, 77 Wis. 677; Coleman *v.* Hunt, 77 Wis. 263; Landauer *v.* Espenhain, 95 Wis. 169; Hart *v.* Moulton, 104 Wis. 349, 76 Am. St. Rep. 881; Hood *v.* Dorer, 107 Wis. 149; Grafton *v.* Hinkley, 111 Wis. 46; Carpenter *v.* Meachem, 111 Wis. 60; Lenz *v.* Chicago, etc., R. Co., 111 Wis. 198.

Application of the Rule to Suits by Separate Creditors Against the Same Debtor — *Indiana.* — Goodall *v.* Mopley, 45 Ind. 355.

Iowa. — Thomas *v.* McDonald, 102 Iowa 564.

Louisiana. — Broderick's Succession, 12 La. Ann. 521; Converse *v.* Steamer Lucy Robinson, 15 La. Ann. 433; Levy *v.* Winter, 43 La. Ann. 1049; Ledoux *v.* Lavedan, 49 La. Ann. 913.

Maine. — Biddle, etc., Co. *v.* Burnham, 91 Me. 578.

Minnesota. — Mower *v.* Hanford, 6 Minn. 535.

New York. — Reid *v.* Evergreens, (Supm. Ct. Gen. T.) 21 How. Pr. (N. Y.) 319; Heywood *v.* Thacher, 65 Hun (N. Y.) 619, 29 Abb. N. Cas. (N. Y.) 75.

Ohio. — Kit Carter Cattle Co. *v.* McGillin, 10 Ohio Dec. 146, 7 Ohio N. P. 575.

1. Mutuality of Estoppel Essential — *England.* — Spencer *v.* Williams, L. R. 2 P. & D. 230.

United States. — Wood *v.* Ward, 2 Flipp. (U. S.) 336; The 420 Min. Co. *v.* Bullion Min. Co., 3 Sawy. (U. S.) 634, 11 Morr. Min. Rep. 608, 9 Fed. Cas. No. 4,989; Reed *v.* Proprietors of Locks, etc., 8 How. (U. S.) 274; Lownsdale *v.* Portland, Deady (U. S.) 1, 15 Fed. Cas. No. 8,578; Brooklyn City, etc., R. Co. *v.* National Bank, 102 U. S. 14; Litchfield *v.* Goodnow, 123 U. S. 549; Baring *v.* Fanning, 1 Paine (U. S.) 549, 2 Fed. Cas. No. 982; Larison *v.* Hager, 44 Fed. Rep. 49; Bailey *v.* Sundberg, 49 Fed. Rep. 583, 1 U. S. App. 101; Andrews *v.* National Foundry, etc., Works, (C. C. A.) 76 Fed. Rep. 166; Maloy *v.* Duden, (C. C. A.) 86 Fed. Rep. 402; Lane *v.* Welds, 99 Fed. Rep. 286, 39 C. C. A. 528.

Alabama. — McLelland *v.* Ridgeway, 12 Ala. 482; Gwynn *v.* Hamilton, 29 Ala. 233; Harris *v.* Plant, 31 Ala. 639; Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353; Phillips *v.* Thompson, 3 Stew. & P. (Ala.) 369.

Arkansas. — Bell *v.* Wilson, 52 Ark. 171; Treadwell *v.* Pitts, 64 Ark. 447.

California. — Valentine *v.* Mahoney, 37 Cal. 389.

Connecticut. — Burdick *v.* Norwich, 49 Conn. 225; Bethlehem *v.* Watertown, 51 Conn. 490; Clarke's Appeal, 70 Conn. 195.

Delaware. — Burton *v.* Hazzard, 4 Harr. (Del.) 100.

Georgia. — Bradley *v.* Johnson, 49 Ga. 412; Dodd *v.* Mayfield, 99 Ga. 319.

Illinois. — Lamar Ins. Co. *v.* Pennell, 19 Ill. App. 212.

Indiana. — Maple *v.* Beach, 43 Ind. 51; Hoosier Stone Co. *v.* Louisville, etc., R. Co., 131 Ind. 575.

Iowa. — Myers *v.* Johnson County, 14 Iowa 47; McNamee *v.* Moreland, 26 Iowa 96; McDonald *v.* Gregory, 41 Iowa 513; Goodnow *v.* Litchfield, 63 Iowa 275.

Kentucky. — Bridges *v.* McAlister, 106 Ky. 791.

Maine. — Cobb *v.* Little, 2 Me. 261, 11 Am.

action cannot, by accepting the result of the judgment therein, make such judgment *res judicata* in his favor, and preclude the parties to the action from objecting that the judgment was not binding upon him.[1]

Basis of the Rule. — The rule that a judgment or decree concludes only parties and privies is based on that fundamental principle that no man can be deprived of his property except by due process of law, a principle which in the *United States* has been embodied in the federal Constitution and in the constitutions of the several states.[2]

The Rule, However, Is Not an Inflexible One. — The courts in many jurisdictions have allowed themselves a good deal of latitude in applying it, observing the spirit of it rather than the letter,[3] and there are some well-recognized exceptions to or modifications of it.[4]

2. Only Adversary Parties Concluded. — Not all the parties to a suit are necessarily concluded by the judgment or decree, in a subsequent suit between the same parties, but only those between whom the matter in issue in the second suit was adjudicated. To be concluded they must have been adversary parties.[5] Thus, where a person is made a party to a suit for one

Dec. 72; Biddle, etc., Co. *v.* Burnham, 91 Me. 578, *distinguishing* Atkinson *v.* White, 60 Me. 396.

Maryland. — Cecil *v.* Cecil, 19 Md. 72, 81 Am. Dec. 626; Groshon *v.* Thomas, 20 Md. 234; Cheveront *v.* Textor, 53 Md. 295.

Massachusetts. — Brigham *v.* Fayerweather, 140 Mass. 411.

Minnesota. — Nowak *v.* Knight, 44 Minn. 241; Farrell *v.* St. Paul, 62 Minn. 271, 54 Am. St. Rep. 641; Whitcomb *v.* Hardy, 68 Minn. 265; Thompson *v.* Chicago, etc., R. Co., 71 Minn. 89.

Missouri. — Bell *v.* Hoagland, 15 Mo. 360; State *v.* Barker, 26 Mo. App. 487; St. Louis Mut. L. Ins. Co. *v.* Cravens, 69 Mo. 72.

Nebraska. — Densmore *v.* Tomer, 14 Neb. 392.

New Hampshire. — Fogg *v.* Plumer, 17 N. H. 112; Hunt *v.* Haven, 52 N. H. 162; Parker *v.* Moore 59 N. H. 454; Chamberlain *v.* Carlisle, 26 N. H. 540.

New Jersey. — Ransom *v.* Brinkerhoff, 56 N. J. Eq. 149.

New York. — Sheldon *v.* Edwards, 35 N. Y. 279; Atlantic Dock Co. *v.* New York, 53 N. Y. 64; Sweetser *v.* Davis, 26 N. Y. App. Div. 398; Pfeffer *v.* Kling, 58 N. Y. App. Div. 179, *affirmed* 171 N. Y. 668; Brower *v.* Bowers, 1 Abb. App. Dec. (N. Y.) 214; Shipman *v.* Fanshaw, (Ct. App.) 15 Abb. N. Cas. (N. Y.) 299; Matter of Wright, 1 Connoly (N. Y.) 287; Starbuck *v.* Starbuck, 62 N. Y. App. Div. 437; Townsend *v.* Van Buskirk, 22 N. Y. App. Div. 441; Beyer *v.* Schultze, 54 N. Y. Super. Ct. 212; Barker *v.* Cassidy, 16 Barb. (N. Y.) 177; Lansing *v.* Montgomery, 2 Johns. (N. Y.) 382; Bissick *v.* McKenzie, 4 Daly (N. Y.) 265; Van Camp *v.* Fowler, 61 Hun (N. Y.) 626, 16 N. Y. Supp. 281, *affirmed* 133 N. Y. 600; Williams *v.* Hays, 64 Hun (N. Y.) 202; Furlong *v.* Banta, 80 Hun (N. Y.) 248; Davis *v.* Bonn, (N. Y. City Ct. Gen. T.) 13 Misc. (N. Y.) 331; Johnson *v.* Gillette, (County Ct.) 16 Misc. (N. Y.) 431. See also Todd *v.* Kerr, 42 Barb. (N. Y.) 317.

North Carolina. — Armfield *v.* Moore, Busb. L. (44 N. Car.) 157.

Ohio. — Leonard *v.* O'Hara, 1 Cinc. Super. Ct. 42.

Oregon. — Morrison *v.* Halladay, 27 Oregon 175.

Pennsylvania. — Chandler's Appeal, 100 Pa St. 262; Walker *v.* Philadelphia, 195 Pa. St. 168, 78 Am. St. Rep. 801.

South Carolina. — Manigault *v.* Deas, Bailey Eq. (S. Car.) 283.

Tennessee. — Simpson *v.* Jones, 2 Sneed (Tenn.) 36; Boles *v.* Smith, 5 Sneed (Tenn.) 105.

Texas. — Reed *v.* Allen, 56 Tex. 182; Allen *v.* Read, 66 Tex. 13.

Virginia. — Erskine *v.* Henry, 9 Leigh (Va.) 188; Winston *v.* Starke, 12 Gratt. (Va.) 317; Payne *v.* Coles, 1 Munf. (Va.) 373.

West Virginia. — Buford *v.* Adair, 43 W. Va. 211, 64 Am. St. Rep. 854.

Wisconsin. — Lenz *v.* Chicago, etc., R. Co., 111 Wis. 198.

1. Shipman *v.* Rollins, 98 N. Y. 311, 15 Abb. N. Cas. (N. Y.) 288, *reversing* 33 Hun (N. Y.) 89.

2. Principle Underlying Rule. — Nichols *v.* McIntosh, 19 Colo. 22; Fisher *v.* Wineman, 125 Mich. 642; Davis *v.* Reaves, 7 Lea (Tenn.) 588. See also Carney *v.* Emmons, 9 Wis. 114.

3. Hill *v.* Bain, 15 R. I. 75, 2 Am. St. Rep. 873. See also Thompson *v.* Clay, 3 T. B. Mon. (Ky.) 359, 16 Am. Dec. 108.

4. See *infra*, this section, 9. *Exceptions to and Modifications of General Rule.*

5. Only Adversary Parties Concluded — *California.* — Beronio *v.* Ventura County Lumber Co., 129 Cal. 232.

Illinois. — Conwell *v.* Thompson, 50 Ill. 329.

Indiana. — Finley *v.* Cathcart, 149 Ind. 470, 63 Am. St. Rep. 292.

Minnesota. — Pioneer Sav., etc., Co. *v.* Bartsch, 51 Minn. 474, 38 Am. St. Rep. 511.

Missouri. — McMahan *v.* Geiger, 73 Mo. 145, 39 Am. Rep. 489; Carmody *v.* Hanick, 85 Mo. App. 659; Springfield *v.* Plummer, 89 Mo. App. 515.

New York. — Mahoney *v.* Prendergast, 58 Hun (N. Y.) 611, 12 N. Y. Supp. 869; Earle *v.* Earle, 73 N. Y. App. Div. 300; Ostrander *v.* Hart, 130 N. Y. 406.

Ohio. — Koelsch *v.* Mixer, 52 Ohio St. 207.

Texas. — Still *v.* Lombardi, 8 Tex. Civ. App.

purpose only, the adjudication of a question involved in the suit as between other parties thereto, but in which he has no interest, will not bind him.[1]

3. Coplaintiffs and Codefendants — *a.* IN GENERAL. — The mere circumstance of any person having been formally arrayed on the same side in a suit is immaterial, however, and they will, notwithstanding, be estopped by a decision on a matter which was in issue between them, and as to which they had a controversy against each other.[2] But persons arrayed on the same side in a suit will not be concluded as against each other if no issue between them was presented and adjudicated.[3] By a joint judgment against two or more defendants who are not adversary their joint liability to the plaintiff is established and nothing more. They are not concluded as to their respective rights among themselves.[4] But the fact of the liability of each to the plaintiff is conclusively determined both as between themselves and the plaintiff and between each other.[5] Even though one of several defendants is authorized to plead over against his codefendants, if he elects not to do so the relation of the codefendants as between themselves will not be changed or in

315; Sandoval *v.* Rosser, (Tex. Civ. App. 1894) 26 S. W. Rep. 930.

And see *infra*, this title, *Matters Concluded.*

1. Goodnow *v.* Stryker, 62 Iowa 221.

2. Coplaintiffs and Codefendants Concluded by Adjudication Between Them — *United States.* — Oregon R., etc., Co. *v.* Balfour, (C. C. A.) 90 Fed. Rep. 295.

California. — Haggin *v.* Clark, 71 Cal. 444.

Minnesota. — Goldschmidt *v.* Nobles County, 37 Minn. 49.

Missouri. — Nave *v.* Adams, 107 Mo. 414, 28 Am. St. Rep. 421; Kansas City *v.* Mitchener, 85 Mo. App. 36.

New York. — Pratt *v.* Johnston, 59 N. Y. App. Div. 52; Craig *v.* Ward, 1 Abb. App. Dec. (N. Y.) 454, 3 Keyes (N. Y.) 387, 3 Abb. Pr. N. S. (N. Y.) 235, *affirming* 36 Barb. (N. Y.) 377; Leavitt *v.* Wolcott, 95 N. Y. 212.

North Carolina. — Baugert *v.* Blades, 117 N. Car. 221.

Texas. — Carnes *v.* Carnes, (Tex. Civ. App. 1901) 64 S. W. Rep. 877.

As to who are bound by a judgment or decree rendered in judicial proceedings for partition, see the title PARTITION, vol. 21, p. 1183.

3. When Coplaintiffs and Codefendants Are Not Concluded as Against Each Other — *Illinois.* — Conwell *v.* Thompson, 50 Ill. 330.

Indiana. — Finley *v.* Cathcart, 149 Ind. 470, 63 Am. St. Rep. 292.

Iowa. — Kennedy *v.* Independent School Dist., 48 Iowa 189. But see Devin *v.* Ottumwa, 53 Iowa 461.

Minnesota. — Pioneer Sav., etc., Co. *v.* Bartsch, 51 Minn. 474, 38 Am. St. Rep. 511.

Missouri. — Kansas City *v.* Mitchener, 85 Mo. App. 36; Springfield *v.* Plummer, 89 Mo. App. 515.

New Jerscy. — Gardner *v.* Raisbeck, 28 N. J. Eq. 71.

New York. — Mahoney *v.* Prendergast, 58 Hun (N. Y.) 611, 12 N. Y. Supp. 869; Denike *v.* Denike, 44 N. Y. App. Div. 621, *affirmed* 167 N. Y. 585; Earle *v.* Earle, 73 N. Y. App. Div. 300; O'Connor *v.* New York, etc., Land Imp. Co., (C. Pl. Gen. T.) 8 Misc. (N. Y.) 243; Peet *v.* Kent, (Supm. Ct. Gen. T.) 5 N. Y. St. Rep. 134, *affirmed* 122 N. Y. 669. But see Craig *v.* Ward, 1 Abb. App. Dec. (N. Y.) 454, 3 Keyes (N. Y.) 387, 3 Abb. Pr. N. S. (N. Y.) 235, *affirming* 36 Barb. (N. Y.) 377.

North Carolina. — Baugert *v.* Blades, 117 N. Car. 221.

Ohio. — Wood *v.* Butler, 23 Ohio St. 520; Koelsch *v.* Mixer, 52 Ohio St. 207.

Oklahoma. — Keagy *v.* Wellington Nat. Bank, (Okla. 1902) 69 Pac. Rep. 811.

Texas. — Still *v.* Lombardi, 8 Tex. Civ. App. 315; Hoxie *v.* Farmers, etc., Nat. Bank, 20 Tex. Civ. App. 462; Sandoval *v.* Rosser, (Tex. Civ. App. 1894) 26 S. W. Rep. 930; Cohen *v.* Simpson, (Tex. Civ. App. 1895) 32 S. W. Rep. 59.

As to What Was Requisite under the New York Code of Civil Procedure, § 521, to render a judgment conclusive between codefendants, see Ostrander *v.* Hart, 130 N. Y. 406; Savage *v.* Buffalo, 49 N. Y. App. Div. 577; Earle *v.* Earle, 73 N. Y. App. Div. 300.

4. *Connecticut.* — Bulkeley *v.* House, 62 Conn. 459.

Indiana. — Westfield Gas, etc., Co. *v.* Noblesville, etc., Gravel Road Co., 13 Ind. App. 481, 55 Am. St. Rep. 244.

Missouri. — McMahan *v.* Geiger, 73 Mo. 145, 39 Am. Rep. 489; State Bank *v.* Bartle, 114 Mo. 276; O'Rourke *v.* Lindell R. Co., 142 Mo. 342, *distinguishing* Wiggin *v.* St. Louis, 135 Mo. 558.

Ohio. — Cox *v.* Hill, 3 Ohio 412.

Texas. — Sandoval *v.* Rosser, (Tex. Civ. App. 1894) 26 S. W. Rep. 930.

5. Westfield Gas, etc., Co. *v.* Noblesville, etc., Gravel Road Co., 13 Ind. App. 481, 55 Am. St. Rep. 244.

Action Commenced Without the Knowledge of Person Joined as Coplaintiff. — If an action be commenced and pending in the name of A, B, and C jointly, and A becomes nonsuit, so that the defendant has judgment against all the plaintiffs for his costs, which are paid upon execution by B, in an action by B against A, to recover one-third of the costs paid, A will be permitted to give in evidence that the former action was commenced without his knowledge or consent, and that he had no interest in the suit, and if such be the case he will not be concluded as against B by the former judgment. Wilson *v.* Mower, 5 Mass. 407.

any way affected by a joint and several judgment rendered against them.[1]

Decrees on Cross-bills. — In a suit in equity a defendant to the original bill is not affected by the result of litigation between two or more of his codefendants, on a cross-bill to which he is not a party.[2] But parties to the same suit in chancery for the settlement of accounts are bound by a decree on the cross-bill of one defendant against the complainant.[3]

b. NECESSARY PARTIES MADE DEFENDANTS IN CHANCERY SUITS. — In chancery suits where parties are often made defendants because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between codefendants may be passed upon and decided; and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the court and passed upon by its decree.[4]

c. WHERE SUITS OF CLAIMANTS AGAINST COMMON FUND ARE CONSOLIDATED. — Where cases are consolidated and heard together the object of which is satisfaction out of a common fund, the object being to settle the claims of the respective claimants between each other as well as their claims against the common debtor or fund, the decree is binding upon all the parties.[5]

4. Absolute Identity of Parties in Both Suits Not Essential. — It is not an objection to the application of the rule of *res judicata* that the parties to the former suit included some who are not joined in the subsequent suit, or *vice versa*. The rule is applicable to all who were parties in both actions.[6]

So Notwithstanding the Death of One Who Was a Codefendant in an action, the judgment will be conclusive in a suit brought by the surviving defendants against the plaintiff in the former action in reference to the same subject-matter.[7]

5. Who Are Concluded Where Suits Are Heard Together. — Generally, where two suits are heard together, if the proper parties are made to either suit, the

1. Still *v.* Lombardi, 8 Tex. Civ. App. 315.
2. Cleveland *v.* Chambliss, 64 Ga. 352.
3. Prentice *v.* Buxton, 3 B. Mon. (Ky.) 35.
4. **Necessary Parties Made Defendants in Chancery Suits.** — Corcoran *v.* Chesapeake, etc., Canal Co., 94 U. S. 741; Riley *v.* Grafton First Nat. Bank, 81 Md. 14; National Marine Bank *v.* Heller, 94 Md. 213; Waldo *v.* Waldo, 52 Mich. 91.

Where in a Foreclosure Case several parties are brought into court and declared against as subsequent incumbrancers, purchasers, or lessees of the mortgaged premises, and called upon to set out their several and respective liens, claims, and rights therein, their respective answers may also be considered as cross-petitions for relief as against each other, as well as against the plaintiff, and any one of said defendants regularly served with process who fails to answer any material allegation contained in the answer of his codefendant is bound thereby and by the decree founded thereon, and unless he appeals from such decree, the same becomes as to him *res judicata*. Hapgood *v.* Ellis, 11 Neb. 131.

5. Tharp *v.* Cotton, 7 B. Mon. (Ky.) 636.
6. **Absolute Identity of Parties Not Essential** — *United States.* — Green *v.* Bogue, 158 U. S. 478; Thompson *v.* Roberts, 24 How. (U. S.) 233.

Indiana. — Davenport *v.* Barnett, 51 Ind. 329; Goble *v.* Dillon, 86 Ind. 327, 44 Am. Rep. 308; State *v.* Krug, 94 Ind. 366; Wilson *v.* Buell, 117 Ind. 315.

Iowa. — Campbell *v.* Ayres, 18 Iowa 252; Larum *v.* Wilmer, 35 Iowa 244.

Kansas. — Peterson *v.* Warner, 6 Kan. App. 298.

Minnesota. — Whitcomb *v.* Hardy, 68 Minn. 265.

Missouri. — Nave *v.* Adams, 107 Mo. 414, 28 Am. St. Rep. 421.

New Jersey. — Gardner *v.* Raisbeck, 28 N. J. Eq. 75.

New York. — Meagley *v.* Binghamton, 36 Hun (N. Y.) 171; Palmer *v.* Great Western Ins. Co., (C. Pl. Gen. T.) 10 Misc. (N. Y.) 167; Cahnmann *v.* Metropolitan St. R. Co., (Supm. Ct. App. T.) 37 Misc. (N. Y.) 475, *reversing* (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 127; Dyett *v.* Hyman, 129 N. Y. 351, 26 Am. St. Rep. 533, *affirming* (C. Pl. Gen. T.) 13 N. Y. Supp. 895.

North Carolina. — Fowler *v.* Osborne, 111 N. Car. 404.

Texas. — Girardin *v.* Dean, 49 Tex. 243; Russell *v.* Farquhar, 55 Tex. 355; Frankel *v.* Heidenheimer, 1 Tex. App. Civ. Cas., § 807.

West Virginia. — Western Min., etc., Co. *v.* Virginia Cannel Coal Co., 10 W. Va. 250; McCoy *v.* McCoy, 29 W. Va. 794.

Wisconsin. — Marshall *v.* Pinkham, 73 Wis. 401.

See also Miller *v.* Thayer, 74 Cal. 351; Allard *v.* Lobau, 3 Mart. N. S. (La.) 293; French *v.* Neal, 24 Pick. (Mass.) 55; Neppach *v.* Jones, 28 Oregon 286; Hillegass *v.* Hillegass, 5 Pa. St. 97; Follansbee *v.* Walker, 74 Pa. St. 306; Pierson *v.* Catlin, 18 Vt. 77. But see Lawrence *v.* Vernon, 3 Sumn. (U. S.) 20, 15 Fed. Cas. No. 8,146; Corl *v.* Riggs, 12 Mo. 430.

7. Parker *v.* Legett, 12 Rich. L. (S. Car.) 198.

judgment or decree will be binding upon all, though all were not made parties to each suit.[1]

6. Identity of Capacity Essential. — It is essential to the application of the principle of *res judicata* not only that the person sought to be bound by the former judgment should have been a party to both actions, but he must have appeared in both in the same capacity or character. Thus, a judgment for or against an executor, administrator, guardian, assignee, or trustee in a suit in which he appears in his representative capacity does not generally conclude him in a subsequent action in which he appears as an individual to protect or vindicate his own personal interest or right, and *e converso* a judgment for or against a person acting in his individual right is not conclusive upon him in a subsequent suit in which he appears in his representative capacity.[2] So, a judgment against a person in one representative capacity will not conclude him in a subsequent suit in which he appears in another and different repre-

1. Shenandoah Valley Nat. Bank *v.* Bates, 20 W. Va. 210; Waggoner *v.* Wolf, 28 W. Va. 820.

2. **Identity of Capacity Essential to Application of Principle** — *England.* — Leggott *v.* Great Northern R. Co., 1 Q. B. D. 599, 45 L. J. Q. B. 557, 35 L. T. N. S. 334, 24 W. R. 784.

United States. — Carey *v.* Roosevelt, 81 Fed. Rep. 608.

Arizona. — Gray *v.* Noonan, (Ariz. 1897) 50 Pac. Rep. 116.

California. — Karr *v.* Parks, 44 Cal. 46.

Connecticut — Fuller *v.* Metropolitan L. Ins. Co., 68 Conn. 55, 57 Am. St. Rep. 84; Clarke's Appeal, 70 Conn. 195.

Georgia. — Davis *v.* Davis, 30 Ga. 296; Braswell *v.* Hicks, 106 Ga. 791, *citing* 21 AM. AND ENG. ENCYC. OF LAW (1st ed.) 134 *et seq.*; Pollock *v.* Cox, 108 Ga. 430; Hooper *v.* Southern R. Co., 112 Ga. 96.

Illinois. — Sutton *v.* Read, 176 Ill. 69.

Indiana — Erwin *v.* Garner, 108 Ind. 488; McBurnie *v.* Seaton, 111 Ind. 56.

Kansas. — Atchison, etc., R. Co. *v.* Jefferson County, 12 Kan. 127.

Louisiana. — Mercier *v.* Sterlin, 5 La. 472; Slocomb *v.* De Lizardi, 21 La. Ann. 355, 99 Am. Dec. 740; Baudin *v.* Dubourg, 4 Mart. N. S. (La.) 496.

Maine. — Lander *v.* Arno, 65 Me. 26.

Mississippi. — Washburn *v.* Phillips, 6 Smed. & M. (Miss.) 425.

Missouri. — Terrill *v.* Boulware, 24 Mo. 254.

New York. — Rathbone *v.* Hooney, 58 N. Y. 463; Landon *v.* Townshend, 112 N. Y. 93, 8 Am. St. Rep. 712, *reversing* 44 Hun (N. Y.) 561; Landon *v.* Townshend, 129 N. Y. 166, *affirming* 60 Hun (N. Y.) 578, 14 N. Y. Supp. 522, *distinguishing* and *limiting* Wagner *v.* Hodge, 34 Hun (N. Y.) 524; Collins *v.* Hydorn, 135 N. Y. 320, *reversing* 62 Hun (N. Y.) 286; Kager *v.* Brenneman, 47 N. Y. App. Div. 63; Furlong *v.* Banta, 80 Hun (N. Y.) 248; McGuckin *v.* Milbank, 83 Hun (N. Y.) 473; *In re* Mellen, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 811, 67 Hun (N. Y.) 648; Matter of Yetter, 44 N. Y. App. Div. 404, *affirmed* 162 N. Y. 615; Gerstein *v.* Fisher, (N. Y. Super. Ct. Spec. T.) 12 Misc. (N. Y.) 211; Nuttall *v.* Simis, (Supm. Ct. Tr. T.) 22 Misc. (N. Y.) 19, *affirmed* 31 N. Y. App. Div. 503.

Ohio. — Henry *v.* Pittsburg, etc., R. Co., 5 Ohio Dec. 41, 2 Ohio N. P. 118.

Pennsylvania. — Posten *v.* Posten, 4 Whart. (Pa.) 27; Allen *v.* Union Bank, 5 Whart. (Pa.) 420. See also Kauffelt *v.* Leber, 9 W. & S. (Pa.) 93.

South Dakota. — Sonnenberg *v.* Steinbach, 9 S. Dak. 518, 62 Am. St. Rep. 885.

Tennessee. — Melton *v.* Pace, 103 Tenn. 484; Buchanan *v.* Kimes, 2 Baxt. (Tenn.) 275.

Texas. — Hanrick *v.* Gurley, 93 Tex. 458.

Virginia. — Blakey *v.* Newby, 6 Munf. (Va.) 64.

West Virginia. — McNutt *v.* Trogden, 29 W. Va. 469.

But see Beardsley *v.* Beardsley, (1899) 1 Q. B. 746, 68 L. J. Q. B. 270, 80 L. T. N. S. 51, 47 W. R. 284; Shaw *v.* Padley, 64 Mo. 519; Anderson *v.* Third Ave. R. Co., 9 Daly (N. Y.) 487.

Under the Express Provisions of the Louisiana Code it was essential, to give to a judgment the authority of *res judicata* in a subsequent suit, that the issue should have been between the same parties, acting in the same capacity. Cloutier *v.* Lecomte, 3 Mart. (La.) 481. See also Robeson *v.* Carpenter, 7 Mart. N. S. (La.) 30.

Heir and Creditor. — A decree rendered against a person as heir does not bind him in a subsequent suit in which he appears as a creditor. Yandell *v.* Pugh, 53 Miss. 295.

Universal Legatee and Heir. — But a judgment recognizing certain parties as the legal heirs of their deceased grandmother, rendered in a suit against the surviving husband of their grandmother, who claimed under her will to be her universal legatee, may be pleaded as *res judicata* against him in a suit to annul the judgment brought by him in the assumed capacity of a legal heir. Lebrew's Succession, 31 La. Ann. 212.

Actual Capacity and Not Mere Formal Designation the Test. — A judgment in a suit in which a person in fact appears as a trustee and asserts rights in that capacity is conclusive upon him in a subsequent suit involving the same subject-matter in which he appears and is designated as "trustee," although, in the first suit he was not styled "trustee." Daniel *v.* Gum, (Tenn. Ch. 1897) 45 S. W. Rep. 468.

Persons Made Defendants to a Foreclosure Suit as Judgment Creditors are concluded by the decree rendered therein, although they hold a chattel mortgage upon the property. Benjamin *v.* Elmira, etc., R. Co., 49 Barb. (N. Y.) 441.

sentative capacity.[1] But where a person appears in a suit in both an individual and a representative capacity the judgment will conclude him in both capacities.[2]

7. Who Are Parties Within the Doctrine of Res Judicata — *a.* IN GENERAL. — The term parties as used in connection with the doctrine of *res judicata* includes all who are directly interested in the subject-matter of the suit and have a right and are given an opportunity to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment or decree, in case an appeal lies. Persons not having these rights, substantially, are regarded as strangers to the cause.[3] A mere nominal party having no control of or interest in the suit is not bound by the judgment.[4]

1. Different Representative Capacities. — Carey *v.* Roosevelt, (C. C. A.) 102 Fed. Rep. 569, 43 C. C. A. 320, *reversing* 91 Fed. Rep. 567. See also Leggott *v.* Great Northern R. Co., 1 Q. B. D. 599, 45 L. J. Q. B. 557, 35 L. T. N. S. 334, 24 W. R. 784. But see Colt *v.* Colt, 111 U. S. 566, *affirming* 48 Fed. Rep. 385.

2. Appearance in Both Individual and Representative Capacities — *United States.* — Corcoran *v.* Chesapeake, etc., Canal Co., 94 U. S. 741; Brown *v.* Howard, 92 Fed. Rep. 537.

Georgia. — Jenkins *v.* Nolan, 79 Ga. 295; La Pierre *v.* Webb, 113 Ga. 820.

Kentucky. — Maddox *v.* Williams, 87 Ky. 147.

South Carolina. — Manigault *v.* Deas, Bailey Eq. (S. Car.) 283.

See also McBurnie *v.* Seaton, 111 Ind. 56; Pepper *v.* Pepper, 24 Ill. App. 316.

Person Sued in Individual Capacity Defending as Administrator. — Where in the defense of an action brought against one as an individual he files an answer which practically, though not in express terms, makes him, in his character as administrator of a deceased person, a defendant to the action, and defends in the right of his intestate's estate, the estate is concluded by the judgment rendered in that action. Braswell *v.* Hicks, 106 Ga. 791.

3. Parties Defined — *United States.* — Lovejoy *v.* Murray, 3 Wall. (U. S.) 1; Flanders *v.* Seelye, 105 U. S. 718; Litchfield *v.* Goodnow, 123 U. S. 549; Green *v.* Bogue, 158 U. S. 478; Robbins *v.* Chicago, 4 Wall. (U. S.) 657, *affirming* 2 Black (U. S.) 418; American Bell Telephone Co. *v.* National Improved Telephone Co., 27 Fed. Rep. 663; Frank *v.* Wedderin, (C. C. A.) 68 Fed. Rep. 818; Wilgus *v.* Germain, (C. C. A.) 72 Fed. Rep. 773; Theller *v.* Hershey, 89 Fed. Rep. 575; Hauke *v.* Cooper, (C. C. A.) 108 Fed. Rep. 922. See also Hale *v.* Finch, 104 U. S. 261; McIntosh *v.* Pittsburg, 112 Fed. Rep. 705.

Alabama. — Lawrence *v.* Ware, 37 Ala. 553. See also McLelland *v.* Ridgeway, 12 Ala. 482; Marr *v.* Southwick, 2 Port. (Ala.) 351.

California. — Drinkhouse *v.* Spring Valley Water Works, 87 Cal. 253.

Kentucky. — Hardee *v.* Hall, 12 Bush (Ky.) 327; Schmidt *v.* Louisville, etc., R. Co., 99 Ky. 143; Owingsville, etc., Turnpike Road Co. *v.* Hamilton, (Ky. 1899) 53 S. W. Rep. 5.

Maine. — Atkinson *v.* White, 60 Me. 396; Biddle, etc, Co. *v.* Burnham, 91 Me. 578. See also Emery *v.* Davis, 17 Me. 252.

Maryland. — Cecil *v.* Cecil, 19 Md. 72, 81 Am. Dec. 626.

Massachusetts. — Elliott *v.* Hayden, 104 Mass. 180; Brigham *v.* Fayerweather, 140 Mass. 411.

Michigan. — Hale *v.* Chandler, 3 Mich. 531.

Missouri. — Harvie *v.* Turner, 46 Mo. 444; Strong *v.* Phœnix Ins. Co., 62 Mo. 289, 21 Am. Rep. 417; McDonald *v.* Matney, 82 Mo. 363; Springfield *v.* Plummer, 89 Mo. App. 515; Rieschick *v.* Klingelhoefer, 91 Mo. App. 430; State *v.* St. Louis, 145 Mo. 551.

New Hampshire. — Nichols *v.* Day, 32 N. H. 133, 64 Am. Dec. 358; Hunt *v.* Haven, 52 N. H. 162.

New Jersey. — Buckingham *v.* Ludlum, 37 N. J. Eq. 137.

New York. — Castle *v.* Noyes, 14 N. Y. 329; Craig *v.* Ward, 1 Abb. App. Dec. (N. Y.) 454; Bush *v.* Knox, 2 Hun (N. Y.) 576; Bissick *v.* McKenzie, 4 Daly (N. Y.) 265; O'Brien *v.* Browning, (Supm. Ct. Spec. T.) 49 How. Pr. (N. Y.) 109; Yorks *v.* Steele, 50 Barb. (N. Y.) 397; Greenwood *v.* Marvin, (Supm. Ct. Gen. T.) 11 N. Y. St. Rep. 235, *affirmed* 111 N. Y. 423.

Ohio. — Cincinnati *v.* Wright, 7 Ohio Dec. (Reprint) 234, 1 Cinc. L. Bul. 387

Pennsylvania. — Peterson *v.* Lothrop, 34 Pa. St. 223; Com. *v.* Comrey, 174 Pa. St. 355; Fifth Mut. Bldg. Soc. *v.* Holt, 184 Pa. St. 572; Walker *v.* Philadelphia, 195 Pa. St. 168, 78 Am. St. Rep. 801.

Tennessee. — Boles *v.* Smith, 5 Sneed (Tenn.) 105; Morgan *v.* Winston, 2 Swan (Tenn.) 472. See also Blair *v.* Blair, (Tenn. Ch. 1896) 41 S. W. Rep. 1078.

Washington. — Douthitt *v.* MacCulsky, 11 Wash. 601.

West Virginia. — Bensimer *v.* Fell, 35 W. Va. 15, 29 Am. St. Rep. 774. See also McCoy *v.* McCoy, 29 W. Va. 794.

Wisconsin. — Daskam *v.* Ullman, 74 Wis. 474. See also Carney *v.* Emmons, 9 Wis. 114.

As to Who are Parties to Proceedings in Rem. — See *infra*, this section, *Proceedings in Rem.*

4. Mere Nominal Party Not Concluded. — Walker *v.* Philadelphia, 195 Pa. St. 168, 78 Am. St. Rep. 801. See also Hamilton *v.* Berry, 14 B. Mon. (Ky.) 25; School Dist. Number One *v.* Whalen, 17 Mont. 1; State *v.* Cincinnati Gas-Light, &c., Co., 18 Ohio St. 262; Smith *v.* Milwaukee, 18 Wis. 369.

Only persons whose interests may be affected can be parties to judicial proceedings either at law or in chancery, and though one whose interests cannot be affected be named as a party, the judgment or decree will not conclude those claiming under him the property which is the subject of litigation. Harris *v.* Cornell, 80 Ill. 54.

b. NECESSITY OF NOTICE OR KNOWLEDGE OF SUIT. — To be concluded a person must have had notice or knowledge of the suit.[1] This rests on the plain principle of right, that no man shall be deprived of his property until an opportunity has been afforded him of making defense.[2] Ordinarily there must be a legal service of process,[3] or a voluntary appearance without such service.[4] But in some jurisdictions the broad rule is enunciated that any

1. Notice or Knowledge of Suit Essential — *United States.* — Flanders *v.* Seelye, 105 U. S. 718.

Alabama. — Dunklin *v.* Wilson, 64 Ala. 162.

Arkansas. — Clark *v.* Grayson, 2 Ark. 149.

Colorado. — Nichols *v.* McIntosh, 19 Colo. 22.

Connecticut. — Duryee *v.* Hale, 31 Conn. 217.

Georgia. — Womack *v.* White, 30 Ga. 696; Roe *v.* Doe, 34 Ga. 167.

Iowa. — Guedert *v.* Emmet County, (Iowa 1902) 89 N. W. Rep. 85.

Louisiana. — Ledoux *v.* Lavedan, 49 La. Ann. 913.

Massachusetts. — Munroe *v.* Luke, 19 Pick. (Mass.) 39.

Michigan. — Dean *v.* Chapin, 22 Mich. 275.

Mississippi. — Englehard *v.* Sutton, 7 How. (Miss.) 99.

New Hampshire. — Nichols *v.* Day, 32 N. H. 133, 64 Am. Dec. 358.

New York. — Schrauth *v.* Dry Dock Sav. Bank, 86 N. Y. 390.

Pennsylvania. — Updegraff *v.* Cooke, 8 Phila. (Pa.) 336.

Texas. — Williams *v.* Warren, 82 Tex. 319; Colman *v.* Reavis, (Tex. Civ. App. 1896) 34 S. W. Rep 645.

2. Dunklin *v.* Wilson, 64 Ala. 162.

3. Legal Service of Process — *United States.* — Brooklyn *v.* Ætna L. Ins. Co., 99 U. S. 362; Empire Tp. *v.* Darlington, 101 U. S. 87; Mason *v.* Eldred, 6 Wall. (U. S.) 231; Webster *v.* Reid, 11 How. (U. S.) 437; *In re* Hinds, 3 Nat. Bankr. Reg. 351, 12 Fed. Cas. No. 6,516; Larison *v.* Hager, 44 Fed. Rep. 49. See also Pennoyer *v.* Neff, 95 U. S. 714.

Alabama. — Dunklin *v.* Wilson, 64 Ala. 162.

Colorado. — Nichols *v.* McIntosh, 19 Colo. 22.

Connecticut. — Wood *v.* Watkinson, 17 Conn. 500, 44 Am. Dec. 562.

Georgia. — Roe *v.* Doe, 34 Ga. 167; Davis *v.* Howard, 56 Ga. 430.

Indiana. — Burton *v.* Reagan, 75 Ind. 77; Paulus *v.* Latta, 93 Ind. 34.

Iowa. — McCormick *v.* Grundy County, 24 Iowa 382.

Kentucky. — Moore *v.* Farrow, 3 A. K. Marsh. (Ky.) 41.

Louisiana. — Augustin *v.* Cailleau, 5 Mart. (La.) 464.

Massachusetts. — Gibbs *v.* Bryant, 1 Pick. (Mass.) 118.

Michigan. — Bonesteel *v.* Todd, 9 Mich. 371, 80 Am. Dec. 90.

Mississippi. — McPike *v.* Wells, 54 Miss. 136.

New York. — Sperry *v.* Reynolds, 65 N. Y. 179; New York, etc., R. Co. *v.* Kyle, 5 Bosw. (N. Y.) 587; New Jersey Zinc Co. *v.* Blood, (Supm. Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 147.

Pennsylvania. — White's Estate, 163 Pa. St. 388.

South Carolina. — Warren *v.* Simon, 16 S. Car. 362.

Tennessee. — Bleidorn *v.* Pilot Mountain Coal, etc., Co., 89 Tenn. 166.

Texas. — Freeman *v.* Hawkins, 77 Tex. 498, 19 Am. St. Rep. 769; McDonald *v.* Miller, 90 Tex. 309.

Wisconsin. — Coleman *v.* Hunt, 77 Wis. 264; Liginger *v.* Field, 78 Wis. 367; Carpenter *v.* Meachem, 111 Wis. 60.

Where a Writ Issued Against a Minor, with Notice to His Guardian, and the sheriff returned "served the defendants," a verdict and judgment is evidence against the minor. Hillegass *v.* Hiliegass, 5 Pa. St. 97.

The Mere Recital that "Notice Has Been Given to All Persons Interested" is not enough to make the judgment binding upon one who was not in any manner cited or made a party to the proceeding. Gilman *v.* Healy, 46 Hun (N. Y.) 310.

Generally, as to What Constitutes Legal Service of Process, see the title SERVICE OF PROCESS AND PAPERS in the ENCYC. OF PL. AND PR., vol. 19, p. 567.

4. Voluntary Appearance — *United States.* — Anderson *v.* Watt, 138 U. S. 694; *In re* Hinds, 3 Nat. Bankr. Reg. 351, 12 Fed. Cas. No. 6,516; Larison *v.* Hager, 44 Fed. Rep. 49; Compton *v.* Jesup, (C. C. A.) 68 Fed. Rep. 263; Frank *v.* Wedderin, (C. C. A.) 68 Fed. Rep. 818.

Arkansas. — Clark *v.* Grayson, 2 Ark. 149.

California. — Johnston *v.* San Francisco Sav. Union, 75 Cal. 134, 7 Am. St. Rep. 129.

Connecticut. — Wood *v.* Watkinson, 17 Conn. 500, 44 Am. Dec. 562.

Georgia. — Holley *v.* Wallace, 10 Ga. 158.

Indiana. — Paulus *v.* Latta, 93 Ind. 34.

Kentucky. — Shaefer *v.* Gates, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164; Moore *v.* Farrow, 3 A. K. Marsh. (Ky.) 41.

Louisiana. — Ledoux *v.* Lavedan, 49 La. Ann. 913.

Michigan. — Bonesteel *v.* Todd, 9 Mich. 371, 80 Am. Dec. 90.

Mississippi. — McPike *v.* Wells, 54 Miss. 136.

New Hampshire. — Nichols *v.* Day, 32 N. H. 133, 64 Am. Dec. 358.

New York. — Sperry *v.* Reynolds, 65 N. Y. 179; Schrauth *v.* Dry Dock Sav. Bank, 86 N. Y. 390; New York, etc., R. Co., *v.* Kyle, 5 Bosw. (N. Y.) 587.

Ohio. — Cox *v.* Hill, 3 Ohio 411.

Texas. — Williams *v.* Warren, 82 Tex. 319; McDonald *v.* Miller, 90 Tex. 309.

As to What Constitutes an Appearance, see the ENCYC. OF PL. AND PR., title APPEARANCE, vol. 2, p. 588.

In South Carolina it has been held that no person can be made a defendant in a cause so as to be concluded by the judgment rendered therein, except by the process of law or by his own consent, which must appear of record. Marshall *v.* Drayton, 2 Nott & M. (S. Car.) 25; Miller *v.* Alexander, 1 Hill Eq (S. Car.) 25.

Statute Prescribing Mode of Making Minor Party. — Where a statute prescribed explicitly

person who is directly interested in a suit and has knowledge of its pendency, and who refuses or neglects to appear and avail himself of his rights, is concluded by the judgment rendered therein.[1]

Persons Not Brought In by Pleadings Not Concluded. — But though a person be served with process in a suit, yet if he is not named or in any manner designated or brought into the suit by the pleadings he is not a party, and will not be bound by the judgment or decree.[2] But where a person is not served with process in or named as a party to an action, but comes in and answers, reciting that he was sued by a fictitious name, and sets up his claim, a judgment rendered against him by his true name will conclude him, and this though the complaint was not amended by inserting his true name.[3]

c. ACQUIESCENCE BY ONE IN PROSECUTION OR DEFENSE IN HIS NAME. — A person will be concluded by a judgment in a suit if, with his knowledge, the suit is commenced and prosecuted, or defended in his name, and judgment rendered therein, without objection on his part.[4]

But the Mere Fact that an Unauthorized Person procured counsel and caused an answer to be filed for one who was not served with notice and did not appear will not make him a party to the suit, so as to render an adjudication therein binding upon him.[5]

d. PERSONS PROSECUTING OR DEFENDING IN THE NAMES OF OTHERS — (1) *In General.* — One who prosecutes or defends a suit in the name of another

the mode in which a minor may be made a party to an action, a minor will not be bound by a judgment unless he was made a party in the manner prescribed. Whitesides *v.* Barber, 24 S. Car. 373.

1. Persons Directly Interested and Having Knowledge of Pendency Concluded — *United States.* — Robbins *v.* Chicago, 4 Wall. (U. S.) 657, *affirming* 2 Black (U. S.) 418; Audenreid *v.* Woodward, 4 Fed. Rep. 173; American Bell Telephone Co. *v.* National Improved Telephone Co., 27 Fed. Rep. 663.

Illinois. — Thomsen *v.* McCormick, 136 Ill. 135.

Maryland. — Albert *v.* Hamilton, 76 Md. 304; Riley *v.* Grafton First Nat. Bank, 81 Md. 14; Williams *v.* Snebly, 92 Md. 9.

See also Goldsmith *v.* Greve, 10 Fed. Cas. No. 5,521; Frank *v.* Wedderin, (C. C. A.) 68 Fed. Rep. 818; Pope *v.* Nance, 1 Stew. (Ala.) 354, 18 Am. Dec. 60; Kaye *v.* Louisville, (Ky. 1890) 14 S. W. Rep. 679; Conger *v.* Chilcote, 42 Iowa 18; Holbrook *v.* Colburn, 6 Rich. Eq. (S. Car.) 289; Grant *v.* Connecticut Mut. L. Ins. Co., 29 Wis. 125. But see Ford *v.* O'Donnell 40 Mo. App. 51; King *v.* Buffalo, 57 Hun (N. Y.) 586, 10 N. Y. Supp. 564; Scott *v.* Drennen, 9 Daly (N. Y.) 226; Whitesides *v.* Barber, 24 S. Car. 373; McDonald *v.* Miller, 90 Tex. 309.

2. McDonald *v.* Miller, 90 Tex. 309; Moseley *v.* Cocke, 7 Leigh (Va.) 224.

The Bare Title of a Cause at the head of one or two orders of court, in which the defendant is stated to be G. M. "*et al.*," is not sufficient to show that a partner of G. M., not anywhere named in any portion of the record, was a defendant and party to the proceeding. Williams *v.* Bankhead, 19 Wall. (U. S.) 563.

3. Johnston *v.* San Francisco Sav. Union, 75 Cal. 134, 7 Am St. Rep. 129.

Persons Brought In Upon Motion of an Original Defendant. — In an action to quiet title, a person who, though not made a party by the plaintiff, is made a party upon motion of one of the original defendants, and is served with summons, is bound by the decree rendered, although he failed to file any pleading setting up his claim. Desnoyers *v.* Dennison, 10 Ohio Cir. Dec. 430, 19 Ohio Cir. Ct. 320.

4. One Acquiescing in Prosecution or Defense in His Name Concluded. — Henderson *v.* Terry, 62 Tex. 281; Logan *v.* Trayser, 77 Wis. 579. See also Carpenter *v.* Carpenter, 126 Mich. 217.

Where the members of a church corporation brought a suit for its benefit, though not in its name, against its trustees, the corporation cannot, after it has accepted and enjoyed the benefit of a decree in its favor, say that the proceeding was not prosecuted in its behalf, and bring a suit in its own name to compel an account and allege that it was not bound by such portions of the decree as were unfavorable to it. Third Reformed Dutch Church's Appeal, 88 Pa. St. 503.

5. Goodnow *v.* Plumbe, 64 Iowa 672.

Repudiation of Attorney's Action in Bringing Suit Followed by Ratification Thereof. — An action was instituted in behalf of a large number of plaintiffs by name, but some of the persons whose names were thus used as plaintiffs gave to the defendant an instrument in writing that the suit had been instituted without their knowledge or consent that they repudiated the action of the attorneys who instituted it, and did not desire it further prosecuted, but upon further inquiry became satisfied with the action of the attorneys, ratified it, and employed them to proceed with the case in their names, in connection with the names of those who did not disaffirm, appeared upon the trial as plaintiffs, and participated therein as litigants and witnesses, explaining that the writing was given under a misapprehension on their part. They were never dismissed nor were their names stricken from the record as plaintiffs by the court. It was held that a decree or judgment rendered upon the merits of the case was binding upon them. Little *v.* Giles, 27 Neb. 179.

to establish or protect his own right, or who assists in the prosecution or defense in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment, and as fully entitled to avail himself of it as an estoppel against an adversary party, as he would be if he had been a party to the record.[1] In such case the person

1. Prosecution or Defense of Suit in Another's Name — *United States.* — Lovejoy *v.* Murray, 3 Wall. (U. S.) 1; York Bank *v.* Asbury, 1 Biss. (U. S.) 230, 30 Fed. Cas. No. 18,142; U. S., etc., Felting Co. *v.* The Asbestos Felting Co., 18 Blatchf. (U. S.) 310; Bailey *v.* Sundberg, (C. C. A.) 49 Fed. Rep. 583, 1 U. S. App. 101; David Bradley Mfg. Co. *v.* Eagle Mfg. Co., (C. C. A.) 57 Fed. Rep. 980, 18 U. S. App. 349, *affirming* 50 Fed. Rep. 193; Empire State Nail Co. *v.* American Solid Leather Button Co., 71 Fed. Rep. 588; Carey *v.* Roosevelt, 83 Fed. Rep. 242; Sanders *v.* Peck, (C. C. A.) 87 Fed. Rep. 61; Theller *v.* Hershey, 89 Fed. Rep. 575; James *v.* Germania Iron Co., (C. C. A.) 107 Fed. Rep. 597, 46 C. C. A. 476; Hauke *v.* Cooper, (C. C. A.) 108 Fed. Rep. 922, 48 C. C. A. 144. See also McCarty *v.* Lehigh Valley R. Co., 160 U. S. 110; American Bell Telephone Co. *v.* National Improved Telephone Co., 27 Fed. Rep. 663; Lacroix *v.* Lyons, 33 Fed. Rep. 437. But see Lownsdale *v.* Portland, Deady (U. S.) 1, 15 Fed. Cas. No. 8,578.

Alabama. — Tarleton *v.* Johnson, 25 Ala. 300, 60 Am. Dec. 515. See also Pope *v.* Nance, 1 Stew. (Ala.) 354, 18 Am. Dec. 60.

California. — Valentine *v.* Mahoney, 37 Cal. 389; Russell *v.* Mallon, 38 Cal. 259; McCreery *v.* Everding, 54 Cal. 168. See also Sampson *v.* Ohleyer, 22 Cal. 200.

District of Columbia. — Birdsall *v.* Welch, 6 D. C. 316.

Florida. — Elizabethport Cordage Co. *v.* Whitlock, 37 Fla. 190.

Georgia. — Linton *v.* Harris, 78 Ga. 265. But see Williamson *v.* White, 101 Ga. 276, 65 Am. St. Rep. 302.

Illinois. — Cole *v.* Favorite, 69 Ill. 457; Bennitt *v.* Wilmington Star Min. Co., 119 Ill. 9, *affirming* 18 Ill. App. 17; Thomsen *v.* McCormick, 136 Ill. 135; Lightcap *v.* Bradley, 186 Ill. 510; Anderson *v.* West Chicago St. R. Co., 200 Ill. 329, *affirming* 102 Ill. App. 310; McDonald *v.* Western Refrigerating Co., 35 Ill. App. 283. See also Marquardt Sav. Bank *v.* Sheppleman, 97 Ill. App. 31.

Indiana. — Montgomery *v.* Vickery, 110 Ind. 211; Burns *v.* Gavin, 118 Ind. 320; Shugart *v.* Miles, 125 Ind. 445; Roby *v.* Eggers, 130 Ind. 415; Worley *v.* Hineman, 6 Ind. App. 240; Smith *v.* Downey, 8 Ind. App. 179, 52 Am. St. Rep. 467.

Iowa. — McNamee *v.* Moreland, 26 Iowa 96; Stoddard *v.* Thompson, 31 Iowa 80; Conger *v.* Chilcote, 42 Iowa 18; Bellows *v.* Litchfield, 83 Iowa 36; Baxter *v.* Myers, 85 Iowa 328, 39 Am. St. Rep. 298.

Kentucky. — Schmidt *v.* Louisville, etc., R. Co., 99 Ky. 143; Bridges *v.* McAlister, 106 Ky. 791; Hamilton *v.* Berry, 14 B. Mon. (Ky.) 25. See also Kaye *v.* Louisville, (Ky. 1890) 14 S. W. Rep. 679. But see McCallister *v.* Bridges, (Ky. 1897) 40 S. W. Rep. 71.

Louisiana. — Citizens Bank *v.* Miller, 45 La. Ann. 493.

Maryland. — Parr *v.* State, 71 Md. 220. See also Kerr *v.* Union Bank, 18 Md. 396.

Massachusetts. — Valentine *v.* Farnsworth, 21 Pick (Mass.) 176.

Michigan. — Jennings *v.* Sheldon, 44 Mich. 92; Bachelder *v.* Brown, 47 Mich. 366; Estelle *v.* Peacock, 48 Mich. 469; Grant Tp. *v.* Reno Tp., 107 Mich. 409; Carpenter *v.* Carpenter, 126 Mich. 217.

Minnesota. — Reed *v.* McGregor, 62 Minn. 94; Fleckten *v.* Spicer, 63 Minn. 454. See also St. Paul Nat. Bank *v.* Cannon, 46 Minn. 95, 24 Am. St. Rep. 189.

Missouri. — Wood *v.* Ensel, 63 Mo. 193; Landis *v.* Hamilton, 77 Mo. 554; State *v.* Barker, 26 Mo. App. 487; Koontz *v.* Kaufman, 31 Mo. App. 397; Carmody *v.* Hanick, 85 Mo. App. 659; Sturdivant Bank *v.* Wilson, 87 Mo. App. 534; Rieschick *v.* Klingelhoefer, 91 Mo. App. 430.

Nevada. — Elder *v.* Frevert, 18 Nev. 446.

New Jersey. — Lyon *v.* Stanford, 42 N. J. Eq. 411.

New York. — Castle *v.* Noyes, 14 N. Y. 329; Carleton *v.* Lombard, 149 N. Y. 137; Southgate *v.* Montgomery, 1 Paige (N. Y.) 41; Van Koughnet *v.* Dennie, 68 Hun (N. Y.) 179; Greenwood *v.* Marvin, (Supm. Ct. Gen. T.) 11 N. Y. St. Rep. 235, *affirmed* 111 N. Y. 423. See also Van Alstine *v.* McCarty, 51 Barb. (N. Y.) 326.

North Dakota. — Boyd *v.* Wallace, 10 N. Dak. 78.

Ohio. — Board of Education *v.* Cosgrove, 5 Ohio Cir. Dec. 343, 11 Ohio Cir. Ct. 163.

Pennsylvania. — Peterson *v.* Lothrop, 34 Pa. St. 223.

Rhode Island. — Hill *v.* Bain, 15 R. I. 75, 2 Am. St. Rep. 873.

Texas. — Bomar *v.* Ft. Worth Bldg. Assoc., 20 Tex. Civ. App. 603; Cleveland *v.* Heidenheimer, (Tex. Civ. App. 1898) 44 S. W. Rep. 551.

Washington. — Douthitt *v.* MacCulsky, 11 Wash. 601; Shoemake *v.* Finlayson, 22 Wash. 12.

But see Thomas *v.* Baker, 41 Kan. 350; McPike *v.* Wells, 54 Miss. 136; Clark *v.* Lyman, 8 Vt. 290.

In Louisiana a person, though not a formal party in a suit, will be bound by the judgment if he is identified in interest with the defendant upon the record, and assents to his defending for both; and such assent may be implied. Reinach *v.* New Orleans Imp. Co., 50 La. Ann. 497.

But in New Hampshire it has been held that one who is interested in the subject-matter of a suit, and who assists the defendant in making his defense and employs and pays counsel for him, is not bound by the judgment in such suit. Hunt *v.* Haven, 52 N. H. 162.

And in Missouri it has been held that where suit is brought against the comptroller and auditor of a municipal corporation to enjoin them from paying the salary of a certain mu-

so participating in the suit is a party within the rule previously stated.[1] For the same reason the prosecution or defense of an action in the name of a merely nominal party will not avoid the plea of *res judicata*, where the question in issue has been decided adversely to the real party in interest in a prior suit in which he and the opposite party in the present suit were adverse parties.[2]

Thus One Who Instigates Another to Do a Wrongful Act, and when the wrongdoer is sued takes upon himself and conducts the defense of the case, is estopped from again litigating with the plaintiff in that action the issues there decided.[3]

Appearance of Counsel of Person Interested in Similar Question. — But the appearance in a suit of the counsel of a person who is not a party thereto, but who is interested in a question similar to that being adjudicated, will not make the judgment therein binding upon such person.[4]

(2) *Essential Elements in the Estoppel* — (a) **Interest in Subject-matter of Litigation.** — The judgment in a suit will not operate as an estoppel for or against a person participating in the prosecution or defense, if such person had no interest in the subject-matter of the litigation.[5]

(b) **Prosecution or Defense Must Be Open and Avowed.** — Nor will the judgment operate as an estoppel against the person so participating unless his conduct in undertaking the prosecution or defense was open and avowed, or otherwise known to the opposite party.[6]

nicipal officer, the mere fact that such officer employs counsel to defend the suit, who participate in the trial and the examination of witnesses, will not make the judgment therein binding upon him. State *v.* Johnson, 123 Mo. 43, *affirming* (Mo. 1894) 25 S. W. Rep. 855.

In Rhode Island it has been held that it is not sufficient, to conclude a party by a judgment in a former suit against his servant, agent, or employee to which he was not a party of record, that he employed an attorney who was present for him and participated in the trial. Central Baptist Church *v.* Manchester, 17 R. I. 492, 33 Am. St. Rep. 893.

Under a Tennessee Statute, Act of 1852, c. 152, § 2, the plaintiff in an action of ejectment was not concluded by a judgment in a former action against his tenant where he, the plaintiff, was not a party of record in such action, even though he voluntarily appeared and was permitted to conduct the defense in the name of the tenant. Boles *v.* Smith, 5 Sneed (Tenn.) 105.

Where a City Was Not Formally Made a Party to a writ of prohibition brought to prevent the judge of one of the city courts from proceeding to enforce the collection of a tax, yet, if the city was the real party in interest and conducted the litigation, and became also a formal party to an appeal taken from the judgment, such judgment, affirmed on appeal, will be conclusive upon the city in a subsequent proceeding. Kentucky Bank *v.* Stone, 88 Fed. Rep. 393, *affirmed* 174 U. S. 408.

Heirs Acquiescing in Suit Brought by Ancestor as Heir in Conjunction with Other Heirs. — It would seem that when a suit in equity is brought in the names of several heirs, all having the same interest, if one of them is dead at the time the suit is brought in his name, and the fact that the suit is so brought is known to his heirs or their agent, and no objection is made, but the intention is to claim the benefit of the decree, the heirs or their agent will be bound thereby. Doggett *v.* Helm, 17 Gratt. (Va.) 96.

But a Vendee of Land Is Not Estopped from Asserting Title to the same merely because he paid attorneys for resisting the confirmation of a sale of the land under a judgment obtained against his vendor prior to the conveyance to him. Schribar *v.* Platt, 19 Neb. 625.

1. See *supra*, this section, 7. *Who Are Parties Within the Doctrine of Res Judicata — In General.*

2. U. S. *v.* Des Moines Valley R. Co., (C. C. A.) 84 Fed. Rep. 40; Bierman *v.* Crecelius, 135 Mo. 386; Hill *v.* Bain, 15 R. I. 75, 2 Am. St. Rep. 873. See also Carey *v.* Roosevelt, (C. C. A.) 102 Fed. Rep. 569.

For Application of Rule to Suit Brought in Name of Government for sole benefit of a private individual, see U. S. *v.* Des Moines Valley R. Co., (C. C. A.) 84 Fed. Rep. 40, *distinguishing* U. S. *v.* Winona, etc., R. Co., 32 U. S. App. 306, 67 Fed. Rep. 969. See also Union Pac. R. Co. *v.* U. S., 67 Fed. Rep. 975, 32 U. S. App. 311.

3. Instigator of Wrongful Act Conducting Defense of Action Against Wrongdoer. — Lovejoy *v.* Murray, 3 Wall. (U. S.) 1; Tootle *v.* Coleman, (C. C. A.) 107 Fed. Rep. 41. See also Castle *v.* Noyes, 14 N. Y. 329. But see Elliott *v.* Hayden, 104 Mass. 180.

4. Goodnow *v.* Stryker, 62 Iowa 221.

5. Only Persons Interested in Subject-matter of Litigation Concluded. — Koehring *v.* Aultman, 7 Ind. App. 475; Goodnow *v.* Litchfield, 63 Iowa 275; Iowa Homestead Co. *v.* Des Moines Nav., etc., Co., 63 Iowa 285; Schroeder *v.* Lahrman, 26 Minn. 87; Cannon River Mfg. Assoc. *v.* Rogers, 42 Minn. 123, 18 Am. St. Rep. 497.

Person Whose Interests Are Only Indirectly Involved. — A person who interests himself in securing a favorable decision of the questions involved in a suit so far as they are applicable to his own interests, which are only indirectly involved, and who pays part of the expenses, is not concluded by the judgment. Litchfield *v.* Goodnow, 123 U. S. 549.

6. Open and Avowed Conduct in Conducting Suit an Element in Estoppel. — Andrews *v.* National

(c) **Participation Must Be for Protection of Party's Own Interest.** — It is also essential, to render the judgment conclusive upon a person so participating, that he do so for the protection of his own interest. If he acts merely as the agent or attorney of the party upon the record he will not be concluded.[1] Nor is the appearance of a person interested in the subject-matter of contention as a witness for a party to the record in itself sufficient to make the judgment conclusive upon him.[2]

(3) *Evidence Admissible to Show Real Situation of Parties.* — In order to invoke a judgment as an estoppel, for or against the real party in interest, it is always competent to show what the real situation was, and what part in promoting or defending the suit was actually taken by him,[3] and parol evidence is admissible for this purpose.[4]

(4) *Interest and Relation of Parties a Question for Jury.* — Whether or not a person against whom a judgment is set up as an estoppel was interested in the matter adjudicated and prosecuted or defended the suit, or assisted in the prosecution or defense, is a question for the jury.[5]

c. PERSONS RESPONSIBLE OVER — (1) *General Rule.* — Where a person is responsible over to another, either by operation of law or by express con-

Foundry, etc., Works, (C. C. A.) 76 Fed. Rep. 166; Cramer *v.* Singer Mfg. Co., 93 Fed. Rep. 636, 35 C. C. A. 508; Lane *v.* Welds, 99 Fed. Rep. 286, 39 C. C. A. 528; Schroeder *v.* Lahrman, 26 Minn. 87; Cannon River Mfg. Assoc. *v.* Rogers, 42 Minn. 123, 18 Am. St. Rep. 497; Central Baptist Church *v.* Manchester, 17 R. I. 492, 33 Am. St. Rep. 893.

But in Illinois the rule is that the real party in interest to an action, though not a formal party on the record, is bound by the judgment, even though his connection with the case is concealed. Cheney *v.* Patton, 144 Ill. 373. See also Cheney *v.* Cross, 80 Ill. App. 640, *affirmed* 181 Ill. 31; Cheney *v.* Patton, 134 Ill. 422.

Employment of Counsel by One Not Appearing Openly. — A judgment is not conclusive for or against one who, without himself appearing openly in the case, merely employed an attorney who appeared for the party of record. Loftis *v.* Marshall, 134 Cal. 394.

1. Party Must Participate to Protect His Own Interest to Be Concluded. — Cramer *v.* Singer Mfg. Co., 93 Fed. Rep. 636, 35 C. C. A. 508; Williams *v.* Cooper, 124 Cal. 666; Schroeder *v.* Lahrman, 26 Minn. 87; Fogg *v.* Plumer, 17 N. H. 112; Central Baptist Church *v.* Manchester, 17 R. I. 492, 33 Am. St. Rep. 893.

The Supreme Court of the United States has held that a person who is interested in the questions to be decided in a suit does not, by filing a brief in support of the claim of a party to the suit, make the judgment therein conclusive upon himself. Stryker *v.* Goodnow, 123 U. S. 527.

But in Colorado it has been held that where the question of the title to property is being litigated, and a grantee of the defendant suppresses knowledge of her title, and as agent of her grantor, under his power of attorney, participates in, directs and controls the defense, she will be concluded by the judgment and estopped thereafter to assert against the plaintiff and those in privity with him the title she elected to conceal. McClellan *v.* Hurd, 21 Colo. 197, *affirming* 1 Colo. App. 327.

Party Claiming Adversely to His Former Client. — Where a person appears in a suit merely as the attorney for a party, the judgment therein will not be conclusive upon him in a subsequent suit, involving the right to the same property, in which he appears as a party claiming adversely to his former client. Wheeler *v.* Buckman, 1 Robt. (N. Y.) 408.

2. Person Not Concluded Because He Appeared as Witness for Party — *United States.* — Lacroix *v.* Lyons, 33 Fed. Rep. 437; Wilgus *v.* Germain, (C. C. A.) 72 Fed. Rep. 773; Lane *v.* Welds, (C. C. A.) 99 Fed. Rep. 286.

Minnesota. — Schroeder *v.* Lahrman, 26 Minn. 87.

New Jersey. — Bacon *v.* Fay, 63 N. J. Eq. 411.

New York. — Williams *v.* Barkley, 165 N. Y. 48; Yorks *v.* Steele, 50 Barb. (N. Y.) 397; O'Brien *v.* Browning, (Supm. Ct. Spec. T.) 49 How. Pr. (N. Y.) 109.

Pennsylvania. — Miller's Estate, 159 Pa. St. 562; Fifth Mut. Bldg. Soc. *v.* Holt, 184 Pa. St. 572.

Rhode Island. — Central Baptist Church *v.* Manchester, 17 R. I. 492, 33 Am. St. Rep. 893. See also Atkinson *v.* Hackney, 13 Ky. L. Rep. 975; Fisk *v.* Cathacart, 16 Colo. 238; Stamp *v.* Franklin, 144 N. Y. 607, *affirming* 75 Hun (N. Y.) 373.

A person interested in the subject-matter of a suit will not be bound by the judgment therein merely because he furnishes the names of two witnesses and himself appears as a witness. Koontz *v.* Kaufman, 31 Mo. App. 397.

3. Evidence Admissible to Show Real Situation. — Maloy *v.* Duden, (C. C. A.) 86 Fed. Rep. 402; Tarleton *v.* Johnson, 25 Ala. 300, 60 Am. Dec. 515; Bennitt *v.* Wilmington Star Min. Co., 119 Ill. 9, *affirming* 18 Ill. App. 17.

4. Tarleton *v.* Johnson, 25 Ala. 300, 60 Am. Dec. 515; Bennitt *v.* Wilmington Star Min. Co., 119 Ill. 9, *affirming* 18 Ill. App. 17. But see State *v.* Cincinnati Tin, etc., Co., 66 Ohio St. 182; McCallister *v.* Bridges, (Ky. 1897) 40 S. W. Rep. 70.

5. Hauke *v.* Cooper, 108 Fed. Rep. 922, 48 C. C. A. 144; Tarleton *v.* Johnson, 25 Ala. 300, 60 Am. Dec. 515. See also Carpenter *v.* Carpenter, 126 Mich. 217.

tract for whatever may be justly recovered in a suit against such other, and he is duly notified of the pendency of the suit and requested to take upon himself the defense of it, and is given an opportunity to do so, the judgment therein, if obtained without fraud or collusion, will be conclusive in a subsequent suit against him for the indemnity, whether he appeared in the former suit or not.[1]

Rationale of Rule. — In such case the person responsible over is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means of controverting the claim as if he were the real and nominal party upon the record,[2] and it would be unreasonable to permit him to contest the justice of the claim in the suit against himself, after having neglected or failed to show its injustice, in the suit against the person he was bound to indemnify.[3]

Limits of the Doctrine. — But to make this doctrine applicable the person first sued must have a right of action over against another for indemnity in case of loss, and become a plaintiff against the indemnitor to recover over for such loss. Therefore, if the indemnitor be first sued by one who has a right of action against both the indemnitor and the indemnitee, the judgment in such action will not conclude the indemnitee in a subsequent action against him by the same plaintiff.[4]

Notice or Knowledge of Action Essential to Estoppel. — In cases of this character notice or knowledge of the action and an opportunity to defend are indispensable to the conclusiveness of the judgment.[5]

1. Conclusiveness of Judgment upon Persons Responsible Over to Defendant — *United States.* — Robbins *v.* Chicago, 4 Wall. (U. S.) 657, *affirming* 2 Black (U. S.) 418; Washington Gas Light Co. *v.* District of Columbia, 161 U. S. 316.

Florida. — Love *v.* Gibson, 2 Fla. 598.

Georgia. — Bullock *v.* Winter, 10 Ga. 214.

Illinois. — Drennan *v.* Bunn, 124 Ill. 175, 7 Am. St. Rep. 354; Cressey *v.* Kimmel, 78 Ill. App. 27. See also Chicago, etc., R. Co. *v.* Northern Line Packet Co., 70 Ill. 217.

Maine. — Davis *v.* Smith, 79 Me. 351.

Massachusetts. — Minneapolis First Nat. Bank *v.* City Nat. Bank, (Mass. 1902) 65 N. E. Rep. 24; Boston *v.* Worthington, 10 Gray (Mass.) 496, 71 Am. Dec. 678.

Michigan. — Knickerbocker *v.* Wilcox, 83 Mich. 200, 21 Am. St. Rep. 595; Fitzpatrick *v.* Hoffman, 104 Mich. 228.

Minnesota. — Mackey *v.* Fisher, 36 Minn. 347.

Mississippi. — Cartwright *v.* Carpenter, 7 How. (Miss.) 328, 40 Am. Dec. 66.

Missouri. — Koontz *v.* Kaufman, 31 Mo. App. 397; Strong *v.* Phœnix Ins. Co., 62 Mo. 289, 21 Am. Rep. 417; Gantt *v.* American Cent. Ins. Co., 68 Mo. 503; Kansas City, etc., R. Co. *v.* Southern R. News Co., 151 Mo. 373, 74 Am. St. Rep. 545; Strong *v.* American Cent. L. Ins. Co., 4 Mo. App. 7; Ford *v.* O'Donnell, 40 Mo. App. 51; Memphis *v.* Miller, 78 Mo. App. 67; Dempsey *v.* Schawacker, 140 Mo. 680. See also Garrison *v.* Babbage Transp. Co., 94 Mo. 130.

New Hampshire. — Thrasher *v.* Haines, 2 N. H. 443; Nichols *v.* Day, 32 N. H. 135; Hunt *v.* Haven, 52 N. H. 162; Lebanon *v.* Mead, 64 N. H. 8.

New Jersey. — Hoppaugh *v.* McGrath, 53 N. J. L. 81.

New York. — Kelly *v.* Forty-Second St., etc., R. Co., 37 N. Y. App. Div. 500; Heiser *v.* Hatch, 86 N. Y. 614; Jackson *v.* St. Paul F. & M. Ins. Co., 99 N. Y. 124; Troy *v.* Troy, etc., R. Co., 3 Lans. (N. Y.) 270, *affirmed* 49 N. Y. 657. But see Blasdale *v.* Babcock, 1 Johns. (N. Y.) 517.

Ohio. — Cincinnati *v.* Wright, 7 Ohio Dec. (Reprint) 234, 1 Cinc. L. Bul. 387.

Pennsylvania. — Lloyd *v.* Barr, 11 Pa. St. 41; Fowler *v.* Jersey Shore, 17 Pa. Super. Ct. 366. See also Brown *v.* Haven, 37 Vt. 439. But see Gist *v.* Davis, 2 Hill Eq. (S. Car.) 335, 29 Am. Dec. 89.

On the trial of an action on a bond which obligated the defendant to save the plaintiff harmless against a note executed by the plaintiff to a third party, who had sued plaintiff on the note, it was held not error to allow the plaintiff to put in evidence the record of the suit against him, in connection with proof that he had paid off the note. Pierce *v.* Wright, 33 Tex. 631.

2. Reason for Rule. — Waterbury *v.* Waterbury Traction Co., (Conn. 1901) 50 Atl. Rep. 3; Brown *v.* Chaney, 1 Ga. 410; Boston *v.* Worthington, 10 Gray (Mass.) 496, 71 Am. Dec. 678; Hoppaugh *v.* McGrath, 53 N. J. L. 81; Fowler *v.* Jersey Shore, 17 Pa. Super. Ct. 366.

3. Thrasher *v.* Haines, 2 N. H. 443; Lebanon *v.* Mead, 64 N. H. 8.

4. Schaefer *v.* Fond du Lac, 99 Wis. 333. See also Shutesbury *v.* Hadley, 133 Mass. 242.

5. Notice or Knowledge of Action Essential — *United States.* — Washington Gas Light Co. *v.* District of Columbia, 161 U. S. 316.

Alabama. — Hagerthy *v.* Bradford, 9 Ala. 567.

Arkansas. — Marlatt *v.* Clary, 20 Ark. 251.

Georgia. — Brown *v.* Chaney, 1 Ga. 410.

Illinois. — Lamar Ins. Co. *v.* Pennell, 19 Ill. App. 212.

Upon the Question What Constitutes Sufficient Knowledge or Notice of the suit the authorities are not uniform. Some hold that it is sufficient that the person responsible over, though not expressly notified, has knowledge, however acquired, of the pendency and nature of the action, and of the facts upon which his liability depends.[1] Other authorities hold that express notice is necessary.[2] And there are some cases which declare that it is indispensable that the party responsible over, in addition to having notice of the pendency of the litigation, be requested to take charge of it, and notified that if he fail he shall be held responsible.[3]

(2) *Specific Applications of Rule.* — This rule as to the conclusiveness of a judgment upon a person responsible over to the defendant is most frequently applied where there is a contract of indemnity[4] or

Indiana. — Ewing *v.* Sills, 1 Ind. 125; Catterlin *v.* Frankfort, 79 Ind. 547, 41 Am. Rep. 627; Morris *v.* Lucas, 8 Blackf. (Ind.) 9.

Kentucky. — Maupin *v.* Compton, 3 Bibb (Ky.) 214; Cox *v.* Strode, 4 Bibb (Ky.) 4; Jones *v.* Henry, 3 Litt. (Ky.) 427; Morgan *v.* Simmons, 3 J. J. Marsh. (Ky.) 611.

Massachusetts. — Train *v.* Gold, 5 Pick. (Mass.) 380.

Michigan. — De Witt *v.* Prescott, 51 Mich. 298.

Mississippi. — Cartwright *v.* Carpenter, 7 How. (Miss.) 328, 40 Am. Dec. 66.

Missouri. — Fields *v.* Hunter, 8 Mo. 128; Stewart *v.* Thomas, 45 Mo. 42.

New Hampshire. — Lebanon *v.* Mead, 64 N. H. 8.

New York. — Taylor *v.* Barnes, 69 N. Y. 430; Oceanic Steam Nav. Co. *v.* Campania Transatlantica Espanola, 144 N. Y. 663; Seneca Falls *v.* Zalinski, 8 Hun (N. Y.) 571; Kettle *v.* Lipe, 6 Barb. (N. Y.) 467.

Pennsylvania. — Morrison *v.* Mullin, 34 Pa. St. 12.

South Carolina. — Davis *v.* Wilbourne, 1 Hill L. (S. Car.) 27, 26 Am. Dec. 154; Goodwyn *v.* Taylor, 2 Brev. (S. Car.) 171.

Tennessee. — Stephens *v.* Jack, 3 Yerg. (Tenn.) 403, 24 Am. Dec. 583.

Vermont. — Carpenter *v.* Pier, 30 Vt. 81, 73 Am. Dec. 288.

Wisconsin. — Grafton *v.* Hinkley, 111 Wis. 46.

1. Express Notice Essential. — Robbins *v.* Chicago, 4 Wall. (U. S.) 657, *affirming* 2 Black (U. S.) 418; Missouri Pac. R. Co. *v.* Twiss, 35 Neb. 267, 37 Am. St. Rep. 437.

Notice Implied from Knowledge of Pendency and Participation in Defense. — In some jurisdictions it has been held that notice to the person responsible over may be implied from his knowledge of the pendency of the action and his participation in its defense. Davis *v.* Smith, 79 Me. 351; Port Jervis *v.* Port Jervis First Nat. Bank, 96 N. Y. 550, *affirming* 31 Hun (N. Y.) 107; Crawford *v.* Turk, 24 Gratt. (Va.) 176.

2. Express Notice Necessary.— Hunt *v.* Haven, 52 N. H. 162; Jacob *v.* Pierce, 2 Rawle (Pa.) 204; Goodwyn *v.* Taylor, 2 Brev. (S. Car.) 171. But see Carman *v.* Noble, 9 Pa. St. 366.

In New York it has been held that no particular form of words is necessary in order to constitute notice in such cases, nor is it even necessary to give a written notice. It is sufficient that the party against whom ultimate liability is claimed is fully and fairly informed of the claim and that the action is pending, with full opportunity to defend or to participate in the defense. Oceanic Steam Nav. Co. *v.* Campania Transatlantica Espanola, 144 N. Y. 663.

For Notice Held to Be Insufficient, see Lamar Ins. Co. *v.* Pennell, 19 Ill. App. 212; Lebanon *v.* Mead, 64 N. H. 8.

3. Notice to Take Charge of Litigation and of Responsibility in Case of Recovery Essential. — Sampson *v.* Ohleyer, 22 Cal. 200; Richmond *v.* Ames, 164 Mass. 467; Consolidated Hand-Method Lasting Mach. Co. *v.* Bradley, 171 Mass. 127, 68 Am. St. Rep. 409; Mason *v.* Kellogg, 38 Mich. 132; Hersey *v.* Long, 30 Minn. 114. See also Oskaloosa *v.* Pinkerton, 51 Iowa 697; Axford *v.* Graham, 57 Mich. 422; Buchanan *v.* Kauffman, 65 Tex. 235. But see Boston *v.* Worthington, 10 Gray (Mass.) 496, 71 Am. Dec. 678.

Oral Notice to a Husband, Who Acted as His Wife's Agent in the management of her real estate, that suits had been brought and that he might be needed as a witness, without any intimation that his wife should be informed of it and should take upon herself the defense of the suits, was held not to be sufficient notice to the wife. Richmond *v.* Ames, 164 Mass. 467.

4. Contracts of Indemnity — *California.* — Sampson *v.* Ohleyer, 22 Cal. 200; Showers *v.* Wadsworth, 81 Cal. 270.

Illinois. — Drennan *v.* Bunn, 124 Ill. 175, 7 Am. St. Rep. 354.

Kentucky. — Jones *v.* Henry, 3 Litt. (Ky.) 427.

Maine. — Davis *v.* Smith, 79 Me. 351.

Massachusetts. — Train *v.* Gold, 5 Pick. (Mass.) 380.

Missouri. — Stewart *v.* Thomas, 45 Mo. 42.

New York. — Kettle *v.* Lipe, 6 Barb. (N. Y.) 467.

Pennsylvania. — Mehaffy *v.* Lytle, 1 Watts (Pa.) 314; Carman *v.* Noble, 9 Pa. St. 366.

Virginia. — Allebaugh *v.* Coakley, 75 Va. 628; Lee County Justices *v.* Fulkerson, 21 Gratt. (Va.) 182; Crawford *v.* Turk, 24 Gratt. (Va.) 176.

North Dakota Statute, providing that indemnitors shall not be bound by judgments in actions to which they are not parties, construed. Joy *v.* Elton, 9 N. Dak. 428.

In Absence of Notice of Suit, Judgment Only Prima Facie Evidence. — In a suit by a constable upon a bond to indemnify him for the seizure of the property under execution, a

warranty,[1] or between parties to bills and notes,[2] or where the relations between the parties is that of principal and surety,[3] master and servant,[4] principal and agent,[5] landlord and tenant,[6] and the like. But these instances do not mark the limits within which the doctrine is applicable. It has been applied to contracts of reinsurance;[7] to municipal corporations mulcted in damages for nonrepair of or obstructions or defects in streets as against persons who were under contracts to repair, or upon whom the duty of reparation devolved;[8] and to cases in which a party is made responsible in damages

judgment against him for damages for such seizure, in a suit in which the indemnitors had no notice, is only *prima facie* evidence against them, and they may show that the constable had a good defense to the suit. Robinson *v.* Baskins, 53 Ark. 330, 22 Am. St. Rep. 202.

Notice to Two of Three Joint Promisors of the commencement of a suit against which they had indemnified defendant is notice to all, and will render a judgment recovered therein conclusive on all. Carman *v.* Noble, 9 Pa. St. 366.

1. **Contracts of Warranty** —*Arkansas.* — Boyd *v.* Whitfield, 19 Ark. 447; Marlatt *v.* Clary, 20 Ark. 251. But see Lonergan *v.* Baber, 59 Ark. 15.

California. — Sampson *v.* Ohleyer, 22 Cal. 200.

Maine. — Thurston *v.* Spratt, 52 Me. 202; Atkinson *v.* White, 60 Me. 396.

Massachusetts. — Richmond *v.* Ames, 164 Mass. 467.

Michigan. — Mason *v.* Kellogg, 38 Mich. 132; De Witt *v.* Prescott, 51 Mich. 298; Axford *v.* Graham, 57 Mich. 422.

Minnesota. — Hersey *v.* Long, 30 Minn. 114.

Missouri. — Fields *v.* Hunter, 8 Mo. 128; St. Louis *v.* Bissell, 46 Mo. 157; Ford *v.* O'Donnell, 40 Mo. App. 51.

New Hampshire. — Andrews *v.* Davison, 17 N. H. 413, 43 Am. Dec. 606; Hunt *v.* Haven, 52 N. H. 162.

New York. — Bissick *v.* McKenzie, 4 Daly (N. Y.) 265.

Pennsylvania. — Jacob *v.* Pierce, 2 Rawle (Pa.) 204.

South Carolina. — Davis *v.* Wilbourne, 1 Hill L. (S. Car.) 27, 26 Am. Dec. 154. See also Brown *v.* M'Mullen, 1 Hill L. (S. Car.) 29.

Tennessee. — Stephens *v.* Jack, 3 Yerg. (Tenn.) 403, 24 Am. Dec. 583.

Texas. — Buchanan *v.* Kauffman, 65 Tex. 235.

Vermont. — Walker *v.* Ferrin, 4 Vt. 523; Carpenter *v.* Pier, 30 Vt. 81, 73 Am. Dec. 288; Knapp *v.* Marlboro, 34 Vt. 235. See also Farnham *v.* Chapman, 60 Vt. 338. But see Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98.

Wisconsin. — Daskam *v.* Ullman, 74 Wis. 474. See also Marsh *v.* Smith, 73 Iowa 295.

But in Kentucky it has been held that the vendor of a chattel, in an action brought against him by his vendee upon his warranty of title, is not concluded by the judgment in a suit previously brought by a stranger against the vendee to recover the chattel, although he had notice of the suit. Roberts *v.* Smiley, 5 T. B. Mon. (Ky.) 270.

In Louisiana it has been held that in a suit against a vendor upon his warranty of title the judgment in a previous suit between the vendee and a purchaser from him, involving the validity of the title, of which the vendor had notice, and in which, though not a formal party, he participated through counsel, will be followed unless manifestly erroneous, or unless the issue is changed by new and additional evidence. Elder *v.* Farrell, (La. 1888) 5 So. Rep. 71.

In an Action upon a Covenant of Warranty of the Soundness of a Slave, the plaintiff cannot introduce as evidence the record of a judgment recovered against him, because of the unsoundness of the slave, by one to whom he had sold (subsequent to his own purchase from defendant) with warranty of soundness. Morgan *v.* Winston, 2 Swan (Tenn.) 472.

2. **Parties to Bills and Notes.** — Hagerthy *v.* Bradford, 9 Ala. 567; Drennan *v.* Bunn, 124 Ill. 175, 7 Am. St. Rep. 354; Cressey *v.* Kimmel, 78 Ill. App. 27; Ewing *v.* Sills, 1 Ind. 125; Morris *v.* Lucas, 8 Blackf. (Ind.) 9; Maupin *v.* Compton, 3 Bibb (Ky.) 214.

3. See the title SURETYSHIP.

4. **Master and Servant.** — Gillingham *v.* Charleston Tow-Boat, etc., Co., 40 Fed. Rep. 649.

5. **Principal and Agent.** — Baynard *v.* Harrity, 1 Houst. (Del.) 200; Hardee *v.* Hall, 12 Bush (Ky.) 327; Harvie *v.* Turner, 46 Mo. 444. See Erie Second Nat. Bank *v.* Ocean Nat. Bank, 11 Blatchf. (U. S.) 363.

But in Delaware it has been held that in an action by a principal against his agent for damages resulting from the agent's negligence which the principal has been compelled to pay, the judgment recovered against the principal is only evidence of the quantum of damages recovered against him, and not that the damage was occasioned by the negligence of the agent. Baynard *v.* Harrity, 1 Houst. (Del.) 200.

6. **Landlord and Tenant.** — Van Alstine *v.* McCarty, 51 Barb. (N. Y.) 326.

7. See the title REINSURANCE, *ante*, p. 247.

8. **Municipal Corporations** — *United States.* — Robbins *v.* Chicago, 4 Wall. (U. S.) 657, *affirming* 2 Black (U. S.) 418; Washington Gas Light Co. *v.* District of Columbia, 161 U. S. 316.

District of Columbia. — District of Columbia *v.* Baltimore, etc., R. Co., 1 Mackey (D. C.) 314.

Georgia. — Western, etc., R. Co. *v.* Atlanta, 74 Ga. 774; Faith *v.* Atlanta, 78 Ga. 779.

Illinois. — Todd *v.* Chicago, 18 Ill. App. 565.

Indiana. — Catterlin *v.* Frankfort, 79 Ind. 547, 41 Am. Rep. 627; McNaughton *v.* Elkhart, 85 Ind. 384.

Massachusetts. — Milford *v.* Holbrook, 9 Allen (Mass.) 17, 85 Am. Dec. 735; Boston *v.* Worthington, 10 Gray (Mass.) 496, 71 Am. Dec. 678.

New York. — Rochester *v.* Montgomery, 72 N. Y. 65, *affirming* 9 Hun (N. Y.) 394; Port Jervis *v.* Port Jervis First Nat. Bank, 96 N. Y.

because of another's negligence.[1]

(3) *Persons Expressly Covenanting for Result of Suits Between Others.* — There are many authorities that hold that if one expressly covenants for the result or consequences of a suit between others and stipulates to abide by the result, the judgment in such suit will be conclusive evidence against him although he was not a party to the suit and had no notice of it.[2]

f. INTERVENORS AND PERSONS BROUGHT INTO PENDING PROCEEDINGS — (1) *In General.* — One who intervenes in a suit is a party thereto, and is as much bound by the judgment as if he had been an original party.[3] A person may become a party to proceedings in equity and be bound thereby, by appearing in the suit and filing his claim, and having an opportunity of sustaining it by evidence, and of appealing from the order of the court in regard thereto.[4] But one who merely appears and obtains leave to interplead, but goes no further, is not concluded.[5]

550, *affirming* 31 Hun (N. Y.) 107; New York *v.* Brady, 151 N. Y. 611, *affirming* 81 Hun (N. Y.) 440; Seneca Falls *v.* Zalinski, 8 Hun (N. Y.) 571.

Pennsylvania. — Fowler *v.* Jersey Shore, 17 Pa. Super. Ct. 366.

1. Persons Responsible for Negligence of Others — *United States.* — Washington Gas Light Co. *v.* District of Columbia, 161 U. S. 316; Lawrence *v.* Stearns, 79 Fed. Rep. 878.

Connecticut. — Waterbury *v.* Waterbury Traction Co., (Conn. 1901) 50 Atl. Rep. 3.

District of Columbia. — District of Columbia *v.* Baltimore, etc., R. Co., 1 Mackey (D. C.) 314.

Massachusetts. — Milford *v.* Holbrook, 9 Allen (Mass.) 17, 85 Am. Dec. 735. But see Consolidated Hand-Method Lasting Mach. Co. *v.* Bradley, 171 Mass. 127, 68 Am. St. Rep. 409.

Minnesota. — Mackey *v.* Fisher, 36 Minn. 347.

Nebraska. — Missouri Pac. R. Co. *v.* Twiss, 35 Neb. 267, 37 Am. St. Rep. 437.

New York. — Oceanic Steam Nav. Co. *v.* Campania Transatlantica Espanola, 144 N. Y. 663; New York *v.* Brady, 151 N. Y. 611, *affirming* 81 Hun (N. Y.) 440; Rochester *v.* Montgomery, 72 N. Y. 65, *affirming* 9 Hun (N. Y.) 394; New York *v.* Brady, 77 Hun (N. Y.) 241.

2. Persons Expressly Covenanting for Result of Suits Between Others — *United States.* — Gill's Case, 7 Ct. Cl. 522; Pullman's Palace Car Co. *v.* Washburn, 66 Fed. Rep. 790.

Arkansas. — Robinson *v.* Baskins, 53 Ark. 330, 22 Am. St. Rep. 202.

Colorado. — Woodworth *v.* Gorsline, (Colo. 1902) 69 Pac. Rep. 705.

Indiana. — Taylor *v.* Williams, 120 Ind. 414.

New York. — Conant *v.* Jones, 50 N. Y. App. Div. 336; Rapelye *v.* Prince, 4 Hill (N. Y.) 119, 40 Am. Dec. 267, *distinguishing* Douglass *v.* Howland, 24 Wend. (N. Y.) 35.

Wisconsin. — Grafton *v.* Hinkley, 111 Wis. 46.

But see Masterson *v.* Little, 75 Tex. 682; Williams *v.* Warren, 82 Tex. 319; Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98.

3. Intervenors Are Parties — *United States.* — Frank *v.* Wedderin, (C. C. A.) 68 Fed. Rep. 818; Austin *v.* Hamilton County, 76 Fed. Rep. 208, 22 C. C. A. 128; Houston First Nat. Bank *v.* Ewing, (C. C. A.) 103 Fed. Rep. 168; Martin *v.* People's Bank, 115 Fed. Rep. 226.

Arkansas. — Burgess *v.* Poole, 45 Ark. 373.

Iowa. — Witter *v.* Fisher, 27 Iowa 9; German Bank *v.* American F. Ins. Co., 83 Iowa 491, 32 Am. St. Rep. 316.

Kentucky. — Hamilton *v.* Cole, (Ky. 1892) 18 S. W. Rep. 13; Tolle *v.* Owensboro, etc., R. Co., 64 S. W. Rep. 455, 23 Ky. L. Rep. 864.

Louisiana. — Dosson *v.* Bieller, 10 La. Ann. 570; Shelton *v.* Brown, 22 La. Ann. 162; Markham *v.* O'Connor, 23 La. Ann. 688.

Maine. — Huntress *v.* Tiney, 46 Me. 83.

Missouri. — Richardson *v.* Watson, 23 Mo. 34; Missouri Pac. R. Co. *v.* Levy, 17 Mo. App. 501.

North Carolina. — Piedmont Wagon Co. *v.* Byrd, 119 N. Car. 460. See also McKesson *v.* Mendenhall 64 N. Car. 502.

Pennsylvania. — Osner *v.* Vollrath, 2 Pa. Co. Ct. 184; Baker *v.* Cochran, 1 Del. Co. Rep. (Pa.) 29.

South Carolina. — Boyce *v.* Boyce, 6 Rich. Eq. (S. Car.) 302.

Texas. — Hanrick *v.* Gurley, 93 Tex. 458. See also O'Brien *v.* Browning, (Supm. Ct. Spec. T.) 49 How. Pr. (N. Y.) 109. But see Guthrie *v.* Pierson, (Tex. Civ. App. 1896) 35 S. W. Rep. 405; Sutherland *v.* Elmendorf, 24 Tex. Civ. App. 137.

A Trustee in Bankruptcy who intervenes in a suit in which the property rights of the bankrupt are involved is concluded by the judgment rendered therein. *In re* Van Alstyne, 100 Fed. Rep. 929.

4. Farmer's Bank *v.* Thomas, 37 Md. 246.

5. Weber *v.* Mick, 131 Ill. 520.

Persons Held Not Concluded by Adjudications in Foreclosure Proceedings. — A person who was not a party to, and who did not appear in, a foreclosure suit, while the suit was pending, brought a bill to enjoin foreclosure as to a part of the premises claimed by him, which bill was afterwards withdrawn. It was held that he was not concluded by the judgment in the foreclosure suit. Gage *v.* McGregor, 61 N. H. 47.

So where, in a foreclosure proceeding, a person interested appears by attorney and files a paper asking for an apportionment of the mortgage debt, he does not, if such paper is disregarded by the court, become a party to the suit, and will not be concluded by the decree rendered therein. Bates *v.* Ruddick, 2 Iowa 423, 65 Am. Dec. 774.

A Person Whose Application to Be Made a Party in a Suit Is Denied except upon his compliance with terms which the court has no right to impose, and with which he refuses to comply, is not a party, and therefore not bound by the judgment.[1]

Adjudication Prior to Intervention. — An intervenor is not concluded by any decision rendered prior to his intervention.[2]

(2) *Persons Coming In on Appeal.* — Where a person who is not a party to a suit, but is interested in the subject-matter thereof, appeals from the judgment rendered therein, and the appellate court hears and decides the cause on its merits, its judgment will be conclusive upon such appellant.[3] But where a person who is not a party to a suit is improperly summoned to answer an appeal from the judgment he will not be bound by any judgment which the appellate court may render upon the appeal.[4]

(3) *New Parties Brought In by Amended Bill.* — Where a hearing is had on a bill after it has been amended, but the decree rendered does not recite that the cause was heard on the amended bill, and is such as might have been rendered on the original bill, new parties brought in by the amended bill are not concluded thereby.[5]

g. EFFECT OF SEVERANCE, WITHDRAWAL, OR DISMISSAL. — Where a severance has been granted as to one of two defendants, and suit is prosecuted against the other defendant to judgment, such judgment will not conclude the defendant who has been permitted to sever.[6] So, a decree rendered in a suit does not bind one who was originally a party but who was permitted to withdraw before the rendition of the decree.[7] Persons who file their claims in a suit in equity in obedience to the directions of the court are not voluntary parties, and when they are dismissed from the case and their claims are stricken from the files they are not barred by the proceedings from afterwards instituting suit on such claims.[8]

h. WHO MAY BECOME PARTIES WITHIN THE DOCTRINE OF RES JUDICATA — (1) *In General.* — Generally a party to a suit must be either a natural person or persons or a legal entity, as a corporation created by or in pursuance of law,[9] and the principle of *res judicata* is as applicable to corporations as it is to natural persons.[10]

A Town Before It Is Incorporated has no legal existence and cannot be concluded by any judgment or decree.[11]

(2) *The State.* — The state, like the citizen, is subject to the principle of *res judicata*, and is conclusively bound by a decision rendered in a proceeding to which it is a party.[12] But actions by or against the state can be brought

1. Coleman *v.* Hunt, 77 Wis. 263.

2. Merchants' Nat. Bank *v.* Kopplin, 1 Kan. App. 599.

3. Renick *v.* Ludington, 20 W. Va. 511. See also Martin *v.* People's Bank, 115 Fed. Rep. 226.

4. Renick *v.* Ludington, 20 W. Va. 511. See also Moseley *v.* Cocke, 7 Leigh (Va.) 224; Owingsville, etc., Turnpike Road Co. *v.* Hamilton, (Ky. 1899) 54 S. W. Rep. 175, *denying* rehearing of (Ky. 1899) 53 S. W. Rep. 5.

5. Renick *v.* Ludington, 20 W. Va. 511.

6. **Severance.** — Eikenberry *v.* Edwards, 71 Iowa 82; Parker *v.* Campbell, (Tex. 1901) 65 S. W. Rep. 482.

7. **Withdrawal.** — Owens *v.* Alexander, 78 N. Car. 1.

8. **Dismissal of Involuntary Parties.** — Palmer *v.* Woods, 149 Ill. 146, *affirming* 48 Ill. App. 630.

9. Lownsdale *v.* Portland, Deady (U. S.) 1, 15 Fed. Cas. No. 8,578.

10. **Principle Applicable to Corporations.** — Louisiana State Bank *v.* Orleans Nav. Co., 3 La. Ann. 294.

11. **Town Before Incorporated.** — Lownsdale *v.* Portland, Deady (U. S.) 1, 15 Fed. Cas. No. 8,578.

12. **State Subject to Principle of Res Judicata** — *United States.* — U. S. *v.* O'Grady, 22 Wall. (U. S.) 641, *affirming* 10 Ct. Cl. 134; Fendall's Case, 14 Ct. Cl. 247; Kentucky Bank *v.* Stone, 88 Fed. Rep. 383, *affirmed* 174 U. S. 408; Kentucky Bank *v.* Louisville, 88 Fed. Rep. 985, *affirmed* 174 U. S. 408; Atlantic Dredging Co. *v.* U. S., 35 Ct. Cl. 463. See also Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246.

California. — People *v.* Holladay, 93 Cal. 241, 27 Am. St. Rep. 186, 102 Cal. 661.

Nebraska. — State *v.* Kennedy, 60 Neb. 300; State *v.* Savage, (Neb. 1902) 90 N. W. Rep. 898.

Canada. — Gwynne, J., in Fonseca *v.* Atty.-Gen., 17 Can. Sup. Ct. 612; Reg. *v.* St. Louis, 5 Can. Exch. 330. See also State *v.* Cincinnati Tin, etc., Co., 66 Ohio St. 182.

only by express authority of the legislature, and the state cannot be estopped by an act of its officers, unless it has by statute authorized such officers to act on that behalf, and then the estoppel can be no broader than the authority.[1]

(3) *Slaves.* — In the slaveholding states, prior to the abolition of slavery, a slave could not sue or be sued, and therefore a judgment rendered against a slave in an action in which he appeared was a nullity. Consequently such a judgment would not bar an action brought by the former slave after the abolition of slavery.[2]

(4) *Married Women.* — As a general rule, at common law a married woman can neither sue nor be sued alone, but she must sue or be sued in connection with her husband,[3] and therefore, to render a judgment conclusive upon her, it is necessary that her husband should have been joined in the suit.[4] By statute, however, in most jurisdictions the common-law rule has been much modified, and in some jurisdictions the disability of married women in this respect has been removed.[5] Where her disability has thus been removed she will be concluded by a judgment in a suit in which she sued or was sued without the joinder of her husband.[6]

8. What Constitutes Privity — *a.* IN GENERAL. — The term privity denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party is that they are identified with him in interest; and whenever this identity is found to exist, all are alike concluded.[7]

Succession to Estate or Interest of a Party. — Thus, every person is privy to a judgment or decree who has succeeded to an estate or interest held by one who was a party to such judgment or decree, if the succession occurred after

1. Adams *v.* Bradley, 5 Sawy. (U. S.) 217, 1 Fed. Cas. No. 48; Carr *v.* U. S., 98 U. S. 433; State *v.* Cincinnati Tin, etc., Co., 66 Ohio St. 182. And see the title STATES.

2. **Principle of Res Judicata Was Not Applicable to Slaves.** — Wood *v.* Ward, 2 Flipp. (U. S.) 336. In this case a suit for freedom had been brought in a slave state, in which the court held that the plaintiff was a slave and not a free person as claimed, and in the subsequent suit brought after the abolition of slavery by such plaintiff against the same defendant, involving the same question, it was held that this judgment was no bar.

3. See the title HUSBAND AND WIFE, vol. 15, p. 794.

4. **Rule at Common Law.** — Roberts *v.* Pierson, 2 Wils. C. Pl. 3.

5. See the title HUSBAND AND WIFE, vol. 15, p. 794.

6. **Rule under Statutes.** — McDonald *v.* Mobile L. Ins. Co., 65 Ala. 358; Robinson *v.* Walker, 81 Ala. 404. See also Truesdail *v.* McCormick, 126 Mo. 39; Jones *v.* Taylor, 7 Tex. 240, 56 Am. Dec. 48.

7. **Privity Defined** — *United States.* — Lownsdale *v.* Portland, Deady (U. S.) 1, 15 Fed. Cas. No. 8,578; Lovejoy *v.* Murray, 3 Wall. (U. S.) 1; Gill's Case, 7 Ct. Cl. 522; Litchfield *v.* Goodnow, 123 U. S. 549; Bailey *v.* Sundberg, (C. C. A.) 49 Fed. Rep. 583; Gordon *v.* Newman, (C. C. A.) 62 Fed. Rep. 686; Hauke *v.* Cooper, (C. C. A.) 108 Fed. Rep. 922.

Alabama. — Winston *v.* Westfeldt, 22 Ala. 760; Lawrence *v.* Ware, 37 Ala. 553.

California. — Satterlee *v.* Bliss, 36 Cal. 489.

Iowa. — McDonald *v.* Gregory, 41 Iowa 513.

Michigan. — Prentiss *v.* Holbrook, 2 Mich. 372.

New Hampshire. — Hunt *v.* Haven, 52 N. H. 162; Chamberlain *v.* Carlisle, 26 N. H. 540; Nichols *v.* Day, 32 N. H. 133, 64 Am. Dec. 358.

New Jersey. — Buckingham *v.* Ludlum, 37 N. J. Eq. 138.

New York. — Goddard *v.* Benson, (C. Pl. Gen. T.) 15 Abb. Pr. (N. Y.) 191; Williams *v.* Barkley, 165 N. Y. 48, *affirming* 52 N. Y. App. Div. 631.

South Carolina. — Gist *v.* Davis, 2 Hill Eq. (S. Car.) 335, 29 Am. Dec. 89.

Texas. — Bradford *v.* Knowles, 78 Tex. 109.

Washington. — Douthitt *v.* MacCulsky, 11 Wash. 601.

Wisconsin. — Smith *v.* Pretty, 22 Wis. 655. See also Emmons *v.* Dowe, 2 Wis. 322.

Canada. — Dingwall *v.* McBean, 30 Can. Sup. Ct. 441.

1 Greenleaf on Ev., § 523. See also Borough *v.* Whichcote, 3 Bro. P. C. (Toml. ed.) 596.

Privity implies a relationship by succession or representation between the party to the second action and the party to the prior action in respect to the right adjudicated in the first action. When this exists, the party in the second action is barred by an adjudication upon the right made in the first action. Stamp *v.* Franklin, 144 N. Y. 607, *affirming* 75 Hun (N. Y.) 373.

Privity relates to persons in their relation to property, and not to any question independent of property. Hart *v.* Moulton, 104 Wis. 349, 76 Am. St. Rep. 881.

the bringing of the action.[1] But in order that privity shall exist, the succession must have occurred after the institution of the suit. One who succeeded to the right of property of a party prior to that time is not in privity with him and is not concluded by the judgment.[2] Indeed, some cases hold that to constitute privity the succession to the right of property must have occurred subsequently to the rendition of the judgment.[3] But whether a person acquiring property *pendente lite* is technically a privity or not, he is generally bound by the judgment under the doctrine of *lis pendens*, which is, properly regarded, but one phrase of the law of *res judicata*.[4]

Absolute Identity of Interest is essential to privity. One whose interest is almost identical with that of a party, but who does not claim through him, is not in privity with him.[5] The fact that two parties as litigants in two different suits happen to be interested in proving or disproving the same facts creates no privity between them.[6]

The Mere Fact that a Person Is in Possession of Property at the time a suit is commenced between other persons in relation to the title to such property does not make him a privy to either of the parties where he does not hold under either of them.[7]

b. CLASSIFICATION. — Upon the accuracy of the definition of privity given in the text[8] the authorities are substantially agreed, but upon the question of its application to specific cases and upon the analogous question of the proper classification of privies there is some conflict and confusion. The authorities all agree that there are privies in law, privies in blood, and privies in estate,[9] while there are some cases that further extend the classi-

1. Succession Subsequent to Institution of Suit Constitutes Privity — *United States.* — Central Nat. Bank *v.* Hazard, 30 Fed. Rep. 484.

California. — Semple *v.* Wright, 32 Cal. 659; McCormick *v.* Sutton, 78 Cal. 232.

Illinois. — Cadwallader *v.* Harris, 76 Ill. 370; Leslie *v.* Bonte, 130 Ill. 498, *affirming* 30 Ill. App. 288; O'Connell *v.* Chicago Terminal Transfer R. Co., 184 Ill. 324, *citing* 21 AM. AND ENG. ENCYC. OF LAW (1st ed.) 139.

Kentucky. — Soward *v.* Coppage, (Ky. 1888) 9 S. W. Rep. 389.

Nebraska. — Baldridge *v.* Foust, 28 Neb. 259.

New York. — Wilson *v.* Davol, 5 Bosw. (N. Y.) 619.

South Carolina. — Reese *v.* Holmes, 5 Rich. Eq. (S. Car.) 531.

2. Privity Not Created by Succession Prior to Institution of Suit — *United States.* — Keokuk, etc., R. Co. *v.* Missouri, 152 U. S. 301; Ingersoll *v.* Jewett, 16 Blatchf. (U. S.) 378; Simplot *v.* Chicago, etc., R. Co., 16 Fed. Rep. 350; Carey *v.* Roosevelt, 81 Fed. Rep. 608; Carroll *v.* Goldschmidt, (C. C. A.) 83 Fed. Rep. 508.

California. — Satterlee *v.* Bliss, 36 Cal. 489.

Florida. — Logan *v.* Stieff, 36 Fla. 473; Austin *v.* Hoxsie, (Fla. 1902) 32 So. Rep. 878. See also Reddick *v.* Meffert, 32 Fla. 409.

Indiana. — Fordice *v.* Hardesty, 36 Ind. 23; Boling *v.* Howell, 93 Ind. 329.

Kentucky. — Doyle *v.* Armstrong, 2 Duv. (Ky.) 534.

Maryland. — Griffith *v.* Hammond, 45 Md. 85; Oliver *v.* Caton, 2 Md. Ch. 302.

Michigan. — Seymour *v.* Wallace, 121 Mich. 402.

Missouri. — Koontz *v.* Kaufman, 31 Mo. App. 397; Rieschick *v.* Klingelhoefer, 91 Mo. App. 430.

New York. — Wilson *v.* Davol, 5 Bosw. (N. Y.) 619.

South Carolina. — Patterson *v.* Rabb, 38 S. Car. 138.

West Virginia. — Bensimer *v.* Fell, 35 W. Va. 15, 29 Am. St. Rep. 774; Maxwell *v.* Leeson, 50 W. Va. 361.

Wisconsin. — Coleman *v.* Hunt, 77 Wis. 263; Hart *v.* Moulton, 104 Wis. 349, 76 Am. St. Rep. 881.

3. Kitty *v.* Fitzhugh, 4 Rand. (Va.) 600; Hunt *v.* Haven, 52 N. H. 162.

4. This question is exhaustively treated in another part of this work. See the title NOTICE OF PENDENCY AND LIS PENDENS, vol. 21, p. 591.

5. Cook *v.* Parham, 63 Ala. 456; Lake, etc., Orphan House *v.* Lawrence, 11 Paige (N. Y.) 80.

6. Spencer *v.* Williams, L. R. 2 P. & D. 230; Sturbridge *v.* Franklin, 160 Mass. 149.

7. Miller *v.* Blackett, 47 Fed. Rep. 547.

Where a Person Is Collusively Placed in Possession of premises by a tenant after action of ejectment by the landlord against the tenant for holding over after the expiration of his term, a judgment for the plaintiff does not determine the question of title or right of possession as between the landlord and such third person. Calderwood *v.* Brooks, 45 Cal. 519.

8. See *supra*, this section, *What Constitutes Privity — In General.*

9. Classification — *Alabama.* — McLelland *v.* Ridgeway, 12 Ala. 482.

Maine. — Merrill *v.* Suffolk Bank, 31 Me. 57, 50 Am. Dec. 649.

Michigan. — Prentiss *v.* Holbrook, 2 Mich. 372.

New Hampshire. — Nichols *v.* Day, 32 N. H. 135, 64 Am. Dec. 358; Hunt *v.* Haven, 52 N. H. 162.

New York. — Bush *v.* Knox, 2 Hun (N. Y.) 576.

fication to privies by representation [1] and privies by contract.[2] There have, however, been few attempts to define these several classes of privies further than by illustration.[3] It would seem, therefore, that the best method of treating this subject is to enumerate certain well recognized legal relationships between persons that have been held to create privity, rather than to attempt any general classification of privies.

c. VENDOR AND VENDEE. — Privity exists between a vendor of property, real or personal, and his vendee, and a judgment in a suit in which the title to property is in issue will be conclusive for or against any vendee of either of the parties to the suit who acquired title after the institution of the suit.[4] But such a judgment will not be conclusive for or against a vendee to whom the property was transferred prior to the institution of the suit. There is no privity in such case.[5]

d. PERSONS ACQUIRING PROPERTY AT JUDICIAL SALE OR UNDER A DECREE IN EQUITY. — A purchaser at a judicial sale or one to whom a deed of property has been made under the authority of or in obedience to the decree of a court of equity, and all persons claiming under him, are in privity of estate to the judgment or decree under which the sale or deed was made, and are concluded thereby, and all persons who were parties to the suit in which the judgment or decree was rendered are precluded from questioning their title.[6] But persons not parties to such suit and not claiming under persons who were parties are not precluded from questioning such title.[7]

Subsequent Judgment Against Execution Debtor. — A purchaser at an execution sale

West Virginia. — Bensimer *v.* Fell, 35 W. Va. 15, 29 Am. St. Rep. 774.

1. Privy by Representation. — Buckingham *v.* Ludlum, 37 N. J. Eq. 138; Chapman *v.* Frank, 15 Daly (N. Y.) 282.

2. Willey *v.* Paulk, 6 Conn. 74.

3. A Privy in Estate has been defined to be any person who must necessarily derive his title to the property in question from a party bound by a judgment. Coleman *v.* Davis, (Tex. Civ. App. 1896) 36 S. W. Rep. 103.

4. *United States.* — Keokuk, etc., R. Co. *v.* Missouri, 152 U. S. 301; Ingersoll *v.* Jewett, 16 Blatchf. (U. S.) 378; Hauke *v.* Cooper, (C. C. A.) 108 Fed. Rep. 922, 48 C. C. A. 144.

California. — Satterlee *v.* Bliss, 36 Cal. 489.

Georgia. — Means *v.* Sanders, 14 Ga. 113; Simms *v.* Freiherr, 100 Ga. 607.

Iowa. — Adams County *v.* Graves, 75 Iowa 642.

Michigan. — Prentiss *v.* Holbrook, 2 Mich. 372.

New York. — Park Hill Co. *v.* Herriot, 41 N. Y. App. Div. 324; Ostrander *v.* Hart, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 809, 55 Hun (N. Y.) 611, *affirmed* 130 N. Y. 406.

North Carolina. — Weeks *v.* McPhail, 128 N. Car. 130.

Pennsylvania. — Soper *v.* Guernsey, 71 Pa. St. 219; Strayer *v.* Johnson, 110 Pa. St. 21.

South Carolina. — State *v.* Chester, etc., R. Co., 13 S. Car. 290.

Tennessee. — Vaughn *v.* Law, 1 Humph. (Tenn.) 123.

Texas. — Hair *v.* Wood, 58 Tex. 77; Carnes *v.* Carnes, (Tex. Civ. App. 1901) 64 S. W. Rep. 877.

Wisconsin. — Finney *v.* Boyd, 26 Wis. 366; Grunert *v.* Spalding, 104 Wis. 193.

5. *United States.* — Ingersoll *v.* Jewett, 16 Blatchf. (U. S.) 378; Simplot *v.* Chicago, etc., R. Co., 16 Fed. Rep. 350; Gottlieb *v.* Thatcher, 34 Fed. Rep. 435; Jones *v.* Wilkey, 78 Fed. Rep. 532.

California. — Satterlee *v.* Bliss, 36 Cal. 489; Chester *v.* Bakersfield Town Hall Assoc., 64 Cal. 42.

Florida. — Austin *v.* Hoxsie, (Fla. 1902) 32 So. Rep. 878; Logan *v.* Stieff, 36 Fla. 473.

Indiana. — Cray *v.* Wright, 16 Ind. App. 258.

Michigan. — Seymour *v.* Wallace, 121 Mich. 402.

New York. — Tauziede *v.* Jumel, 133 N. Y. 614, *affirming* 60 Hun (N. Y.) 583, 15 N. Y. Supp. 24.

Pennsylvania. — Posten *v.* Posten, 4 Whart. (Pa.) 27.

Vermont. — Church *v.* Chapin, 35 Vt. 231.

West Virginia. — Bensimer *v.* Fell, 35 W. Va. 15, 29 Am. St. Rep. 774.

But see Powell *v.* Heckerman, 6 Tex. Civ. App. 304; Kramer *v.* Breedlove, (Tex. 1887) 3 S. W. Rep. 561. For an exhaustive treatment of the question of privity between vendor and purchaser, see the title VENDOR AND PURCHASER.

6. Purchasers at Judicial Sales — *United States.* — Central Nat. Bank *v.* Hazard, 30 Fed. Rep. 484; St. Louis Southwestern R. Co. *v.* Stark, 12 U. S. App. 227, 55 Fed. Rep. 758.

Georgia. — Gunn *v.* Wades, 62 Ga. 20.

Iowa. — Blake *v.* Koons, 71 Iowa 356.

Mississippi. — Shirley *v.* Fearne, 33 Miss. 653, 69 Am. Dec. 375.

New York. — Hening *v.* Punnett, 4 Daly (N. Y.) 543; Park Hill Co *v.* Herriot, 41 N. Y. App. Div. 324. See also Livingston *v.* Livingston, 56 N. Y. App. Div. 484, *affirmed* 166 N. Y. 601.

West Virginia. — State *v.* Irwin, 51 W. Va. 192.

7. Eisele *v.* Schmitz, 67 N. J. L. 58.

is not concluded by a subsequent judgment against the debtor whose property was sold.[1]

e. ASSIGNOR AND ASSIGNEE — (1) *Judgment in Suit in Which Assignor Is a Party.* — A judgment in a suit in which an assignor was a party is conclusive in favor of or against the assignee where the assignment was made after the institution of the suit in which the judgment was rendered.[2] But the contrary is true where the assignment was made before the institution of the suit.[3]

(2) *Judgment in Suit in Which Assignee Is a Party.* — But a judgment for or against an assignee will not, ordinarily, be conclusive for or against the assignor who was not a party to the suit.[4] Where, however, an assignment is made of a claim for the purpose of a suit thereon, the judgment in such suit will conclude the assignor. In such case privity exists between the assignee and assignor.[5]

f. LANDLORD AND TENANT — (1) *Judgment in Suit in Which Lessor Is a Party.* — A judgment in a suit in which a lessor is a party will be conclusive for or against the lessee, where the lessee acquired his lease after the commencement of the suit.[6] But upon the question whether a judgment against a lessor will conclude a lessee holding under a lease made prior to the commencement of the action the authorities are not entirely harmonious.[7]

(2) *Judgment in Suit in Which Lessee Is a Party.* — As the lessor does not claim under the lessee, a judgment in a suit in which the lessee is a party will not be conclusive for or against the lessor where the lessor did not in fact participate in the action and had no notice thereof.[8] And according to some

1. Gottlieb *v.* Thatcher, 34 Fed. Rep. 435.

2. Where Assignment Was Made After Institution of Suit — *United States.* — Corcoran *v.* Chesapeake, etc., Canal Co., 94 U. S. 741; Block *v.* Commissioners, 99 U. S. 686; Smith *v.* Kernochen, 7 How. (U. S.) 198; Adams *v.* Preston, 22 How. (U. S.) 473; Simplot *v.* Chicago, etc., R. Co., 16 Fed. Rep. 350; Pennington *v.* Hunt, 20 Fed. Rep. 195; Richardson *v.* Warner, 28 Fed. Rep. 343; Newton Mfg. Co. *v.* Wilgus, 90 Fed. Rep. 483.

California.—Hartson *v.* Shanklin, 58 Cal. 248.

Iowa. — Zion Church *v* Parker, 114 Iowa 1.

Kentucky. — Soward *v.* Coppage, (Ky. 1888) 9 S. W. Rep. 389.

Louisiana. — Judice *v.* Kerr, 8 La. Ann. 462; Bisland *v.* Griffin, 9 La. Ann. 150.

Michigan. — Prentiss *v.* Holbrook, 2 Mich. 372.

Tennessee. — Buckner *v.* Geodeker, (Tenn. Ch. 1897) 45 S. W. Rep. 448.

Washington. — Isensee *v.* Austin, 15 Wash. 352; Davis *v.* Seattle Nat. Bank, 19 Wash. 65. See also Hart *v.* Bates, 17 S. Car. 35.

Wisconsin. — Lawrence *v.* Milwaukee, 45 Wis. 306.

3. Where Assignment Was Made Before Institution of Suit. — Simplot *v.* Chicago, etc., R. Co., 16 Fed. Rep. 350; Gregory *v.* Clabrough, 129 Cal. 475; Aultman *v.* Sloan, 115 Mich. 151; Barrowcliffe *v.* Cummins, 53 Hun (N. Y.) 636, 6 N. Y. Supp. 228; Pruyn *v.* Milwaukee, 18 Wis. 369.

4. Judgment for or Against Assignee. — Gaines *v.* Patterson, 3 Dana (Ky.) 408; Hunt *v.* Lucas, 68 Mo. App. 518; Chapman *v.* Frank, 15 Daly (N. Y.) 282; Johnson *v.* Union Switch, etc., Co., 59 N. Y. Super. Ct. 169, *affirmed* 129 N. Y. 653. See also Ganiott *v.* Havard, 6 Mart. N. S. (La.) 290; Brown *v.* Brown, 2 E. D. Smith (N. Y.) 153; Tyree *v.* Magness, 1 Sneed (Tenn.) 276.

5. Hodson *v.* Union Pac. R. Co., 14 Utah 402, 60 Am. St. Rep. 902; Garretson *v.* Ferrall, 92 Iowa 728. See also Cheney *v.* Patton, 144 Ill. 373.

6. Hessel *v.* Johnson, 124 Pa. St. 233.

7. In California it has been held that a tenant of the defendant in ejectment, who acquired his lease before the commencement of the suit, is not estopped as to his term by a judgment in the action obtained against his lessor. Satterlee *v.* Bliss, 36 Cal. 489.

But in Michigan and Minnesota it has been held that a judgment against a lessor will conclude the lessee who holds under a lease made prior to the institution of the suit, in a subsequent suit in which such lessee is a party claiming under the lessor. Sawyer *v.* McAdie, 70 Mich. 386; Blew *v.* Ritz, 82 Minn. 530. See also Hiller *v.* White, 80 Ill. 580.

8. Judgment for or Against Lessee — *Alabama.* — Stanley *v.* Johnson, 113 Ala. 344; Wilson *v.* State, 115 Ala. 129.

California. — Douglas *v.* Fulda, 45 Cal. 592; Chant *v.* Reynolds, 49 Cal. 213.

Georgia. — Sanford *v.* Tanner, 114 Ga. 1005.

Illinois. — Oetgen *v.* Ross, 47 Ill. 142, 95 Am. Dec. 468; Orthwein *v.* Thomas, (Ill. 1887) 13 N. E. Rep. 564.

Indiana. — Wilson *v.* Brookshire, 126 Ind. 497; Sheets *v.* Joyner, 11 Ind. App. 205.

Indian Territory. — Lochner *v.* Garborina, 3 Indian Ter. 664.

Kansas. — Redden *v.* Tefft, 48 Kan. 302.

Massachusetts. — Bartlett *v.* Boston Gas Light Co., 122 Mass. 209.

Michigan. — Powers *v.* Scholtens, 79 Mich. 299.

Missouri. — Magwire *v.* Labeaume, 7 Mo. App. 179.

New Jersey. — Baxter *v.* Carrol, (N. J. 1898) 41 Atl. Rep. 407.

authorities the lessor will not be concluded by a judgment in an action against the lessee merely because he had notice of the suit and an opportunity to defend.[1] But when the lessor is a party to the suit, acting in his own right, he will, of course, be concluded by the judgment.[2] So he will be if he instigates the action and conducts and controls the litigation.[3] But he does not become a party so as to be bound by the judgment by appearing as attorney for his tenant and defending the suit in the name of and for the tenant.[4]

g. MORTGAGOR AND MORTGAGEE — (1) *Judgment in Suit in Which Mortgagor Is a Party.* — A judgment in a suit in which a mortgagor is a party will be conclusive for or against the mortgagee if the mortgage was executed after the institution of the suit.[5] But the rule is otherwise if the mortgage was subsisting at the time of the commencement of the suit.[6] Thus, a mortgagee is not bound by the decree in a suit to foreclose a prior mortgage or other incumbrance if he is not made a party to the suit.[7] Nor is he, unless made a party to the suit, concluded by a judgment or decree enforcing a lien against the property.[8] So, a judgment in attachment proceedings is not conclusive upon one having a subsisting chattel mortgage on the property attached, and who is not a party to such proceedings.[9]

(2) *Judgment in Suit in Which Mortgagee Is a Party.* — A mortgagor is not concluded by a judgment in an action prosecuted by the mortgagee against a third person, to which the mortgagor was not a party, and which was not carried on at his instance, or for his benefit.[10]

h. BAILOR AND BAILEE. — A judgment against a bailor in a suit in regard to the property bailed will conclude the bailee.[11]

i. HUSBAND AND WIFE. — Husband and wife are for most purposes distinct persons at law, and an adjudication in an action to which a wife is a party alone, and in which the husband is not a necessary party, neither binds him in a subsequent action, to which he is a party, nor can he avail himself of the benefit of the adjudication on the ground merely that he was her husband. If, in respect to the subject-matter of the wife's action, there was a privity between the husband and wife, he would be bound under the same circumstances as a former judgment binds other persons, and not otherwise.[12]

New York. — Ryerss *v.* Rippey, 25 Wend. (N. Y.) 432; Ryerss *v.* Wheeler, 25 Wend. (N. Y.) 437; New York L. Ins., etc., Co. *v.* Cutler, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 407.

Tennessee.—Boles *v.* Smith, 5 Sneed (Tenn.) 105.

Texas. — Hart *v.* Meredith, (Tex Civ. App. 1901) 65 S. W. Rep. 507.

See also Sampson *v.* Ohleyer, 22 Cal. 200; Davidson *v.* Barclay, 63 Pa. St. 406. But see Western Tel. Co. *v.* Baltimore, etc., R. Co., 69 Md. 211; Freer *v.* Stotenbur, 2 Abb. App. Dec. (N. Y.) 189.

1. Wilson *v.* Brookshire, 126 Ind. 497; Bennett *v.* Leach, 25 Hun (N. Y.) 178; Haney *v.* Brown, (Tex. Civ. App. 1898) 46 S. W. Rep. 55.

2. Haney *v.* Brown, (Tex. Civ. App. 1898) 46 S. W. Rep. 55.

3. Wilson *v.* Brookshire, 126 Ind. 497. But see Magwire *v.* Labeaume, 7 Mo. App. 179. And see *supra*, this section, *Who Are Parties Within the Doctrine of Res Judicata — Persons Prosecuting or Defending in the Names of Others — In General.*

4. Haney *v.* Brown, (Tex. Civ. App. 1898) 46 S. W. Rep. 55. And see *supra*, this section, 7. *d.* (2) (*c*).

5. **Where Mortgage Was Executed After Commencement of Suit.** — Keokuk, etc., R. Co. *v.* Missouri, 152 U. S. 301.

6. **Mortgage Subsisting at Time of Institution of Suit.** — Keokuk, etc., R. Co. *v.* Missouri, 152 U. S. 301; Southern Bank, etc., Co. *v.* Folsom, (C. C. A.) 75 Fed. Rep. 929; Louisville Trust Co. *v.* Cincinnati, (C. C. A.) 76 Fed. Rep. 296; Williams *v.* Cooper, 124 Cal. 666; Patapsco Guano Co. *v.* Hurst, 106 Ga. 184; Koehring *v.* Aultman, 7 Ind. App. 476; Caumiser *v.* Humpich, 64 S. W. Rep. 851, 23 Ky. L. Rep. 1133; Vincent *v.* Hansen, 113 Mich. 173; Westphal *v.* Westphal, 81 Minn. 242; Slack *v.* John, 63 N. J. Eq. 126; Campbell *v.* Hall, 16 N. Y. 575.

7. **Decree in Suit to Foreclose Prior Mortgage.** — Sarpy County State Bank *v.* Hinkle, 53 Neb. 108; Hunt *v.* Haven, 52 N. H. 162; Campbell *v.* Hall, 16 N. Y. 575; McDonald *v.* Miller, 90 Tex. 309, *distinguishing* Webb *v.* Maxan, 11 Tex. 678; Fisher *v.* Foote, 25 Tex. Supp. 311, and Ufford *v.* Wells, 52 Tex. 612.

8. **Judgment or Decree Enforcing Lien.** — National Foundry, etc., Works *v.* Oconto City Water Supply Co., (C. C. A.) 113 Fed. Rep. 793; Horn *v.* Jones, 28 Cal. 195; Corser *v.* Kindred, 40 Minn. 467; Henkle *v.* Aldridge, 40 Minn. 468, note.

9. **Judgment in Attachment Proceedings.** — Gleason *v.* Wilson, 48 Kan. 500.

10. Shattuck *v.* Bascom, 105 N. Y. 39.

11. Hughes *v.* United Pipe Lines, 119 N. Y. 423.

12. **Judgment in Action in Which Wife Alone Is a Party.** — Neeson *v.* Troy, 29 Hun (N. Y.) 173;

So a judgment against the husband in an action in which the wife is not a party will not conclude the wife in a subsequent action concerning her separate estate, in which the wife is a party alone, or in which the husband and wife are joined.[1] But where husband and wife are formal parties to an action, but in substance and fact it only concerns the separate estate of the wife, and it is only sought to establish her rights and to protect her interests and no relief is asked for or against the husband, he will be regarded as her next friend or trustee, and the decree rendered will be conclusive on her.[2]

j. MINORS AND THEIR LEGAL REPRESENTATIVES. — Minors who are represented in a suit by the person or persons legally authorized to represent them are concluded by the judgment therein.[3]

k. PRINCIPAL AND AGENT AND MASTER AND SERVANT — (1) *Judgment to Which Agent or Servant Is a Party.* — The weight of authority supports the rule that a judgment in a suit in which an agent or a servant is a party prosecuting or defending under the authority and in the right of the principal or master is conclusive for or against the principal or master.[4] But to have such effect it must appear that the agent or servant was acting for his principal or master

Groth *v.* Washburn, 39 Hun (N. Y.) 324; Stamp *v.* Franklin 144 N. Y. 607, *affirming* 75 Hun (N. Y.) 373; Walker *v.* Philadelphia, 195 Pa. St. 168, 78 Am. St. Rep. 801. See also Leinkauff *v.* Munter, 76 Ala. 194. But see Pettengill *v.* Yonkers, (Supm. Ct. Gen. T.) 15 N. Y. St. Rep. 854.

1. Judgment in Action in Which Husband Alone Is a Party. — Michan *v.* Wyatt, 21 Ala. 813; Jacobs *v.* Case, (Ky. 1886) 1 S. W. Rep. 6; Durst *v.* Amyx, (Ky. 1890) 13 S. W. Rep. 1087; Read *v.* Allen, 56 Tex. 182; Jeffus *v.* Allen, 56 Tex. 195. See also Rogers *v.* Roberts, 58 Md. 519; Greiner *v.* Klein, 28 Mich. 12; Allen *v.* Read, 66 Tex. 13.

Wife's Title by Adverse Possession Not Affected by Judgment Against Husband. — Where a person holding adverse possession of land under a claim of right dies, leaving his widow and heirs in possession, and subsequently the widow marries and continues to reside on the premises with her second husband, a judgment against the second husband in an action against him alone for the recovery of the property will not conclude the wife. Hamilton *v.* Wright, 30 Iowa 480.

2. Bein *v.* Heath, 6 How. (U. S.) 228; Michan *v.* Wyatt, 21 Ala. 813; Berry *v.* Williamson, 11 B. Mon. (Ky.) 245.

Authority of Husband to Represent Wife in Actions Concerning Community Property. — Lichty *v.* Lewis, (C. C. A.) 77 Fed. Rep. 111, *affirming* 63 Fed. Rep. 535; Leggett *v.* Ross, 14 Wash. 41.

3. Minors and Their Legal Representatives — *England.* — Gregory *v.* Molesworth, 3 Atk. 626.

United States.—Corker *v.* Jones, 110 U. S. 317.

Georgia. — Archer *v.* Archer, 115 Ga. 950.

Louisiana. — Grounx *v.* Abat, 7 La. 17; Broussard *v.* Bernard, 7 La. 216; Towles *v.* Conrad, 3 Rob. (La.) 69; Louisiana State Bank *v.* Orleans Nav. Co., 3 La. Ann. 294; Porche *v.* Ledoux, 12 La. Ann. 350; Martin *v.* Martin, 5 Mart. N. S. (La.) 165; Holmes *v.* Dabbs, 15 La. Ann. 501.

South Carolina. — Owings *v.* Hunt, 53 S. Car. 187.

Tennessee. — Blair *v.* Blair, (Tenn. Ch. 1896) 41 S. W. Rep. 1078. See also Burkham *v.* Cooper, 1 Ohio Cir. Dec. 371; White's Estate, 163 Pa. St. 388.

4. Judgment in Suit to Which Agent or Servant Is a Party — *United States.* — Emma Silver Min. Co. *v.* Emma Silver Min. Co., 7 Fed. Rep. 401.

Illinois. — Moore *v.* Richardson, 100 Ill. App. 134. See also Lake Shore, etc., R. Co. *v.* Goldberg, 2 Ill. App. 228.

Kentucky. — Warfield *v.* Davis, 14 B. Mon. (Ky.) 33; Bridges *v.* McAlister, 106 Ky. 791.

Louisiana. — Guidry *v.* Jeanneaud, 25 La. Ann. 634. But see State *v.* Voorhies, 39 La. Ann. 499, 4 Am. St. Rep. 274.

Maryland. — McKinzie *v.* Baltimore, etc., R. Co., 28 Md. 161.

Massachusetts. — Kingsley *v.* Davis, 104 Mass. 178.

Michigan. — Hoppin *v.* Avery, 87 Mich. 551. But see Warner *v.* Comstock, 55 Mich. 615.

Missouri. — Lippman *v.* Campbell, 40 Mo. App. 564.

New York. — Kent *v.* Hudson River R. Co., 22 Barb. (N. Y.) 278; Snyder *v.* Trumpbour, 38 N. Y. 355. But see Alexander *v.* Taylor, 4 Den. (N. Y.) 302.

Tennessee. — Farnsworth *v.* Arnold, 3 Sneed (Tenn.) 252.

See also Wright *v.* London Gen. Omnibus Co., 2 Q. B. D. 271. But see Goundie *v.* Northampton Water Co., 7 Pa. St. 233.

Rule Applied to Municipal Officers and the Municipality. — Conover *v.* Mayor, etc., of New York, 25 Barb. (N. Y.) 513.

Judgment for Deputy Sheriff as Bar to Subsequent Suit Against Sheriff. — King *v.* Chase, 15 N. H. 9.

Judgment Against Police Officer. — A judgment in favor of the plaintiff in an action brought to recover possession of property, against a police officer by whom it had been taken under a search warrant, as A's property stolen from him, is not conclusive in a subsequent action by A against the plaintiff in the former suit, involving the right to the same property, as there is no privity between A and the police officer, such officer not being an employee of A, but the servant of the people, acting in their name. Scott *v.* Drennen, 9 Daly (N. Y.) 226.

and within the scope of the authority conferred upon him,[1] or that his action, if not so authorized, has since been ratified by the principal or master.[2]

(2) *Judgment to Which Principal or Master Is a Party* — (a) **In General.** — So, as a general rule, a judgment in a suit in which a principal or master is a party will be conclusive in favor of or against an agent or a servant in a subsequent suit in regard to the same matter.[3]

(b) **Judgment in Action for Wrongful Act or Negligence of Agent or Servant.** — Thus, a judgment upon the merits for the defendant in an action against a principal or master for the wrongful act or the negligence of his agent or servant is conclusive against the plaintiff in a subsequent action by him against the agent or servant.[4]

(c) **Judgment Determining Question of Title Adversely to Principal or Master.** — Where a person sued for the conversion of property justifies solely under the title of a third person for whom he claims to have acted as agent or servant, he will be concluded by a judgment in a suit between such third person and the present plaintiff determining the question of title adversely to such third person.[5]

(3) *Rationale of Rule.* — The application of the principle of *res judicata* to persons standing in the relation of principal and agent or master and servant has, by some authorities, been supported on the ground that privity exists between persons standing in these relations.[6] But other authorities deny the existence of such privity, and hold that in such cases the technical rule is, upon grounds of public policy, expanded so as to embrace within the estoppel of a judgment persons who are not, strictly speaking, either parties or privies.[7]

l. PRINCIPAL AND SURETY. — The questions whether a judgment for or against a principal debtor is conclusive for or against his surety, and whether a judgment for or against the surety is conclusive in favor of or against the principal debtor, are fully treated under another title in this work.[8]

m. EFFECT OF AUTHORITY TO SUE FOR ANOTHER'S BENEFIT. — If a person transfers his right of action to another, or if he authorizes another to sue for his benefit and on his behalf, or if he takes such proceedings in a court of justice by which any officer of the law is authorized to sue for his benefit and on his behalf, and suit is brought by the person authorized, the judgment therein will conclude the person in whose behalf the suit is brought. So one at whose solicitation a receiver is appointed is bound by a judgment in a suit brought by such receiver on his behalf and for his benefit.[9]

n. CO-OWNERS. — The weight of authority seems to support the rule that a judgment against one of two or more co-owners of land, all being in possession, will not conclude the other co-owners who were not parties to the suit.[10] Where, under a judgment for partition, partition is made of only a

1. McCarty *v.* Lehigh Valley R. Co., 160 U. S. 110; Pico *v.* Webster, 12 Cal. 140; Douglass *v.* New York, (Supm. Ct. Spec. T.) 56 How. Pr. (N. Y.) 178; Kent *v.* Hudson River R. Co., 22 Barb. (N. Y.) 278.

As to the scope of the authority of agents and servants, see the titles AGENCY, vol. 1, p. 930, and MASTER AND SERVANT, vol. 20, p. 3.

2. Kent *v.* Hudson River R. Co., 22 Barb. (N. Y.) 278.

3. **Judgment in Suit to Which Principal or Master Is a Party.** — Kentucky Bank *v.* Stone, 88 Fed. Rep. 383, *affirmed* 174 U. S. 408; Faust *v.* Baumgartner, 113 Ind. 139. But see Phillips *v.* Jamieson, 51 Mich. 153.

Rule Applied to Municipal Corporations and Their Officers. — Bank of Kentucky *v.* Stone, 88 Fed. Rep. 383.

4. **Wrongful Act or Negligence of Agent or Servant.** — Bailey *v.* Sundberg, (C. C. A.) 49 Fed. Rep. 583; Anderson *v.* West Chicago St. R. Co., 200 Ill. 329, *affirming* 102 Ill. App. 310; Emery *v.* Fowler, 39 Me. 326, 63 Am. Dec. 627. See also Erie Second Nat. Bank *v.* Ocean Nat. Bank, 11 Blatchf. (U. S.) 362; Mohr *v.* Langan, 77 Mo. App. 481; Hill *v.* Bain, 15 R. I. 75, 2 Am. St. Rep. 873.

5. **Judgment as to Title.** — Mohr *v.* Langan, 77 Mo. App. 481. See also Spear *v.* Hill, 54 N. H. 87.

6. **Reason for Rule.** — Hoppin *v.* Avery, 87 Mich. 551; Mohr *v.* Langan, 77 Mo. App. 482.

7. Bailey *v.* Sundberg, (C. C. A.) 49 Fed. Rep. 583; Anderson *v.* West Chicago St. R. Co., 200 Ill. 329, *affirming* 102 Ill. App. 310; Emery *v.* Fowler, 39 Me. 326, 63 Am. Dec. 627.

8. See the title SURETYSHIP.

9. Tinkham *v.* Borst, (Supm. Ct. Spec. T.) 24 How. Pr. (N. Y.) 246.

10. **Co-owners.** — Miller *v.* Blackett, 47 Fed.

part of the land held in common, and all the cotenants are not made parties to the suit, the judgment will not bar a subsequent petition for partition of the whole land held in common, to which all the cotenants are made parties.[1] Neither a recovery of his aliquot portion of damages by one joint owner of a chattel in an action for a tort, nor a judgment against him alone, in such action, will bar a separate action by another part owner.[2]

o. DECEDENT AND HEIR, NEXT OF KIN, DEVISEE, OR LEGATEE. — Privity exists between a decedent and his heir, next of kin, devisee, or legatee, and a judgment against the former prior to his death will conclude the latter.[3]

Death of Decedent Before Judgment. — But where several persons are in possession of property and an action of ejectment is brought against them, the judgment therein will not conclude the heirs of one of such persons who was made a party to the action, but who died before judgment was rendered.[4]

p. DECEDENT AND ADMINISTRATOR OR EXECUTOR. — Privity exists between an intestate or testator and his personal representatives. Therefore, a judgment which was rendered during the life of an intestate or testator in a suit in which he was a party is conclusive for or against his administrator or executor.[5]

q. PERSONAL REPRESENTATIVES AND LEGATEES, DISTRIBUTEES, OR CREDITORS — **Executor and Legatees.** — Privity exists between an executor and a legatee until the delivery of the legacy, and, therefore, a judgment rendered previous to that time in a suit in which the executor is a party will be conclusive for or against the legatee. But privity ceases upon the delivery of the legacy, and thereafter a judgment against the executor will not conclude the legatee.[6]

Administrator and Distributees or Creditors. — Distributees and creditors are in privity with the administrator, and a judgment in a suit having relation to the personal estate of the intestate to which the administrator was a party will be conclusive for or against the distributees[7] and creditors.[8]

r. PERSONAL REPRESENTATIVES AND HEIRS OR DEVISEES — (1) *Rule at Common Law.* — At common law the heir or devisee does not claim under the

Rep. 547; Stokes *v.* Morrow, 54 Ga. 597; Stovall *v.* Carmichael, 52 Tex. 383; Bass *v.* Sevier, 58 Tex. 567. See also Williams *v.* Sutton, 43 Cal. 65; Scisson *v.* McLaws, 12 Ga. 166. But see Parker *v.* Legett, 12 Rich. L. (S. Car.) 198

Judgment for Tenant in Possession Inures to Benefit of Cotenant. — In *Texas* where suit was brought to recover possession of land against one of two persons who claimed the land as tenants in common, the person sued being at the time in sole possession, a judgment for the defendant divesting the plaintiff's title and vesting it in the defendant was held to inure to the benefit of the other cotenant and to preclude the plaintiff from setting up against him the title divested by the judgment. Foster *v.* Johnson, 89 Tex. 640.

A Judgment in an Action Brought by One Tenant in Common for a Nuisance to the joint possession is conclusive upon both tenants, in a subsequent action by them for a continuation of the nuisance, that a nuisance existed at the time of the prior judgment. Fell *v.* Bennett, 110 Pa. St. 181.

1. Colton *v.* Smith, 11 Pick. (Mass.) 311, 22 Am. Dec. 375.

2. Brizendine *v.* Frankfort Bridge Co., 2 B. Mon. (Ky.) 32, 36 Am. Dec. 587.

3. Riverside Land, etc., Co. *v.* Jensen, 108 Cal. 146; Hurrell *v.* Hurrell, 65 N. Y. App. Div. 527; *Ex p.* Roberts, 19 S. Car. 150. But see Dunning *v.* Crane, 61 N. J. Eq. 634.

4. New York Cent., etc., R. Co. *v.* Brennan, 12 N. Y. App. Div. 103.

5. **Decedent and Personal Representatives.** — Thompson *v.* Frew, 107 Ill. 478; Wilson's Succession, 12 La. Ann. 591; Paterson *v.* Baker, 51 N. J. Eq. 49; Button *v.* Cole, 109 Wis. 247.

6. **Executor and Legatee.**—Carey *v.* Roosevelt, 81 Fed. Rep. 608, (C. C. A.) 102 Fed. Rep. 569; Martin *v.* Ellerbe, 70 Ala. 326; Castellaw *v.* Guilmartin, 54 Ga. 299; Redmond *v.* Coffin, 2 Dev. Eq. (17 N. Car.) 437; Harris *v.* Bryant, 83 N. Car. 568; Hooper *v.* Hooper, 32 W. Va. 526. But see De Mora *v.* Concha, 29 Ch. D. 303.

7. **Administrator and Distributees.** — Martin *v.* Ellerbe, 70 Ala. 326; Merritt *v.* Daffin, 24 Fla. 320; Blue *v.* Watson, 59 Miss. 619; Nichols *v.* Day, 32 N. H. 133, 64 Am. Dec. 358; Mauldin *v.* Gossett, 15 S. Car. 565.

8. **Administrator and Creditors.** — Hansen's Empire Fur Factory *v.* Teadout, 104 Iowa 360; Blue *v.* Watson, 59 Miss. 619.

As to When under the Provision of the Tennessee Statute (Shannon's Code, § 4136), creditors will be concluded by a judgment in a suit brought by or against the administrator of their deceased debtor, involving the question whether a conveyance made by such debtor

personal representatives of the deceased, and so a judgment in a suit in which such personal representatives are parties will not be conclusive for or against the heir or devisee.[1] And *e converso* a judgment in a suit in which the heirs or devisees are parties will not conclude the personal representatives.[2]

Where Executor Is Sole Devisee. — But it has been held that where an executor is sole devisee a judgment in an action in which he appears as executor will conclude him in a subsequent action in which he appears as devisee.[3] This is an exception to or modification of the rule that it is essential to the application of the principle of *res judicata* that the party sought to be bound by the former adjudication should have appeared in both suits in the same capacity.[4]

(2) *Rule under Statutes.* — By statutes in some states executors and administrators are made the representatives of their intestates or testators as to their real as well as their personal estates, and sometimes provision is expressly made that they may sue or be sued in real as well as personal actions. Under such statutes it has generally been held that judgments in actions in which administrators or executors are parties will be conclusive for or against the heirs or devisees.[5]

s. PERSONAL REPRESENTATIVES AND PURCHASERS AT JUDICIAL SALES. — There is no privity between an administrator and a purchaser under a sale of real property by order of the court of probate. Therefore, a decree in a suit to which the administrator was a party is not available to estop the purchaser who was not a party.[6]

t. ADMINISTRATOR DE BONIS NON AND PREDECESSOR. — The weight of authority supports the rule that an administrator *de bonis non* is not in privity with his predecessor in the administration, and therefore will not be concluded by a judgment in a suit to which such predecessor was a party.[7]

u. EXECUTORS AND ADMINISTRATORS IN DIFFERENT STATES. — Where ancillary letters of administration have been granted there is no privity between the domiciliary executor or administrator and the ancillary administrator. But executors in different states are, as regards the creditors of the testator, in privity with each other. Privity also exists between the executor of a will and an administrator with the will annexed in another jurisdiction.[8]

v. COHEIRS AND CODISTRIBUTEES. — Coheirs and codistributees do not claim through one another, and there is, therefore, no privity between them, and the weight of authority seems to support the rule that a judgment rendered in a suit in which one or more of them were parties will not conclude any who were not parties.[9]

was fraudulent, see Walter *v.* Hartman, (Tenn. 1902) 67 S. W. Rep. 476.

1. Judgment in Suit in Which Personal Representatives Are Parties — *United States.* — Carey *v.* Roosevelt, 81 Fed. Rep. 608.

California. — Beckett *v.* Selover, 7 Cal. 215, 68 Am. Dec. 237.

Florida. — Merritt *v.* Daffin, 24 Fla. 320.

Illinois. — Stone *v.* Wood, 16 Ill. 177.

Massachusetts. — Forbes *v.* Douglass, 175 Mass. 191.

New Hampshire. — Nichols *v.* Day, 32 N. H. 133, 64 Am. Dec. 358.

New York. — Van Camp *v.* Fowler, (Supm. Ct. Gen. T.) 16 N. Y. Supp. 281, *affirmed* 133 N. Y. 600; Burnham *v.* Burnham, 46 N. Y. App. Div. 513. But see Park Hill Co. *v.* Herriot, 41 N. Y. App. Div. 324.

Tennessee. — Davis *v.* Reaves, 7 Lea (Tenn.) 585.

West Virginia. — Bensimer *v.* Fell, 35 W. Va. 15, 29 Am. St. Rep. 774.

2. Judgment in Suit in Which the Heirs or Devisees Are Parties. — Forbes *v.* Douglass, 175 Mass. 191.

3. Where Executor Is Sole Devisee. — Colton *v.* Onderdonk, 69 Cal. 155, 58 Am. Rep. 556; Donifelser *v.* Heyl, 7 Kan. App. 606, *affirmed* 59 Kan. 779; Stewart *v.* Montgomery, 23 Pa. St. 410; Com. *v.* Cochran, 146 Pa. St. 223. But see Merchants Nat. Bank *v.* Good, 21 W. Va. 455.

4. For the general rule, see *supra*, this section, *Identity of Capacity Essential.*

5. Statutory Rule. — Bayly *v.* Muehe, 65 Cal. 345; Merritt *v.* Daffin, 24 Fla. 320. But see Beckett *v.* Selover, 7 Cal. 215, 68 Am. Dec. 237.

6. Crandall *v.* Gallup, 12 Conn. 365.

7. This question is treated elsewhere in this work. See the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1335.

8. This subject has been fully treated in another part of this work. See the title FOREIGN EXECUTORS AND ADMINISTRATORS, vol. 13, pp. 920, 921.

9. Coheirs and Codistributees. — Walker *v.*

w. CORPORATIONS AND STOCKHOLDERS. — The weight of authority supports the rule that the stockholders in a corporation are in privity with the corporation and are concluded by a judgment rendered in a suit in which the corporation is a party.[1]

x. COUNTY OR MUNICIPAL CORPORATION AND ITS CITIZENS. — A judgment for or against a county or municipal corporation, or its legal representatives, if it adjudicates matters of general interest to all the citizens or taxpayers, will be conclusive for or against such citizens or taxpayers as to such matters;[2] it will also be conclusive for or against the state in a subsequent suit in which the state appears as the representative of the people.[3] But a municipality does not represent a citizen or taxpayer in regard to his private property. Therefore, a judgment for or against the municipality in regard to property in which a citizen claims a private individual right will not conclude the citizen as to that right.[4]

y. PUBLIC OFFICERS AND SUCCESSORS. — An incumbent of a public office is in privity with the predecessor in the office, and a judgment for or against such predecessor concerning the rights and privileges of the office will conclude him.[5]

9. Exceptions to and Modifications of General Rule — *a.* PROCEEDINGS IN REM. — There is an exception to or a modification of the general rule as to the persons concluded by a judgment or decree[6] in the case of proceedings *in rem* and decisions upon the personal status or relations of the parties, such as marriage, divorce, bastardy, settlement, and the like.[7]

b. JUDGMENT CONCLUSIVE PROOF OF ITS OWN EXISTENCE. — A judgment is conclusive, even against strangers, of the fact of its rendition and of those legal consequences which result from that fact.[8] It is also admissible

Perryman, 23 Ga. 309; Barksdale *v.* Hopkins, 23 Ga. 332; Purdy *v.* Doyle, 1 Paige (N. Y.) 558; Murray *v.* Stephens, 4 Strobh. (S. Car.) 352. See also Johns *v.* Northcutt, 49 Tex. 444. But see Waldo *v.* Waldo, 52 Mich. 91.

1. This matter is treated under another title in this work. See the title STOCKHOLDERS.

2. **Adjudications on Matters of General Interest** — *United States.* — Holt County *v.* National L. Ins. Co., (C. C. A.) 80 Fed. Rep. 686; McIntosh *v.* Pittsburg, 112 Fed. Rep. 705.

Illinois. — Harmon *v.* Auditor of Public Accounts, 123 Ill. 122, 5 Am. St. Rep. 502, 22 Ill. App. 129; Elson *v.* Comstock, 150 Ill. 303. But see People *v.* Loeffler, 175 Ill. 585.

Iowa. — Clark *v.* Wolf, 29 Iowa 197; Cannon *v.* Nelson, 83 Iowa 242. See also Dicken *v.* Morgan, 59 Iowa 157. But see Kane *v.* Independent School Dist., 82 Iowa 5.

Kansas. — McEntire *v.* Williamson, 63 Kan. 275.

Kentucky. — Locke *v.* Com., (Ky. 1902) 69 S. W. Rep. 763.

Louisiana. — Xiques *v.* Bujac, 7 La. Ann. 498; Taxpayers *v.* O'Kelly, 49 La. Ann. 1039.

Nebraska. — Shanahan *v.* South Omaha, (Neb. 1902) 89 N. W. Rep. 285.

New York. — Ashton *v.* Rochester, 133 N. Y. 187, 28 Am. St. Rep. 619.

North Carolina. — Young *v.* Henderson, 76 N. Car. 420; Bear *v.* Brunswick County, 122 N. Car. 434, 65 Am. St. Rep. 711.

Wyoming. — Grand Island, etc., R. Co. *v.* Baker, 6 Wyo. 369, 71 Am. St. Rep. 926.

See also Gaskill *v.* Dudley, 6 Met. (Mass.) 546; 39 Am. Dec. 750; Stallcup *v.* Tacoma, 13 Wash. 141, 52 Am. St. Rep. 25.

But see Price *v.* Gwin, 144 Ind. 105.

3. People *v.* Holliday, 93 Cal. 242, 102 Cal. 661.

4. **Citizens Not Concluded as to Private Rights.** — Rork *v.* Smith, 55 Wis. 67; James *v.* Louisville, (Ky. 1897) 40 S. W. Rep. 912. See also Helphrey *v.* Redick, 21 Neb. 80.

5. **Privity Exists Between Successive Holders of an Office.**— Brounker *v.* Atkyns, Skin. 14; New Orleans *v.* Citizens' Bank, 167 U. S. 371; Starr *v.* Chicago, etc., R. Co., 110 Fed. Rep. 3; Holsworth *v.* O'Chander, 49 Neb. 42; State *v.* Kennedy, 60 Neb. 300; State *v.* Savage, (Neb. 1902) 90 N. W. Rep. 898. See also Harshman *v.* Knox County, 122 U. S. 306. But see Greenleaf *v.* Pasquotank County, 123 N. Car. 30.

6. See *supra*, this section, *Persons Concluded — General Rule.*

7. See *infra*, this title, VII. 6. *Proceedings in Rem.*

8. **Judgment Conclusive Proof of Its Own Existence and Resulting Legal Consequences** — *England.* — Reed *v.* Jackson, 1 East 355.

Alabama. — Ansley *v.* Carlos, 9 Ala. 973; McLelland *v.* Ridgeway, 12 Ala. 482; Harris *v.* Plant, 31 Ala. 639; Johnson *v.* Marshall, 34 Ala. 522; Harrison *v.* Harrison, 39 Ala. 489; Taylor *v.* Means, 73 Ala. 468; Central R., etc., Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353.

California. — Watrous *v.* Cunningham, 71 Cal. 30.

Connecticut. — Smith *v.* Chapin, 31 Conn. 530; Bethlehem *v.* Watertown, 51 Conn. 490.

Florida. — Love *v.* Gibson, 2 Fla. 598.

Georgia. — Hardwick *v.* Hook, 8 Ga. 354; Chance *v.* Summerford, 25 Ga. 662.

Illinois. — Pile *v.* McBratney, 15 Ill. 314; Koren *v.* Roemheld, 7 Ill. App. 650.

to prove the time of its rendition.[1]

c. JUDGMENT AS EVIDENCE OF A DEBT. — The weight of authority supports the rule that a judgment for a debt is, as between the judgment-creditor and other creditors, or where a contest is made with reference to property or rights to property of the debtor, conclusive, even as against strangers, to establish the relation of debtor and creditor, and the existence, justness, and amount of the debt, and cannot be attacked except for fraud or collusion.[2] But in some jurisdictions it has been held that a judgment for a debt is only *prima facie* evidence of the fact of indebtedness against a stranger to the suit.[3] Thus, it has been held that a judgment for a debt is *prima facie* but not con-

Kentucky. — Roberts *v.* Smiley, 5 T. B. Mon. (Ky.) 270; Head *v.* McDonald, 7 T. B. Mon. (Ky.) 203; Chiles *v.* Bridges, Litt. Sel. Cas. (Ky.) 420; Lewis *v.* Knox, 2 Bibb (Ky.) 453; Darland *v.* Governor, 2 Bibb (Ky.) 541; Cox *v.* Strode, 4 Bibb (Ky.) 4; Hardee *v.* Hall, 12 Bush (Ky.) 327.

Louisiana. — Gillett *v.* Landis, 17 La. 470; Canonge *v.* Louisiana State Bank, 7 Mart. N. S. (La.) 583. See also Richardson *v.* Scott, 6 La. 54.

Maryland. — Key *v.* Dent, 14 Md. 86. See also Bayne *v.* Suit, 1 Md. 80.

Massachusetts. — Copp *v.* M'Dugall, 9 Mass. 1.

Minnesota. — Hartman *v.* Weiland, 36 Minn. 223; Pioneer Sav., etc., Co *v.* Bartsch, 51 Minn. 474, 38 Am. St. Rep. 511; Kurtz *v.* St. Paul, etc., R. Co., 61 Minn. 18; Pabst Brewing Co. *v.* Jensen, 68 Minn. 293. See also Olmsted County *v.* Barber, 31 Minn. 256.

Mississippi. — Crum *v.* Wilson, 61 Miss. 233.

Missouri. — Fields *v.* Hunter, 8 Mo. 128; St. Louis Mut. L. Ins. Co. *v.* Cravens, 69 Mo. 72; Ford *v.* O'Donnell, 40 Mo. App. 51.

New Hampshire. — Harrington *v.* Wadsworth, 63 N. H. 400.

New York. — Railroad Equipment Co. *v.* Blair, 145 N. Y. 607; Reynolds *v.* Brown, 15 Barb. (N. Y.) 24.

South Carolina. — Etters *v.* Wilson, 12 Rich. L. (S. Car.) 145.

Tennessee. — Stephens *v.* Jack, 3 Yerg. (Tenn.) 403, 24 Am. Dec. 583.

Texas. — McCamant *v.* Roberts, 66 Tex. 260.

Vermont. — Bramble *v.* Poultney, 11 Vt. 208.

A verdict and judgment between third persons may be offered in evidence by way of inducement, or to establish a collateral fact. When thus offered, it is usually conclusive evidence of the fact established by it, and no more. King *v.* Chase, 15 N. H. 9, 41 Am. Dec. 675. See also Chamberlain *v.* Carlisle, 26 N. H. 540; Bethlehem *v.* Watertown, 51 Conn. 490; Turpin *v.* Brannon, 3 McCord L. (S. Car.) 261.

1. Time of Rendition. — Johnson *v.* Marshall, 34 Ala. 522; Chamberlain *v.* Carlisle, 26 N. H. 540.

2. Judgment Conclusive of Existence of Debt — *United States.* — Alkire Grocery Co. *v.* Richesin, 91 Fed. Rep. 79. See also Central Trust Co. *v.* Charlotte, etc., R. Co., 65 Fed. Rep. 257; Southern R. Co. *v.* Bouknight, (C. C. A.) 70 Fed. Rep. 442.

Alabama. — Harrison *v.* Harrison, 39 Ala. 490; Yeend *v.* Weeks, 104 Ala. 331, 53 Am. St. Rep. 50; Moore, etc., Hardware Co. *v.* Curry, 106 Ala. 284; Bain *v.* Wells, 107 Ala. 562. But see Jones *v.* Kolisenski, 11 Ala. 607; Hooper *v.* Pair, 3 Port. (Ala.) 401, 29 Am. Dec. 258.

New York. — Candee *v.* Lord, 2 N. Y. 269; Railroad Equipment Co. *v.* Blair, 145 N. Y. 607; St. Nicholas Bank *v.* De Rivera, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 666; Merchants' Nat. Bank *v.* Hagemeyer, 4 N. Y. App. Div. 52; Ledoux *v.* Bank of America, 24 N. Y. App. Div. 123. But see Burnham *v.* Burnham, 46 N. Y. App. Div. 513, *affirmed* 165 N. Y. 659.

Ohio. — Swihart *v.* Shaum, 24 Ohio St. 432.

West Virginia. — Bensimer *v.* Fell, 35 W. Va. 15, 29 Am. St. Rep. 774; Ceredo First Nat. Bank *v.* Huntington Distilling Co., 41 W. Va. 530, 56 Am. St. Rep. 878; Turner *v.* Stewart, 51 W. Va. 493.

See also Joshua Hendy Mach. Works *v.* Connolly, 76 Cal. 305; Rice *v.* Rice, 108 Ill. 199; Williams *v.* Warren, 82 Tex. 319.

For the Reason of This Rule, see Ledoux *v.* Bank of America, 24 N. Y. App. Div. 123.

When, by the Record of a Case, It Appears That on Publication, the defendant not appearing, an office judgment stood confirmed, and the plaintiff recovered a debt against the defendant, this is not evidence of the debt against a third person claiming a lien, that, but for such debt, would be valid. Houston *v.* McCluney, 8 W. Va. 135.

3. Judgment Only Prima Facie Evidence of Indebtedness. — Aron *v.* Chaffe, 72 Miss. 159; Foster *v.* Nowlin, 4 Mo. 18; Garland *v.* Rives, 4 Rand. (Va.) 282, 15 Am. Dec. 756. See also Posten *v.* Posten, 4 Whart. (Pa.) 27.

In Louisiana a judgment for a debt is *prima facie* evidence of the debt against a stranger, unless it be directly attacked on the ground of fraud and collusion. Brassac *v.* Ducros, 4 Rob. (La.) 335; Serapurn *v.* La Croix, 1 La. 373; Winter *v.* Thibodeaux, 8 La. 193; Lesassier *v.* Dashiell, 17 La. 194; Turner *v.* Luckett, 2 La. Ann. 885; Fox *v.* Fox, 4 La. Ann. 135; Judson *v.* Connolly, 5 La. Ann. 400; Lanata *v.* Planas, 2 La. Ann. 544. But see Lartigue *v.* Baldwin, 5 Mart. (La.) 193.

In Minnesota it has been held that to prove an indebtedness on the part of a judgment debtor, and as of the day of its rendition, the judgment of a court of competent jurisdiction is admissible in evidence in a subsequent action between other parties, but that it may be impeached in such a suit on the ground of fraud and collusion, and perhaps on other grounds. Pabst Brewing Co. *v.* Jensen, 68 Minn. 293, *distinguishing* Hartman *v.* Weiland, 36 Minn. 223, and Bloom *v.* Moy, 43 Minn. 397, 19 Am. St. Rep. 243.

In Maine it has been held that a judgment for a debt is not binding, as to the amount of

clusive evidence of the debt in an action by the judgment creditor to impeach a conveyance made by the debtor on the ground of fraud or want of consideration.[1] So, where an administrator applies for license to sell land which has descended to the heir, to pay a judgment recovered for a debt due from the estate, it has been held that the judgment is presumptive evidence of the debt as against the heir.[2] So it has been held that a judgment recovered against the executors of a decedent is *prima facie* evidence of the amount of the debt, in a scire facias against the heirs for the purpose of charging the decedent's real estate in their hands.[3] But the judgment is in any case only evidence of the existence and amount of the debt on the day of its rendition, and not at any previous date.[4]

d. JUDGMENT AS EVIDENCE OF AN ADVANCEMENT. — It has been held that a judgment finding that an advancement has been made to the heir and distributee of an intestate is conclusive upon a creditor of such heir that the advancement has been made and of the amount thereof.[5]

e. JUDGMENT AS LINK IN CHAIN OF TITLE. — A judgment is always admissible as a link in a party's chain of title, or as an introductory fact to such a link. In such case the rule limiting the admissibility of judgments and decrees to suits between parties and privies is wholly inapplicable, for unless judgments and decrees could be admitted for this purpose no title could be established a single link in which depended upon the sanction of a judicial decision.[6] But although the record of a decree recites the perfect links in a party's chain of title, and it was necessary for them all to appear in order to obtain the decree, the record will not suffice as against a stranger to prove any of these links; it will serve only to aid or supply the particular link which, without the decree, would be defective or absent.[7]

Judgment of Probate Court. — In consonance with the rule stated it has been held that the judgment of a probate court affecting the title to land is competent and admissible in evidence as a link in a chain of title against the whole world.[8]

the indebtedness, upon one not a party to the suit. Sargent *v.* Salmond, 27 Me. 539.

1. Judgment for Debt as Evidence in Action to Impeach Debtor's Conveyance. — Aron *v.* Chaffe, 72 Miss. 159; Jenness *v.* Berry, 17 N. H. 549; Vogt *v.* Ticknor, 48 N. H. 242. See also Church *v.* Chapin, 35 Vt. 231.

In Massachusetts it has been held that a judgment for a debt against a vendor is competent evidence in favor of the creditor who seeks to impeach the sale on the ground of fraud. Damon *v.* Bryant, 2 Pick. (Mass.) 411; Reed *v.* Davis, 5 Pick. (Mass.) 388; Goodnow *v.* Smith, 97 Mass. 69. See also Pierce *v.* Jackson, 6 Mass. 242.

2. Judgment for Debt Due by Estate as Evidence Against Heir. — Nichols *v.* Day, 32 N. H. 133, 64 Am. Dec. 358.

3. Sergeant *v.* Ewing, 36 Pa. St. 156. See also Phillips *v.* Allegheny Valley R. Co., 107 Pa. St 465.

4. Yeend *v.* Weeks, 104 Ala. 331, 53 Am. St. Rep. 50; Hartman *v.* Weiland, 36 Minn. 223; Bloom *v.* Moy, 43 Minn. 397, 19 Am. St. Rep. 243.

5. Comer *v.* Shehee, 129 Ala. 588. See also Liginger *v.* Field, 78 Wis. 367.

6. Judgment Admissible as Link in Chain of Title — *United States.* — Barr *v.* Gratz, 4 Wheat. (U. S.) 213; McDonald *v.* Hannah, 51 Fed. Rep. 73.

Alabama. — Steele *v.* Tutwiler, 57 Ala. 113.

Georgia. — Bussey *v.* Dodge, 94 Ga. 584.

Illinois. — Gage *v.* Goudy, 141 Ill. 215.

Louisiana. — Snapp *v.* Potterfield, 14 La. Ann. 407.

Maine. — Sheldon *v.* White, 35 Me. 233.

Maryland. — Barney *v.* Patterson, 6 Har. & J. (Md.) 182.

Minnesota. — Kurtz *v.* St. Paul, etc., R. Co., 61 Minn. 18.

Missouri. — Walsh *v.* Agnew, 12 Mo. 520; Cravens *v.* Jameson 59 Mo. 68.

New York. — Railroad Equipment Co. *v.* Blair, 145 N. Y. 607; Skelly *v.* Jones, 61 N. Y. App. Div. 173, *affirming* 33 Misc. (N. Y.) 304.

Ohio. — Little *v.* Eureka Ins. Co., 5 Ohio Dec. (Reprint) 285, 4 Am. L. Rec. 228.

Rhode Island.—Glezen *v.* Haskins, 23 R. I. 601.

South Carolina. — Wardlaw *v.* Hammond, 9 Rich. L. (S. Car.) 454; Etters *v.* Wilson, 12 Rich. L. (S. Car.) 145; Turpin *v.* Brannon, 3 McCord L. (S. Car.) 261.

Texas. — Thornton *v.* Murray, 50 Tex. 161.

Virginia. — Lovell *v.* Arnold, 2 Munf. (Va.) 167; Baylor *v.* Dejarnette, 13 Gratt. (Va.) 152.

A Judgment for the Defendants in an Action Against Vestrymen of a Church, to oust them from their offices, is conclusive, as to the title of the vestrymen to their offices, upon the rector of the church and all other persons who do not claim the said offices, in any collateral proceeding to which they and the vestrymen are parties. People *v.* Hart, (C. Pl. Gen. T.) 13 N. Y. Supp. 903.

7. Bussey *v.* Dodge, 94 Ga. 584.

8. Judgment of Probate Court Affecting Title to Land. — Kurtz *v.* St. Paul, etc., R. Co., 61

Judgment Authorizing Execution or Sale. — So, where a person seeks to deraign title through a sale under an execution or through any judicial sale, the judgment or decree authorizing the execution or sale may be given in evidence against a stranger to the proceeding.[1]

Wherever a Deed Is Made under a Decree in Chancery the decree is admissible as a muniment of title in a subsequent suit between other parties.[2]

Judgment Admissible upon Question of Abandonment of Mining Claim. — Where, in an action to recover possession of a mining claim, the defense is that the claim had been abandoned by the plaintiff, a judgment for the plaintiff in an action previously brought by him to recover possession of the same ground, against other parties who were then in possession and claiming it adversely to him, is admissible upon the question of abandonment.[3]

f. WHERE FACT MAY BE ESTABLISHED BY PROOF OF GENERAL REPUTATION. — Where a fact may be established by proof of general reputation such as custom, pedigree, and the like, the record of a judgment or decree finding such a fact is *prima facie* evidence against persons who were strangers to the suit. The solemn adjudication of a court upon testimony is justly regarded as stronger proof of the fact than mere evidence of general reputation.[4]

g. SUITS BY OR AGAINST REPRESENTATIVES OF A CLASS — (1) *In General.* — The general principle has been enunciated that in equity if *bona fide* bills are filed and litigated by representatives of a class, and the subject-matter of the suit is common to all, the decree binds the entire class as fully as if all were before the court.[5] So, where there is a common liability in a class of persons, and in consequence of the great number of them it is impracticable to bring them all before the court, an adequate number may be brought in as representatives of the class, and an adjudication against the class in such case will conclude every member of it.[6] But in all cases of this character, the right to protect which the suit is brought must be one which exists against all, or the obligation which it is sought to enforce must be common to all.[7] In

Minn. 18. But see Morin *v.* St. Paul, etc., R. Co., 33 Minn. 176.

1. **Judgment Authorizing Execution or Sale.** — Thompson *v.* Chauveau, 6 Mart. N. S. (La.) 458; Martin *v.* Rutt, 127 Pa. St. 380; McCamant *v.* Roberts, 66 Tex. 260.

2. **Where Deed Is Made under Decree in Chancery.** — Hardwick *v.* Hook, 8 Ga. 354; House *v.* Wiles, 12 Gill & J. (Md.) 338; Finch *v.* Finch, 131 N. Car. 271; Glezen *v.* Haskins, 23 R. I. 601; Hall *v.* Carruth, 1 McCord L. (S. Car.) 507; Waggoner *v.* Wolf, 28 W. Va. 820. But see M'Clary *v.* Bowmar, 3 Litt. (Ky.) 248.

3. Richardson *v.* McNulty, 24 Cal. 339.

4. **Judgment as Evidence of Fact Whereof General Reputation Is Proof.** — Pile *v.* McBratney, 15 Ill. 314; Maple *v.* Beach, 43 Ind. 51. See also Brune *v.* Thompson, C. & M. 34, 41 E. C. L. 24.

Special Verdict Stating a Pedigree. — Where the fact to be proved is such whereof hearsay and reputation are evidence, a special verdict between other parties stating a pedigree will be evidence to prove a descent. Buller N. P. 233*b*; Judge Tucker, Pegram *v.* Isabell, 2 Hen. & M. (Va.) 201.

Decree as Evidence of Death and Heirship. — A decree in a suit for the partition of land by heirs, which finds the death of a person and the heirship of the parties, is *prima facie* evidence of the death and heirship against a party in ejectment, though he was not a party or privy to the partition suit. Delano *v.* Bennett, 90 Ill. 533.

5. **Class Suits.** — McIntosh *v.* Pittsburg, 112 Fed. Rep. 705; Harmon *v.* Auditor of Public Accounts, 123 Ill. 122, 5 Am. St. Rep. 502, *affirming* 22 Ill. App. 129; Hawthorne *v.* Beckwith, 89 Va. 786; Stallcup *v.* Tacoma, 13 Wash. 141, 52 Am. St. Rep. 25. See also Home Constr. Co. *v.* Duncan, (Ky. 1902) 68 S. W. Rep. 15.

6. Reid *v.* Evergreens, (Supm. Ct. Gen. T.) 21 How. Pr. (N. Y.) 319; Leonard *v.* O'Hara, 1 Cinc. Super. Ct. 42. See also Hawthorne *v.* Beckwith, 89 Va. 786.

7. Reid *v.* Evergreens, (Supm. Ct. Gen. T.) 21 How. Pr. (N. Y.) 319. See also Loesnitz *v.* Seelinger, 127 Ind. 422.

Suits Between Two Multitudes of Persons. — Where one multitude of persons is interested in a right and another multitude interested in contesting that right, the right being a general right, and it is utterly impossible to try the question of the existence of the right between the two multitudes on account of their number, some individuals out of the one multitude may be selected to represent one set of claimants, and another set of persons to represent the parties resisting the claim, and the right may be finally decided as between all parties in a suit so constituted. Commissioners of Sewers *v.* Gellatly, 3 Ch. D. 610, 45 L. J. Ch. 788, 24 W. R. 1059; York *v.* Pilkington, 1 Atk. 282. See also Dewey *v.* St. Albans Trust Co., 60 Vt. 1, 6 Am. St. Rep. 84.

For Suits Held Not to Be Such Class Suits, or so representative in their character as to bind

some jurisdictions this rule has been enforced or qualified by statutory enactment.[1]

(2) *Suits by Persons Having Claims upon a Particular Fund.* — If there are many persons standing in the same situation as to their rights or claims upon a particular fund, and when the shares of a part cannot be determined until the rights of all the others are settled or ascertained, as in the case of creditors of an insolvent estate or residuary legatees, some of such persons may prosecute in behalf of themselves and all others standing in the same situation who may afterwards elect to come in and claim as parties to the suit and bear their portion of the expenses of the litigation, and if such parties neglect to come in under the decree after a reasonable notice for that purpose, the fund will be distributed without reference to any unliquidated or unsettled claims which they might have had upon the same, and the defendants will be protected against any further litigation in respect to the fund.[2]

h. When Persons Having Contingent Interests Will Be Concluded. — Sometimes, where there are contingent interests in property which is the subject of litigation, it is not possible to bring before the court in person all persons who are interested or who may become interested in such property. In such a case the rule in equity is that if proper parties are before the court to represent all interests, so that the same may be properly adjudicated, the decree will be conclusive on all persons having contingent interests who cannot be brought before the court in person.[3] This rule is founded on convenience and necessity, and is applicable whenever the necessity arises.[4] Contingent limitations and executory devises to persons not in being may be bound by a decree against a person claiming a vested estate of inheritance;[5] but a person in being claiming under a limitation by way of executory devise not subject to any preceding vested estate of inheritance by which it may be defeated must be made a party to a bill affecting his rights, and will not be bound by the decree if he is not.[6] Where there is a tenant for life with remainder to his children or to his first son in tail, with remainder over, if the life tenant is brought before the court before he has issue, the decree will be conclusive for or against the contingent remaindermen.[7] But if the life tenant has children living they must be brought before the court,[8] and if the first tenant in tail is living he must be brought in.[9] The rule as to contingent interests also applies to persons who are nonascertainable. Thus, where there is a tenant for life with remainder to his "lawful heirs," such heirs, being nonascertainable during the life of the life tenant, will be concluded by an adjudication if the life tenant was a party to the suit.[10]

persons who are not parties, see Compton *v.* Jesup, (C. C. A.) 68 Fed. Rep. 263; McNaney *v.* Hall, 86 Hun (N. Y.) 415; Adelbert College *v.* Toledo, etc., R. Co., 5 Ohio Dec. 14, 3 Ohio N. P. 15; Leonard *v.* O'Hara, 1 Cinc. Super. Ct. 42.

1. Statutes Enforcing or Qualifying Rule. — Coann *v.* Atlanta Cotton Factory Co., 14 Fed. Rep. 4; Reid *v.* Evergreens, (Supm. Ct. Gen. T.) 21 How. Pr. (N. Y.) 319. And see the statutes in the several states.

2. Suits by Claimants Against a Particular Fund. — Hallett *v.* Hallett, 2 Paige (N. Y.) 15; Hamilton *v.* Home Ins. Co., 3 Ohio Dec. 389, 1 Ohio N. P. 329. See also Palmer *v.* Woods, 149 Ill. 146, *affirming* 48 Ill. App. 630; Egberts *v.* Wood, 3 Paige (N. Y.) 517, 24 Am. Dec. 236; Dewey *v.* St. Albans Trust Co., 60 Vt. 1, 6 Am. St. Rep. 84.

3. Contingent Interests. — Giffard *v.* Hort, 1 Sch. & Lef. 386; Gray *v.* Smith, 76 Fed. Rep. 525; Mayall *v.* Mayall, 63 Minn. 511; Mathews *v.* Lightner, 85 Minn. 333; Clyburn *v.* Reynolds, 31 S. Car. 91; Harrison *v.* Walton, 95 Va. 721, 64 Am. St. Rep. 830; Burlingham *v.* Vandevender, 47 W. Va. 804.

4. Mayall *v.* Mayall, 63 Minn. 511; Burlingham *v.* Vandevender, 47 W. Va. 804.

5. Giffard *v.* Hort, 1 Sch. & Lef. 386; Mathews *v.* Lightner, 85 Minn. 333; Dunham *v.* Doremus, 55 N. J. Eq. 511; Miller *v.* Texas, etc., R. Co., 132 U. S. 662.

6. Giffard *v.* Hort, 1 Sch. & Lef. 386; Moseley *v.* Hankinson, 22 S. Car. 323.

7. Giffard *v.* Hort, 1 Sch. & Lef. 386; Gray *v.* Smith, 76 Fed. Rep. 525; Mathews *v.* Lightner, 85 Minn. 333; Pray *v.* Hegeman, 98 N. Y. 351; Hawthorne *v.* Beckwith, 89 Va. 786; Baylor *v.* Dejarnette, 13 Gratt. (Va.) 152; Burlingham *v.* Vandevender, 47 W. Va. 804.

8. Moseley *v.* Hankinson, 22 S. Car. 323.

9. Giffard *v.* Hort, 1 Sch. & Lef. 386.

10. Burlingham *v.* Vandevender, 47 W. Va. 804. See also Mathews *v.* Lightner, 85 Minn. 333.

i. JUDGMENTS IN SUITS ON JOINT OBLIGATIONS — (1) *Judgment Against One or More of the Obligors* — (a) **General Rule at Common Law.** — It is a well-settled rule of the common law that a judgment on a joint obligation against one or more of several joint obligors is a bar to an action against the other joint obligor or obligors or against all the obligors jointly. The *rationale* of this rule involves not only the doctrine of *res judicata* but also that of merger. The judgment being a higher order of security than the simple obligation, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered being extinguished, their entire liability is gone. They cannot be sued separately, for they have incurred no several obligation; they cannot be sued jointly with the others, because judgment has been already recovered against the latter, who would otherwise be subjected to two suits for the same cause.[1]

(b) **Exceptions to Rule** — *aa.* JUDGMENT AGAINST SURVIVING OBLIGOR. — To the rule stated the courts in some jurisdictions have recognized certain exceptions. Thus, it has been held that where one of two joint obligors has died, a judgment against the survivor does not bar proceedings against the estate of the other.[2]

bb. WHERE OBLIGORS ARE NOT ALL WITHIN PROCESS OF COURT. — Another exception that has been recognized is where the joint obligors are not residents of the

1. Judgment Against One or More of Several Joint Obligors — *England.* — Bermondsey *v.* Ramsey, L. R. 6 C. P. 247; King *v.* Hoare, 13 M. & W. 494; Buckland *v.* Johnson, 15 C. B. 145, 80 E. C. L. 145; Hoare *v.* Niblett, (1891) 1 Q. B. 781, 60 L. J. Q. B. 565, 64 L. T. N. S. 659, 39 W. R. 491, 55 J. P. 664; McLeod *v.* Power, (1898) 2 Ch. 295, 67 L. J. Ch. 551, 79 L. T. N. S. 67, 47 W. R. 74. See also the opinion of Mr. Baron Bayley, in Lechmere *v.* Fletcher, 1 Cromp. & M. 623.

Canada. — Truteau *v.* Fahey, 2 Quebec Super. Ct. 449.

United States. — Woodworth *v.* Spafford, 2 McLean (U. S.) 168; Mason *v.* Eldred, 6 Wall. (U. S.) 231; Trafton *v.* U. S., 3 Story (U. S.) 646, 24 Fed. Cas. No. 14,135; U. S. *v.* Ames, 99 U. S. 35, *affirming* 24 Fed. Cas. No. 14,440; Willings *v.* Consequa, Pet. (C. C.) 301, 30 Fed. Cas. No. 17,767.

Florida. — Ferrall *v.* Bradford, 2 Fla. 508, 50 Am. Dec. 293.

Illinois. — People *v.* Harrison, 82 Ill. 84; Finch *v.* Galigher, 71 Ill. App. 75.

Indiana. — Devol *v.* Halstead, 16 Ind. 287; Archer *v.* Heiman, 21 Ind. 29; Barnett *v.* Juday, 38 Ind. 86; Root *v.* Dill, 38 Ind. 169; Kittering *v.* Norville, 39 Ind. 183; Holman *v.* Langtree, 40 Ind. 349; Erwin *v.* Scotten, 40 Ind. 389; Kennard *v.* Carter, 64 Ind. 31; Odell *v.* Carpenter, 71 Ind. 463; Cox *v.* Maddux, 72 Ind. 206; Merriman *v.* Barker, 121 Ind. 74; Martin *v.* Baugh, 1 Ind. App. 20; Capital City Dairy Co. *v.* Plummer, 20 Ind. App. 408; Taylor *v.* Claypool, 5 Blackf. (Ind.) 557.

Kentucky. — Slaughter *v.* Ripperdan, 5 Litt. (Ky.) 337.

Maine. — Rand *v.* Nutter, 56 Me. 339.

Maryland. — Westheimer *v.* Craig, 76 Md. 399.

Massachusetts. — Gibbs *v.* Bryant, 1 Pick. (Mass.) 118; Ward *v.* Johnson, 13 Mass. 148; Kingsley *v.* Davis, 104 Mass. 178.

Michigan. — Bonesteel *v.* Todd, 9 Mich. 371, 80 Am. Dec. 90.

New Hampshire. — Olcott *v.* Little, 9 N. H. 259, 32 Am. Dec. 357.

New York. — Coonley *v.* Wood, 36 Hun (N. Y.) 559; National Broadway Bank *v.* Hitch, 66 Hun (N. Y.) 401; Heckemann *v.* Young, 134 N. Y. 170, 30 Am. St. Rep. 655; Russell *v.* McCall, 141 N. Y. 437, 38 Am. St. Rep. 807; Benson *v.* Paine, 2 Hilt. (N. Y.) 552, 9 Abb. Pr. (N. Y.) 28, 17 How. Pr. (N. Y.) 407; Peters *v.* Sanford, 1 Den. (N. Y.) 224; Robertson *v.* Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227.

North Carolina. — Rufty *v.* Claywell, 93 N. Car. 306.

Ohio. — Carr *v.* Beckett, 1 Ohio Cir. Dec. 43; Clinton Bank *v.* Hart, 5 Ohio St. 33; Avery *v.* Vansickle, 35 Ohio St. 274.

Rhode Island. — Hunt *v.* Bates, 7 R. I. 217, 82 Am. Dec. 592.

Texas. — Wooters *v.* Smith, 56 Tex. 198; Bute *v.* Brainerd, 93 Tex. 137.

West Virginia. — Armentrout *v.* Smith, (W. Va. 1903) 43 S. E. Rep. 98.

Wisconsin. — Bowen *v.* Hastings, 47 Wis. 232; Lauer *v.* Bandow, 48 Wis. 638.

But in South Carolina a contrary doctrine prevails. Collins *v.* Lemasters, 1 Bailey L. (S. Car.) 348, 21 Am. Dec. 469; State Treasurers *v.* Bates, 2 Bailey L. (S. Car.) 362; Union Bank *v.* Hodges, 11 Rich. L. (S. Car.) 480.

Judgment Against Joint Lessees for Unpaid Rent is no bar to an action against one of the lessees for fraudulent representations made by him alone. New York Land Imp. Co. *v.* Chapman, 118 N. Y. 288, *reversing* 54 N. Y. Super. Ct. 297.

2. Effect of Judgment Against Survivor. — Liverpool Borough Bank *v.* Walker, 4 De G. & J. 24; Weyer *v.* Thornburgh, 15 Ind. 124; Devol *v.* Halstead, 16 Ind. 287. See also Marr *v.* Southwick, 2 Port. (Ala.) 351; Cox *v.* Maddux, 72 Ind. 206; Merriman *v.* Barker, 121 Ind. 74; Greathouse *v.* Kline, 93 Ind. 598; Smith *v.* Ballantyne, 10 Paige (N. Y.) 101.

Rule under Alabama Statute, Clay's Dig. 323, Martin *v.* Hill, 8 Ala. 43.

same state, or all within the process of any court in which the suit could be brought.[1]

cc. Reason for Exceptions. — The reason given for these exceptions is that the holder of the obligation should not be deemed to have waived his claim or remedy against any joint obligor, by reason of a separate suit and judgment against another joint obligor, when a joint suit was impossible.[2]

(c) **Application of Rule to Partnership Obligations.** — In consonance with the doctrines that have been stated it has been held that a judgment recovered against one of two or more partners on a partnership obligation is a bar to a subsequent suit against the other partner or partners or against all of them jointly;[3] and this is so though the new defendant was a dormant partner at the time of the contract and this fact was unknown to the plaintiff at the time the judgment was rendered.[4]

But Where One of Two Partners Has Died, a judgment against the survivor does

1. Where All Obligors Are Not Residents or Within Process of Court — *United States.* — Beck, etc., Lithographing Co. *v.* Wacker, etc., Brewing, etc., Co., (C. C. A.) 76 Fed. Rep. 10, 46 U. S. App. 486. See also Larison *v.* Hager, 44 Fed. Rep. 49.

Indiana. — Cox *v.* Maddux, 72 Ind. 206; Merriman *v.* Barker, 121 Ind. 74.

Maine. — Rand *v.* Nutter, 56 Me. 339.

New Hampshire. — Olcott *v.* Little, 9 N. H. 259, 32 Am. Dec. 357; Tibbetts *v.* Shapleigh, 60 N. H. 487.

Ohio. — Whittaker *v.* Stone, 7 Ohio Cir. Dec. 591; Yoho *v.* McGovern, 42 Ohio St. 11.

2. Reason for Exceptions to Rule — *Indiana.* — Cox *v.* Maddux, 72 Ind. 206; Merriman *v.* Barker, 121 Ind. 74.

3. Judgment Against a Partner on Partnership Obligation — *England.* — Cambefort *v.* Chapman, 19 Q. B. D. 229, 56 L. J. Q. B. 639, 57 L. T. N. S. 625, 35 W. R. 838, 51 J. P. 455; *In re* Hodgson, 31 Ch. D. 177, 55 L. J. Ch. 241, 54 L. T. N. S. 222, 34 W. R. 127; Kendall *v.* Hamilton, 4 App. Cas. 504, 48 L. J. C. Pl. 705, 41 L. T. N. S. 418, 28 W. R. 97.

United States. — Woodworth *v.* Spafford, 2 McLean (U. S.) 168; Sedam *v.* Williams, 4 McLean (U. S.) 51; U. S. *v.* Ames, 99 U. S. 35, *affirming* 24 Fed. Cas. No. 14,440; Mason *v.* Eldred, 6 Wall. (U. S.) 231, in effect *overruling* Sheehy *v.* Mandeville, 6 Cranch (U. S.) 254; *In re* Herrick, 13 Nat. Bankr. Reg. 312, 12 Fed. Cas. No. 6,420; Willings *v.* Consequa, Pet. (C. C.) 301, 30 Fed. Cas. No. 17,767.

Illinois. — Wann *v.* McNulty, 7 Ill. 355, 43 Am. Dec. 58; Thompson *v.* Emmert, 15 Ill. 415.

Indiana. — Nicklaus *v.* Roach, 3 Ind. 78; Rose *v.* Comstock, 17 Ind. 1; Crosby *v.* Jeroloman, 37 Ind. 264; Henderson *v.* Reeves, 6 Blackf. (Ind.) 101.

Kentucky. — Nichols *v.* Burton, 5 Bush (Ky.) 320; Williams *v.* Rogers, 14 Bush (Ky.) 776; Scott *v.* Colmesnil, 7 J. J. Marsh. (Ky.) 416.

New York. — Kramer *v.* Schatzkin, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 206; Robertson *v.* Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227; Benson *v.* Paine, 2 Hilt. (N. Y.) 552, 9 Abb. Pr. (N. Y.) 28, 17 How. Pr. (N. Y.) 407; National Broadway Bank *v.* Hitch, 66 Hun (N. Y.) 401.

Ohio. — Sloo *v.* Lea, 18 Ohio 279.

Pennsylvania. — Smith *v.* Black, 9 S. & R. (Pa.) 142, 11 Am. Dec. 686.

Texas. — Gaut *v.* Reed, 24 Tex. 46, 76 Am. Dec. 94.

See also Ells *v.* Bone, 71 Ga. 466. But see McLelland *v.* Ridgeway, 12 Ala. 482; Beall *v.* West, 13 Iowa 61.

But in South Carolina the rule is otherwise. Union Bank *v.* Hodges, 11 Rich. L. (S. Car.) 480. But see Philson *v.* Bampfield, 1 Brev. (S. Car.) 202.

Judgment upon Individual Note or Acceptance. — In Kentucky and New York it has been held that where one of two or more partners gives his individual note or acceptance for their joint debt, a judgment upon the note or acceptance extinguishes the joint liability. Benson *v.* Paine, 2 Hilt. (N. Y.) 552, 9 Abb. Pr. (N. Y.) 28, 17 How. Pr. (N. Y.) 407; Peters *v.* Sanford, 1 Den. (N. Y.) 224; McMaster *v.* Vernon, 3 Duer (N. Y.) 249. But see Drake *v.* Mitchell, 3 East 251; Cambefort *v.* Chapman, 19 Q. B. D. 229, 56 L. J. Q. B. 639, 57 L. T. N. S. 625, 35 W. R. 838, 51 J. P. 455.

In Connecticut and Iowa the contrary doctrine prevails. Fairchild *v.* Holly, 10 Conn. 474; Gilman *v.* Foote, 22 Iowa 560.

Joint Judgment Vacated as to One Partner. — In *New York* it has been held that where a joint judgment against members of a partnership has, notwithstanding the opposition of the plaintiff, been vacated as to one of the partners, and he has been let in to contest his liability, the judgment standing against the other partner will not bar proceedings against the defendant thus let in. Heckemann *v.* Young, 134 N. Y. 170, 30 Am. St. Rep. 655, *reversing* 55 Hun (N. Y.) 406.

4. Dormant Partner. — U. S. *v.* Ames, 24 Fed. Cas. No. 14,440, *affirmed* 99 U. S. 35; Moale *v.* Hollins, 11 Gill & J. (Md.) 11, 33 Am. Dec. 684; Smith *v.* Black, 9 S. & R. (Pa.) 142, 11 Am. Dec. 686. See also Mason *v.* Eldred, 6 Wall. (U. S.) 231.

Contract Purporting to Be the Individual Obligation of a Single Partner. — But in *Kentucky* it has been held that though a contract is really a partnership obligation, yet if it appears upon its face to be the sole individual contract of a single member of the firm and is sued on as such, a judgment in such suit will not bar an action upon the contract as a partnership obligation. Scott *v.* Colmesnil, 7 J. J. Marsh. (Ky.) 416. But see Nichols *v.* Burton, 5 Bush (Ky.) 320.

not bar proceedings against the estate of the other.[1] In such proceedings the judgment against the surviving partner is proper evidence to prove the fact that a recovery was had against him,[2] but it is not proof of the liability of the decedent so as to charge his representatives.[3]

(d) **Rule under Statutes.** — The common-law rule as to judgments on joint obligations,[4] which was in some cases productive of great hardship and injustice, has been changed by statute in many of the United States, it being provided, expressly or in substance, that a judgment against one or more of several joint obligors shall not be a bar to an original action against the other joint obligors, with the proviso generally added that this provision shall not be so construed as to allow more than one satisfaction.[5] It is entirely within the power of the state thus to limit the operation of the judgment.[6]

(2) *Judgment for Defendant on the Merits.* — It has been held that a judgment for the defendant on the merits in an action upon a joint contract brought against one of several joint contractors is a bar to an action upon the same contract against all the contractors, or against the contractor or contractors not made parties to the first action.[7] But there is authority in support of the contrary rule.[8]

(3) *Judgment on Appeal by One Obligor from Judgment Against All.* — Where from a judgment against joint creditors one of them only appeals, the

1. Judgment Against Surviving Partner. — Fillyau *v.* Laverty, 3 Fla. 72. See also *In re* Hodgson, 31 Ch. D. 177, 55 L. J. Ch. 241, 54 L. T. N. S. 222, 34 W. R. 127; Jacomb *v.* Harwood, 2 Ves. 265. And see *supra*, this subsection, *aa. Judgment Against Surviving Obligor.*

This Was Also the Rule under the Pennsylvania Statute, Act of April 11, 1848, § 4. Moores' Appeal, 34 Pa. St. 411.

2. What May Be Proved by Judgment Against Surviving Partner. — Sturges *v.* Beach, 1 Conn. 507.

3. Sturges *v.* Beach, 1 Conn. 507; Buckingham *v.* Ludlum, 37 N. J. Eq. 137; Smith *v.* Ballantyne, 10 Paige (N. Y.) 101; Leake, etc., Orphan House *v.* Lawrence, 11 Paige (N. Y.) 80, *affirmed* 2 Den. (N. Y.) 577; Moores' Appeal, 34 Pa. St. 411. See Van Kleeck *v.* McCabe, 87 Mich. 599, 24 Am. St. Rep. 182.

4. See *supra*, this subsection, (*a*) *General Rule at Common Law.*

5. Statutory Rule — *United States.* — Mason *v.* Eldred, 6 Wall. (U. S.) 231.

Georgia. — Ells *v.* Bone, 71 Ga. 466.

Illinois. — Finch *v.* Galigher, 181 Ill. 625, *reversing* 71 Ill. App. 75.

Iowa. — Citizens' Sav. Bank *v.* Oleson, 47 Iowa 492.

Kentucky. — Williams *v.* Rogers, 14 Bush (Ky.) 776, *overruling* Nichols *v.* Burton, 5 Bush (Ky.) 320. See also Burrus *v.* Anderson, 3 Met. (Ky.) 500.

Maryland. — Thomas *v.* Mohler, 25 Md. 36; Westheimer *v.* Craig, 76 Md. 399.

Massachusetts. — Shirley *v.* Shattuck, 13 Met. (Mass.) 256.

Michigan. — Bonesteel *v.* Todd, 9 Mich. 371, 80 Am. Dec. 90.

Mississippi. — Hyman *v.* Stadler, 63 Miss. 362; Scharff *v.* Noble, 67 Miss. 143.

New York. — Oakley *v.* Aspinwall, 4 N. Y. 513, 8 N. Y. Leg. Obs. 123, *reversing* 2 Sandf. (N. Y.) 7; Morey *v.* Tracey, 92 N. Y. 581; Kramer *v.* Schatzkin, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 206; Dean *v.* Eldridge, (Supm. Ct. Gen. T.) 29 How. Pr. (N. Y.) 218. See also Orleans County Nat. Bank *v.* Spencer, 19 Hun (N. Y.) 569; Mervin *v.* Kumbel, 23 Wend. (N. Y.) 293; Lane *v.* Salter, 51 N. Y. 1, *reversing* 4 Robt. (N. Y.) 239.

North Carolina. — Rufty *v.* Claywell, 93 N. Car. 306.

Pennsylvania. — Herschberger *v.* Brown, 2 Woodw. (Pa.) 101; Miller *v.* Reed, 3 Grant Cas. (Pa.) 51.

Tennessee. — Lowry *v.* Hardwick, 4 Humph. (Tenn.) 188.

Texas. — Wooters *v.* Smith, 56 Tex. 198; Bute *v.* Brainerd, 93 Tex. 137. See also Forbes *v.* Davis, 18 Tex. 268.

But in Indiana the common-law rule has not been changed, Burns's Stat. Annot. (1894) § 322, not having that effect. Capital City Dairy Co. *v.* Plummer, 20 Ind. App. 408. See also Erwin *v.* Scotten, 40 Ind. 389; Kittering *v.* Norville, 39 Ind. 183; Archer *v.* Heiman, 21 Ind. 29; Martin *v.* Baugh, 1 Ind. App. 20. But see Greathouse *v.* Kline, 93 Ind. 598.

The New York Code of Civil Procedure, § 456, relating to the severance of an action as to parties thereto, does not have reference to cases of joint liability. National Broadway Bank *v.* Hitch, 66 Hun (N. Y.) 401.

The West Virginia Code, c. 125, § 52, so far changes the common-law rule as to permit a plaintiff to take several judgments against several joint obligors, as they are served with process in the same suit, but it does not authorize more than one suit against all or any of the obligors, whether served with process in the first suit or not. Armentrout *v.* Smith, (W. Va. 1903) 43 S. E. Rep. 98.

6. Mason *v.* Eldred, 6 Wall. (U. S.) 231; Bonesteel *v.* Todd, 9 Mich. 371, 80 Am. Dec. 90.

7. Judgment for Defendant. — Reynolds *v.* Pittsburgh, etc., R. Co., 29 Ohio St. 602. See also Pfau *v.* Lorain, 1 Cinc. Super. Ct. 73; Bowen *v.* Hastings, 47 Wis. 232.

8. McLelland *v.* Ridgeway, 12 Ala. 482. See also Larison *v.* Hager, 44 Fed. Rep. 49.

judgment of the appellate court upon such appeal will bind all the defendants.[1]

j. JUDGMENTS IN SUITS ON JOINT AND SEVERAL OBLIGATIONS — (1) *Effect of Judgment Against One Obligor or Against All Jointly.* — There are some authorities which support the rule that where a contract is joint and several its legal effect is double, equivalent to independent contracts founded upon one consideration, for performance severally and also for performance jointly, and that distinct remedies upon the same instrument, treating it as a joint contract and as a several contract, may be pursued until satisfaction is fully obtained, a judgment in the joint suit being no bar to a separate action, and *vice versa.*[2] But the rule which is better supported both by reason and authority is that upon such an obligation the obligee has only an election to bring a joint suit or to sue each obligor separately, and that if he brings a joint suit and obtains judgment he cannot afterwards sue the parties separately, it being held that in such case the contract is merged in the judgment;[3] and *e converso* if he sues separately and obtains judgment against one of the obligors, he cannot thereafter bring a joint action against all.[4] The authorities are practically unanimous, however, in holding that a separate suit and judgment against one of the obligors, without satisfaction, will not bar an action against another.[5] But satisfaction of a judgment obtained in such an

1. Bowen *v.* Hastings, 47 Wis. 232.

2. Joint Judgment No Bar to Separate Action and Vice Versa. — Moore *v.* Rogers, 19 Ill. 347; People *v.* Harrison, 82 Ill. 84; Kirkpatrick *v.* Stingley, 2 Ind. 269. See also Orr *v.* Thompson, 9 Ill. 451. But see Stingley *v.* Kirkpatrick, 7 Blackf. (Ind.) 359.

3. Judgment in Joint Suit Bar to Separate Suit. — U. S. *v.* Price, 9 How. (U. S.) 83 [in effect *overruling* U. S. *v.* Cushman, 2 Sumn. (U. S.) 426, 25 Fed. Cas. No. 14,908, and Trafton *v.* U. S., 3 Story (U. S.) 646, 24 Fed. Cas. No. 14,135]; Clinton Bank *v.* Hart, 5 Ohio St. 33; McDivitt *v.* McDivitt, 4 Watts (Pa.) 384. See also *Ex p.* Rowlandson, 3 P. Wms. 405; U. S. *v.* Ames, 99 U. S. 35; Russell *v.* McCall, 141 N. Y. 437, 38 Am. St. Rep. 807; Baker *v.* Kinsey, 41 Ohio St. 403; Miller *v.* Reed, 3 Grant Cas. (Pa.) 51; Spencer *v.* Dearth, 43 Vt. 98.

And in Pennsylvania this was held to be the rule though only one of the obligors was served with process. Downey *v.* Farmers', etc., Bank, 13 S. & R. (Pa.) 288. In this respect, however, the rule has been changed by statute in this state. Vanemen *v.* Herdman, 3 Watts (Pa.) 202.

In Ohio and Oregon it has been held that where an action is commenced against all the obligors on a joint and several obligation, but process is not served on all of them, a judgment for the plaintiff will not bar a subsequent action against an obligor not served. Handley *v.* Jackson, (Oregon 1898) 51 Pac. Rep. 1098; Clinton Bank *v.* Hart, 5 Ohio St. 33.

4. Judgment in Separate Suit Bar to Joint Action. — Clinton Bank *v.* Hart, 5 Ohio St. 33; McDivitt *v.* McDivitt, 4 Watts (Pa.) 384. See also U. S. *v.* Ames, 99 U. S. 35; Russell *v.* McCall, 141 N. Y. 437, 38 Am. St. Rep. 807; Miller *v.* Reed, 3 Grant Cas. (Pa.) 51; Spencer *v.* Dearth, 43 Vt. 98.

5. Judgment Against One Obligor No Bar to Action Against Another — *England.* — Bermondsey *v.* Ramsey, L. R. 6 C. P. 247; Higgins's Case, 6 Coke 44. See also Lechmere *v.* Fletcher, 1 Cromp. & M. 623.

United States. — U. S. *v.* Ames, 99 U. S. 35; Brooklyn City, etc., R. Co. *v.* National Bank, 102 U. S. 14.

Georgia. — Booth *v.* Huff, (Ga. 1902) 42 S. E. Rep. 381.

Illinois. — Orr *v.* Thompson, 9 Ill. 451; Joyce *v.* Spafford, 101 Ill. App. 422.

Indiana. — Ellis *v.* State, 2 Ind. 262; Morrison *v.* Fishel, 64 Ind. 177; Giles *v.* Canary, 99 Ind. 116; Beard *v.* Adams, 8 Blackf. (Ind.) 469. See also Capital City Dairy Co. *v.* Plummer, 20 Ind. App. 408.

Iowa. — Harlan *v.* Berry, 4 Greene (Iowa) 212. See also Gilman *v.* Foote, 22 Iowa 560.

Kansas. — Jenks *v.* School Dist., 18 Kan. 356.

Kentucky. — Sayre *v.* Coleman, 9 Dana (Ky.) 173.

Louisiana. — Illinois State Bank *v.* Sloo, 16 La. 544, 35 Am. Dec. 223; Hite *v.* Vaught, 2 La. Ann. 970; Williams *v.* Brent, 7 Mart. N. S. (La.) 205.

Massachusetts. — Simonds *v.* Center, 6 Mass. 18; Porter *v.* Ingraham, 10 Mass. 88. See also Ward *v.* Johnson, 13 Mass. 148.

Missouri. — Armstrong *v.* Prewitt, 5 Mo. 476, 32 Am. Dec. 338; Knox County Sav. Bank *v.* Cottey, 70 Mo. 150; Phœnix Mut. L. Ins. Co. *v.* Landis, 50 Mo. App. 116.

New Hampshire. — Townsend *v.* Riddle, 2 N. H. 448.

New York. — Benson *v.* Paine, 2 Hilt. (N. Y.) 552, 17 How. Pr. (N. Y.) 407; Strauss *v.* Trotter, (C. Pl. Gen. T.) 6 Misc. (N. Y.) 77; Coonley *v.* Wood, 36 Hun (N. Y.) 559; Russell, etc., Mfg. Co. *v.* Carpenter, 5 Hun (N. Y.) 162.

North Carolina. — Hix *v.* Davis, 68 N. Car. 231.

Ohio. — Clinton Bank *v.* Hart, 5 Ohio St. 33.

Pennsylvania. — McDivitt *v.* McDivitt, 4 Watts (Pa.) 384; Allen *v.* Union Bank, 5 Whart. (Pa.) 420.

Rhode Island. — Hunt *v.* Bates, 7 R. I. 217, 82 Am. Dec. 592.

South Carolina. — Day *v.* Hill, 2 Spears L. (S. Car.) 628, 42 Am. Dec. 390.

Tennessee. — Christian *v.* Hoover, 6 Yerg. (Tenn.) 505.

Vermont. — Sawyer *v.* White, 19 Vt. 40.

action will constitute a bar.[1]

Statutory Regulations. — In some of the United States this matter is regulated by statute. Under some of the statutes a judgment recovered against one or more of several joint and several obligors will not bar a subsequent suit against any who were not parties to the action.[2]

(2) *Effect of Judgment for Defendant in Separate Suit Against One Obligor.* — A judgment in favor of one of several joint and several obligors in a separate suit against him will not bar a subsequent action against another obligor, unless it appear that the judgment was founded on a satisfaction or discharge of the contract.[3]

k. JUDGMENTS IN SUITS AGAINST JOINT TORTFEASORS — (1) *Judgment Against One or More of the Tortfeasors* — (a) **Rule in England.** — In England a mere judgment, without satisfaction, against one of two or more joint tortfeasors will bar a separate action against another.[4]

(b) **Rule in the United States.** — But in the United States the prevailing rule is otherwise, and a mere judgment will not constitute such a bar;[5] but

1. Satisfaction of Judgment a Bar. — Gilmore *v.* Carr, 2 Mass. 171; Farwell *v.* Hillard, 3 N. H. 318; Allen *v.* Union Bank, 5 Whart. (Pa.) 420. See also Mathews *v.* Lawrence, 1 Den. (N. Y.) 212, 43 Am. Dec. 665.

But the Mere Taking in Execution of the Body of one of the obligors, under a judgment against him, will not bar an action against another obligor. Porter *v.* Ingraham, 10 Mass 88.

2. Rule under Statutes. — Citizens' Sav. Bank *v.* Oleson, 47 Iowa 492; Scharff *v.* Noble, 67 Miss. 143; Miller *v.* Reed, 3 Grant Cas. (Pa.) 51; Davis *v.* Sidle, 25 Pa. Co. Ct. 122.

Under an Iowa Statute, in an action on a joint and several instrument against all the promisors, judgment might have been rendered against one and the cause continued as to the others, and the judgment would not have been a bar to the plaintiff's cause of action against the others. Smith *v.* Coopers, 9 Iowa 376.

3. Townsend *v.* Riddle, 2 N. H. 448. See Spencer *v.* Dearth, 43 Vt. 98.

In Maine it has been held that a judgment rendered in a suit upon a joint and several note in favor of one surety will not be a bar to another suit against another surety upon such note, unless it is shown that the first verdict was rendered upon a defense which would be an extinguishment of the cause of action; or unless the grounds of defense set up in both cases are shown to be identical. Hill *v.* Morse, 61 Me. 541.

4. English Rule. — Buckland *v.* Johnson, 15 C. B. 145, 80 E. C. L. 145; Brown *v.* Wootton, Cro. Jac. 73; King *v.* Hoare, 13 M. & W. 494; Brinsmead *v.* Harrison, L. R. 6 C. P. 584, 40 L. J. C. Pl. 281, 24 L. T. N. S. 798, 19 W. R. 956, *affirmed* 41 L. J. C. Pl. 190, L. R. 7 C. P. 547, 27 L. T. N. S. 99, 20 W. R. 784.

5. American Rule — *United States.* — Lovejoy *v.* Murray, 3 Wall. (U. S.) 1. *affirming* 2 Cliff. (U. S.) 191; Long *v.* Conner, 17 Nat. Bankr. Reg. 540, 15 Fed. Cas. No. 8,479; Collard *v.* Delaware, etc., R. Co., 6 Fed. Rep. 246; Power *v.* Baker, 27 Fed. Rep. 396; American Bell Telephone Co. *v.* Albright, 32 Fed. Rep. 287, *affirmed* 136 U. S. 629.

Alabama. — Blann *v.* Crocheron, 19 Ala. 647, 54 Am. Dec. 203.

Arkansas. — McGee *v.* Overby, 12 Ark. 164.

Colorado. — Hattersley *v.* Burrows, 4 Colo. App. 538.

Connecticut. — Sheldon *v.* Kibbe, 3 Conn. 214, 8 Am. Dec. 176; Morgan *v.* Chester, 4 Conn. 387; Atwater *v.* Tupper, 45 Conn. 144, 29 Am. Rep. 674.

Illinois. — Wanack *v.* People, 187 Ill. 116, *affirming* 87 Ill. App. 371; Roodhouse *v.* Christian, 55 Ill. App. 107.

Indiana. — Allen *v.* Wheatley, 3 Blackf. (Ind.) 332; Fleming *v.* McDonald, 50 Ind. 278, 19 Am. Rep. 711.

Iowa. — Cushing *v.* Hederman, (Iowa 1902) 91 N. W. Rep. 940.

Kentucky. — United Soc. of Shakers *v.* Underwood, 11 Bush (Ky.) 265, 21 Am. Rep. 214; Sharp *v.* Gray, 5 B. Mon. (Ky.) 4.

Maine. — Cleveland *v.* Bangor, 87 Me. 259, 47 Am. St. Rep. 326.

Massachusetts. — Elliott *v.* Hayden, 104 Mass. 183; Knight *v.* Nelson, 117 Mass. 458; Savage *v.* Stevens, 128 Mass. 254.

New York. — Atlantic Dock Co. *v.* New York, 53 N. Y. 64; Pasthoff *v.* Banendahl, (Supm. Ct. Gen. T.) 6 N. Y. St. Rep. 613; Cohn *v.* Goldman, 43 N. Y. Super. Ct. 436; Russell *v.* McCall, 141 N. Y. 437, 38 Am. St. Rep. 807; Wies *v.* Fanning, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 543.

Ohio. — Maple *v.* Cincinnati, etc., R. Co., 40 Ohio St. 313, 48 Am. Rep. 685.

Pennsylvania. — Fox *v.* Northern Liberties, 3 W. & S. (Pa.) 103.

South Carolina. — Hawkins *v.* Hatton, 1 Nott & M. (S. Car.) 318, 9 Am. Dec. 700.

Tennessee. — Turner *v.* Brock, 6 Heisk. (Tenn.) 50; Knott *v.* Cunningham, 2 Sneed (Tenn.) 204; Christian *v.* Hoover, 6 Yerg. (Tenn.) 505.

Vermont. — Preston *v.* Huchinson, 29 Vt. 144; Sanderson *v.* Caldwell, 2 Aik. (Vt.) 195.

West Virginia. — Griffie *v.* McClung, 5 W. Va. 131.

See also Ayer *v.* Ashmead, 31 Conn. 447, 83 Am. Dec. 154; Hopkins *v.* Hersey, 20 Me. 449; White *v.* Philbrick, 5 Me. 147, 17 Am. Dec. 214; Hyde *v.* Noble, 13 N. H. 494, 38 Am. Dec. 508; White *v.* Philbrick, 5 Me. 147, 17 Am. Dec. 214. But see Campbell *v.* Phelps, 1

satisfaction of the judgment will.[1]

(2) *Judgment in Favor of One of the Tortfeasors.* — So it is the prevailing rule in the *United States* that a judgment in favor of one of the joint tortfeasors will not bar a separate action against another.[2]

V. Matters Concluded — 1. Statement of the Rule. — The rule is unquestioned that a judgment of a court of competent jurisdiction, upon the merits of a controversy, is conclusive between the parties and those in privity with them, upon every question of fact directly in issue and determined in the action.[3]

Pick. (Mass.) 62, 11 Am. Dec. 139. *Contra*, Swope *v.* Courtney, 1 Cranch (C. C.) 33.

But in Rhode Island and Virginia the contrary rule prevails. Hunt *v.* Bates, 7 R. I. 217, 82 Am. Dec. 592; Wilkes *v.* Jackson, 2 Hen. & M. (Va.) 355. See also Bennett *v.* Fifield, 13 R. I. 139, 43 Am. Rep. 17; Ammonett *v.* Harris, 1 Hen. & M. (Va.) 488.

A Judgment Without Satisfaction, Against an Agent, for a fraud committed while acting within the scope of his agency, is not a bar to an action against the principal for the same fraud. Maple *v.* Cincinnati, etc., R. Co., 40 Ohio St. 313, 48 Am. Rep. 685.

1. Satisfaction of Judgment a Bar — *Illinois.* — Emory *v.* Addis, 71 Ill. 273; Wanack *v.* People, 187 Ill. 116, *affirming* 87 Ill. App. 371; Stanley *v.* Leahy, 87 Ill. App. 465.

Indiana. — Allen *v.* Wheatley, 3 Blackf. (Ind.) 332.

Iowa. — Miller *v.* Beck, 108 Iowa 575.

Maine. — Mitchell *v.* Libbey, 33 Me. 74.

Massachusetts. — Savage *v.* Stevens, 128 Mass. 254; Luce *v.* Dexter, 135 Mass. 23.

Missouri. — Garner *v.* Henzig, 15 Mo. App. 591.

Nebraska. — Bryant *v.* Reed, 34 Neb. 720.

New Jersey. — Spurr *v.* North Hudson County R. Co., 56 N. J. L. 346.

New York. — Dexter *v.* Broat, 16 Barb. (N. Y.) 337; Pasthoff *v.* Banendahl, (Supm. Ct. Gen. T.) 6 N. Y. St. Rep. 613. See also Mathews *v.* Lawrence, 1 Den. (N. Y.) 212, 43 Am. Dec. 665.

Effect of Taking Out Execution on Final Judgment. — Sheldon *v.* Kibbe, 3 Conn. 214, 8 Am Dec. 176; Morgan *v.* Chester, 4 Conn. 387; Davis *v.* Scott, 1 Blackf. (Ind.) 169; Allen *v.* Wheatley, 3 Blackf. (Ind.) 332; Fleming *v.* McDonald, 50 Ind. 278, 19 Am. Rep. 711; Rendell *v.* School Dist. No. 2, 75 Me. 358; White *v.* Philbrick, 5 Me. 147, 17 Am. Dec. 214.

2. Effect of Judgment in Favor of One Joint Tort Feasor. — Goble *v.* Dillon, 86 Ind. 327, 44 Am. Rep. 308; Sprague *v.* Waite, 19 Pick. (Mass.) 455; Lansing *v.* Montgomery, 2 Johns. (N. Y.) 382. See also Thompson *v.* Chicago, etc., R. Co., 71 Minn. 89. But see People *v.* Stephens, (Sup. Ct.) 51 How. Pr. (N. Y.) 235, *affirmed* 71 N. Y. 527; Anderson *v.* West Chicago St. R. Co., 200 Ill. 329, *affirming* 102 Ill. App. 310.

3. Matters Concluded in General — *England.* — Peterborough *v.* Germaine, 6 Bro. P. C. (Toml. ed.) 1. See also Hawkins *v.* Miles, 4 L. J. Ch. 139.

United States. — National Foundry, etc., Works *v.* Oconto Water Supply Co., 183 U. S. 216; Miller *v.* Perris Irrigation Dist., 99 Fed. Rep. 143; Manhattan Trust Co. *v.* Trust Co. of North America, (C. C. A.) 107 Fed. Rep. 328; Aurora City *v.* West, 7 Wall. (U. S.) 82.

Alabama. — Brown *v.* Tillman, 121 Ala. 626.

California. — Boston *v.* Haynes, 33 Cal. 31; People *v.* San Francisco, 27 Cal. 655.

Georgia. — Harris *v.* Colquit, 44 Ga. 663; Claflin Co. *v.* De Vaughn, 106 Ga. 282.

Illinois. — Peterson *v.* Nehf, 80 Ill. 25; Webber *v.* Mackey, 31 Ill. App. 369; Bradish *v.* Grant, 119 Ill. 606.

Indiana. — Duncan *v.* Holcomb, 26 Ind. 378; Boyer *v.* Berryman, 123 Ind. 451; Forgerson *v.* Smith, 104 Ind. 246.

Iowa. — McGregor *v.* McGregor, 21 Iowa 441.

Kentucky. — Russell *v.* England, (Ky. 1899) 50 S. W. Rep. 250.

Louisiana. — Bonvillain *v.* Bourg, 16 La. Ann. 363; Flagg *v.* St. Charles, 48 La. Ann. 765.

Maine. — Gilmore *v.* Patterson, 36 Me. 544.

Massachusetts. — Jamaica Pond Aqueduct Corp. *v.* Chandler, 121 Mass. 1.

Missouri. — Langford *v.* Doniphan, 1 Mo. App. Rep. 381; Givens *v.* Thompson, 110 Mo. 432.

Nebraska. — Lewis *v.* Mills, 47 Neb. 910; Upton *v.* Betts, 59 Neb. 724.

New Jersey. — Wooster *v.* Cooper, 59 N. J. Eq. 204.

New York. — Mersereau *v.* Pearsall, 19 N. Y. 108; Tauziede *v.* Jumel, 133 N. Y. 614; Stokes *v.* Foote, 172 N. Y. 327; Sterns *v.* Marks, 35 Barb. (N. Y.) 565.

North Carolina. — Gay *v.* Stancell, 76 N. Car. 369; Preiss *v.* Cohen, 117 N. Car. 54; Albertson *v.* Williams, 97 N. Car. 264.

Pennsylvania. — Raisig *v.* Graf, 17 Pa. Super. Ct. 509.

Washington. — Matter of Macdonald, 29 Wash. 422.

West Virginia. — Ohio River R. Co. *v.* Johnson, 50 W. Va. 499.

Wisconsin. — Driscoll *v.* Damp, 16 Wis. 106.

A judgment in a former suit is conclusive upon the same issues raised in a subsequent one, although additional property was involved in the former, Rucker *v.* Steelman, 97 Ind. 222; or other parties were joined therein, Parker *v.* Straat, 39 Mo. App. 616.

Facts Established by Admissions in Pleading. — A judgment upon facts established by admissions in the pleadings is as conclusive upon the parties as a judgment upon facts established by evidence. Miller *v.* Union Switch, etc., Co., 59 Hun (N. Y.) 624, 13 N. Y. Supp. 711.

Judgment upon Verdict Directed by Court. — A judgment for the defendant on a verdict directed by the court binds the plaintiff if not

2. Extent of Estoppel. — This estoppel extends not only to every material fact within the issues which was expressly litigated and determined,[1] but also to those matters which, although not expressly determined, are comprehended and involved in the thing expressly stated and decided. Hence it is not necessary to the conclusiveness of a former judgment that issues should have been taken upon the precise point controverted in the second action. Any conclusion which the court or jury must evidently have arrived at in order to reach the judgment or verdict rendered will be fully concluded.[2] In

appealed from. Morgan *v.* Chicago, etc., R. Co., 83 Wis. 348.

A Judgment, Though Satisfied, is not extinguished, but is conclusive of everything therein adjudicated. Ferris *v.* Udell, 139 Ind. 579.

Matter Once Pleaded as a Defense and determined adversely to the defendant cannot again be pleaded. Jordan *v.* Faircloth, 34 Ga. 47; Dixon *v.* Caster, 65 Kan. 739; Hasty *v.* Berry, (Ky. 1886) 1 S. W. Rep. 8; Jones *v.* Silver, (Mo. App. 1902) 70 S. W. Rep. 1109; or used as a ground for a subsequent action by the defendant, although no affirmative relief was asked in the former action, Bierer *v.* Fretz, 37 Kan. 27; Parker *v.* Brancker, 22 Pick. (Mass.) 40.

An Equitable Defense Which Has Been Once Pleaded to an Action at Law and decided adversely cannot be made the ground of a subsequent suit in equity. Bias *v.* Vickers, 27 W. Va. 456.

So Matter Pleaded as a Set-off or Counterclaim and determined adversely cannot again be pleaded.

California. — Reed *v.* Cross, 116 Cal. 473.

Colorado. — Worrel *v.* Smith, 6 Colo. 141.

Iowa. — Taylor *v.* Chambers, 1 Iowa 124.

Maine. — Smith *v.* Berry, 37 Me. 298; Baker *v.* Stinchfield, 57 Me. 363.

Massachusetts. — Jones *v.* Richardson, 5 Met. (Mass.) 247; Stevens *v.* Miller, 13 Gray (Mass.) 283.

Missouri. — Thompson *v.* Wineland, 11 Mo. 243.

New York. — Rogers *v.* Rogers, 1 Daly (N. Y.) 194; M'Lean *v.* Hugarin, 13 Johns. (N. Y.) 184.

Ohio. — Mayer *v.* Wick, 15 Ohio St. 548.

Pennsylvania. — Matthews *v.* Green, 12 Phila. (Pa.) 341, 35 Leg. Int. (Pa.) 438.

Wisconsin. — Dudley *v.* Stiles, 32 Wis. 371; New London Bank *v.* Ketchum, 66 Wis. 428.

Nor Can Such Matter be made the basis of a subsequent action between the same parties.

England. — Eastmure *v.* Laws, 5 Bing. N. Cas. 444, 35 E. C. L. 170, 7 Scott 461, 7 Dowl. P. C. 431, 2 Arn. 54, 8 L. J. C. Pl. 236, 3 Jur. 460.

Indiana. — Steves *v.* Frazee, 19 Ind. App. 284.

Iowa. — Newby *v.* Caldwell, 54 Iowa 102.

New York. — Wright *v.* Miller, 147 N. Y. 362; Collyer *v.* Collins, (Supm. Ct. Gen. T.) 17 Abb. Pr. (N. Y.) 467; Stokes *v.* Stokes, 49 N. Y. App. Div. 302.

North Carolina. — Casey *v.* Cooper, 99 N. Car. 395.

Ohio. — Dougherty *v.* Cummings, 6 Ohio Cir. Dec. 714, 9 Ohio Cir. Ct. 718; Timmons *v.* Dunn, 4 Ohio St. 680.

Oregon. — Glenn *v.* Savage, 14 Oregon 567.

1. Questions Actually Litigated and Determined — *United States.* — Empire State Nail Co. *v.* American Solid Leather Button Co., (C. C. A.) 74 Fed. Rep. 864.

Alabama. — Cole *v.* Conolly, 16 Ala. 271; Hutchinson *v.* Dearing, 20 Ala. 798.

Illinois. — Charles E. Henry Sons Co. *v.* Mahoney, 97 Ill. App. 313.

Iowa. — Hornish *v.* Ringen Stove Co., (Iowa 1902) 89 N. W. Rep. 95.

Kentucky. — Russell *v.* Howerton, 60 S. W. Rep. 916, 22 Ky. L. Rep. 1468.

Maryland. — Trayhern *v.* Colburn, 66 Md. 277.

Massachusetts. — Smith *v.* Whiting, 11 Mass. 445.

Minnesota. — Johnson *v.* Johnson, 57 Minn. 100; Thompson *v.* Crosby, 62 Minn. 324; Keene *v.* Lobdell, 85 Minn. 110.

Mississippi. — Perry *v.* Lewis, 49 Miss. 443.

New York. — Demarest *v.* Darg, 32 N. Y. 281; Kingsland *v.* Spalding, 3 Barb. Ch. (N. Y.) 341; Tyler *v.* Willis, 35 Barb. (N. Y.) 213, 13 Abb. Pr. (N. Y.) 369; Birckhead *v.* Brown, 5 Sandf. (N. Y.) 134.

Tennessee. — Warwick *v.* Underwood, 3 Head (Tenn.) 238, 75 Am. Dec. 767.

Utah. — Rio Grande Western R. Co. *v.* Telluride Power Transmission Co., 23 Utah 22; Hoagland *v.* Hoagland, (Utah 1902) 69 Pac. Rep. 471.

Withholding Evidence. — A party cannot limit the conclusiveness of a judgment by withholding evidence in respect to an issue which should have been litigated therein. Slater *v.* Skirving, 51 Neb. 108, 66 Am. St. Rep. 444; Sulphur Springs Ice, etc., Co. *v.* McKinley, (Tex. Civ. App. 1897) 39 S. W. Rep. 1098.

2. Adjudication by Necessary Implication — *England.* — Reg. *v.* Hartington Middle Quarter Tp., 4 El. & Bl. 780, 82 E. C. L. 780, 1 Jur. N. S. 586, 24 L. J. M. C. 98, 3 C. L. R. 554.

United States. — Florida Cent. R. Co. *v.* Schutte, 103 U. S. 118; Oglesby *v.* Attrill, 20 Fed. Rep. 570; Conklin *v.* Wehrman, 43 Fed. Rep. 12; O'Hara *v.* Mobile, etc., R. Co., 75 Fed. Rep. 130; St. Joseph Union Depot Co. *v.* Chicago, etc., R. Co., (C. C. A.) 89 Fed. Rep. 648; New Dunderberg Min. Co. *v.* Old, (C. C. A.) 97 Fed. Rep. 150; Geer *v.* Ouray County, (C. C. A.) 97 Fed. Rep. 435; Ætna L. Ins. Co. *v.* Hamilton County, (C. C. A.) 117 Fed. Rep. 82; Raphael *v.* Trask, 118 Fed. Rep. 678; Hawes *v.* Contra Costa Water Co., 5 Sawy. (U. S.) 297.

Alabama. — Perry *v.* King, 117 Ala. 533; Bloodgood *v.* Grasey, 31 Ala. 575; Wittick *v.* Traun, 25 Ala. 317; Chamberlain *v.* Gaillard, 26 Ala. 504.

California. — Reed *v.* Cross, 116 Cal. 473.

Georgia. — Maynard *v.* Newton, (Ga. 1902) 42 S. E. Rep. 376.

the notes below will be found, under appropriate catch lines, many cases in which the application of this principle has been invoked.[1]

Illinois. — Union Pac. R. Co. *v.* Chicago, etc., R. Co., 164 Ill. 88; Campbell *v.* Wilson, 195 Ill. 284.

Indiana. — Ashmead *v.* Hurt, 125 Ind. 566; Ferris *v.* Udell, 139 Ind. 579; Lemmon *v.* Osborn, 153 Ind. 172; Beaver *v.* Irwin, 6 Ind. App. 285.

Iowa. — State Nat. Bank *v.* North Western Union Packet Co., 35 Iowa 226; Mowry *v.* Wareham, 101 Iowa 28.

Kansas. — John V. Farwell Co. *v.* Lykins, 59 Kan. 96; Manley *v.* Park, 62 Kan. 553.

Kentucky. — Burnett *v.* Com., (Ky. 1899) 52 S. W. Rep. 965; Geo. T. Stagg Co. *v.* Taylor, (Ky. 1902) 68 S. W. Rep. 862; Moore *v.* Moore, (Ky. 1890) 14 S. W. Rep. 339.

Maryland. — Trayhern *v.* Colburn, 66 Md. 277.

Massachusetts. — Merriam *v.* Woodcock, 104 Mass. 326.

Michigan. — Bond *v.* Markstrum, 102 Mich. 11; Peters *v.* Youngs, 122 Mich. 484.

Minnesota. — Allis *v.* Davidson, 23 Minn. 442; Mitchell *v.* Chisholm, 57 Minn. 148.

Mississippi. — Stewart *v.* Stebbins, 30 Miss. 66.

Missouri. — Baubie *v.* Ossman, 142 Mo. 499; Donnell *v.* Wright, 147 Mo. 639.

New York. — Brown *v.* New York, 66 N. Y. 385; Dunham *v.* Bower, 77 N. Y. 76, 33 Am. Rep. 570; Pray *v.* Hegeman, 98 N. Y. 351; Merritt *v.* Peirano, 10 N. Y. App. Div. 563; Aultman, etc., Co. *v.* Syme, 23 N. Y. App. Div. 344; Zerega *v.* Will, 34 N. Y. App. Div. 488; American Grocery Co. *v.* Pirkl, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 727; Hawkins *v.* Ringler, 47 N. Y. App. Div. 262; Conant *v.* Jones, 50 N. Y. App. Div. 336; Bush *v.* Coler, 60 N. Y. App. Div. 47; Chester *v.* Buffalo Car Mfg. Co., 70 N. Y. App. Div. 443; Embury *v.* Conner, 3 N. Y. 522, 53 Am. Dec. 325; Charles *v.* Lowenstein, (Supm. Ct. Spec. T.) 26 How. Pr. (N. Y) 29.

North Carolina. — Wilkinson *v.* Brinn, 124 N. Car. 723.

Pennsylvania. — Weaver *v.* Lutz, 102 Pa. St. 595; Rauwolf *v.* Glass, 184 Pa. St. 237, *citing* 21 Am. and Eng. Encyc. of Law 193; Church's Appeal, (Pa. 1886) 7 Atl. Rep. 751; Hamner *v.* Griffith, 1 Grant Cas. (Pa.) 193.

Rhode Island. — Sherman *v.* Sherman, 18 R. I. 504.

South Carolina. — Earle *v.* Earle, 33 S. Car. 498; Willis *v.* Tozer. 44 S. Car. 1.

Tennessee. — Vance *v.* McNabb Coal, etc., Co., (Tenn. Ch. 1897) 48 S. W. Rep. 235.

Texas. — Woolley *v.* Sullivan, 92 Tex. 28; Gordon *v.* Thorp, (Tex. Civ. App. 1899) 53 S. W. Rep. 357.

West Virginia. — Blake *v.* Ohio River R. Co., 47 W. Va. 520.

A proposition assumed or decided by the court to be true, and which must be so assumed or decided in order to establish another proposition which expresses the conclusion of the court, is as effectually passed upon and settled in that court as the very matters directly decided. School Dist. No. 28 *v.* Stocker, 42 N. J. L. 115; Blake *v.* Ohio River R. Co., 47 W. Va. 520.

Where a judgment is necessarily based on certain premises, such premises are equally conclusive in a subsequent action between the same parties as the judgment itself. Shelby *v.* Creighton, (Neb. 1902) 91 N. W. Rep. 369.

Illustrations. — A decree of divorce necessarily affirms the validity of the marriage, and so long as it stands no proceeding can be maintained to have the marriage declared void. Walker *v.* Walker, 150 Ind. 317.

A decree of a probate court distributing the estate of a testator under the trust created in the will is necessarily an adjudication of the validity of the trust and of the title of the trustees to take under the will. Goldtree *v.* Allison, 119 Cal. 344.

A decree of partition is *res judicata* that the parties thereto were cotenants in the whole of the land involved in the decree. Irvin *v.* Buckles, 148 Ind. 389.

A judgment taken by the landlord in summary proceedings for nonpayment of rent is conclusive between the parties as to the existence and validity of the lease, the occupation by the tenant, and that rent is due. Reich *v.* Cochran, 151 N. Y. 122, 56 Am. St. Rep. 607; Jacob *v.* Thompson, 73 N. Y. App. Div. 224.

A judgment against a corporation upon a contract necessarily adjudicates the power of the corporation to make the contract. Lake County *v.* Platt, (C. C. A.) 79 Fed. Rep. 567. See also Barbee *v.* Shannon, 1 Indian Ter. 199.

A decree foreclosing a mortgage is necessarily an adjudication of the validity of the mortgage. Finley *v.* Houser, 22 Oregon 562.

Implied Finding Against Plaintiff. — Where a petition contains several counts, and all of them are submitted to the jury, and there is a verdict for plaintiff on one of said counts, specifying which, there is an implied finding against the plaintiff on the remaining counts, and the judgment will be a bar to any subsequent suit on the demand contained in the counts not named in the verdict. Hoyle *v.* Farquharson, 80 Mo. 377; Downing *v.* Missouri, etc., R. Co., 70 Mo. App. 657.

Adjudication by Implication. — Where, in a suit for an injunction and damages, the judgment granting the injunction is silent as to damages, it is equivalent to a rejection of the claim for damages, and will sustain a plea of *res judicata* in a subsequent suit for damages. Rice *v.* Garrett, 12 La. Ann. 755; Spencer *v.* Banister, 12 La Ann. 766.

1. Existence and Validity of Contract. — Andrews Bros. Co. *v.* Youngstown Coke Co., (C. C. A.) 86 Fed. Rep. 585; Parnell *v.* Hahn, 61 Cal. 131; Gordon *v.* Johnson, 3 Colo. App. 139; Shepard *v.* Stockham, 45 Kan. 244; Blackinton *v.* Blackinton, 113 Mass. 231; Priest *v.* Eide, 19 Mont. 53; Shaw *v.* Broadbent, 129 N. Y. 114; Topliff *v.* Topliff, 4 Ohio Cir. Dec. 312, 8 Ohio Cir. Ct. 55.

Validity of Municipal and County Bonds — Judgments Sustaining Validity — *United States.* — Knox County *v.* Harshman, 133 U. S. 152 (suit to restrain issuance of mandamus to compel levy of tax to pay interest); Franklin County *v.* German Sav. Bank, 142 U. S. 93 (suit to enjoin collection of tax to pay bonds);

Immaterial Issues. — But the rule does not extend to every issue determined

Beloit *v.* Morgan, 7 Wall. (U. S.) 619 (action for recovery of interest); Laird *v.* De Soto, 32 Fed. Rep. 652 (action on the bond).

Iowa. — Whitaker *v.* Johnson County, 12 Iowa 595 (action on interest coupons).

Kansas. — Garden City *v.* Merchants', etc., Nat. Bank, 65 Kan. 345 (action on interest coupons).

New York. — Williamsburgh Sav. Bank *v.* Solon, 136 N. Y. 465 (suit in equity to cancel bonds).

North Carolina. — Union Bank *v.* Oxford, 116 N. Car. 339 (suit to compel issuance of railroad aid bonds).

Oklahoma. — Territory *v.* Hopkins, 9 Okla. 133 (proceeding for refunding bonds).

Virginia. — Washington, etc., R. Co. *v.* Cazenove, 83 Va. 744 (suit to cancel bonds).

Judgments Declaring Invalidity. — Bissell *v.* Spring Valley Tp., 124 U. S. 225 (judgment on interest coupons); Gorham *v.* Broad River Tp., (C. C. A.) 118 Fed. Rep. 1016 (mandamus to compel levy of tax to pay interest coupons).

Validity of Deed of Conveyance. — Parker *v.* Kane, 22 How. (U. S.) 1; Scott *v.* Des Moines, 64 Iowa 438 (upon sufficiency of acknowledgment); Bates *v.* Kelley, 82 Mich. 91, 21 Am. St. Rep. 554 (upon issue of forgery).

Validity of Mortgage. — Graydon *v.* Hurd, (C. C. A.) 55 Fed. Rep. 724; Prouty *v.* Matheson, 107 Iowa 259; Ellis *v.* Lyceum, 62 Hun (N. Y.) 622, 16 N. Y. Supp. 924.

Validity of Assignment. — Black *v.* Caldwell, 83 Fed. Rep. 880 (assignment of mortgage); Smith *v.* Lusk, 119 Ala. 394 (assignment of mortgage); Lytle *v.* Chicago Great Western R. Co., 75 Minn. 330 (assignment of claim for wages).

Validity of Lease. — Wilson *v.* Deen, 121 U. S. 525; Louisville, etc., R. Co. *v.* Carson, 169 Ill. 247; Reich *v.* Cochran, 74 Hun (N. Y.) 551.

Validity of Will. — Corprew *v.* Corprew, 84 Va. 599 See also Doe *v.* Watson, 8 How. (U. S.) 263.

Validity of Agreement for Lease. — Sobey *v.* Beiler, 28 Iowa 323.

Relationship of Landlord and Tenant. — Prendergast *v.* Searle, 81 Minn. 291; McCotter *v.* Flinn, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 119; Mutual Reserve Fund L. Assoc. *v.* Cordero, (N. Y. City Ct. Gen. T.) 33 Misc. (N. Y.) 387.

Adjudication that Holding Over Constitutes Renewal of Lease. — Racke *v.* Anheuser-Busch Brewing Assoc., 17 Tex. Civ. App. 167.

Decree Adjudicating Invalidity of School Warrant. — Seattle Nat. Bank *v.* School Dist. No. 40, 20 Wash. 368.

Construction of Contract — *United States.* — Tioga R. Co. *v.* Blossburg, etc., R. Co., 20 Wall. (U. S.) 137 (contract for trackage rights).

Alabama. — Liddell *v.* Chidester, 84 Ala. 508, 5 Am. St. Rep. 387 (contract of employment).

California. — Wiese *v.* San Francisco Musical Soc., 82 Cal. 645 (mutual benefit insurance policy).

Mississippi. — Hooke *v.* Wood, 2 How. (Miss.) 867 (marriage contract); Williams *v.* Luckett, 77 Miss. 394 (contract of employment).

Missouri. — Buchanan *v.* Smith, 75 Mo. 463 (deed of trust).

New Jersey. — Commercial Assur. Co. *v.* New Jersey Rubber Co., 61 N. J. Eq. 446 (fire insurance policy).

New York. — Merritt *v.* Peirano, 167 N. Y. 541 (contract of bailment — consideration); Genet *v.* Delaware, etc., Canal Co., 14 N. Y. App. Div. 177, *modified* 163 N. Y. 173 (mining agreement).

Construction of Will. — John *v.* Smith, 91 Fed. Rep. 827; Ingram *v.* Mercer University, 102 Ga. 226; Lowe *v.* Holder, 106 Ga. 879; Malona *v.* Schwing, 101 Ky. 56; Byrne *v.* Hume, 84 Mich. 185; Cline *v.* Sherman, 144 N. Y. 601; Matter of Vedder, 2 Connoly (N. Y.) 548; Park Hill Co. *v.* Herriot, 41 N. Y. App. Div. 324; Westbrook *v.* Thompson, 104 Tenn. 363.

Character of Conveyance — Absolute or in Mortgage. — McCandless *v.* Yorkshire Guarantee, etc., Corp., 101 Ga. 180; Seiler *v.* Northern Bank, 86 Ky. 128.

Character of Covenant. — Henck *v.* Barnes, 84 Hun (N. Y.) 546.

Capacity of City to Contract Debt. — Prince *v.* Quincy, 28 Ill. App. 490, *affirmed* 128 Ill. 443; Howard *v.* Huron, 5 S. Dak. 539.

Capacity of Married Woman to Execute Mortgage. — Barrell *v.* Tilton, 119 U. S. 637.

Execution of Note by Firm. — Allen *v.* Cooley, 60 S. Car. 353.

Lunacy. — Fiscus *v.* Guthrie, 125 Ind. 598.

Usury. — Hendrix *v.* Webb, 113 Ga. 1028; Divoll *v.* Atwood, 41 N. H. 443; Meares *v.* Finlayson, 63 S. Car. 537; Bumpass *v.* Reams, 1 Sneed (Tenn.) 595; Stuart *v.* Tenison Bros. Saddlery Co., 21 Tex. Civ. App. 530; Tracey *v.* Shumate, 22 W. Va. 474.

Fraud in Obtaining Contract or Conveyance — *United States.* — Whitney *v.* Butler, 118 U. S. 655 (lease).

Maryland. — McDowell *v.* Goldsmith, 6 Md. 319, 61 Am. Dec. 305 (mortgage).

Massachusetts. — Hoseason *v.* Keegen, 178 Mass. 247 (deed of conveyance).

Michigan. — Scudder *v.* Andrus, 124 Mich. 252 (partnership agreement).

New York. — Barber *v.* Kendall, 1 N. Y. App. Div. 247 (agreement to pay off mortgage).

Pennsylvania. — Lewis *v.* Nenzel, 38 Pa. St. 222 (bond and mortgage); Rauwolf *v.* Glass, 184 Pa. St. 237 (contract of sale of goods).

Decrees Adjudging Conveyances Void as to Creditors of the Grantors. — *In re* Skinner, 97 Fed. Rep. 190; Earnest *v.* Sherwood, 115 Ga. 299; Bresnahan *v.* Nugent, 92 Mich. 76; Weiser *v.* Kling, 38 N. Y. App. Div. 266; Curlee *v.* Rembert, 37 S. Car. 214.

Decrees Adjudging Conveyances Attacked as Fraudulent to Be Valid. — Clark *v.* Krause, 6 Mackey (D. C.) 108; Peterson *v.* Warner, 6 Kan. App. 298; Bunker *v.* Tufts, 57 Me. 417; Carson *v.* McCormick Harvesting Mach. Co., 18 Tex. Civ. App. 225.

The decree is conclusive although the subsequent suits are based on other judgments than those sought to be enforced in the former proceeding. Neal *v.* Foster, 36 Fed. Rep. 29.

Material Alteration in Instrument. — Ballard *v.* Franklin L. Ins. Co., 81 Ind. 239; Peru Plow, etc., Co. *v.* Ward, 6 Kan. App. 289; Edgell *v.* Sigerson, 26 Mo. 583.

in the former suit. It extends only to those which were necessary to the

Decrees in Suits for Reformation of Instruments are conclusive as to allegations of mistake. Detroit, etc., R. Co. *v.* McCammon, 108 Mich. 368; Reiff *v.* Mullholland, 65 Ohio St. 178.

Right under Contract to Use Turnpike Free of Tolls. — Owingsville, etc., Turnpike Road Co. *v.* Hamilton, (Ky. 1899) 53 S. W. Rep. 5, *rehearing denied* 54 S. W. Rep. 175.

Extinguishment of Rights under Contract. — Clay *v.* Deskins, 8 U. S. App. 661.

Forfeiture of Lease. — Cook *v.* Basom, 164 Mo 594; Pittsburg, etc., R. Co. *v.* Altoona, etc., R. Co., 203 Pa. St. 108.

Right to Rescind Contract. — Williams *v.* Barkley, 165 N. Y. 48.

Operation of Statute of Limitations. — Edwards *v.* Bates County, 55 Fed. Rep. 436; Hargadine McKittrick Dry Goods Co. *v.* Hudson, 111 Fed. Rep. 361; Allen *v.* Allen, 106 Cal. 137; Almy *v.* Daniels, 15 R. I. 312; Converse *v.* Davis, (Tex. Civ. App. 1896) 37 S. W. Rep. 247.

Payment of Mortgage. — Eastern Bldg., etc., Assoc. *v.* Welling, 116 Fed. Rep. 100; Lawrence's Estate, 169 Pa. St. 185.

Payments on Notes. — Freeman's Appeal, 74 Conn. 247; Young *v.* Brehe, 19 Nev. 379, 3 Am. St. Rep. 892; Peach *v.* Mills, 14 Vt. 371.

Validity of Title to Land — *Alabama.* — Shumake *v.* Nelms, 25 Ala. 126.

California. — Jackson *v.* Lodge, 36 Cal. 28.

Georgia. — Johnson *v.* Lovelace, 61 Ga. 62; Linton *v.* Harris, 78 Ga. 265.

Illinois. — Ilg *v.* Burbank, 59 Ill. App. 291; Sholl *v.* German Coal Co., 139 Ill. 21.

Kentucky. — Swope *v.* Schwartz, (Ky. 1891) 15 S. W. Rep. 251.

Nebraska. — Gregory *v.* Kenyon, 34 Neb. 640.

North Carolina. — Harper *v.* McCombs, 109 N. Car. 714.

Ohio. — Maloney *v.* Maloney, 4 Ohio Cir. Dec. 255, 12 Ohio Cir. Ct. 700.

Pennsylvania. — Stevens *v.* Hughes, 31 Pa. St. 381.

South Carolina. — Caston *v.* Perry, 1 Bailey L. (S. Car.) 533, 21 Am. Dec. 482; Jefferies *v.* Allen, 34 S. Car. 189.

Virginia. — Hudson *v.* Yost, 88 Va. 347.

Existence of Easement. — Hodge *v.* Shaw, 85 Iowa 137, 39 Am. St. Rep. 290; Manning *v.* Port Reading R. Co., 54 N. J. Eq. 46.

Existence and Extent of Municipal Franchise. — Louisville Trust Co. *v.* Cincinnati, 73 Fed. Rep. 716; Stewart *v.* Ashtabula, (C. C. A.) 107 Fed. Rep. 857; Canal, etc., R. Co. *v.* Cresent City R. Co., 47 La. Ann. 314; Becker *v.* Lebanon, etc., St. R. Co., 11 Pa. Super. Ct. 649.

Right to Use of Land under License. — Delaware, etc., R. Co. *v.* Breckenridge, (N. J. 1899) 43 Atl. Rep. 1097.

Right to Use of Leased Premises for Specified Purpose. — Madison *v.* Garfield Coal Co., 114 Iowa 56.

Prescriptive Right to Water in Pond. — Dyer *v.* Cranston Print Works, 21 R. I. 63.

Right to Turn Surface Water. — Rarey *v.* Lee, 7 Ind. App. 518

Right to Maintain Dam. — Union Mill, etc., Co. *v.* Dangberg, 81 Fed. Rep. 73; Thomas *v.* Junction City Irrigation Co., 80 Tex. 550; Chesapeake, etc., R. Co. *v.* Rison, 99 Va. 18, 2 Va. Sup. Ct. 648.

Right to Homestead in Land. — McClarin *v.* Anderson, 104 Ala. 201; Webster *v.* Dundee Mortg., etc , Co., 93 Ga. 278; Aultman *v.* Utsey, 49 S. Car. 399; Rice *v.* Aiken, 3 Tex. Civ. App. 143.

Right to Dower in Land. — Julier *v.* Julier, 62 Ohio St. 90, 78 Am. St. Rep. 697.

Existence of Color of Title. — Bryan *v.* Alexander, 111 N. Car. 142.

Existence of Equitable Title. — Winona, etc., Land Co. *v.* Minnesota, 159 U. S. 526; Hammond *v.* Thornton, 107 Ga. 259; Preston *v.* Rickets, 91 Mo. 320; Wendell *v.* Lewis, 6 Paige (N. Y.) 233.

Existence of Trust in Respect to Property. — Thomas *v.* Merry, 113 Ind. 83; Western Union Tel. Co. *v.* Shepard, 49 N. Y. App. Div. 345.

Right to Participate in Distribution of Trust Fund. — Mason *v.* Pomeroy, 154 Mass. 481.

Respective Rights of Prior and Subsequent Mortgagees. — Moore *v.* Wood, (Tenn. Ch. 1901) 61 S. W. Rep. 1063.

Adjudication of Rights of Petitioner in Decedent's Estate. — *In re* Wells, 69 Vt. 388.

Existence and Validity of Lien. — Compton *v.* Jesup, (C. C. A.) 68 Fed. Rep. 263; Sicard *v.* Buffalo, etc., R. Co., 15 Blatchf. (U. S.) 525; Lacy *v.* Eller, 8 Ind. App. 286; Hazelrigg *v.* Boarman, (Ky. 1887) 2 S. W. Rep. 769; Nave *v.* Adams, 107 Mo. 414, 28 Am. St. Rep. 421; Johnson *v.* Murphy, 17 Tex. 216.

Right to Lien on Real Property. — Voorheis *v.* Blanton, 96 Fed. Rep. 497; Lemmon *v.* Osborn, 153 Ind. 172.

Priority of Liens. — English *v.* Aldrich, 132 Ind. 500, 32 Am. St. Rep. 270; Sullivan *v.* Miller, 106 N. Y. 635; Jenkins *v.* Smith, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 750; Lehman *v.* Hinton, 44 W. Va. 1.

Right of Annuitants under Will. — Kendall *v.* Hardenbergh, 94 Fed. Rep. 911.

Right to Compensation for Improvements. — Morarity *v.* Calloway, 134 Ind. 503; Wainwright *v.* Rowland, 25 Mo. 53.

Adjudication that Estate in Lands Is in Fee. — Lantz *v.* Maffett, 102 Ind. 23.

Adjudication that Property Is Wife's Separate Estate. — Smith *v.* McAtee, 27 Md. 420, 92 Am. Dec. 641.

Adjudication that Land Purchased Was Individual Property of Guardian. — Corker *v.* Jones, 110 U. S. 317.

Identity of Property Purchased with Trust Funds. — Case *v.* New Orleans, etc., R. Co., 2 Woods (U. S.) 236.

Ownership of Personal Property. — Elliott *v.* Porter, (Idaho 1899) 59 Pac. Rep. 360; Berry *v.* Chamberlain, 53 N. J. L. 463; Reiner *v.* Brown, (N. J. 1899) 42 Atl. Rep. 329; Malone *v.* Weill, 67 N. Y. App. Div. 169.

Right to Possession of Personal Property. — Hoisington *v.* Brakey, 31 Kan. 560; Edmonston *v.* Jones, (Mo. App. 1902) 69 S. W. Rep. 741; Keller *v.* Feldman, 81 Hun (N. Y.) 593.

Title to Vessel Sold under Proceeding in Rem. — The Globe, 2 Blatchf. (U. S.) 427.

Ownership of Patent. — Puetz *v.* Bransford, 32 Fed. Rep. 318.

Validity of Patent. — Shoe Machinery Co. *v.*

disposal of the matter involved. Although a judgment may, in express terms,

Cutlan, (1896) 1 Ch. 667; Empire State Nail Co. *v.* American Solid Leather Button Co., (C. C. A.) 74 Fed. Rep. 864, Dubois *v.* Philadelphia, etc., R. Co., 5 Fish. Pat. Cas. 208.

Existence and Validity of Debts or Demands — *United States.* — Carter *v.* Couch, (C. C. A.) 84 Fed. Rep. 735.

Alabama. — Wooten *v.* Steele, 109 Ala. 563, 55 Am. St. Rep. 947.

Connecticut. — Huntley *v.* Holt, 59 Conn. 102, 21 Am. St. Rep. 71.

Illinois. — Judd *v.* Ross, 146 Ill. 40.

Indiana. — Hord *v.* Bradbury, 156 Ind. 20.

Iowa. — Street *v.* Beckman, 43 Iowa 496.

Kansas. — Security Invest. Co. *v.* Richmond Nat. Bank, 58 Kan. 414.

Kentucky. — Walker *v.* Mitchell, 18 B. Mon. (Ky.) 541.

Maryland. — Trayhern *v.* Colburn, 66 Md. 277.

Mississippi. — Humphreys *v.* Stafford, 71 Miss. 135.

Montana. — Finch *v.* Kent, 24 Mont. 268.

New York. — Matter of Howe, 61 Hun (N. Y.) 608; Candee *v.* Lord, 2 N. Y. 269.

North Carolina. — Bond *v.* Billups, 8 Jones L. (53 N. Car.) 423.

Pennsylvania. — Noble *v.* Cope, 50 Pa. St. 17; High's Estate, 136 Pa. St. 222; Heilman *v.* Kroh, 155 Pa. St. 1; Ralston's Estate, 158 Pa. St. 645; Besecher *v.* Flory, 176 Pa. St. 23; Lowenstein *v.* Helfrich, 7 Kulp (Pa.) 533; Stockley *v.* Pollock, 10 Kulp (Pa.) 83.

South Carolina. — Thew *v.* Porcelain Mfg. Co., 8 S. Car. 286.

Texas. — Overstreet *v.* Root, 84 Tex. 26; McCord-Collins Commerce Co. *v.* Levi, 21 Tex. Civ. App. 109.

Washington. — State *v.* Headlee, 18 Wash. 220.

Wisconsin. — Faber *v.* Matz, 86 Wis. 370

Adjudication upon Account of Executor or Administrator. — Lycan *v.* Miller, 56 Mo. App. 79; Cooper *v.* Duncan, 58 Mo. App. 5; Matter of Clapp, (Surrogate Ct.) 30 Misc. (N. Y.) 395; Collins *v.* Smith, 109 N. Car. 468; Wiren *v.* Nesbitt, 85 Tex. 286; Gibson *v.* Green, 89 Va. 524, 37 Am. St. Rep. 888.

Adjudication upon Account of Guardian. — Poullain *v.* Poullain, 72 Ga. 412; Dunsford *v.* Brown, 23 S. Car. 328.

Order Passing upon Receiver's Account. — Stevens *v.* Hadfield, 178 Ill. 532.

Adjudication upon Account of Committee of Lunatic. — Com. *v.* Patterson, 13 Pa. Super. Ct. 136.

Adjudication upon Settlement of Accounts Between Partners. — Maloy *v.* Duden, 77 Fed. Rep. 935; State *v.* Baldwin, 31 Mo. 561; Hayes *v.* Reese, 34 Barb. (N. Y.) 151; Larsen *v.* Winder, 20 Wash. 419.

Allowance or Rejection of Claims Against Estate. — Nave *v.* Wilson, 33 Ind. 294; La Porte *v.* Organ, 5 Ind. App. 369; Bradford *v.* Cook, 4 La. Ann. 231; Wilcox *v.* Gilchrist, 85 Hun (N. Y.) 1; Gibson *v.* Hale, 57 Tex. 405; Phelan *v.* Fitzpatrick, 84 Wis. 240

Adjudication upon Amount of Mortgage Debt. — Stevens *v.* Stembridge, 104 Ga. 619; Brigel *v.* Creed, 10 Ohio Dec. 214.

Allowance of Compensation in Condemnation Proceedings. — Illinois Cent. R. Co. *v.* Champaign, 163 Ill. 524.

Amount of Balance Due Legatees. — Sheldon *v.* Armstead, 7 Gratt. (Va.) 264.

Judgment upon Account Stated. — Edmanson *v.* Best, 57 Fed. Rep. 531, 18 U. S. App. 288; Manning *v.* Irish, 47 Iowa 650; Manley *v.* Tufts, 59 Kan. 660; Hermann *v.* Schwartz Bros. Commission Co., 59 Mo. App. 649.

Validity of Settlement Between Debtor and Creditor. — Carbiener *v.* Montgomery, 97 Iowa 659.

Payment of Judgment. — Tucker *v.* Respass, 28 Ga. 613; Greer *v.* Major, 114 Mo. 145; Moore *v.* Garner, 109 N. Car. 157; Babb *v.* Sullivan, 43 S. Car. 436.

Liability upon Note. — Perkins *v.* Brazos, 66 Conn. 242; Lieb *v.* Lichtenstein, 121 Ind. 483; Dewitt *v.* Boring, 123 Ind. 4; Garrison *v.* Cobb, 106 Ind. 245; Aultman *v.* Mount, 62 Iowa 674; Burke *v.* Miller, 4 Gray (Mass.) 114; Hixson *v.* Ogg, 53 Ohio St. 361; Corbell *v.* Zeluff, 12 Gratt. (Va.) 226; Isbester *v.* Ray, 26 Can. Sup. Ct. 79.

Liability for Rent. — Love *v.* Waltz, 7 Cal. 250; Northwestern Brewing Co. *v.* Manion, 145 Ill. 182; White *v.* Coatsworth, 6 N. Y. 137; Dry Dock, etc., R. Co. *v.* North, etc., River R. Co., (C. Pl. Gen. T.) 3 Misc. (N. Y.) 61; Grafton *v.* Brigham, 70 Hun (N. Y.) 131.

Liability upon Contract of Guaranty. — Kellogg *v.* Thompson, 115 Mich. 618; Bulmer *v.* Young, 47 N. Y. App. Div. 464.

Liability upon Covenants for Title. — Knowlton *v.* Warner, 25 Ill. App. 221; Pierce *v.* Early, 79 Iowa 199.

Liability of General Fund of Village to Satisfaction of Judgment. — Hyde Park *v.* Corwith, 122 Ill 441; Slee *v.* Hyde Park, (Ill. 1888) 14 N. E. Rep. 697.

Liability of Separate Property of One of Several Defendants. — Morrison *v.* Clark, 55 Tex. 437.

Liability to the Payment of Testator's Debts of Property Devised. — Stevenson *v.* Flournoy, 89 Ky. 561.

Personal Liability of Mortgagor. — Ward *v.* Obenauer, 119 Mich. 17.

Liability for Loss of Goods. — Bassett *v.* Connecticut River R. Co., 150 Mass. 178.

Liability for Obstruction or Diversion of Stream. — Lillis *v.* Emigiant Ditch Co., 95 Cal. 553; Last Chance Water Ditch Co. *v.* Heilbron, 86 Cal. 1; Boulder, etc., Ditch Co. *v.* Lower Boulder Ditch Co., 22 Colo. 115; Buckers Irrigation, etc., Co. *v.* Platte Valley Irrigation Co., 28 Colo. 187; McLeod *v.* Lee, 17 Nev. 103.

Right to Distrain for Rent. — Monteith *v.* Gehrig, 43 Ill. App. 465.

Right to Costs and Disbursements. — Straits of Dover Steamship Co. *v.* Munson, 100 Fed. Rep. 1005, 41 C. C. A. 156.

Right of Executor to Become Party to Suit. — Willis *v.* Fairchild, 51 N. Y. Super. Ct. 405.

Right to Intervene in Suit. — McDonald *v.* Seligman, 81 Fed. Rep. 753.

Right to Legal Fees. — Van Gelder *v.* Hallenbeck, 46 Hun (N. Y.) 432; Lawton *v.* Perry, 45 S. Car. 319.

Right to Revive Judgment. — Witherspoon *v.* Twitty, 43 S. Car. 348.

purport to affirm a particular fact or rule of law, yet if such fact or rule of

Right to Claim under Assignment. — Robb *v.* Van Horn, 150 Pa. St. 508.

Right of Receiver to Sue on Judgment Against Stockholder. — Burr *v.* Smith, 113 Fed. Rep. 858.

Rendition of Services Between Certain Dates. — Langston *v.* U. S., 26 Ct. Cl. 256.

Adjudication that Cause of Action Has Not Been Improperly Split. — Lorillard *v.* Clyde, 102 N. Y. 59, 122 N. Y. 41, 19 Am. St. Rep. 470.

Legality of Levy of Attachment. — Hamlet *v.* Fletcher, 36 La. Ann. 551; Haskell *v.* Sumner, 1 Pick. (Mass.) 459.

Validity of Injunction. — Yale *v.* Baum, 70 Miss. 225.

Validity of Mortgage Sale. — Grape Creek Coal Co. *v.* Farmers' L. & T. Co., (C. C. A.) 80 Fed. Rep. 200.

Lawfulness of Seizure and Sale of Property under Chattel Mortgage. — Reynolds *v.* Mandel, 175 Ill. 615.

Validity of Body Execution. — Sherman *v.* Grinnell, 159 N. Y. 50.

Validity of Master's Report. — Green *v.* Bogue, 158 U. S. 478.

Validity of Appointment of Receiver. — Griffin *v.* Long Island R. Co , 102 N. Y. 449.

Sufficiency of Affidavit of Claimant to Property Levied on. — Zadek *v.* Dixon, (Tex. 1886) 3 S. W. Rep. 247.

Exemption of Property from Execution. — La Motte *v.* Harper, 88 Ga. 26.

Validity and Legality of Assessments upon Property for Public Improvements. — Ross *v.* Portland, 105 Fed. Rep. 682; People *v.* Brislin, 80 Ill. 423; Lehmer *v.* People, 80 Ill. 601; Rich *v.* Chicago, 187 Ill. 396; People *v.* Banfield, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 13; Port Angeles *v.* Lauridsen, 26 Wash. 153.

Legality of Setting Apart of Year's Support. — Ward *v.* Barnes, 95 Ga. 103.

Excessiveness of Assessment for Taxation. — Shaw *v.* Cincinnati, 1 Ohio Dec. 91, 1 Ohio N. P. 88.

Due Presentation of Claim Against Estate. — Matter of Gall, 40 N. Y. App. Div. 114.

Necessity for Condemnation of Land. — Muhle *v.* New York, etc., R. Co., (Tex. Civ. App. 1893) 23 S. W. Rep. 809, *affirmed* in 86 Tex. 459.

Service of Summons. — Culver *v.* Phelps, 130 Ill. 217.

Negligence in Performance of Contract. — Vigeant *v.* Scully, 35 Ill. App. 44; Gregg *v.* Page Belting Co., 69 N. H. 247.

Trespass upon Land. — Baxter *v.* Thede, 96 Ill. App. 499; Myton *v.* Wilson, 11 Pa. Super. Ct. 645.

Violation of Trade-mark. — Whitehurst *v.* Rogers, 38 Md. 503.

Liability of Railroad for Failure to Provide Crossing. — Bettys *v.* Chicago, etc., R. Co., 43 Iowa 602.

Existence of Nuisance. — McGrane *v.* New York El. R. Co., 67 N. Y. App. Div. 37; Hartman *v.* Pittsburg Incline Plane Co., 2 Pa. Super. Ct. 123, 27 Pittsb. Leg. J. N. S. (Pa.) 146, 39 W. N. C. (Pa.) 27.

Existence of Grounds for Divorce. — Butler *v.* Butler, (1894) P. 25, 1 Reports 535, 63 L. J. P. 1, 69 L. T. N. S. 545, 42 W. R. 49; Peterson *v.* Peterson, 68 Minn. 71; Smith *v.* Smith, 55 N. J. Eq. 222; Tillison *v.* Tillison, 63 Vt. 411.

Commission of Contempt. — Eaton Rapids *v.* Horner, 126 Mich. 52; Socialistic Co-Operative Pub. Assoc. *v.* Kuhn, 54 N. Y. App. Div. 241; Wilson *v.* Craige, 113 N. Car. 463.

Validity of Marriage. — Lythgoe *v.* Lythgoe, 75 Hun (N. Y.) 147; Olmstead *v.* Olmstead, 76 N. Y. App. Div. 582.

Legitimacy. — Blackburn *v.* Crawford, 3 Wall. (U. S.) 175; Caujolle *v.* Ferrié, 13 Wall. (U. S.) 465; Huebschmann *v.* Cotzhausen, 107 Wis. 64.

Paternity. — Com. *v.* Ellis, 160 Mass. 165.

Issue Whether Child Was Born Alive. — Garwood *v.* Garwood, 29 Cal. 514.

Issue as to Whether Person Is Next of Kin to Decedent. — Howell *v.* Budd, 91 Cal. 342; *In re* Blythe, 112 Cal. 689; King *v.* Ross, 21 R. I. 413.

Right to Custody of Child. — An adjudication on the question of the right to the custody of an infant child, on habeas corpus is conclusive on a subsequent application for the writ based on the same state of facts. Matter of Sneden, 105 Mich. 61, 55 Am. St. Rep. 435; State *v.* Bechdel, 37 Minn. 360, 5 Am. St. Rep. 854.

Residence. — Magowan *v.* Magowan, 57 N. J. Eq. 195.

Legal Existence of Corporation. — Robertson *v.* Parks, 76 Md. 118.

Legality of Organization of Corporation. — Peninsular Iron Co. *v.* Eells, (C. C. A.) 68 Fed. Rep. 24; Lawrence County *v.* Hall, 70 Ind. 469.

Right of Foreign Corporation to Do Business in State. — Glencove Granite Co. *v.* City Trust, etc., Co., 114 Fed. Rep. 978.

Invalidity of Act of Corporation Directors. — Atlanta Hill Gold Min., etc., Co. *v.* Andrews, 55 N. Y. Super. Ct. 93.

Parties Adjudged to Be True Representatives of Corporation. — Order of Solon *v.* Gaskill, 192 Pa. St. 484.

Adjudication that Person Is Not a Stockholder. — Porter *v.* Bagby, 50 Kan. 412.

Relation of Ousted Stockholder to Insolvent Corporation as Creditor. — Reading Iron Works' Estate, 149 Pa. St. 182.

Existence and Nature of Partnership. — Bishop *v.* Smith, 9 Kan. App. 602; Atwater *v.* Fowler, 1 Edw. (N. Y.) 417; Van Dolsen *v.* Abendroth, 43 N. Y. Super. Ct. 470.

Relation of Parties as Cotenants. — Hunt *v.* Hunt, 109 Mich. 399.

Adjudication that Person Was Executor of a Testator. — Borer *v.* Chapman, 119 U. S. 587.

Issue Whether Act Was Done in Capacity of Sheriff or Receiver. — Brown *v.* Tillman, 121 Ala. 626.

Authority of Agent. — Child *v.* McClosky, 14 S. Dak. 181.

Settlement of Pauper. — Bangor *v.* Brunswick, 33 Me. 352; Armstrong County *v.* Plumcreek Tp. Overseers, 158 Pa. St. 92; Cabot *v.* Washington, 41 Vt. 168.

Diversity of Citizenship. — Lacassagne *v.* Chapuis, 144 U. S. 119; New Orleans *v.* Fisher, 180 U. S. 185.

law was immaterial to the issue, and the controversy did not turn upon it, the adjudication will not conclude the parties in reference thereto.[1]

Adjudication upon Collateral Questions. — Hence, a judgment cannot be pleaded in respect to matters only collaterally or incidentally considered.[2]

Acceptor for Accommodation. — Cailleux *v.* Hall, 1 E. D. Smith (N. Y.) 5.

Adjudication upon Boundary. — Satterwhite *v.* Sherley, 127 Ind. 59.

Validity of Election. — Harmon *v.* Auditors of Public Accounts, 22 Ill. App. 129, *affirmed* 123 Ill. 122, 5 Am. St. Rep. 502; Monroe County *v.* Conner, 155 Ind. 484; Stallcup *v.* Tacoma, 13 Wash. 141, 52 Am. St. Rep. 25.

Validity of Title to Office. — People *v.* Hart, (C. Pl. Gen. T.) 13 N. Y. Supp. 903.

Eligibility to Hold Office. — People *v.* Rodgers, 118 Cal. 393.

Existence of Vacancy in Office. — Matter of Howard, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 233.

Illegality of Expulsion of Member from Trade Union. — Merschiem *v.* Musical Mut. Protective Union, (Supm. Ct. Gen. T.) 24 Abb. N. Cas. (N. Y.) 252.

Validity of Statute. — Bell County Coke, etc., Co. *v.* Pineville Graded School, (Ky. 1897) 42 S. W. Rep. 92.

Validity of Municipal Ordinance. — Home Constr. Co. *v.* Duncan, 64 S. W. Rep. 997, 23 Ky L. Rep. 1225.

Repeal of Statutes. — Bell *v.* Allegheny County, 184 Pa. St. 296, 63 Am. St. Rep. 795.

Jurisdiction of Court. — White *v.* Fresno Nat. Bank 98 Cal. 166; Connor *v.* Hall, 91 Ga. 62; Stuart *v.* Peyton, 97 Va. 796; Hungerford *v.* Cushing, 8 Wis. 324.

Existence of Facts Giving Right to an Accounting. — Rhodes *v.* Ashurst, 176 Ill. 351.

Character of Work Done under Contract. — McNicholas *v.* Lake, 13 Colo. App. 164.

Payment of Money Into Court. — Blake *v.* Ohio River R. Co., 47 W. Va. 520.

Issue as to the Destruction of a Certificate of Deposit. — Cook *v.* Casler, 76 N. Y. App. Div. 279.

Height and Character of Dam. — McLeod *v.* Lee, 17 Nev. 103.

Existence of Highway. — Brant *v.* Plumer, 64 Iowa 33; Fulton *v.* Pomeroy, 111 Wis. 663.

Existence of Watercourse. — Hahn *v.* Miller, 68 Iowa 745.

Adjudication Closing Highway. — Bradbury *v.* Walton, 94 Ky. 163.

Foreign Character of Vessel.— The Rio Grande, 23 Wall. (U. S.) 458.

1. Immaterial Issues — *United States.* — Semple *v.* British Columbia Bank, 5 Sawy. (U. S.) 394.

Alabama. — Callan *v.* Anderson, 131 Ala. 228.

California. — McDonald *v.* Bear River, etc., Water, etc., Co., 15 Cal. 145; Kidd *v.* Laird, 15 Cal. 161, 76 Am. Dec. 472; Matter of Heydenfeldt, 127 Cal. 456; Lord *v.* Thomas, (Cal. 1894) 36 Pac. Rep. 372.

Illinois. — Gaffield *v.* Plumber, 175 Ill. 521.

Iowa. — Koon *v.* Mallett, 68 Iowa 205; Bayliss *v.* Deford, 73 Iowa 495.

Maryland. — Shryock *v.* Hensel, 95 Md. 614.

Massachusetts — Watts *v.* Watts, 160 Mass. 464, 39 Am. St. Rep. 509.

Minnesota. — Dixon *v.* Merritt, 21 Minn. 196; Irish American Bank *v.* Ludlum, 56 Minn. 317.

New York. — Woodgate *v.* Fleet, 44 N. Y. 1; Lorillard *v.* Clyde, 99 N. Y. 196; People *v.* Johnson, 37 Barb. (N. Y.) 502; Lance *v.* Shaughnessy, 86 Hun (N. Y.) 411; Springer *v.* Bien, 16 Daly (N. Y.) 275; Merritt *v.* Merritt, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 230; Harrison *v.* McAdam, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 18; Shaw *v.* Broadbent, 129 N. Y. 114.

North Carolina. — Lowder *v.* Noding, 8 Ired. Eq (43 N. Car.) 208.

Oregon.—Bingham *v.* Honeyman, 32 Oregon 129.

South Carolina. — Garrett *v.* Day, 2 McCord Eq. (S. Car.) 27, 16 Am. Dec. 629.

West Virginia. — Houser *v.* Ruffner, 18 W. Va. 244.

Contra. — Almy *v.* Daniels, 15 R. I. 312.

2. Matters Collaterally or Incidentally Considered — *United States.* — Society, etc., *v.* Hartland, 2 Paine (U. S.) 536; *In re* Henry Ulfelder Clothing Co., 98 Fed. Rep. 409.

Arkansas. — Shall *v.* Biscoe, 18 Ark. 142.

California. — Matter of Freud, 134 Cal. 333; Chapman *v.* Hughes, 134 Cal. 641.

Connecticut. — Kennedy *v.* Scovil, 14 Conn. 61; Dickinson *v.* Hayes, 31 Conn. 417.

Georgia. — Evans *v.* Birge, 11 Ga. 265.

Illinois. — Smith *v.* Rountree, 185 Ill. 219; Voge *v.* Breed, 14 Ill. App. 538; Ryan *v.* Potwin, 62 Ill. App. 134.

Kansas. — State *v.* Hornaday, 62 Kan. 334.

Maine. — Hobbs *v.* Parker, 31 Me. 143.

Maryland. — Emmert *v.* Stouffer, 64 Md. 543; Singery *v.* Atty.-Gen., 2 Har. & J. (Md.) 487.

Massachusetts. — Minor *v.* Walters, 17 Mass. 237; Dallinger *v.* Richardson, 176 Mass. 77.

Michigan. — Perkins *v.* Cheney, 114 Mich. 567, 68 Am. St. Rep. 495.

Mississippi. — Land *v.* Keirn, 52 Miss. 341; Union, etc., Bank *v.* Allen, 77 Miss. 442.

Missouri. — Ridgley *v.* Stillwell, 27 Mo. 128; Fish *v.* Lightner, 44 Mo. 268; State *v.* Butler County, 164 Mo. 214.

New Hampshire. — Potter *v.* Baker, 19 N. H. 166.

New York. — People *v.* Hall, 104 N. Y. 170.

Oregon. — Applegate *v.* Dowell, 15 Oregon 513.

Pennsylvania. — Lentz *v.* Wallace, 17 Pa. St. 412, 55 Am. Dec. 569; Tams *v.* Lewis, 42 Pa. St. 402; Cavanaugh *v.* Buehler, 120 Pa. St. 441; Kapp *v.* Shields, 17 Pa. Super. Ct. 524.

Texas. — Faires *v.* McLellan, (Tex. Civ. App. 1893) 24 S. W. Rep. 365.

Virginia. — Houck *v.* Kerfoot, 99 Va. 658.

West Virginia. — Henry *v.* Davis, 13 W. Va. 230.

Reasons of the Court. — A party is not estopped by the reasons which a judge may assign for the conclusion which he comes to. It is the judgment itself, and not the reasons of the court, which creates an estoppel. *In re* Allsop, 61 L. T. N. S. 213; Citizens' Bank *v.* Brigham,

3. Matters Not Adjudicated — *a.* IN GENERAL. — A judgment is not *res judicata* as to a question not appearing upon the face of the record, or shown by extrinsic evidence to have been determined in the action.[1] If there be

61 Kan. 727; Pepper *v.* Dunlap, 5 La. Ann. 200; Fisk *v.* Parker, 14 La. Ann. 496; Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194.

1. Matters Not Adjudicated — *United States.* — Caujolle *v.* Ferrié, 5 Blatchf. (U. S.) 225; Myers *v.* D'Meza, 2 Woods (U. S.) 160; *In re* Vetterlein, 44 Fed. Rep. 57; Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 50 Fed. Rep. 151; Detroit *v.* Detroit City R. Co., 56 Fed. Rep. 867; Mack *v.* Levy, 60 Fed. Rep. 751; Dexter *v.* Sayward, 84 Fed. Rep. 296; U. S. *v.* Oregon Cent. Military Road Co., 103 Fed. Rep. 549; Ohio River R. Co. *v.* Fisher, (C. C. A.) 115 Fed. Rep. 929; Kruger *v.* Constable, 116 Fed. Rep. 722; Fuller *v.* Venable, (C. C. A.) 118 Fed. Rep. 543; New Orleans *v.* Citizen's Bank, 167 U. S. 371; Lander *v.* Mercantile Nat. Bank, 22 U. S. Supm. Ct. 908; Harmon *v.* Struthers, 48 Fed. Rep. 260; Starling *v.* Weir Plow Co., 49 Fed Rep. 637; Rocker Spring Co. *v.* William D. Gibson Co., 58 Fed. Rep. 217; Mack *v.* Levy, 59 Fed. Rep. 468; U. S. *v.* Lane, 8 Wall. (U. S.) 185; Thompson *v.* N. T. Bushnell Co., 80 Fed. Rep. 332; Russell *v.* Place, 94 U. S. 608; Washington, etc., Steam Packet Co. *v.* Sickles, 5 Wall. (U. S.) 580.

Alabama. — Ford *v.* Ford, 68 Ala. 141; Trimble *v.* Fariss, 78 Ala. 260.

Arkansas. — Ozark Land Co. *v.* Lane-Bodley Co., 64 Ark 301.

California. — Deering *v.* Richardson-Kimball Co., 109 Cal. 73; Downing *v.* Rademacher, (Cal. 1900) 62 Pac. Rep. 1055; Ephraim *v.* Pacific Bank, 136 Cal. 646; Matter of Newman, 124 Cal. 688; Bosquett *v.* Crane, 51 Cal. 505.

Colorado. — Johnson *v.* Johnson, 20 Colo. 143.

Connecticut. — Kashman *v.* Parsons, 70 Conn. 295.

Delaware. — Reybold *v.* Jefferson, 1 Harr. (Del.) 401, 26 Am. Dec. 401.

Georgia. — Hunter *v.* Davis, 19 Ga. 413; National Bank *v.* Southern Porcelain Mfg. Co., 59 Ga. 157; Sloan *v.* Price, 84 Ga. 171, 20 Am. St. Rep. 354.

Illinois. — Williams *v.* Walker, 62 Ill. 517; Bentley *v.* O'Bryan, 111 Ill. 53; Chicago *v.* Cameron, 22 Ill. App. 91; Wolverton *v.* Taylor, 54 Ill. App. 380; People *v.* Gary, 196 Ill. 310; Dowdall *v.* Cannedy, 32 Ill. App. 207; Althrop *v.* Beckwith, 14 Ill. App. 628.

Indiana. — Gross *v.* Whitley County, 158 Ind. 531; Kilander *v.* Hoover, 111 Ind. 10; Koons *v.* Blanton, 129 Ind. 383; Chicago, etc., R. Co. *v.* State, 153 Ind. 134; Beidenkoff *v.* Brazee, 28 Ind. App. 646.

Iowa. — Linton *v.* Crosby, 61 Iowa 293; Wilson *v.* Stripe, 4 Greene (Iowa) 551, 61 Am. Dec. 138; Thomas *v.* McDaneld, 88 Iowa 374; Zook *v.* Thompson, 111 Iowa 464.

Kansas. — Smith *v.* Auld, 31 Kan. 262; Provident Loan Trust Co. *v.* Marks, 59 Kan. 230, 68 Am. St. Rep. 349; Scott *v.* Wagner, 2 Kan. App. 386; Dryden *v.* St. Joseph, etc., R. Co., 23 Kan. 525.

Kentucky. — Stilwell *v.* Duncan, 62 S. W. Rep. 898, 23 Ky. L. Rep. 261; Fire Assoc. *v.* Dickey, (Ky. 1887) 3 S. W. Rep. 372; Craine *v.* Edwards, 92 Ky. 109; Louisville Trust Co. *v.* Drennon Springs Co., (Ky. 1896) 34 S. W. Rep. 1072; Falkenburg *v.* Johnson, 102 Ky. 543, 80 Am. St. Rep. 369; Hughes *v.* Wood, (Ky. 1898) 48 S. W. Rep. 152; Mitchell *v.* Tyler, (Ky. 1899) 49 S. W. Rep. 422.

Louisiana. — Goodrich *v.* Pettingale, 7 La. Ann. 665; Hoggatt *v.* Thomas, 35 La. Ann. 298; Justus's Succession, 45 La. Ann. 190; Rose's Succession, 48 La. Ann. 418; Cantrelle *v.* Roman Catholic Cong., 16 La. Ann. 442; State *v.* Citizens' Bank, 52 La. Ann. 1086.

Maine. — Hill *v.* Crocker, 87 Me. 208, 47 Am. St. Rep. 321.

Massachusetts. — Stapleton *v.* Dee, 132 Mass. 279; Darcy *v.* Kelley, 153 Mass. 433; Newell *v.* Carpenter, 118 Mass. 411; Waterhouse *v.* Levine, (Mass. 1903) 65 N. E. Rep. 822.

Michigan. — Jacobson *v.* Miller, 41 Mich. 90; Brand *v.* Connery, (Mich. 1902) 92 N. W. Rep. 784.

Minnesota. — Baker *v.* Wyman, 47 Minn. 177; Heidel *v.* Benedict, 61 Minn. 170, 52 Am. St. Rep. 592; Bowe *v.* Minnesota Milk Co., 44 Minn. 460; State *v.* Cooley, 65 Minn. 406; Neilson *v.* Pennsylvania Coal, etc., Co., 78 Minn. 113.

Mississippi. — Cohea *v.* Johnson, 69 Miss. 46; Davis *v.* Davis, 65 Miss. 498.

Missouri. — Foote *v.* Clark, 102 Mo. 394; Van Liew *v.* Barrett, etc., Beverage Co., 144 Mo. 509; Smoot *v.* Judd, 161 Mo 673; State *v.* William Barr Dry-Goods Co., 45 Mo. App. 96; Sears *v.* Stone County, 105 Mo. 236, 24 Am. St. Rep. 378; Strong *v.* Hamilton, 144 Mo. 668.

Nebraska. — State *v.* Haverly, 62 Neb. 767; Burns *v.* School Dist. No. 18, 61 Neb. 351; Quigley *v.* McEvony, 41 Neb. 73; Hamilton Nat. Bank *v.* American L. & T. Co., (Neb. 1902) 92 N. W. Rep. 189; Morgan *v.* Mitchell, 52 Neb. 667.

New Hampshire. — Boston, etc., R. Co. *v.* Sargent, 70 N. H. 299.

New Jersey. — Schweitzer *v.* Bonn, 55 N. J. Eq. 107; Bernard *v.* Hoboken, 27 N. J. L. 412; Ruckelschaus *v.* Oehme, 48 N. J. Eq. 436; Annan *v.* Hill Union Brewery Co., 59 N. J. Eq. 414.

New York. — Fitzgerald *v.* Topping, 48 N. Y. 438; Hymes *v.* Estey, 116 N. Y. 501, 15 Am. St. Rep. 421; Stannard *v.* Hubbell, 123 N. Y. 520; Lewis *v.* Ocean Nav., etc., Co., 125 N. Y. 341; Unglish *v.* Marvin, 128 N. Y. 380; Matter of Holmes, 131 N. Y. 80; Converse *v.* Sickles, 146 N. Y. 200, 48 Am. St. Rep. 790; Aldridge *v.* Walker, 151 N. Y. 527; Stevens *v.* Melcher, 152 N. Y. 551; Corse *v.* Chapman, 153 N. Y. 466; Fairchild *v.* Edson, 154 N. Y. 199, 61 Am. St. Rep. 609; Stokes *v.* Stokes, 155 N. Y. 581; Commercial Pub. Co. *v.* Beckwith, 167 N. Y. 329; Stannard *v.* Hubbell, 56 Hun (N. Y.) 450; Skinner *v.* Walter A. Wood Mowing, etc., Mach. Co., 65 Hun (N. Y.) 622, 20 N. Y. Supp. 251; Otis *v.* Crouch, 89 Hun (N. Y.) 548; Rider *v.* Union India Rubber Co., 4 Bosw. (N. Y.) 169; Schwenck *v.* Widemeyer, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 456; Dickinson *v.* Price, 64 Hun (N. Y.) 149; Cooper *v.* Brooklyn, (Brooklyn City Ct. Gen. T.) 18 N.

any uncertainty as to the precise issue involved and determined in the action, as, for example, if it appear that several distinct matters were litigated, upon

Y. Supp. 438; Douglas *v.* Yost, 64 Hun (N. Y.) 155, 28 Abb. N. Cas. (N. Y.) 370; Sterrit *v.* Lee, 44 N. Y. App. Div. 619; Brantingham *v.* Huff, 43 N. Y. App. Div. 414; Felix *v.* Devlin, 50 N. Y. App. Div. 331; Rudd *v.* Cornell, 58 N. Y. App. Div. 207; Sans *v.* New York, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 559; Chamberlain *v.* Cuming, 65 N. Y. App. Div. 474; Rowley *v.* Feldman, 74 N. Y. App. Div. 492.

North Carolina. — Jones *v.* Beaman, 117 N. Car. 259; Harrington *v.* Hatton, 130 N. Car. 89; *In re* Thomas, 111 N. Car. 409.

Oklahoma. — Hawkins *v.* Overstreet, 7 Okla. 277.

Oregon. — Nickum *v.* Burckhardt, 30 Oregon 464, 60 Am. St. Rep. 822; Feldman *v.* McGuire, 34 Oregon 309.

Pennsylvania. — Morgan's Appeal, 110 Pa. St. 271; Fidelity Ins. Trust, etc., Co. *v.* Gazzam, 161 Pa. St. 536; Com. *v.* Order of Solon, 166 Pa. St. 33; Appleton's Estate, 203 Pa. St. 80; Kapp *v.* Shields, 17 Pa. Super. Ct. 524; French *v.* Burns, 19 Pa. uper. Ct. 333; Buchle's Estate, 14 Pa. Co. Ct. 99, 3 Pa. Dist. 16; Reese *v.* Reese, 157 Pa. St. 200; Cawley's Estate, 162 Pa. St. 520.

Rhode Island. — Crafts *v.* Crafts, 23 R. I. 5.

South Carolina. — Gourdin *v.* Trenholm, 25 S. Car. 362; McKenzie *v.* Sifford, 48 S. Car. 458; Virginia-Carolina Chemical Co. *v.* Kirven, 57 S. Car. 445; Hosford *v.* Wynn, 26 S. Car. 130.

Tennessee. — East Tennessee, etc., R. Co. *v.* Mahoney, 89 Tenn. 314; McQuade *v.* Williams, 101 Tenn. 334; Brewster *v.* Galloway, 4 Lea (Tenn.) 558; Walter *v.* Hartman, (Tenn. 1902) 67 S. W. Rep. 476.

Texas. — Teal *v.* Terrell, 48 Tex. 491; Sheffield *v.* Goff, 65 Tex. 354; Hartford F. Ins. Co. *v.* Cameron, 18 Tex. Civ. App. 237; Patrick *v.* Hopkins County, (Tex. 1887) 6 S. W. Rep. 626; Gray *v.* Thomas, 83 Tex. 246; Robinson *v.* Dickey, 14 Tex. Civ. App. 70; Bodeman *v.* Reinhard, (Tex. Civ. App. 1900) 54 S. W. Rep. 1051; Noel *v.* Clark, (Tex. Civ. App. 1901) 60 S. W. Rep. 356; Walsh *v.* Ford, (Tex. Civ. App. 1901) 66 S. W. Rep. 854; James *v.* James, 81 Tex. 373; West *v.* Cole, (Tex. Civ. App. 1899) 50 S. W. Rep. 151.

Utah. — U. S. *v.* Gardo House, 9 Utah 285.

Vermont. — Stowell *v.* Hastings, 59 Vt. 494, 59 Am. Rep. 748; Church *v.* Chapin, 35 Vt. 223.

Virginia. — Tidball *v.* Shenandoah Nat. Bank, 98 Va. 768; Legrand *v.* Rixey, 83 Va. 862; Eaves *v.* Vial, 98 Va. 134; Withers *v.* Sims, 80 Va. 651; Niday *v.* Harvey, 9 Gratt. (Va.) 454.

Washington. — Field *v.* Greiner, 11 Wash. 8; Hitchcock *v.* Nixon, 16 Wash. 281; Brier *v.* Traders' Nat. Bank, 24 Wash. 695; Hanna *v.* Kasson, 26 Wash. 568; Ryan *v.* Sumner, 17 Wash. 228.

West Virginia. — Doonan *v.* Glynn, 28 W. Va. 715; Brown *v.* Squires, 42 W. Va. 367.

Wisconsin. — Logan *v.* Trayser, 77 Wis. 579; Ford *v.* Plankinton Bank, 87 Wis. 363; Fordyce *v.* State, (Wis. 1902) 92 N. W. Rep. 430; Gates *v.* Parmly, 93 Wis. 294.

Canada. — Grant *v.* Maclaren, 23 Can. Sup. Ct. 310.

Illustrations. — A determination in a suit named that a given instrument was not the deed of certain individuals is no determination that it was not the several deed of each. McLean *v.* Hansen, 37 Ill. App. 48.

An Adjudication in an Action upon the Guaranty of a Promissory Note that the plaintiff had not sufficiently exhausted his remedies against the maker does not constitute an adjudication upon the validity of the guaranty, and cannot be pleaded in bar of another action thereon after an execution against the maker has been returned unsatisfied. Boyer *v.* Austin, 54 Iowa 402.

An Order of the Probate Court in the final settlement in the administration of an estate by joint administrators, awarding a certain sum to one of the administrators for extra services, is not a conclusive adjudication against the other administrator as to the right of the one to whom the allowance was made to the entire sum so awarded. Oakley *v.* Oakley, 111 Ala. 506.

An adjudication of the probate court on a petition for an allowance, by one claiming as widow of a deceased person, is conclusive only so far as it relates to the allowances made to her pending the litigation, and is not *res judicata* as to her right as widow to a distributive share of the estate to which the widow is entitled. Bordwell *v.* Saginaw Circuit Judge, 119 Mich. 421.

A Decree Prohibiting a Railroad Company from Carrying on a Business as a Public Warehouseman is not an adjudication as to the right of the defendant under its charter to sell or lease its property for such use by another. State *v.* New Orleans Warehouse Co., (La. 1902) 33 So. Rep. 81.

The Dismissal of an Application for the Appointment of a Guardian for one alleged to be insane is merely an adjudication that he is not insane to the extent that renders him incapable of taking care of himself, and does not establish his sanity so as to operate as an estoppel in a subsequent contest of his will on the ground of mental incapacity. Manley *v.* Staples, 62 Vt. 153.

Adjudication upon Motion to Remove Receiver. — An adverse ruling on a motion, the principal purpose of which is to secure the removal of a receiver on the ground that he is a stockholder of the corporation, and therefore not a suitable person to enforce the stockholders' liability provided for in the case of banking institutions, is not an adjudication of the question whether the corporation is a banking institution within the meaning of Const. Neb., art. 11*b*, § 7. Hamilton Nat. Bank *v.* American L. & T. Co., (Neb. 1902) 92 N. W. Rep. 189.

Mental Incapacity. — The finding that a testator was incompetent to make a will at a certain time is not an adjudication of his mental incapacity to convey property at a subsequent time. Arnold *v.* Arnold, (Ky. 1891) 17 S. W. Rep. 203.

A Decree for Plaintiff on a Bill to Set Aside and Annul a Conveyance on the ground of the mental

any one or more of which the judgment may have turned,[1] the whole matter of the action will be at large and open to subsequent controversy.[2]

b. MATTERS NOT IN ISSUE. — So, for obvious reasons, a judgment cannot be conclusive as to a matter which was not in issue in the former action[3]

incapacity of the grantor is not a bar to a subsequent suit against his heirs to enforce specifically the contract under which such deed was made, the question of the grantor's capacity, at the time he made such contract, not having been raised in the former suit. Fishburne *v.* Ferguson, 85 Va. 321.

An Adjudication in Condemnation Proceedings that a company may erect a dam in a lawful manner is not an adjudication that the dam which it has erected is lawful. Chesapeake, etc., R. Co. *v.* Rison, 99 Va. 18.

1. When Several Distinct Issues Are Litigated. — De Sollar *v.* Hanscome, 158 U. S. 216; Sawyer *v.* Nelson, 160 Ill. 629; Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 164 Mass. 222, 49 Am. St. Rep. 454; Griffin *v.* Barbee, (Tex. Civ. App. 1902) 68 S. W. Rep. 698.

So When Several Defenses Are Pleaded and the judgment does not show upon which issue the decision was rendered, there is no estoppel. Belleville, etc., R. Co. *v.* Leathe, (C. C. A.) 84 Fed. Rep. 103; Geary *v.* Bangs, 138 Ill. 77; Augir *v.* Ryan, 63 Minn. 373; Hearn *v.* Boston, etc., R. Co., 67 N. H. 320.

To an action by an indorsee against the maker of a note the defendant pleaded two defenses, viz., that the plaintiff was not a *bona fide* holder, and that there had been a breach of the contract in pursuance of which the note was given. The plaintiff recovered judgment for the full amount of the note. It was held that since it did not appear upon which issue the judgment was rendered, the issue as to breach of contract was not *res judicata*. Griffith *v.* Fields, 105 Iowa 362.

To an action brought upon a lost acceptance the defendant pleaded two pleas, viz., *non est factum* and payment, and supported them by evidence that the bill which he had accepted was not the one described in the complaint, and that the one accepted had been paid. There was verdict and judgment for the defendant. It was held that this judgment was not a bar to a subsequent action upon the bill alleged to be the one actually accepted, since it was not shown upon which issue the former verdict was rendered. Greene *v.* Merchants', etc., Bank, 73 Miss. 542.

A Judgment Entered upon a General Verdict is conclusive only as to such matters as are shown to have been involved in the decision. Rowland *v.* Hobby, 26 N. Y. App. Div. 522.

Judgment Consistent with Finding of Fact Either Way. — The question whether the public has an easement for a street in certain premises is not *res judicata* although litigated in a former action between the parties and submitted to the jury, if there was no special finding upon it and the judgment is consistent with the determination either way. Van Valkenburgh *v.* Milwaukee, 43 Wis. 574.

2. Russell *v.* Place, 94 U. S. 608.

3. Matters Not in Issue — *United States.* — New Orleans *v.* Citizens' Bank, 167 U. S. 371, Wilder *v.* Rio Grande County, 41 Fed. Rep. 512; Lublin *v.* Stewart, etc., Co., 75 Fed. Rep. 294; Newburyport Water Co. *v.* Newburyport, 85 Fed. Rep. 723; Stufflebeam *v.* De Lashmutt, 101 Fed. Rep. 367; Manhattan Trust Co. *v.* Sioux City, etc., R. Co., 102 Fed. Rep. 710; Enfield *v.* Jordan, 119 U. S. 680.

Alabama. — Davidson *v.* Shipman, 6 Ala. 27; State *v.* Williams, 131 Ala. 56.

Arkansas. — Hannah *v.* Carrington, 18 Ark. 85; McCombs *v.* Wall, 66 Ark. 336.

California. — Barber *v.* Mulford, 117 Cal. 356; McDonald *v.* McCoy, 121 Cal. 55; More *v.* More, 133 Cal. 489; Concannon *v.* Smith, 134 Cal. 14; Golson *v.* Donlap, 73 Cal. 157; Journe *v.* Hewes, 124 Cal 244.

Connecticut. — Abbe *v.* Goodwin, 7 Conn. 377; Crandall *v.* Gallup, 12 Conn. 365; Fuller *v.* Metropolitan L. Ins. Co., 68 Conn. 55, 57 Am. St. Rep. 84; *In re* Premier Cycle Mfg. Co., 70 Conn. 473; Hannon *v.* O'Dell, 71 Conn. 698.

Georgia. — Hendrix *v.* Webb, 113 Ga. 1028; Worth *v.* Carmichael, 114 Ga. 699.

Illinois. — Farwell *v.* Great Western Tel. Co., 161 Ill. 522; White *v.* Sherman, 168 Ill. 589, 61 Am. St. Rep. 132; McCartney *v.* Osburn, 118 Ill. 403; Russell *v.* Epler, 10 Ill. App. 304.

Indiana. — Bougher *v.* Scobey, 21 Ind. 365; Mitchell *v.* French, 100 Ind. 334; Clements *v.* Davis, 155 Ind. 624; McFadden *v.* Ross, 108 Ind. 512.

Iowa. — Crum *v.* Boss, 48 Iowa 433; Muecke *v.* Barrett, 104 Iowa 413; Des Moines Nat. Bank *v.* Harding, 86 Iowa 153; Owen *v.* Higgins, 113 Iowa 735.

Kentucky. — Lancaster *v.* Wolff, 62 S. W. Rep. 717, 23 Ky. L. Rep. 233; Arnold *v.* Arnold, 11 B. Mon. (Ky.) 81.

Louisiana. — Jeannin *v.* De Blanc, 11 La. Ann. 465; Ledoux *v.* Lavedan, 49 La. Ann. 913.

Maine. — Lord *v.* Chadbourne, 42 Me. 429, 66 Am. Dec. 290; Parks *v.* Libby, 90 Me. 56.

Maryland. — Shafer *v.* Stonebraker, 4 Gill & J. (Md.) 345; Cummings *v.* Bannon, (Md. 1887) 8 Atl. Rep. 357; Field *v.* Malster, 88 Md. 691; Shryock *v.* Hensel, 95 Md. 614.

Massachusetts. — Sewall *v.* Robbins, 139 Mass. 164; Gilbert *v.* Thompson, 9 Cush. (Mass.) 348; Standish *v.* Parker, 2 Pick. (Mass.) 20, 13 Am. Dec. 393.

Michigan. — Nims *v.* Vaughn, 40 Mich. 356; Shurte *v.* Fletcher, 111 Mich. 84; Lansing *v.* Detroit, etc., R. Co., (Mich. 1902) 89 N. W. Rep. 54.

Minnesota. — Wayzata *v.* Great Northern R. Co., 67 Minn. 385.

Missouri. — Union Nat. Bank *v.* State Nat. Bank, 155 Mo. 95, 78 Am. St. Rep. 560; Garland *v.* Smith, 164 Mo. 1; Short *v.* Taylor, 137 Mo. 517, 59 Am. St. Rep. 508.

Nebraska. — Slater *v.* Skirving, 51 Neb. 108, 66 Am. St. Rep. 444; Anderson *v.* Kreidler, 56 Neb. 171; Upton *v.* Betts, 59 Neb. 724; Malone *v.* Garver, (Neb. 1902) 92 N. W. Rep. 726.

Nevada. — Sherman *v.* Dilley, 3 Nev. 21.

New Hampshire. — Towns *v.* Nims, 5 N. H.

and which could not properly have been litigated therein.[1]

c. MATTERS IN ISSUE BUT NOT DECIDED. — Even where the matter was in issue, if the issue was not determined, by reason of the decision turning

259, 20 Am. Dec. 578; Taylor *v.* Dustin, 43 N. H. 493; Palmer *v.* Russell, 43 N. H. 625.

New Jersey. — Ransom *v.* Brinkerhoff, 56 N. J. Eq. 149; Hodge *v.* U. S. Steel Corp. (N. J. 1902). 53 Atl. Rep. 601.

New York. — Stokes *v.* Foote, 172 N. Y. 327; McKnight *v.* Dunlop, 4 Barb. (N. Y.) 36; Matthews *v.* Duryee, 45 Barb. (N. Y.) 69, 17 Abb. Pr. (N. Y.) 256; Van Camp *v.* Fowler, 61 Hun (N. Y.) 626, 16 N. Y. Supp. 281; Fox *v.* McComb, 63 Hun (N. Y.) 630, 17 N. Y. Supp. 783; People *v.* Johnson, (Supm. Ct. Gen. T.) 14 Abb. Pr. (N. Y.) 416; Allen *v.* Farmers' L. & T. Co., 18 N. Y. App. Div. 27; Fancher *v.* Bonfils, 44 N. Y. App. Div. 637; Nelson *v.* Brown, 144 N. Y. 384; Warren *v.* Union Bank, 157 N. Y. 259, 68 Am. St. Rep. 777; Campbell *v.* Consalus, 25 N. Y. 613; Goodale *v.* Tuttle, 29 N. Y. 459.

North Carolina. — Shuster *v.* Perkins, 2 Jones L. (47 N. Car.) 217; Snow Steam Pump Works *v.* Dunn, 119 N. Car. 77; Debnam *v.* Chitty, 131 N. Car. 657.

Ohio. — Gibson *v.* McNeely, 11 Ohio St. 131; Armstrong *v.* Harvey, 11 Ohio St. 527; B'Hymer *v.* Sargent, 11 Ohio St. 682.

Oregon. — Glenn *v.* Savage, 14 Oregon 567; Nickum *v.* Gaston, 28 Oregon 322; Baker *v.* Williams, etc., Banking Co., (Oregon 1902) 70 Pac. Rep. 711; Adams *v.* Church, (Oregon 1902) 70 Pac. Rep. 1037.

Pennsylvania. — Philadelphia *v.* Ridge Ave. Pass. R. Co., 28 W. N. C. (Pa.) 106.

Rhode Island. — Providence *v.* Adams, 11 R. I. 190.

South Carolina. — Akers *v.* Rowan, 36 S. Car. 87; Gilchrist *v.* Martin, Bailey Eq. (S. Car.) 492.

Tennessee. — State *v.* Frost, 103 Tenn. 685; Gribble *v.* Wilson, 101 Tenn. 612; Upchurch *v.* Anderson, (Tenn. Ch. 1898) 52 S. W. Rep. 917; Daniels *v.* Pickett, (Tenn. Ch. 1900) 59 S. W. Rep. 148; Johnston *v.* Osmont, (Tenn. Ch. 1900) 59 S. W. Rep. 644.

Texas. — Foster *v.* Wells, 4 Tex. 101; Horton *v.* Hamilton, 20 Tex. 606; Linney *v.* Wood, 66 Tex. 22; Schneider-Davis Co. *v.* Brown, (Tex. Civ. App. 1898) 46 S. W. Rep. 108; Moore *v.* Moore, (Tex. Civ. App. 1899) 52 S. W. Rep. 565; Walraven *v.* Farmers', etc., Nat. Bank, (Tex. Civ. App. 1899) 53 S. W. Rep. 1028.

Vermont. — Tarbell *v.* Tarbell, 57 Vt. 492.

Virginia. — Kelly *v.* Hamblen, 98 Va. 383; Tarter *v.* Wilson, 95 Va. 19.

Washington. — De Mattos *v.* Jordan, 15 Wash. 378; Fogg *v.* Hoquiam, 23 Wash. 340; Bingham *v.* Keylor, 25 Wash. 156.

West Virginia. — Beckwith *v.* Thompson, 18 W. Va. 103; Doonan *v.* Glynn, 28 W. Va. 715; Dent *v.* Pickens, 50 W. Va. 382; Biern *v.* Rav, 49 W. Va. 129.

Wisconsin. — Lamontagne *v.* T. W. Harvey Lumber Co., 84 Wis. 331.

A Special Finding in an Equitable Action, made for the purpose of taking an appeal, has no conclusive effect upon the parties in a collateral suit, except to explain the scope of the judgment, where that is doubtful upon its face. Kashman *v.* Parsons, 70 Conn. 295.

Issues Withdrawn from the Case. — Palmer *v.* Sanger, 143 Ill. 34; Boykin *v.* Rosenfield, (Tex. Civ. App. 1893) 24 S. W. Rep. 323; Crebbin *v.* Bryce, 24 Tex. Civ. App. 532.

1. Questions Which Could Not Have Been Litigated — *California.* — Ramsbottom *v.* Bailey, 124 Cal. 259.

Colorado. — Water Supply, etc., Co. *v.* Larimer, etc., Reservoir Co., 25 Colo. 87.

Illinois. — Quinn *v.* Ohlerking, 37 Ill. App. 315.

Indiana. — Stringer *v.* Adams, 98 Ind. 539; Indianapolis, etc., R. Co. *v.* Center Tp., 130 Ind. 89.

Iowa. — Spinney *v.* Miller, 114 Iowa 210.

Massachusetts. — McIntire *v.* Linehan, 178 Mass. 263.

Michigan. — Nichols *v.* Marsh, 61 Mich. 509.

Mississippi. — Scully *v.* Lowenstein, 56 Miss. 652.

New Jersey. — Mershon *v.* Williams, 63 N. J. L. 398.

New York. — Barker *v.* Laney, 90 Hun (N. Y.) 108.

North Carolina. — McCall *v.* Zachary, 131 N. Car. 466.

South Dakota. — Cassill *v.* Morrow, 13 S. Dak. 109; Pitts *v.* Oliver, 13 S. Dak. 561.

Washington. — Harding *v.* Atlantic Trust Co., 26 Wash. 536.

Canada. — Hyde *v.* Lindsay, 29 Can. Sup. Ct. 595.

Legal and Equitable Issues. — A judgment at law cannot be conclusive as to issues purely equitable. Arnold *v* Grimes, 2 Iowa 1; McKinney *v.* Curtiss, 60 Mich. 611; Blanchard *v.* Pasteur, 2 Hayw. (3 N. Car.) 393; Owens *v.* Heidbreder, (Tex. Civ. App. 1898) 44 S. W. Rep. 1079; Bryant *v.* Hunters, 3 Wash. (U. S.) 48.

Thus a judgment at law that a deed is invalid for want of delivery does not preclude the vendee from resorting to a court of equity to enforce the instrument specifically as a contract to convey. Jenkins *v.* Harrison, 66 Ala. 345.

So an adjudication at law that certain acts constitute a valid and enforceable contract of sale is no bar to a bill in equity seeking relief from the sale on the ground of mistake. Scott *v.* Hall, 58 N. J. Eq. 42.

Criminal Indictments and Civil Actions. — A conviction under an indictment for illegally removing distilled spirits is not a bar to an action *in rem* to forfeit the spirits so removed. U. S. *v.* Three Copper Stills, 47 Fed. Rep. 495.

The dismissal, on demurrer, of an indictment against an innkeeper for not keeping his inn closed on Sunday is not a bar to the action of the board of excise commissioners in revoking the defendant's license for the same cause. People *v.* Excise Com'rs, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 884.

An acquittal under an indictment for a malicious injury to real property is not a bar to an action by the owner, under the statute, to

upon some other point, or otherwise, there is no estoppel.[1] And for stronger reasons is this true where the judgment expressly reserves the question.[2]

d. CHANGES OF CONDITION. — An adjudication is conclusive only as to those matters capable of being controverted between the parties at the time and as to conditions then existing, and cannot operate as an estoppel to another action or proceeding which, though involving the same rights passed upon, is yet predicated upon facts which have arisen subsequent to the former adjudication.[3]

recover treble the value of the property destroyed. Von Hoffman *v.* Kendall, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 713, 63 Hun (N. Y.) 628.

1. Matters in Issue but Not Decided — *England.* — Seddon *v.* Tutop, 6 T. R. 607, 1 Esp. 401.

United States. — Werlein *v.* New Orleans, 177 U. S. 390; Belleville, etc., R. Co. *v.* Leathe, (C. C. A.) 84 Fed. Rep. 103; Fayerweather *v.* Ritch, 88 Fed. Rep. 713; St. Joseph Union Depot Co *v.* Chicago, etc., R. Co., (C. C. A.) 89 Fed. Rep. 648; Thompson *v.* N. T. Bushnell Co , 80 Fed. Rep. 332; The Lindrup, 70 Fed. Rep. 718.

Iowa. — Kern *v.* Wilson, 82 Iowa 407.

Kansas. — Brury *v.* Smith, 8 Kan. App. 52.

Louisiana. — Fink *v.* Martin, 5 La. Ann. 103; Johns *v.* Race, 48 La. Ann. 1170.

Massachusetts. — Hamlin *v.* New York, etc., R. Co., 176 Mass. 514.

Missouri. — American Hardwood Lumber Co. *v.* Nickey, 89 Mo. App. 270.

Montana. — Gassert *v.* Black, 18 Mont. 35.

New Jersey. — Clark Thread Co. *v.* William Clark Co., 52 N. J. Eq. 658.

New York. — Sweet *v.* Tuttle, 14 N. Y. 465; Hoch *v.* Metropolitan El. R. Co., 59 Hun (N. Y.) 541; Robinson *v.* New York, etc., R. Co., 64 Hun (N. Y.) 41; Robinson *v.* Jewett, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 732.

South Carolina. — Hunter *v.* Hunter, 63 S. Car. 78. See also Duren *v.* Kee, 41 S. Car. 171.

Texas. — Converse *v.* Davis, 90 Tex. 462.

Washington. — McGee *v.* Wineholt, 23 Wash. 748.

Wisconsin. — Lanyon *v.* Woodward, 65 Wis. 543.

2. Questions Expressly Reserved — *Florida.* — Epstein *v.* Ferst, 35 Fla. 498.

Iowa. — Scribner *v.* York, 89 Iowa 737; Christie *v.* Iowa L. Ins. Co., 111 Iowa 177.

Massachusetts. — Low *v.* Low, 177 Mass. 306.

Missouri. — Loessing *v.* Loessing, 88 Mo. App. 494.

New York. — People *v.* Hall, 104 N. Y. 170.

North Carolina. — Faison *v.* Grandy, 128 N. Car. 438.

Rhode Island. — Glidden *v.* Whipple, 23 R. I. 304.

South Carolina. — Hill *v.* Gray, 45 S. Car. 91; Salinas *v.* Aultman, 45 S. Car. 283.

Tennessee. — Wolfe *v.* Potts, (Tenn. Ch. 1897) 42 S. W. Rep. 188; Condon *v.* Knoxville, etc , R. Co., (Tenn. Ch. 1895) 35 S. W. Rep. 781.

Texas. — Haralson *v.* St. Louis, etc., R. Co., (Tex. Civ. App. 1901) 62 S. W. Rep. 788.

3. Change of Condition — *England.* — Hall *v.* Levy, L. R. 10 C. P. 154, 44 L. J. C. Pl. 89, 23 W. R. 393, 31 L. T. N. S. 727.

Canada. — Stuart *v.* Mott, 23 Can. Sup. Ct. 153.

United States. — Pittsburgh, etc., R. Co. *v.* Keokuk, etc., Bridge Co., (C. C. A.) 107 Fed. Rep. 781.

Arkansas. — Weis *v.* Meyer, 55 Ark. 18; Hill *v.* Bryant, 61 Ark. 203.

California. — People *v.* Rodgers, 118 Cal. 393; Freman *v.* Marshall, 137 Cal. 159; Jones *v.* Petaluma, 36 Cal. 231.

Illinois. — Ligare *v.* Chicago, etc., R. Co., 166 Ill. 249.

Iowa. — Dwyer *v.* Goran, 29 Iowa 126.

Louisiana. — Martin *v.* Walker, 43 La. Ann. 1019.

Maine. — Ingraham *v.* Camden, etc., Water Co., 82 Me. 335.

Massachusetts. — Staple *v.* Spring, 10 Mass. 72; Kent *v.* Gerrish, 18 Pick. (Mass.) 564.

Minnesota. — Guilford *v.* Western Union Tel. Co., 59 Minn. 332, 50 Am. St. Rep. 407. See also Hibbs *v.* Marpe, 84 Minn. 12.

Missouri. — Meriwether *v.* Block, 31 Mo. App. 170.

New York. — Smith *v.* McCluskey, 45 Barb. (N. Y.) 610; Beckwith *v.* Griswold, 29 Barb. (N. Y.) 291.

North Carolina. — Robinson *v.* Lamb, 131 N. Car. 229; Rogers *v.* Ratcliff, 3 Jones L. (48 N. Car.) 225.

Pennsylvania. — Fernsler *v.* Seibert, (Pa. 1885) 1 Cent. Rep. 568; Morrison *v.* Beckey, 6 Watts (Pa.) 349; Smith *v.* Elliott, 9 Pa. St. 345.

Tennessee. — Hurst *v.* Means, 2 Sneed (Tenn.) 546.

Vermont. — Dewey *v.* St. Albans Trust Co., 60 Vt. 1, 6 Am. St. Rep. 84.

Wisconsin. — McFarlane *v.* Cushman, 21 Wis. 401.

Custody of Child. — An adjudication in regard to the custody of a minor child is conclusive only as to the state of facts then existing, and does not bind the court upon a subsequent proceeding in which a different state of facts is alleged. People *v.* Hickey, 86 Ill. App. 20; Lemunier *v.* McCearly, 37 La. Ann. 133; Weir *v.* Marley, 99 Mo. 484; People *v.* Mercein, 3 Hill (N. Y.) 399, 38 Am. Dec. 644.

Grounds for Divorce. — A judgment for the defendant in an action for divorce does not bar a second action for causes arising subsequent to the entry of the former judgment. Wagner *v.* Wagner, 104 Cal. 293; Glaude *v.* Peat, 43 La. Ann. 161.

Appointment of Receiver. — A refusal before judgment to appoint a receiver of mortgaged property is not a bar to an application made more than a year after judgment of foreclosure, where changes have taken place in the value and circumstances of the property and the responsibility of the debtor. Nash *v.* Meggett, 89 Wis. 486.

Expiration of Privilege. — The refusal of an application to commit a person for contempt,

4. Identity of Subject, Cause of Action, and Issue. — *a.* RULE STATED. — The rule is commonly laid down that in order to render a matter *res judicata* there must be a concurrence of four conditions, viz.: (1) Identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality in the persons for or against whom the claim is made.[1]

b. IDENTITY OF THING SUED FOR. — In respect to the first requisite the rule must be taken with considerable qualification. While it is ordinarily true that the plea of *res judicata* or estoppel cannot be interposed where a second action, though between the same parties, concerns a different thing from that involved in the first, this does not proceed from the want of identity in the thing sued for, but rather from the want of identity in the issues involved in the two actions. If the diversity of objects produces a diversity of issues, as where title to [2] or right to recover [3] different subjects of property is involved, there is no room for the operation of the rule. But if the two actions, although they may involve the right to different things, put in issue a common matter of fact as a necessary ground of recovery, its adjudication in the first suit is conclusive upon the second.[4] So, on the other hand, an identity in the thing sued for will not support the plea if in the second action it be claimed by a different right not involved in the first action.[5]

c. IDENTITY OF CAUSE OF ACTION — (1) *In General.* — The same qualification must be applied to the second requisite. While it is sometimes said that to sustain a plea of *res judicata* the cause of action must be identical with that declared on in the former suit whose judgment is pleaded in bar,[6] yet, except in *Louisiana* where the Civil Code makes this a requisite,[7] the

on the ground of privilege as a member of Parliament, does not bar a second application after such privilege has expired. *In re* Anglo-French Co-operation Soc., 14 Ch. D. 533.

Right to Claim Homestead. — A decree denying a right of homestead in land held under a contract of purchase does not prevent the consideration of a subsequent application after the purchase money has been paid. Munro *v.* Jeter, 24 S. Car. 29.

Removal of Disability by Legislation. — An adjudication that a contract is invalid for want of authority in a county to make it does not bar an action on such contract after it has been legalized by act of the legislature. Steele County *v.* Erskine, (C. C. A.) 98 Fed. Rep. 215. Nor does an adjudication that certain devisees, being aliens, could take no interest under a will estop them from asserting their rights when subsequent legislation has removed their disability. McGillis *v.* McGillis, 154 N. Y. 532.

Liability to Taxation. — An adjudication that property is exempt from taxation is not conclusive after the corporation claiming the exemption has changed its business, Memphis City Bank *v.* Tennessee, 161 U. S. 186, or the charter under which such exemption was claimed has been amended, Louisville Third Nat. Bank *v.* Stone, 174 U. S. 432; Newport *v.* Masonic Temple Assoc., 103 Ky. 592; Shuck *v.* Lebanon, 107 Ky. 252.

Title Subsequently Acquired. — People *v.* Holladay, 93 Cal. 241, 27 Am. St. Rep. 186; People *v.* Smith, 93 Cal. 490; State University *v.* Maultsby, 2 Jones Eq. (55 N. Car.) 241; Woodbridge *v.* Banning, 14 Ohio St. 328; McKissick *v.* McKissick, 6 Humph. (Tenn.) 75.

Character of Applicant for Liquor License. — State *v.* Higgins, 84 Mo. App. 531.

1. Identity of Subject, Cause of Action and Issue. — Bouv. L. Dict.; Lyon *v.* Perin, etc., Mfg. Co., 125 U. S. 698; Atchison, etc., R. Co. *v.* Jefferson County, 12 Kan. 127; Winham *v.* Kline, 77 Mo. App. 36; Mershon *v.* Williams, 63 N. J. L. 398.

2. Title to Different Parcels of Land. — Long *v.* Louisville, etc., R. Co., (Ky. 1899) 51 S. W. Rep. 807; Oaks *v.* West, (Tex. Civ. App. 1901) 64 S. W. Rep. 1033.

Mortgages of Different Parcels of Land. — Fessenden *v.* Barrett, 50 Fed. Rep. 690; Brill *v.* Shively, 93 Cal. 674; Dooley *v.* Potter, 140 Mass. 49.

3. Right to Recover Different Objects. — Poor *v.* Darrah, 5 Houst. (Del.) 394; Milligan *v.* Browarsky, 147 Pa. St. 155; Morton *v.* Morris, (Tex. Civ. App. 1901) 66 S. W. Rep. 94.

4. Diversity of Objects but Identity of Issue. — Flanagin *v.* Thompson, 4 Hughes (U. S.) 421; Baxter *v.* Myers, 85 Iowa 328, 39 Am. St. Rep. 298; Peterson *v.* Warner, 6 Kan. Ann. 298; Hanson *v.* Hanson, (Neb. 1902) 90 N. W. Rep. 208.

5. Identity of Subject, but Claimed by Different Right. — Morrison *v.* Clark, 89 Me. 103, 56 Am. St. Rep. 395. See also Linne *v.* Stout, 44 Minn. 110.

6. Identity of Cause of Action. — Davis *v.* Sexton, 35 Ill. App. 407; Edwards *v.* Ballard, 14 La. Ann. 362; Dunlap *v.* Edwards, 29 Miss. 41; Winham *v.* Kline, 77 Mo. App. 36; Matthews *v.* Roberts, 2 N. J. Eq. 338; Gates *v.* Goreham, 5 Vt. 317, 26 Am. Dec. 303.

7. Under Rev. Civ. Code La. (1900), art. 2286, to support a plea of *res judicata* the thing demanded must be the same, and the demand must be founded upon the same cause of action. Peyton *v.* Enos, 16 La. Ann. 135; Cantrelle *v.* Roman Catholic Cong., 16 La. Ann.

decisions do not support the statement. The rule to which the great majority of cases conform is that a judgment in a former suit is conclusive upon a subsequent one between the same parties or their privies, though upon a different cause of action, if the issues presented in the second suit were involved and fully determined in the first.[1]

(2) *Different Causes of Action Arising from the Same Transaction.* — Hence, when an issue going to the merits of two or more actions arising from the same transaction is determined upon the hearing of the first action, judgment therein may be pleaded as *res judicata* to the subsequent ones.[2]

Notes of a Series. — Thus, a judgment on one of a series of notes given upon the same transaction and consideration is conclusive in actions upon the others if the judgment be rendered upon some issue which involves the validity of the whole transaction.[3]

(3) *Different Causes of Action Arising from the Same Contract.* — And so in respect to different causes of action arising from the same contract. A judgment rendered in an action for one of a series of payments due under a contract is conclusive in actions for subsequent instalments upon all issues involving the validity of the contract which were litigated in the first action.[4]

442; Lewis *v.* New Orleans Sav. Inst., 33 La. Ann. 1463; Liquidating Com'rs *v.* Marrero, 106 La. 130; Sample *v.* Scarborough, 44 La. Ann. 288; State *v.* American Sugar Refining Co., 108 La. 603.

1. Different Causes of Action, but Identity of Issue. — New Orleans *v.* Citizens' Bank, 167 U. S. 371; Stevens *v.* Wadleigh, (Ariz. 1899) 57 Pac. Rep. 622; Betts *v.* Starr, 5 Conn. 550, 13 Am. Dec. 94; Reynolds *v.* Mandel, 73 Ill. App. 379; Lynch *v.* Swanton, 53 Me. 100; Harlow *v.* Bartlett, 170 Mass. 584; Harrison *v.* Wallton, 95 Va. 721, 64 Am. St. Rep. 830.

2. Different Causes of Action Arising from the Same Transaction. — Rio Grande Western R. Co. *v.* Telluride Power Transmission Co., 23 Utah 22.

A sold B certain personal property. C, a constable, levied upon the property by virtue of attachments recovered by A's creditors. B subsequently sold a part of the property and C sued him for the conversion, alleging that the bill of sale from A was fraudulent as to his creditors, and recovered judgment. It was held that the judgment was conclusive upon the issue of fraud in a subsequent action by B against C to recover the residue of the property. Doty *v.* Brown, 4 N. Y. 71. See also McDowell *v.* Gibson, 58 Kan. 607.

A party sued a railroad company for the trespass of its agent in going upon the plaintiff's land and removing rails which the railroad company had rented to the plaintiff. Judgment was given for the defendant on the ground that the plaintiff had failed to pay the rental for the rails, and that the defendant had the right to remove them. Subsequently the plaintiff sued the defendant for the assault of its agent in forcibly removing him from the track during the process of taking up the rails. It was held that the right of the defendant to enter upon the plaintiff's land and to remove the rails was *res judicata*, and that the defendant was not liable for an assault necessarily made in the exercise of this right, provided excessive force was not used. Willoughby *v.* North Eastern R. Co., 52 S. Car. 166.

When Several Conveyances Are Alleged to Be the Product of the Same Fraud. — Coyle *v.* Ward, 36 N. Y. App. Div. 181.

3. Notes of a Series — *Georgia.* — Freeman *v.* Bass, 34 Ga. 355, 89 Am. Dec. 255.

Indiana. — Felton *v.* Smith, 88 Ind. 149, 45 Am. Rep. 454; Cleveland *v.* Creviston, 93 Ind. 31, 47 Am. Rep. 367.

Kansas. — Furneaux *v.* Whitewater First Nat. Bank, 39 Kan. 144, 7 Am. St. Rep. 541; Peru Plow, etc., Co. *v.* Ward, 6 Kan. App. 289.

Nebraska. — Gilmore *v.* Whiteman, 50 Neb. 760.

New York. — Graham, etc., Co. *v.* Van Horn, (Supm. Ct. Spec. T.) 49 N. Y. Supp. 401; Crompton, etc., Loom Works *v.* Brown, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 319; Higgins *v.* Mayer, (Supm. Ct. Spec. T.) 10 How. Pr. (N. Y.) 363; Treadwell *v.* Stebbins, 6 Bosw. (N. Y.) 538.

Pennsylvania. — Amshel *v.* Hosenfeld, 20 Pa. Super. Ct. 373.

4. Judgment in Action to Recover Instalment of Commissions. — Everett *v.* New York Engraving, etc., Co., (N. Y. City Ct. Gen. T.) 19 Misc. (N. Y.) 360; Ward *v.* Sire, 52 N. Y. App. Div. 443.

Judgment in Action for Instalment of Purchase Money. — French *v.* Howard, 14 Ind. 455.

Judgment in Action for Assessment under Mutual Insurance Policy. — Orr *v.* Mercer County Mut. F. Ins. Co , 114 Pa. St. 387.

Judgment in Action for Instalment of Salary. — Freeman *v.* Barnum, 131 Cal. 386; Kennedy *v.* McCarthy, 73 Ga. 346; Allen *v.* International Text Book Co., 201 Pa. St. 579; Everill *v.* Swan, 20 Utah 56.

Judgment in Action for Instalment of Rent — *England.* — Howlett *v.* Tarte, 10 C. B. N. S. 814, 100 E. C. L. 814.

United States. — Whitney *v.* Butler, 118 U. S. 655; Oregonian R. Co. *v.* Oregon R., etc., Co., 27 Fed. Rep. 277.

California. — Love *v.* Waltz, 7 Cal. 250.

Illinois. — Marshall *v.* John Grosse Clothing Co., 184 Ill. 421, 75 Am. St. Rep. 181.

Michigan. — Jacobson *v.* Miller, 41 Mich. 90; Jenkinson *v.* Wysner, 125 Mich. 89.

(4) *Continuing Trespass or Nuisance.* — In an action for the continuance of a trespass or nuisance, a judgment in a former action for the same cause is admissible as evidence of the existence of the wrong, and becomes conclusive as to the plaintiff's right to recover when supported by evidence that there has been no change of condition since the former judgment was rendered.[1]

d. IDENTITY OF ISSUE. — From these illustrations it will appear that it is not the identity of the thing sued for, or of the cause of action, which determines the conclusiveness of a former judgment upon a subsequent action, but merely the identity of the issue involved in the two suits. If an issue presented in a subsequent suit between the same parties or their privies is shown to have been determined in a former one, the question is *res judicata*,[2] although the actions are based on different grounds,[3] or tried on different theories,[4]

New York. — Tysen *v.* Tompkins, 10 Daly (N. Y.) 244; Burdick *v.* Cameron, 10 N. Y. App. Div. 589; Huber *v.* Ryan, 57 N. Y. App. Div. 34.

Washington. — Dolan *v.* Scott, 25 Wash. 214.

A Judgment in an Action upon a Coupon from a Municipal Bond, adjudging the plaintiff to be the *bona fide* holder thereof, is conclusive as to the validity of the bond in his hands in a subsequent action by the city to obtain its surrender. Paterson *v.* Baker, 51 N. J. Eq. 49.

A Judgment upon an Action to Recover an Instalment of Interest due upon a promissory note is conclusive, in a subsequent action to recover the principal, in respect to all issues concerning the validity of the note which were litigated therein. Linton *v.* National L. Ins. Co., (C. C. A.) 104 Fed. Rep. 584; Louisiana State Bank *v.* Orleans Nav. Co., 3 La. Ann. 294; Black River Sav. Bank *v.* Edwards, 10 Gray (Mass.) 387; Edgell *v.* Sigerson, 26 Mo. 583.

1. Continuing Trespass — Diversion of Stream. — Gallagher *v.* Kingston Water Co., 25 N. Y. App. Div. 82; Schoch *v.* Foreman, 3 Brews. (Pa.) 157; Long *v.* Trexler, (Pa. 1887) 8 Atl. Rep. 620.

Continuing Nuisance. — Richardson *v.* Boston, 19 How. (U. S.) 263; Shepherd *v.* Willis, 19 Ohio 142; Hartman *v.* Pittsburg Incline Plane Co., 11 Pa. Super. Ct. 438.

2. Identity of Issues. — Hunter *v.* Stewart, 4 De G. F. & J. 168, 31 L. J. Ch. 346, 8 Jur. N. S. 317, 5 L. T. N. S. 471, 10 W. R. 176; Union Steam-Pump Co. *v.* Battle Creek Steam-Pump Co., (C. C. A.) 104 Fed. Rep. 337; Lorillard *v.* Clyde, 48 N. Y. Super. Ct. 409.

3. Actions Based on Different Grounds — *England.* — Macdougall *v.* Knight, 25 Q. B. D. 1; Marriott *v.* Hampton, 7 T. R. 265.

United States. — Southern Pac. R. Co. *v.* U. S., 168 U. S. 1; Columb *v.* Webster Mfg. Co., (C. C. A.) 84 Fed. Rep. 592.

Kentucky. — McCain *v.* Louisville, etc., R. Co., 97 Ky. 804.

Minnesota. — O'Brien *v.* Manwaring, 79 Minn. 86.

New Jersey. — Putnam *v.* Clark, 34 N. J. Eq. 532.

New York. — Taylor *v.* Taylor, 63 Hun (N. Y.) 303.

Ohio. — Martin *v.* Roney, 41 Ohio St. 141.

Wisconsin. — Grunert *v.* Spalding, 104 Wis. 193.

A judgment for the defendant in an action for malicious prosecution is a bar to a subsequent suit against him for slander for the same accusation as the one upon which he was arrested, and for which he brought his action for malicious prosecution, though said slanderous words were uttered on a different occasion, provided they were uttered before the suit for malicious prosecution was commenced. Tidwell *v.* Witherspoon, 21 Fla. 359, 58 Am. Rep. 665.

K., a junior mortgagee, sued his mortgagor and the senior mortgagee to have his mortgage lien adjudged prior to that of the senior mortgagee, alleging specific acts of fraud on the part of the senior mortgagee by which he was induced to accept his junior mortgage. The cause was determined adversely to K., and in favor of the senior mortgagee. Afterwards K. commenced an action to have a deed which he had executed to the senior mortgagee, and which was in fact the consideration for K.'s mortgage, annulled on the ground of fraud in the procurement thereof, alleging the same facts alleged in the former suit. It was held that he was estopped by the former adjudication. King *v.* Co-operative Sav., etc., Assoc., (Idaho 1899) 59 Pac. Rep. 557.

4. Actions Tried on Different Theories. — Hubbell *v.* U. S., 171 U. S. 203; Quirk *v.* Rooney, 130 Cal. 505.

A plaintiff who prosecutes an action on the theory that an obstruction of a way by a defendant constitutes a private nuisance cannot, after judgment has gone against him, maintain a second action on the theory that the obstruction constitutes a public nuisance. Phelan *v.* Quinn, 130 Cal. 374.

A plaintiff who brings an action against an attorney as such to recover damages for the latter's negligence in not collecting a judgment cannot, upon his failure to recover, bring another action against the same defendant alleging the same facts, but counting on the defendant's negligence as assignee. Nickless *v.* Pearson, 126 Ind. 477.

A creditor who obtains a judgment against a corporation and, because an execution thereon is returned unsatisfied, brings a proceeding against a stockholder of the corporation to establish a stockholder's liability on the judgment will not afterwards be permitted to amend his petition and change his proceeding by alleging the dissolution of the corporation, and basing his right of recovery against the stockholder on the promissory notes which had been merged in the judgment originally set up and made the basis of the claim against the stockholder. Remington Paper Co. *v.* Hudson, 64 Kan. 43.

or are instituted for different purposes and seek different relief.[1]

The Test of Identity is found in the inquiry whether the same evidence will support both actions.[2]

5. Matters Which Might Have Been Litigated — *a.* ACTIONS FOR THE SAME CAUSE — (I) *Statement of the Rule.* — The rule is well settled that a judgment of a court of competent jurisdiction, delivered upon the merits of a cause, is final and conclusive between the parties in a subsequent action upon the same cause, not only as to all matters actually litigated and determined in the former action, but also as to every ground of recovery[3]

1. McGrady *v.* Monks, 1 Tex. Civ. App. 611.

2. **Test of Identity** — *England.* — Hunter *v.* Stewart, 4 De G. F. & J. 168, 31 L. J. Ch. 346, 8 Jur. N. S. 317, 5 L. T. N. S. 471, 10 W. R. 176; Kitchen *v.* Campbell, 3 Wils. C. Cl. 304, 2 W. Bl. 827; Brunsden *v.* Humphrey, 14 Q. B. D. 141, *reversing* 11 Q. B. D. 712.

United States. — Stone *v.* U. S., 29 U. S. App. 32.

Georgia. — Crockett *v.* Routon, Dudley (Ga.) 254.

Iowa. — Hahn *v.* Miller, 68 Iowa 745; Hawk *v.* Evans, 76 Iowa 593, 14 Am. St. Rep. 247; Prouty *v.* Matheson, 107 Iowa 259.

New York. — Marsh *v.* Masterson, 50 N. Y. Super. Ct. 187.

3. **Matters Which Might Have Been Litigated** — *England.* — Henderson *v.* Henderson, 3 Hare 100.

United States. — Cromwell *v.* Sac County, 94 U. S. 351; Aurora City *v.* West, 7 Wall. (U. S.) 82; Beloit *v.* Morgan, 7 Wall. (U. S.) 622; Stockton *v.* Ford, 18 How. (U. S.) 418; Patterson *v.* Wold, 33 Fed. Rep. 791; Farwell *v.* Brown, 35 Fed. Rep. 811; McAleer *v.* Lewis, 75 Fed. Rep. 734; Lake County *v.* Platt, (C. C. A.) 79 Fed. Rep. 567; Holt County *v.* National L. Ins. Co., (C. C. A.) 80 Fed. Rep. 686; Linton *v.* National L. Ins. Co., (C. C. A.) 104 Fed. Rep. 584.

Alabama. — Mervine *v.* Parker, 18 Ala. 241.

California. — Sullivan *v.* Triunfo Gold, etc., Min. Co., 39 Cal. 459.

Connecticut. — Hungerford's Appeal, 41 Conn. 322; Wildman *v.* Wildman, 70 Conn. 700.

Delaware. — Hollis *v.* Morris, 2 Harr. (Del.) 128.

Georgia. — Thweatt *v.* Kiddoo, 58 Ga. 300; Ryan *v.* Kingsbery, 89 Ga. 228; Wilson *v.* Williams, 115 Ga. 474.

Illinois. — Rogers *v.* Higgins, 57 Ill. 244; Kelly *v.* Donlin, 70 Ill. 378, Ruegger *v.* Indianapolis, etc., R. Co , 103 Ill. 449; Bailey *v.* Bailey, 115 Ill. 551; Bennitt *v.* Wilmington Star Min. Co., 119 Ill. 9; Litch *v.* Clinch, 136 Ill. 410; Louisville, etc., R. Co. *v.* Carson, 169 Ill. 247; Allen *v.* Haley, 169 Ill. 532; Springer *v.* Darlington, 198 Ill. 121; Harvey *v.* Aurora, etc., R. Co., 186 Ill. 283; Terre Haute, etc., R. Co. *v.* Peoria, etc., R. Co., 81 Ill. App. 435, *affirmed* 182 Ill. 501; Ingwersen *v.* Buchholz, 88 Ill. App. 73; Nilson *v.* Home Bldg., etc., Assoc., 96 Ill. App. 235; West Chicago St. R. Co. *v.* Anderson, 102 Ill. App. 310.

Indiana. — Bates *v.* Spooner, 45 Ind. 489; Ulrich *v.* Drischell, 88 Ind. 354; Storm *v.* Ermantrout, 89 Ind. 214; Hose *v.* Allwein, 91 Ind. 501; Elwood *v.* Beymer, 100 Ind. 504; Kurtz *v.* Carr, 105 Ind. 574; Center Tp. *v.* Marion County, 110 Ind. 579; Jarboe *v.* Severin, 112 Ind. 572; Fischli *v.* Fischli, 1 Blackf. (Ind.) 360, 12 Am. Dec. 251.

Iowa. — Campbell *v.* Ayers, 1 Iowa 257; Keokuk County *v.* Alexander, 21 Iowa 377.

Kansas. — Townsdin *v.* Shrader, 39 Kan. 286.

Kentucky. — Locke *v.* Com., 69 S. W. Rep. 763, 24 Ky. L. Rep. 654.

Louisiana. — Rareshide *v.* Enterprise Ginning, etc., Co., 43 La. Ann. 820.

Maine. — Buck *v.* Collins, 69 Me. 445.

Maryland. — State *v.* Brown, 64 Md. 199.

Michigan. — Sayers *v.* Auditor Gen., 124 Mich. 259.

Minnesota. — Thompson *v.* Myrick, 24 Minn. 4.

Mississippi. — Burford *v.* Kersey, 48 Miss. 642; Gaines *v.* Kennedy, 53 Miss. 103.

Missouri. — Laffoon *v.* Fretwell, 24 Mo. App. 258.

New Hampshire. — Berry *v.* Whidden, 62 N. H. 473.

New Mexico. — Territory *v.* Santa Fe Pac. R Co., 10 N. Mex. 410; Armijo *v.* Mountain Electric Co., (N. Mex. 1902) 67 Pac. Rep. 726.

New York. — Embury *v.* Conner, 3 N. Y. 511, 53 Am. Dec. 325; Doty *v.* Brown, 4 N. Y. 71, 53 Am. Dec. 350; Clemens *v.* Clemens, 37 N. Y. 59; Bloomer *v.* Sturges, 58 N. Y. 168; Tuska *v.* O'Brien, 68 N. Y. 446; Smith *v.* Smith, 79 N. Y. 634; Jordan *v.* Van Epps, 85 N. Y. 427; Patrick *v.* Shaffer, 94 N. Y. 423; Pray *v.* Hegeman, 98 N. Y. 351; Fairchild *v.* Lynch, 99 N. Y. 359; Griffin *v.* Long Island R. Co., 102 N. Y. 449; Goebel *v.* Iffla, 111 N. Y. 170; Campbell Printing Press, etc., Co. *v.* Walker, 114 N. Y. 7; Lorillard *v.* Clyde, 122 N. Y. 41, 19 Am. St. Rep. 470; Burdick *v.* Post, 12 Barb. (N. Y.) 168; Harris *v.* Harris, 36 Barb. (N. Y.) 88; Burt *v.* Sternburgh, 4 Cow. (N. Y.) 559, 15 Am. Dec. 402; Phillips *v.* Berick, 16 Johns. (N. Y.) 136, 8 Am. Dec. 299; Wilson *v.* Sanger, 57 N. Y. App. Div. 323; Brawner *v.* Fahy, 64 N. Y. App. Div. 122; Bracken *v.* Atlantic Trust Co., 36 N. Y. App. Div. 67; Ritchie *v.* Talcott, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 412.

Ohio. — Covington, etc., Bridge Co. *v.* Sargent, 27 Ohio St. 233; Roby *v.* Rainsberger, 27 Ohio St. 674; Petersine *v.* Thomas, 28 Ohio St. 596; Raymond *v.* Ross, 40 Ohio St. 343; Desnoyers *v.* Dennison, 10 Ohio Cir. Dec. 430, 19 Ohio Cir. Ct. 320; Werner *v.* Cincinnati, 23 Ohio Cir. Ct. 475.

Oregon. — Barrett *v.* Failing, 8 Oregon 152; Neil *v.* Tolman, 12 Oregon 289.

Pennsylvania. — Pennock *v.* Kennedy, 153 Pa. St. 579; Ahl's Estate, 169 Pa. St. 609; Raisig *v.* Graf, 17 Pa. Super. Ct. 509; Corry *v.* Corry Chair Co., 18 Pa. Super. Ct. 271.

South Carolina. — Ruff *v.* Doty, 26 S. Car.

or defense [1] which might have been presented and determined therein. This rule is applied both at law and in equity. Thus, a court of equity will not

173, 4 Am. St. Rep. 709; Newell *v.* Neal, 50 S. Car. 68; McDowall *v.* McDowall, Bailey Eq. (S. Car.) 324.

Tennessee. — Knight *v.* Atkisson, 2 Tenn. Ch. 384; Boyd *v.* Robinson, 93 Tenn. 3; Lindsley *v.* Thompson, 1 Tenn. Ch. 272; Daniel *v.* Gum, (Tenn. Ch. 1897) 45 S. W. Rep. 468; Vance *v.* McNabb Coal, etc., Co., (Tenn. Ch. 1897) 48 S. W. Rep. 235.

Texas. — Cook *v.* Burnley, 45 Tex. 97.

Vermont. — Parkhurst *v.* Sumner, 23 Vt. 538, 56 Am. Dec. 94.

Virginia. — Shenandoah Valley R. Co. *v.* Griffith, 76 Va. 913; Diamond State Iron Co. *v.* Rarig, 93 Va. 595; Beale *v.* Gordon, (Va. 1895) 21 S. E. Rep. 667.

West Virginia. — Biern *v.* Ray, 49 W. Va. 129.

Wisconsin. — Pierce *v.* Kneeland, 9 Wis. 24; Danaher *v.* Prentiss, 22 Wis. 311.

Application of the Rule. — "The rule that what has been judicially determined shall not again be made the subject of controversy extends to every question in the proceedings which was legally cognizable, and applies where a party has neglected the opportunity of trial, or has failed to present his cause or defense in whole or in part under the mistaken belief that the matter would remain open and could be made the subject of another proceeding." Schwan *v.* Kelly, 173 Pa. St. 65, *quoted* in Corry *v.* Corry Chair Co., 18 Pa. Super. Ct. 271.

A judgment for the defendant in an action to recover a debt litigated on the theory that the defendant is liable individually is a bar to a subsequent action against the defendant as a surviving partner, since his liability as such could have been tried in the former action. Wilcox *v.* Gilchrist, 85 Hun (N. Y.) 1.

Where an Issue Is Raised in a Suit and is not withdrawn, the judgment is conclusive as to it although no evidence in support of it was produced, and no decision regarding it was rendered. Schmidt *v.* Zahensdorf, 30 Iowa 498.

The Acceptance of a General Offer of Judgment and entry thereof concludes the party accepting it from bringing a new action for any part of the claim embraced in the complaint, and which it might have litigated in the former action. Davies *v.* New York, 93 N. Y. 250.

A Judgment Confirming the Report of a Referee is a bar to any claim which ought to have been set up in that reference. Williams *v.* Batchelor, 90 N. Car. 364.

A Defendant in Replevin who recovers judgment for the return of the property, but who neglects to ask damages for the detention or depreciation of the property, cannot recover them in a separate action. Drewyour *v.* Merrell, 112 Mich. 681; Teel *v.* Miles, 51 Neb. 542.

After a Suit for Divorce and Alimony has been finally determined by the court granting the divorce, and in lieu of alimony confirming an executed agreement as to the amount paid as alimony, a new action for additional alimony cannot be maintained when the reasons for such additional allowance existed or might have been provided for in such final judgment, and when it is not sought to impeach such final judgment. Petersine *v.* Thomas, 28 Ohio St. 596. See also Roe *v.* Roe, 52 Kan. 724, 39 Am. St. Rep. 367.

A Judgment Dissolving a Prior Injunction is a bar to any inquiry into the grounds for the injunction existing anterior to that judgment, and of which the party might then have availed himself. McMicken *v.* Morgan, 9 La. Ann. 208.

1. Matters of Defense Which Might Have Been Pleaded — *United States.* — Cromwell *v.* Sac County, 94 U. S. 352.

Alabama. — Gatchell *v.* Foster, 94 Ala. 622; Peet *v.* Hatcher, 112 Ala. 514, 57 Am. St. Rep. 45.

Iowa. — Lawrence Sav. Bank *v.* Stevens, 46 Iowa 429.

Mississippi. — Jones *v.* Merrill, 69 Miss. 747.

New York. — McLaughlin *v.* Great Western Ins. Co., (C. Pl. Gen. T.) 20 N. Y. Supp. 536; Jacobie *v.* Mickle, (Supm. Ct. Gen. T.) 24 N. Y. Supp. 87.

South Carolina. — Perkins *v.* Perkins, 49 S. Car. 563; Carrigan *v.* Drake, 36 S. Car. 354.

Utah. — Everill *v.* Swan, 20 Utah 56.

Vermont. — Bishop *v.* Baldwin, 14 Vt. 145.

A Defendant in an Action to Foreclose a Mortgage cannot plead as a defense matter which might have been advanced in a previous action to cancel the mortgage for duress and want of consideration. Davidson *v.* Weed, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 147.

A Defendant to an Action upon a Delivery Bond cannot plead as a defense a matter which might have been set up in the action in which such bond was given. Tucker *v.* Carr, 20 R. I. 477, 78 Am. St. Rep. 893.

A Stockholder of a Corporation Sued on a Judgment Against It cannot plead want of power in the corporation to make the contract upon which the judgment against it was rendered, since the plea of *ultra vires* might have been raised by the corporation in the action against it. Singer *v.* Hutchinson, 183 Ill. 606, 75 Am. St. Rep. 133.

A Party to a Proceeding to Establish a Copy of a Lost Note cannot plead *non est factum* to a subsequent action on the established copy. Vaughn *v.* Drewry, 79 Ga. 761.

The Defendant in a Mandamus Proceeding to enforce the collection of a judgment is estopped to plead matters which might have been urged by way of defense in the tribunal in which the judgment was entered. U. S. *v.* New Orleans, 98 U. S. 381; Ralls County Ct. *v.* U. S., 105 U. S. 733; Hartson *v.* Shanklin, 57 Cal. 558; Chicago *v.* Sansum, 87 Ill. 182; Harkness *v.* Hutcherson, 90 Tex. 383; Smith *v.* Ormsby, 20 Wash. 396, 72 Am. St. Rep. 110; State *v.* Gloyd, 14 Wash. 5; State *v.* Gates, 22 Wis. 210.

Statute of Frauds. — In an action for breach of contract the defendant cannot plead that the contract is void because not in writing when such defense might have been interposed to the former action for money due under such contract. Foulke *v.* Thalmessinger, 1 N. Y. App. Div. 598, *affirmed* 158 N. Y. 725.

In an Action to Recover a Second Instalment of Rent due, the lessee is barred from raising a

grant a relief which might have been had in a prior action at law;[1] nor, on the other hand, will a court of law entertain an action for a cause which might have been taken advantage of in a prior suit in equity.[2]

(2) *Failure to Plead Payment or Credits.* — If a defendant to an action upon a note or bond fails to plead a payment made thereon, the fact of pay-

question concerning the validity of the lease which might have been raised in the action for the first instalment of the rent. Marshall *v.* John Grosse Clothing Co., 83 Ill. App. 338, *affirmed* in 184 Ill. 421, 75 Am. St. Rep. 181; Louisville, etc., R. Co. *v.* Carson, 169 Ill. 247; Phipps *v.* Oprandy, 69 N. Y. App. Div. 497.

Defenses Which Might Have Been Pleaded to an Action for the Foreclosure of a Mortgage will not be heard in a subsequent action for possession of the property under the foreclosure sale. Mally *v.* Mally, 52 Iowa 654.

A Defendant to a Creditor's Bill to Subject Land to the Satisfaction of a Judgment cannot plead a defense which might have been pleaded to the action in which the judgment was recovered. Baxter *v.* Myers, (Iowa 1891) 47 N. W. Rep. 879; Swinford *v.* Teegarden, 159 Mo. 635; Lee *v.* McKoy, 118 N. Car. 518. See also Bush *v.* Thomasville Bank, 111 Ga. 664.

A Defendant to an Action upon a Note Given in Satisfaction of a Judgment cannot plead a defense which might have been set up to the original action. Lagerquist *v.* Williams, 74 Ill. App. 17; Henry *v.* Sansom, 2 Tex. Civ. App. 150.

A Suit to Set Aside a Will on the ground of the mental incapacity of the testator will not be entertained if the plaintiff was a party to a prior action in which the validity of the will was directly put in issue and sustained. Faught *v.* Faught, 98 Ind. 470.

An Action Cannot Be Maintained for a Cause Which Might Have Been Pleaded as a Defense to a prior action between the same parties.

Kentucky. — Hardwicke *v.* Young, (Ky. 1901) 62 S. W. Rep. 10; Shaw *v.* Milby, (Ky. 1901) 63 S. W. Rep. 577.

Maine. — White *v.* Savage, 94 Me. 138.

Maryland. — Trayhern *v.* Colburn, 66 Md. 277.

Missouri. — Lyman *v.* Milwaukee Harvester Co., 68 Mo. App. 637.

New York. — Nemetty *v.* Naylor, 100 N. Y. 562.

North Carolina. — Evans *v.* Cumberland Mills, 118 N. Car. 583.

Pennsylvania. — Lancaster *v.* Frescoln, 192 Pa. St. 452.

An Insurer Cannot Recover Money Paid in Satisfaction of a Judgment recovered upon a policy issued by it on a ground which might have been pleaded as a defense to the action on the policy. New York L. Ins. Co. *v.* Weaver, (Ky. 1902) 70 S. W. Rep. 628.

A Defendant Who Fails to Plead Usury to an action against him upon a contract for the payment of money cannot recover the usurious interest by a subsequent action. Charles *v.* Davis, 62 N. H. 375; Heath *v.* Frackleton, 20 Wis. 320, 91 Am. Dec. 405. It is otherwise under some of the statutes against usury. Ross *v.* Ross, 3 Met. (Ky.) 274. See also Ryan *v.* Southern Bldg., etc., Assoc., 50 S. Car. 185, 62 Am. St. Rep. 831.

1. Thus, a Court of Equity Will Not Enjoin the Execution or Collection of a Judgment for a cause which might have been pleaded as a defense to the action in which the judgment was rendered.

United States. — Tompkins *v.* Drennen, 56 Fed. Rep. 694, 13 U. S. App. 308.

Illinois. — Warren *v.* Cook, 116 Ill. 199.

Iowa. — Fulliam *v.* Drake, 105 Iowa 615.

Kentucky. — Wren *v.* Ficklin, (Ky. 1900) 59 S. W. Rep. 746.

Louisiana. — Ludeling *v.* Chaffe, 40 La. Ann. 645; Choppin *v.* Union Nat. Bank, 47 La. Ann. 660.

Missouri. — Caldwell *v.* White, 77 Mo. 471.

Tennessee. — Arnold *v.* Kyle, 8 Baxt. (Tenn.) 319.

Nor Will a Judgment Be Vacated for a cause which might have been pleaded as a defense to the action. Barksdale *v.* Greene, 29 Ga. 418; Owen *v.* Gibson, 74 Ga. 465; Ruff *v.* Doty, 26 S. Car. 173, 4 Am. St. Rep. 709; Evans *v.* International Trust Co., (Tenn. Ch. 1900) 59 S. W. Rep. 373; Hatch *v.* De La Garza, 22 Tex. 176.

Defenses Cognizable in Equity Only. — But a judgment at law is not a bar to an equitable proceeding respecting matters of which the former court had not equitable jurisdiction requisite to determine the facts and adjudge the relief to which the parties are entitled.

Alabama. — Bates *v.* Crowell, 122 Ala. 611.

California. — Hills *v.* Sherwood, 48 Cal. 386.

Illinois. — Featherstone *v.* Betlejewski, 75 Ill. App. 59.

Iowa. — Gordon *v.* Kennedy, 36 Iowa 167.

Michigan. — Bush *v* Merriman, 87 Mich. 260.

New Jersey. — Metropolitan Sav., etc., Assoc. *v.* Dughi, (N. J. 1901) 49 Atl. Rep. 542.

Ohio. — Witte *v.* Lockwood, 39 Ohio St. 141.

Vermont. — Dunham *v.* Downer, 31 Vt. 249.

The rule is the same in those jurisdictions where equitable defenses to legal actions are permitted but not required. Dorsey *v.* Reese, 14 B. Mon. (Ky.) 127. See also Chicago, etc., R. Co. *v.* Hay, 119 Ill. 493.

But it is otherwise when the statute requires equitable defenses to be pleaded. Eastern Bldg., etc., Assoc. *v.* Welling, 116 Fed. Rep. 100; Fowler *v.* Atkinson, 6 Minn. 503.

2. When Relief Might Have Been Had in Prior Suit in Equity. — Hence, an execution debtor, after having invoked the power of a court of equity to declare an execution void or irregular, and to grant relief against it, cannot afterwards resort to a court of law for the same relief which he could have obtained in equity. Laur *v.* People, 17 Ill. App. 448.

So Damages Which Might Have Been Recovered in a Suit in Equity to Enjoin a Nuisance cannot be subsequently recovered in an action at law. Gilbert *v.* Boak Fish Co., 86 Minn. 365; Inderlied *v.* Whaley, 85 Hun (N. Y.) 63; Wright *v.* Webber, 31 Pittsb. Leg. J. N. S. (Pa.) 115.

ment is *res judicata* and the amount thereof cannot be recovered in a subsequent suit.[1] So, if the grantee of property conveyed with intent to defraud the grantor's creditors, in a suit against him to set aside the conveyance, fails to ask credit for payments made by him for the discharge of incumbrances or taxes upon the property, he cannot recover them by a subsequent action.[2]

(3) *Failure to Set Up Title to or Interest in Land.* — If a party to an action involving the title to land fails to assert his title to or interest therein, he will be estopped by the judgment from subsequently claiming the land or such interest by any title which he held at the time the judgment was rendered.[3]

b. DIFFERENT CAUSES OF ACTION — (1) *Statement of the Rule.* — While a prior judgment is conclusive between the parties in a subsequent suit upon the same cause of action in respect to every matter which might have been litigated and determined in the former action, such a judgment operates, in a subsequent suit between the parties upon a different cause of action, as an estoppel only as to those matters in issue or points of controversy which were actually litigated and decided in the former action and upon which the finding or judgment therein was based.[4]

1. Failure to Plead Payment. — Bobe *v.* Stickney, 36 Ala. 482; Doyle *v.* Reilly, 18 Iowa 108, 85 Am. Dec. 582; Callahan *v.* Murrell, (Ky. 1898) 45 S. W. Rep. 67.

Judgment by Default. — In some jurisdictions no distinction is made in the application of this principle between judgments rendered in litigated cases and those taken by default. State *v.* McBride, 76 Ala. 51; Tilton *v.* Gordon, 1 N. H. 33.

But in *Massachusetts* and *New York* a credit not properly allowed in a judgment taken by default may be recovered by the defendant in a subsequent action. Minor *v.* Walter, 17 Mass. 237; Smith *v.* Weeks, 26 Barb. (N. Y.) 463. *Compare* Loring *v.* Mansfield, 17 Mass. 394.

2. Failure to Plead Credits for Incumbrances Discharged. — Weiser *v.* Weisel, (Supm. Ct. Spec. T.) 5 N. Y. Annot. Cas. 196. But see Smith *v.* Rountree, 85 Ill. App. 161, *affirmed* 185 Ill. 219.

So a Party to a Partition Suit cannot afterwards claim compensation for improvements which might have been allowed to him in the suit for partition. Pierson *v.* Conley, 95 Mich. 619. See also Newberry *v.* Sheffey, 89 Va. 286.

3. Failure to Set up Title to or Interest in Land — *California.* — Christy *v.* Spring Valley Water Works, 97 Cal. 21.

Illinois. — Bailey *v.* Bailey, (Ill. 1886) 2 West. Rep. 386; Bennitt *v.* Wilmington Star Min. Co., 119 Ill. 9.

Indiana. — Green *v.* Glynn, 71 Ind. 336.

Iowa. — Reed *v.* Douglas, 74 Iowa 244, 7 Am. St. Rep. 476.

Kentucky. — Ligon *v.* Triplett, 12 B. Mon. (Ky.) 283.

Louisiana. — Howcott *v.* Petit, 106 La. 530.

Maryland. — Anderson *v.* Anderson, 89 Md. 1.

Michigan. — Pierson *v.* Conley, 95 Mich. 619.

Missouri. — Richardson *v.* Watson, 23 Mo. 34; Ketchum *v.* Christman, 128 Mo. 38.

South Dakota. — Southard *v.* Smith, 8 S. Dak. 230.

Texas. — McCray *v.* Freeman, 17 Tex. Civ. App. 268.

Virginia. — Simpson *v.* Dugger, 88 Va. 963.

Failure to Claim Homestead — *Iowa.* — Dodd *v.* Scott, 81 Iowa 319, 25 Am. St. Rep. 492.

Kentucky. — Harpending *v.* Wylie, 13 Bush (Ky.) 158; Snapp *v.* Snapp, 87 Ky. 554; Turner *v.* Gill, 105 Ky. 414; Sorrell *v.* Samuels, (Ky. 1899) 49 S. W. Rep. 762.

Michigan. — Bemis *v.* Conley, 95 Mich. 617.

North Dakota. — Foogman *v.* Patterson, 9 N. Dak. 254.

South Carolina. — Haddon *v.* Lenhardt, 54 S. Car. 88.

Texas. — O'Connor *v.* Lucio, 14 Tex. Civ. App. 682.

Wyoming. — Graham *v.* Culver, 3 Wyo. 639, 31 Am. St. Rep. 105.

Where husband and wife have united in a mortgage, waiving their right of homestead as directed by statute, and the mortgage appears to be duly acknowledged, a judgment of foreclosure in an action in which both husband and wife were before the court and made no defense is a bar to an action by them claiming a homestead in the land upon the ground that the mortgage was not acknowledged by the wife, as required by statute. Honaker *v.* Cecil, 84 Ky. 202.

Failure to Claim Dower. — Where, after the death of two partners, a suit is brought for an accounting and for a sale of the partnership property, and the widow of one of the partners is made a defendant, and makes no claim to any dower rights in the partnership real estate, she will be estopped from making such claim as against one who purchases the land in reliance upon a decree declaring it to be a part of the partnership assets, and ordering its sale as such. Free *v.* Beatley, 95 Mich. 426. But see Malloney *v.* Horan, 49 N. Y. 111, 10 Am. Rep. 335.

4. Estoppel of Former Judgment in Suit upon Different Cause of Action — *United States.* — Cromwell *v.* Sac County, 94 U. S. 357; Nesbit *v.* Riverside Independent Dist., 144 U. S. 610; Dennison *v.* U. S., 168 U. S. 241; Clark *v.* Blair, 14 Fed. Rep. 812; Lawrence *v.* Stearns, 79 Fed. Rep. 878; Chicago, etc., R. Co. *v.* St. Joseph Union Depot Co., 92 Fed. Rep. 22; Linton *v.* National L. Ins. Co., (C. C. A.) 104 Fed. Rep. 584; James *v.* Germania Iron Co., (C. C. A.) 107 Fed. Rep. 597; Ætna L. Ins.

(2) *Matter of Set-off or Counterclaim* — (a) **In General.** — Hence, a judgment against a defendant is not conclusive as to a set-off or counterclaim which he might have pleaded to the action. In the absence of statute [1] a defendant having a cross-demand against the plaintiff may, at his election, either use it in the pending suit as a set-off, or reserve it to be used as the basis of an independent action. His failure, therefore, to plead it does not preclude him from bringing a subsequent action upon it.[2]

(b) **To Actions for Price of Goods Sold.** — Thus, a purchaser of goods, when sued for the price thereof or upon a note given therefor, though he has his election to do so, is not bound to set up a claim for damages for breach of warranty in the quality of the goods purchased,[3] or for fraud in the

Co. *v.* Hamilton County, (C. C. A.) 117 Fed. Rep. 82.

Alabama. — Crowder *v.* Red Mountain Min. Co., 127 Ala. 254.

California. — Freeman *v.* Barnum, 131 Cal. 386.

Massachusetts. — Foye *v.* Patch, 132 Mass. 105.

Michigan. — Bond *v.* Markstrum, 102 Mich. 11.

Minnesota. — State *v.* Cooley, 58 Minn. 514.

New York. — Arnold *v.* Norfolk, etc., Hosiery Co., 63 Hun (N. Y.) 176.

North Carolina. — Debnam *v.* Chitty, 131 N. Car. 657.

Wisconsin. — Montpelier Sav. Bank, etc., Co. *v.* School Dist. No. 5, (Wis. 1902) 92 N. W. Rep. 439.

A Recovery of Judgment upon an Interest Coupon Is Not Conclusive as to the validity of other interest coupons attached to the same bond, Cromwell *v.* Sac County, 94 U. S. 351; Skinner *v.* Franklin County, 56 Fed. Rep. 783, 9 U. S. App. 676; Lake County *v.* Sutliff, 97 Fed. Rep. 270, 38 C. C. A. 167; or of the bond itself, Nesbit *v.* Riverside Independent Dist., 144 U. S. 610, 25 Fed. Rep. 635; Debnam *v.* Chitty, 131 N. Car. 657. Nor is a recovery upon a bond conclusive as to the validity of other bonds of the same series. Montpelier Sav. Bank, etc., Co. *v.* School Dist. No. 5, (Wis. 1902) 92 N. W. Rep. 439.

So a Judgment in an Action for Interest Due on a Promissory Note taken by default does not estop the maker from setting up the plea of want of consideration in a subsequent action upon the note. Crowder *v.* Red Mountain Min. Co., 127 Ala. 254.

A Recovery of Judgment for One Instalment of Salary due to a public officer does not decide the constitutionality of the statute under which he was appointed, so as to preclude the raising of the issue in a subsequent action for another instalment. Freeman *v.* Barnum, 131 Cal. 386.

1. See the title SET-OFF, COUNTERCLAIM, AND RECOUPMENT, 19 ENCYC. OF PL. AND PR. 731.

2. **Omission to Plead Set-off or Counterclaim** — *England.* — Moore *v.* Battie, Ambl. 372, 1 Eden 273.

United States. — Fitzhugh *v.* McKinney, 43 Fed. Rep. 461; Central Trust Co. *v.* Clark, (C. C. A.) 81 Fed. Rep. 269.

Alabama. — Robbins *v.* Harrison, 31 Ala. 160.

Arkansas. — Beaty *v.* Johnston, 66 Ark. 529.

Illinois. — Sheetz *v.* Baker, 38 Ill. App. 349.

Indiana. — Goble *v.* Dillon, 86 Ind. 327, 44 Am. Rep. 308; Gates *v.* Newman, 18 Ind. App. 392; Collier *v.* Cuningham, 2 Ind. App. 254.

Iowa. — Fairfield *v.* McNany, 37 Iowa 75; Savery *v.* Sypher, 39 Iowa 675.

Michigan. — Seventh Day Adventist Pub. Assoc. *v.* Fisher, 95 Mich. 274; Perkins *v.* Oliver, 110 Mich. 402.

Missouri. — Mason *v.* Summers, 24 Mo. App. 174.

Nebraska. — Uppfalt *v.* Woermann, 30 Neb. 189.

New Hampshire. — Metcalf *v.* Gilmore, 63 N. H. 174.

New York. — Davis *v.* Aikin, 85 Hun (N. Y.) 554; Potter *v.* Gates, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 87; Watson *v.* Cowdrey, 23 Hun (N. Y.) 169.

North Carolina. — Shankle *v.* Whitley, 131 N. Car. 168.

Pennsylvania. — Kauff *v.* Messner, 4 Brews. (Pa.) 98; Gillum *v.* Kahnweiler, 2 Pa. Dist. 656; Connery *v.* Brooke, 73 Pa. St. 80.

Texas. — Anderson *v.* Rogge, (Tex. Civ. App. 1894) 28 S. W. Rep. 106.

Vermont. — Cade *v.* McFarland, 48 Vt. 47; Kezar *v.* Elkins, 52 Vt. 119.

West Virginia. — Kennedy *v.* Davisson, 46 W. Va. 433.

Wisconsin. — Dudley *v.* Stiles, 32 Wis. 371.

A Judgment for Plaintiff in an Action to Recover Rent Due under a lease is not a bar to an action by the lessee to recover damages for breach of the covenant for quiet enjoyment. Riley *v.* Hale, 158 Mass. 240. See also Parsons *v.* Crawford, 64 N. H. 23.

A Judgment for Plaintiff in an Action by a Tenant for Injuries Received from a defect in the house rented is not a bar to a subsequent action by the landlord for rent due. Johnson *v.* Reeves, 112 Ga. 690.

A Judgment upon an Insurance Policy does not estop the insurer from subsequently bringing an action upon the premium note. Indiana Farmers' Live Stock Ins. Co. *v.* Stratton, 4 Ind. App. 566.

A Recovery of Judgment for Damages Committed by Trespassing Animals does not estop the defendant from bringing an action to recover damages for injuries to the animals resulting from the plaintiff's negligence in caring for them while held by him to secure his lien. Richardson *v.* Halstead, 44 Neb. 606.

3. **Breach of Warranty.**— Gilmore *v.* Williams, 162 Mass. 351; Bodurtha *v.* Phelon, 13 Gray (Mass.) 413; Thoreson *v.* Minneapolis Harvester Works, 29 Minn. 341; Parker *v.* Roberts, 63 N. H. 431; Barth *v.* Burt, 43 Barb. (N. Y.)

sale,[1] or for the value of a portion of the goods not delivered,[2] but may recover such damages in a subsequent action against the seller.

(c) **To Actions for Services Rendered.** — So, in many jurisdictions it is held that a recovery of judgment for the value of services rendered is not a bar to a subsequent action by the defendant for damages sustained from the negligence or the unskilfulness of the plaintiff in the performance of such services where the former judgment was given by default, or the issue supporting the counterclaim was not raised by the defendant.[3] In other jurisdictions, however, it has been held that the character of the performance of the work for which the services are demanded is a fact which is necessarily involved in a judgment for the recovery of such services, and therefore, judgment for the plaintiff in such action estops the defendant from subsequently claiming that the services were not properly performed.[4]

c. DIVISIBLE AND INDIVISIBLE CAUSES OF ACTION — (1) *Entire and Indivisible Causes of Action* — (a) **Statement of the Rule.** — The rule is well established that a single and indivisible cause of action, whether founded upon a contract or a tort, cannot be divided and made the subject of several suits. All the items which go to make up the demand must be recovered in a single action. If the party entitled thereto brings an action for a part only of such demand, a judgment therein will forever estop him from bringing suit for the residue.[5]

628; Dilley *v.* Ratcliff, (Tex. Civ. App. 1902) 69 S. W. Rep. 237.

So, on the other hand, a recovery by the vendee for a breach of warranty does not bar a subsequent action by the vendor upon the note given, for the prices of the goods sold. Trautwein *v.* Twin City Iron Works, 55 Minn. 264.

1. Fraud in Sale. — McDonald *v.* Christie, 42 Barb. (N. Y.) 36.

2. Value of Goods Not Delivered. — Whitcomb *v.* Williams, 4 Pick. (Mass) 228.

3. Negligence or Unskilfulness in Performance of Contract — Recovery in Subsequent Action — *England.* — Davis *v.* Hedges, L. R. 6 Q. B. 687 (improper performance of building contract); Rigge *v.* Burbidge, 15 M. & W. 598 (unskilfully erecting kitchen range).

Indiana. — Goble *v.* Dillon, 86 Ind. 327, 44 Am. Rep. 308 (malpractice of physician).

Michigan. — Mimnaugh *v.* Partlin, 67 Mich. 391 (contract of bailment).

Minnesota. — Jordahl *v.* Berry, 72 Minn. 119, 71 Am. St. Rep. 469 (malpractice of physician).

Rhode Island. — Dewsnap *v.* Davidson, 18 R. I. 98 (foreclosure of mechanics' lien).

Tennessee. — Sale *v.* Eichberg, 105 Tenn. 333 (malpractice of physician).

Vermont. — Davenport *v.* Hubbard, 46 Vt. 200, 14 Am. Rep. 620 (failure to perform contract in time specified).

West Virginia. — Lawson *v.* Conaway, 37 W. Va. 159, 38 Am. St. Rep. 17 (malpractice of physician).

Wisconsin. — Ressequie *v.* Byers, 52 Wis. 650, 38 Am. Rep. 775(malpractice of physician).

4. Right of Recovery Denied —*New Hampshire.* — Haynes *v* Ordway, 58 N. H. 167 (malpractice of physician).

New York. — Edwards *v.* Stewart, 15 Barb. (N. Y.) 67 (malpractice of physician); Bellinger *v.* Craigue, 31 Barb. (N. Y.) 534 (malpractice of physician); Gates *v.* Preston, 41 N. Y. 113 (malpractice of physician); Collins *v.* Bennett, 46 N. Y. 495 (services rendered under contract of bailment); Smith *v.* Hemstreet, 54 N. Y. 644 (breach of contract by landlord to repair); Blair *v.* Bartlett, 75 N. Y. 150, 31 Am. Rep. 455 (malpractice of physician); Dunham *v.* Bower, 77 N. Y. 76, 33 Am. Rep. 570 (failure of carrier to deliver goods). See also Schwinger *v.* Raymond, 83 N. Y. 197.

5. Entire and Indivisible Causes of Action — *England.* — Brunsden *v.* Humphrey, 14 Q. B. D. 141; Bagot *v.* Williams, 5 Dowl. & R. 87, 3 B. & C. 235, 10 E. C. L. 62, 27 Rev. Rep. 340.

United States. — Bartels *v.* Schell, 16 Fed. Rep. 341; De Wesse *v.* Smith, 97 Fed. Rep. 309; Baird *v.* U. S., 96 U. S. 430.

California. — Beronio *v.* Southern Pac. R. Co., 86 Cal. 415, 21 Am. St. Rep. 57.

Maryland. — Wagoner *v.* Wagoner, 76 Md. 311.

Massachusetts. — Warren *v.* Comings, 6 Cush. (Mass.) 103.

New York. — Secor *v.* Sturgis, 16 N. Y. 548; Draper *v.* Stouvenel, 38 N. Y. 223; Farrington *v.* Payne, 15 Johns. (N. Y.) 432.

Pennsylvania. — Corbet *v.* Evans, 25 Pa. St. 310; Eisenhower *v.* School Dist., 13 Pa. Super. Ct. 51.

South Carolina. — Steen *v.* Mark, 32 S. Car. 286.

The Law, to Prevent Vexatious or Oppressive Litigation, forbids the splitting up of one single or entire cause of action into parts, and the bringing of separate actions for each; and neither in this way, nor by withholding proof of particular items on the trial, nor by formally withdrawing them from the consideration of the jury, can the effect of the judgment as a complete adjudication of the entire cause of action be prevented. Perry *v.* Dickerson, 85 N. Y. 345, 39 Am. Rep. 663.

It is immaterial that the form of the second action is different from the first, Warren *v.* Comings, 6 Cush. (Mass.) 103; or that the demand was divided so as to bring the actions within the jurisdiction of a justice of the peace, Broxton *v.* Nelson, 103 Ga. 327, 68 Am. St.

(b) **Actions upon Contracts.** — Thus, if an entire sum be due upon a contract, the plaintiff in an action thereon must include every item due at the time, or he will be concluded by the judgment from bringing a second action for items which he has omitted.[1]

(c) **Actions for Breaches of Contract.** — So, damages suffered from a single breach of contract[2] or covenant[3] constitute an entire indivisible demand and will support a single action only.

Rep. 97; Lucas *v.* Le Compte, 42 Ill 303; Pilcher *v.* Ligon, 91 Ky. 228; Catawba Mills *v.* Hood, 42 S. Car. 203.

Split Causes of Action by Consent. — The rule prohibiting the splitting of a single cause of action being for the benefit of the defendant, it may be waived by his expressly or impliedly consenting to the severance of it. Claflin *v.* Mather Electric Co., (C. C. A.) 98 Fed. Rep. 699; Sherer *v.* Langford, 67 Ill. App. 342; Indianapolis, etc., R. Co. *v.* Center Tp., 130 Ind. 89; Little *v.* Portland, 26 Oregon 235.

Mistake of Fact. — Where a party brings an action upon the mistaken supposition that an order on a third party which he has accepted for a part of his demand has been paid, he is not estopped from bringing a second action for the amount covered by the order, which, it subsequently transpired, had not been paid. Kane *v.* Morehouse, 46 Conn. 300.

Mechanics' Liens. — In *Missouri* the court has long been committed to the doctrine that the rule against splitting an account will not be applied where no injury can accrue to the debtor or a second claim be made for the same demand, if its application will defeat the statutory lien in favor of mechanics and materialmen. Hayden *v.* Logan, 9 Mo. App. 492; Compound Lumber Co. *v.* Fehlhammer Planing Mill Co., 59 Mo. App. 661; Philip Gruner, etc., Lumber Co. *v.* Jones. 71 Mo. App. 110; Kick *v.* Doerste, 45 Mo. App. 134. Where several contiguous buildings are erected under one contract, a subcontractor who does the work on them for the original contractor is bound to apportion the work done and materials furnished to the different houses in making up his liens, if he seeks a separate lien against each lot, as he still has the option to do, instead of filing a joint lien against them as provided in section 4227 of the Revised Statutes of 1899. Kick *v.* Doerste, 45 Mo. App. 134. To hold that the rule against splitting an account applies in such instances would practically destroy the separate remedy against the different buildings and partially defeat the object of the statutes as interpreted by the court. Christopher, etc., Architectural Iron, etc., Co. *v.* Kelly, 91 Mo. App. 93.

1. Actions upon Contract — *Connecticut.* — Pinney *v.* Barnes, 17 Conn. 420 (action upon executor's bond).

Georgia. — Evans *v.* Collier, 79 Ga. 319 (actions for services rendered) Atlanta Elevator Co. *v.* Fulton Bag. etc., Mills, 106 Ga. 427 (action upon running account).

Illinois. — Rosenmueller *v.* Lampe, 89 Ill. 212, 31 Am. Rep. 74 (action for services rendered).

Kansas. — Bolen Coal Co. *v.* Whittaker Brick Co., 52 Kan. 747 (action upon running account).

Kentucky. — Pilcher *v.* Ligon, 91 Ky. 228 (action for services rendered),

Maryland. — Archer *v.* State, 74 Md. 410 (action upon official bond).

Massachusetts. — Warren *v.* Comings, 6 Cush. (Mass.) 103 (action for part of quarter's rent).

Missouri. — La Crosse Lumber Co. *v.* Audrain County Agricultural, etc., Soc., 59 Mo. App. 24 (action upon running account).

Pennsylvania. — Buck *v.* Wilson, 113 Pa. St. 423; Raisig *v.* Graf, 17 Pa. Super. Ct. 509 (action upon running account).

Washington. — Stern *v.* Washington Nat. Bank, 14 Wash. 511 (action for services rendered).

If a Mortgagee Brings Suit upon a Mortgage and takes judgment of foreclosure only when he might have taken a personal judgment for the residue, after exhausting the mortgaged premises he cannot afterwards maintain another action to recover a personal judgment for such residue. Crosby *v.* Jeroloman, 37 Ind. 264.

If a Seller of Goods Delivered under a Single Contract omits an item from an action for the price, he cannot recover it in a subsequent action. Dutton *v.* Shaw, 35 Mich. 431.

Attorney's Fees. — Where a contract for the payment of money provides that in case legal proceedings should be required for the collection of the same a reasonable attorney's fee should be included in the amount recovered, such fee must be recovered in the action upon the contract, and cannot be recovered by a subsequent action. Abbott *v.* Brown, 121 Ill. 108; Koenig *v.* Morrison, 44 Mo. App. 411.

Action upon Note. — If a plaintiff in an action upon a promissory note takes judgment for an amount less than the amount due, he cannot recover the balance in a subsequent action. White *v.* Herndon, 8 Ohio Cir. Dec. 292, 15 Ohio Cir. Ct. 290. See also Price *v.* Holman, 135 N. Y. 124.

Where a Lloyds Insurance Policy provides that no action shall be brought except against some one underwriter as attorney in fact for all, if the insured brings an action against one underwriter merely for his proportionate share of the loss, the judgment therein precludes him from thereafter suing the other underwriters. McCredy *v.* Thrush, 37 N. Y. App. Div. 465.

2. Damages for Breaches of Contract. — Claflin *v.* Mather Electric Co., 87 Fed. Rep. 795; Willoughby *v.* Atkinson Furnishing Co., 96 Me. 372; Bowe *v.* Minnesota Milk Co., 44 Minn. 460; Coggins *v.* Bulwinkle, 1 E. D. Smith (N. Y.) 434; Hill *v.* Joy, 149 Pa. St. 243.

3. Breaches of Covenant. — Mitchell *v.* Gillespie, 25 Ga. 346; Osborne *v.* Atkins, 6 Gray (Mass.) 423; Kerr *v.* Simmons, 9 Mo. App. 376; Bruce *v.* Foley, 18 Wash. 96.

A Breach of a Recognizance Entered into by a Surety upon the conviction of a defendant for neglecting to support his family creates but a single cause of action, and there can be only

Contract of Employment. — Thus, if a servant who has been wrongfully discharged brings an action before the term for which he was employed has expired, for the salary due to him up to that time, the judgment is a bar to a subsequent action for salary for the remainder of the term.[1]

(d) **Actions for Torts.** — On like principle, the commission of a single tortious act creates a single cause of action only, and all damages resulting therefrom must be recovered in one suit.[2]

(e) **Actions for Permanent Injuries to Land.** — This principle finds frequent application in actions for injuries to land. The rule here applied is that if such injuries are permanent, there can be but one action therefor, and all damages, actual and prospective, must be recovered therein.[3]

one recovery therefor. New York *v.* Constantine, 60 N. Y. Super. Ct. 469.

1. Breach of Contract of Employment — *Illinois.* — Weill *v.* Fontanel, 31 Ill. App. 615.

Maine. — Alie *v.* Nadeau, 93 Me. 282, 74 Am. St. Rep. 346.

Maryland. — Olmstead *v.* Bach, 78 Md. 132, 44 Am. St. Rep. 273.

Missouri. — Soursin *v.* Salorgne, 14 Mo. App. 486.

Nebraska. — Kahn *v.* Kahn, 24 Neb. 709.

New York. — Parry *v.* American Opera Co., (N. Y. City Ct. Gen. T.) 19 Abb. N. Cas. (N. Y.) 269; Waldron *v.* Hendrickson, 40 N. Y. App. Div. 7; Wieland *v.* Willcox, 40 N. Y. App. Div. 213.

Ohio. — James *v.* Allen County, 44 Ohio St. 226, 58 Am. Rep. 821.

Pennsylvania. — Eisenhower *v.* School Dist., 13 Pa. Super. Ct. 51.

Contra. — Williams *v.* Luckett, 77 Miss. 394.

2. Damages from Commission of Tort — *United States.* — Horton *v.* New York Cent., etc., R. Co., 63 Fed. Rep. 897.

Kansas. — Wichita, etc., R. Co. *v.* Beebe, 39 Kan. 465.

Massachusetts. — Sullivan *v.* Baxter, 150 Mass. 261; Stevens *v.* Pierce, 151 Mass. 207; Goodrich *v.* Yale, 8 Allen (Mass.) 454.

Michigan. — Finn *v.* Peck, 47 Mich. 208; Jungnitsch *v.* Michigan Malleable Iron Co., 121 Mich. 460.

Wisconsin. — Kaehler *v.* Dobberpuhl, 60 Wis. 256.

Destruction of Several Articles of Personalty by One Tortious Act. — Only one action can be maintained against a railroad company for the value of two horses where both are killed at the same time and place. St. Louis Southwestern R. Co. *v.* Moss, 9 Tex. Civ. App. 6.

Where insured property is destroyed by a single act of a tortfeasor, and the insured brings an action against the wrongdoer for the destruction of a part of such property only, he is estopped from further action against the tortfeasor, Knowlton *v.* New York, etc., R. Co., 147 Mass. 606; Weber *v.* Morris, etc., R. Co., 36 N. J. L. 213; although the subsequent action is brought and prosecuted for the benefit of the insurance company, Trask *v.* Hartford, etc., R. Co., 2 Allen (Mass.) 331; and also from further action against the insurance company, which, under the terms of the policy, was subrogated to his rights against such tortfeasor, Packham *v.* German F. Ins. Co., 91 Md. 515.

A Recovery in Replevin for a part only of the goods taken under a single wrongful act precludes the recovery of the remainder of them by a subsequent action if the portion not demanded was not concealed or otherwise disposed of so that it could not be replevied. Thisler *v.* Miller, 53 Kan. 515, 42 Am. St. Rep. 302; Bennett *v.* Hood, 1 Allen (Mass.) 47, 79 Am. Dec. 705; Funk *v.* Funk, 35 Mo. App) 246; Barnard *v.* Devine, (Supm. Ct. App. T., 34 Misc. (N. Y.) 182; Stern *v.* Riches, 111 Wis. 591. So, if the plaintiff demands possession of the goods only, he cannot in a subsequent action demand damages for their detention or depreciation. Serrao *v.* Noel, 15 Q. B. D. 549; Ellis *v.* Crowl, 46 Kan. 100; Bracken *v.* Atlantic Trust Co., 36 N. Y. App. Div. 67. The same principles apply to actions of trover. Folsom *v.* Clemence, 119 Mass. 4 3.

3. Permanent Injuries to Land — *District of Columbia.* — District of Columbia *v.* Hutchinson, 1 App. Cas. (D. C.) 403 (construction of sewer).

Georgia. — Clark *v.* Lanier, 104 Ga. 184 (flooding land by erecting dam).

Illinois. — Decatur Gas Light, etc., Co. *v.* Howell, 92 Ill. 19 (pollution of water by gas works); Swantz *v.* Muller, 27 Ill. App. 320 (flooding land by erecting dam); McGillis *v.* Willis, 39 Ill. App. 311 (flooding land by erecting dam); Chicago, etc., R. Co. *v.* Brinkman, 47 Ill. App. 287 (deprivation of connection with highway); Lake Erie, etc., R. Co. *v.* Purcell, 75 Ill. App. 573 (diversion of stream).

Indiana. — North Vernon *v.* Voegler, 103 Ind. 314 (changing flow of surface water).

Iowa. — Hodge *v.* Shaw, 85 Iowa 137, 39 Am. St. Rep. 290 (obstruction of right of way); Watson *v.* Van Meter, 43 Iowa 76 (flooding land by raising dam); Stodghill *v.* Chicago, etc., R. Co., 53 Iowa 341 (diversion of stream).

Kentucky. — Covington, etc., El. R. Transfer, etc., Co. *v.* Kleymeier, 105 Ky. 609 (operation of railroad).

Massachusetts. — Fowle *v.* New Haven, etc., R. Co., 107 Mass. 352 (diversion of stream).

Minnesota. — Pierro *v.* St. Paul, etc., R. Co., 39 Minn. 451, 12 Am. St Rep. 673 (construction of railroad).

Texas. — International, etc., R. Co. *v.* Gieselman, 12 Tex. Civ. App. 123 (construction of drain); Brown *v.* Southwestern Tel., etc., Co., 17 Tex. Civ. App. 433 (erecting telegraph poles and wires); San Antonio, etc., R. Co. *v.* Lougorio, (Tex. Civ. App. 1894) 25 S. W. Rep. 1020 (operation of railroad).

And see generally the titles DAMAGES, vol. 8, p. 677; FLOODS, vol. 13, p. 703.

(f) **Indivisible Grounds of Defense or Counterclaim — Grounds of Defense.** — A defendant having a single indivisible ground of defense cannot plead it to several distinct actions, but must seek whatever relief he is entitled to in the first action.[1]

Indivisible Counterclaim. — So, if a defendant pleads a counterclaim exceeding the plaintiff's demand, but does not ask judgment for the excess, he cannot subsequently sue for such excess in a separate action.[2]

(2) *Independent Causes of Action* — (a) **Statement of the Rule.** — But while a party can bring only a single suit for one indivisible cause of action, there is no rule which requires him to unite in one suit several independent causes of action. A party may bring against another as many separate actions as he has causes of action, and the fact that they might all be united in a single suit does not qualify his right, except that under certain circumstances, to prevent vexation and oppression, the court may require him to consolidate them.[3]

(b) **Causes Arising from Distinct and Independent Contracts.** — Thus, separate demands arising from distinct and independent contracts, though between the same parties, as, for example, demands arising from separate sales of goods[4] or from work done at different times, and in pursuance of different agreements,[5]

1. Indivisible Grounds of Defense. — Thus, if a defendant to an action upon a series of notes given for the purchase price of property defeats recovery on the plea of breach of warranty, want of consideration, or otherwise, he is afterwards estopped from setting up the same defense to actions upon the other notes of the series. Geiser Threshing Mach. Co. *v.* Farmer, 27 Minn. 428. *Compare* Clark *v.* Sammons, 12 Iowa 368; Bayliss *v.* Deford, 73 Iowa 495. His proper course is either to claim judgment over for the excess of his damage over the amount of the note, Foster *v.* Konkright, 70 Ind. 123, or to bring a cross-bill to have the other notes canceled. Hoover *v.* Kilander, 135 Ind. 600.

2. Indivisible Counterclaim. — Inslee *v.* Hampton, 11 Hun (N. Y.) 156, in which it was said that a defendant cannot use his counterclaim first as a shield and then as a sword; he must elect and stand by his choice.

In *England* the rule has been held to be otherwise where the amount of the excess exceeds the jurisdiction of the court. Webster *v.* Armstrong, 54 L. J. Q. B. 236, 1 Cab. & El. 471.

3. Independent Causes of Action — *England.* — Brunsden *v.* Humphrey, 14 Q. B. D. 141, *reversing* 11 Q. B. D. 712.

United States. — Priest *v.* Glenn, 51 Fed. Rep. 405, 4 U. S. App. 509; Olsen *v.* Whitney, 109 Fed. Rep. 80.

Alabama. — Lensoir *v.* Wilson, 36 Ala. 600; Ullman *v.* Herzberg, 91 Ala. 458.

Arkansas. — Jefferson *v.* Dunavant, 53 Ark. 133.

Georgia. — Henson *v.* Taylor, 108 Ga. 567.

Iowa. — Morrison *v.* Springfield Engine, etc., Co., 84 Iowa 637.

Kentucky. — Schuster *v.* White, 106 Ky. 317; Louisville, etc., R. Co. *v.* Orr, 91 Ky. 109.

Mississippi. — Hubbard *v.* Flynt, 58 Miss. 266.

Missouri. — Taylor *v.* Hines, 31 Mo. App. 622.

Nebraska. — Beck *v.* Devereaux, 9 Neb. 109.

New York. — Secor *v.* Sturgis, 16 N. Y. 548; Gentles *v.* Finck, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 153; Gedney *v.* Gedney, 19 N. Y. App. Div. 407; Bracken *v.* Atlantic Trust Co., 36 N. Y. App. Div. 67.

North Carolina. — Gregory *v.* Hobbs, 93 N. Car. 1; Tyler *v.* Capehart, 125 N. Car. 64.

Ohio. — Ruehlmann *v.* Eleventh Ward Bldg. Assoc. No. 2, 1 Ohio Dec. 428, 7 Ohio N. P. 296.

Pennsylvania. — Daniels *v.* Heidenreich, 8 Kulp (Pa.) 413.

Rhode Island. — Dyer *v.* Dyer, 17 R. I. 547.

Texas. — Harris *v.* Houston, (Tex. Civ. App. 1900) 60 S. W. Rep. 440.

Wisconsin. — Wentworth *v.* Racine County, 99 Wis. 26.

Item Withdrawn under Leave of Court. — If a plaintiff sues for several distinct causes of action, and, by leave of the court, withdraws one of them and proceeds to judgment for the other, it is no bar to a subsequent action for the claim so withdrawn. Wood *v.* Corl, 4 Met. (Mass.) 203; Killion *v.* Wright, 34 Pa. St. 91.

Causes Arising from Both Contract and Tort. — A recovery by a lessor of rent is not a bar to a subsequent action by him for injuries to the property leased. Wright *v.* Tileston, 60 Minn. 34. So a recovery for the hire of a chattel is not a bar to a subsequent action for an injury to it. Shaw *v.* Beers, 25 Ala. 449.

4. Separate Sales of Goods. — Alkire Grocer Co. *v.* Tagart, 60 Mo. App. 389, 1 Mo. App. Rep. 159; Cushman *v.* Bean, 2 Hilt. (N. Y.) 340.

Where two bills of goods were sold to the defendant, at different times, a credit of six months given upon one, and none as to the other, it was held that the demands were separate and distinct, and that a recovery upon the bill first sold was no bar to an action upon the second. Staples *v.* Goodrich, 21 Barb. (N. Y.) 317.

When goods are sold under an agreement that the account is to be due and payable at the end of each month, the account for each month constitutes a separate cause of action. Beck *v.* Devereaux, 9 Neb. 109.

5. Work Done at Different Times. — New Orleans, etc., R. Co. *v.* Castello, 50 Ala. 12; Schuster *v.* White, (Ky. 1898) 44 S.W. Rep. 959.

will sustain separate actions.[1]

(c) **Distinct and Independent Causes Arising from the Same Contract.** — *aa.* In General. — So, separate demands, though they may grow out of the same contract, create distinct causes of action which may be separately recovered.[2]

bb. Separate Instalments Due under Contract. — Thus, if a contract provides for the payment of distinct sums at different times, each instalment constitutes a separate demand which may be successively sued on and recovered.[3]

1. Causes Arising from Different Contracts. — Gilmer *v.* Morris, 35 Fed. Rep. 682, 55 Fed. Rep. 775; Secor *v.* Sturgis, 16 N. Y. 548; Byrnes *v.* Byrnes, 102 N. Y. 4; Terrerri *v.* Jutte, 159 Pa. St. 244; Kaster *v.* Welsh, 157 Pa. St. 590; Daniels *v.* Heidenreich, 8 Kulp (Pa.) 413.

A Contract to Carry a Passenger and His Personal Baggage is distinct and independent from a contract to carry trunks of merchandise, upon which he pays extra transportation, and a separate action may be maintained for the loss of the baggage and the merchandise. Millard *v.* Missouri, etc., R. Co., 20 Hun (N. Y.) 191, *affirmed* 86 N. Y. 441.

2. Distinct and Independent Causes Arising from the Same Contract — *United States.* — Union Switch, etc., Co. *v.* Johnson, 72 Fed. Rep. 147, 39 U. S. App. 141.

Kentucky. — Givens *v.* Peake, 1 Dana (Ky.) 225.

Minnesota. — Reynolds *v.* Franklin, 47 Minn. 145.

Missouri. — Brown *v.* Chadwick, 32 Mo. App. 615.

New York. — Van Keuren *v.* Miller, 78 Hun (N. Y.) 173.

Pennsylvania. — Merchants' Ins. Co. *v.* Algeo, 31 Pa. St. 446.

Wisconsin. — Andrew *v.* Schmitt, 64 Wis. 664; Boutin *v.* Lindsley, 84 Wis. 644.

3. Separate Instalments Due under Contract — *Colorado.* — Hallack *v.* Gagnon, 4 Colo. App. 360.

Maryland. — Ahl *v.* Ahl, 60 Md. 207.

Michigan. — Raymond *v.* White, 120 Mich. 165.

Minnesota. — Ramsey County Bldg. Soc. *v.* Lawton, 49 Minn. 362.

Missouri. — Stifel *v.* Lynch, 7 Mo. App. 326; West *v.* Moser, 49 Mo. App. 201; Jones *v.* Silver, (Mo. App. 1902) 70 S. W. Rep. 1109.

Nebraska. — Beck *v.* Devereaux, 9 Neb. 109.

New York. — Lorillard *v.* Clyde, 122 N. Y. 41, 19 Am. St. Rep. 470; Parmenter *v.* State, 135 N. Y. 154; Reformed Protestant Dutch Church *v.* Brown, 54 Barb. (N. Y.) 191; Smith *v.* Moonelis, (C. Pl. Gen. T.) 18 N. Y. Supp. 135; McCleary *v.* Malcom Brewing Co., 56 N. Y. App. Div. 531, Seed *v.* Johnston, 63 N. Y. App. Div. 340, Mills *v.* Garrison, 3 Abb. App. Dec. (N. Y.) 297.

Texas. — Howe *v.* Harding, 84 Tex. 74.

Principal and Interest Due on Bond or Note. — On a bond or note with interest payable at stated periods, each instalment of the interest and the principal constitutes a distinct and independent cause of action and may be recovered in a separate action. Butterfield *v.* Ontario, 44 Fed. Rep. 171; Dulaney *v.* Payne, 101 Ill. 325, 40 Am. Rep. 205; Wehrly *v.* Morfoot, 103 Ill. 183; Andover Sav. Bank *v.* Adams, 1 Allen (Mass.) 28; Sparhawk *v.* Wills, 6 Gray (Mass.) 163; Stevens *v.* Barringer, 13 Wend. (N. Y.) 639.

The fact that a promissory note running for several years, with interest payable annually, provides that if the interest is not so paid the entire principal sum shall immediately become due and payable does not make the principal and an unpaid instalment of interest an entire demand. Wehrly *v.* Morfoot, 103 Ill. 183.

A recovery of the interest due on a note will not bar a subsequent action for the principal, although the note was past due when the action for the interest was begun. Dulaney *v.* Payne, 101 Ill. 328, 40 Am. Rep. 205; Andover Sav. Bank *v.* Adams, 1 Allen (Mass.) 28; Sparhawk *v.* Wills, 6 Gray (Mass.) 163.

But it has been held that annual interest cannot be recovered by a separate action after the principal has become due. Howe *v.* Bradley, 19 Me. 31. *Contra*, Stevens *v.* Barringer, 13 Wend. (N. Y.) 639.

Where Separate Notes Are Given for the Purchase Price of an Article, each constitutes an independent cause of action and may be separately recovered. Gammon *v.* Cottrell, 87 Ind. 213; Felton *v.* Smith, 88 Ind. 149, 45 Am. Rep. 454; Williams *v.* Kitchen, 40 Mo. App. 604.

Instalments of Salary due at stated intervals under a continuing contract of employment constitute independent demands and may be separately recovered. McEvoy *v.* Bock, 37 Minn. 402.

Each Instalment of Rent, as it falls due, creates a distinct cause of action, which may be separately recovered.

Illinois. — Casselberry *v.* Forquer, 27 Ill. 170; McDole *v.* McDole, 106 Ill. 452; Marshall *v.* John Grosse Clothing Co., 83 Ill. App. 338, *affirmed* 184 Ill. 421, 75 Am. St. Rep. 181.

Indiana. — Epstein *v.* Greer, 85 Ind. 372.

Kentucky. — Webb *v.* Bailey, (Ky. 1896) 33 S. W. Rep. 935.

Massachusetts. — Stone *v.* St. Louis Stamping Co., 155 Mass. 267.

New York. — Jex *v.* Jacob, (Supm. Ct. Gen. T.) 7 Abb. N. Cas. (N. Y.) 452; Underhill *v.* Collins, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 495, *affirmed* 133 N. Y. 685; Holthausen *v.* Kells, 18 N. Y. App. Div. 80.

Oregon — Weiler *v.* Henarie, 15 Oregon 28.

Pennsylvania. — Stiles *v.* Himmelwright, 16 Pa. Super. Ct. 649.

Tennessee. — Barnes *v.* Black Diamond Coal Co., 101 Tenn. 354.

A judgment of recovery in ejectment for possession and rents and profits during the pendency of the ejectment action is not a bar to a further suit for rents and profits covering a period anterior to that covered by the former judgment. Neher *v.* Armijo, (N. Mex. 1901) 66 Pac. Rep. 517.

Rents Accruing from Different Pieces of Property. — Claims by one of two tenants in com-

Recovery of All Instalments Due. — In some jurisdictions, however, the limitation is imposed that each action must include every instalment due when it is commenced, unless a suit is at the time pending for the recovery thereof, or other circumstances exist.[1]

cc. Amount Due under Contract and Damages for Its Breach. — A claim for a sum due for work performed under a contract is distinct from a claim for damages for its breach, and separate actions may be maintained for each.[2]

dd. Distinct Breaches of Continuing Contracts or Covenants. — Every distinct breach of a continuing contract or covenant creates a separate cause of action which may be recovered by a separate suit.[3]

(d) **Causes Arising from Distinct and Independent Torts.** — So every commission of a distinct and independent tort gives rise to a separate cause of action which may be the subject of a separate suit.[4]

(e) **Distinct Causes Arising from Continuing Torts.** — If an injury to land proceeds from a cause which is only temporary in character and abatable, it constitutes a continuing nuisance for which the injured party may maintain an action as often as he suffers damage, each action being limited to the injury sustained by him up to the time of the bringing of the action.[5]

(f) **Distinct Causes Arising from the Same Tort.** — Distinct causes of action are

mon against the estate of his deceased cotenant for his proportion of the rents collected by the latter from each of two distinct pieces of property are several as arising out of different acts; and a judgment upon the claim as to one piece of property is not a bar to a claim as to the other. Gedney *v.* Gedney, 160 N. Y. 471.

1. Recovery Must Include All Instalments Due. — Seed *v.* Johnston, 63 N. Y. App. Div. 340; Lorillard *v.* Clyde, 122 N. Y. 41, 19 Am. St. Rep. 470. But see *contra*, Stifel *v.* Lynch, 7 Mo. App. 326; Williams *v.* Kitchen, 40 Mo. App. 604.

In some states it is held that a landlord is bound to include in his suit for rent all instalments which are due at the time he brings his action. Jex *v.* Jacob, (Supm. Ct. Gen. T.) 7 Abb. N. Cas. (N. Y.) 452; Underhill *v.* Collins, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 495, *affirmed* 133 N. Y. 685; Stiles *v.* Himmelwright, 16 Pa. Super. Ct. 649. See also Morrison *v.* De Donato, 76 Mo. App. 643. But see *contra*, McDole *v.* McDole, 106 Ill. 452; Fox *v.* Althorp, 40 Ohio St. 322.

2. Amount Due under Contract and Damages for Its Breach. — Chicago, etc., R. Co. *v.* Yawger, 24 Ind. App. 460; Olmstead *v.* Bach, (Md. 1892) 25 Atl. Rep. 343; Texas, etc., R. Co. *v.* Saxton, 7 N. Mex. 302; Perry *v.* Dickerson, 85 N. Y. 345, 39 Am. Rep. 663, *affirming* (Brooklyn City Ct. Gen. T.) 7 Abb. N. Cas. (N. Y.) 466; Raven *v.* Smith, 87 Hun (N. Y.) 90; Levin *v.* Standard Fashion Co., 16 Daly (N. Y.) 404.

3. Distinct Breaches of Continuing Contract or Covenant. — Ebbetts *v.* Conquest, 82 L. T. N. S. 560 (breach of covenant to repair in lease); Menges *v.* Milton Piano Co., (Mo. App. 1902) 70 S. W. Rep. 728 (agent's contract for sale of goods); Gardner *v.* Letson 8 Ohio Dec. 256, 5 Ohio N. P. 112 (breach of covenant against incumbrances).

4. Separate Assaults and Batteries. — Adams *v.* Haffards, 20 Pick. (Mass.) 127.

Conversion of Distinct Sums of Money at Different Times. — Shook *v.* Lyon, 16 Daly (N. Y.) 420; Kilbourne *v.* Sullivan County, 137 N. Y. 170.

Injuries to Land from the Construction of Different Railroads. — American Bank-Note Co. *v.* Metropolitan El. R. Co., 63 Hun (N. Y.) 506.

Damage to Different Portions of Land at Different Times. — Illinois Cent. R. Co. *v.* Wilbourn, 74 Miss. 284; Pantall *v.* Rochester, etc., Coal, etc., Co., 18 Pa. Super. Ct. 341.

Trespasses by Cattle at Different Times. — De La Guerra *v.* Newhall, 55 Cal. 21.

A Recovery Against a Defendant for Enticing Away the Plaintiff's Wife is not a bar to a subsequent action against the same defendant for criminal conversation with her. Schnell *v.* Blohm, 40 Hun (N. Y.) 378.

A Recovery of Damages for Permanent Injury to Land from the erection of a structure upon adjoining land is not a bar to an action for transient injuries occasioned by the negligent operation of such structure. Bramlette *v.* Louisville, etc., R. Co., (Ky. 1902) 68 S. W. Rep. 145.

So, recovery of damages for permanent injuries to land from the grading of a street is not a bar to a subsequent action for negligence in doing the work. Kehoe *v.* Philadelphia, 199 Pa. St. 45; Jones *v.* Seattle, 23 Wash. 753.

An Action Against a Press Association for Composing a Libelous Article and sending it to its subscribers is not a bar to another action against the same defendant as joint tortfeasor with a newspaper for publishing it. Union Associated Press *v.* Heath, 49 N. Y. App. Div. 247.

5. Diversion of Stream. — Covert *v.* Brooklyn, 13 N. Y. App. Div. 188.

Construction of Inclined Plane. — Hartman *v.* Pittsburg Incline Plane Co., 11 Pa. Super. Ct. 438.

Interruption of Plaintiff's Access to River. — Rumsey *v.* New York, etc., R. Co., 63 Hun (N. Y.) 200, *affirmed* 137 N. Y. 563.

Damages from Flooding Lands — *Georgia.* — Stafford *v.* Maddox, 87 Ga. 537; Mulligan *v.* Augusta, 115 Ga. 337.

Illinois. — Sanitary Dist. *v.* Ray, 199 Ill. 63; Cleveland, etc., R. Co. *v.* Nuttall, 59 Ill. App. 639.

sometimes predicable upon the same tort.[1] Thus, if a plaintiff be injured in his person and property by the negligent act of another, though there is but one wrongful act there is infringement of two rights, for the redress of each of which the plaintiff may maintain a separate action.[2]

VI. NATURE AND REQUISITES OF JUDGMENT OR ORDER — 1. Necessity for Judgment. — **The Weight of Authority** supports the view that it is not the finding of the court or the verdict of the jury rendered in an action that concludes the parties in subsequent litigation, but the judgment entered thereon,[3] for the verdict, when rendered, is under the control of the court in which the action was tried, and may be set aside for good reasons,[4] and hence it is necessary, in order to support the plea of *res judicata*, that a judgment, decree, or final order should have been actually rendered and entered in the prior action or suit.[5]

Indiana. — Rary *v.* Lee, 7 Ind. App. 518.

Maine. — Billings *v.* Berry, 50 Me. 31; Smith *v.* Brunswick, 80 Me. 189.

Minnesota. — Bowers *v.* Mississippi, etc., Boom Co., 78 Minn. 398.

Missouri. — McKee *v.* St. Louis, etc., R. Co., 49 Mo. App. 174.

North Carolina. — Ridley *v.* Seaboard, etc., R. Co., 118 N. Car. 996; Burwell *v.* Cannaday, 3 Jones L. (48 N. Car.) 165.

Ohio. — Wright *v.* Cincinnati, 8 Ohio Dec. 588.

Texas. — Clark *v.* Dyer, 81 Tex. 339.

And see the title FLOODS, vol. 13, p. 703.

1. Distinct Causes Arising from the Same Tort. — Crockett *v.* Miller, 112 Fed. Rep. 729, 50 C. C. A. 447; St. Louis, etc., R. Co. *v.* Trimble, 54 Ark. 354; Ireland *v.* Emmerson, 93 Ind. 1, 47 Am. Rep. 364.

The fact that a plaintiff is deprived of his property by a single wrongful act does not preclude him from suing the tortfeasor in separate actions of replevin for so much of the property as is found in his hands, and in trover for so much as he has converted. Taub *v.* McClelland-Colt Commission Co., 10 Colo. App. 190; Farwell *v.* Myers, 64 Mich. 234; Reid *v.* Ferris, 112 Mich. 693, 67 Am. St. Rep. 437; Reid *v.* Parks, 122 Mich. 363; Huffman *v.* Knight, 36 Oregon 581. See also Schoeneman *v.* Chamberlin, 55 N. Y. App. Div. 351.

Separate actions may be maintained to recover possession of bonds, and to recover interest collected by the defendant thereon while the bonds were in his hands. Govin *v.* De Miranda, (N. Y. Super. Ct. Gen. T.) 9 Misc. (N. Y.) 684.

2. Injuries to Person and Property from Same Act — *England.* — Brunsden *v.* Humphrey, 14 Q. B. D. 141, *reversing* 11 Q. B. D. 712.

United States. — Peake *v.* Baltimore, etc., R. Co., 26 Fed. Rep. 495.

Missouri. — Smith *v.* Warden, 86 Mo. 382.

New York. — Reilly *v.* Sicilian Asphalt Paving Co., 170 N. Y. 40; Cahnmann *v.* Metropolitan St. R. Co., (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 127.

Texas. — Watson *v.* Texas, etc., R. Co., 8 Tex. Civ. App. 144.

Contra, Doran *v.* Cohen, 147 Mass. 342; King *v.* Chicago, etc., R. Co., 80 Minn. 83; Von Fragstein *v.* Windler, 2 Mo. App. 598.

3. Judgment, Not Verdict, Concludes Parties. — Denike *v.* Denike, 44 N. Y. App. Div. 621, *affirmed* 167 N. Y. 585; Lance *v.* Shaughnessy, 86 Hun (N. Y.) 411, *affirmed* 153 N. Y. 653; Springer *v.* Bien, 128 N. Y. 99.

"It is the verdict, with the judgment of the court upon it, which constitutes the estoppel or the *res adjudicata*." Hawks *v.* Truesdell, 99 Mass. 557.

Special Findings of a jury, not confirmed by any judgment of the court nor involved in any general verdict, cannot be relied on, in a trial before another jury of the same or another suit, as proof of the facts thus found. Hawks *v.* Truesdell, 99 Mass. 557.

4. Control of Court. — Dougherty *v.* Lehigh Coal, etc., Co., 202 Pa. St. 635.

Findings of Fact Which Have Been Set Aside and a new trial granted cannot be an estoppel on a subsequent trial. Winona *v.* Minnesota R. Constr. Co., 27 Minn. 415.

5. Judgment Necessary. — Matter of Holbert, 57 Cal. 257; Carstarphen *v.* Holt, 96 Ga. 703; Crum *v.* Rea, 14 Ind. App. 379; Child *v.* Morgan, 51 Minn. 116; Gapen *v.* Bretternitz, 31 Neb. 302; De Forest *v.* Andrews, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 145; Chester City Presb. Church *v.* Conlin, 7 Del. Co. Rep. (Pa.) 437.

It Is the Termination and Not the Commencement of proceedings in one court which may be pleaded in another. It is the judgment and not the proceedings preliminary thereto which is the bar to a second judgment. People *v.* Westchester County, (Supm. Ct.) 1 Park. Crim. (N. Y.) 659.

An Order for Judgment on the findings of the court does not itself constitute a judgment and there is no estoppel where the judgment was not entered. Child *v.* Morgan, 51 Minn. 116. See also Bouldin *v.* Phelps, 30 Fed. Rep. 547.

For What Purpose Verdict Admissible. — While a declaration and a verdict thereon in the plaintiff's favor, upon which no judgment was ever entered, are not admissible to show an adjudication of the matters set forth in such declaration, or as a conclusive estoppel against the defendant therein as to such matters, they are competent for the purpose of showing, as between the parties and their privies in estate, the independent fact that such a verdict was rendered in the case in which that declaration was filed, and are admissible, if otherwise relevant, to show that the parties were at that time at issue upon the particular facts therein pleaded, and as a circumstance, in connection with other and independent evidence, tending to show acquiescence in the

On the Other Hand, however, there is authority for the view that as the judgment of the court determines no question of fact in a jury case, and is but the effect which should follow as a matter of course upon the verdict, it would be looking to the form and rejecting the substantial effect of the proceeding to consider only the judgment and disregard the verdict upon the question of *res judicata*, and hence, that where a verdict still remains in effect a party may avail himself of it as a bar to the prosecution of the same cause of action without the entry of any judgment upon the verdict.[1]

Kansas Rule. — In Kansas the court has said that findings of court and verdicts of jury and reports of commissions or referees may sometimes be considered as adjudications within the rule of *res judicata*, but they can be considered such only in cases where they themselves are final, or in cases where a final judgment has afterwards been rendered upon them, sustaining and confirming them; and even when confirmed by a final judgment they are adjudications only so far as they are necessarily included in and become a part of such judgment.[2]

Refusal of New Trial. — An order refusing a new trial is a final determination of the rights of the parties to the action so far as the trial court is concerned, and hence is a " judgment " under the language of the Code of South Carolina. Hence, where a verdict has been rendered and a new trial refused, the plea of *res judicata* can be made out although no formal judgment has been entered.[3]

Judgment Not Signed and Enrolled. — In Louisiana it has been held that a judgment which is not signed cannot be the foundation for a plea of *res judicata*,[4] and in *England* it has been laid down that according to the strict rules of pleading, a judgment which is not signed and enrolled cannot be insisted on by way of plea, though it may be insisted on by answer.[5]

2. Judgment Must Be Final. — In order to support the plea of *res judicata* there must have been a final judgment or decree rendered in the former action or suit.[6] The question as to what judgments are or are not final, and all

verdict and its consequences, to be weighed by the jury in determining whether such acquiescence was attributable to the verdict itself, or to other and distinct causes. Carstarphen *v.* Holt, 96 Ga. 703.

Decree Nunc pro Tunc. — In a case where the defendant set up a former adjudication of the same question and it was assumed by both parties that there had been a decree in the former suit, but at the hearing of the later suit the plaintiff objected that there had been no decree, the court, on motion of the defendant, signed and entered a decree in the first suit and allowed it to be put in evidence and held that it was a bar. Barker *v.* Stowe, 20 Blatchf. (U. S.) 185.

The Exclusion of Evidence properly admissible under the issues is as complete an adjudication as if the evidence were admitted and then discredited by the finding. Hord *v.* Bradbury, 156 Ind. 20.

1. Verdict Sufficient. — Hume *v.* Schintz, 90 Tex. 72, 91 Tex. 204.

Where an Action Was Continued for Judgment until the further order of the court, it was held that the verdict must be regarded as establishing conclusively the plaintiff's right though no judgment had yet been entered, the court saying: " For aught that appears judgment will follow in due course upon the verdict * * * when the order for continuance is vacated or rescinded." Downer *v.* Cripps, 170 Mass. 345.

2. Kansas Rule. — Auld *v.* Smith, 23 Kan. 65, 31 Kan. 262; Attica State Bank *v.* Benson, 8 Kan. App. 566; Mitchell *v.* Insley, 33 Kan. 654.

A Verdict on a Cause of Action Resting in Tort does not convert the tort into a debt; it must be merged into a judgment before it becomes a debt. Stauffer *v.* Remick, 37 Kan. 454.

3. Refusal of New Trial. — Ball *v.* Trenholm, 45 Fed. Rep. 588.

4. Judgment Not Signed. — Ferguson *v.* Chastant, 35 La. Ann. 485. *Compare* Consolidated Assoc. of Planters *v.* Mason, 23 La. Ann. 618.

The Judgment on a Rule to Distribute Proceeds may serve as a basis for *res judicata* although not signed, since it is merely incidental, distributing a fund realized under the main judgment. State *v.* Alexander, 106 La. 460.

5. Judgment Not Signed or Enrolled. — Kinsey *v.* Kinsey, 2 Ves. 577. See also Anonymous, 3 Atk. 809; Joly *v.* Swift, 11 Ir. Eq. 410; Pearse *v.* Dobinson, 35 L. J. Ch. 110, 13 L. T. N. S. 519, 14 W. R. 121. But *compare* Prettyman *v.* Prettyman, 1 Vern. 310, in which case it was held that a former decree of dismission might be pleaded in bar though it was not signed and enrolled, the court saying: " Either that suit was for the same matter as the present, or not; * * * if it is, then that suit is either depending or determined, and either way it is pleadable."

6. Judgment Must Be Final — *United States* — Aurora City *v.* West, 7 Wall. (U. S.) 82;

considerations affecting the finality of judgments, have been fully discussed in another portion of this work to which reference is made.[1]

3. Judgment Must Be on the Merits. — It is also necessary, in order to support a plea of *res judicata*, that the former judgment should have been rendered upon the merits of the controversy; the plea cannot be based upon a judgment founded upon a lack of jurisdiction, a nonjoinder or misjoinder of parties plaintiff or defendant, a misconception of the form of pleading, a formal or technical defect in the pleadings, or the like.[2]

Tippecanoe County *v.* Lucas, 93 U. S. 113; Whitaker *v.* Bramson, 2 Paine (U. S.) 220; Cromwell *v.* Sac County, 94 U. S. 351; Montgomery *v.* Samory, 99 U. S. 482; New Orleans Nat. Banking Assoc. *v.* Adams, 3 Woods (U. S.) 21.

Arizona. — Reilly *v.* Perkins, (Ariz. 1899) 56 Pac. Rep. 734.

California. — Board of Education *v.* Fowler, 19 Cal. 13.

Florida. — Marvin *v.* Hampton, 18 Fla. 131.

Indiana. — Proctor *v.* Cole, 104 Ind. 373; Jones *v.* Vert, 121 Ind. 140, 16 Am. St. Rep. 379; Crum *v.* Rea, 14 Ind. App. 379.

Iowa. — Collins *v.* Jennings, 42 Iowa 447.

Kansas. — Auld *v.* Smith, 23 Kan. 65; Attica State Bank *v.* Benson, 8 Kan. App. 566; Matter of Parker, 44 Kan. 279.

Kentucky. — Tuggle *v.* Gilbert, 1 Duv. (Ky.) 340; Nickell *v.* Fallen, (Ky. 1893) 23 S. W. Rep. 366.

Louisiana. — Humphreys *v.* Browne, 19 La. Ann. 159; Foss *v.* Brentel, 14 La. Ann. 810; Trescott *v.* Lewis, 12 La. Ann. 197; Durnford's Succession, 1 La. Ann. 92; Kellam *v.* Rippey, 3 La. Ann. 202.

Michigan. — Tucker *v.* Rohrback, 13 Mich. 75.

Missouri. — Garrett *v.* Greenwell, 92 Mo. 120.

Nebraska. — Hart *v.* Bank of Commerce, 51 Neb. 486.

Nevada. — Sherman *v.* Dilley, 3 Nev. 22.

New York. — Hunt *v.* Hoboken Land, etc., Co., 1 Hilt. (N. Y.) 164; Cook *v.* Litchfield, 5 Sandf. (N. Y.) 342; Webb *v.* Buckelew, 82 N. Y. 555. See also Wilson *v.* Sanger, 57 N. Y. App. Div. 323.

Oklahoma. — Brakefield *v.* Lucas, 10 Okla. 584.

Pennsylvania. — Casebeer *v.* Mowry, 55 Pa. St. 422, 93 Am. Dec. 766; Bennett Water Co. *v.* Millvale, 200 Pa. St. 613, 202 Pa. St. 616.

Tennessee. — Southern R. Co. *v.* Brigman, 95 Tenn. 624; Hall *v.* Calvert, (Tenn. Ch. 1897) 46 S. W. Rep. 1120.

Vermont. — Morey *v.* King, 49 Vt. 304.

1. What Judgments Are Final, Etc. — See the title FINAL JUDGMENTS AND DECREES, vol. 13, p. 23. See also the following cases:

California. — Schultz *v.* McLean, 76 Cal. 608.

Georgia. — Conquest *v.* National Bank, 97 Ga. 500.

Illinois. — Linington *v.* Strong, 111 Ill. 152.

Indiana. — Stevens *v.* Reynolds, 143 Ind. 468.

Iowa. — McClelland *v.* Bennett, 106 Iowa 74.

Louisiana. — Anderson *v.* Valentine, 15 La. Ann. 379; Surget *v.* Newman, 43 La. Ann. 873.

Massachusetts. — Merriam *v.* Whittemore, 5 Gray (Mass.) 316.

Michigan. — Jungnitsch *v.* Michigan Malleable Iron Co., 121 Mich. 460.

Missouri. — McReynolds *v.* Kansas City, etc., R. Co., 34 Mo. App. 581.

Oklahoma. — Brakefield *v.* Lucas, 10 Okla. 584.

Pennsylvania. — Barton *v.* Reynolds, 17 Pa. Super. Ct. 504; Stedman *v.* Poterie, 139 Pa. St. 100, 27 W. N. C. (Pa.) 270.

Tennessee. — Childs *v.* Dennis, (Tenn. Ch. 1901) 61 S. W. Rep. 1092; Rosenbaum *v.* Davis, 106 Tenn. 51.

Texas. — Harmon *v.* Bynum, 40 Tex. 324; Jecker *v.* Phytides, (Tex. Civ. App. 1901) 65 S. W. Rep. 1129; Henderson *v.* Moss, 82 Tex. 69.

Vermont. — New York City Third Nat. Bank *v.* Dorset Marble Co., 58 Vt. 70; Dixon *v.* Sinclear, 4 Vt. 354, 24 Am. Dec. 610.

Pendency of Motion for New Trial. — See Harris *v.* Barnhart, 97 Cal. 546; Young *v.* Brehe, 19 Nev. 379, 3 Am. St. Rep. 892; Snow *v.* Rich, 22 Utah 123.

2. Judgment Must Be on the Merits — *England.* — Hitchin *v.* Campbell, 2 W. Bl. 827, 3 Wils. C. Pl. 304, Lampen *v.* Kedgewin, 1 Mod. 207; Reg. *v.* May, 5 Q. B. D. 382, 49 L. J. M. C. 67, 42 L. T. N. S. 772, 28 W. R. 918.

United States. — Gilmer *v.* Grand Rapids, 16 Fed. Rep. 708; Hughes *v.* U. S., 4 Wall. (U. S.) 232; Keller *v.* Stolzenbach, 20 Fed. Rep. 47; Gould *v.* Evansville, etc., R. Co., 91 U. S. 526; Michigan Ins. Bank *v.* Eldred, 6 Biss. (U. S.) 370; Spicer's Case, 5 Ct. Cl. 34; Casey *v.* Pennsylvania Asphalt Paving Co., 109 Fed. Rep. 744, *affirmed* (C. C. A.) 114 Fed. Rep. 189; U. S. *v.* Coos Bay Wagon Road Co., 110 Fed. Rep. 864; U. S. *v.* Rand, 53 Fed. Rep. 348, 5 U. S. App. 230. See also Cromwell *v.* Sac County, 94 U. S. 351.

Alabama. — Perkins *v.* Moore, 16 Ala. 9; Hanson *v.* Patterson, 17 Ala. 738; McCall *v.* Jones, 72 Ala. 368; Hanchey *v.* Coskrey, 81 Ala. 149.

Arizona. — Reilly *v.* Perkins, (Ariz. 1899) 56 Pac. Rep. 734.

Arkansas. — State *v.* Roth, 47 Ark. 222; Moss *v.* Ashbrooks, 12 Ark. 369; Adams *v.* State, 9 Ark. 33.

California. — Reynolds *v.* Lincoln, 71 Cal. 183; Gray *v.* Dougherty, 25 Cal. 266; Rosenthal *v.* McMann, 93 Cal. 505; Naftzger *v.* Gregg, (Cal. 1892) 31 Pac. Rep. 612.

Colorado. — Hallack *v.* Loft, 19 Colo. 74.

Connecticut. — Miles *v.* Strong, 68 Conn. 273.

District of Columbia. — Cummings *v.* Baker, 16 App. Cas. (D. C.) 1.

Florida. — Moore *v.* Felkel, 7 Fla. 44; Thornton *v.* Eppes, 6 Fla. 546.

Georgia. — Papworth *v.* Fitzgerald, 111 Ga. 54.

A Judgment Against the Plaintiff for Costs of Suit rendered after trial and hearing the testimony is absolute and without qualification, and is a bar to a subsequent suit.[1]

Issues in Bar and in Abatement. — There seems to be no sound reason why a judgment on an issue in bar, though it also embraced an issue in abatement, should not conclude the parties in all further controversies.[2]

Affirmance Not Involving Merits. — Where a case has been decided in the trial

Illinois. — Hoyt *v.* Chicago, etc., R. Co., 177 Ill. 617, *affirming* 50 Ill. App. 583; Lundy *v.* Mason, 174 Ill. 505; Rogers *v.* Higgins, 57 Ill. 244; Smalley *v.* Edey, 19 Ill. 207.

Indiana. — Roberts *v.* Norris, 67 Ind. 386; Proctor *v.* Cole, 104 Ind. 373. See also Goble *v.* Dillon, 86 Ind. 327, 44 Am. Rep. 308; Estep *v.* Larsh, 21 Ind. 190.

Iowa. — Harrison *v.* Hartford F. Ins. Co., 102 Iowa 112; Atkins *v.* Anderson, 63 Iowa 739; Kern *v.* Wilson, 82 Iowa 407.

Kansas. — Matter of Parker, 44 Kan. 279; Auld *v.* Smith, 23 Kan. 65; Attica State Bank *v.* Benson, 8 Kan. App. 566.

Kentucky. — Yankey *v.* Sweeney, 85 Ky. 55; Pepper *v.* Donnelly, 87 Ky. 259; Bitzer *v.* O'Bryan, 107 Ky. 590; Kendal *v.* Talbot, 1 A. K. Marsh. (Ky.) 321; Hamel *v.* Lawrence, 1 A. K. Marsh. (Ky.) 330; Carlisle *v.* Howes, (Ky. 1897) 43 S. W. Rep. 191. See also Maize *v.* Bowman, 93 Ky. 205.

Louisiana. — Louisiana State Bank *v.* Orleans Nav. Co., 3 La. Ann. 294.

Maryland. — Schindel *v.* Suman, 13 Md. 310.

Massachusetts. — Morton *v.* Sweetser, 12 Allen (Mass.) 134; Jordan *v.* Siefert, 126 Mass. 25.

Michigan. — Detroit *v.* Houghton, 42 Mich. 459.

Minnesota. — Gerrish *v.* Pratt, 6 Minn. 53; Andrews *v.* School Dist. No. 4, 35 Minn. 70; Kerrigan *v.* Chicago, etc., R. Co., 86 Minn. 407.

Mississippi. — Johnson *v.* White, 13 Smed. & M. (Miss.) 584; Mosby *v.* Wall, 23 Miss. 81, 55 Am. Dec. 71; Perry *v.* Lewis, 49 Miss. 443; Conn *v.* Bernheimer, 67 Miss. 498; Agnew *v.* McElroy, 10 Smed. & M. (Miss.) 552, 48 Am. Dec. 772.

Missouri. — Baldwin *v.* Davidson, 139 Mo. 118, 61 Am. St. Rep. 460; Baker *v.* Lane, 137 Mo. 682; Garrett *v.* Greenwell, 92 Mo. 120; Verhein *v.* Schultz, 57 Mo. 326; Wells *v.* Moore, 49 Mo. 229; Bell *v.* Hoagland, 15 Mo. 360; Taylor *v.* Larkin, 12 Mo. 103, 49 Am. Dec. 119; Winham *v.* Kline, 77 Mo. App. 36; Bennett *v.* Southern Bank, 61 Mo. App. 297; Lilly *v.* Tobbein, (Mo. 1890) 13 S. W. Rep. 1060.

Nebraska. — Philpott *v.* Brown, 16 Neb. 387.

Nevada. — Gibson *v.* Milne, 1 Nev. 526.

New Hampshire. — Ordway *v.* Boston, etc., R. Co., 69 N. H. 429; Meredith Mechanic Assoc. *v.* American Twist Drill Co., 67 N. H. 450; Taylor *v.* Barron, 30 N. H. 78, 64 Am. Dec. 281; Demerit *v.* Lyford, 27 N. H. 541; Brackett *v.* Hoitt, 20 N. H. 257.

New York. — Stokes *v.* Stokes, 49 N. Y. App. Div. 302; Vaughan *v.* O'Brien, (Supm. Ct. Gen. T.) 39 How. Pr. (N. Y.) 515; Varick *v.* Edwards, Hoffm. (N. Y.) 382; Shaw *v.* Broadbent, 129 N. Y. 114; MacArdell *v.* Olcott, 62 N. Y. App. Div. 127; People *v.* Cooper, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 288; Genet *v.* Delaware, etc., Canal Co., 163 N. Y. 173, *modifying* 14 N. Y. App. Div. 177; People *v.* Champlain, 33 N. Y. App. Div. 277.

North Carolina. — Coleman *v.* Howell, 131 N. Car. 125; Halcombe *v.* Haywood County, 89 N. Car. 346; Bond *v.* McNider, 3 Ired. L. (25 N. Car.) 440.

Ohio. — Moore *v.* Dunn, 41 Ohio St. 62. See also Fuher *v.* Villwock, 6 Ohio Cir. Dec. 373, 14 Ohio Cir. Ct. 389.

Oklahoma. — Brakefield *v.* Lucas, 10 Okla. 584.

Oregon. — Pruitt *v.* Muldrick, 39 Oregon 353.

Pennsylvania. — Buchanan *v.* Banks, 203 Pa. St. 599; Weigley *v.* Coffman, 144 Pa. St. 489, 27 Am. St. Rep 667; Detrick *v.* Sharrar, 95 Pa. St. 521; Carmony *v.* Hoober, 5 Pa. St. 305. See also Dunlevy's Estate, 10 Pa. Co. Ct. 454; Miller's Estate, 159 Pa. St. 562, 34 W. N. C. (Pa.) 89.

South Carolina. — Charles *v.* Charles, 13 S. Car. 385.

South Dakota. — Taylor *v.* Neys, 11 S. Dak. 605. See also Whittaker *v.* Warren, 14 S. Dak. 611.

Tennessee. — Wallace *v.* Goodlett, 104 Tenn. 670; Fowlkes *v.* State, 14 Lea (Tenn.) 14; Witcher *v.* Oldham, 4 Sneed (Tenn.) 220.

Texas. — Worst *v.* Sgitcovich, (Tex. Civ. App. 1898) 46 S. W. Rep. 72; Jackson *v.* Finlay, (Tex. Civ. App. 1897) 40 S. W. Rep. 427; Philipowski *v.* Spencer, 63 Tex. 608; Jackson *v.* Elliott, 49 Tex. 62; Cook *v.* Burnley, 45 Tex. 115; Houston *v.* Musgrove, 35 Tex. 594; Horton *v.* Hamilton, 20 Tex. 611; Weathered *v.* Mays, 4 Tex. 387.

Vermont. — Jericho *v.* Underhill, 67 Vt. 85, 48 Am. St. Rep. 804.

Virginia. — Tate *v.* New York State Bank, 96 Va. 765; Karn *v.* Rorer Iron Co., 86 Va. 754.

Washington. — Bartelt *v.* Seehorn, 25 Wash. 261.

West Virginia. — Cornell *v.* Hartley, 41 W. Va. 493.

See also the title DISMISSAL, DISCONTINUANCE, AND NONSUIT, 6 ENCYC. OF PL. AND PR. 987, notes 4 and 5.

What Judgments Are on the Merits. — In order that a judgment or decree should be on the merits, it is not necessary that the litigation should be determined "on the merits," in the moral or abstract sense of these words. It is sufficient that the status of the action was such that the parties might have had their suit thus disposed of, if they had properly presented and managed their respective cases. Parkes *v.* Clift, 9 Lea (Tenn.) 524.

1. Zimmerman *v.* Zimmerman, 15 Ill. 84.

2. Sheldon *v.* Edwards, 35 N. Y. 279. See also People *v.* Skidmore, 27 Cal. 287; Gundlin *v.* Hamburg American Packet Co., (C. Pl. Gen. T.) 8 Misc. (N. Y.) 291.

court upon the merits and affirmed in the appellate court, it is available as *res judicata*, though the judgment of affirmance in the appellate court was not upon the merits.[1]

A Judgment Non Obstante Veredicto is as conclusive upon the merits as though a binding instruction had been given to the jury in favor of the party for whom the judgment is rendered, and hence has the effect of *res judicata*.[2]

Statute of Limitations — Laches. — A finding against a party, either upon final hearing or demurrer, that his cause of action as shown by him is barred by the statute of limitations, or by laches, is a decision upon the merits concluding the right of action.[3]

A Decree Dissolving an Injunction upon the Merits is final and constitutes *res judicata*, where no relief but an injunction was sought.[4]

4. Judgment by Confession or Consent. — A judgment by confession or consent may constitute *res judicata*, for such a judgment is quite as final and conclusive between the parties and their privies as any other judgment.[5]

1. Affirmance Not Involving Merits. — Trescott *v.* Barnes, 51 Iowa 409.

2. Judgment Non Obstante Veredicto. — Casey *v.* Pennsylvania Asphalt Paving Co., 109 Fed. Rep. 744, *affirmed* (C. C. A.) 114 Fed. Rep. 189.

3. Statute of Limitations — Laches. — Parkes *v.* Clift, 9 Lea (Tenn.) 524. See also People *v.* Preston, 62 Hun (N. Y.) 185, *affirmed* 131 N. Y. 644.

4. Fluhartv *v.* Mills, 49 W. Va. 446.

5. Judgment by Confession or Consent — *England.* — *In re* South American, etc., Co., (1895) 1 Ch. 37; Ferrers's Case, 6 Coke 7*a*, Cro. Eliz. 668; Brunsden *v.* Humphrey, 14 Q. B. D. 141, *reversing* on other grounds 11 Q. B. D. 712; Kitchen *v.* Campbell, 3 Wils. C. Pl. 304, 2 W. Bl. 827; McLeod *v.* Power, (1898) 2 Ch. 295; Newington *v.* Levy, L. R. 6 C. P. 180, *affirming* L. R. 5 C. P. 607; River Ribble Joint Committee *v.* Croston Urban Dist. Council, (1897) 1 Q. B. 251.

Canada. — Hardy Lumber Co. *v.* Pickerel River Imp. Co., 29 Can. Sup. Ct. 211.

United States. — Aurora City *v.* West, 7 Wall. (U. S.) 90; Nashville, etc., R. Co. *v.* U. S., 113 U. S. 261; U. S. *v.* Parker, 120 U. S. 89; Safe Deposit, etc., Co. *v.* Wright, 105 Fed. Rep. 155. See also Mandeville *v.* Holey, 1 Pet. (U. S.) 137.

Alabama. — Moore *v.* Barclay, 23 Ala. 740; Alabama G. S. R. Co. *v.* South, etc., Alabama R. Co., 84 Ala. 570, 5 Am. St. Rep. 401.

Arkansas. — Harris *v.* Preston, 10 Ark. 201.

California. — Crossman *v.* Davis, 79 Cal. 603; McCreery *v.* Fuller, 63 Cal. 30.

Florida. — Thornton *v.* Eppes, 6 Fla. 546; Moore *v.* Felkel, 7 Fla. 44.

Georgia. — Cothran *v.* Brower, 75 Ga. 494; Cunningham *v.* Schley, 68 Ga. 105.

Illinois. — Thomas *v.* Mueller, 106 Ill. 36; McDonald *v.* Chisholm, 131 Ill. 273; Hulse *v.* Mershon, 125 Ill. 52; Krenchi *v.* Dehler, 50 Ill. 176. See also Lagerquist *v.* Williams, 74 Ill. App. 17. But *compare* Wadhams *v.* Gay, 73 Ill. 415.

Indiana. — Fletcher *v.* Holmes, 25 Ind. 463; Maghee *v.* Collins, 27 Ind. 84.

Iowa. — Twogood *v.* Pence, 22 Iowa 543; Plummer *v.* Douglas, 14 Iowa 72, 81 Am. Dec. 456; Allison *v.* Hess, 28 Iowa 388; North *v.* Mudge, 13 Iowa 496, 81 Am. Dec. 441; Miller *v.* Clarke, 37 Iowa 325. See also Heironymus *v.* Heironymus, 64 Iowa 81.

Kansas. — See Townsdin *v.* Shrader, 39 Kan. 286.

Kentucky. — King *v.* Ohio Valley R. Co., (Ky. 1889) 10 S. W. Rep. 631.

Louisiana. — Edwards *v.* Edwards, 29 La. Ann. 597; Dunn *v.* Pipes, 20 La. Ann. 276; Greenwood *v.* New Orleans, 12 La. Ann. 426; Jamison *v.* New Orleans, 12 La. Ann. 346. See also Girod *v.* Pargoud, 11 La. Ann. 329.

Maryland. — Royston *v.* Horner, 86 Md. 249, 63 Am. St. Rep. 510; Huntt *v.* Townshend, 31 Md. 336, 100 Am. Dec. 63.

Massachusetts. — Hanscom *v.* Hewes, 12 Gray (Mass.) 334; Jordan *v.* Siefert, 126 Mass. 25. See also Chamberlain *v.* Preble, 11 Allen (Mass.) 370.

Michigan. — Town *v.* Smith, 14 Mich. 348.

Mississippi. — Blackbourn *v.* Senatobia Educational Assoc., 74 Miss. 852; Travis *v.* Willis, 55 Miss. 557; Black *v.* Pattison, 61 Miss. 599.

Missouri. — Lightfoot *v.* Wilmot, 23 Mo. App. 5; Mechanics' Bank *v.* Meyer, 93 Mo. 417.

New Hampshire. — Hillsborough *v.* Nichols, 46 N. H. 379.

New Jersey. — Gifford *v.* Thorn, 9 N. J. Eq. 702; Sayre *v.* Hewes, 32 N. J. Eq. 652. See also Dean *v.* Thatcher, 32 N. J. L. 473.

New York. — Brown *v.* New York, 66 N. Y. 386, *affirming* 5 Daly (N. Y.) 481; Gates *v.* Preston, 41 N. Y. 113; Miller *v.* Earle, 24 N. Y. 110; French *v.* Shotwell, 5 Johns. Ch. (N. Y.) 555; Sheldon *v.* Stryker, 34 Barb. (N. Y.) 120; Tripp *v.* Saunders, (Supm. Ct.) 59 How. Pr. (N. Y.) 379; Neusbaum *v.* Keim, 24 N. Y. 325. See also Matter of Irvin, (Surrogate Ct.) 24 Misc. (N. Y.) 353; Kirby *v.* Fitzgerald, 31 N. Y. 424. *Compare* Metropolitan El. R. Co. *v.* Manhattan El. R. Co., 11 Daly (N. Y.) 373.

North Carolina. — Donnelly *v.* Wilcox, 113 N. Car. 408.

Pennsylvania. — Dodds *v.* Blackstock, 1 Pittsb. (Pa.) 46; Schoch *v.* Foreman, 3 Brews. (Pa.) 157; Kauff *v.* Messner, 4 Brews. (Pa.) 98; Orr *v.* Mercer County Mut. F. Ins. Co., 114 Pa. St. 387; Secrist *v.* Zimmerman, 55 Pa. St. 446; Shallcross *v.* Smith, 81 Pa. St. 132; McCleery *v.* Thompson, 130 Pa. St. 443. See also Dixon *v.* Miller, 20 Pa. Co. Ct. 335; Livezly *v.* Pennock, 2 Browne (Pa.) 321; Verner *v.* Carson, 66 Pa. St. 440.

Rhode Island. — Hicks *v.* Aylsworth, 13 R. I. 562.

South Carolina. — Moore *v.* Trimmier, 32 S.

A Judgment upon an Agreed State of Facts is such a judgment as will conclusively determine the rights of the parties and constitute a bar to a new suit.[1]

Confession by One of Several Joint Debtors. — The provision of the New York Code of Civil Procedure that one or more joint debtors may confess a judgment for a joint debt due or to become due, but, where all the joint debtors do not unite in the confession, judgment must be entered and enforced against those only who confess it, and is not a bar to an action against all the joint debtors upon the same demand, should not be limited in its application to confessions technically so called, but should also be held to embrace confessions made through the medium of a cognovit or offer to allow judgment.[2]

Matters of Law. — While a decree *pro confesso* concludes the defendant against whom it is entered as to all matters of fact properly alleged in the bill, it does not follow that he must be held to have confessed all matters of law so alleged.[3]

A Bill Which Is Taken as Confessed Against an Absentee after publication is not evidence against him of any fact, even as to his personal rights.[4]

A Consent Decree Procured by Fraud is not binding or conclusive.[5]

5. Judgment by Default. — A judgment by default is just as conclusive as to the rights of the parties before the court as a judgment on issue joined,[6] and consequently the doctrine of *res judicata* applies to such a judgment with the same validity and force as to a judgment rendered upon a trial of issues.[7]

Car. 511. See also Kerr *v.* Webb, 9 Rich. Eq. (S. Car.) 369.

Tennessee. — See Stone *v.* Duncan, 1 Head (Tenn.) 103.

Texas. — Ellis *v.* Mills, 28 Tex. 585; Morris *v.* Bank of Commerce, 67 Tex. 602; Cotton *v.* Jones, (Tex. Civ. App. 1894) 27 S. W. Rep. 191.

Vermont. — Barney *v.* Goff, 1 D. Chip. (Vt.) 304.

Virginia. — Beazley *v.* Sims, 81 Va. 644; Richmond, etc., R. Co. *v.* Shippen, 2 Patt. & H. (Va.) 327. See also Wohlford *v.* Compton, 79 Va. 333; Smith *v.* Chilton, 84 Va. 840; Syme *v.* Johnston, 3 Call (Va.) 558.

Wisconsin. — Reid *v.* Southworth, 71 Wis. 288. See also Van Valkenburgh *v.* Milwaukee, 43 Wis. 574.

Unauthorized Consent. — A judgment entered by consent of the mayor of a town cannot give validity to municipal aid bonds which were void because not issued in conformity with the statute. Kelley *v.* Milan, 127 U. S. 139, *affirming* 21 Fed. Rep. 842.

1. Derby *v.* Jacques, 1 Cliff. (U. S.) 425.

2. Kantrowitz *v.* Kulla, (N. Y. City Ct. Gen. T.) 20 Abb. N. Cas. (N. Y.) 321.

3. Ames *v.* Holmes, 190 Ill. 561.

4. Danforth *v.* Woods, 11 Paige (N. Y.) 9.

5. French *v.* Shotwell, 5 Johns. Ch. (N. Y.) 555.

6. **Judgment by Default Conclusive** — *United States.* — Last Chance Min. Co. *v.* Tyler Min. Co., 157 U. S. 683; Oregon R. Co. *v.* Oregon R., etc., Co., 28 Fed. Rep. 505, not affected as to this point by *reversal* in 136 U. S. 646.

Arkansas. — Harris *v.* Preston, 10 Ark. 201.

California. — Crossman *v.* Davis, 79 Cal. 603; Maddux *v.* San Luis Obispo County Bank, 129 Cal. 665.

Georgia. — Harbig *v.* Freund, 69 Ga. 180; Cunningham *v.* Schley, 68 Ga. 105.

Indiana. — Barton *v.* Anderson, 104 Ind. 578.

Iowa. — Allison *v.* Hess, 28 Iowa 388.

Kansas. — Johnson *v.* Jones, 58 Kan. 745.

Maine. — White *v.* Savage, 94 Me. 138.

Maryland. — Walsh *v.* McIntire, 68 Md. 402; Green *v.* Hamilton, 16 Md. 317, 77 Am. Dec. 295.

Massachusetts. — Gaskill *v.* Dudley, 6 Met. (Mass.) 546, 39 Am. Dec. 750.

Missouri. — See St. Louis *v.* Lang, 131 Mo. 412.

New Jersey. — Gifford *v.* Thorn, 9 N. J. Eq. 702.

New York. — Ostrander *v.* Hart, 130 N. Y. 412; Mutual Reserve Fund L. Assoc. *v.* Cordero, (N. Y. City Ct. Gen. T.) 33 Misc. (N. Y.) 387; Brown *v.* New York, 66 N. Y. 385; Henriques *v.* Yale University, 28 N. Y. App. Div. 354, *affirming* 22 Misc. (N. Y.) 653.

South Dakota. — Howard *v.* Huron, 6 S. Dak. 180.

Tennessee. — See Union Bank *v.* Hicks, 4 Humph. (Tenn.) 327.

A Judgment by Default in a Tax Sale Proceeding is not, in *Illinois*, conclusive upon the taxpayer, but can be impeached collaterally. Gage *v.* Pumpelly, 115 U. S. 454, *explaining* Graceland Cemetery Co. *v.* People, 92 Ill. 619; Belleville Nail Co. *v.* People, 98 Ill. 399; Gage *v.* Bailey, 102 Ill. 11; Riverside Co. *v.* Howell, 113 Ill. 259.

A Judgment by Default in Summary Proceedings for Nonpayment of Rent is conclusive between the parties as to the existence and validity of the lease, the occupation by the tenant, and that rent is due, and also as to any other facts alleged in the petition or affidavit which are required to be alleged as a basis of the proceedings. Reich *v.* Cochran, 151 N. Y. 122, 56 Am. St. Rep. 607, *affirming* 74 Hun (N. Y.) 551.

7. **Doctrine of Res Judicata Applicable** — *England.* — Irish Land Commission *v.* Ryan, (1900) 2 Ir. R. 565.

United States. — Lake County *v.* Platt, 79 Fed. Rep. 567, 49 U. S. App. 216; Garner *v.* Second Nat. Bank, 89 Fed. Rep. 636.

Illinois. — Mason *v.* Patterson, 74 Ill. 191.

Kansas. — Venable *v.* Dutch, 37 Kan. 515, 1 Am. St. Rep. 260.

It must be borne in mind, however, that the confession implied from the default is limited to the material issuable facts which are well pleaded in the declaration or complaint,[1] and hence, while the principle of *res judicata* applies to all issues involved in the controversy,[2] it does not apply to issues which were not raised in the pleadings,[3] nor to matters which might have been decided, but were not.[4]

Ruling on Motion to Set Aside Default. — The ruling on a motion to set aside a default is *res judicata*, and its correctness cannot be gainsaid so long as the order remains in force.[5]

6. Judgment on Demurrer — *a.* FORMAL DEFECTS. — A judgment upon a demurrer which is based upon formal or technical defects of pleading, a lack

Kentucky. — Kimbrough *v.* Harbett, (Ky. 1901) 60 S. W. Rep. 836.

Louisiana. — Goodrich *v.* Hunton, 31 La. Ann. 582.

Massachusetts. — Hanscom *v.* Hewes, 12 Gray (Mass.) 334.

Minnesota. — Doyle *v.* Hallam, 21 Minn. 515; Northern Trust Co. *v.* Crystal Lake Cemetery Assoc., 67 Minn. 131.

Missouri. — Greenabaum *v.* Elliott, 60 Mo. 25.

Nebraska. — Kloke *v.* Gardels, 52 Neb. 117.

New York. — Goebel *v.* Iffla, 111 N. Y. 170; Newton *v.* Hook, 48 N. Y. 676; C. Graham, etc., Co. *v.* Van Horn, (Supm. Ct. Spec. T.) 49 N. Y. Supp. 401; Binck *v.* Wood, 43 Barb. (N. Y.) 315; Maltonner *v.* Dimmick, 4 Barb. (N. Y.) 566; Ferris *v.* Fisher, 67 Hun (N. Y.) 134; Barber *v.* Kendall, 158 N. Y. 401, *affirming judgment* in 1 N. Y. App. Div. 247; Ogsbury *v.* La Farge, 2 N. Y. 113.

Ohio — Ewing *v.* McNairy, 20 Ohio St. 315.

Oklahoma. — Crawford *v.* Noble County, 8 Okla. 450.

West Virginia. — Buena Vista Freestone Co. *v.* Parrish, 34 W. Va. 652. See also cases cited in preceding note. And see further the title DEFAULTS, 6 ENCYC. OF PL. AND PR. 1.

The Suffering of Judgment Nil Dicit by a defendant precludes him from subsequently denying that he owes the plaintiffs the money adjudged by a court of competent jurisdiction to be due them. McCalley *v.* Wilburn, 77 Ala. 549.

A Judgment Against the Plaintiff for Costs only on default, not being upon the merits, is not a conclusive bar. Gabrielson *v.* Waydell, 67 Fed. Rep. 342.

Finality. — A judgment entered by default under the statute does not ascertain the amount and therefore is not final in the first instance; but becomes a final judgment when the amount is ascertained and entered on the record. It is, however, final in the first instance as respects the right of the plaintiff and the liability of the defendant. Clark *v.* Compton, 15 Tex. 32. See also Loney *v.* Bailey, 43 Md. 10; Green *v.* Hamilton, 16 Md. 317, 77 Am. Dec. 295.

1. Default Conclusive Only as to Matters Properly Pleaded — *United States.* — Cromwell *v.* Sac County, 94 U. S. 351.

Alabama. — McCalley *v.* Wilburn, 77 Ala. 549.

California. — Kittridge *v.* Stevens, 16 Cal. 381.

Connecticut. — Welch *v.* Wadsworth, 30 Conn. 149, 79 Am. Dec. 236.

Indiana. — Unfried *v.* Heberer, 63 Ind. 67; Barton *v.* Anderson, 104 Ind. 578; Goble *v.* Dillon, 86 Ind. 327, 44 Am. Rep. 308; Allen *v.* Rice, 16 Ind. App. 572.

Iowa. — Shirland *v.* Union Nat. Bank, 65 Iowa 97.

Kentucky. — Ligon *v.* Triplett, 12 B. Mon. (Ky.) 283.

Massachusetts. — Minor *v.* Walter, 17 Mass. 237; Gaskill *v.* Dudley, 6 Met. (Mass.) 546, 39 Am. Dec. 750; Briggs *v.* Richmond, 10 Pick. (Mass.) 391, 20 Am. Dec. 526; Hanham *v.* Sherman, 114 Mass. 19; Fuller *v.* Shattuck, 13 Gray (Mass.) 70, 74 Am. Dec. 622.

Missouri. — Greenabaum *v.* Elliott, 60 Mo. 25.

New York. — Brown *v.* New York, 66 N. Y. 385; Jarvis *v.* Driggs, 69 N. Y. 143; Argall *v.* Pitts, 78 N. Y. 239; Stelle *v.* Palmer, (N. Y. Super. Ct. Spec. T.) 11 Abb. Pr. (N. Y.) 62.

Ohio. — McCurdy *v.* Baughman, 43 Ohio St. 78.

Texas. — Ellis *v.* Mills, 28 Tex. 584.

Wisconsin. — Van Valkenburgh *v.* Milwaukee, 43 Wis. 574.

See also the title DEFAULTS, ENCYC. OF PL. AND PR., vol. 6, p. 117.

A defendant by not answering the complaint does not admit that the plaintiff is entitled to the relief demanded against the defendant, but simply that the plaintiff is entitled to such relief as the facts properly alleged entitle him to have. Argall *v.* Pitts, 78 N. Y. 239.

A Judgment by Default Only Admits for the Purpose of the Action the legality of the demand or claim in suit: it does not make the allegations of the declaration or complaint evidence in an action upon a different claim. Cromwell *v.* Sac County, 94 U. S. 351.

2. Material Matters Within Issues. — The rule that the estoppel of a former judgment extends to matters which although not expressly determined are comprehended and involved in the thing expressly stated and decided, extends to judgments taken by default. Crompton, etc., Loom Works *v.* Brown, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 513, *affirming* (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 319.

3. Extraneous Issues. — Sobolisk *v.* Jacobson, 6 N. Dak. 175.

4. Last Chance Min. Co. *v.* Tyler Min. Co., 157 U. S. 683; Van Alstyne *v.* Indiana, etc., R. Co., 34 Barb. (N. Y.) 28; Smith *v.* Whistler, 8 Ohio Cir. Dec. 768, 16 Ohio Cir. Ct. 130.

5. White *v.* Watts, 18 Iowa 74.

of jurisdiction, a misjoinder of parties, or the like, as it does not involve the merits of the controversy, cannot be made available as *res judicata.*[1]

b. WHERE MERITS INVOLVED — (1) *General Rule.* — But a judgment on demurrer will constitute *res judicata* where it goes upon the merits of the case; that is, where the demurrer is sustained and judgment entered for the demurring party on the ground that the opposing party has not shown a good cause of action, or defense, or where the demurrer is overruled and judgment entered for the opposing party on the facts as confessed by the demurrer.[2]

1. Demurrer for Formal Defects, etc. — *United States.* — House *v.* Mullen, 22 Wall. (U. S.) 42.

Alabama. — Perkins *v.* Moore, 16 Ala. 9.

Arkansas. — Moss *v.* Ashbrooks, 12 Ark. 369.

California. — People *v.* Skidmore, 27 Cal. 287. See also Robinson *v.* Howard, 5 Cal. 428; Sivers *v.* Sivers, 97 Cal. 518.

Georgia. — Papworth *v.* Fitzgerald, 111 Ga. 54; Satterfield *v.* Spier, 114 Ga. 127.

Idaho. — Lockett *v.* Lindsay, 1 Idaho 324.

Illinois. — Vanlandingham *v.* Ryan, 17 Ill. 25.

Indiana. — Terre Haute, etc., R. Co. *v.* State, (Ind. 1902) 65 N. E. Rep. 401; Stevens *v.* Dunbar, 1 Blackf. (Ind.) 56.

Iowa. — Roberts *v.* Hamilton, 56 Iowa 683.

Massachusetts. — Wilbur *v.* Gilmore, 21 Pick. (Mass.) 250.

New York. — See Skinner *v.* Dayton, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286.

Ohio. — McGatrick *v.* Wason, 4 Ohio St. 566.

Pennsylvania. — Detrick *v.* Sharrar, 95 Pa. St. 521.

Texas. — Nickelson *v.* Ingram, 24 Tex. 630. See also Gray *v.* Edwards, 3 Tex. Civ. App. 361.

2. Where Merits Involved — *England.* — Ferrers's Case, 6 Coke 7*a*, Cro. Eliz. 668; Brunsden *v.* Humphrey, 14 Q. B. D. 141, *reversing* on other grounds 11 Q. B. D. 712; Kitchen *v.* Campbell, 3 Wils. C. Pl. 304, 2 W. Bl. 827.

United States. — Gould *v.* Evansville, etc., R. Co., 91 U. S. 526; Aurora City *v.* West, 7 Wall. (U. S.) 90; Goodrich *v.* Chicago, 5 Wall. (U. S.) 566; Oregonian R. Co. *v.* Oregon R., etc., Co., 27 Fed. Rep. 277, not affected as to this point by *reversal* in 136 U. S. 646; Alley *v.* Nott, 111 U. S. 472; Bissell *v.* Spring Valley Tp., 124 U. S. 225; Brown *v.* District of Columbia, 19 Ct. Cl. 445; Lindsley *v.* Union Silver Star Min. Co., (C. C. A.) 115 Fed. Rep. 46, 106 Fed. Rep. 468; Messinger *v.* New England Mut. L. Ins. Co., 59 Fed. Rep. 416; Fuller *v.* Hamilton County, 53 Fed. Rep. 411.

Alabama. — Stein *v.* McGrath, 128 Ala. 175; McDonald *v.* Mobile L. Ins. Co., 65 Ala. 358; Perkins *v.* Moore, 16 Ala. 9, 17.

Arizona. — See Wilson *v.* Lowry, (Ariz. 1898) 52 Pac. Rep. 777.

Arkansas. — Luttrell *v.* Reynolds, 63 Ark. 254.

California. — Robinson *v.* Howard, 5 Cal. 428; Peterson *v.* Weissbein, 75 Cal. 174; Los Angeles *v.* Mellus, 58 Cal. 16, 19, 59 Cal. 444. See also Terry *v.* Hammonds, 47 Cal. 32.

Colorado. — Schroers *v.* Fisk, 10 Colo. 599.

Connecticut. — Brennan *v.* Berlin Iron Bridge Co., 71 Conn. 479.

Florida. — Thornton *v.* Eppes, 6 Fla. 546; Moore *v.* Felkel, 7 Fla. 44.

Georgia. — Kimbro *v.* Virginia, etc., Air-Line R. Co., 56 Ga. 185; Fain *v.* Hughes, 108 Ga. 537; Papworth *v.* Fitzgerald, 111 Ga. 54; Turner *v.* Cates, 90 Ga. 731; Black *v.* Black, 27 Ga. 40; Greene *v.* Central of Georgia R. Co., 112 Ga. 859; Ferguson *v.* Carter, 8 Ga. 524; Gray *v.* Gray, 34 Ga. 499; Smith *v.* Hornsby, 70 Ga. 552.

Illinois. — Vanlandingham *v.* Ryan, 17 Ill. 25; Nispel *v.* Laparle, 74 Ill. 306.

Indiana. — La Porte *v.* Organ, 5 Ind. App. 369; Nickless *v.* Pearson, 126 Ind. 477; Porter *v.* Fraleigh, 19 Ind. App. 562; Wilson *v.* Ray, 24 Ind. 159; Estep *v.* Larsh, 21 Ind. 190.

Iowa. — Gregory *v.* Woodworth, 107 Iowa 151; Felt *v.* Turnure, 48 Iowa 397; Lamb *v.* McConkey, 76 Iowa 47.

Kansas. — Hyatt *v.* Challiss, 59 Kan. 422; Merrill *v.* Ness County, 7 Kan. App. 717; Brown *v.* Kirkbride, 19 Kan. 588; McLaughlin *v.* Doane, 40 Kan. 392, 10 Am. St. Rep. 210.

Kentucky. — Thomas *v.* Bland, 91 Ky. 1; Woolley *v.* Louisville Banking Co., 81 Ky. 527. See also Francis *v.* Wood, 81 Ky. 16.

Louisiana. — City Bank *v.* Walden, 1 La. Ann. 46; Sewell *v.* Scott, 35 La. Ann. 553.

Michigan. — Rodman *v.* Michigan Cent. R. Co., 59 Mich. 395.

Minnesota. — Carlin *v.* Brackett, 38 Minn. 307.

Mississippi. — Straw *v.* Illinois Cent. R. Co., 73 Miss. 446.

Missouri. — Connecticut Mut. L. Ins. Co. *v.* Smith, 117 Mo. 261, 38 Am. St. Rep. 656; Wells *v.* Moore, 49 Mo. 229; Coleman *v.* Dalton, 71 Mo. App. 14; Bennett *v.* Southern Bank, 61 Mo. App. 297.

New Jersey. — Gifford *v.* Thorn, 9 N. J. Eq. 702.

New York. — Stowell *v.* Chamberlain, 60 N. Y. 272, *affirming* 3 Thomp. & C. (N. Y.) 374; Bouchaud *v.* Dias, 3 Den. (N. Y.) 238.

North Carolina. — Halcombe *v.* Haywood County, 89 N. Car. 346; Johnson *v.* Pate, 90 N. Car. 334.

South Dakota. — Howard *v.* Huron, 6 S. Dak. 180.

Tennessee. — Parkes *v.* Clift, 9 Lea (Tenn.) 524.

Texas. — Hanrick *v.* Gurley, 93 Tex. 458; Scherff *v.* Missouri Pac. R. Co., 81 Tex. 471, 26 Am. St. Rep. 828; Bomar *v.* Parker, 68 Tex. 435, *overruling* Hughes *v.* Lane, 25 Tex. 356; Jackson *v.* Finlay, (Tex. Civ. App. 1897) 40 S. W. Rep. 427; Cameron *v.* Hinton, (Tex. Civ. App. 1898) 48 S. W. Rep. 24, 616, *affirming* 92 Tex. 492; Dixon *v.* Zadek, 59 Tex. 529; Parker *v.* Spencer, 61 Tex. 155; Girardin *v.* Dean, 49 Tex. 243. See also Worst *v.* Sgitcovich, (Tex. Civ. App. 1898) 46 S. W. Rep. 72.

Virginia. — Washington, etc., R. Co. *v.* Cazenove, 83 Va. 744.

(2) *New Action Supplying Omissions in Declaration, etc.* — It is equally well settled, however, that if the plaintiff fails on demurrer in a first action from the omission of essential allegation in his declaration, which is fully supplied in a second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right; for the reason that the merits of the cause as disclosed in the second declaration were not heard and decided in the first action.[1]

c. PRESUMPTION AS TO GROUND OF DEMURRER. — It has been held that in the absence of a contrary showing the court will presume that a former judgment on demurrer which is pleaded in bar was on account of a petition defective in form or substance, and hence is not a bar to a subsequent action in which the complaint is perfect.[2]

d. DEMURRER ON SEVERAL GROUNDS. — The weight of authority supports the view that where a demurrer contains several grounds, of which one goes to the merits of the case as presented in the pleading demurred to while the others do not, a judgment for costs upon the sustaining of the demurrer is, at least *prima facie*, conclusive between the parties in a subsequent action based upon the same state of facts.[3]

e. TO WHAT POINT ESTOPPEL EXTENDS. — Where the judgment in the former action is upon demurrer to the declaration, the estoppel extends only to the exact point raised by the pleadings or decided, and does not operate as a bar to a second suit for other breaches of the same covenants.[4]

Washington. — Plant *v.* Carpenter, 19 Wash. 621.

West Virginia. — Corrothers *v.* Sargent, 20 W. Va. 351.

Wisconsin. — Ellis *v.* Northern Pac. R. Co., 80 Wis. 459, 27 Am. St. Rep. 44.

It Must Appear that Merits Were Decided. — Estep *v.* Larsh, 21 Ind. 190.

Where No Formal Defects Appear upon the face of the bill the court will presume that the demurrer has gone to the merits. Corrothers *v.* Sargent, 20 W. Va. 351.

1. Supplying Omission of Essential Allegation, etc. — *United States.* — Gould *v.* Evansville, etc., R. Co., 91 U. S. 526; Gilman *v.* Rives, 10 Pet. (U. S.) 298; Spicer's Case, 5 Ct. Cl. 34; Post *v.* Pearson, 108 U. S. 418; Smith *v.* McNeal, 109 U. S. 426; North Muskegon *v.* Clark, 62 Fed. Rep. 694, 10 C. C. A. 591. See also Gilmer *v.* Morris, 46 Fed. Rep. 333.

Alabama. — Perkins *v.* Moore, 16 Ala. 9.

Arizona. — Wilson *v.* Lowry, (Ariz. 1898) 52 Pac. Rep. 777.

Arkansas. — See Pritchard *v.* Woodruff, 36 Ark. 196.

California. — Terry *v.* Hammonds, 47 Cal. 32; Reynolds *v.* Lincoln, 71 Cal. 183; Los Angeles *v.* Mellus, 59 Cal. 444.

Colorado. — See Gallup *v.* Lichter, 4 Colo. App. 296.

Connecticut.—Chapin *v.* Curtis, 23 Conn. 388.

Florida. — Florida Southern R. Co. *v.* Brown, 23 Fla. 104.

Georgia. — Kilpatrick *v.* Strozier, 67 Ga. 247; Gray *v.* Gray, 34 Ga. 499. See also Steed *v.* Savage, 115 Ga. 97.

Indiana. — Campbell *v.* Hunt, 104 Ind. 210. See also Estep *v.* Larsh, 21 Ind. 190.

Iowa. — Keater *v.* Hock, 16 Iowa 24; Griffin *v.* Seymour, 15 Iowa 30, 83 Am. Dec. 396; Roberts *v.* Hamilton, 56 Iowa 683.

Kansas. — Seckler *v.* Delfs, 25 Kan. 159; McClung *v.* Hohl, 10 Kan. App. 93; McLaughlin *v.* Doane, 40 Kan. 392, 10 Am. St. Rep. 210.

Kentucky. — Thomas *v.* Bland, 91 Ky. 1; Woolley *v.* Louisville Banking Co., 81 Ky. 527. See also Francis *v.* Wood, 81 Ky. 16.

Louisiana. — Baker *v.* Frellsen, 32 La. Ann. 822.

Massachusetts. — Wilbur *v.* Gilmore, 21 Pick. (Mass.) 250.

Michigan. — Rodman *v.* Michigan Cent. R. Co., 59 Mich. 395.

Minnesota. — Swanson *v.* Great Northern R. Co., 73 Minn. 103.

Mississippi. — Alabama, etc., R. Co. *v.* McCerren, 75 Miss. 687; Mosby *v.* Wall, 23 Miss. 81, 55 Am. Dec. 71.

Nebraska. — State *v.* Cornell, 52 Neb. 25.

New York. — Cauhape *v.* Parke, 46 Hun (N. Y.) 306; Stowell *v.* Chamberlain, 3 Thomp. & C. (N. Y.) 374, *affirmed* 60 N. Y. 272. See also Simon *v.* Schmidt, 41 Hun (N. Y.) 318.

North Carolina. — Johnson *v.* Pate, 90 N. Car. 334.

Oregon. — O'Hara *v.* Parker, 27 Oregon 156.

Pennsylvania. — Detrick *v.* Sharrar, 95 Pa. St. 521.

Wisconsin. — Taylor *v.* Matteson, 86 Wis. 113; Docter *v.* Furch, 76 Wis. 153.

Wyoming. — Bonnifield *v.* Price, 1 Wyo. 223.

A Judgment Entered on a Third Demurrer is of no greater force under the *Missouri* statute than if the plaintiff had, on the first or second adverse ruling, declined to amend, and judgment had been entered against him. Bennett *v.* Southern Bank, 61 Mo. App. 297.

2. Presumption. — Bennett *v.* Southern Bank, 61 Mo. App. 297.

3. Judgment Conclusive. — House *v.* Mullen, 22 Wall. (U. S.) 42; Merrill *v.* Ness County, 7 Kan. App. 717; People *v.* Stephens, (Supm. Ct.) 51 How. Pr. (N. Y.) 235, *affirmed* 71 N. Y. 527. But see Griffin *v.* Seymour, 15 Iowa 30, 83 Am. Dec. 396, the reference thereto in Bissell *v.* Spring Valley Tp., 124 U. S. 225, and the explanation thereof in the preceding cases.

4. Wiggins Ferry Co. *v.* Ohio, etc., R. Co.,

7. Nonsuit. — It is well settled in the United States that a judgment of nonsuit or in the nature of a nonsuit is not an adjudication upon the merits, but leaves the parties in the same condition, so far as the cause of action is concerned, as though no action had ever been instituted, and hence cannot constitute *res judicata.*[1] This rule is not confined in its operation to volun-

142 U. S. 396; Morrell *v.* Morgan, 65 Cal. 575. See also *supra*, this title, *Matters Concluded.*

1. Nonsuit Not a Bar — *United States.* — U. S. *v.* Parker, 120 U. S. 89, Derby *v.* Jacques, 1 Cliff. (U. S.) 425; Homer *v.* Brown, 16 How. (U. S.) 354; Bucher *v.* Cheshire R. Co., 125 U. S. 555; Book *v.* U. S., 31 Ct. Cl. 272; Union Bank *v.* Oxford, 90 Fed. Rep. 7; Manhattan L. Ins. Co. *v.* Broughton, 109 U. S. 121; Michigan Ins. Bank *v.* Eldred, 6 Biss. (U. S.) 370; Evans *v.* White, Hempst. (U. S.) 296; Gardner *v.* Michigan Cent. R. Co., 150 U. S. 349; Aurora City *v.* West, 7 Wall. (U. S.) 90.

Alabama — Beadle *v.* Graham, 66 Ala. 99.

Arkansas. — Hallum *v.* Dickinson, 47 Ark. 120.

California. — Wood *v.* Ramond, 42 Cal. 643; Fleming *v.* Hawley, 65 Cal. 492; Merritt *v.* Campbell, 47 Cal. 542; Pyle *v.* Piercy, 122 Cal. 382. See also Jacob *v.* Day, 111 Cal. 571.

Colorado. — Hallack *v.* Loft, 19 Colo. 74; Denver, etc., R. Co. *v.* Iles, 25 Colo. 19.

Connecticut. — Anderson *v.* Gregory, 43 Conn. 61.

Florida. — State *v.* Anderson, 26 Fla. 240.

Georgia. — Ryan *v.* Fulghum, 96 Ga. 234; Alabama G. S. R. Co. *v.* Blevins, 92 Ga. 522; Hendrick *v.* Clonts, 91 Ga. 196; Herndon *v.* Black, 97 Ga. 327; Smith *v.* Floyd County, 85 Ga. 420; Phipps *v.* Alford, 95 Ga. 215.

Illinois. — Holmes *v.* Chicago, etc., R. Co., 94 Ill. 439; Mobile, etc., R. Co. *v.* Healy, 100 Ill. App. 586.

Louisiana. — Johnson *v.* New Orleans, 50 La. Ann. 920; Allinet *v.* His Creditors, 15 La. Ann. 130; D'Arensbourg *v.* Chauvin, 6 La. Ann. 778; Fisk *v.* Parker, 14 La. Ann. 496.

Maine. — Jay *v.* Carthage, 48 Me. 353; Pendergrass *v.* York Mfg. Co., 76 Me. 509; Haynes *v.* Jackson, 66 Me. 93. See also Brett *v.* Marston, 45 Me. 401.

Massachusetts. — Morgan *v.* Bliss, 2 Mass. 111; Marsh *v.* Hammond, 11 Allen (Mass.) 483; Clapp *v.* Thomas, 5 Allen (Mass.) 158; Bridge *v.* Sumner, 1 Pick. (Mass.) 371.

Missouri. — Hudson-Kimberly Pub. Co. *v.* Young, 90 Mo. App. 505; Wiethaupt *v.* St. Louis, 158 Mo. 655; National Water Works Co. *v.* School Dist., 23 Mo. App. 227; Lee *v.* Kaiser, 80 Mo. 431.

Nebraska. — Runge *v.* Brown, 23 Neb. 817; Pence *v.* Uhl, 11 Neb. 320.

Nevada. — Laird *v.* Morris, 23 Nev. 34; Van Vliet *v.* Olin, 1 Nev. 495.

New Hampshire. — Eaton *v.* George, 40 N. H. 258; Holton *v.* Gleason, 26 N. H. 501; Demerit *v.* Lyford, 27 N. H. 541; Taylor *v.* Barron, 30 N. H. 78, 64 Am. Dec. 281.

New Jersey. — Beckett *v.* Stone, 60 N. J. L. 23.

New York. — Sheldon *v.* Edwards, 35 N. Y. 279; Audubon *v.* Excelsior Ins. Co., 27 N. Y. 216; People *v.* Vilas, 36 N. Y. 459, 93 Am. Dec. 520; Dexter *v.* Clark, 35 Barb. (N. Y.) 271; Nicoll *v.* Karrick, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 199; Loeb *v.* Willis, 100 N. Y. 231; Seaman *v.* Ward, 1 Hilt. (N. Y.) 52; Tattersall *v.* Hass, 1 Hilt. (N. Y.) 56; Merrick *v.* Hill, 77 Hun (N. Y.) 30, 23 Civ. Pro. (N. Y.) 413; Coit *v.* Bland, (Supm. Ct. Gen. T.) 22 How. Pr. (N. Y.) 2, 12 Abb. Pr. (N. Y.) 462, *sub nom.* Coit *v.* Beard, 33 Barb. (N. Y.) 357.

Ohio. — Holland *v.* Hatch, 15 Ohio St. 464.

Oregon. — Hughes *v.* Walker, 14 Oregon 481.

Pennsylvania. — Moreland Tp. *v.* Gordner, 109 Pa. St. 116; Vought *v.* Sober, 73 Pa. St. 49; Detrick *v.* Sharrar, 95 Pa. St. 521; Fisher *v.* Longnecker, 8 Pa. St. 410.

Rhode Island. — Robinson *v.* Merchants', etc., Transp. Co., 16 R. I. 637.

South Carolina. — Whaley *v.* Stevens, 24 S. Car. 479. See also Charles *v.* Charles, 13 S. Car. 385.

South Dakota. — Taylor *v.* Neys, 11 S. Dak. 605.

Tennessee. — Illinois Cent. R. Co. *v.* Bentz, 108 Tenn. 670; Hooper *v.* Atlanta, etc., R. Co., 107 Tenn. 712.

Texas. — Brainerd *v.* Bute, (Tex. Civ. App. 1898) 44 S. W. Rep. 575; Scherff *v.* Missouri Pac. R. Co., 81 Tex. 471, 26 Am. St. Rep. 828.

Vermont. — Hazen *v.* Lyndonville Nat. Bank, 70 Vt. 543, 67 Am. St. Rep. 680.

West Virginia. — Buena Vista Freestone Co. *v.* Parrish, 34 W. Va. 652.

Wisconsin. — Gummer *v.* Omro, 50 Wis. 247; Gates *v.* Parmly, 93 Wis. 294; Benware *v.* Pine Valley, 53 Wis. 527.

See also the title DISMISSAL, DISCONTINUANCE, AND NONSUIT, 6 ENCYC. OF PL. AND PR. 988, note 3.

The Nevada Statute with reference to nonsuits does not change the rule stated in the text. Laird *v.* Morris, 23 Nev. 34.

A Judgment for Costs, amounting to no more than a nonsuit, is not sufficient to constitute a bar. Taylor *v.* Neys, 11 S. Dak. 605.

Where a Separate Equity Suit Has Grown Out of the Original Action and has been separately tried and determined, and a separate decree entered therein upon the merits, such decree in the equity case is not disturbed as *res judicata* by a subsequent nonsuit in the action at law. McReynolds *v.* Kansas City, etc., R. Co., 34 Mo. App. 581, *affirmed* 110 Mo. 484.

Action to Enforce a Mechanic's Lien. — In Sullivan *v.* Brewster, 1 E. D. Smith (N. Y.) 681, the court, while recognizing that as a general rule in actions to recover demands from a defendant a judgment of nonsuit or dismissal of the complaint would not prevent a second action for the same cause, held that this rule should not be applied in a proceeding to enforce a mechanic's lien, for the reason that the statute did not contemplate more than one proceeding to enforce the lien. The court said also: "It is proper, however, to remark that a failure to recover against the owner does not deprive the plaintiff of his claim against his debtor."

tary nonsuits, but extends as well to involuntary nonsuits;[1] nor is its operation affected by reason of the judgment of nonsuit having been rendered upon an agreed statement of facts,[2] or the nonsuit having been taken after a reversal of the judgment by an appellate court.[3]

In England the same rule at one time prevailed,[4] but a different rule has now been established.[5]

8. Retraxit. — A retraxit is stronger than a nonsuit, for the plaintiff thereby voluntarily and deliberately admits of record that he has no cause of action. Such being the case, a retraxit is always held to be conclusive, and prevents a subsequent action.[6]

9. Nolle Prosequi. — The nature and effect of a *nolle prosequi* was not well defined or understood in early times; and the older authorities involve contradictory conclusions. In some cases it was considered in the nature of a *retraxit*, operating as a full release and discharge of the action, and, of course, as a bar to any future suit.[7] In other cases it was held not to amount to a *retraxit*, but simply to an agreement not to proceed further in that suit as to the particular person or cause of action to which it was applied. And this latter doctrine has been constantly adhered to, in modern times, and constitutes the received law.[8]

Nonsuit After Submission for Final Decision. — After a cause is submitted to a justice for his final decision, it is no longer in the power of the plaintiff to submit to a nonsuit, or in the power of the justice to grant one. If the justice after that enters an order which he calls a nonsuit, it will be regarded as a judgment for the defendant, and will be a bar to another action for the same cause. Elwell *v.* M'Queen, 10 Wend. (N. Y.) 521; Peters *v.* Diossy, 3 E. D. Smith (N. Y.) 115. *Compare* Gillilan *v.* Spratt, 3 Daly (N. Y.) 440, *reversing* (C. Pl. Spec. T.) 8 Abb. Pr. N. S. (N. Y.) 13.

1. Involuntary Nonsuit. — Hallum *v.* Dickinson, 47 Ark. 120; National Water Works Co. *v.* School Dist., 23 Mo. App. 227; Hughes *v.* Walker, 14 Oregon 481; Robinson *v.* Merchants', etc., Transp. Co., 16 R. I. 637; Gummer *v.* Omro, 50 Wis. 247. See also cases cited in the preceding note. But see *contra*, Ordway *v.* Boston, etc., R. Co., 69 N. H. 429, in which case the court said: "An involuntary nonsuit, ordered by the court for the insufficiency of the plaintiff's evidence to authorize the jury to find a verdict in his favor, is a bar to a subsequent suit upon the same cause of action between the same parties."

2. Agreed Statement of Facts. — Derby *v.* Jacques, 1 Cliff. (U. S.) 425; U. S. *v.* Parker, 120 U. S. 89; Pendergrass *v.* York Mfg. Co., 76 Me. 509. See also cases cited in the first note to this paragraph.

3. Nonsuit After Reversal. — Gardner *v.* Michigan Cent. R. Co., 150 U. S. 349; Holland *v.* Hatch, 15 Ohio St. 464. See also cases cited in the first note to this paragraph.

4. Hitchin *v.* Campbell, 2 W. Bl. 827, 3 Wils. C. Pl. 304.

5. English Rule. — Order XVI., rule 17, of the Consolidated County Court Orders, 1875, provides that "any judgment of nonsuit, unless the judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant." This rule is not *ultra vires*. Poyser *v.* Minors, 7 Q. B. D. 329, 50 L. J. Q. B. D. 555, 45 L. T. N. S. 33, 29 W. R. 773.

6. Retraxit a Bar — *England*. — Bowden *v.* Horne, 7 Bing. 716, 20 E. C. L. 302; Noke *v.* Ingham, 1 Wils. C. Pl. 90.

United States. — U. S. *v.* Parker, 120 U. S. 89; Minor *v.* Mechanics Bank, 1 Pet. (U. S.) 74. See also Aurora City *v.* West, 7 Wall. (U. S.) 90.

Alabama. — Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159; Bullock *v.* Perry, 2 Stew. & P. (Ala.) 319.

Arkansas. — Harris *v.* Preston, 10 Ark. 201.

California. — Merritt *v.* Campbell, 47 Cal. 542; Westbay *v.* Gray, 116 Cal. 660.

Colorado. — Hallack *v.* Loft, 19 Colo. 74.

Georgia. — Cunningham *v.* Schley, 68 Ga. 105; Justices *v.* Selman, 6 Ga. 432; Cox *v.* Griffin, 17 Ga. 249.

Illinois. — Herring *v.* Poritz, 6 Ill. App. 211.

Kentucky. — Bank of Commonwealth *v.* Hopkins, 2 Dana (Ky.) 395.

Massachusetts. — Bridge *v.* Sumner, 1 Pick. (Mass.) 371.

Michigan. — See Farr *v.* Lachman, (Mich. 1902) 89 N. W. Rep. 688, 8 Detroit Leg. N. 1137.

Minnesota. — Walker *v.* St. Paul City R. Co., 52 Minn. 130.

Mississippi. — Coffman *v.* Brown, 7 Smed. & M. (Miss.) 125, 45 Am. Dec. 299.

Missouri. — State *v.* Primm, 61 Mo. 166. See also Murphy *v.* Creath, 26 Mo. App. 581.

North Carolina. — Crawford *v.* Glass, 11 Ired. L. (33 N. Car.) 118; Bond *v.* McNider, 3 Ired. L. (25 N. Car.) 440.

Vermont. — Small *v.* Haskins, 26 Vt. 209.

Virginia. — Wohlford *v.* Compton, 79 Va. 333; Tate *v.* New York State Bank, 96 Va. 765.

See generally the title RETRAXIT, 18 ENCYC. OF PL. AND PR. 898.

Reservation of Right to Institute New Action. — See Exchange Bank *v.* Gilman, 17 Can. Sup. Ct. 108.

7. Early Cases Holding Nolle Prosequi a Bar. — Green *v.* Charnock, Cro. Eliz. 762; Beecher *v.* Shirley, Cro. Jac. 211; Parker *v.* Lawrence, Hob. 70.

8. Nolle Prosequi Not a Bar. — Cooper *v.* Tiffin, 3 T. R. 511; Minor *v.* Mechanics Bank,

10. Non Prosequitur. — A judgment of *non prosequitur*, being merely in the nature of a nonsuit, is not a bar to a future action.[1]

11. Dismissal — *a.* GENERAL RULE STATED. — Whether or not the dismissal of an action at law or a suit in chancery will operate as a bar to another action or suit is a matter depending entirely upon the ground on which the dismissal is based. If, as frequently happens in suits in equity, the dismissal is based upon the merits of the case, as that the complainant has shown no ground of relief, or the like, such dismissal is *res judicata* as to all matters involved in the proceeding,[2] but if, on the other hand, the dismissal be for

1 Pet. (U. S.) 47; Lambert *v.* Sandford, 2 Blackf. (Ind.) 137, 18 Am. Dec. 149.

A Nolle Prosequi as to Part Entered Up After Judgment for the whole is equivalent to a *retraxit* and is a bar to any further action for the same cause, for after the plaintiff has obtained a judgment this entry comes much more near in form to a *remittitur* after a judgment by default than to the ordinary entry of *nolle prosequi*. Bowden *v.* Horne, 7 Bing. 716, 20 E. C. L 302.

A Nol. Pros. in a Criminal Prosecution is not a bar to another indictment or prosecution for the same offense. State *v.* Primm, 61 Mo. 166. See generally in this work the title JEOPARDY, vol. 17, pp. 595-596.

1. Non Pros. Not a Bar. — Book *v.* U. S., 31 Ct. Cl. 272; Howes *v.* Austin, 35 Ill. 396. See also Buena Vista Freestone Co. *v.* Parrish, 34 W. Va. 652.

Non Pros. After Verdict. — Pub. Gen. Laws Md. (1888), art. 26, § 17, provides that: "Wherever, by reason of the verdict of a jury being below the jurisdiction of the court in which the same is rendered, a judgment of *non pros.* is entered, the record of such judgment shall be a bar to any action founded upon the same cause of action in that or any court the limit of whose jurisdiction shall be greater than the amount of such verdict; but the amount of such verdict, less such costs as may be adjudged against the plaintiff, shall be a debt from the defendant to the plaintiff, recoverable in any court that may have jurisdiction to that amount, or before a justice of the peace, as the case may be." It is apparent, therefore, that a verdict and a judgment of *non pros.* in such cases is of a different character and is clothed with a conclusiveness which does not ordinarily attach to such judgments, for by force of the statute the amount of the debt is conclusively established by the verdict and judgment. Berkley *v.* Wilson, 87 Md. 219.

2. Dismissal on Merits a Bar — *England.* — Jones *v.* Nixon, 1 Younge 359; Rochester *v.* Lee, 1 Macn. & G. 467.

Canada. — Lacolle *v.* Duquette, 15 L. C. Jur. 304.

United States. — Garner *v.* Second Nat. Bank, 89 Fed. Rep. 636; U. S. *v.* Parker, 120 U. S. 89; Baker *v.* Cummings, 181 U. S. 117; Durant *v.* Essex Co., 7 Wall. (U. S.) 109; Lyon *v.* Perin, etc., Mfg. Co., 125 U. S. 698; Hubbell *v.* U. S., 171 U. S. 203; Stewart *v.* Ashtabula, 107 Fed. Rep. 857, 47 C. C. A. 21, *reversing* 98 Fed. Rep. 516; Shinkle *v.* Vickery, 117 Fed. Rep. 916; State *v.* Boller, 47 Fed. Rep. 415.

Alabama. — Strang *v.* Moog, 72 Ala. 460; McDonald *v.* Mobile L. Ins. Co., 65 Ala. 358.

Arkansas. — Trapnall *v.* Burton, 24 Ark. 371.

Colorado. — Best *v.* Hoppie, 3 Colo. 137.

District of Columbia. — Stevens *v.* Du Barry, 1 Mackey (D. C.) 294.

Georgia. — Baldwin *v.* McCrea, 38 Ga. 650.

Illinois. — Knowlton *v.* Hanbury, 117 Ill. 471; Atty.-Gen. *v.* Chicago, etc., R. Co., 112 Ill. 520; Ruegger *v.* Indianapolis, etc., R. Co., 103 Ill. 449.

Indiana. — Stults *v.* Forst, 135 Ind. 297.

Iowa. — Scully *v.* Chicago, etc., R. Co., 46 Iowa 528. See also Adams County *v.* Graves, 75 Iowa 642.

Kansas. — Brown *v.* Kirkbride, 19 Kan. 588; Goodman *v.* Malcolm, 5 Kan. App. 285.

Kentucky. — Curts *v.* Bardstown, 6 J. J. Marsh. (Ky.) 536; Campbell *v.* Mayhugh, 15 B. Mon. (Ky.) 142.

Louisiana. — Consolidated Assoc. of Planters *v.* Mason, 23 La. Ann. 618; City Bank *v.* Walden, 1 La. Ann. 46; Granger *v.* Singleton, 32 La. Ann. 898; Bledsoe *v.* Erwin, 33 La. Ann. 615.

Maryland. — See Hitch *v.* Davis, 8 Md. 524.

Massachusetts. — Bigelow *v.* Winsor, 1 Gray (Mass.) 299; Butchers' Slaughtering, etc., Assoc. *v.* Boston, 137 Mass. 186; Flanders *v.* Hall, 159 Mass. 95; Blackinton *v.* Blackinton, 113 Mass. 231; Foster *v.* The Richard Busteed, 100 Mass. 409; Lewis *v.* Lewis, 106 Mass. 309.

Michigan. — Edgar *v.* Buck, 65 Mich. 356; Schulmeister *v.* Blendon Tp. 126 Mich. 488.

Minnesota. — Cameron *v.* Chicago, etc., R. Co., 51 Minn. 153; Wagner *v.* Wagner, 36 Minn. 239.

Mississippi. — Chiles *v.* Champenois, 69 Miss. 603.

Nebraska. — Carroll *v.* Patrick, 23 Neb. 834.

New Hampshire. — Hall *v.* Dodge, 38 N. H. 346.

New York. — Neafie *v.* Neafie, 7 Johns. Ch. (N. Y.) 1, 11 Am. Dec. 380; Perine *v.* Dunn, 4 Johns. Ch. (N. Y.) 140; People *v.* Vilas, 36 N. Y. 459, 93 Am. Dec. 520; Vowell *v.* Twenty-Third St. R. Co., (C. Pl. Gen. T.) 14 Misc. (N. Y.) 538; Bostwick *v.* Abbott, 40 Barb. (N. Y.) 331, 16 Abb. Pr. (N. Y.) 417; Boyd *v.* Boyd, 53 N. Y. App. Div. 152, *affirming* 26 Misc. (N. Y.) 679; Holmes *v.* Remsen, 7 Johns. Ch. (N. Y.) 286.

North Carolina. — Jenkins *v.* Johnston, 4 Jones Eq. (57 N. Car.) 149.

Ohio. — Wilcox *v.* Balger, 6 Ohio 409.

Pennsylvania. — Kelsey *v.* Murphy, 26 Pa. St. 78; Kershaw *v.* Kershaw, 5 Pa. Dist. 551; Weigley *v.* Coffman, 144 Pa. St. 489, 27 Am. St. Rep. 667; Marsteller *v.* Marsteller, 132 Pa. St. 517, 19 Am. St. Rep. 604, *disapproving* Ayres *v.* Novinger, 8 Pa. St. 412.

some cause not touching upon the merits of the controversy, it will not constitute a bar, the case then coming within the operation of the rule hereinbefore stated, that in order for a judgment or decree to constitute *res judicata* it must be a determination of the merits of the controversy.[1]

Tennessee. — Williams *v.* Hollingsworth, 5 Lea (Tenn.) 358.

Virginia. — Washington, etc., R. Co. *v.* Cazenove, 83 Va. 744; Holliday *v.* Coleman, 2 Munf. (Va.) 162.

West Virginia. — Rogers *v.* Rogers, 37 W. Va. 407; St. Lawrence Boom, etc., Co. *v.* Holt, 51 W. Va. 352.

Wisconsin. — Amory *v.* Amory, 26 Wis. 152.

Dismissal a Final Decree. — In Kershaw *v.* Kershaw, 5 Pa. Dist. 551, the court said: "It was, at one time, doubted whether the mere dismissal of a bill was such a final decree as could be pleaded in any court of record in bar of a new action for the same causes. It is now held that the mere dismissal of a bill, without more, is such a final decree. If the complainant should fail for want of sufficient proof, and believe he could, in the future, supply the necessary evidence, he must ask that the dismissal of his bill be without prejudice."

A Dismissal Made After the Cause Is Set Down for Final Hearing will have the effect, unless otherwise ordered by the chancellor, of a dismissal on the merits, and may be pleaded in bar to another suit. Phillips *v.* Wormley, 58 Miss. 398.

The Effect of a Voluntary Dismissal is the same as that of an adverse one, where the merits are involved. Edgar *v.* Buck, 65 Mich. 356.

1. Dismissal Not a Bar Where Merits Not Involved — *England.* — Brandlyn *v.* Ord. 1 Atk. 571; Moss *v.* Anglo-Egyptian Nav. Co., L. R. 1 Ch. 108, 12 Jur. N. S. 13.

United States. — Hukill *v.* Maysville, etc., R. Co., 72 Fed. Rep. 745; Hughes *v.* U. S., 4 Wall. (U. S.) 232; Walden *v.* Bodley, 14 Pet. (U. S.) 156; Badger *v.* Badger, 1 Cliff. (U. S.) 237; Allen *v.* Blunt, 2 Woodb. & M. (U. S.) 121; Gassman *v.* Jarvis, 100 Fed. Rep. 146; Grant *v.* Phœnix Mut. L. Ins. Co., 121 U. S. 105; Green *v.* U. S., 18 Ct. Cl. 93; Cheney *v.* Stone, 29 Fed. Rep. 885; Woods *v.* Lindvall, 4 U. S. App. 49, (C. C. A.) 48 Fed. Rep. 62, *affirming* 47 Fed. Rep. 195, *affirmed* 143 U. S. 203; Gilmer *v.* Morris, 30 Fed. Rep. 476; Keller *v.* Stolzenbach, 20 Fed. Rep. 47; St. Romes *v.* Levee Steam Cotton Press Co., 127 U. S. 614; Rincon Water, etc., Co. *v.* Anaheim Union Water Co., 115 Fed. Rep. 543; Ryan *v.* Seaboard, etc., R. Co., 89 Fed. Rep. 397; Clark *v.* Bernhard Mattress Co., 82 Fed. Rep. 339; Whitaker *v.* Davis, 91 Fed. Rep. 720; Bunker Hill, etc., Min., etc., Co. *v.* Shoshone Min. Co., (C. C. A.) 109 Fed. Rep. 504. See also McMillan *v.* Conrad, 16 Fed. Rep. 128.

Alabama. — Strang *v.* Moog, 72 Ala. 460; Fitzpatrick *v.* Featherstone, 3 Ala. 40; Gayle *v.* Bishop, 14 Ala. 552; Hardy *v.* Branch Bank, 15 Ala. 722; Burgess *v.* American Mortg. Co., 119 Ala. 669.

Arkansas. — Moss *v.* Ashbrooks, 12 Ark. 369.

California. — Pyle *v.* Piercy, 122 Cal. 383; Rosenthal *v.* McMann, 93 Cal. 505; Oakland *v.* Oakland Water Front Co., 118 Cal. 160. See also Leese *v.* Sherwood, 21 Cal. 151; Dowling *v.* Polack, 18 Cal. 625.

Colorado. — Gallup *v.* Lichter, 4 Colo. App. 296, Hallack *v.* Loft, 19 Colo. 74; Fairbanks *v.* Kent, 16 Colo. App. 35.

District of Columbia. — Anderson *v.* Reid, 16 App. Cas. (D. C.) 60.

Georgia. — Heard *v.* National Bank, 114 Ga. 291; Herndon *v.* Black, 97 Ga. 327; Smith *v.* Hornsby, 70 Ga. 552; Rudolph *v.* Underwood, 88 Ga. 664; Phipps *v.* Alford, 95 Ga. 215.

Illinois. — Mobile, etc., R. Co. *v.* Healy, 100 Ill. App. 586; Jones *v.* Hunter, 32 Ill. App. 445; Chamberlain *v* Sutherland, 4 Ill. App. 494; Gage *v.* Ewing, 114 Ill. 15. See also Gerber *v.* Gerber, 155 Ill. 219; Lake Erie, etc., R. Co. *v.* Sellman, 51 Ill. App. 617.

Iowa. — Kern *v.* Wilson, 82 Iowa 407. See also Adams County *v.* Graves, 75 Iowa 642.

Kansas — McClung *v.* Hohl, 10 Kan. App. 93; Smith *v.* Auld, 31 Kan. 262; Merrill *v.* Ness County, 7 Kan. App. 717; Mills *v.* Pettigrew, 45 Kan. 573.

Kentucky. — Potter *v.* Benge, (Ky. 1902) 67 S. W. Rep. 1005; Covington *v.* Taffee, (Ky. 1902) 68 S. W. Rep. 629; Hibler *v.* Shipp, 78 Ky. 64; Lamaster *v.* Lair, 1 Dana (Ky.) 109.

Louisiana. — Fisk *v.* Parker, 14 La. Ann. 496; Allinet *v.* His Creditors, 15 La. Ann. 130.

Massachusetts. — Butchers' Slaughtering, etc., Assoc. *v.* Boston, 137 Mass. 186; Bigelow *v.* Winsor, 1 Gray (Mass.) 299; Foote *v.* Gibbs, 1 Gray (Mass.) 412; Foster *v.* The Richard Busteed, 100 Mass. 409.

Michigan. — Laird *v.* Laird, 127 Mich. 24. See also Sessions *v.* Sherwood, 78 Mich. 234.

Minnesota. — Kerrigan *v.* Chicago, etc., R. Co., 86 Minn. 407; Craver *v.* Christian, 34 Minn. 397; Andrews *v.* School Dist. No. 4, 35 Minn. 70.

Mississippi. — Baird *v.* Bardwell, 60 Miss. 164; Nevill *v.* Matthews, Walk. (Miss.) 377.

Missouri. — Mumma *v.* Staudte, 36 Mo. App. 695; State *v.* Brooke, 29 Mo. App. 286; Murphy *v.* Creath, 26 Mo. App. 581; Baldwin *v.* Davidson, 139 Mo. 118, 61 Am. St. Rep. 460.

Nebraska. — Home F. Ins. Co. *v.* Deets, 54 Neb. 620; Runge *v.* Brown, 23 Neb. 817; Oliver *v.* Lansing, 48 Neb. 338; Cheney *v.* Cooper, 14 Neb. 415; Irwin *v.* Gay, (Neb. 1902) 91 N. W. Rep. 197; Maywood Bank *v.* McAllister, 56 Neb. 188; Hart *v.* Bank of Commerce, 51 Neb. 486; Rodgers *v.* Levy, 36 Neb. 601.

Nevada. — Van Vliet *v.* Olin, 1 Nev. 495.

New Jersey. — Henninger *v.* Heald, 51 N. J. Eq. 74.

New York. — Derleth *v.* Degraaf, 51 N. Y. Super. Ct. 369; Smith *v.* Adams, 24 Wend. (N. Y.) 585; Rosse *v.* Rust, 4 Johns. Ch. (N. Y.) 300; Genet *v.* Delaware, etc., Canal Co., 170 N. Y. 278, *reversing* 49 N. Y. App. Div. 645; Porges *v.* Cohen, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 703; Lewis *v.* Davis, 8 Daly (N. Y.) 185; Robbins *v.* Wells, 1 Robt. (N. Y.) 666; Miller *v.* McGuckin, (Supm. Ct. Gen. T.) 15 Abb. N. Cas. (N. Y.) 204; Canandaigua *v.* Benedict, 24 N. Y. App. Div. 348; National Hudson River Bank *v.* Reynolds, 57 Hun (N. Y.) 307; Hoag *v.* Greenwich, (Supm. Ct. Gen.

A Voluntary Dismissal by the plaintiff or the party who has put in a cross-bill or an equitable defense, or a petition in intervention, is not a bar,[1] especially

T.) 15 N. Y. Supp. 743, 61 Hun (N. Y.) 622, *affirmed* as to this point, 133 N. Y. 152; Dexter *v.* Clark, (Supm. Ct. Gen. T.) 22 How. Pr. (N. Y.) 289, 35 Barb. (N. Y.) 271; Coit *v.* Bland, (Supm. Ct. Gen. T.) 22 How. Pr. (N. Y.) 2, 12 Abb. Pr. (N. Y.) 462, *sub nom.* Coit *v.* Beard, 33 Barb. (N. Y.) 357; Mechanics Banking Assoc. *v.* Mariposa Co., 7 Robt. (N. Y.) 225; Wheeler *v.* Ruckman, 51 N. Y. 391, *affirming* (N. Y. Super. Ct. Gen. T.) 35 How. Pr. (N. Y.) 350, 5 Robt. (N. Y.) 702; Mitchell *v.* Cook, 29 Barb. (N. Y.) 243; MacArdell *v.* Olcott, 62 N. Y. App. Div. 127.

North Carolina. — Grubb *v.* Clayton, 2 Hayw. (3 N. Car.) 378; Autry *v.* Floyd, 127 N. Car. 186; Campbell *v.* Potts, 119 N. Car. 530. See also Rollins *v.* Henry, 84 N. Car. 569.

Ohio. — Loudenback *v.* Collins, 4 Ohio St. 251.

Oregon. — Hughes *v.* Walker, 14 Oregon 481; O'Hara *v.* Parker, 27 Oregon 156; Pruitt *v.* Muldrick, 39 Oregon 353.

Pennsylvania. — Small's Appeal, (Pa. 1888) 15 Atl. Rep. 807; Champlin *v.* Smith, 164 Pa. St. 481; Weigley *v.* Coffman, 144 Pa. St. 489, 27 Am. St. Rep. 667; Detrick *v.* Sharrar, 95 Pa. St. 521.

Rhode Island — Sayles *v.* Tibbitts, 5 R. I. 79.

South Carolina. — Gist *v.* Davis, 2 Hill Eq. (S. Car.) 335, 29 Am. Dec. 89.

Tennessee. — Fowlkes *v.* State, 14 Lea (Tenn.) 14; Jourolmon *v.* Massengill, 86 Tenn. 81; Driver *v.* White, (Tenn. Ch. 1898) 51 S. W. Rep. 994; Renshaw *v.* Tullahoma First Nat. Bank, (Tenn. Ch. 1900) 63 S. W. Rep. 194; Donaldson *v.* Nealis, 108 Tenn. 638.

Texas. — Mills County *v.* Brown County, 10 Tex. Civ. App. 356; Adoue *v.* Wettermark, (Tex. Civ. App. 1902) 68 S. W. Rep. 553; Worst *v.* Sgitcovich, (Tex. Civ. App. 1898) 46 S. W. Rep. 72; Jackson *v.* Elliott, 49 Tex. 62.

Vermont. — Porter *v.* Vaughn, 26 Vt. 624.

Virginia. — See Tate *v.* New York State Bank, 96 Va. 765.

West Virginia. — Cornell *v.* Hartley, 41 W. Va. 493; Stockton *v.* Copeland, 30 W. Va. 674.

New York Statute. — Section 1209, N. Y. Code Civ. Proc., provides that a final judgment dismissing the complaint either before or after the trial shall not have the effect of preventing a new action for the same cause of action unless the judgment expressly declares, or it appears by the judgment roll, that it is rendered upon the merits. Glencove Granite Co. *v.* City Trust, etc., Co., (C. C. A.) 118 Fed. Rep. 386; Genet *v.* Delaware, etc., Canal Co., 170 N. Y. 278, *reversing* 49 N. Y. App. Div. 645; Stokes *v.* Stokes, 49 N. Y. App. Div. 302, *reversed* on other grounds, Stokes *v.* Foote, 172 N. Y. 327.

Where an Appeal from a Judgment of Dismissal Is Dismissed, this leaves the judgment of dismissal in full force and it is not a bar. Phipps *v.* Alford, 95 Ga. 215.

The Dismissal of a Case for Want of Evidence to Support It is virtually a judgment of nonsuit, and is no bar to a subsequent action for the same cause. Alabama G. S. R. Co. *v.* Blevins, 92 Ga. 522. But *compare* Cochran *v.* Couper, 2 Del. Ch. 27.

1. Voluntary Dismissal by Plaintiff — *Arkansas.* — Jones *v.* Graham, 36 Ark. 383.

California. — Parks *v.* Dunlap, 86 Cal. 189; Pierce *v.* Hilton, 102 Cal. 276.

Georgia. — Fagan *v.* McTier, 81 Ga. 73.

Illinois. — Mobile, etc., R. Co. *v.* Healy, 100 Ill. App. 586.

Indiana. — Louisville, etc., R. Co. *v.* Wylie, 1 Ind. App. 136; McWhorter *v.* Norris, 9 Ind. App. 490.

Iowa. — Weyand *v.* Atchison, etc., R. Co., 75 Iowa 573, 9 Am. St. Rep. 504; Harrison *v.* Hartford F. Ins. Co., (Iowa 1899) 80 N. W. Rep. 309.

Kentucky. — Cavenaugh *v.* Davis, 7 J. J. Marsh. (Ky.) 371.

North Carolina. — Bond *v.* McNider, 3 Ired. L. (25 N. Car.) 440.

Tennessee. — Jourolmon *v.* Massengill, 86 Tenn. 81.

Texas. — Kopf *v.* Huckins, 11 Tex. Civ. App. 86.

Where a Plaintiff Dismisses His Suit as to One of Several Defendants, such defendant ceases to be a party to the record and is not concluded by the judgment in the suit. Berber *v.* Kerzinger, 23 Ill. 346; Marvin *v.* Hampton, 18 Fla. 131.

Dismissal of Cross-bill. — Desmond *v.* Lanphier, 86 Ill. App. 101, *affirmed* Lanphier *v.* Desmond, 187 Ill. 370.

Dismissal of Equitable Defense. — McCreary *v.* Casey, 45 Cal. 128.

Dismissal of Petition in Intervention. — Dalhoff *v.* Coffman, 37 Iowa 283.

Involuntary Dismissal. — A dismissal which is not voluntary, but is brought about by an announcement of the court that unless additional evidence is introduced there can be no recovery, is not a bar. McWhorter *v.* Norris, 9 Ind. App. 490.

An Order Allowing the Withdrawal of a Claim is, unless set aside, binding and conclusive upon the parties to the case; and if, in pursuance of such order, the claim be in fact withdrawn, it cannot be correctly said that there has been an adjudication of the same upon its merits. Huntress *v.* Portwood, (Ga. 1902) 42 S. E. Rep. 513. See also Stewart *v.* Register, 108 N. Car. 588.

Dismissal of Injunction Suit — Consent of Defendant. — If a defendant consents to the dismissal of an action and to the dissolution of a temporary injunction pending in it, he cannot in an action on the bond claim that the dissolution of the injunction was a judicial determination upon its merits. Columbus, etc., R. Co. *v.* Burke, 54 Ohio St. 98.

Dismissal after Reversal. — A plaintiff having recovered judgment in a lower court, this judgment was reversed upon appeal to the Superior Court on the ground, among others, that certain notes were proper subjects of set-off, and upon return of the case to the lower court for further proceedings consistent with the opinion of the Superior Court, the plaintiff dismissed the action. It was held that the decision of the Superior Court was conclusive

if expressed to be without prejudice.[1]

b. PRESUMPTION AS TO MERITS. — Where a suit in equity is dismissed and the ground of dismissal does not appear upon the record, it will be presumed that the dismissal was based upon the merits of the case, and hence it constitutes *res judicata*.[2]

c. DISMISSAL WITHOUT PREJUDICE. — The courts frequently avoid the possibility of such a presumption by dismissing the suit "without prejudice," in which case the dismissal is absolutely without any effect as a bar to future proceedings.[3] But the mere fact that the dismissal is not expressed to be

of the question of the right of the defendant to plead and rely upon the notes as a set-off. Jenkins *v.* Headley, (Ky. 1897) 40 S. W. Rep. 460.

1. Dismissal Without Prejudice. — Harrison *v.* Hartford F. Ins. Co., (Iowa 1899) 80 N. W. Rep. 309; Kendall *v.* Selby, (Neb. 1902) 92 N. W. Rep. 178; Calvert *v.* Newberger, 11 Ohio Cir. Dec. 184, 20 Ohio Cir. Ct. 353. See also Elkhart Car Works Co. *v.* Ellis, 135 Ind. 205.

2. Presumption that Dismissal in Equity Was on Merits — *United States.* — Durant *v.* Essex Co., 7 Wall. (U. S.) 107.

Alabama. — Tankersly *v.* Pettis, 71 Ala. 179.

Illinois. — Knowlton *v.* Hanbury, 117 Ill. 471; Stickney *v.* Goudy, 132 Ill. 213. See also Armstead *v.* Blickman, 51 Ill. App. 470.

Iowa. — See Adams County *v.* Graves, 75 Iowa 642.

Kentucky. — Carlisle *v.* Howes, (Ky. 1897) 43 S. W. Rep. 191.

Maryland. — Martin *v.* Evans, 85 Md. 8, 60 Am. St. Rep. 292.

Massachusetts. — Blackinton *v.* Blackinton, 113 Mass. 231.

Nebraska. — Carroll *v.* Patrick, 23 Neb. 834.

New York. — People *v.* Vilas, 36 N. Y. 459, 93 Am. Dec. 520. See also Coit *v.* Bland, (Supm. Ct. Gen. T.) 22 How. Pr. (N. Y.) 2, 12 Abb. Pr. (N. Y.) 462.

Tennessee. — Parkes *v.* Clift, 9 Lea (Tenn.) 524.

West Virginia. — Carberry *v.* West Virginia, etc., R. Co., 44 W. Va. 260; Watson *v.* Watson, 45 W. Va. 290.

Presumption Conclusive. — A general entry of "bill dismissed" with no words of qualification or restriction, such as "dismissed without prejudice," or "without prejudice to an action at law," or the like, is conclusively presumed to be upon the merits and is a final determination of the controversy. Foote *v.* Gibbs, 1 Gray (Mass.) 412; Borrowscale *v.* Tuttle, 5 Allen (Mass.) 377; Bigelow *v.* Winsor, 1 Gray (Mass.) 299. See also Bradley *v.* Bradley, 160 Mass. 258.

3. Dismissal "Without Prejudice" — *England.* — On a Demurrer, Ch. Cas. (pt. i.) 155.

United States. — Lyon *v.* Perin, etc., Mfg. Co., 125 U. S. 698; Mobile County *v.* Kimball, 102 U. S. 691; Cunningham *v.* Cleveland, (C. C. A.) 98 Fed. Rep. 657; Northern Pac. R. Co. *v.* St. Paul, etc., R. Co., 47 Fed. Rep. 536. See also Durant *v.* Essex Co., 7 Wall. (U. S.) 107; Abraham *v.* Casey, 179 U. S. 210, *affirming* Lacassagne *v.* Abraham, 51 La. Ann. 840.

Alabama. — Tankersly *v.* Pettis, 71 Ala. 179.

California. — Moore *v.* Russell, 133 Cal. 297.

Delaware. — Cochran *v.* Couper, 2 Del. Ch. 27.

Illinois. — Knowlton *v.* Hanbury, 117 Ill. 471. See also Gerber *v.* Gerber, 155 Ill. 219.

Indiana. — See Louisville, etc., R. Co. *v.* Wylie, 1 Ind. App. 136.

Kansas. — Missouri, etc., R. Co. *v.* McWherter, 59 Kan. 345.

Kentucky. — Campbell *v.* Mayhugh, 15 B. Mon. (Ky.) 142.

Maryland. — O'Keefe *v.* Irvington Real Estate Co., 87 Md. 196.

Massachusetts. — Bigelow *v.* Winsor, 1 Gray (Mass.) 299. See also Foster *v.* The Richard Busteed, 100 Mass. 409.

Mississippi. — Ragsdale *v.* Vicksburg, etc., R. Co., 62 Miss. 480; Mobile, etc., R. Co. *v.* Davis, 62 Miss. 271; Nevitt *v.* Bacon, 32 Miss. 12, 66 Am. Dec. 609; Tucker *v.* Wilson, 68 Miss. 693.

Missouri. — Long *v.* Long, 141 Mo. 352.

New York. — People *v.* Vilas, 36 N. Y. 459, 93 Am. Dec. 520. See also Perine *v.* Dunn, 4 Johns. Ch. (N. Y.) 140; Mechanics Banking Assoc. *v.* Mariposa Co., 7 Robt. (N. Y.) 225.

North Dakota. — Proudzinski *v.* Garbutt, 10 N. Dak. 300.

Ohio. — Wanzer *v.* Self, 30 Ohio St. 378; Calvert *v.* Newberger, 11 Ohio Cir. Dec. 184, 20 Ohio Cir. Ct. 353.

Pennsylvania. — Ballentine *v.* Ballentine, (Pa. 1888) 15 Atl. Rep. 859. See also Kelsey *v.* Murphy, 26 Pa. St. 78.

Rhode Island. — Reynolds *v.* Hennessy, 17 R. I. 169.

South Carolina. — Bush *v.* Bush, 1 Strobh. Eq. (S. Car.) 377.

Tennessee. — See Parkes *v.* Clift, 9 Lea (Tenn.) 524.

Texas. — Jackson *v.* Elliott, 49 Tex. 62.

Vermont. — Hazen *v.* Lyndonville Nat. Bank, 70 Vt. 543, 67 Am. St. Rep. 680.

Washington. — Bates *v.* Drake, 28 Wash. 447.

Effect of Dismissal Without Prejudice. — When a bill is dismissed without prejudice, the effect of the reservation is to prevent the decree from constituting a bar to another bill brought upon the same title; but it by no means compromits the court as a judicial determination in favor of that title. Lang *v.* Waring, 25 Ala. 625, 60 Am. Dec. 533.

Dismissal "Sauf Recours." — Wallbridge *v.* Farwell, 3 Montreal Super. Ct. 238.

Where an Order of Dismissal Without Prejudice Is Set Aside, conditioned upon the payment of all costs by the plaintiff within a certain time, and he fails to pay the costs, this leaves him in the same condition that he was before the order of dismissal was set aside, and it stands as originally made and is not a bar. Mattingly *v.* Louisville, etc., R. Co., 92 Ky. 463.

"without prejudice" does not necessarily establish that the dismissal was a decision on the merits, and therefore a bar to subsequent proceedings.[1]

If a Dismissal Without Prejudice Is Void for want of power to make it, then there is no valid judgment; for there is no other dismissal than that which is without prejudice, and hence there is no bar.[2]

d. DISMISSAL ON AGREEMENT. — It has been asserted that the judgment of a court of competent jurisdiction dismissing a suit agreed upon the ground that it has been agreed by the parties is a final determination as to those parties of the matters litigated in that suit. It is virtually an acknowledgment by the plaintiff in open court, as in *retraxit*, that the plaintiff has no cause of action, or rather no further cause of action. It is not merely an abandonment of his suit by the plaintiff as in a nonsuit, but is the concurrent action of both parties.[3] This rule cannot, however, apply where the entry shows upon its face that the judgment of dismissal is not the result of an adjustment of the subject-matter of the controversy.[4] And some courts, among them the Supreme Court of the United States, hold the view that the general entry of the dismissal of a suit by agreement is no evidence of an intention to abandon the claim on which it is founded, but is evidence rather of a purpose to preserve the right to institute a new suit if it becomes necessary.[5]

e. EFFECT OF DISMISSAL FOR WANT OF JURISDICTION. — Where a suit has been brought in a United States court, and the defendant has filed a plea to the jurisdiction, setting out that the plaintiff has wrongfully overstated his damages for the purpose of conferring jurisdiction upon the court, and that the real and actual amount in controversy is below the jurisdiction of the court, and such plea has been submitted upon its merits to a jury which has returned a verdict thereon in favor of the defendant, and a judgment has accordingly been entered in the United States court dismissing the cause for want of jurisdiction, this judgment is *res judicata* as to the question of jurisdiction, and where suit is subsequently brought in a state court on the same cause of action, and against the same defendant, he is estopped to remove the suit to the United States court.[6]

f. DISMISSAL AS TO ONE OR MORE OF SEVERAL CAUSES OF ACTION. — Where an action was based upon several items which might have formed the basis of separate actions, and upon the motion of the defendant the complaint is dismissed as to some of the items, and there is no adjudication thereon, the judgment in such action is not *res judicata* as to such items.[7]

g. DISMISSAL AS TO ONE OF TWO DEFENDANTS. — Where an action

1. Smith *v.* Auld, 31 Kan. 262.

2. Wanzer *v.* Self, 30 Ohio St. 378.

3. **Dismissal on Agreement** — *California.* — Merritt *v.* Campbell, 47 Cal. 542. See also Parks *v.* Dunlap, 86 Cal. 189.

Indiana. — Reddick *v.* Keesling, 129 Ind. 128.

Iowa. — Heironymus *v.* Heironymus, 64 Iowa 81.

Kentucky. — Jarboe *v.* Smith, 10 B. Mon. (Ky.) 257, 52 Am. Dec. 541; Bank of Commonwealth *v.* Hopkins, 2 Dana (Ky.) 395.

Maryland. — Royston *v.* Horner, 86 Md. 249, 63 Am. St. Rep. 510.

Nevada. — Phillpotts *v.* Blasdel, 10 Nev. 19.

Rhode Island. — See Hicks *v.* Aylsworth, 13 R. I. 563.

Virginia. — Wohlford *v.* Compton, 79 Va. 333; Hoover *v.* Mitchell, 25 Gratt. (Va.) 387.

West Virginia. — Pethtel *v.* McCullough, 49 W. Va. 520.

Compromise. — Where a suit is dismissed pursuant to the terms of a compromise between the parties, this will preclude a further action for the same cause. Ellis *v.* Mills, 28 Tex. 584.

A Dismissal on Motion Pursuant to a Written Stipulation between the parties does not constitute *res judicata*. Rincon Water, etc., Co. *v.* Anaheim Union Water Co., 115 Fed. Rep. 543, *distinguishing* Merritt *v.* Campbell, 47 Cal. 542.

Where the Record of the Former Action Is Not Before the Court and there is no finding disclosing its contents, the court cannot say that the dismissal of such former action by agreement estops the plaintiff therein from prosecuting a subsequent action. Reddick *v.* Keesling, 129 Ind. 128.

4. Marshall *v.* Otto, 59 Fed. Rep. 249, *distinguishing* Merritt *v.* Campbell, 47 Cal. 542.

5. Haldeman *v.* U. S., 91 U. S. 584; Bishop *v.* McGillis, 82 Wis. 120.

6. Henderson *v.* Cabell, 83 Tex. 541.

7. McNicholas *v.* Lake, 13 Colo. App. 164. See generally *supra*, this title, *Matters Concluded*.

against two defendants is tried upon the merits, and the plaintiff obtains judgment against one of such defendants, but as to the other the action is dismissed, the judgment of dismissal is a bar to a subsequent suit against the defendant as to whom the first action was dismissed,[1] unless the dismissal was without prejudice to the rights of the plaintiff as against such defendant.[2]

h. DISMISSAL OF PETITION TO VACATE JUDGMENT. — An order dismissing a petition to vacate a judgment is final and appealable, and is, therefore, *res judicata* of the matters set up in the petition.[3]

12. Discontinuance. — Where the former action has been discontinued by the plaintiff before judgment it does not constitute a bar, but leaves him at liberty to commence another action for the same cause.[4]

13. Premature Action, etc. — Where a plaintiff has been unsuccessful in his first action for the reason that it was prematurely brought, either because the amount claimed is not yet due, or because there has not been a demand, or for any similar reason, this will not bar another action for the same cause when the right of action becomes complete.[5] And the same rule applies

1. Best *v.* Hoppie, 3 Colo. 137.

2. Hamill *v.* Ward, 14 Colo. 277.

3. Peyton *v.* Peyton, 28 Wash. 278. See also Kuhn *v.* Mason, 24 Wash. 94.

4. Discontinuance Not a Bar — *England.* — Cooper *v.* Tiffin, 3 T. R. 511. See also Brandlyn *v.* Ord, 1 Atk. 571.

United States. — Aurora City *v.* West, 7 Wall. (U. S.) 90; Wilson *v.* Smith, 117 Fed. Rep. 707.

Indiana. — Miller *v.* Mans, 28 Ind. 194.

Iowa. — Delany *v.* Reade, 4 Iowa 292.

Kentucky. — Weingartner *v.* Missouri Lumber, etc., Co., (Ky. 1898) 44 S. W. Rep. 355.

Massachusetts. — White *v.* New Bedford Cotton Waste Corp., 178 Mass. 20.

Michigan. — Shank *v.* Woodworth, 111 Mich. 642.

Minnesota. — Phelps *v.* Winona, etc., R. Co., 37 Minn. 485, 5 Am. St. Rep. 867.

New Hampshire. — Demerit *v.* Lyford, 27 N. H. 541; Hudson *v.* Nashua, 62 N. H. 591.

New York. — Loeb *v.* Willis, 100 N. Y. 231; Audubon *v.* Excelsior Ins. Co., 27 N. Y. 216; Earl *v.* Campbell, (Super. Ct. Spec. T.) 14 How. Pr. (N. Y.) 330; Carlisle *v.* McCall, 1 Hilt. (N. Y.) 399.

North Carolina. — Bond *v.* McNider, 3 Ired. L. (25 N. Car.) 440.

Ohio. — McGatrick *v.* Wason, 4 Ohio St. 566.

Pennsylvania. — Springer *v.* Wood, (Pa. 1886) 5 Cent. Rep. 203.

Rhode Island. — Reynolds *v.* Hennessy, 17 R. I. 169.

South Carolina. — Dunham *v.* Carson, 37 S. Car. 269; Wadsworthville Poor School *v.* Meetze, 4 Rich. L. (S. Car.) 50.

Texas. — Scherff *v.* Missouri Pac. R. Co., 81 Tex. 471, 26 Am. St. Rep. 828.

After Judgment there can be no right again to litigate the same subject-matter with the same party. Properly speaking, there can be no discontinuance. The rights of the parties in the action having been determined, there is no continuing action and nothing to discontinue. The controversy has been adjudicated. Ball *v.* Trenholm, 45 Fed. Rep. 588. See also Larrabee *v.* Rideout, 45 Me. 193.

Abandonment of Action. — Allison *v.* Hess, 28 Iowa 388.

5. Premature Action — *England.* — Heming *v.* Wilton, 5 C. & P. 54, 24 E. C. L. 208.

Canada. — Barber *v.* McCuaig, 31 Ont. 593; Leger *v.* Fournier, 14 Can. Sup. Ct. 314. *dismissing appeal* from 3 Montreal Q. B. 124, which *affirmed* 1 Montreal Super. Ct. 360.

United States. — Pierpoint Boiler Co. *v.* Penn Iron, etc., Co., 75 Fed. Rep. 289.

California. — Gray *v.* Dougherty, 25 Cal. 266.

Connecticut. — Peck *v.* Easton, 74 Conn. 456.

Illinois. — Brackett *v.* People, 115 Ill. 29; Bacon *v.* Schepflin, 185 Ill. 122, *affirming* 85 Ill. App. 553; Farber *v.* National Forge, etc., Co., 50 Ill. App. 503.

Indiana. — Williams *v.* Lewis, 124 Ind. 344.

Iowa. — Harrison *v.* Hartford F. Ins. Co., 102 Iowa 112.

Kansas. — Seaton *v.* Hixon, 35 Kan. 663.

Kentucky. — Yankey *v.* Sweeney, 85 Ky. 55. See also Anderson *v.* Trimble, (Ky. 1896) 37 S. W. Rep. 71.

Louisiana. — Hewitt *v.* Williams, 48 La. Ann. 686.

Massachusetts. — Stone *v.* Addy, 168 Mass. 26; Maxwell *v.* Clarke, 139 Mass. 112; Tracy *v.* Merrill, 103 Mass. 280; New England Bank *v.* Lewis, 8 Pick. (Mass.) 113; Waterhouse *v.* Levine, (Mass. 1903) 65 N. E. Rep. 822. See also Crosby *v.* Baker, 6 Allen (Mass.) 295.

Michigan. — Franks *v.* Fecheimer, 44 Mich. 177.

Missouri. — Dillinger *v.* Kelley, 84 Mo. 561; Shanklin *v.* Francis, 67 Mo. App. 457; McNees *v.* Southern Ins. Co., 69 Mo. App. 232.

New York. — Moloney *v.* Nelson, 158 N. Y. 351, *affirming* 12 N. Y. App. Div. 545, which *affirmed* (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 474; Marcellus *v.* Countryman, 65 Barb. (N. Y.) 201; Quackenbush *v.* Ehle, 5 Barb. (N. Y.) 469; Wilcox *v.* Lee, 1 Robt. (N. Y.) 355, 1 Abb. Pr. N. S. (N. Y.) 250.

North Carolina. — See Pender *v.* Mallett, 123 N. Car. 57; Stewart *v.* Register, 108 N. Car. 588.

Pennsylvania. — See Wilson *v.* Hamilton, 9 S. & R. (Pa.) 424.

Rhode Island. — Slocom *v.* Wilbour, 23 R. I. 97.

South Carolina. — Timmons *v.* Turner, 55 S. Car. 490.

Tennessee. — Estill *v.* Taul, 2 Yerg. (Tenn.) 467, 24 Am. Dec. 498.

Vermont. — McLaughlin *v.* Hill, 6 Vt. 20.

where a defendant has for a like reason failed to establish a set-off set up by him in a prior action.[1] The judgment in such action does, however, conclusively establish that it was prematurely brought.[2]

14. Appealed Judgments — *a.* EFFECT OF PENDENCY OF APPEAL — (1) *Different Views on the Subject.* — The courts of some of the states have held that the effect of an appeal in any case is to suspend the judgment appealed from for all purposes; and that, pending the appeal, the judgment is neither a bar nor an estoppel.[3] In others the courts have regarded the appeal, in cases where the power of the appellate court is confined to the affirmation, modification, or reversal of the judgment, according to the facts found or the things done as appears from the record, as a mere proceeding for the correction of errors, and have, therefore, held that the judgment of the

Wisconsin. — Oleson *v.* Merrihew, 45 Wis. 397; McFarlane *v.* Cushman, 21 Wis. 401.

Wyoming. — Bath *v.* Lindenmyer, 1 Wyo. 240.

An Ineffectual Attempt to Enforce a Claim Which Has No Legal Existence does not estop a party from thereafter asserting one which is valid. Bresnahan *v.* Nugent, 92 Mich. 76.

Where Both Parties Claim under Executory Contracts of Purchase of a Mexican grant made by the grantee prior to the issuance of the patent to him, a judgment in a former action between the same parties and in which the same question was determined, that is, which party acquired the original grantee's interest in the land, is no less a bar by reason of its having been rendered before a patent had been issued to the original grantee, under whom both parties claim. Phelan *v.* Tyler, 64 Cal. 80.

1. Krapp *v.* Eldridge, 33 Kan. 106.

2. Wilhelmi *v.* Des Moines Ins. Co., (Iowa 1896) 68 N. W. Rep. 782.

In Coghlan *v.* Dana, 173 Mass. 421, a testator had devised his real estate in trust to be equally divided between the children of his son, " at such time as they shall arrive at the age of twenty-one years." Two of the legatees, who were living at the time the legacy vested, died, leaving their parents as their heirs. After the death of one of the children the trustees brought a bill, making the parents and the surviving children parties, in which they asked instructions on the question to whom belonged the share of the real estate to which the deceased child would have been entitled had he reached twenty-one. This bill was dismissed on the express ground that it was prematurely brought. It was held that this dismissal imported that, whoever might be entitled to the corpus of the fund, the trust continued as to the whole of it until some child reached the age of twenty-one years, or until all the children were dead, and that hence it was a conclusive adjudication against the right of the parents of the deceased legatees to maintain a bill to have a share of the trust property paid over to them, at a time when the surviving legatee under the will was still a minor and the deceased legatees would not have been twenty-one if alive.

3. Judgment Not a Bar When Appeal Pending — *United States.* — Green *v.* U. S., 18 Ct. Cl. 93; Bryar *v.* Campbell, 177 U. S. 649 (a Pennsylvania case); Sharon *v.* Hill, 26 Fed. Rep. 337 (a California case).

California. — Smith *v.* Smith, 134 Cal. 117; Harris *v.* Barnhart, 97 Cal. 546; Woodbury *v.* Bowman, 13 Cal. 635; People *v.* Beevers, 99 Cal. 286; McGarrahan *v.* Maxwell, 28 Cal. 75. See also Purser *v.* Cady, 120 Cal. 214; Murray *v.* Green, 64 Cal. 363; Naftzger *v.* Gregg, 99 Cal. 83, 37 Am. St. Rep. 23; Matter of Blythe, 99 Cal. 472; Story *v.* Story, etc., Commercial Co., 100 Cal. 41.

Georgia. — Tommey *v.* Finney, 45 Ga. 155.

Louisiana. — Byrne *v.* Prather, 14 La. Ann. 663. See also Fush *v.* Egan, 48 La. Ann. 60.

Michigan. — Day *v.* De Jonge, 66 Mich. 550.

Minnesota. — See Hershey *v.* Meeker County Bank, 71 Minn 255.

Montana. — Boucher *v.* Barsalou, (Mont. 1902) 69 Pac. Rep. 555.

New Jersey. — De Camp *v.* Miller, 44 N. J. L. 617.

Tennessee. — Southern R. Co. *v.* Brigman, 95 Tenn. 624; Hall *v.* Calvert, (Tenn. Ch. 1897) 46 S. W. Rep. 1120; Delk *v.* Yelton, 103 Tenn. 476; Davidson Lumber Co. *v.* Jones, (Tenn. Ch. 1901) 62 S. W. Rep. 386.

Vermont. — Small *v.* Haskins, 26 Vt. 209.

Appeal to United States Supreme Court. — A final judgment of a state Supreme Court which has been removed by writ of error into the Supreme Court of the United States and awaits adjudication in that court is not *res judicata.* Eastern Bldg., etc., Assoc. *v.* Welling, 103 Fed. Rep. 352.

In Equity and Admiralty Cases an appeal suspends the sentence altogether, and it is not *res judicata* until the final sentence of the appellate court is pronounced. Yeaton *v.* U. S., 5 Cranch (U. S.) 281; Sharon *v.* Hill, 26 Fed. Rep. 337; Hughes *v.* Dundee Mortg., etc., Co., 28 Fed. Rep. 40; Souter *v.* Baymore, 7 Pa. St. 415, 47 Am. Dec. 518.

When a Judgment Is Appealed from with Supersedeas or stay of execution it must, until the appeal shall be determined, be denied recognition for any practical efficacy whatever in a collateral proceeding, and hence it cannot support a plea of *res judicata.* Ketchum *v.* Thatcher, 12 Mo. App. 185. See also Smith *v.* Farmers' Bank, (Ky. 1899) 51 S. W. Rep. 451.

Judgment Not a Bar While Review Pending. — Haynes *v.* Ordway, 52 N. H. 284.

Removal into Higher Court by Habeas Corpus. — It has been held in *England* that where a cause is removed by habeas corpus from an inferior court after judgment by default, that judgment is not evidence against the defendant in the superior court. Bottings *v.* Firby, 9 B. & C. 762, 17 E. C. L. 492, 4 M. & R. 566.

court below is in the meantime in full force as a bar or estoppel.[1]

(2) *Difficulty in the Way of Adoption of Either View.* — It will readily be seen that serious difficulties or injustice may result from the adoption of either of the views above set forth. The adoption of the first view enables a person against whom a judgment has been rendered to avoid its force for a considerable time by taking an appeal, and during such time he may carry on other controversies involving the same issues and obtain decisions contrary to that from which the appeal was taken and which could not have been obtained had the former judgment been admissible as evidence against him; and when it is finally determined that such judgment was free from error there may be no mode of retrieving the loss resulting from its suspension by the appeal. On the other hand, if the second view set out be adopted, this may result in the evil that though a judgment is erroneous, and for that reason is reversed, yet before the reversal it may be used as evidence, and may thereby lead to another judgment which cannot in turn be reversed, because the action of the trial court in receiving and giving effect to the former judgment was correct and did not become erroneous when such judgment was subsequently reversed.[2]

(3) *Solution of the Difficulty.* — There is, however, a very simple solution of the difficulty, for a trial court has ample power, when it is apparent that injustice may be done, to grant continuances until a case pending in the appellate court, and sought to be used as a bar or an estoppel, is determined; and it would seem that the trial court should always do this, on a proper showing made, where an appeal has been taken in good faith and a sufficient

1. Judgment a Bar Notwithstanding Pendency of Appeal — *United States.* — Ransom *v.* Pierre, (C. C. A.) 101 Fed. Rep. 665 (a South Dakota case).

Arkansas. — State *v.* Richard, 21 Ark. 515; Cloud *v.* Wiley, 29 Ark. 80.

Connecticut. — Bank of North America *v.* Wheeler, 28 Conn. 433, 73 Am. Dec. 683.

Illinois. — Moore *v.* Williams, 132 Ill. 589, 22 Am. St. Rep. 563. But see Lake Erie, etc., R. Co. *v.* Sellman, 51 Ill. App. 617.

Indiana. — Nill *v.* Comparet, 16 Ind. 107, 79 Am. Dec. 411; Scheible *v.* Slagle, 89 Ind. 323.

Iowa. — Watson *v.* Richardson, 110 Iowa 698. See also Hackett *v.* Freeman, 103 Iowa 296.

Missouri. — Hudelmeyer *v.* Hughes, 13 Mo. 87.

Nebraska. — Creighton *v.* Keith, 50 Neb. 810.

Nevada. — Cain *v.* Williams, 16 Nev. 426. See also Rogers *v.* Hatch, 8 Nev. 35, characterizing as mere *dictum* the expression of a contrary opinion in Sherman *v.* Dilley, 3 Nev. 21.

New York. — Mercantile Nat. Bank *v.* Corn Exch. Bank, 73 Hun (N. Y.) 78; Stevens *v.* Stevens, 69 Hun (N. Y.) 332; Harris *v.* Hammond, (Sup. Ct. Gen. T.) 18 How. Pr. (N. Y.) 123; Tyler *v.* Willis, (Supm. Ct. Gen. T.) 13 Abb. Pr. (N. Y.) 369, 35 Barb. (N. Y.) 213; Parkhurst *v.* Berdell, 110 N. Y. 386, 6 Am. St. Rep. 384; Sullivan *v.* Ringler, 69 N. Y. App. Div. 388. See also Matter of Pioneer Paper Co., (Supm. Ct. Spec. T.) 36 How. Pr. (N. Y.) 111.

Oregon. — Day *v.* Holland, 15 Oregon 464.

Texas. — Texas Trunk R. Co. *v.* Jackson, 85 Tex. 605 [*overruling* Thompson *v.* Griffin, 69 Tex. 139; Westmoreland *v.* Richardson, 2 Tex. Civ. App. 175, and Dallas, etc., R. Co. *v.* Day, 3 Tex. Civ. App. 353]; Maxwell *v.* Cisco First Nat. Bank, (Tex. Civ. App. 1894) 24 S. W. Rep. 848; Buckner *v.* Lancaster, (Tex. Civ. App. 1897) 40 S. W. Rep. 631; Cunningham *v.* Holt, 12 Tex. Civ. App. 150. See also Cook *v.* Carroll Land, etc., Co., 6 Tex. Civ. App. 326; New York, etc., Steamship Co. *v.* Wright, (Tex. Civ. App. 1894) 26 S. W. Rep. 106; Glaze *v.* Johnson, (Tex. Civ. App. 1901) 65 S. W. Rep. 662.

Wisconsin. — Smith *v.* Schreiner, 86 Wis. 19, 39 Am. St. Rep. 869.

A Stay of Execution pending appeal under the *Kansas* statute has no other force or effect on the judgment than simply to prevent its enforcement by execution, and hence the judgment may, notwithstanding this, have its full effect in other respects. Willard *v.* Ostrander, 51 Kan. 481, 37 Am. St. Rep. 294.

Abandoned Appeal. — See Glaze *v.* Johnson, (Tex. Civ. App. 1901) 65 S. W. Rep. 662.

2. Difficulties Presented by Either View. — Freeman on Judgments, § 328, *quoted* in Willard *v.* Ostrander, 51 Kan. 481, 37 Am. St. Rep. 294.

In New York, where the doctrine prevails that the taking of an appeal from the judgment does not prevent the judgment from being pleaded in bar to another action between the same parties, the objection to this view set out in the text cannot obtain, for it has been decided that if, after a judgment has been successfully pleaded in the second suit, it is reversed on appeal, the judgment in the second action may be set aside by the trial court for that reason, although no error was committed on the trial. Parkhurst *v.* Berdell, 110 N. Y. 386, 6 Am. St. Rep. 384, *cited* in Ransom *v.* Pierre, (C. C. A.) 101 Fed. Rep. 665. See also Mercantile Nat. Bank *v.* Corn Exchange Bank, 73 Hun (N. Y.) 78.

bond to stay execution has been given, if the introduction of the judgment in another case would have the effect of permitting the party holding the judgment to collect the same through the medium of another action.[1] It has also been said that the true course in such a case is to plead the pendency of the former suit in abatement until the judgment therein becomes final, when a supplemental answer averring the proper facts in bar of the execution would be in order,[2] but it is evident that such a plea would not in every case be available, and a motion for a continuance is a much better mode to secure the benefit of the evidence and avoid a conclusion which may prove unjust.[3]

(4) *Character of Appeal.* — It has been laid down as a reasonable explanation of the conflict of authority on this question that the effect of an appeal depends upon the character of the jurisdiction of the appellate court. That is, if by the statute a case carried before it by appeal is to be retried by it as upon original process in that court, and it has jurisdiction to settle the controversy by a judgment of its own and to enforce that judgment by its own process, the appeal will vacate the judgment of the inferior tribunal. But if the appeal is in the nature of a writ of error, and only carries up the case to the appellate court for the correction of errors which might have intervened on the trial of the case below, and for its adjudication upon the question whether the judgment appealed from should be affirmed, reversed, or modified, and that court has no other powers or duties than to affirm, reverse, or modify that judgment, or remit the case to the inferior tribunal, then such appeal does not vacate or suspend the judgment appealed from; and the removal of the case to the appellate court would no more bar an action upon the judgment than the pendency of a writ of error at common law, when that was the proper mode of correcting errors which might have occurred in the inferior tribunal.[4]

(5) *Inconsistent Positions.* — It is well settled that the law will not allow parties to assume inconsistent positions in the trial or the progress of a cause, consequently a defendant is precluded from pleading a judgment as a bar to another action while he is seeking to reverse the same judgment on error in the Supreme Court.[5]

(6) *Application for Appeal.* — The authorities which hold that an appeal perfected to a superior court vacates the judgment of the court below have no application to a case where an application for an appeal was filed, but the appeal was never allowed or perfected, and no transcript of the record was ever filed in the appellate court.[6]

(7) *Foreign Judgment.* — Where, under the law of the state in which a judgment was rendered, an appeal does not vacate the judgment, an action may be maintained in another state upon such judgment, notwithstanding the pendency of an appeal.[7]

b. AFFIRMANCE. — The affirmance by the Supreme Court on appeal of a judgment or order of a lower court is conclusive upon the parties, notwith-

1. **Continuance.** — Willard *v.* Ostrander, 51 Kan. 481, 37 Am. St. Rep. 294. See also State *v.* Richard, 21 Ark. 515.

2. **Plea in Abatement.** — Harris *v.* Barnhart, 97 Cal. 546. See also Tommey *v.* Finney, 45 Ga. 155; Byrne *v.* Prather, 14 La. Ann. 663; Delk *v.* Yelton, 103 Tenn. 476.

3. Smith *v.* Smith, 134 Cal. 117. See also Rose *v.* Superior Ct., 65 Cal. 570; Brown *v.* Campbell, 100 Cal. 635, 38 Am. St. Rep. 314.

4. **Character of Appeal.** — Bank of North America *v.* Wheeler, 28 Conn. 433, 73 Am. Dec. 683; Rogers *v.* Hatch, 8 Nev. 35; Cain *v.* Williams, 16 Nev. 426; Burns *v.* Howard, (Supm. Ct. Spec. T.) 9 Abb. N. Cas. (N. Y.) 321.

Writ of Error. — If a writ of error is seasonably sued out and bail put into the action, this is a supersedeas so far as to prevent an execution from issuing on the judgment pending the writ of error, but it leaves the judgment otherwise in full force between the parties, either as a ground of action, a bar, or an estoppel. Sharon *v.* Hill, 26 Fed. Rep. 337; Hughes *v.* Dundee Mortg., etc., Co., 28 Fed. Rep. 40. See also cases cited above.

5. **Inconsistent Positions.** — Hughes *v.* Dundee Mortg., etc., Co., 28 Fed. Rep. 40.

6. **Application for Appeal.** — Hubbell *v.* U. S., 171 U. S. 203.

7. **Foreign Judgment.** — Faber *v.* Hovey, 117 Mass. 108.

standing the fact that the case was never presented to the appellate court, but the affirmance was for want of an assignment of errors.[1]

c. REVERSAL — (1) *Judgment of Reversal.* — As a general rule, the judgment of an appellate court reversing a judgment, decree, or order of a trial court does not purport to be final or to pass upon the merits of the controversy, and hence does not operate as *res judicata*, but leaves the parties in the same position as they were before judgment of the lower court was rendered.[2] Where, however, the appellate court has reversed for causes going to the merits and the reversal shows an intention finally to decide the case upon the merits, the judgment then has all the characteristics necessary to constitute it *res judicata*.[3]

(2) *Reversed Judgment.* — It is obvious that a judgment which has been reversed on appeal or writ of error concludes no one, and is not an estoppel or bar in any sense.[4]

d. AFFIRMANCE IN PART AND REVERSAL IN PART. — Where a judgment is, on appeal or writ of error, affirmed in part or reversed in part, it is *res judicata* as to those matters which were affirmed, but not as to those in reference to which the judgment was reversed.[5]

e. DISMISSAL OF APPEAL. — Ordinarily, when an appeal is dismissed this has the same effect as an affirmance of the judgment in the court below, and the rights of all the parties are the same as if no appeal had been taken.[6] But

1. Affirmance for Want of Assignment of Errors. — Miller *v.* Bernecker, 46 Mo 194.

2. Judgment of Reversal Not Res Judicata — *United States.* — Harvey *v.* Richards, 2 Gall. (U. S.) 216; Aurora City *v.* West, 7 Wall. (U. S.) 82; Phelps *v.* Elliott, 35 Fed. Rep. 455.

California. — Stearns *v.* Aguirre, 7 Cal. 443.

Illinois. — Chicago, etc., R. Co. *v.* Lee, 87 Ill 454; Walker *v.* Doane, 131 Ill. 27; Chicago, etc., R. Co. *v.* Berg, 57 Ill. App. 521, *affirmed* 162 Ill. 348.

Maine. — See Brown *v.* Whitmore, 71 Me. 65.

Maryland. — See Borden Min. Co. *v.* Barry, 17 Md. 419.

New York. — Platz *v.* Burton, etc., Cider, etc., Co., (Albany City Ct.) 7 Misc. (N. Y.) 473; Hunt *v.* Hoboken Land, etc., Co., 1 Hilt. (N. Y.) 161. See also Carter *v.* Beckwith, 128 N. Y. 312.

Pennsylvania. — Coleman's Appeal, 62 Pa. St. 252, Fries *v.* Pennsylvania R. Co., 98 Pa. St. 142, Roll *v.* Davison, 165 Pa. St. 392.

Texas. — Best *v.* Nix, 6 Tex. Civ. App. 349. See also Galveston, etc., R. Co. *v.* Arispe, 5 Tex. Civ. App. 611.

3. When Judgment of Reversal May Be Res Judicata. — Jenkins *v.* Headley, (Ky. 1897) 40 S. W. Rep. 460; Wilkes *v.* Coopwood, 39 Miss. 348; Platz *v.* Burton, etc., Cider, etc., Co., (Albany City Ct.) 7 Misc. (N. Y.) 473.

4. Reversed Judgment Not a Bar — *California.* — Board of Education *v.* Fowler, 19 Cal. 11.

Illinois. — Chicago Forge, etc., Co. *v.* Rose, 69 Ill. App. 123; Baker *v.* Hess, 53 Ill. App. 473.

Indiana. — Maghee *v.* Collins, 27 Ind. 83.

Iowa. — Stanbrough *v.* Cook, 86 Iowa 740; Edgar *v.* Greer, 10 Iowa 279.

Kentucky. — McCallister *v.* Bridges, (Ky. 1897) 40 S. W. Rep. 70.

Montana. — Mattingly *v.* Lewisohn, 13 Mont. 508.

New York. — Loeb *v.* Willis, 100 N. Y. 231. See also Commercial Bank *v.* Sherwood, 162 N. Y. 310, *affirming* 20 N. Y. App. Div. 70; McElroy *v.* Mumford, (Supm. Ct. Gen. T.) 16 N. Y. Supp. 691.

Ohio. — Zanesville Gas-Light Co. *v.* Zanesville, 47 Ohio St. 35.

Pennsylvania. — Fries *v.* Pennsylvania R. Co., 98 Pa. St. 142; Jenkinson *v.* Hilands, 146 Pa. St. 380.

Texas. — Scherff *v.* Missouri Pac. R. Co., 81 Tex. 471, 26 Am. St. Rep. 828. See also Watkins *v.* Junker, 4 Tex. Civ. App. 629; Mills County *v.* Brown County, 10 Tex. Civ. App. 356.

Appeal from Reversal. — See McElroy *v.* Mumford, (Supm. Ct. Gen. T.) 16 N. Y. Supp. 691.

Judgment Based upon Judgment Subsequently Reversed. — See Frankfort *v.* Deposit Bank, 65 S. W. Rep. 10, 23 Ky. L. Rep. 1285.

5. Affirmance in Part and Reversal in Part. — Osburn *v.* McCartney, 121 Ill. 408; Goodsell *v.* Western Union Tel. Co., 55 N. Y. Super. Ct. 173; Mowry *v.* Baraboo First Nat. Bank, 66 Wis. 539.

Separate Judgment Not Appealed From. — Where, in an action against several defendants, judgment was rendered in favor of one and against the others, in accordance with a practice sanctioned by a statute of the state, and there has been no appeal from the judgment in favor of the one defendant, but the other defendants have appealed from the judgment rendered against them, and that judgment has been reversed, the judgment rendered in favor of the one defendant is a bar to any further proceeding on the same cause of action against him. Bloch *v.* Price, 32 Fed Rep 447.

6. Dismissal of Appeal. — Pueblo Chicago Lumber Co. *v.* Danziger, 7 Colo. App. 149; Fagan *v.* McTier, 81 Ga. 73; Manley *v.* Park, 62 Kan. 553. See also Wolfe *v.* Potts, (Tenn. Ch. 1897) 42 S. W. Rep. 188.

Dismissal of Writ of Error for Irregularity. — McLendon *v.* McGlaun, 60 Ga. 244.

where the effect of an appeal is to annul the judgment of the inferior court and bring the entire matter up anew in the higher court, and a plaintiff, after a judgment against him in the lower court, appeals and subsequently dismisses his appeal, such dismissal of the appeal amounts to a dismissal of the suit, and hence the judgment rendered therein does not constitute a bar to another suit for the same cause of action.[1]

f. EFFECT OF JUDGMENT DURING TIME ALLOWED TO APPEAL. — In some of those states which hold that the effect of an appeal is to suspend the judgment appealed from for all purposes, the courts have gone so far as to hold that a judgment is not final so as to constitute a bar during the time allowed for an appeal, even though no appeal has actually been taken, but becomes final only upon the expiration of such time.[2]

15. Conditional Judgment. — Where a judgment confirms the title to land in certain persons, agreeably to the report of referees who have awarded the lands to such persons upon conditions precedent, and such conditions are not performed, the judgment is not conclusive as to the title.[3]

16. Vacated Judgment. — A judgment which has been vacated or set aside cannot operate as a bar.[4]

17. Trial by Court Without Jury. — When a party waives a jury and consents that the justice shall hear the evidence and then give such judgment as he may think it demands, such party is concluded by the judgment so rendered.[5]

18. Withdrawal of Attorney. — The effect of a dismissal on the merits as a bar cannot be changed by the fact that the attorneys for the plaintiff withdrew their appearance, where it remains patent and clear that notwithstanding such fact the cause was submitted upon the merits and passed upon by the court.[6]

VII. ACTIONS AND PROCEEDINGS, ORDERS AND JUDGMENTS — 1. Introductory Statement. — The application of the law of *res judicata* to particular orders and judgments depends upon a variety of considerations, such as the character of each as to finality; common-law or statutory rules declaring its force and legal effect; the nature of the proceeding in which it is rendered, whether an action, a motion, or a special or summary proceeding; and whether it is invoked as final and conclusive in subsequent proceedings in the same case or in other and independent litigation.[7]

1. Lee *v.* Kaiser, 80 Mo. 431; Dossett *v.* Miller, 3 Sneed (Tenn.) 72.

2. **Effect of Judgment Before Expiration of Time Allowed for Appeal.**—New Orleans Nat. Banking Assoc. *v.* Adams, 3 Woods (U. S.) 21; Brown *v.* Campbell, 100 Cal. 635, 38 Am. St. Rep. 314; Story *v.* Story, etc., Commercial Co., 100 Cal. 41; Matter of Blythe, 99 Cal. 472; Naftzger *v.* Gregg, 99 Cal. 83, 37 Am. St. Rep. 23; Harris *v.* Barnhart, 97 Cal. 546; Fresno Milling Co. *v.* Fresno Canal, etc., Co., (Cal. 1894) 36 Pac. Rep. 412. But see *contra*, Cook *v.* Rice, 91 Cal. 664.

3. Com. *v.* Pejepscut Proprietors, 7 Mass. 399.

4. **Judgment Vacated or Set Aside.** — Taylor *v.* Smith, 4 Ga. 133; Graef *v.* Bernard, 162 Mass. 300; Loeb *v.* Willis, 100 N. Y. 231; Scherff *v.* Missouri Pac. R. Co., 81 Tex. 471, 26 Am. St. Rep. 828. See also Delauney *v* Burnett, 9 Ill. 454; Mannerback *v.* Pennsylvania R. Co., 16 Pa. Super. Ct. 622.

An Appeal from an Order Vacating a Judgment does not reinstate the judgment so as to give to it operation as an estoppel. Hershey *v.* Meeker County Bank, 71 Minn. 255.

Where Two Judgments of the Same Purport Are Rendered in the same case at the same term of court, it will be presumed that the first judgment merged in the second or was constructively vacated by it, and in such case the first judgment will not sustain a plea of *res judicata*. Johnson *v.* Hesser, 61 Neb. 631.

5. Kreuchi *v.* Dehler, 50 Ill. 176.

6. **Withdrawal of Attorney.** — Scully *v.* Chicago, etc., R. Co., 46 Iowa 528. See also Bigham *v.* Kistler, 114 Ga. 453.

7. See generally *infra*, this subdivision; and the title NOTICE OF PENDENCY AND LIS PENDENS, vol. 21, p. 629 *et seq.*

Statutory Declarations of the Conclusiveness of Judgments and Orders. — See Code Civ. Pro. Cal., §§ 1908, 1909; Code Civ. Pro. Mont., §§ 3196, 3197; 1 Hill's Annot. Laws Oregon, §§ 733, 734.

Effect of Decrees Probating Wills, on Real and Personal Property. — See the title PROBATE AND LETTERS OF ADMINISTRATION, vol. 23, pp. 133, 134; Johns *v.* Hodges, 62 Md. 525; Mushrush *v.* Mushrush, 7 Pa. Dist. 743; Newman *v.* Waterman, 63 Wis. 612, 53 Am. Rep. 310.

2. Forms of Action — *a.* IN GENERAL. — The efficacy of a judgment or decree as a bar or estoppel does not depend upon any technical consideration of the identity of forms of action, but upon matter of substance. It is only necessary that the same matter should have been previously adjudicated. That the forms of action of the two cases are different is immaterial.[1]

b. ELECTION OF REMEDIES — MERGER — (1) *General Rule.* — A common instance of the application of the doctrine that identity of forms of action is unnecessary is where a person has a choice of two or more remedies for the same claim or demand. Having selected one, a judgment therein rendered upon the merits by a competent tribunal, either for or against him, will, as a general rule, preclude him from resorting to the other.[2]

1. Forms of Action or Proceeding Immaterial — *England.* — Slade's Case, 4 Coke 92*b;* Kitchen *v.* Campbell, 3 Wils. C. P. 304, 2 W. Bl. 827; Routledge *v.* Hislop, 2 El. & El. 549, 105 E. C. L. 549, 6 Jur. N. S. 398; Brunsden *v.* Humphrey, 14 Q. B. D. 141, *reversing* on other grounds 11 Q. B. D. 712.

United States. — Lawrence *v.* Vernon, 3 Sumn. (U. S.) 20, 15 Fed. Cas. No. 8,146.

Alabama. — White *v.* Martin, 1 Port. (Ala.) 215, 26 Am. Dec. 365.

Arkansas. — Dawson *v.* Parham, 55 Ark. 286.

California. — Taylor *v.* Castle, 42 Cal. 367.

Georgia. — Duncan *v.* Stokes, 47 Ga. 593.

Indiana. — Baker *v.* State, 109 Ind. 47; Fromlet *v.* Poor, 3 Ind. App. 425.

Iowa. — Newby *v.* Caldwell, 54 Iowa 102.

Kansas. — Council Grove State Bank *v.* Rude, 23 Kan. 143.

Kentucky. — Hardwicke *v.* Young, (Ky. 1901) 62 S. W. Rep. 10.

Louisiana. — Plicque *v.* Perret, 19 La. 319; McNeely *v.* Hyde, 46 La. Ann. 1083.

Maryland. — State *v.* Ramsburg, 43 Md. 325; Harryman *v.* Roberts, 52 Md. 64; Trayhern *v.* Colburn, 66 Md. 277; Bolton Mines Co. *v.* Stokes, 82 Md. 50.

Massachusetts. — Eastman *v.* Cooper, 15 Pick. (Mass.) 276, 26 Am. Dec. 600; Warren *v.* Comings, 6 Cush. (Mass.) 103; Harlow *v.* Bartlett, 170 Mass. 584. See also Livermore *v.* Herschell, 3 Pick. (Mass.) 33.

Missouri. — Union R., etc., Co. *v.* Traube, 59 Mo. 355.

New Hampshire. — Sanderson *v.* Peabody, 58 N. H. 116.

New York. — Gregory *v.* Burrall, 2 Edw. (N. Y.) 417; Johnson *v.* Smith, 8 Johns. (N. Y.) 383; Stowell *v.* Chamberlain, 60 N. Y. 272, *affirming* 3 Thomp & C. (N. Y.) 374; Steinbach *v.* Relief F. Ins. Co., 77 N. Y. 498, 33 Am. Rep. 655; House *v.* Lockwood, 137 N. Y. 259; Miller *v.* Manice, 6 Hill (N. Y.) 114, *cited* Marsh *v.* Masterson, 50 N. Y. Super. Ct. 187, which was *affirmed* 101 N. Y. 401; Hudson *v.* Smith, 39 N. Y. Super. Ct. 452; Atlanta Hill Gold Min., etc., Co. *v.* Andrews, 55 N. Y. Super. Ct. 93, *affirmed* 120 N. Y. 58; Swan *v.* Wheeler, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 225; Birckhead *v.* Brown, 5 Sandf. (N. Y.) 134.

North Carolina. — Edwards *v.* Baker, 99 N. Car. 258.

Pennsylvania. — Cist *v.* Zeigler, 16 S. & R. (Pa.) 283, 16 Am. Dec. 573; Gilchrist *v.* Bale, 8 Watts (Pa.) 355, 34 Am. Dec. 469; Finley *v.* Hanbest, 30 Pa. St. 190.

Vermont. — Spencer *v.* Dearth, 43 Vt. 98.

See also in this connection *infra*, this subdivision, *Special and Summary Proceedings.*

Law and Equity. — See further cases cited *supra*, this title, *Courts and Tribunals — Particular Courts;* Moore *v.* Williams, 132 Ill. 589, 22 Am. St. Rep. 563.

Appeal and Writ of Error. — Smith *v* Wright, 71 Ill. 167.

Certiorari and Mandamus. — Shields *v.* Paterson, 58 N. J. L. 550.

2. Election of Remedies — *England.* — Buckland *v.* Johnson, 15 C. B. 145, 80 E. C. L. 145 [*distinguishing* Kitchen *v.* Campbell, 3 Wils. C. P. 304, 2 W. Bl. 827]; Gibbs *v.* Cruikshank, L. R. 8 C. P. 454. See also Moses *v.* Macferlan, 2 Burr. 1010.

United States. — Kendall *v.* Stokes, 3 How. (U. S.) 100.

Alabama. — Cannon *v.* Brame, 45 Ala. 262.

California. — Taylor *v.* Castle, 42 Cal. 367.

Illinois. — Karr *v.* Barstow, 24 Ill. 581; Stier *v.* Harms, 154 Ill. 476; Kapischki *v.* Koch, 180 Ill. 44, *affirming* 79 Ill. App. 238; Savage *v.* French, 13 Ill. App. 17; Terre Haute, etc., R. Co. *v.* People, 41 Ill. App. 513; Hess *v.* Miller, 99 Ill. App. 225.

Kentucky. — Hall *v.* Forman, 82 Ky. 505.

Maine. — Rendall *v.* School Dist. No 2, 75 Me. 358.

Maryland. — Beall *v.* Pearre, 12 Md. 550; Walsh *v.* Chesapeake, etc., Canal Co., 59 Md. 423; Bolton Mines Co. *v.* Stokes, 82 Md. 50.

Massachusetts. — Norton *v.* Doherty, 3 Gray (Mass.) 372, 63 Am. Dec. 758; Smith *v.* Way, 9 Allen (Mass.) 472; Bradley *v.* Brigham, 149 Mass. 141; Stevens *v.* Pierce, 151 Mass. 207. See also Boynton *v.* Willard, 10 Pick. (Mass.) 166; Salem India Rubber Co. *v.* Adams, 23 Pick. (Mass.) 256; Butler *v.* Hildreth, 5 Met. (Mass.) 49.

Michigan. — Button *v.* Trader, 75 Mich. 295.

Minnesota. — Hatch *v.* Coddington, 32 Minn. 92, *cited* Veline *v.* Dahlquist, 64 Minn. 119.

Mississippi. — Agnew *v.* McElroy, 10 Smed. & M. (Miss.) 552, 48 Am. Dec. 772, *cited* Perry *v.* Lewis, 49 Miss. 443.

New York. — Rice *v.* King, 7 Johns. (N. Y.) 20; Bracken *v.* Atlantic Trust Co., 167 N. Y. 510, *affirming* 42 N. Y. App. Div. 621. See also Walden Nat. Bank *v.* Birch, 130 N. Y. 221, *affirming* (Supm. Ct. Gen. T.) 7 N. Y. Supp. 934, 55 Hun (N. Y.) 606.

Pennsylvania. — Marsh *v.* Pier, 4 Rawle (Pa.) 273, 26 Am. Dec. 131.

Texas. — Roberts *v.* Lovejoy, 60 Tex. 253.

Virginia. — Hite *v.* Long, 6 Rand. (Va.) 457, 18 Am. Dec. 719, *cited* Sangster *v.* Com., 17 Gratt. (Va.) 124.

(2) *Limitations and Exceptions to Rule.* — While the election is usually determined by judgment,[1] in the case of inconsistent or alternative remedies any decisive act by the party with knowledge of the facts indicative of his intention to select one remedy is just as final as a judgment.[2] The doctrine of merger or *res judicata* is, therefore, not necessarily involved, but rather that of the election of remedies. On the other hand, where the remedies are consistent and concurrent, if the election is final it becomes so by reason of the rendition of a judgment having the requisites of *res judicata;*[3] but there are some rights as to which there is contrariety of decision on the question whether an unsatisfied judgment in one form of action is final and a bar, even between the same parties or privies, and some well-established exceptions. There are also many instances where different concurrent remedies may each be pursued to judgment without trenching upon the law of *res judicata,* although there can be but one satisfaction.[4] The subject is an intricate one,

West Virginia. — Porter *v.* Mack, 50 W. Va. 581. See generally the title ELECTION OF REMEDIES, 7 ENCYC. OF PL. AND PR., 360.

The Test whether a previous action is a bar is not whether the damages sought to be recovered are different, but whether the cause of action is the same. Gibbs *v.* Cruikshank, L. R. 8 C. P. 454.

1. Miller *v.* Hyde, 161 Mass. 472, 42 Am. St. Rep. 424, opinion of Holmes, J.

2. **Election of Inconsistent Remedies.** — See the title ELECTION OF REMEDIES, 7 ENCYC. OF PL. AND PR., 361 *et seq.*, and see the following cases: Connihan *v.* Thompson, 111 Mass. 270; Whiteside *v.* Brawley, 152 Mass. 133; Thomas *v.* Watt, 104 Mich. 201; Cooper *v.* Smith, 109 Mich. 458; Morris *v.* Rexford, 18 N. Y. 552; Rodermund *v.* Clark, 46 N. Y. 354; Terry *v.* Munger, 121 N. Y. 161, 18 Am. St. Rep. 803, *affirming* 49 Hun (N. Y.) 560; White *v.* White, 68 Vt. 161; Lodi Bank *v.* Washburn Electric Light, etc., Co., 98 Wis. 547, *citing* 7 ENCYC. OF PL. AND PR. 366; Carroll *v.* Fethers, 102 Wis. 436; Barth *v.* Loeffelholtz, 108 Wis. 562; Clausen *v.* Head, 110 Wis. 405; Ludington *v.* Patton, 111 Wis. 208.

3. "**The Doctrine of Merger** applies only where the situation is the reverse of that which is ruled by the law as regards the election of remedies, though the legal effect is the same, *i. e.*, to confine the plaintiff to a single remedy. In the latter situation the remedies are always inconsistent; in the former always consistent." Barth *v.* Loeffelholtz, 108 Wis. 562, *per* Marshall, J.

4. **Judgment Not a Bar Where Remedies Are Concurrent until Satisfaction of Claim or Demand** — *England.* — Drake *v.* Mitchell, 3 East 251.

United States. — Clark *v.* Young, 1 Cranch (U. S.) 181.

Arizona. — Gray *v.* Noonan, (Ariz. 1898) 53 Pac. Rep. 7.

Maine. — Lander *v.* Arno, 65 Me. 26.

Massachusetts. — Storer *v.* Storer, 6 Mass. 390; Connihan *v.* Thompson, 111 Mass. 270; Bradley *v.* Brigham, 149 Mass. 141; Vanuxem *v.* Burr, 151 Mass. 386, 21 Am. St. Rep. 458; Clare *v.* New York, etc., R. Co., 172 Mass. 211; Hervey *v.* Rawson, 164 Mass. 501.

Michigan. — Goodrich *v.* White, 39 Mich. 489; Durfee *v.* Joslyn, 92 Mich. 211.

Minnesota. — Macomb Sewer-Pipe Co. *v.* Hanley, 61 Minn. 359.

Missouri. — Linville *v.* Rhoades, 73 Mo. App. 217.

Nebraska. — Simons *v.* Fagan, 62 Neb. 287.

New York. — Bowen *v.* Mandeville, 95 N. Y. 237, *affirming* 29 Hun (N. Y.) 42; New York Land Imp. Co. *v.* Chapman, 118 N. Y. 288, *reversing* 54 N. Y. Super. Ct. 297; Walden Nat. Bank *v.* Birch, 130 N. Y. 221, *affirming* (Supm. Ct. Gen. T.) 7 N. Y. Supp. 934, 55 Hun (N. Y.) 606; Morgan *v.* Skidmore, (Ct. App.) 3 Abb. N. Cas. (N. Y.) 92, *affirming* 55 Barb. (N. Y.) 263; Goldberg *v.* Dougherty, 39 N. Y. Super. Ct. 189; Wanzer *v.* De Baun, 1 E. D. Smith (N. Y.) 261.

Pennsylvania. — Schriver *v.* Eckenrode, 87 Pa. St. 213.

Rhode Island. — Whittier *v.* Collins, 15 R. I. 90, 2 Am. St. Rep. 879.

Tennessee. — Betterton *v.* Roope, 3 Lea (Tenn.) 215, 31 Am. Rep. 633.

Texas. — St. Louis Southwestern R. Co. *v.* Hall, etc., Woodworking Mach. Co., 23 Tex. Civ. App. 211.

Vermont. — Root *v.* Lord, 23 Vt. 569; Johnson *v.* Worden, 47 Vt. 458; Merchants' Nat. Bank *v.* Taylor, 66 Vt. 574; Priest *v.* Foster, 69 Vt. 417.

Washington. — Fischer *v.* Quigley, 8 Wash. 327.

Wisconsin. — Milwaukee First Nat. Bank *v.* Finck, 100 Wis. 446; Barth *v.* Loeffelholtz, 108 Wis. 562; Clausen *v.* Head, 110 Wis. 409; Carpenter *v.* Meachem, 111 Wis. 60, *citing* 7 ENCYC. OF PL. AND PR. 362; Shaw *v.* Gilbert, 111 Wis. 165.

See also cases holding judgment to be a bar but in which there had been satisfaction. Vernon *v.* Watson, (1891) 2 Q. B. 288; Wabash R. Co. *v.* People, 78 Ill. App. 268; Illinois Cent. R. Co. *v.* People, 81 Ill. App. 176; Illinois Cent. R. Co. *v.* People, 84 Ill. App. 260; Perry *v.* Lewis, 49 Miss. 443; Hartland *v.* Hackett, 57 Vt. 92.

Judgment as Security Only. — "A judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and, therefore, until then it cannot operate to change any other collateral concurrent remedy which the party may have." Drake *v.* Mitchell, 3 East 251, *per* Ellenborough, C. J., *approved* Lord *v.* Bigelow, 124 Mass. 185, and Vanuxem *v.* Burr, 151 Mass. 386, 21 Am. St. Rep. 458.

and perhaps the best statement summarizing and differentiating it is that contained in an opinion lately rendered in *Wisconsin.*[1]

Resort to Wrong Remedy. — The doctrines of election of remedies and *res judicata* have no application to cases where judgment is rendered against a party because he has misconceived his right and remedy. The only penalty that falls upon him is payment of the costs and expenses of the suit in which he fails.[2] As respects *res judicata* this is only one phase of the rule that a

Actions to Recover Goods and Chattels or Their Value. — For the doctrine that the title to goods and chattels wrongfully in the possession of another does not pass to the defendant upon a judgment against him for their value, but if found can be retaken from him or his privies until satisfaction of the judgment, see further the title TROVER AND CONVERSION. And see *exp.* Drake, 5 Ch. D. 866; Ledbetter *v.* Embree, 12 Ind. App. 617; Wyman *v.* Bowman, 71 Me. 121; Miller *v.* Hyde, 161 Mass. 472, 42 Am. St. Rep. 424, Field, C. J., Holmes and Knowlton, JJ., *dissenting*; Turner *v.* Brock, 6 Heisk. (Tenn.) 50.

Action upon Attachment Bond and Case for Malicious Attachment. — Simons *v.* Fagan, 62 Neb. 287. *Contra*, Hall *v.* Forman, 82 Ky. 505.

1. The Subject Summarized and Differentiated. — In election of remedies there can be but one remedy resorted to though there be several at the start, because, while each of them stands for a specific right, the several rights are alternatives. In merger, one can have but a single remedy, because, though there are several remedies standing for concurrent rights in form, the enforcement of one reasonably covering the entire field, by a rule of judicial policy, draws to it and absorbs the others, such policy being a species of equitable interference with legal remedies where they are uselessly multiplied. Where complete identity of parties does not exist and inclusion in some form of the entire damage in the first action, but there are consistent rights with appropriate remedies, each covering a part or all of the subject of the wrong, the possessor thereof is absolutely entitled to judicial machinery to enforce them all up to the point of a single and complete satisfaction, when all run into one and are extinguished by such satisfaction. Barth *v.* Loeffelholtz, 108 Wis. 562, *per* Marshall, J.

2. Resort to Wrong Remedy — *United States.* — Elgin Nat. Watch Co. *v.* Meyer, 29 Fed. Rep. 225.

Indiana. — Bunch *v.* Grave, 111 Ind. 351.

Iowa. — Keater *v.* Hock, 16 Iowa 23.

Massachusetts. — Harding *v.* Hale, 2 Gray (Mass.) 399; Snow *v.* Alley, 156 Mass. 193.

Michigan. — Fifield *v.* Edwards, 39 Mich. 264; Kingsbury *v.* Kettle, 90 Mich. 476.

Minnesota. — Matter of Van Norman, 41 Minn. 494; West *v.* Hennessey, 58 Minn. 133; Schrepfer *v.* Rockford Ins. Co., 77 Minn. 291.

Mississippi. — Johnson *v.* White, 13 Smed. & M. (Miss.) 584.

New Hampshire. — Gould *v.* Blodgett, 61 N. H. 115.

New Jersey. — Kirkpatrick *v.* McElroy, 41 N. J. Eq. 539.

New Mexico. — Neher *v.* Armijo, (N. Mex. 1901) 66 Pac. Rep. 517,

New York. — Marsh *v.* Masterton, 101 N. Y. 401; Belden *v.* State, 103 N. Y. 1, *affirming* 31 Hun (N. Y.) 409; Stowell *v.* Chamberlain, 3 Thomp. & C. (N. Y.) 374, *affirmed* 60 N. Y. 272.

Oregon. — Huffman *v.* Knight, 36 Oregon 581.

Wisconsin. — Fuller-Warren Co. *v.* Harter, 110 Wis. 80.

See for Miscellaneous Illustrations — *England.* — Kitchen *v.* Campbell, 3 Wils. C. Pl. 304, 2 W. Bl. 827.

United States. — Jones *v.* Hillis, 100 Fed. Rep. 355.

Alabama. — Deens *v.* Dunklin, 33 Ala. 47; Southern R. Co. *v.* Raney, 117 Ala. 270.

California. — Owens *v.* McNally, 124 Cal. 29.

Georgia. — Reid *v.* Caldwell, 114 Ga. 676.

Illinois. — Gaar *v.* Hurd, 92 Ill. 315; Geary *v.* Bangs, 37 Ill. App. 301, *affirmed* 138 Ill. 77.

Kentucky. — Bowman *v.* Humphrey, (Ky. 1896) 37 S. W. Rep. 150.

Louisiana. — Cochran *v.* Violet, 38 La. Ann. 525; McCaffrey *v.* Benson, 40 La. Ann. 10; Laroussini *v.* Werlein, 50 La. Ann. 637.

Massachusetts. — Salem India Rubber Co. *v.* Adams, 23 Pick. (Mass.) 256; Butler *v.* Hildreth, 5 Met. (Mass.) 49.

Michigan. — Farwell *v.* Myers, 64 Mich. 234; Black *v.* Miller, 75 Mich. 323; Hallett *v.* Gordon, 128 Mich. 364, 8 Detroit Leg. N. 685.

Minnesota. — Richardson *v.* Richards, 36 Minn. 111; Rossman *v.* Tilleny, 80 Minn. 160.

Mississippi. — Conn *v.* Bernheimer, 67 Miss. 498.

Nebraska. — Gayer *v.* Parker, 24 Neb. 643, 8 Am. St. Rep. 229.

New Hampshire. — Rand *v.* Rand, 58 N. H. 536.

New York. — Kinney *v.* Kiernan, 49 N. Y. 164, *reversing* 2 Lans. (N. Y.) 492; Gutchess *v.* Whiting, 46 Barb. (N. Y.) 139; Gall *v.* Gall, 17 N. Y. App. Div. 312; Steinson *v.* Board of Education, 49 N. Y. App. Div. 143, *affirmed* 165 N. Y. 431; McCormack *v.* Barton, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 625; Derleth *v.* Degraaf, 51 N. Y. Super. Ct. 369; White *v.* Whiting, 8 Daly (N. Y.) 23.

North Carolina. — Cabe *v.* Vanhook, 127 N. Car. 424.

Ohio. — *In re* Ward, 12 Ohio Cir. Dec. 44, 21 Ohio Cir. Ct. 753.

Oregon. — Powell *v.* Dayton, etc., R. Co., 16 Oregon 33, 8 Am. St. Rep. 251.

South Carolina. — Sease *v.* Dobson, 34 S. Car. 345; Wagener *v.* Kirven, 52 S. Car. 25.

Texas. — Philipowski *v.* Spencer, 63 Tex. 607; Henrietta Nat. Bank *v.* Barrett, (Tex. Civ. App. 1894) 25 S. W. Rep. 456; Douglass *v.* Blount, (Tex. Civ. App. 1901) 62 S. W. Rep. 429.

Washington. — Buddress *v.* Schafer, 12 Wash. 310.

judgment not rendered upon the merits is not a bar.[1]

3. Interlocutory Orders, Judgments, or Decrees — *a.* GENERAL RULE. — As has been already stated, only a judgment or decree rendered upon the merits and finally terminating the cause, and not an interlocutory order, judgment, or decree, will, as a rule, be *res judicata*.[2] Except through the intervention of statutory provisions, interlocutory [3] orders, judgments, or decrees are not generally appealable directly, but can be reviewed only on appeal from the final judgment or decree.[4] Until the final termination of the cause on the merits they are not conclusive in the subsequent proceedings therein, but are subject to be vacated or modified by the court at any time;[5] nor can they be invoked as a bar or estoppel in other litigation between parties or privies until such termination.[6]

b. ORDERS ON MOTIONS AND LIKE APPLICATIONS. — A statement frequently met with, and which is in effect equivalent to the general rule as to interlocutory orders, judgments, or decrees just discussed, is that orders and decisions of courts made in passing upon motions and like applications in a cause are not *res judicata*. This is no doubt true of orders which affect only the conduct of the action, and are neither determinative of a substantial right nor subject to review in advance of the final judgment. They may be reversed or modified during the further course of the litigation, the application renewed on a new state of facts, or, if leave of court is first obtained, on the same facts.[7] While the court may, and often does, deny motions made

Wisconsin. — Eastman *v.* Porter, 14 Wis. 40.

1. See *supra*, this title, *Nature and Requisites of Judgment or Order*.

2. See *supra*, this title, *Nature and Requisites of Judgment or Order;* Smith *v.* Smith, (Neb. 1902) 89 N. W. Rep. 799.

3. Interlocutory Defined. — See INTERLOCUTORY, vol. 16, pp. 1117, 1118.

Final Judgments and Decrees. — For what constitutes a final judgment or decree, see the title FINAL JUDGMENTS AND DECREES, vol. 13, p. 23.

4. See the titles APPEALS, 2 ENCYC. OF PL. AND PR. 80 *et seq.;* ORDERS, 15 ENCYC. OF PL. AND PR. 372 *et seq.*

It frequently happens in the course of an action that the court makes decisions which determine, to a greater or less extent, what the final judgment shall be, and these decisions may be reviewed upon an appeal from such final judgment. Dobberstein *v.* Murphy, 44 Minn. 526. See also Thompson *v.* Mylne, 4 La. Ann. 206.

In England, under the early chancery practice, an appeal would lie from an interlocutory order as well as from the final decree. Camden, etc., R., etc., Co. *v.* Stewart, 21 N. J. Eq. 484, *affirming* 19 N. J. Eq. 345, *citing* 2 Daniell Ch. Pl. and Pr. 1491; Forgay *v.* Conrad, 6 How. (U. S.) 201 [*cited* Smith *v.* Vulcan Iron Works, 165 U. S. 518]; Richmond *v.* Atwood, (C. C. A.) 52 Fed. Rep. 10.

5. Interlocutory Orders, Judgments, and Decrees Subject to Be Vacated or Changed until Final Termination of Cause. — David Bradley Mfg. Co. *v.* Eagle Mfg. Co., (C. C. A.) 57 Fed. Rep. 980; Capell *v.* Landano, 34 Ala. 135; Reilly *v.* Perkins, (Ariz. 1899) 56 Pac. Rep. 734; Gibson *v.* Rees, 50 Ill. 383; Jeffery *v.* Robbins, 167 Ill. 375; Adkisson *v.* Dent, 88 Ky. 628; Scherer *v.* Christian Moerlein Brewing Co., 65 S. W. Rep. 448, 23 Ky. L. Rep. 1613; Thompson *v.* Mylne, 4 La. Ann. 206; Davis *v.* Roberts, 1 Smed. & M. Ch. (Miss.) 543; Shinn *v.* Smith, 79 N. Car. 310. *Contra*, after the close of the term at which rendered, Davis *v.* Demming, 12 W. Va. 246. See generally the title DECREES, 5 ENCYC. OF PL. AND PR. 1041 *et seq.*

File of Proceedings in Bankruptcy. — *Ex p.* Bacon, 17 Ch. D. 447.

6. Interlocutory Orders, Judgments, and Decrees Not Res Judicata — *United States.* — Brush Electric Co. *v.* Western Electric Co., (C. C. A.) 76 Fed. Rep. 761; Ogden City *v.* Weaver, (C. C. A.) 108 Fed. Rep. 564.

Alabama. — McLane *v.* Spence, 11 Ala. 172; Capell *v.* Landano, 34 Ala. 135.

Kentucky. — Schafer-Myer Brewing Co. *v.* Hasselback, (Ky. 1900) 56 S. W. Rep. 971 [*citing* Adkisson *v.* Dent, 88 Ky. 630]; Mitchell *v.* Chenault, (Ky. 1901) 65 S. W. Rep. 447, 23 Ky. L. Rep. 1544.

New York. — Harris *v.* Burdett, 43 N. Y. Super. Ct. 57, *affirmed* 76 N. Y. 582.

Pennsylvania. — Coleman's Estate, 7 Pa. Dist. 731.

Rhode Island. — Davis *v.* National Eagle Bank, (R. I. 1901) 50 Atl. Rep. 530.

Virginia. — Quarles *v.* Kerr, 14 Gratt. (Va.) 48; Yates *v.* Wilson, 86 Va. 625.

Cause Terminating Otherwise than on the Merits. — Where a cause terminates without a trial on the merits being had, as where a suit in equity is discontinued, or, in an action at law, a juror is withdrawn, an interlocutory order such as, for example, a denial of an application for a preliminary injunction or a ruling admitting or rejecting evidence on objection thereto, is not *res judicata* in a subsequent action or trial. Massam *v.* Thorley's Cattle Food Co., 14 Ch. D. 748; Walton *v.* Mather, (N. Y. City Ct. Gen. T.) 15 Misc. (N. Y.) 453.

7. See the title MOTIONS, 14 ENCYC. OF PL. AND PR. 176 *et seq.;* Easton *v.* Pickersgill, 75 N. Y. 599; Matter of Barkley, 42 N.

pendente lite on the ground that the same question has been already determined in the case, it is not because the court has not the power to alter its ruling, but rather because it will not submit to be harassed by repetitions of motions based upon the same grounds.[1] The statement, however, is too broad if it is sought to apply it to every character of motion, regardless of its nature and scope.[2]

c. APPEALABLE ORDERS. — By statute in most jurisdictions many interlocutory orders may be appealed directly. Where no advantage is taken of the statute in the case of a particular order, the question of its finality and conclusiveness is frequently a matter of statutory regulation. On appeal from the final judgment or decree it seems that orders which have not been directly appealed are not generally conclusive on the appellate court if connected with and essential to the rendition by it of a proper decision.[3] On the other hand, where such orders have been directly appealed to the court of last resort, the decisions thereon have been generally held conclusive, so far as they go, throughout all the subsequent proceedings in the cause, under the doctrine of the "law of the case."[4] Orders which were or might have been directly appealed may also be binding and conclusive upon parties and privies in other litigation, at least after the action or suit in which they were rendered has finally terminated.[5]

d. ILLUSTRATIONS. — In the notes will be found other cases from different jurisdictions and cross-references to titles in this work, in which various interlocutory orders are discussed with reference to their force and effect when the same facts or questions are sought to be relitigated during the subsequent course of the proceedings. The decisions of the courts and the statutory provisions relating to the subject are not uniform, and no general

Y. App. Div. 597, *appeal dismissed* without opinion 161 N. Y. 647; German Exch. Bank *v.* Kroder, (C. Pl. Spec. T.) 14 Misc. (N. Y.) 179; Dawson *v.* Parsons, (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 190; De Biase *v.* Hartfield, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 316; White *v.* Ladd, 41 Oregon 324.

1. Castle *v.* Madison, 113 Wis. 346.

2. Buckles *v.* Chicago, etc., R. Co., 53 Fed. Rep. 566; Spitley *v.* Frost, 15 Fed. Rep. 299; Williams *v.* Barkley, 165 N. Y. 48, *affirming* 52 N. Y. App. Div. 631; Matter of Barkley, 42 N. Y. App. Div. 597, *appeal dismissed* without opinion 161 N. Y. 647; New York, etc., Telephone Co. *v.* Metropolitan Telephone, etc., Co., 81 Hun (N. Y.) 453; De Biase *v.* Hartfield, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 316; White *v.* Ladd, 41 Oregon 324. See generally cases cited *infra*, this subdivision, *Illustrations; Special and Summary Proceedings.*

3. Interlocutory Orders Not Appealed. — Kane *v.* Whittick, 8 Wend. (N. Y.) 218, *explaining* Le Guen *v.* Gouverneur, 1 Johns. Cas. (N. Y.) 436, 1 Am. Dec. 121, and Jaques *v.* M. E. Church, 17 Johns. (N. Y.) 549, 8 Am. Dec. 447; Harrington *v.* Libby, 6 Daly (N. Y.) 259. *Compare* Mapes *v.* Coffin, 5 Paige (N. Y.) 296. See generally the titles APPEALS, 2 ENCYC. OF PL. AND PR. 87 *et seq.*; ORDERS, 15 ENCYC. OF PL. AND PR. 372 *et seq.*

4. Interlocutory Orders Appealed. — Bangs *v.* Strong, 4 N. Y. 315; Lyon *v.* Merritt, 6 Paige (N. Y.) 473; Price *v.* Campbell, 5 Call (Va.) 115; Wells *v.* American Express Co., 55 Wis. 23, 42 Am. Rep. 695. *Contra*, Price *v.* Nesbit, 1 Hill Eq. (S. Car.) 446. See generally cases cited in the next note but one. See also in this connection, *supra*, II. 3. (2), *Res Judicata and Stare Decisis;* and the title STARE DECISIS.

Upon Familiar Principles, closely approximating those of *res adjudicata* and not infrequently so called, the decision becomes the law of the case, both for this court and the lower court, at all subsequent stages, except so far as the situation is changed. McCord *v.* Hill, (Wis. 1903) 94 N. W. Rep. 65.

Appeals to Intermediate Courts. — Edison General Electric Co. *v.* Edmonds, 4 British Columbia 354.

5. Appealable Orders as a Bar or Estoppel in Other Litigation. — Quirk *v.* Rooney, 130 Cal. 505; New York, etc., Telephone Co. *v.* Metropolitan Telephone, etc., Co., 81 Hun (N. Y.) 453. See also Sioux Falls Sav. Bank *v.* Lien, 14 S. Dak. 410, and generally cases cited *infra*, this subdivision, *Special and Summary Proceedings.*

Orders on Motions to Dissolve Attachment. — In actions on attachment bonds. Hoge *v.* Norton, 22 Kan. 374; Hall *v.* Harris, 1 S. Dak. 279, 36 Am. St. Rep. 730. *Contra,* on questions of title or possession, Watson *v.* Jackson, 24 Kan. 443; Miami County Nat. Bank *v.* Barkalow, 53 Kan. 68; Blair *v.* Anderson, 58 Kan. 97, 62 Am. St. Rep. 606; Frazer *v.* Barry, 4 Kan. App. 33, Clark, J., *dissenting;* Buchanan County First Nat. Bank *v.* Linvill, (Kan. App. 1900) 62 Pac. Rep. 165. *Contra*, in another attachment proceeding although between the same parties and upon the same claim, Johnson *v.* Stockham, 89 Md. 368.

Orders on Pleas in Abatement. — Tutorship of Minor Heirs, 38 La. Ann. 756; *In re* Wrisley, 126 Mich. 109, 7 Detroit Leg. N. 759; McClure *v.* Paducah Iron Co., 90 Mo. App. 567.

rule of law covering it can be formulated.[1]

e. REVERSAL OR MODIFICATION BY DIFFERENT JUDGE. — It is a general rule that a judge has no power to reverse or modify the decision of another judge of co-ordinate jurisdiction.[2] This rule, however, has no application to orders which are not of such character as to be *res judicata*, but which remain subject to revision or reversal until the final termination of the cause.[3]

1. Orders on Applications in Civil Cause to Make or Set Aside Arrest. — Matter of Roberts, 10 Hun (N. Y.) 253, *reversed* on other grounds 70 N. Y. 5, 53 How. Pr. (N. Y.) 199; Talcott *v.* Harris, 18 Hun (N. Y.) 567; Matter of Thomas, (C. Pl. Spec. T.) 10 Abb. Pr. N. S. (N. Y.) 114, *approved* Matter of Rosenberg, (C. Pl. Spec. T.) 10 Abb. Pr. N. S. (N. Y.) 450; Roulhac *v.* Brown, 87 N. Car. 1.

Orders on Applications to Dissolve Attachment. — Stapleton *v.* Orr, 43 Kan. 170; Santa Fe Bank *v.* Haskell County Bank, 59 Kan. 354; Garrett *v.* Greenwell, 92 Mo 120, *overruling* Stewart *v.* Nelson, 79 Mo. 522; Dawson *v.* Quillen, 43 Mo. App. 118; State *v.* Bierwirth, 47 Mo. App. 551; Caruthers *v.* Williams, 53 Mo. App. 181; White *v.* Ladd, 41 Oregon 324.

Orders on Demurrer — *United States.* — Bowdoin College *v.* Merritt, 63 Fed. Rep. 213.

Alabama. — Feibelman *v.* Manchester F. Assur. Co., 108 Ala. 180; Bates *v.* Chapman, 108 Ala. 225.

Arizona. — Reilly *v.* Perkins, (Ariz. 1899) 56 Pac. Rep. 734.

Connecticut. — Johnson *v.* Sandford, 13 Conn. 461.

Dakota. — Pearson *v.* Post, 2 Dak. 246.

Georgia. — Folsom *v.* Howell, 94 Ga. 112; Hollis *v.* Nelms, 115 Ga. 5; Stromberg-Carlson Telephone Mfg. Co. *v.* Bisbee, 115 Ga. 346.

Iowa. — Richman *v.* Muscatine County, 77 Iowa 513, 14 Am. St. Rep. 308; Brown *v.* Cunningham, 82 Iowa 512; McClain *v.* Capper, 98 Iowa 145; Van Werden *v.* Equitable L. Assur. Soc., 99 Iowa 621.

Kentucky. — McDowell *v.* Chesapeake, etc., R. Co., 90 Ky. 346.

Mississippi. — Alabama, etc., R. Co. *v.* McCerren, 75 Miss. 687.

New Jersey. — Van Horn *v.* Van Horn, 53 N. J. L. 514.

New York. — McCullough *v.* Pence, 85 Hun (N. Y.) 271; Recknagel *v.* Steinway, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 633, *modified* on other grounds 58 N. Y. App. Div. 352; Lawrence *v.* Church, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 566, 57 Hun (N. Y.) 585, *reversed* on other grounds 128 N. Y. 324.

North Carolina. — Wilson *v.* Lineberger, 82 N. Car. 412.

South Dakota. — Connor *v.* Corson, 13 S. Dak. 550.

Tennessee. — McNairy *v.* Nashville, 2 Baxt. (Tenn.) 251; Murdock *v.* Gaskill, 8 Baxt. (Tenn.) 22; Jameson *v.* McCoy, 5 Heisk. (Tenn.) 108; Rodgers *v.* Dibrell, 6 Lea (Tenn.) 69; Grommers *v.* Theime, 13 Lea (Tenn.) 320; Kirkpatrick *v.* Utley, 14 Lea (Tenn.) 96; Battle *v.* Street, 85 Tenn. 282; Gordon *v.* Weaver, (Tenn. Ch. 1899) 53 S. W. Rep. 753.

Wisconsin. — Noonan *v.* Orton, 27 Wis. 300; Lathrop *v.* Knapp, 37 Wis. 307; Hackett *v.* Carter, 38 Wis. 394; Bowen *v.* Hastings, 47 Wis. 232; Oshkosh Fire Dept. *v.* Tuttle, 50 Wis. 552; Watson *v.* Appleton, 62 Wis. 269; Quackenbush *v.* Wisconsin, etc., R. Co., 71 Wis. 472; Ellis *v.* Northern Pac. R. Co., 80 Wis. 459, 27 Am. St. Rep. 44; Schoenleber *v.* Burkhardt, 94 Wis. 575; Case *v.* Hoffman, 100 Wis. 314; Priewe *v.* Wisconsin, etc., Imp. Co., 103 Wis. 537, 74 Am. St. Rep. 904; South Bend Chilled Plow Co. *v.* George C. Cribb Co., 105 Wis. 443; McCord *v.* Hill, (Wis. 1903) 94 N. W. Rep. 65.

Canada. — Grand Trunk R. Co. *v.* McMillan, 16 Can. Sup. Ct. 543; McKean *v.* Jones, 19 Can. Sup. Ct. 489.

See the title DEMURRERS, ENCYC. OF PL. AND PR., vol. 6, p. 359 *et seq.*

Orders on Applications to Vacate Temporary Injunctions or Receiverships or to Grant Them. — Atlanta *v.* First Methodist Church, 83 Ga. 448; Ingram *v.* Mercer University, 102 Ga. 226; Heard *v.* National Bank, 114 Ga. 291; Murphey *v.* Harker, 115 Ga. 77; Savannah, etc., R. Co. *v.* Savannah, 115 Ga. 137; Collins *v.* Carr, (Ga. 1902) 42 S. E. Rep. 373; Johns *v.* Schmidt, 32 Kan. 383 [*cited* Union Terminal R. Co. *v.* Railroad Com'rs, 54 Kan. 352]; Peck *v.* Goodberlett, 109 N. Y. 180; Jones *v.* Thorne, 80 N. Car. 72.

Orders on Pleas in Abatement. — Sharon *v.* Hill, 26 Fed. Rep. 337, 722; Baisley *v.* Baisley, 113 Mo. 544, 35 Am. St. Rep. 726.

Orders in State and Federal Courts on Applications to Remove or Remand Causes. — Girardey *v.* Bessman, 77 Ga. 483; Bodley *v.* Emporia Nat. Bank, 38 Kan. 59; Herndon *v.* Ætna Ins. Co., 108 N. Car. 648. See the titles REMOVAL OF CAUSES, 18 ENCYC. OF PL. AND PR. 345 *et seq.*, 391 *et seq.*; APPEALS, 2 ENCYC. OF PL. AND PR. 84.

Orders Entered by State Court in Cause Afterwards Removed to Federal Court. — See the title REMOVAL OF CAUSES, 18 ENCYC. OF PL. AND PR. 363 *et seq.*

Order Allowing Stockholders to Answer for Defendant Corporation. — Morrill *v.* Little Falls Mfg. Co., 46 Minn. 260.

Order of Reference. — *In re* Emig, 186 Pa. St. 409.

2. General Rule. — Matter of Livingston, 34 N. Y. 555; Matter of Roberts, 10 Hun (N. Y.) 253; Recknagel *v.* Steinway, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 633, *modified* on other grounds 58 N. Y. App. Div. 352; State *v.* Evans, 74 N. Car. 324; Wilson *v.* Lineberger, 82 N. Car. 412; Mabry *v.* Henry, 83 N. Car. 298; Roulhac *v.* Brown, 87 N. Car. 1; Henry *v.* Hilliard, 120 N. Car. 479. See the title JUDGE, vol. 17, p. 718.

3. Orders Not Res Judicata Not Within Rule. — Pearson *v.* Post, 2 Dak. 246; Richman *v.* Muscatine County, 77 Iowa 513, 14 Am. St. Rep. 308; McClain *v.* Capper, 98 Iowa 145; Shaw *v.* Patterson, 2 Tenn. Ch. 171. See also Kleckner *v.* Turk, 45 Neb. 176, *distinguishing* Marvin *v.* Weider, 31 Neb. 774.

f. General Requisites of Res Judicata. — That an order made on a motion or like application in an action shall be *res judicata*, the decision must also have the other general requisites necessary to estoppel by judgment or by verdict respectively. Thus, it must have been upon the merits, and there must be identity of parties and of claim or demand or issue of law or fact sought to be relitigated.[1]

4. Special and Summary Proceedings — *a.* In General. — As a general rule, it makes no difference under what form, whether by petition, exception, rule, or intervention, a question is presented; whenever the same question recurs, even under a different form of procedure, the doctrine of *res judicata* applies. Although the proceeding is special or summary and not an ordinary action or suit, if it is a recognized judicial remedy, admitting of the deliberate consideration and investigation of the claim or demand, and if the order or judgment rendered therein affects substantial rights, is in its nature final and may be reviewed on appeal, the decision rendered is final and conclusive between parties and privies.[2]

1. Orders on Motions, to Constitute a Bar or Estoppel, Must Have General Requisites of Res Judicata. — Brock *v.* South, etc., Alabama R. Co., 65 Ala. 79; Fisk *v.* Hartford, 70 Conn. 720, 66 Am. St. Rep. 147; Andrew's Succession, 16 La. Ann. 197; Kilpatrick *v.* O'Connell, 62 Md. 403; Abbey *v.* Commercial Bank, 34 Miss. 571, 69 Am. Dec. 401; Mack *v.* Patchin, (Buffalo Super. Ct. Gen. T.) 29 How. Pr. (N. Y.) 20; Himes *v.* Kiehl, 154 Pa. St. 190, 31 W. N. C. (Pa.) 487; Rhoad *v.* Patrick, 37 S. Car. 517; Battle *v.* Street, 85 Tenn. 282; Davis *v.* Schaffner, 3 Tex. Civ. App. 121; Castle *v.* Madison, 113 Wis. 346.

2. See for the General Rule and Miscellaneous Illustrations — *United States.* — Chapman *v.* Smith, 16 How. (U. S.) 114.

Arkansas. — Walker *v.* Fuller, 29 Ark. 448.

California. — Sunkler *v.* McKenzie, 127 Cal. 554, 78 Am. St. Rep. 86.

Georgia. — Obear *v.* Gray, 73 Ga. 455.

Iowa. — Hawk *v.* Evans, 76 Iowa 593, 14 Am. St Rep. 247.

Louisiana. — Plicque *v.* Perret, 19 La. 319; Morton *v.* Packwood, 3 La. Ann. 167; Trescott *v.* Lewis, 12 La. Ann. 197 [*citing* Wells *v.* Hunter, 5 Mart. N. S. (La.) 120]; Stadeker *v.* His Creditors, 12 La. Ann. 817; Foss *v.* Brentel, 14 La. Ann. 810; Grivot *v.* Louisiana State Bank, 31 La. Ann. 467; Sewell *v.* Scott, 35 La. Ann. 553; Searcy *v.* Their Creditors, 46 La. Ann. 376; Ledoux *v.* Lavedan, 49 La. Ann. 913.

Maryland. — Contee *v.* Dawson, 2 Bland (Md.) 264; Taylor *v.* Sindall, 34 Md. 38.

Missouri. — Cody *v.* Vaughan, 53 Mo. App. 169.

New Mexico. — Union Trust Co. *v.* Atchison, etc., R. Co., 8 N. Mex. 159.

New York. — Demarest *v.* Darg, 32 N. Y. 281, 29 How. Pr. (N. Y.) 266, *affirming* (C. Pl. Gen. T.) 11 Abb. Pr. (N. Y.) 9; Leavitt *v.* Wolcott, 95 N. Y. 212; Sherman *v.* Grinnell, 159 N. Y. 50; Aldridge *v.* Walker, 73 Hun (N. Y.) 281; Hollister *v.* Sinclair, 89 Hun (N. Y.) 421, National Bank *v.* Hausee, (Supm. Ct. Spec. T.) 15 Abb. N. Cas. (N. Y.) 488, 7 Civ. Pro. (N. Y.) 350.

North Carolina. — Williams *v.* Batchelor, 90 N. Car. 364.

Pennsylvania. — Ahl's Estate, 171 Pa. St. 317.

Contra Illustrations. — Bromley *v.* Holland, 7 Ves. Jr. 3 [*reversing* on other grounds 5 Ves. Jr. 610, *discussed* Frauenthal's Appeal, 100 Pa. St. 290]; Selz *v.* Presburger, 49 N. J. L. 396. See generally the cases cited *infra*, in this subdivision.

Landlord and Tenant Proceedings. — White *v.* Coatsworth, 6 N. Y. 138; Brown *v.* New York, 66 N. Y. 386, *affirming* 5 Daly (N. Y.) 481; Yonkers, etc., F. Ins. Co. *v.* Bishop, 1 Daly (N. Y.) 449; Powers *v.* Witty, (C. Pl. Gen. T.) 42 How. Pr. (N. Y.) 352; Matter of Roberts, (C. Pl. Spec. T.) 59 How. Pr. (N. Y.) 136; Kelsey *v.* Ward, (Supm. Ct. Gen. T.) 16 Abb. Pr. (N. Y.) 98, *affirmed* 38 N. Y. 83; Gillilan *v.* Spratt, (C. Pl. Spec. T.) 8 Abb. Pr. N. S. (N. Y.) 13, *reversed* on other grounds 3 Daly (N. Y.) 440, 41 How. Pr. (N. Y.) 27; Marsteller *v.* Marsteller, 132 Pa. St. 517, 19 Am. St. Rep. 604.

Trial of Right of Property. — Roberts *v.* Heim, 27 Ala. 678 [*cited* Lenoir *v.* Wilson, 36 Ala. 600]; Dickerson *v.* Powell, 21 Ga. 143; Henderson *v.* Hill, 64 Ga. 292; Holton *v.* Taylor, 80 Ga. 508; Smith *v.* Usher, 108 Ga. 231; Walker *v.* Equitable Mortg. Co., 114 Ga. 862; People *v.* Ward, 41 Ill. App. 464; Ilg *v.* Burbank, 59 Ill. App. 291; Stevens *v.* Springer, 23 Mo. App. 375; Remdall *v.* Swackhamer, 8 Oregon 503; Capital Lumbering Co. *v.* Hall, 9 Oregon 93; Bain *v.* Lyle, 68 Pa. St. 60. *Contra*, Perkins *v.* Thornburgh, 10 Cal. 189; Sponenbarger *v.* Lemert, 23 Kan. 55; Graves *v.* Butcher, 24 Kan. 291; Dilley *v.* McGregor, 24 Kan. 362.

Petitions in Chancery. — *In re* May, 28 Ch. D. 516; Matter of Livingston, 34 N. Y. 555; Culross *v.* Gibbons, 130 N. Y. 447.

Petitions in Probate Courts. — Wilson *v.* Smith, 117 Fed. Rep. 711; Byrne *v.* Hume, 84 Mich. 185, 86 Mich. 546.

Bills of Review and Writs of Error. — Booth *v.* Com., 7 Met. (Mass.) 285; Hayes *v.* Collins, 114 Mass. 54.

Supplementary Proceedings. — McCullough *v.* Clark, 41 Cal. 298; Baker *v.* State, 109 Ind. 47.

Habeas Corpus. — See the title Habeas Corpus, vol. 15, pp. 211, 212; Gaster *v.* State, (Wis. 1903) 94 N. W. Rep. 787.

Mandamus. — See the title Mandamus, vol. 19, p. 723; Kendall *v.* Stokes, 3 How. (U. S.) 87 [*cited* State *v.* Ryan, 2 Mo. App. 303]; Stein-

b. PROCEEDINGS IN ACTIONS. — Nor is the doctrine of *res judicata* confined to actions or suits and independent special or summary proceedings. It not infrequently has application to various proceedings had *pendente lite* and in advance of the final termination of the litigation;[1] and also to many motions and like applications having the several characteristics just enumerated, made in actions after judgment,[2] common instances of which are motions in law

son *v.* Board of Education, 165 N. Y. 431, *affirming* 49 N. Y. App. Div. 143.

Naturalization Proceedings. — See the title CITIZENSHIP, vol. 6, p. 24.

An Order of Seizure and Sale of Property on Executory Process in Louisiana issued on a mortgage is not a bar in the true and legal sense of the term, and possesses none of its features. It issues without citation, decides no issue and cannot be pleaded as *res judicata* in bar of a suit brought to foreclose. Weaver *v.* Field, 4 Woods (U. S.) 152; Humphreys *v.* Browne, 19 La. Ann. 158; Mitchell *v.* Logan, 34 La. Ann. 998.

Preliminary Examination. — A judgment or order made in a preliminary proceeding or examination, as, for example, a hearing before a justice of the peace in a bastardy case, is not *res judicata*. Matter of Parker, 44 Kan. 279; Munro *v.* Callahan, 41 Neb. 849, *approving* Daly *v.* Melendy, 32 Neb. 852. See the title PRELIMINARY EXAMINATION, 16 ENCYC. OF PL. AND PR. 871, 872.

1. Proceedings to Establish Claims Against Estates of Decedents. — Robitshek *v.* Swedish-American Nat. Bank, 72 Minn. 319; McKinney *v.* Davis, 6 Mo. 501; Smith *v.* Sims, 77 Mo. 269; Covington *v.* Chamblin, 156 Mo. 574; Matter of Gall, 40 N. Y. App. Div. 114; Matter of Bradley, (Surrogate Ct.) 25 Misc. (N. Y.) 261, *affirmed* 42 N. Y. App. Div. 301; Swan *v.* House, 50 Tex. 650; Gibson *v.* Hale, 57 Tex. 405; Williams *v.* Robinson, 63 Tex. 576.

Orders Settling Accounts of Legal Representatives, Distributing Decedents' Estates and the Like — *Arkansas.* — Ringgold *v.* Stone, 20 Ark. 526.

Louisiana. — Anderson's Succession, 12 La. Ann. 95; Duhé's Succession, 42 La. Ann. 252; Tutorship of Minors *v.* Scarborough, 44 La. Ann. 288; Conrad's Succession, 45 La. Ann. 89 [*approved* Allen's Succession, 49 La. Ann. 1096]; Ledoux *v.* Lavedan, 49 La. Ann. 913.

Massachusetts. — Abbott *v.* Bradstreet, 3 Allen (Mass.) 587.

Michigan. — Lawrence *v.* Hathaway, 128 Mich. 119.

Missouri. — Sheetz *v.* Kirtley, 62 Mo. 417; Baldwin *v.* Davidson, 139 Mo. 118, 61 Am. St. Rep. 460; Brown *v.* Woody, 22 Mo. App. 253;

Nebraska. — Shelby *v.* Creighton, (Neb. 1902) 91 N. W. Rep. 369.

New York. — Matter of Hood, 90 N. Y. 512; Brown *v.* Wheeler, 53 N. Y. App. Div. 6; Matter of Douglas, 60 N. Y. App. Div. 64; Matter of Blair, (Surrogate Ct.) 34 Misc. (N. Y.) 444, *affirming* 67 N. Y. App. Div. 116.

Oklahoma. — Greer *v.* McNeal, 11 Okla. 526.

Utah. — Ehrngren *v.* Gronlund, 19 Utah 411.

See the title EXECUTORS AND ADMINISTRATORS, vol. 11, pp. 1174, 1310 *et seq.*

Settlement of Guardians' and Curators' Accounts. — McWilliams *v.* Kalbach, 55 Iowa 110; Tutorship of Minors *v.* Scarborough, 44 La. Ann. 288; Smith *v.* Lewis, 45 La. Ann. 1457; Cummings *v.* Cummings, 123 Mass. 270; Sheetz *v.* Kirtley, 62 Mo. 417. See the title GUARDIAN AND WARD, vol. 15, p. 114 *et seq.*

Motion to Stay Proceedings. — Buckles *v.* Chicago, etc., R. Co., 53 Fed. Rep. 566.

2. Motions After Judgment and Motions Pendente Lite. — When a case has once ripened into a judgment its binding force becomes complete, and the doctrine of *res judicata* applies with all its limitations. Without statutory authority the court has no power to relieve the parties therefrom. Not so with rulings made while the case is pending. Castle *v.* Madison, 113 Wis. 346.

Motions for New Trial. — Great Northern R. Co. *v.* Mossop, 17 C. B. 130, 84 E. C. L. 130; Coombs *v.* Hibberd, 43 Cal. 452; Dorland *v.* Cunningham, 66 Cal. 484; Wimpy *v.* Gaskill, 76 Ga. 41; Lookabaugh *v.* Cooper, 5 Okla. 102; Burnham *v.* Spokane Mercantile Co., 18 Wash. 207.

Motions and Proceedings to Confirm or Set Aside Judicial Sales. — Jeter *v.* Hewitt, 22 How. (U. S.) 352; Montgomery *v.* Samory, 99 U. S. 482; Spitley *v.* Frost, 15 Fed. Rep. 299; Austin *v.* Walker, 61 Iowa 158; Sewell *v.* Watson, 31 La. Ann. 589; Peet *v.* Cowenhoven, (Supm. Ct.) 14 Abb. Pr. (N. Y.) 56; Shearer *v.* Peffer, 155 Pa. St. 501. *Contra*, on the rights of property, White-Crow *v.* White-Wing, 3 Kan. 276; Benz *v.* Hines, 3 Kan. 390, 89 Am. Dec. 594; Treptow *v.* Buse, 10 Kan. 170; Capital Bank *v.* Huntoon, 35 Kan. 577; Mills *v.* Pettigrew, 45 Kan. 573. See the title JUDICIAL SALES, vol. 17, p 933 *et seq.*; 1016 *et seq.*

Motions to Quash or Set Aside Executions. — Parker *v.* Obenchain, 140 Ind. 211; Reed *v.* Whitlow, (Ky. 1897) 43 S. W. Rep. 686, Johnson *v.* Latta, 84 Mo. 139; National Bank *v.* Hansee, (Supm. Ct. Spec. T.) 15 Abb. N. Cas. (N. Y.) 488, 7 Civ. Pro. (N. Y.) 350; Harris *v.* Shuster, 3 Pa. Super. Ct. 331. *Contra*, Rockwell *v.* Lake County, 17 Colo. 118, 31 Am. St. Rep. 265; State *v.* Bierwirth, 47 Mo. App. 551.

Application for Writ of Assistance. — Peters *v.* Youngs, 122 Mich. 484; Rawiszer *v.* Hamilton, (C. Pl. Gen. T.) 51 How. Pr. (N. Y.) 297; Burner *v.* Hevener, 34 W. Va. 774, 26 Am. St. Rep. 948. *Contra*, on questions of title or possession, Trope *v.* Kerns, 83 Cal. 553; Dickey *v.* Gibson, 121 Cal. 276.

Motion to Dismiss Appeal. — Rudolph *v.* Herman, 4 S. Dak. 203, 431; Cothren *v.* Connaughton, 24 Wis. 134. *Contra*, Reeves *v.* Best, 13 Colo. App. 225.

Motion for Leave to Issue Execution on Dormant Judgment. — Wheeler *v.* Eldred, 137 Cal. 37; Sanderson *v.* Daily, 83 N. Car. 67.

Motion to Substitute Attorneys and Vacate Injunction Against Collection of Judgment. — Williams *v.* Barkley, 165 N. Y. 48, *affirming* 52 N.

actions to set aside or annul judgments on equitable or statutory grounds.[1] Any difference of opinion as to the force and legal effect of a particular proceeding or motion is generally due to its limitations as a legal remedy under the laws of the particular jurisdiction.

5. Real and Personal Actions — *a.* In General. — There has been said to be a distinction between real and personal actions in the application of the doctrine of *res judicata;* that all personal actions are of the same degree and the bar of the judgment is perpetual, but an unsuccessful party to a real action may have an action of a higher nature to try the same right again.[2] But this distinction amounts only to the general rule of *res judicata,* that each species of judgment is only conclusive so far as concerns its own subject-matter; and the principles of law governing the force and legal effect of judgments and decrees are, with few exceptions, equally and universally true of all actions, both real and personal.[3]

b. Actions Involving Title or Possession of Property — (1) *In General.* — Thus, a judgment or decree in whatever form of action is, upon general principles of *res judicata,* a bar or estoppel as to all titles or possessory

Y. App. Div. 631; Matter of Barkley, 42 N. Y. App. Div. 597, *appeal dismissed* without opinion 161 N. Y. 647.

Motion to Vacate Satisfaction of Judgment or Lien. — Kaufman *v.* Keenan, (N. Y. City Ct. Gen. T.) 2 N. Y. Supp. 395; Straw *v.* Murphy, 179 Pa. St. 376. *Contra,* Arden *v.* Patterson, 5 Johns. Ch. (N. Y.) 44.

Motion to Retax Costs. — Parrott *v.* Hodgson, 46 Ill. App. 231; Wilson County *v.* McIntosh, 30 Kan. 234.

1. Statutory Motions and Like Applications for Equitable or Other Relief Against Judgments — *California.* — *Contra,* Herd *v.* Tuohy, 133 Cal. 55, *citing* Code Civ. Pro. Cal., § 1909.

Georgia. — Grier *v.* Jones, 54 Ga. 154.

Illinois. — Kaufman *v.* Schneider, 35 Ill. App. 256, *modified* on other grounds 134 Ill. 215.

Indiana. — Reeves *v.* Plough, 46 Ind. 350 [*cited* Lieb *v.* Lichtenstein, 121 Ind. 483]; Moore *v.* Horner, 146 Ind. 287.

Iowa. — White *v.* Watts, 18 Iowa 74.

Louisiana. — State *v.* Judge, 35 La. Ann. 214; Hoggatt *v.* Crandall, 39 La. Ann. 976.

Missouri. — Poorman *v.* Mitchell, 48 Mo. 45.

Michigan. — Gray *v.* Barton, 62 Mich. 186, *followed* Codde *v.* Mahiat, 109 Mich. 186.

Nebraska. — Slater *v.* Skirving, 51 Neb. 108, 66 Am. St. Rep. 444.

New Hampshire. — Claggett *v.* Simes, 25 N. H. 402.

New York. — Ray *v.* Connor, 3 Edw. (N. Y.) 478; Dwight *v.* St. John, 25 N. Y. 203; De Biase *v.* Hartfield, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 316. See also Bush *v.* O'Brien, 164 N. Y. 205, *reversing* 47 N. Y. App. Div. 581, *dissenting* opinion of O'Brien, J. *Contra,* Simpson *v.* Hart, 1 Johns. Ch. (N. Y.) 91, *reversing* 14 Johns. (N. Y.) 63; Hackett *v.* Connet, 2 Edw. (N. Y.) 73; Blank *v.* Blank, 107 N. Y. 91; Dutton *v.* Smith, 10 N. Y. App. Div. 566; Pignolet *v.* Geer, 1 Robt. (N. Y.) 626, 19 Abb. Pr. (N. Y.) 264; Metropolitan El. R. Co. *v.* Manhattan El. R. Co., 11 Daly (N. Y.) 373, 14 Abb. N. Cas. (N. Y.) 103; Miller *v.* McGuckin, (Supm. Ct. Gen. T.) 15 Abb. N. Cas. (N. Y.) 204; Monroe *v.* Monroe, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 655, 66 Hun (N. Y.) 635. See also Schrauth *v.* Dry Dock Sav. Bank, 86 N. Y. 390; Matter of Barkley, 42 N. Y. App. Div. 597, *appeal dismissed* without opinion 161 N. Y. 647.

North Carolina. — Mabry *v.* Henry, 83 N. Car. 298.

Oregon. — Thompson *v.* Cornell, 31 Oregon 231, 65 Am. St. Rep. 818.

Pennsylvania. — Gordinier's Appeal, 89 Pa. St. 528; Schenck's Appeal, 94 Pa. St. 37; Frauenthal's Appeal, 100 Pa. St. 290; Himes *v.* Kiehl, 154 Pa. St. 190, 31 W. N. C. (Pa.) 487; Ahl *v.* Goodhart, 161 Pa. St. 455; Haneman *v.* Pile, 161 Pa. St. 599; Wilson *v.* Buchanan, 170 Pa. St. 14.

Rhode Island. — Curry *v.* Swett, 13 R. I. 476; Kinkead *v.* Keene, 22 R. I. 336.

South Dakota. — Weber *v.* Tschetter, 1 S. Dak. 205.

Washington. — Chezum *v.* Claypool, 22 Wash. 498; McCord *v.* McCord, 24 Wash. 529; Wilson *v.* Seattle Dry Dock, etc., Co., 26 Wash. 297; Peyton *v.* Peyton, 28 Wash. 278. *Compare* Clein *v.* Wandschneider, 14 Wash. 257, *followed* State *v.* Superior Ct., 18 Wash. 227, *distinguished* Burnham *v.* Spokane Mercantile Co., 18 Wash. 207.

Wisconsin. — Second Ward Bank *v.* Upman, 14 Wis. 596; Kabe *v.* The Vessel Eagle, 25 Wis. 108; Branger *v.* Buttrick, 28 Wis. 450; Moll *v.* Benckler, 28 Wis. 611; Rogers *v.* Hoenig, 46 Wis. 361; Hoppe *v.* Chicago, etc., R. Co., 61 Wis. 367; Day *v.* Mertlock, 87 Wis. 577; Dick *v.* Williams, 87 Wis. 651.

Subsequent Motion or Suit Based upon Different Grounds. — Slater *v.* Skirving, 51 Neb. 108, 66 Am. St. Rep. 444; Weber *v.* Tschetter, 1 S. Dak. 205.

2. Real and Personal Actions Distinguished. — Ferrers's Case, 6 Coke 7; Hitchin *v.* Campbell, 2 W. Bl. 827, 3 Wils. C. Pl. 304.

3. Principles of Res Judicata Applicable to All Actions Both Real and Personal. — Outram *v.* Morewood, 3 East 346; Sturdy *v.* Jackaway, 4 Wall. (U. S.) 174; Aurora City *v.* West, 7 Wall. (U. S.) 82; Kerr *v.* Chess, 7 Watts (Pa.) 367.

A Judgment in Every Species of Action, if final for its own purpose and object, concludes the subject-matter and is a bar to further litigation. Cist *v.* Zeigler, 16 S. & R. (Pa.) 282, 16 Am. Dec. 573.

rights to real or personal property, or claims for damages for its injury, actually adjudicated upon or necessarily involved in the litigation, and which the court has the power to hear and determine; but not as to other titles, rights, or claims which a party or privy may possess.[1] The force and legal effect of judgments in actions provided by law to determine directly questions of title or possession of property are frequently declared by local statutes, which are not uniform in scope. In the notes will be found numerous cases from different jurisdictions discussing judgments and decrees in particular actions with reference to their character as *res judicata*.[2]

1. See Generally and for Miscellaneous Illustrations — *England.* — Saunders *v.* Vautier, Cr. & Ph. 240, *affirming* 4 Beav. 115; Serrao *v.* Noel, 15 Q. B. D. 549.

United States. — Minneapolis Agricultural, etc., Assoc. *v.* Canfield, 121 U. S. 295; Adams *v.* Crittenden, 133 U. S. 296, *cited* in 143 U. S. 305; Southern Pac. R. Co. *v.* U. S., 168 U. S. 1; Southern Minnesota R. Extension Co. *v.* St. Paul, etc., R. Co., (C. C. A.) 55 Fed. Rep. 690; California, etc., Land Co. *v.* Worden, 85 Fed. Rep. 94; U. S. *v.* Oregon Cent. Military Road Co., 103 Fed. Rep. 549.

Alabama. — Robinson *v.* Walker, 81 Ala. 404; Elyton Land Co. *v.* South, etc., Alabama R. Co., 95 Ala. 631; Lee *v.* Thompson, 99 Ala. 95; Bolling *v.* Pace, 99 Ala. 607.

Arizona. — Bishop *v.* Perrin, (Ariz. 1894) 35 Pac. Rep. 1059.

Arkansas. — Pillow *v.* King, 55 Ark. 633.

California. — Clark *v.* Boyreau, 14 Cal 634; Fulton *v.* Hanlow, 20 Cal. 450; Gage *v.* Downey, 94 Cal. 241; Beronio *v.* Ventura County Lumber Co., 129 Cal. 232; White *v.* Costigan, 134 Cal. 33; McCormick *v.* Gross, 135 Cal. 302; Bingham *v.* Kearney, 136 Cal. 175; Scott *v.* Rhodes, (Cal. 1895) 41 Pac. Rep. 878.

Colorado. — Smith *v.* Schlink, 15 Colo. App. 325.

Connecticut. — Sargent *v.* New Haven Steamboat Co., 65 Conn. 116.

Georgia. — McWilliams *v.* Walthall, 77 Ga. 7.

Illinois. — Roby *v.* Calumet, etc., Canal, etc., Co., 165 Ill. 277; Dulin *v.* Prince, 29 Ill. App. 209.

Indiana. — Erwin *v.* Garner, 108 Ind. 488; Jones *v.* Vert, 121 Ind. 140, 16 Am. St. Rep. 379; Thompson *v.* Thompson, 132 Ind. 288; Bruce *v.* Osgood, 154 Ind. 375.

Iowa. — Wright *v.* Mahaffey, 76 Iowa 96; Watson *v.* Richardson, 110 Iowa 698; Schupanitz *v.* Farwick, 115 Iowa 451; Union Terminal Co. *v.* Wilmar, etc., R. Co., (Iowa 1902) 90 N. E. Rep. 92.

Kansas. — Provident Loan Trust Co. *v.* Marks, 6 Kan. App. 34.

Louisiana. — Thoms *v.* Sewell, 30 La. Ann. 359.

Minnesota. — Eide *v.* Clarke, 65 Minn. 466; Northern Trust Co. *v.* Crystal Lake Cemetery Assoc., 67 Minn. 135; McLaughlin *v.* Betcher, (Minn. 1902) 91 N. W. Rep. 14.

Mississippi. — Lorance *v.* Platt, 67 Miss. 183; Hart *v.* Picard, 75 Miss. 651.

Missouri. — Magwire *v.* Tyler, 40 Mo. 406.

Nebraska. — Spear *v.* Tidball, 40 Neb. 107.

New York. — Bracken *v.* Atlantic Trust Co., 167 N. Y. 510, *affirming* 42 N. Y. App. Div. 621; Matter of Metropolitan El. R. Co., 58 Hun (N. Y.) 563, *appeal dismissed* 128 N. Y. 600, 3 Silv. App. (N. Y.) 513; *In re* Opening One Hundred and Sixtieth St., (Supm. Ct. Gen. T.) 13 N. Y. Supp. 51, 59 Hun (N. Y.) 621; Bowe *v.* McNab, 11 N. Y. App. Div. 386; Swan *v.* Wheeler, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 225.

North Carolina. — Garrison *v.* Finley, 112 N. Car. 652.

Ohio. — Heck *v.* Findlay Window Glass Co., 8 Ohio Cir. Dec. 757, 16 Ohio Cir. Ct. 111.

Pennsylvania. — Holloway *v.* Jones, 143 Pa. St. 564.

South Carolina. — Whaley *v.* Stevens, 24 S. Car. 479.

Texas. — Bradford *v.* Knowles, 78 Tex. 109.

Washington. — Denny *v.* Northern Pac. R. Co., 19 Wash. 298.

West Virginia. — Kinports *v.* Rawson, 36 W. Va. 237.

Wisconsin. — Finney *v.* Boyd, 26 Wis. 366.

2. Actions of Forcible Entry and Detainer — *United States.* — People's Pure Ice Co. *v.* Trumbull, (C. C. A.) 70 Fed. Rep. 166.

Alabama. — Brady *v.* Huff, 75 Ala. 80; Bishop *v.* Truett, 85 Ala. 376; Robinson *v.* Allison, 97 Ala. 596.

Arizona. — Bishop *v.* Perrin, (Ariz. 1894) 35 Pac. Rep. 1059.

California. — Millett *v.* Lagomarsino, (Cal. 1894) 38 Pac. Rep. 308.

Illinois. — Equitable Trust Co. *v.* Fisher, 106 Ill. 189; Cochran *v.* Fogler, 116 Ill. 194; Riverside Co. *v.* Townshend, 120 Ill. 9; Vahle *v.* Brackenseik, 145 Ill. 231; Keating *v.* Springer, 146 Ill. 481, 37 Am. St. Rep. 175; Lancaster *v.* Snow, 184 Ill. 534; Shunick *v.* Thompson, 25 Ill. App. 619.

Kansas. — Waite *v.* Teeters, 36 Kan. 604; Deisher *v.* Gehre, 45 Kan. 583; Redden *v.* Tefft, 48 Kan. 302; Soden *v.* Roth, 9 Kan. App. 826.

Kentucky. — Fain *v.* Miles, 60 S. W. Rep. 939, 22 Ky. L. Rep. 1584.

Maine. — Linnell *v.* Lyford, 72 Me. 280.

Mississippi. — Richardson *v.* Callihan, 73 Miss. 4.

Missouri. — Carter *v.* Scaggs, 38 Mo. 302, *cited* Drey *v.* Doyle, 28 Mo. App. 249.

Nebraska. — McKean *v.* Smoyer, 37 Neb. 694.

Ohio. — Gladwell *v.* Hume, 9 Ohio Cir. Dec. 767, 18 Ohio Cir. Ct. 845.

Tennessee. — Casey *v.* McFalls, 3 Sneed (Tenn.) 115; Simmons *v.* Taylor, 91 Tenn. 363.

Texas. — House *v.* Reavis, 89 Tex. 626; Westmoreland *v.* Richardson, 2 Tex. Civ. App. 175.

On the conclusiveness of such judgments in actions for rents and profits or damages, see further the title FORCIBLE ENTRY AND DETAINER, ENCYC. OF PL. AND PR., vol. 9, pp. 72, 73.

(2) *Ejectment* — (a) **At Common Law.** — The action of ejectment as it exists at common law is an exception to the rule that a judgment settles the issues

Landlord and Tenant Proceedings. — Huyghe *v.* Brinkman, 34 La. Ann. 1179; Goenen *v.* Schroeder, 18 Minn. 66; Nemetty *v.* Naylor, 100 N. Y. 562; Willis *v.* McKinnon, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 386; Springs *v.* Schenck, 106 N. Car. 153.

Suits to Quiet Title — *United States.* — San Francisco *v.* Le Roy, 138 U. S. 656; Root *v.* Woolworth, 150 U. S. 401, *affirming* 40 Fed. Rep. 723; Southern Pac. R. Co. *v.* U. S., 183 U. S. 519, *reversing* (C. C. A.) 98 Fed. Rep. 27, 86 Fed. Rep. 962; Union Sav., etc., Assoc. *v.* Byrne, (C. C. A.) 114 Fed. Rep. 831.

California. — Hamm *v.* Arnold, 23 Cal. 373; Marshall *v.* Shafter, 32 Cal. 176; San Francisco *v.* Holladay, 76 Cal. 18; People *v.* Holladay, 93 Cal. 241, 27 Am. St. Rep. 186; Riverside Land, etc., Co. *v.* Jensen, 108 Cal. 146; South San Bernardino Land, etc., Co. *v.* San Bernardino Nat. Bank, 127 Cal. 245.

Indiana. — Farrar *v.* Clark, 97 Ind. 447; Indiana, etc., R. Co. *v.* Allen, 113 Ind. 308, 3 Am. St. Rep. 650, 113 Ind. 581; Tanguey *v.* O'Connell, 132 Ind. 62, *overruling* Curren *v.* Driver, 33 Ind. 480; Muffley *v.* Turner, 141 Ind. 580; Watson *v.* Lecklider, 147 Ind. 395; Graham *v.* Lunsford, 149 Ind. 83; Fromm *v.* Lawrence, 28 Ind. App. 388.

Iowa. — Smith *v.* Baldwin, 85 Iowa 570; Blair *v.* Hemphill, 111 Iowa 226.

Kansas. — Marion County *v.* Welch, 40 Kan. 767; Oldham *v.* Stephens, 45 Kan. 369.

Michigan. — Hanchett *v.* Auditor Gen., 124 Mich. 424, *citing* Sayers *v.* Auditor Gen., 124 Mich. 259.

Mississippi. — Illinois Cent. R. Co. *v.* Le Blanc, 74 Miss. 650.

Texas. — Gordon *v.* Hall, (Tex. Civ. App. 1902) 69 S. W. Rep. 219.

Wisconsin. — Smith *v.* Chicago, etc., R. Co., 83 Wis. 271.

Real Actions. — Doak *v.* Wiswell, 33 Me. 355; Stevens *v.* Taft, 8 Gray (Mass.) 419; Shears *v.* Dusenbury, 13 Gray (Mass.) 292; Jamaica Pond Aqueduct Corp. *v.* Chandler, 121 Mass. 2; Ryder *v.* Loomis, 161 Mass. 161.

Replevin and Detinue — *England.* — Gibbs *v.* Cruikshank, L. R. 8 C. P. 454.

United States. — Claflin *v.* Fletcher, 10 Biss. (U. S.) 281.

Alabama. — Gilbreath *v.* Jones, 66 Ala. 129, *citing* Chamberlain *v.* Gaillard, 26 Ala. 504.

Arkansas. — Robinson *v.* Kruse, 29 Ark. 576.

California. — Kimball *v.* Tripp, 136 Cal. 631.

Connecticut. — Lovell *v.* Hammond Co., 66 Conn. 500.

Florida. — Tyson *v.* Bowden, 8 Fla. 61, 71 Am. Dec. 101.

Illinois. — Warner *v.* Matthews, 18 Ill. 83; Savage *v.* French, 13 Ill. App. 17; Palmer *v.* Emery, 91 Ill. App. 207.

Indiana. — Daggett *v.* Robins, 2 Blackf. (Ind.) 415, 21 Am. Dec. 752; Wallace *v.* Clark, 7 Blackf. (Ind.) 298; Maloney *v.* Griffin, 15 Ind. 213; Denny *v.* Reynolds, 24 Ind. 248; Carr *v.* Ellis, 37 Ind. 465; McFadden *v.* Ross, 108 Ind. 512; McFadden *v.* Fritz, 110 Ind. 1; Fromlet *v.* Poor, 3 Ind. App. 425.

Indian Territory. — Webb *v.* Hunt, 2 Indian Ter. 612.

Iowa. — Buck *v.* Rhodes, 11 Iowa 348; Hawley *v.* Warner, 12 Iowa 42; Hayden *v.* Anderson, 17 Iowa 158.

Kansas. — Armel *v.* Layton, 33 Kan. 41; Ellis *v.* Crowl, 46 Kan. 100; Little *v.* Bliss, 55 Kan. 94.

Kentucky. — Owens *v.* Rawleigh, 6 Bush (Ky.) 656.

Maine. — Moulton *v.* Smith, 32 Me. 406.

Maryland. — Seldner *v.* Smith, 40 Md. 602.

Massachusetts. — Gilbert *v.* Thompson, 9 Cush. (Mass.) 348; Bennett *v.* Hood, 1 Allen (Mass.) 47, 79 Am. Dec. 705; Daggett *v.* Daggett, 143 Mass. 516.

Michigan. — Parmalee *v.* Loomis, 24 Mich. 242; Deyoe *v.* Jamison, 33 Mich. 94; Briggs *v.* Milburn, 40 Mich. 512; Pearl *v.* Garlock, 61 Mich. 419, 1 Am. St. Rep. 603; Robinson *v.* Kunkleman, 117 Mich. 193.

Minnesota. — Hardin *v.* Palmerlee, 28 Minn. 450; Johnson *v.* Vaule, 61 Minn. 401; Wheelock *v.* Svensgaard, 63 Minn. 486; Veline *v.* Dahlquist, 64 Minn. 119.

Missouri. — Wanborg *v.* Karst, 4 Mo. App. 563; Mitchell Furniture Co. *v.* Payton, 4 Mo. App. 564; Missouri Pac. R. Co. *v.* Levy, 17 Mo. App. 501; Sconce *v.* Long Bell Lumber Co., 54 Mo. App. 509; Wright *v.* Broome, 67 Mo. App. 32; Almond *v.* Miller, 83 Mo. App. 597.

Nebraska. — Lathrop *v.* Cheney, 29 Neb. 454; Teel *v.* Miles, 51 Neb. 542.

New Jersey. — Scott *v.* Hall, 60 N. J. Eq. 451, *reversing* 58 N. J. Eq. 42.

New Mexico. — Lowenthal *v.* Baca, 10 N. Mex 347.

New York. — Commerce Exch. Nat. Bank *v.* Blye, 123 N. Y. 132, *reversing* 56 Hun (N. Y.) 403; Mandeville *v.* Avery, 124 N. Y. 376, *reversing* (Supm. Ct. Gen. T.) 17 N. Y. Supp. 429, 63 Hun (N. Y.) 624; Brady *v.* Beadleston, 62 Hun (N. Y.) 548; Govin *v.* De Miranda, 79 Hun (N. Y.) 329; Ladew *v.* Hart, 8 N. Y. App. Div. 150, *affirmed* without opinion 155 N. Y. 629; Sinskie *v.* Brust, 66 N. Y. App. Div. 34; Shepherd *v.* Moodhe, (Brooklyn City Ct. Gen. T.) 8 Misc. (N. Y.) 607; Christiansen *v.* Mendham, (N. Y. City Ct. Gen. T.) 26 Misc. (N. Y.) 662; Barnard *v.* Devine, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 182.

North Carolina. — Woody *v.* Jordan, 69 N. Car. 189.

North Dakota. — Paulson *v.* Nichols, etc., Co., 8 N. Dak. 606.

Oklahoma. — Geiser Mfg. Co. *v.* Berry, (Okla. 1902) 70 Pac. Rep. 202.

Pennsylvania. — Bower *v.* Tallman, 5 W. & S. 556; Cox *v.* Hartranft, 154 Pa. St. 457.

Rhode Island. — Holcomb *v.* Brickley, 12 R. I. 255.

Tennessee. — Colby *v.* Yates, 12 Heisk. (Tenn.) 267.

Vermont. — Farnham *v.* Chapman, 60 Vt. 338.

Virginia. — Alderson *v.* Biggars, 4 Hen. *v.* M. (Va.) 470.

Wisconsin. — Emmons *v.* Dowe, 2 Wis. 322; Hackett *v.* Bonnell, 16 Wis. 471; Wolf River Lumber Co. *v.* Brown, 88 Wis. 638; Rosenow *v.* Gardner, 99 Wis. 358.

once for all between the parties and privies.[1] It is in effect but an action of trespass for damages for forcible expulsion for a term of years, in which the parties of record and the demise are fictitious; and as it is always within the power of the losing party to make a fresh demise to another nominal character, successive actions can be brought until a court of equity interferes and enjoins further contest.[2] This inconclusive character of the common-law judgment in ejectment still obtains in *Missouri*, and perhaps in a few other jurisdictions;[3] but it has been held in the former state that the judgment is *res judicata* in collateral actions until its legal effect has been destroyed by the result of a subsequent ejectment.[4]

(b) **Under Statutes.** — In most states the remedy by ejectment is now regulated by statutes which have abrogated the fictions of the common-law action and changed it into an ordinary action between the real parties in interest. In a

Suits or Proceedings to Determine Boundary Lines — Actions Involving Questions of Boundary — *Connecticut.* — Mosman *v.* Sanford, 52 Conn. 23.

Illinois. — Mueller *v.* Henning, 102 Ill. 646.

Kentucky. — Walker *v.* Leslie, 90 Ky. 642; Hurst *v.* Combs, (Ky. 1890) 14 S. W. Rep. 378.

Louisiana. — White *v.* Purnell, 14 La. Ann. 228; Police Jury *v.* Police Jury, 49 La. Ann. 1331.

Maine. — Young *v.* Pritchard, 75 Me. 513.

New York. — Beebe *v.* Elliott, 4 Barb. (N. Y.) 457.

North Carolina. — Vandyke *v.* Farris, 126 N. Car. 744.

Ohio. — Cincinnati *v.* Hosea, 10 Ohio Cir. Dec. 618, 19 Ohio Cir. Ct. 744.

Oregon. — King *v.* Brigham, 23 Oregon 262.

Texas. — Wood *v.* Cahill, 21 Tex. Civ. App. 38; Wallis *v.* Wofford, (Tex. Civ. App. 1894) 26 S. W. Rep. 739; King *v.* Henderson, (Tex. Civ. App. 1902) 69 S. W. Rep. 487.

A judgment in an action brought solely to determine a boundary line, although brought in the form of an action of trespass to try title, is *res judicata*, and not within a statute permitting a second trial where title is involved. Bird *v.* Montgomery, 34 Tex. 713; Spence *v.* McGowan, 53 Tex. 30; San Patricio *v.* Mathis, 58 Tex. 242; Barbee *v.* Stinnett, 60 Tex. 167; Jones *v.* Andrews, 72 Tex. 5; Birdseye *v.* Shaeffer, (Tex. Civ. App. 1900) 57 S. W. Rep. 987.

Suits under Burnt Records Act — *Illinois.* — Bradish *v.* Grant, 119 Ill. 606; Webber *v.* Clark, 136 Ill. 256; Higgins *v.* Mulvey, 136 Ill. 636; Harms *v.* Coryell, 177 Ill. 496. See also Oberein *v.* Wells, 163 Ill. 101.

Partition. — See the title PARTITION, vol. 21, p. 1183 *et seq.*

Trespass and Trespass to Try Title. — See the title TRESPASS.

Trover. — See the title TROVER AND CONVERSION.

Proceedings to Determine Adverse Rights to Mining Claims. — See the title MINES AND MINING CLAIMS, vol. 20, p. 762; Van Wagenen *v.* Carpenter, 27 Colo. 444.

1. Marsteller *v.* Marsteller, 132 Pa. St. 517, 19 Am. St. Rep. 604; Eichert *v.* Schaffer, 161 Pa. St. 519.

2. Ejectment at Common Law — *United States.* — Blanchard *v.* Brown, 3 Wall. (U. S.) 245; Sturdy *v.* Jackaway, 4 Wall. (U. S.) 174.

Alabama. — Jones *v.* De Graffenreid, 60 Ala. 145; Boyle *v.* Wallace, 81 Ala. 352.

Georgia. — Sims *v.* Smith, 19 Ga. 124.

Kentucky. — Botts *v.* Shields, 3 Litt. (Ky.) 32; Speed *v.* Braxdell, 7 T. B. Mon. (Ky.) 570; Cecil *v.* Johnson, 11 B. Mon. (Ky.) 35.

Louisiana. — Kling *v.* Sejour, 4 La. Ann. 128.

Maryland. — Walsh *v.* McIntire, 68 Md. 402 [*citing* Mac Kenzie *v.* Renshaw, 55 Md. 291]; Brooke *v.* Gregg, 89 Md. 234.

New Jersey. — Van Blarcom *v.* Kip, 26 N. J. L. 351.

New York. — Van Wyck *v.* Seward, 6 Paige (N. Y.) 62, *affirmed* 18 Wend. (N. Y.) 375; King *v.* Townshend, 65 Hun N. Y.) 567, *affirmed* 141 N. Y. 358; Doorley *v.* O'Gorman, 31 N. Y. App. Div. 216, *appeal dismissed* without opinion 158 N. Y. 704.

Oregon. — Barrell *v.* Title Guarantee, etc., Co., 27 Oregon 77; Moores *v.* Moores, 36 Oregon 261.

Tennessee. — Rhodes *v.* Crutchfield, 7 Lea (Tenn.) 518; Gordon *v.* Weaver, (Tenn. Ch. 1899) 53 S. W. Rep. 745.

Texas. — Spence *v.* McGowan, 53 Tex. 30.

See also in this connection the title NOTICE OF PENDENCY AND LIS PENDENS, vol. 21, pp. 640, 641.

3. Missouri. — Slevin *v.* Brown, 32 Mo. 176; Kimmel *v.* Benna, 70 Mo. 52; Ekey *v.* Inge, 87 Mo. 493; Avery *v.* Fitzgerald, 94 Mo. 207; St. Louis *v.* Schulenburg, etc., Lumber Co., 98 Mo. 613; Sutton *v.* Dameron, 100 Mo. 141; Bailey *v.* Winn, 101 Mo. 649; Sampson *v.* Mitchell, 125 Mo. 217; Ridgeway *v.* Herbert, 150 Mo. 606, 73 Am. St. Rep. 464; Speed *v.* St. Louis Merchants Bridge Terminal R. Co., 163 Mo. 111; Dunn *v.* Miller, 8 Mo. App. 467; Hogan *v.* Smith, 11 Mo. App. 314.

Equitable Defenses. — The common-law rule has no application to equitable defenses which, by statute, may be set up in actions of ejectment, but such equitable defenses, when adjudicated upon, are *res judicata*. Preston *v.* Rickets, 91 Mo. 320, *citing* Chouteau *v.* Gibson, 76 Mo. 38, which *affirmed* 7 Mo. App. 1, 562; St. Louis *v.* Schulenburg, etc., Lumber Co., 98 Mo. 613; Emmel *v.* Hayes, (Mo. 1889) 12 S. W. Rep. 521.

Furthermore, it has been held that if the defendant fails to set up his equitable defenses in an action of ejectment, he is guilty of laches and cannot thereafter bring suit upon them in equity. Davidson *v.* Mayhew, 169 Mo. 258.

4. Estes *v.* Nell, 140 Mo. 639.

few of these states a second and sometimes a third trial may be had before the issues are finally and conclusively adjudicated;[1] but with this exception the judgment constitutes a bar or estoppel between parties and privies in the same manner and to the same extent as judgments in other actions, that is, it finally adjudicates such issues as were actually litigated and passed upon, or which might and should have been raised.[2]

1. Statutes Permitting Two or More Trials — *United States.* — Blanchard *v.* Brown, 3 Wall. (U. S.) 245; Sturdy *v.* Jackaway, 4 Wall. (U. S.) 174; Evans *v.* Patterson, 4 Wall. (U. S.) 224; Britton *v.* Thornton, 112 U. S. 526; Hiller *v.* Shattuck, 1 Flipp. (U. S.) 272, 12 Fed. Cas. No. 6,504.

Alabama. — Under the statutes of this state, where two judgments have been rendered in favor of the defendant further contest is barred, but in all other cases the common-law rule is held to prevail. Hawes *v.* Rucker, 94 Ala. 166; Winston *v.* Hodges, 102 Ala. 304; McGrantt *v.* Baggett, 128 Ala. 483. See also Jones *v.* De Graffenreid, 60 Ala. 145; Boyle *v.* Wallace, 81 Ala. 352.

Illinois. — Hammond *v.* Carter, 161 Ill. 621.

Indiana. — Stafford *v.* Cronkhite, 114 Ind. 220; Ferris *v.* Berkshire L. Ins. Co., 139 Ind. 486.

Minnesota. — Doyle *v.* Hallam, 21 Minn. 515.

New York. — Doorley *v.* O'Gorman, 31 N. Y. App. Div. 216, *appeal dismissed* without opinion 158 N. Y. 704; Ten Eyck *v.* Witbeck, 55 N. Y. App. Div. 165, *affirmed* without opinion 170 N. Y. 564.

Pennsylvania. — Mercer *v.* Watson, 1 Watts (Pa.) 330; Treaster *v.* Fleisher, 7 W. & S. (Pa.) 137 [*cited* Crumley *v.* Lutz, 180 Pa. St. 476]; Man *v.* Drexel, 2 Pa. St. 202; Ross *v.* Pleasants, 19 Pa. St. 157 [*citing* Rambler *v.* Tryon, 7 S. & R. (Pa.) 90, 10 Am. Dec. 444]; Taylor *v.* Abbott, 41 Pa. St. 352; Kinter *v.* Jenks, 43 Pa. St. 445; Chase *v.* Irvin, 87 Pa. St. 286; Strayer *v.* Johnson, 110 Pa. St. 21; Marsteller *v.* Marsteller, 132 Pa. St. 517, 19 Am. St. Rep. 604; Eichert *v.* Schaffer, 161 Pa. St. 519; Weller *v.* Dilley, 12 Pa. Co. Ct. 84, 1 Pa. Dist. 803, 6 Kulp (Pa.) 499.

Wisconsin. — Cook *v.* McComb, 98 Wis. 526; Bell *v.* Peterson, 105 Wis. 607.

Judgments by Confession. — Statutory provisions of this character relate only to judgments entered upon verdicts. The effect of a judgment by confession in an action of ejectment is to conclude the right and to estop the party the same as judgments by confession rendered in other actions. Secrist *v.* Zimmerman, 55 Pa. St. 446; Dwyer *v.* Wright, 14 Pa. Co. Ct. 406, *affirmed* on other grounds 162 Pa. St. 405.

Equitable Titles and Defenses. — The statute has no application to a judgment in ejectment based upon an equitable title. The action in such a case is a substitute for and the equivalent of a bill in equity, and the verdict and judgment have all the conclusive effect which a decree in chancery would have. Seitzinger *v.* Ridgway, 9 Watts (Pa.) 496, Huston, J., *dissenting;* Amick *v.* Oyler, 25 Pa. St. 506; Peterman *v.* Huling, 31 Pa. St. 432; Secrist *v.* Zimmerman, 55 Pa. St. 446; Treftz *v.* Pitts, 74 Pa. St. 343; Winpenny *v.* Winpenny, 92 Pa. St. 440; Schive *v.* Fausold, 137 Pa. St. 82; German-American Title, etc., Co. *v.* Shallcross, 147 Pa. St. 485, 30 Am. St. Rep. 751; Budd *v.* Finley, 151 Pa. St. 540.

2. Statutory Action of Ejectment — *United States.* — Sturdy *v.* Jackaway, 4 Wall. (U. S.) 174; Barrows *v.* Kindred, 4 Wall. (U. S.) 399; Hayner *v.* Stanly, 8 Sawy. (U. S.) 214; Tyler Min. Co. *v.* Last Chance Min. Co., 7 U. S. App. 463; Northern Pac. R. Co. *v.* Smith, (C. C. A.) 69 Fed. Rep. 579; Black *v.* Black, 77 Fed. Rep. 785; Rachal *v.* Smith, (C. C. A.) 101 Fed. Rep. 159.

California. — Mitchell *v.* Davis, 23 Cal. 381; Marshall *v.* Shafter, 32 Cal. 176; Mann *v.* Rogers, 35 Cal. 316; Satterlee *v.* Bliss, 36 Cal. 489; Mahoney *v.* Middleton, 41 Cal. 41; Thompson *v.* McKay, 41 Cal. 221; Barrett *v.* Birge, 50 Cal. 655; Burns *v.* Hodgdon, 64 Cal. 72; People's Sav. Bank *v.* Hodgdon, 64 Cal. 95; People *v.* Holladay, 68 Cal. 439; Thrift *v.* Delaney, 69 Cal. 188; Johnson *v.* Vance, 86 Cal. 110; Breon *v.* Bobrecht, 118 Cal. 469, 62 Am. St. Rep. 247; Green *v.* Thornton, 130 Cal. 482; Loftis *v.* Marshall, 134 Cal. 394.

Colorado. — Hurd *v.* McClellan, 1 Colo. App. 327, *affirmed* 21 Colo. 198.

Florida. — Elizabethport Cordage Co. *v.* Whitlock, 37 Fla. 190; Lake *v.* Hancock, 38 Fla. 53, 56 Am. St. Rep. 159.

Georgia. — Sims *v.* Smith, 19 Ga. 124.

Illinois. — Oetgen *v.* Ross, 54 Ill. 79; Yeates *v.* Briggs, 95 Ill. 79; Hawley *v.* Simons, 102 Ill. 115; Gage *v.* Eddy, 186 Ill. 432.

Indiana. — Muffley *v.* Turner, 141 Ind. 580; Graham *v.* Lunsford, 149 Ind. 83.

Iowa. — Des Moines, etc., R. Co. *v.* Bullard, 89 Iowa 749.

Kansas. — Hentig *v.* Redden, 46 Kan. 231, 26 Am. St. Rep. 91, *cited* Peterson *v.* Albach, 51 Kan. 150; and Neuber *v.* Shoel, 8 Kan. App. 345.

Kentucky. — Speed *v.* Braxdell, 7 T. B. Mon. (Ky.) 570; Troutman *v.* Vernon, 1 Bush (Ky.) 482; Sutton *v.* Pollard, 96 Ky. 640; Worsham *v.* Lancaster, (Ky. 1898) 47 S. W. Rep. 448.

Maryland. — Walsh *v.* McIntire, 68 Md. 402; Brooke *v.* Gregg, 89 Md. 234.

Michigan. — Hemmingway *v.* Drew, 47 Mich. 554.

Minnesota. — Bazille *v.* Murray, 40 Minn. 48.

Nebraska. — Spear *v.* Tidball, 40 Neb. 107.

Nevada. — Sherman *v.* Dilley, 3 Nev. 21.

New Jersey. — Mershon *v.* Williams, (N. J. 1895) 31 Atl. Rep. 778.

New York. — Furey *v.* Gravesend, 104 N. Y. 412; Briggs *v.* Wells, 12 Barb. (N. Y.) 567; King *v.* Townshend, 65 Hun (N. Y.) 567, *affirmed* 141 N. Y. 358.

North Carolina. — Holley *v.* Holley, 96 N. Car. 229; Jordan *v.* Farthing, 117 N. Car. 181; Carter *v.* White, 131 N. Car. 14.

Oregon.—Barrell *v.* Title Guarantee, etc., Co., 27 Oregon 77; Moores *v.* Moores, 36 Oregon 261.

Rhode Island. — Bradford *v.* Burgess, 20 R. I. 290.

6. Proceedings in Rem — *a.* STATUS OR TITLE OF RES. — It has been said that judgments, in regard to their conclusive effect as estoppels, are of two classes: judgments *in personam* and judgments *in rem.*[1] The general distinction between the character of the two classes of judgments as *res judicata* is well settled. Judgments in actions or suits *in personam* are *inter partes* and binding and conclusive only upon the parties of record, and, in some instances, persons who actually participate in the litigation and their privies;[2] while those rendered in proceedings strictly *in rem* are *inter omnes* by reason of the power and control of the state over the *res*, and irrevocably determine its status or title against all persons, irrespective of whether they had any other than constructive notice of the litigation or whether they were parties in fact or not.[3] To this extent the authorities

Tennessee. — Rhodes *v.* Crutchfield, 7 Lea (Tenn.) 518; Gordon *v.* Weaver, (Tenn. Ch. 1899) 53 S. W. Rep. 754.

Vermont. — Hodges *v.* Eddy, 52 Vt. 434.

Washington. — Long *v.* Eisenbeis, 21 Wash. 23.

Equitable Titles and Defenses. — Blanchard *v.* Brown, 3 Wall. (U. S.) 245; Hawkins *v.* Wills, 4 U. S. App. 274 [*citing* Johnson *v.* Christian, 128 U. S. 374]; Harper *v.* Campbell, 102 Ala. 342; Dawson *v.* Parham, 55 Ark. 286; O'Connor *v.* Irvine, 74 Cal. 435; McCurry *v.* Robinson, 23 Ga. 321; Brooking *v.* Dearmond, 27 Ga. 58; Hawley *v.* Simons, 102 Ill. 115; Parker *v.* Shannon, 137 Ill. 376; Van Wyck *v.* Seward, 6 Paige (N. Y.) 62, *affirmed* 18 Wend. (N. Y.) 375; Hahl *v.* Sugo, 169 N. Y. 109, *reversing* 46 N. Y. App. Div. 632, which *affirmed* (Supm. Ct. Eq. T.) 27 Misc. (N. Y.) 1; Spaur *v.* McBee, 19 Oregon 76; Winchester *v.* Gleaves, 3 Hayw. (Tenn.) 214.

Ejectment and Actions for Mesne Profits or Damages. — Harris *v.* Mulkern, 1 Ex. D. 31; Coburn *v.* Goodall, 72 Cal. 498, 1 Am. St. Rep. 75; Southern Pac. R. Co. *v.* Purcell, 77 Cal. 69; Gunn *v.* Scovil, 5 Day (Conn.) 113; Apalachicola *v.* Curtis, 9 Fla. 340, 79 Am. Dec. 284; Cunningham *v.* Morris, 19 Ga. 583, 65 Am. Dec. 611; Parker *v.* Salmons, 113 Ga. 1167; Muffley *v.* Turner, 141 Ind. 580; Wilson *v.* Hoffman, 93 Mich. 72, 32 Am. St. Rep. 485; Abrahamson *v.* Lamberson, 68 Minn. 454; Beel *v.* Medford, 57 Miss. 31; Gillum *v.* Case, 71 Miss. 848; Stewart *v.* Dent, 24 Mo. 111; Lee *v.* Bowman, 55 Mo. 400, Neher *v.* Armijo, (N. Mex. 1901) 66 Pac. Rep. 517; Casey *v.* McFalls, 3 Sneed (Tenn.) 115; Strong *v.* Garfield, 10 Vt. 502 [*cited* Lippett *v.* Kelley, 46 Vt. 517]; Walker *v.* Hitchcock, 19 Vt. 634.

Possessory and Petitory Actions — *Louisiana.* — Davis *v.* Young, 36 La. Ann. 374; Broussard *v.* Broussard, 43 La. Ann. 921; Prescott *v.* Payne, 44 La. Ann. 650.

1. Woodruff *v.* Taylor, 20 Vt. 65.

Foreign Judgments. — For a discussion of the force and legal effect of foreign judgments *in rem*, see the title FOREIGN JUDGMENTS, vol. 13, p. 974.

2. See generally *supra*, this title, *Persons Concluded.*

3. **Judgments or Sentences in Various Proceedings in Rem Conclusively Determine Status or Title of Res Against All Persons** — *England.* — Scott *v.* Shearman, 2 W. Bl. 982 [*citing* Robinson *v.* Versvelt, Tr. 2 Geo. 2]; Simpson *v.* Fogo, 1 Hem. M. 195, 9 Jur. N. S. 403; Castrique *v.* Imrie, L. R. 4 H. L. 414, *affirming* 8 C. B. N. S. 405, 98 E. C. L. 405, which *reversed* 8 C. B. N. S. 1, 98 E. C. L. 1.

United States. — Michaels *v.* Post, 21 Wall. (U. S.) 398; Bailey *v.* Sundberg, 1 U. S. App. 101, *reversing* on other grounds 44 Fed. Rep. 807; The James G. Swan, 106 Fed. Rep. 94; Mankin *v.* Chandler, 2 Brock. (U. S.) 125, 16 Fed. Cas. No. 9,030; Tompkins *v.* Tompkins, 1 Story (U. S.) 547, 24 Fed. Cas. No. 14,091.

Alabama. — Deslonde *v.* Darrington, 29 Ala. 92; Dickey *v.* Vann, 81 Ala. 425.

California. — De La Montanya *v.* De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 165.

Maryland. — Worthington *v.* Gittings, 56 Md. 542; Brown *v.* Smart, 69 Md. 320, *affirmed* 145 U. S. 454.

Maine. — Lord *v.* Chadbourne, 42 Me. 429, 66 Am. Dec. 290.

Massachusetts. — Barney *v.* Tourtellotte, 138 Mass. 106; Brigham *v.* Fayerweather, 140 Mass. 411; Lowell *v.* Middlesex County, 152 Mass. 372; Adams *v.* Adams, 154 Mass. 290; Bonnemort *v.* Gill, 167 Mass. 338.

Minnesota. — Thurston *v.* Thurston, 58 Minn. 279; Farrell *v.* St. Paul, 62 Minn. 271, 54 Am. St. Rep. 641.

Mississippi. — Stewart *v.* Board of Police, 25 Miss. 479.

Nevada. — State *v.* Central Pac. R. Co., 10 Nev. 47, *approved* State *v.* Washoe County, 14 Nev. 140.

New Jersey. — McClurg *v.* Terry, 21 N. J. Eq. 225.

New York. — Townsend *v.* Van Buskirk, 22 N. Y. App. Div. 441, *appeal dismissed* 162 N. Y. 265.

Tennessee. — Pinson *v.* Ivey, 1 Yerg. (Tenn.) 296; Hodges *v.* Bauchman, 8 Yerg. (Tenn.) 186; Patton *v.* Allison, 7 Humph. (Tenn.) 320; Fry *v.* Taylor, 1 Head (Tenn.) 595; Martin *v.* Stovall, 103 Tenn. 1.

Texas. — Miller *v.* Foster, 76 Tex. 479.

Vermont. — Woodruff *v.* Taylor, 20 Vt. 65.

West Virginia. — Holly River Coal Co. *v.* Howell, 36 W. Va. 489; State *v.* Sponaugle, 45 W. Va. 415.

See generally cases cited *infra*, this subdivision, particularly those in the section *Estoppel by Verdict.* See also for specific applications of the rule, the titles DIVORCE, vol. 9, p. 745; HABITUAL DRUNKARDS, vol. 15, p. 240 *et seq.*; INSANITY, vol. 16, pp. 626, 627; INSOLVENCY AND BANKRUPTCY, vol. 16, pp. 654, 655; PROBATE AND CONTEST OF WILLS, 16 ENCYC. OF PL. AND PR., 1061.

upon the subject of the force and legal effect of judgments and sentences *in rem* are in accord, but an interesting question has been raised by laws which have been held valid and constitutional by some courts only, classifying certain actions involving real property as actions *in rem*, thereby settling the title against all the world, although some or all of the persons interested are not named of record, but are unknown.[1] It is certain that the phrase "proceeding *in rem*" has been more misused than any other in the law,[2] and often applied or sought to be applied to actions which, although they may concern the right to or possession of property or other tangible thing, are only *inter partes* and do not affect the rights of third persons.[3]

Judgments of Condemnation and Acquittal. — If the property is condemned the title is completely changed, and the new title acquired by the forfeiture travels with the thing in all its future progress. All persons having any interest in the thing in controversy are concluded by the decree in the suit; and, of course, all the rest of the world is concluded, because the judgment binds and settles the rights of all those having any interest in the property. If, on the other hand, the property is acquitted, the taint of forfeiture is completely removed, and cannot be reannexed to it. The original owner stands upon his title discharged of any latent claims with which the supposed forfeiture may have previously infected it. The sentence of acquittal *in rem* ascertains a fact as much as a sentence of condemnation; it ascertains and fixes the fact that the property is not liable to the asserted claim of forfeiture. Bailey *v.* Sundberg, 1 U. S. App. 101, *reversing* 44 Fed. Rep. 807. See also, as to sentences of acquittal, Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, *affirming* 13 Johns. (N. Y.) 561; The Apollon, 9 Wheat. (U. S.) 362; Cushing *v.* Laird, 107 U. S. 69; Kriess *v.* Faron, 118 Cal. 142.

Divorce Proceeding. — A judgment of divorce where the court had jurisdiction is conclusive on the whole world that the parties have ceased to be husband and wife, for the simple reason that if a stranger to the judgment is not able to dispute the existence of a valid judgment, there is nothing left for him to dispute. Farrell *v.* St. Paul, 62 Minn. 271, 54 Am. St. Rep. 641.

Sale of Perishable Property Pendente Lite. — Castrique *v.* Imrie, L. R. 4 H. L. 428, *affirming* on other grounds 8 C. B. N. S. 405, 98 E. C. L. 405, which *reversed* 8 C. B. N. S. 1, 98 E. C. L. 1; Wyman *v.* Campbell, 6 Port. (Ala.) 232.

1. Torrens Land Registration Act. — People *v.* Simon, 176 Ill. 175; Tyler *v.* Judges, 175 Mass. 71, *per* Holmes, C. J., two justices *dissenting*, *writ of error dismissed* 179 U. S. 405; State *v.* Westfall, 85 Minn. 437. *Contra*, State *v.* Guilbert, 56 Ohio St. 575, 60 Am. St. Rep. 756.

Proceedings to Enforce Liens. — Shryock *v.* Hensel, 95 Md. 614. *Contra*, Bardwell *v.* Collins, 44 Minn. 97, 20 Am. St. Rep. 547 [*distinguished* Shepherd *v.* Ware, 46 Minn. 174, 24 Am. St. Rep. 212]; Brown *v.* Board of Levee Com'rs, 50 Miss. 468.

Proceedings for Escheat or to Quiet Title. — Hamilton *v.* Brown, 161 U. S. 256 [*cited* Cooper *v.* Newell, 173 U. S. 555]; Shepherd *v.* Ware, 46 Minn. 174, 24 Am. St. Rep. 212; McClymond *v.* Noble, 84 Minn. 329; Sloan *v.* Thompson, 4 Tex. Civ. App. 419. See also McDonald *v.* McCoy, 121 Cal. 55; Oldham *v.* Stephens, 45 Kan. 369; Lane *v.* Innes, 43 Minn. 137 [*citing* Bennett *v.* Fenton, 41 Fed. Rep. 283]; Pinson *v.* Ivey, 1 Yerg. (Tenn.) 349.

Proceedings for Partition. — Hardy *v.* Beaty 84 Tex. 562, 31 Am. St. Rep. 80.

Replevin. — See Sinskie *v.* Brust, 66 N. Y. App. Div. 34.

2. Tyler *v.* Judges, 175 Mass. 71, *per* Holmes, C. J., *writ of error dismissed* 179 U. S. 405.

Proceedings in Personam and in Rem Distinguished. — Castrique *v.* Imrie, L. R. 4 H. L. 414, *affirming* 8 C. B. N S. 408, 98 E. C. L. 408, which *reversed* 8 C. B. N. S. 1, 98 E. C. L. 1, *per* Blackburn, J.; Tyler *v.* Judges, 175 Mass. 71, *per* Holmes, C. J., *writ of error dismissed* 179 U. S. 405; State *v.* Central Pac. R. Co., 10 Nev. 47; Woodruff *v.* Taylor, 20 Vt. 65. See the title JUDGMENTS AND DECREES, vol. 17, p. 763.

Requisites Necessary to Proceeding in Rem. — The inquiry is first, whether the subject-matter was so situated as to be within the lawful control of the state under the authority of which the court sits; and second, whether the sovereign authority of that state has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. *Per* Blackburn, J., in Castrique *v.* Imrie, L. R. 4 H. L. 414, *affirming* 8 C. B. N. S. 405, 98 E. C. L. 405, which *reversed* 8 C. B. N. S. 1, 98 E. C. L. 1, *citing* Story, Conflict of Laws, § 892.

3. *In re* Bowling, (1895) 1 Ch. 663; South Covington, etc., R. Co. *v.* Gest, 34 Fed. Rep. 628, 36 Fed. Rep. 307; Kearney *v.* Kearney, 72 Cal. 591 [*cited* Hanley *v.* Hanley, 114 Cal. 690]; Lorch *v.* Aultman, 75 Ind. 162; Haight *v.* The Steamboat Henrietta, 4 Iowa 472, 68 Am. Dec. 669; Gregory *v.* Pike, 94 Me. 27; Ritter *v.* The Steamboat Jamestown, 23 Mo. 348; Nebraska L. & T. Co. *v.* Doman, (Neb. 1903) 93 N. W. Rep. 1022; McCotter *v.* Flinn, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 119; Bower *v.* Tallman, 5 W. & S. (Pa.) 556.

Proceedings by Attachment. — Harmer *v.* Bell, 7 Moo. P. C. 267; Mankin *v.* Chandler, 2 Brock. (U. S.) 125, 16 Fed. Cas. No. 9,030; Cole *v.* The Brandt, 6 Fed. Cas. No. 2,978; Dennison *v.* Hyde, 6 Conn. 508; Germain *v.* The Steam Tug Indiana, 11 Ill. 536 [*distinguishing* The Steamboat Rover *v.* Stiles, 5 Blackf. (Ind.) 483, *criticising* The Steamboat Raritan *v.* Smith, 10 Mo. 527]; Samuel *v.* Agnew, 80 Ill. 553; Roose *v.* McDonald, 23 Ind. 157; Iles *v.* Elledge, 18 Kan. 296; Johnson *v.* Stockham, 89 Md. 368; Breault *v.* Merrill, etc., Lumber Co., 72 Minn. 143; Megee *v.* Beirne, 39 Pa.

b. FRAUD AND COLLUSION — VOID JUDGMENTS. — Judgments and sentences *in rem* procured by fraudulent means or collusion are not, as a general rule, *res judicata* against a direct attack based upon such grounds and made by a person who did not participate in the wrongdoing, any more than judgments and decrees *in personam;* [1] and where they are rendered without jurisdiction they are wholly void and have no binding effect in other litigation as a bar or estoppel.[2] As to jurisdiction over the person, it seems that proceedings *in rem* are really against persons the same as actions or suits *in personam;* [3] and with some exceptions standing upon peculiar grounds,[4] either actual or some form of constructive notice to all persons interested, or voluntary appearance, is a necessary prerequisite to the rendition of a valid judgment or sentence *in rem,* the character of the notice to be given being frequently declared by statute or other positive law.[5] In the case of personal

St. 50; Woodruff *v.* Taylor, 20 Vt. 65; Bruff *v.* Thompson, 31 W. Va. 16. See the title ATTACHMENT, vol. 3, pp. 185, 186.

Proceedings to Enforce Mechanics' Liens. — Dunphy *v.* Riddle, 86 Ill. 22; Franklin Sav. Bank *v.* Taylor, 131 Ill. 376; Russell *v.* Grant, 122 Mo. 161, 43 Am. St. Rep. 563. See the title MECHANICS' LIENS, 13 ENCYC. OF PL. AND PR., 1032 *et seq.*

Proceedings Confirming Accounts of Court Auditors. — Taylor *v.* State, 73 Md. 208; Rogers *v.* Citizens' Nat. Bank, 93 Md. 613, *approved* National Marine Bank *v.* Heller, 94 Md. 213. See also Lindsay *v.* Kirk, 95 Md. 50.

Creditors' Bills. — Collins *v.* Hydorn, 135 N. Y. 320, *reversing* 62 Hun (N. Y.) 286. See also Ledoux *v.* Lavedan, 49 La. Ann. 913, *citing* Saul *v.* His Creditors, 7 Mart. N. S. (La.) 425. *Compare* general creditors' bill, *Exp.* Kenmore Shoe Co., 50 S. Car. 140.

Executors and Administrators' Sales. — See the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1118 *et seq.*; Shields *v.* Ashley, 16 Mo. 471.

1. Fraud and Collusion. — Rex *v.* Kingston, 20 How. St. Tr. 538, 2 Smith Lead. Cas. (8th ed.) 784; Worthington *v.* Gittings, 56 Md. 542 [*approved* McCambridge *v.* Walraven, 88 Md. 378]; Adams *v.* Adams, 154 Mass. 290, and cases cited. See for illustration the title PROBATE AND LETTERS OF ADMINISTRATION, vol. 23, p. 136. See also in this connection *supra,* this title, *Nature and Statement of Principles — Res Judicata and Collateral Attack.*

2. Void Judgments. — See generally cases cited in the next note but two; Vanderbergh *v.* Blake, Hardres 194.

3. Proceedings in Rem Against Persons as Well as Against the Res. — All proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected. Hence the *res* need not be personified and made a party defendant, as happens with the ship in admiralty; it need not even be a tangible thing at all, as sufficiently appears by the case of the probate of wills. Personification and naming the *res* as defendant are merely symbols, not the essential matter. They are fictions conveniently expressing the nature of the process and the result, nothing more. *Per* Holmes, C. J., in Tyler *v.* Judges, 175 Mass. 71, *writ of error dismissed* 179 U. S. 405.

4. Some Exceptions to This Rule may be found, such as cases where grants are made by the state for the accomplishment of objects in which the public is interested and the law, in making the grants, provides for forfeiture when the object is not accomplished, and cases where land or other property is forfeited to the government for nonpayment of taxes by the owner. Boggs *v.* Com., 76 Va. 989. See also as to proceedings under tax laws, State *v.* Sponaugle, 45 W. Va. 415 [*citing* Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S. 232]; Gritchell *v.* Kreidler, 12 Mo. App. 497.

5. Actual or Some Form of Constructive Notice to All Persons Interested Necessary — *United States.* — Windsor *v.* McVeigh, 93 U. S. 274; Pennoyer *v.* Neff, 95 U. S. 714, *affirming* 3 Sawy. (U. S.) 274, 17 Fed. Cas. No. 10,083; Hassall *v.* Wilcox, 130 U. S. 493; The Mary, 9 Cranch (U. S.) 126, *reversing* in part 1 Gall. (U. S.) 620, 16 Fed. Cas. No. 9,184; Bailey *v.* Sundberg, 1 U. S. App 101, *reversing* 44 Fed. Rep. 807; Bradstreet *v.* Neptune Ins. Co., 3 Sumn. (U. S.) 600, 3 Fed. Cas. No. 1,793.

California. — Matter of Smith, 122 Cal. 462.

Louisiana. — Lampton's Succession, 35 La. Ann. 418 [*citing* Wells, Res Judicata, § 519, *approved* Lorenz's Succession, 41 La. Ann. 1091]; Barber's Succession, 52 La. Ann. 960.

Massachusetts. — Fisher *v.* McGirr, 1 Gray (Mass.) 35, 61 Am. Dec. 381; Shores *v.* Hooper, 153 Mass. 231 [*citing* Salem *v.* Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650]; Tucker *v.* Fisk, 154 Mass. 574; Bonnemort *v.* Gill, 167 Mass. 338.

Michigan. — Wight *v.* Maxwell, 4 Mich. 45; Dean *v.* Chapin, 22 Mich. 275.

New Jersey. — Doughty *v.* Doughty, 27 N. J. Eq. 315, *affirmed* 28 N. J. Eq. 581.

New York. — Monroe *v.* Douglas, 4 Sandf. Ch. (N. Y.) 182, *affirmed* 5 N. Y. 447. See also Ward *v.* Boyce, 152 N. Y. 191, *cited* Bank of China, etc., *v.* Morse, 168 N. Y. 458.

Pennsylvania. — Millers' Estate, 159 Pa. St. 562.

Vermont. — Woodruff *v.* Taylor, 20 Vt. 65.

Virginia. — Boggs *v.* Com., 76 Va. 989; Dorr *v.* Rohr, 82 Va. 359, 3 Am. St. Rep. 108.

Contra. — Knox *v.* Paull, 95 Ala. 505 [*citing* Sowell *v.* Sowell, 40 Ala. 243]; Stewart *v.* Board of Police, 25 Miss. 479 [*cited* Brown *v.* Board of Levee Com'rs, 50 Miss. 468]; New Orleans, etc., R. Co. *v.* Hemphill, 35 Miss. 17; Luther *v.* Fowler, 1 Grant Cas. (Pa.) 177. See also Kearney *v.* Kearney, 72 Cal. 591 [*cited* Hanley *v.* Hanley, 114 Cal. 690]; Sinskie *v.* Brust, 66 N. Y. App. Div. 34; titles EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1118 *et seq.*;

property seizure into the custody of the court is also probably necessary,[1] and in admiralty proceedings seizure and an exhibition of the warrant to those in charge are said to be sufficient notice in the absence of further requirements by statute or rules of court.[2]

c. ESTOPPEL BY VERDICT. — It has been frequently held that sentences and decrees *in rem* are conclusive evidence against all the world of the facts upon which they were passed, as well as upon the status or title of the *res*.[3] As respects prize causes, this doctrine is, in most jurisdictions, held to be too firmly established by precedent to be overthrown, although said to have been founded on a mistaken notion of the character of proceedings *in rem*.[4] With this exception, however, the tendency of modern authority is not to allow sentences and decrees *in rem* any binding effect as estoppels by verdict,[5] except, of course, where the collateral action is between persons who were parties in fact to the proceedings *in rem*, and contested there the issues sought to be relitigated.[6]

7. Criminal Prosecutions and Penal Actions — *a.* FORMER JEOPARDY. — The rule that a former adjudication is a bar to another action for the same claim

PROBATE AND CONTEST OF WILLS, ENCYC. OF PL. AND PR., vol. 16, p. 1003 *et seq.*

Notice in Proceedings by Boards of Health and Like Tribunals to Abate Nuisances. — See the titles ABATEMENT OF NUISANCES, vol. 1, pp. 95, 96; BOARDS OF HEALTH, vol. 4, p. 604. See also Salem *v.* Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650; Miller *v.* Horton, 152 Mass. 540, 23 Am. St. Rep. 850, Devens, J., *dissenting*.

1. Seizure of Personal Property. — Hamilton *v.* Brown, 161 U. S. 256.

2. Notice in Admiralty Proceedings in Rem. — Tyler *v.* Judges, 175 Mass. 71 [*writ of error dismissed* 179 U. S. 405], *per* Holmes, C. J., *citing* 2 Browne, Civ. and Adm. Law 398, and Betts, Adm. Pr. (1838) 33, 34, App. 14.

3. In Actions for Damages Against Magistrates or Officers Making Seizure. — Note *v.* 2 W. Bl. 1176 [*distinguishing* Henshaw *v.* Pleasance, 2 W. Bl. 1175]; Scott *v.* Sherman, 2 W. Bl. 977; Vanderbergh *v.* Blake, Hardres 194; Brittain *v.* Kinnaird, 1 Brod. & B. 432, 5 E. C. L. 137; Cooke *v.* Sholl, 5 T. R. 255. See also Wilkins *v.* Despard, 5 T. R. 112; Geyer *v.* Aguilar, 7 T. R. 677, *per* Kenyon, C. J., who said: "Where there has been a proceeding in the Exchequer and a judgment *in rem*, as long as the judgment remains in force it is obligatory on the parties who have civil rights depending on the same question."

In Actions Between Vendors and Vendees of Property Seized. — Hart *v.* M'Namara, 4 Price 154, note, 18 Rev. Rep. 690; Kriess *v.* Faron, 118 Cal. 142; Whitney *v.* Walsh, 1 Cush. (Mass.) 29, 48 Am. Dec. 590, *cited* Williams *v.* Delano, 155 Mass. 10.

4. Sentences and Decrees in Prize Causes. — Lothian *v.* Henderson, 3 B. & P. 545; Castrique *v.* Imrie, L. R. 4 H. L. 414, *affirming* 8 C. B. N. S. 405, 98 E. C. L. 405, which *reversed* 8 C. B. N. S. 1, 98 E. C. L. 1; Ballantyne *v.* Mackinnon, (1896) 2 Q. B. 455; Brigham *v.* Fayerweather, 140 Mass. 411; Shores *v.* Hooper, 153 Mass. 231; Farrell *v.* St. Paul, 62 Minn. 271, 54 Am. St. Rep. 641. See also the title FOREIGN JUDGMENTS, vol. 13, p. 1019 *et seq.* *Contra*, in a few jurisdictions. See the title FOREIGN JUDGMENTS, vol. 13, p. 1020.

5. No Estoppel by Verdict as to Persons Not Actually Parties and Contestants — *England.* — Ballantyne *v.* Mackinnon, (1896) 2 Q. B. 455; De Mora *v.* Concha, 29 Ch. D. 268, *affirmed* 11 App. Cas. 541. See also Anderson *v.* Collinson, (1901) 2 K. B. 107, *distinguishing* Reg. *v.* Glynne, L. R. 7 Q. B. 16. *Compare* Bunting *v.* Lepingwel, 4 Coke 29.

United States. — Thormann *v.* Frame, 176 U. S. 350, *affirming* 102 Wis. 653; Overby *v.* Gordon, 177 U. S. 214, *affirming* 13 App. Cas. (D. C.) 393. See also Blackburn *v.* Crawfords, 3 Wall. (U. S.) 175; Morris *v.* Bartlett, (C. C. A.) 108 Fed. Rep. 675, *reversing* 99 Fed. Rep. 786.

California. — See De La Montanya *v.* De La Montanya, 112 Cal. 101, 53 Am. St. Rep. 165.

Massachusetts. — Brigham *v.* Fayerweather, 140 Mass. 411; Lowell *v.* Middlesex County, 152 Mass. 372; Shores *v.* Hooper, 153 Mass. 228, *distinguishing* Ennis *v.* Smith, 14 How. (U. S.) 400, and Pittapur *v.* Garu, L. R. 12 Indian App. 16; Dallinger *v.* Richardson, 176 Mass. 77. See also Salem *v.* Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650; Barney *v.* Tourtellotte, 138 Mass. 106; Miller *v.* Horton, 152 Mass. 540, 23 Am. St. Rep. 850; Tucker *v.* Fisk, 154 Mass. 574, *citing* Adams *v.* Adams, 154 Mass. 290.

Minnesota. — Thurston *v.* Thurston, 58 Minn. 279; Farrell *v.* St. Paul, 62 Minn. 271, 54 Am. St. Rep. 641.

New York. — Ocean Ins. Co. *v.* Francis, 2 Wend. (N. Y.) 64, *affirming* 6 Cow. (N. Y.) 404; Durant *v.* Abendroth, 97 N. Y. 132, *reversing* mem. 48 N. Y. Super. Ct. 554; Townsend *v.* Van Buskirk, 22 N. Y. App. Div. 441, *appeal dismissed* 162 N. Y. 265. See also Matter of Gaines, 84 Hun (N. Y.) 520, *affirmed* without opinion 154 N. Y. 747. See also Sinskie *v.* Brust, 66 N. Y. App. Div. 34.

Wisconsin. — Williams *v.* Williams, 63 Wis. 58, 53 Am. Rep. 253.

6. Estoppel by Verdict as to Persons Actually Parties and Contestants. — Wager *v.* Providence Ins. Co., 150 U. S. 99, *affirming* 35 Fed. Rep. 363; Sly *v.* Hunt, 159 Mass. 151, 38 Am. St. Rep. 403; Ferrell *v.* Broadway, 126 N. Car. 258, *reversed* on other grounds on *rehearing* 127 N. Car. 404. See also De Mora *v.* Concha, 29 Ch. D. 268, *affirmed* 11 App. Cas. 541.

or demand has its counterpart in criminal law in the doctrine of former jeopardy. But the two rules, while similar in purpose and effect,[1] are otherwise separate and distinct subjects. Elsewhere in this work will be found a discussion of former jeopardy, including within its scope both criminal prosecutions and civil actions for penalties and forfeitures.[2]

b. ESTOPPEL BY VERDICT. — It has been held also that when a fact or matter has been once determined by a competent court in a criminal prosecution or action for a penalty or forfeiture, it cannot again be litigated in a similar proceeding between the same parties.[3] This doctrine is analogous in many respects to the estoppel by verdict of the law of *res judicata*, if not identical with it,[4] and is not within the law of former jeopardy.[5]

8. Criminal Prosecutions, Penal and Civil Actions. — A judgment in a criminal prosecution constitutes no bar or estoppel in a civil action based upon the same acts or transactions, and conversely of a judgment in a civil action sought to be given in evidence in a criminal prosecution. The reason most often given for this holding is that the two proceedings are not between the same parties, which is usually the case. But different rules as to the competency of witnesses and the weight of the evidence necessary to the finding in the two proceedings also exist;[6] and on these grounds the doctrine is

1. See Reg. *v.* Miles, 24 Q. B. D. 423, 17 Cox C. C. 9; Ryley *v.* Brown, 17 Cox C. C. 79; Gay *v.* Stancell, 76 N. Car. 369.

2. See the title JEOPARDY, vol. 17, p. 585.

3. **Estoppel by Verdict in Criminal Prosecutions and Penal Actions** — *England.* — Reg. *v.* Blackemore, 2 Den. C. C. 410; Reg. *v.* Haughton, 1 El. & Bl. 501, 72 E. C. L. 501, *citing* Rex *v.* St. Pancras, Peake N. P. (ed. 1795) 219, *distinguishing* Rex *v.* Eardisland, 2 Campb. 494. See also Atty.-Gen. *v.* Wakefield, 5 Price 202; Atty.-Gen. *v.* Reynolds, 5 Price 203. *Compare* Atty.-Gen. *v.* King, 5 Price 195.

United States. — Coffey *v.* U. S., 116 U. S. 436 [*citing* Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, and U. S. *v.* McKee, 4 Dill. (U. S.) 128, 26 Fed. Cas. No. 15,688, *cited* Boyd *v.* U. S., 116 U. S. 616]; U. S. *v.* Butler, 38 Fed. Rep. 498; U. S. *v.* Three Copper Stills, 47 Fed. Rep. 495.

Illinois. — People *v.* Hill, 182 Ill. 425.

Iowa. — State *v.* Waterman, 87 Iowa 255.

Kentucky. — Cooper *v.* Com., 106 Ky. 909, *followed* Petit *v.* Com., (Ky. 1900) 57 S. W. Rep. 14.

Massachusetts. — Robinson *v.* Com., 101 Mass. 27; Com. *v.* Feldman, 131 Mass. 588; Com. *v.* Ellis, 160 Mass. 165, *cited* Com. *v.* Reed, 162 Mass. 215.

Mississippi. — Jones *v.* State, 66 Miss. 380, 14 Am. St. Rep. 570.

New York. — People *v.* Allen, (Oyer & T. Ct.) 1 Park. Crim. (N. Y.) 445.

Vermont. — State *v.* Intoxicating Liquor, 72 Vt. 253.

See also in this connection the titles JEOPARDY, vol. 17, p. 596 *et seq.*; MERGER, vol. 20, p. 600 *et seq.*; Carson *v.* People, 4 Colo. App. 463.

Contra as to the Commonwealth. — State *v.* Jesse, 3 Dev. & B. L. (20 N. Car.) 98; State *v.* Williams, 94 N. Car. 891; Justice *v.* Com., 81 Va. 209.

Perjury. — Where, in a criminal prosecution, it is found that the defendant is not guilty of the acts charged and he is acquitted, he cannot thereafter be tried for perjury based upon testimony given by him as a witness at the trial, asserting his innocence. U. S. *v.* Butler, 38 Fed. Rep. 498; Cooper *v.* Com., 106 Ky. 909, *followed* Petit *v.* Com., (Ky. 1900) 57 S. W. Rep. 14. *Contra*, State *v.* Caywood, 96 Iowa 367; Hutcherson *v.* State, 33 Tex. Crim. 67.

The Rule Is None the Less Applicable because one proceeding is a criminal prosecution in which guilt must be proved beyond a reasonable doubt and the other an action for a forfeiture in which there might be a verdict on a preponderance of proof. The facts having been once ascertained between the same parties they cannot be litigated again between them, as the basis of a proceeding to punish an offense against the criminal or penal laws. Coffey *v.* U. S., 116 U. S. 436; U. S. *v.* Three Copper Stills, 47 Fed. Rep. 495. *Contra*, People *v.* Rohrs, 49 Hun (N. Y.) 150. An action in equity to abate a nuisance has been held a civil action to secure a forfeiture within this rule; and judgment of not guilty in a prosecution for the maintenance of the nuisance, where a part of the penalty which might be imposed on a conviction was its abatement, to be a bar to the suit. State *v.* Meek, 112 Iowa 338.

4. **Estoppel by Verdict Applies Alike to Civil and Criminal Proceedings.** — A fact once determined by a court of competent jurisdiction in a criminal proceeding cannot again be litigated between the same parties unless a different rule applies to criminal proceedings from that which obtains in civil proceedings; but it is well settled that the rule is the same in both classes of cases. Com. *v.* Ellis, 160 Mass. 165. For estoppel by verdict, see *supra*, this title, *Nature and Statement of Principles — Res Judicata and Estoppel.*

5. **Former Jeopardy and Estoppel.** — *Autrefois acquit* and *autrefois convict* are pleas which depend upon the principle that a man shall not be twice in jeopardy for the same thing; not on an estoppel. Reg. *v.* Haughton, 1 El. & Bl. 501, 72 E. C. L. 501, *per* Crompton, J.

6. **Criminal Prosecutions and Civil Actions** — *England.* — Rex *v.* Kingston, 20 How. St. Tr. 540, 2 Smith Lead. Cas. (8th ed.) 784; Jones *v.* White, 1 Stra. 69; Petrie *v.* Nuttall, 11 Exch.

equally applicable to cases where there is mutuality of parties.[1] As between civil and penal actions, a judgment in one is, of course, no bar or estoppel to the prosecution of the other, if the parties are not the same, identity of parties being a fundamental requisite of *res judicata;*[2] but where there is mutuality of parties, it has been generally held otherwise on the ground that the course of the proceedings and the measure of proof required are the same in both, and not different, as with civil and criminal actions.[3]

569; Virgo *v.* Virgo, 69 L. T. N. S. 460. See also Brownsword *v.* Edwards, 2 Ves. 243; Castrique *v.* Imrie, L. R. 4 H. L. 434, *per* Blackburn, J., *arguendo*, *quoted* Ballantyne *v.* Mackinnon, (1896) 2 Q. B. 455.

Canada. — Casgrain *v.* Leblanc, 4 Quebec Super. Ct. 350.

United States. — Chamberlain *v.* Pierson, (C. C. A.) 87 Fed. Rep. 420.

Alabama. — Carlisle *v.* Killebrew, 89 Ala. 329.

California. — Marceau *v.* Travelers' Ins. Co., 101 Cal. 338.

Connecticut. — Betts *v.* New Hartford, 25 Conn. 180; State *v.* Bradnack, 69 Conn. 212.

Delaware. — Jarvis *v.* Manlove, 5 Harr. (Del.) 452.

Georgia. — Cottingham *v.* Weeks, 54 Ga. 275; Claton *v.* Ganey, 63 Ga. 331; Tumlin *v.* Parrott, 82 Ga. 732.

Illinois. — Corbley *v.* Wilson, 71 Ill. 209, 22 Am. Rep. 98 [*cited* Skidmore *v.* Bricker, 77 Ill. 164]; McDonald *v.* Stark, 176 Ill. 456; Schreiner *v.* Illinois Catholic Order, 35 Ill. App. 576; Illinois Cent. R. Co. *v.* Quirk, 51 Ill. App. 607; Young *v.* Copple, 52 Ill. App. 547.

Iowa. — Martin *v.* Blattner, 68 Iowa 286; Crawford *v.* Bergen, 91 Iowa 675.

Louisiana. — Steel *v.* Cazeaux, 8 Mart. (La.) 318, 13 Am. Dec. 288; Lewis *v.* Petayvin, 4 Mart. N. S. (La.) 5; Beausoliel *v.* Brown, 15 La. Ann. 543.

Massachusetts. — Mead *v.* Boston, 3 Cush. (Mass.) 404.

Michigan. — See People *v.* Kenyon, 93 Mich. 19.

Missouri. — See State *v.* Board of Health, 16 Mo. App. 8.

Montana. — Doyle *v.* Gore, 15 Mont. 212.

New York. — Maybee *v.* Avery, 18 Johns. (N. Y.) 352; People *v.* Leland, 73 Hun (N. Y.) 162; Wilson *v.* Manhattan R. Co., (C. Pl. Gen. T.) 2 Misc. (N. Y.) 127, *affirmed* without opinion 144 N. Y. 632; Johnson *v.* Girdwood, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 651, *affirmed* without opinion 143 N. Y. 660; Von Hoffman *v.* Kendall, 17 N. Y. Supp. 713, mem. 63 Hun (N. Y.) 628, *appeal dismissed* without opinion 138 N. Y. 629.

Ohio. — Clark *v.* Irvin, 9 Ohio 131.

Pennsylvania. — Bauder's Appeal, 115 Pa. St. 480; Hahn *v.* Bealor, 132 Pa. St. 242, 25 W. N. C. (Pa.) 361; Morch *v.* Raubitschek, 159 Pa. St. 559, 33 W. N. C. (Pa.) 567; *In re* Campbell, 197 Pa. St. 581. See also Rohm *v.* Borland, (Pa. 1886) 7 Atl. Rep. 171.

Texas. — Landa *v.* Obert, 78 Tex. 33; Dunagain *v.* State, 38 Tex. Crim. 614.

Vermont. — Quinn *v.* Quinn, 16 Vt. 426.

Contra, Dorrell *v.* State, 83 Ind. 357; Anderson *v.* Anderson, 4 Me. 100, 16 Am. Dec. 237. See also in this connection the title MERGER, vol. 20, p. 600 *et seq.*

Plea of Guilty as an Admission in Civil Proceedings. — Schreiner *v.* Illinois Catholic Order, 35 Ill. App. 576; Young *v.* Copple, 52 Ill. App. 547; Crawford *v.* Bergen, 91 Iowa 675; Mead *v.* Boston, 3 Cush. (Mass.) 404; Clark *v.* Irvin, 9 Ohio 131. See also Anderson *v.* Anderson, 4 Me. 100, note *a*, 16 Am. Dec. 237, *citing* Randall *v.* Randall, 4 Me. 326, and Bradley *v.* Bradley, 11 Me. 367. See the titles ADMISSIONS, vol. 1, p. 721, note; ESTOPPEL, vol. 11, pp. 449, 450.

Record as Prima Facie but Not Conclusive Evidence. — Com. *v.* Ham, 156 Mass. 485; Maybee *v.* Avery, 18 Johns. (N. Y.) 352; Johnson *v.* Girdwood, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 651, *affirmed* without opinion 143 N. Y. 660; Clark *v.* Irvin, 9 Ohio 131; Bauder's Appeal, 115 Pa. St. 480; Hahn *v.* Bealor, 132 Pa. St. 242, 25 W. N. C. (Pa.) 361. See also *In re* Campbell, 197 Pa. St. 581.

Judgment of Conviction Put in Evidence by Defendant. — Where the defendant in a civil suit for damages resulting from the commission of an offense puts in evidence without objection a judgment of conviction rendered against him, it will be conclusive evidence of its commission by him. Moses *v.* Bradley, 3 Whart. (Pa.) 272; Porter *v.* Seiler, 23 Pa. St. 424, 62 Am. Dec. 341.

Action upon Life Insurance Policy of Executed Felon. — Upon grounds of public policy the conviction and execution of a person for the commission of a felony is a bar to a civil action to recover upon a life insurance policy issued to him, although the policy contains no special provision upon the subject. Burt *v.* Union Cent. L. Ins. Co., (C. C. A.) 105 Fed. Rep. 419, McCormick, J., *dissenting*, *affirmed* 187 U. S. 362. *Compare* McDonald *v.* Order of Triple Alliance, 57 Mo. App. 87.

1. Rule Applies Although there Is Mutuality of Parties. — Stone *v.* U. S., 167 U. S. 178, *affirming* (C. C. A.) 64 Fed. Rep. 667 [*distinguishing* Coffey *v.* U. S., 116 U. S. 436]; U. S. *v.* Schneider, 35 Fed. Rep. 107; U. S. *v.* Jaedicke, 73 Fed. Rep. 100. See also Britton *v.* State, 77 Ala. 202. *Compare* State *v.* Meek, 112 Iowa 338.

2. Penal and Civil Actions — Different Parties. — Hart *v.* M'Namara, 4 Price 154, note, 18 Rev. Rep. 690.

3. Penal and Civil Actions — Same Parties. — Piper *v.* Boonville, 32 Mo. App. 138. To the same effect, Terre Haute, etc., R. Co. *v.* People, 41 Ill. App. 513; Wabash R. Co. *v.* People, 78 Ill. App. 268; Illinois Cent. R. Co. *v.* People, 81 Ill. App. 176; Illinois Cent. R. Co. *v.* People, 84 Ill. App. 260. See also Rex *v.* Matthews, 5 Price 202. *Contra*, Riker *v.* Hooper, 35 Vt. 457, 82 Am. Dec. 646, *cited* Putnam *v.* Clark, 34 N. J. Eq. 532. For the difference of opinion among the authorities on the measure of proof required in civil and penal

9. Foreign Judgments. — Generally speaking, the law of *res judicata* has application to foreign as well as to domestic judgments, proceeding from the comity both of nations and of courts and the necessity of putting an end to legal controversy and relieving judicial tribunals of the burden of repeatedly adjudicating the same matters.[1] This branch of the subject will be found discussed elsewhere in this work.[2]

VIII. Order of Suits. — Where two or more actions are pending between the same parties at the same time, priority of commencement is of no moment in determining the effect of a judgment in one of them. If the opportunity still remains,[3] it matters not in which suit the subject of the controversy or any question involved is first adjudicated, the result may be set up as *res judicata* against the further litigation of the same matter in the others. The remedy of a party aggrieved by the pendency of several suits involving the same matters is before judgment by plea in abatement or application for a stay of proceedings.[4]

IX. Presumptions and Burden of Proof — 1. Presumption. — The presumption is that all matters which were embraced within the issues in the former action or suit were settled and determined by the adjudication therein.[5]

actions, see further the title Penalties and Penal Actions, Encyc. of Pl. and Pr., vol. 16, p. 295.

1. Law of Res Judicata Applicable to Foreign Judgments. — Tate *v.* Hunter, 3 Strobh. Eq. (S. Car.) 136. To the same effect, see Hopkins *v.* Lee, 6 Wheat. (U. S.) 109; Norton *v.* House of Mercy, (C. C. A.) 101 Fed. Rep. 382; Girardey *v.* Bessman, 77 Ga. 483; Baxter *v.* New England Marine Ins. Co., 6 Mass. 277, 4 Am. Dec. 125; Sayre *v.* Harpold, 33 W. Va. 553.

2. See the title Foreign Judgments, vol. 13, p. 974.

3. After Hearing. — Where the judgment did not exist at the time of the hearing in the other action and, therefore, could neither be pleaded nor put in eidence, it is not *res judicata* therein. McGill *v.* Holmes, 54 N. Y. App. Div. 630, 66 N. Y. Supp. 359, *affirmed* without opinion 168 N. Y. 647, 61 N. E. Rep. 1131.

Pending Appeal. — A plea of former adjudication may be made for the first time on appeal from the judgment in the other action. Pillow *v.* King, 55 Ark. 633; Moores *v* Moores, 36 Oregon 261. *Contra*, Eckert *v.* Binkley, 134 Ind. 614.

4. Order of Suits — *United States.* — Sharon *v.* Hill, 26 Fed. Rep. 337.

Alabama. — McDougald *v.* Rutherford, 30 Ala. 253; McDougald *v.* Dawson, 30 Ala. 553; Davis *v.* Bedsole, 69 Ala. 362.

California. — Martin *v.* Walker, 60 Cal. 94.

Illinois. — Rork *v.* McDavid, 91 Ill. App. 262.

Kansas. — Shepard *v.* Stockham, 45 Kan. 244; Chicago, etc., R. Co. *v.* Anderson County 47 Kan. 766; Bolen Coal Co. *v.* Whittaker Brick Co., 52 Kan. 747.

Louisiana. — Bourgeois *v.* Jacobs, 45 La. Ann. 1310, *citing* Townsend's Succession, 37 La. Ann. 408.

Minnesota. — Allis *v.* Davidson, 23 Minn. 442.

Missouri. — Williams *v.* Dent Iron Co., 30 Mo. App. 662, *citing* Poorman *v.* Mitchell, 48 Mo. 45.

New York. — Rinchey *v.* Stryker, 28 N. Y. 45, 84 Am. Dec. 324, 26 How. Pr. (N. Y.) 75; Matter of Nottingham, 88 Hun (N. Y.) 443; Jex *v.* Jacob, (Supm. Ct. Gen. T.) 7 Abb. N. Cas. (N. Y.) 452.

Pennsylvania. — Marsh *v.* Pier, 4 Rawle (Pa.) 273, 26 Am. Dec. 131, *citing* Garvin *v.* Dawson, 13 S. & R. (Pa.) 246; Finley *v.* Hanbest, 30 Pa. St. 190; Casebeer *v.* Mowry, 55 Pa. St. 419, 93 Am. Dec. 766; Westcott *v.* Edmunds, 68 Pa. St. 34.

Texas. — Williams *v.* Robinson, 63 Tex. 576.

Compare Sharon *v.* Sharon, 84 Cal. 424.

Contra, The Delta, 1 P. D. 393.

Query, Houstoun *v.* Sligo, 29 Ch. D. 448.

Merger of Cause of Action in First Judgment. — Burritt *v.* Belfry, 47 Conn. 323, 36 Am. Rep. 79; U. S. Bank *v.* Merchants' Bank, 7 Gill (Md.) 415; Duffy *v.* Lytle, 5 Watts (Pa.) 120; Brenner *v.* Moyer, 98 Pa. St. 274.

Foreign Judgments. — U. S. Bank *v.* Merchants' Bank, 7 Gill (Md.) 415; Graef *v.* Bernard, 162 Mass. 300.

Partition. — A decree for specific performance of a contract for the sale of land belonging to the estate of a decedent is not *res judicata* as between the heirs in an action for partition commenced prior to the filing of the decree; but although the title acquired by the decree is unimpeachable, the heirs may litigate as between themselves any issue they choose to make. Wagstaff *v.* Marcy, (Supm. Ct. Tr. T.) 25 Misc. (N. Y.) 121.

Abatement — Stay of Proceedings. — See the titles Another Suit Pending, Encyc. of Pl. and Pr., vol. 1, p. 750; Supersedeas and Stay of Proceedings, Encyc. of Pl. and Pr., vol. 20, p. 1252 *et seq.*

5. Presumption. — Bottorff *v.* Wise, 53 Ind. 32; Goble *v.* Dillon, 86 Ind. 327, 44 Am. Rep. 308; Orr *v.* Thomas, 3 La. Ann. 582; Villars *v.* Faivre, 36 La. Ann. 398; Williams *v.* Dent Iron Co., 30 Mo. App. 662; White *v.* Simonds, 33 Vt. 178, 78 Am. Dec. 620. See also Moser *v.* Guaranty Trust, etc., Co., (Pa. 1886) 2 Cent. Rep. 808.

Matter Not Properly Admissible. — Where the matter as to which a former adjudication is claimed is such that under the pleadings in the former action it should not have been admitted in evidence or submitted to the jury,

This presumption is not, however, conclusive, but may be rebutted and overthrown.[1]

2. Burden of Proof. — In order to sustain the plea of *res judicata*, it must either appear upon the face of the record of the former adjudication or be shown by extrinsic evidence[2] that the previous action was between the same parties and that a final decision upon the merits was reached therein in relation to the identical subject-matter which is before the court in the later action.[3] The burden of proving this where it does not clearly appear on the face of the record is upon the party who relies upon the plea of *res judicata* to sustain his side of the contention.[4] Where, however, the record of the former case is such that the same question appears to have been decided therein, the burden of disproving this rests upon the party who denies that such question was decided.[5]

the presumption that a court of general jurisdiction would not allow matter to be introduced in evidence and submitted to the jury which was not admissible under the pleading must prevail over any doubt which might be entertained upon the point. Meredith *v.* Santa Clara Min. Assoc., 56 Cal. 178.

1. Presumption May Be Rebutted. — Bottorff *v.* Wise, 53 Ind. 32; Williams *v.* Dent Iron Co., 30 Mo. App. 662.

Where Facts Are Conceded which show that the cause of action in the second action is distinct from the one merged in the former judgment, any presumption that the claim was included in the former adjudication is rebutted. Fox *v.* Phyfe, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 207.

2. As to the Admissibility of Extrinsic Evidence to aid, vary, or contradict the record, see the title RECORDS, *ante*.

3. Identity — *England.* — See Brandlyn *v.* Ord, 1 Atk. 571.

United States. — Russell *v.* Place, 94 U. S. 606; Merchants' International Steamboat Line *v.* Lyon, 4 McCrary (U. S.) 145; Ætna L. Ins. Co. *v.* Hamilton County, (C. C. A.) 117 Fed. Rep. 82; Thompson *v.* N. T. Bushnell Co., 80 Fed. Rep. 332; Washington, etc., Steam Packet Co. *v.* Sickles, 5 Wall. (U. S.) 592; Davis *v.* Brown, 94 U. S. 423.

Alabama. — Hanchey *v.* Coskrey, 81 Ala. 149.

Connecticut. — Supples *v.* Cannon, 44 Conn. 429; Sargent *v.* New Haven Steamboat Co., 65 Conn. 116.

District of Columbia. — Strong *v.* Grant, 2 Mackey (D. C.) 218.

Illinois. — Merrin *v.* Lewis, 90 Ill. 505; Palmer *v.* Sanger, 143 Ill. 34; Smalley *v.* Edey, 19 Ill. 207.

Iowa. — Reynolds *v.* Sutliff, 71 Iowa 549; Goodenow *v.* Litchfield, 59 Iowa 226; Munn *v.* Shannon, 86 Iowa 363.

Louisiana. — West *v.* His Creditors, 3 La. Ann. 529.

Massachusetts. — McDowell *v.* Langdon, 3 Gray (Mass.) 513.

Nebraska. — See Hartley *v.* Gregory, 9 Neb. 279.

New York. — Bissell *v.* Kellogg, 60 Barb. (N. Y.) 617, *affirmed* 65 N. Y. 432; Rudd *v.* Cornell, 171 N. Y. 114, *affirming* 58 N. Y. App. Div. 207.

Ohio. — Lore *v.* Truman, 10 Ohio St. 45; Miehle Printing Press, etc., Co. *v.* Andrews-Jones Printing Co., 10 Ohio Cir. Dec. 1, 18 Ohio Cir. Ct. 158.

Pennsylvania. — McCormick *v.* Brannan, 24 Pa. Co. Ct. 497, 8 Del. Co. Rep. (Pa.) 137, 14 York Leg. Rec. (Pa.) 143; Cummings *v.* Colgrove, 25 Pa. St. 150.

Tennessee. — Clariday *v.* Reed, (Tenn. Ch. 1898) 53 S. W. Rep. 302; Thompson *v.* Thompson, (Tenn. Ch. 1899) 54 S. W. Rep. 145; Cherry *v.* York, (Tenn. Ch. 1898) 47 S. W. Rep. 184.

Vermont. — McLaughlin *v.* Hill, 6 Vt. 20.

Virginia. — Chrisman *v.* Harman, 29 Gratt. (Va.) 494, 26 Am. Rep. 387.

Where a plea of *res adjudicata* sets up a judgment in a former suit between the same parties and in the same court and a copy of the former record is annexed, the question cannot be determined upon the pleadings, but there must be proof of the truth of the plea or an admission of its truth by the plaintiff. Glaze *v.* Bogle, 105 Ga. 295.

Where a Part of the Record and Papers of the Former Suit Have Been Lost, it is necessary for the party setting up a former adjudication, after showing this fact, to prove their contents, so that the court can know upon what issues the former judgment was rendered. Martin *v.* Weyman, 26 Tex. 460.

4. Burden of Proof — *Illinois.* — Ryan *v.* Potwin, 62 Ill. App. 134.

Indiana. — Dygert *v.* Dygert, 4 Ind. App. 276.

Kentucky. — Pepper *v.* Donnelly, 87 Ky. 261.

New York. — Zoeller *v.* Riley, 100 N. Y. 102, 52 Am. Rep. 157; Lewis *v.* Ocean Nav., etc., Co., 125 N. Y. 341; Eden *v.* Hartt, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 493.

Pennsylvania. — Kauff *v.* Messner, 4 Brews. (Pa.) 98.

Tennessee. — Fowlkes *v.* State, 14 Lea (Tenn.) 14. See also Jourolmon *v.* Massengill, 86 Tenn. 81.

And see also cases cited in preceding note.

Where There Is a Doubt upon a question of *res judicata*, the party against whom the plea is set up should have the benefit of that doubt. West *v.* His Creditors, 3 La. Ann. 532.

Jurisdiction. — Where a party pleads as a bar a judgment or order of a court of limited jurisdiction, it must be shown that the jurisdiction of the court had attached in order to give its order any force. Citizens Nat. Bank *v.* Jones, 22 Tex. Civ. App. 45.

5. Bagot *v.* Williams, 3 B. & C. 235, 10 E. C. L. 62, 5 Dowl. & R. 87, 27 Rev. Rep. 340; Phillips *v.* Berick, 16 Johns. (N. Y.) 137, 8 Am. Dec. 299; Dear *v.* Reed, 37 Hun (N. Y.)

a. EVIDENCE. — In making good the plea of *res judicata*, the evidence must necessarily vary with the nature of the issues presented in the first trial. Sometimes the record makes full proof of the subject-matter, both of the suit and the defense, as it does of the judgment pronounced.[1] At others the identity and scope of the contestation do not appear on the face of the papers. When such is the case, other sources of information must be resorted to.[2] If necessary, it is permissible to prove what testimony was given on the former trial,[3] and the rulings of the court,[4] as a means, and the only means, of showing precisely what issues and inquiries of fact had been submitted to the trying body; this with the view, and solely with the view, of determining the identity of the two contentions. On a second trial it can never become an inquiry whether the first issue was rightly determined, either in matters of law or of fact. Whether the issue was within the scope of the pleadings, whether it was the same as that on trial, and whether it was submitted and determined on its merits, are the subject and extent of permissible testimony on the defense of *res judicata*.[5]

b. QUESTIONS FOR COURT AND JURY. — It may be laid down as a general rule that the nature, effect, and conclusiveness of the prior judgment is a question for the court, while the identity of the parties and the subject-matter, where this is disputed and evidence extrinsic to the record introduced upon the question, is for the jury.[6]

594; White *v.* Simonds, 33 Vt. 178, 78 Am. Dec. 620. See also Seddon *v.* Tutop, 6 T. R. 607, 1 Esp. 401; Agate *v.* Richards, 5 Bosw. (N. Y.) 456.

1. Haas *v.* Taylor, 80 Ala. 459.

The Terms of the Judgment Itself Should Govern, and not the statement of the judge made in relation to it in some other proceeding that there was a clerical error in said terms. Bourg *v.* Gerding, 33 La. Ann. 1369.

Pleadings and Decree to Be Considered. — In determining the question of *res judicata*, the court should not look solely to the issues and the verdict thereon in the prior suit, but should also take into consideration the pleadings upon which the issues were directed and the decree based upon the issues. Robinson *v.* Duleep Singh, 11 Ch. D. 798, 48 L. J. Ch. 758, 39 L. T. N. S. 313, 27 W. R. 21.

2. Haas *v.* Taylor, 80 Ala. 459. See the title RECORDS, *ante*.

A Report or Note of the Proceedings at a trial, drawn up by the presiding judge for the purpose of being submitted to the divisional court in Ireland, on an application for a new trial, is admissible evidence of what took place before him and what he decided. Houstoun *v.* Sligo, 29 Ch. D. 448, 52 L. T. N. S. 96.

The Stenographic Notes of the former trial are admissible to establish the precise point determined in the former action. Charles E. Henry Sons Co. *v.* Mahoney, 97 Ill. App. 313.

The Opinion of the Court is admissible in evidence for the purpose of showing the nature of the action and the issues which were submitted to the court for its consideration, and the like. Miles *v.* Strong, 68 Conn. 273; Cummings *v.* Baker, 16 App. Cas. (D. C.) 1; Anderson *v.* Reid, 16 App. Cas. (D. C.) 60; Fowlkes *v.* State, 14 Lea (Tenn.) 18. *Contra*, Keech *v.* Beatty, 127 Cal. 177; Matter of Broderick, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 534. See the title RECORDS, *ante*.

Instructions to Agent in Relation to Former Suit. — Fuller *v.* Gray, 124 Ala. 388.

Evidence of Jurors. — It is competent to prove even by jurors that the question actually decided at the first trial was not the one at issue in the second. Follansbee *v.* Walker, 74 Pa. St. 306; Susquehanna Mut. F. Ins. Co. *v.* Mardorf, 152 Pa. St. 22. But the secret deliberations of the jury, or the grounds of their proceedings in arriving at a verdict, are not admissible in evidence even though the record does not show with certainty what was adjudged. Rubel *v.* Title Guarantee, etc., Co., 101 Ill. App. 439, *affirmed* 199 Ill. 110.

Sufficiency of Evidence. — See Alabama Iron, etc., Co. *v.* Austin, (C. C. A.) 94 Fed. Rep. 897; Munn *v.* Shannon, 86 Iowa 363; New York *v.* Brown, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 218.

Admission of Counsel. — See Merchants' International Steamboat Line *v.* Lyon, 4 McCrary (U. S.) 145.

3. Haas *v.* Taylor, 80 Ala. 459.

But where a judgment in a former action is introduced in evidence the defendant therein cannot be allowed to show by the testimony of witnesses that he gave no testimony in support of his defenses where such defenses were not withdrawn, for if the defenses were not withdrawn, and were not supported by testimony, adjudications must have been made competently against the defendant. Lorillard *v.* Clyde, 55 N. Y. Super. Ct. 308.

4. Haas *v.* Taylor, 80 Ala. 459.

Instructions. — Where a copy of the charge of the court as filed of record in the first case has been furnished, the court may examine it to determine, if possible, on what point the former recovery was had. Kapp *v.* Shields, 17 Pa. Super. Ct. 524. See also Charles E. Henry Sons Co. *v.* Mahoney, 97 Ill. App. 313.

5. Haas *v.* Taylor, 80 Ala. 459.

6. **Questions for Court and Jury.** — Baxter *v.* Thede, 96 Ill. App. 499; Munn *v.* Shannon, 86 Iowa 363; Hahn *v.* Miller, 68 Iowa 745; Anderson *v.* Rogge, (Tex. Civ. App. 1894) 28 S. W. Rep. 106; Gray *v.* Pingry, 17 Vt. 419, 44

X. WAIVER OF ESTOPPEL. — A party entitled to plead a judgment as an estoppel may waive his right thereto by agreement with the opposing party,[1] or by failing to plead the former judgment and permitting the issue to be tried again.[2]

Inconsistent Admission. — So, if a party makes an admission of record inconsistent with a former judgment which he might have pleaded as an estoppel, his right to make such plea is thereafter waived.[3]

RESOLUTION. (See also the title ORDINANCES, vol. 21, pp. 947, 965.) — See note 4.

RESOLVE. — To resolve is to express as an opinion or determination by resolution or vote.[5]

RESORT. (See also the titles DISORDERLY HOUSES, vol. 9, p. 508; GAMING, vol. 14, p. 674.) — A resort is a place of frequent assembly; a haunt.[6] To resort means to go to; to frequent.[7]

Am. Dec. 345; Warner *v.* Mullane, 23 Wis. 450.

Where the undisputed evidence shows that the language used in a counterclaim set up by the present plaintiff in a former action against him by the present defendant was in legal effect precisely the same as that used in the present case to describe the cause of action and there is no pretense in the evidence that the causes of action are not identical, there is under these circumstances no question of identity to submit to the jury. Munn *v.* Shannon, 86 Iowa 363.

1. Waiver by Agreement. — Wilson *v.* St. Louis, etc., R. Co., 87 Mo. 431.

But a party cannot waive the benefit of an estoppel to the prejudice of another. Pray *v.* Hegeman, 98 N. Y. 351.

2. Failure to Plead Estoppel. — Semple *v.* Ware, 42 Cal. 619; House *v.* Lockwood, 63 Hun (N. Y.) 630, 17 N. Y. Supp. 817; Cherry *v.* York, (Tenn. Ch. 1898) 47 S. W. Rep. 184.

The necessary effect of the estoppel is to preclude all inquiry as to the truth of the matter determined, and when a party who is entitled to set up the estoppel does open the inquiry into the truth of the matter, he cannot complain that the other party pursues it without regard to the estoppel. Megerle *v.* Ashe, 33 Cal. 74.

So, if a defendant instead of pleading *res judicata* sets up the issues on which the judgment was rendered, the plaintiff cannot complain that evidence of such issues was not excluded. Seymour *v.* Hubert, 92 Pa. St. 499.

Estoppel Against Estoppel. — See *supra*, this title, *Nature and Statement of Principles — Estoppel Against Estoppel.*

3. Inconsistent Admission. — Crumlish *v.* Shenandoah Valley R. Co., 45 W. Va. 567.

4. Motion and Resolution. — A charter of a city required that ordinances and ***resolutions*** be approved by the mayor. It was contended that the approval of the mayor was not necessary to a mere verbal motion. In refusing to sustain this contention, the court said: "A ***resolution***, in the sense used in the charter, is nothing more than the formal expression of the will of the city council, and a motion is a proposal made to evoke action upon the part of the council or other assembly. When the motion had been acted upon, it became the formal expression of the will, or ***resolution***, of the city council." El Paso Gas, etc., Co. *v.* El Paso, 22 Tex. Civ. App. 312.

But in Galveston *v.* Morton, 58 Tex. 414, the court said: "The charter requires that all ordinances and ***resolutions***, before they take effect, shall be placed in the clerk's office for action by the mayor. This was neither an ordinance nor a ***resolution***, in the proper sense of the term, so as to be liable to objections on the part of the mayor. It is not termed such in the proceedings of the council, and has none of the features of either. It was a verbal motion, and referred solely to the acceptance of a proposed contract on the part of appellee."

5. Resolve — *In re* Senate File 31, 25 Neb. 876, *quoting* Webst. Dict. See ENACT, vol. 11, p. 20.

6. Resort. — Matter of Sic, 73 Cal. 152, *per* Paterson, J., *concurring*, *quoting* Webst. Dict. This case arose upon the construction of an ordinance directed against "places of ***resort***" for the smoking of opium.

Street or Alley. — In Bandalow *v.* People, 90 Ill. 220, it was said: "Webster, as definitions of the word ***resort***, gives the following: 'Act of visiting,' 'assembly, meeting,' 'concourse, frequent assembling.' As a place of ***resort:*** 'The place frequented, as alehouses, or the resort of the idle and dissolute.' Under these definitions we perceive no reason, when the evidence is considered, why the street and alley adjoining the brewery might not be regarded as places of public ***resort*** within the meaning of the act."

7. The verb ***resort*** implies an assembling or going to or frequenting in numbers. Winslow *v.* State, 5 Ind. App. 315. See also People *v.* Gastro, 75 Mich. 127.

Physical Resort — Place for Betting with Persons Resorting Thereto. — See the title GAMING HOUSES, vol. 14, p. 723.

Disorderly Houses. — It has been held that the word ***resort***, as used in statutes prohibiting the keeping of houses of ill fame ***resorted*** to for the purpose of lewdness and prostitution, implies that a house must be visited frequently for such purpose, and that a single act of illicit intercourse committed at a house does not bring the owner within the statute. See the title DISORDERLY HOUSES, vol. 9, pp. 519, 520, and see State *v.* Garing, 75 Me. 591; Com. *v.* Stahl, 7 Allen (Mass.) 305.

But in State *v.* Ah Sam, 15 Nev. 32, 37 Am,

RESOURCES. — The word "resources" means money or any property that can be converted into supplies; means of raising money or supplies; capabilities of producing wealth or supplying necessary wants; available means or capability of any kind.[1]

RESPECT. — See note 2.

RESPECTABLE. — See note 3.

RESPECTIVE — RESPECTIVELY. (See also the titles REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS, *ante*, p. 374; WILLS.) — The word "respectively" is defined as follows: "As singly or severally considered; singly in the order designated."[4]

RESPITE. (See also the title REPRIEVE, PARDON, AND AMNESTY, *ante*, p. 547.) — A respite is a temporary suspension of the execution of a sentence; a delay, forbearance, or continuation of time.[5]

Rep. 457, where a statute forbade any person to *resort* to any house or other place for the purpose of using opium, it was held that to go once was an infraction of the law. *Compare* Matter of Sic, 73 Cal. 152.

1. Resources. — Webst. Dict., *followed* in Ming *v.* Woolfolk, 3 Mont. 386. This case arose upon the construction of a written contract in which the respondent had agreed to apply, in payment of a certain debt, any sums that he might receive from "any *resources* whatever of the Park Ditch Company." It was held, in conformity with the above definition, that a sum of money received by the respondent from the sale of the water of the Park Ditch Company was obtained from the *resources* of the company.

"Resources" Does Not Mean Money in Hand. A debtor may have ample *resources* to pay his debts as they become due, and yet have no money in his pocket or in bank. Such a debtor is not insolvent. Sacry *v.* Lobree, 84 Cal. 49.

Schools. — A statute authorized counties to appropriate money to provide for the exhibit of their *resources* at an exposition. In construing this statute in Shelby County *v.* Tennessee Centennial Exposition Co., 96 Tenn. 666, the court said: "In the broad and liberal sense, the public schools of a county may well be classed among her *resources*. Obviously, the word *resources*, as employed in the act of the legislature and in the resolutions of the County Court, was intended to include products of farm, forest, manufacture, art, education, etc."

2. In Respect To. — A statute of New York provided that when any crime should be committed "in *respect* to" any portion of the freight of any railroad train making a trip on a railroad in the state, an indictment therefor might be found in any county through which the train passed. In People *v.* Dowling, 84 N. Y. 487, the court, by Folger, C. J., said: "The language of the statute is not technical nor precise. The word *respect* in it is not used with a clear notion of its primary or its acquired meaning. Yet it is plain that the legislature meant any offense which, in the doing of it, acted upon the freight as the subject of the commission of the offense. To receive the freight, after it had been stolen, with guilty knowledge was such an offense."

3. Respectable and Credible — Witnesses. — See CREDIBLE, vol. 8, p. 230, note.

Respectable and Reputable. — See Bowling *v.* Bowling, 8 Ala. 539, and see the title WILLS.

4. Respectively. — Wolf *v.* Lake Erie, etc., R. Co., 55 Ohio St. 535, *quoting* Stand. Dict.

A will contained the following provisions: "I wish * * * that the property, so as above given to said three wives of my three sons, be for the education of their children and the support of their families *respectively*." In construing this the court said: "The use of the word *respectively* indicates that each wife may hold her share of the estate in trust, separately from the others." Clifford *v.* Stewart, 95 Me. 48.

Public Officers. — An act regulating fees and salaries of certain public officers was to take effect "after the present term of the officers hereinbefore named, *respectively*, shall have expired." In construing this statute in Montgomery County *v.* Glass, 4 Kan. App. 291, the court said: "The word *respectively*, as used in this statute, is intended to limit and qualify the words 'after the present term of the officers hereinbefore named shall have expired,' and applies to each of said officers singly; and as thus construed the act was to go into force, as to each officer named, as the term of his office expired, and for this reason this act is obnoxious to the constitutional provision requiring the legislature to fix a definite time for all of its acts to take effect."

Illegitimate Children. — A statute enumerated a number of cases in which an illegitimate child might inherit from one of its parents, and further provided that "in either of the foregoing cases such child and its issue shall inherit from its parents *respectively*, and from their lineal and collateral kindred." In construing this statute the court said: "The right thus given to the child to inherit from the kindred of his *respective* parents is coextensive with his right to inherit from his *respective* parents. The use of the word *respectively* strengthens the construction thus given to the statute. The word conveys the idea that such child shall inherit, in each case, from the parent or parents, of whom the act has declared him to be an heir, and from the kindred of such parent or parents." Messer *v.* Jones, 88 Me. 355. See generally the title SUCCESSION.

5. Respite. - Mishler *v.* Com., 62 Pa. St. 60.

Rev. Civ. Code La. (1900), Art. 3084, defines a *respite* to be "an act by which a debtor who is unable to satisfy his debts at the moment

RESPONDEAT SUPERIOR. — See the titles AGENCY, vol. 1, p. 930; MASTER AND SERVANT, vol. 20, p. 3; and the cross-references under those titles.

RESPONDENT. (See also the title PARTIES TO ACTIONS, 15 ENCYC. OF PL. AND PR. 456.) — The party who answers an appeal from the judgment of an inferior court is called the respondent, the appellee; and the party who answers a petition, bill, or libel in chancery or admiralty proceedings is also called the respondent.

A Corespondent is one of the several respondents in a cause. In English divorce proceedings, when the cause assigned is the adultery of the wife, the paramour may be joined with the wife in the defense, and is called the corespondent.[1]

RESPONDENTIA. — See the title BOTTOMRY AND RESPONDENTIA, vol. 4, p. 736.

RESPONSIBLE — RESPONSIBILITY. (See also LIABILITY — LIABLE, vol. 18, p. 846.) — Responsible means able to respond or to answer in accordance with what is expected or demanded.[2]

transacts with his creditors, and obtains from them time or delay for the payment of the sums which he owes to them." See also Kelly-Goodfellow Shoe Co. *v.* Fluker, 51 La. Ann. 193; Rasch *v.* His Creditors, 3 Rob. (La.) 409.

1. See the title DIVORCE, 7 ENCYC. OF PL. AND PR. 59.

2. **Responsible.** — Webst. Dict., *followed* in People *v.* Dorsheimer, (Supm. Ct. Spec. T.) 55 How. Pr. (N. Y.) 120.

A promise "to be *responsible*" for the contract of another is merely a guaranty, and not a suretyship. Bickel *v.* Auner, 9 Phila. (Pa.) 499, 29 Leg. Int. (Pa.) 20. See also Gilbert *v.* Henck, 30 Pa. St. 209, and see the titles GUARANTY, vol. 14, p. 1127; SURETYSHIP.

Credit and Responsibility. — In Norris *v.* Graham, 33 Md. 58, the plaintiff sued for a sum of money due for wood furnished to a third party on the credit and guaranty of the defendant, and the trial court instructed the jury that if it found from the evidence that the wood in question was furnished "on the credit and *responsibility* of the defendant," then the verdict must be for the plaintiff. In holding this instruction wrong, the appellate court said: "The credit and *responsibility* of a party may attach as well to his liability as security as to his sole undertaking. When, therefore, the general term 'credit and *responsibility*' is used, it may include a collateral as well as an original and exclusive liability."

Surety. (See also the title SURETYSHIP.) — In Chenault *v.* Walker, 14 Ala. 155, upon the meaning of the words "solvent and *responsible*, as applied to sureties, the court said: "By the terms 'solvent and *responsible*' we must understand, it was meant, that the sureties proposed were capable and able to discharge the obligation to be contracted; in other words, that they were good for the penalty of the bond. There is no law which makes it indispensable that such sureties should be the proprietors of land; it is enough if they own other property which is tangible and available for the payment of debts."

Responsible and Reliable Synonymous. — People *v.* Kent, 160 Ill. 655.

Responsible Person — Rule of Court. — A rule of court provided that the next friend of the wife who prosecuted a suit for divorce should be a *responsible* person. In construing this rule the court said: "By the term *responsible*, in this rule, is meant that the next friend should be possessed of property sufficient to pay the costs which may be adjudged against him, if in the end it should appear that the suit was instituted without any reasonable or justifiable cause. The statute having fixed the amount of security for costs in this court at two hundred and fifty dollars, the next friend should, by analogy, be worth at least that sum over and above all his debts." Robertson *v.* Robertson, 3 Paige (N. Y.) 388.

Same — Guardian ad Litem. — See Matter of Mang, 50 N. Y. Super. Ct. 96; McDonald *v.* Brass Goods Mfg. Co., (Supm. Ct.) 2 Abb. N. Cas. (N. Y.) 434.

Same — Costs. — A statute requiring that a writ be indorsed by some "*responsible* person," where the plaintiff resides out of the state, intends that the indorser shall possess sufficient pecuniary ability to pay the costs which may be recovered against the plaintiff. Farley *v.* Day, 26 N. H. 531, the court saying: "It would seem that the meaning of the word *responsible* could not admit of any doubt in this connection. Strictly speaking, the word means 'liable, answerable,' rather than 'able to discharge an obligation;' but the latter is very clearly the sense in which it is used in the statute." See generally the title COSTS, 5 ENCYC. OF PL. AND PR. 100.

Financial Responsibility. — In Clopton *v.* Cozart, 13 Smed. & M. (Miss.) 368, it was said: "It [a certificate] was false in one important particular; it stated that George was a '*responsible* man.' There seems to be no room for doubt as to the meaning of the parties in the use of this word *responsible*. The object of the instrument explains what was meant. George wished to buy on a credit, and *responsible*, in that connection, must have been intended to mean capability to discharge an obligation."

Responsible Citizens. — A testator bequeathed a part of his estate for the purpose of founding a school at a certain town, provided that "*responsible* citizens" of the place should pledge a certain sum for the same purpose within six months after his decease. It was held that a number of subscriptions for small amounts by a large number of persons of limited means, some of them conditional, was

RESPONSIBLE BIDDER. (See also the titles AUCTIONS AND AUCTIONEERS, vol. 3, p. 487; JUDICIAL SALES, vol. 17, p. 948; MUNICIPAL CORPORATIONS, vol. 20, p. 1123; PUBLIC OFFICERS, vol. 23, p. 314; SHERIFFS' SALES; WORKING CONTRACTS; and see LOWER — LOWEST, vol. 19, p. 599.) — The term "responsible bidder" has been held not to refer to pecuniary responsibility alone, but to include judgment, skill, ability, capacity, and integrity; and therefore officers intrusted with the duty of awarding a contract to the lowest responsible bidder must exercise official discretion in determining the question, and cannot be compelled by mandamus to award a contract to a particular bidder merely because he has offered the lowest bid and tendered a sufficient bond.[1]

REST AND RESIDUE. — See RESIDUE — RESIDUARY, *ante*, p. 701.

RESTAURANT. (See also SALOON, *post*.) — See note 2.

RESTITUTION. (See also the title RESTITUTION, 18 ENCYC. OF PL. AND PR. 869.) — See note 3.

RESTITUTION OF CONJUGAL RIGHTS. — See the titles HUSBAND AND WIFE, vol. 15, pp. 812, 814; MARRIAGE, vol. 19, p. 1217.

RESTITUTION OF STOLEN GOODS. — See the title LARCENY, vol. 18, p. 532.

RESTITUTION, WRIT OF. — See the title RESTITUTION, 18 ENCYC. OF PL. AND PR. 869. See also the title LARCENY, vol. 18, p. 532.

RESTORE. (*Compare* RESTITUTION, WRIT OF, *ante*.) — See note 4.

not a subscription by "*responsible* citizens" as contemplated by the testator. Yale College *v.* Runkle, 10 Biss. (U. S.) 300.

1. Responsible Bidder. — Kelly *v.* Chicago, 62 Ill. 282; People *v.* Kent, 160 Ill. 655; State *v.* Rickards, 16 Mont. 149, 50 Am. St. Rep. 476; Hoole *v.* Kinkead, 16 Nev. 220; McDermott *v.* Jersey City, 56 N. J. L. 275; People *v.* Dorsheimer, (Supm. Ct. Spec. T.) 55 How. Pr. (N. Y.) 118; Com. *v.* Mitchell, 82 Pa. St. 348; Douglass *v.* Com., 108 Pa. St. 559; Interstate Vitrified Brick, etc., Co. *v.* Philadelphia, 164 Pa. St. 477; Reuting *v.* Titusville, 175 Pa. St. 512.

"The lowest *responsible* bidder is one who complies with all the requirements of the statute, not merely one whose bid is less than his competitors." Boseker *v.* Wabash County, 88 Ind. 267.

2. Restaurant. — A *restaurant* is an eating house; a place where something to eat, ready prepared or which can readily be prepared, may be obtained. State *v.* Hogan, 30 N. H. 268, in which case it was held that a shop used for the manufacture of tobacco, snuff, and cigars, and in which beer was sold by the glass, was not a *restaurant*.

In Richards *v.* Washington F., etc., Ins. Co., 60 Mich. 426, it was said that the word *restaurant* has no "defined meaning, and is used indiscriminately for all places where refreshments can be had, from the mere eating house or cook shop to the more common shops or stores, where the chief business is vending articles of consumption and confectionery, and the furnishing of eatables to be consumed on the premises is subordinate."

Restaurant and Inn Compared. — See the title INNS AND INNKEEPERS, vol. 16, p. 512.

Restaurant Keeper — Laborer. — See LABOR — LABORER, vol. 18, p. 77, note.

3. Restitution — Ships and Shipping. — In The Saginaw, 95 Fed. Rep. 704, in holding that a vessel was not entitled to recover demurrage where injured in a collision without her fault, where it did not appear how much the owner had actually lost by her detention while under repairs, the court said: "*Restitution* means indemnity for actual pecuniary loss, and nothing more." See generally the title SHIPS AND SHIPPING.

4. Restore. — In Esson *v.* Tarbell, 9 Cush. (Mass.) 414, Shaw, C. J., said: "The right to attach mortgaged property is conditional. If the attaching officer has notice of the mortgagee's debt, and it is demanded of him, and not paid within a time limited (Rev. Stat., c. 9, §§ 78, 79), the *casus fœderis* does not exist, and the statute expressly declares that the property shall be *restored* to the mortgagee. If it be argued that the word *restored* implies that the property, at the time of the attachment, was taken out of the possession of the mortgagee, we think one answer is, and the law assumes, that it is taken out of the constructive possession of the mortgagee. But another, and perhaps more satisfactory, answer is that *restore*, by the obvious meaning of the context and general tenor and object of the law, has a larger and more generic meaning, equivalent to the direction that it shall be surrendered and delivered to the mortgagee, from whom it is detained by the officer without law and against right. If there be any question respecting the right of possession as between the mortgagor and mortgagee, it would not be affected by such a surrender."

Previous Existence. — "The word *restore* relates to something having a previous existence." Chicago, etc., R. Co. *v.* Milwaukee, 97 Wis. 433.

Repair. (See also REPAIR, *ante*, p. 470.) — In People *v.* Highway Com'rs, 158 Ill. 197, it was said: "'To *restore*' and 'to renew' are given by lexicographers as synonyms of 'repair.'"

Obstruction. — A railroad charter provided that when the railroad company should cross with its road any watercourse, highway, etc., it should *restore* such highway, etc., to its

RESTRAIN — RESTRAINT. — To restrain means to curb; to check; to repress; to debar; to prevent; to hinder.[1] A power to regulate and restrain is not equivalent to a power to prohibit or suppress.[2]

RESTRAINING ORDER. — See the title INJUNCTIONS, vol. 16, p. 349.

RESTRAINING TRADE. — See INJURY, INJURE, ETC., vol. 16, p. 500, note, and see the title RESTRAINT OF TRADE, *post*, p. 841.

RESTRAINT OF LIBERTY. — See LIBERTY, vol. 18, p. 1124.

RESTRAINT OF MARRIAGE. — See the titles CONDITIONS, vol. 6, p. 512; ILLEGAL CONTRACTS, vol. 15, p. 954; WILLS.

RESTRAINT OF PRINCES OR PEOPLE. — See the titles CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES, vol. 7, p. 226; MARINE INSURANCE, vol. 19, p. 1033.

former state, or in a sufficient manner not to impair its usefulness. It was held that the word *restore* imported a physical impairment of the roadbed of a highway. The court said: "It is an apt word when used with reference to such a road, but is inappropriate when used with reference to a road physically complete, and to indicate the removal of an obstruction which has no connection with the traveled path, but is an obstruction only as it is calculated at certain times to frighten horses." State *v.* New Haven, etc., R. Co., 45 Conn. 344.

1. Restrain. — Ogden *v.* Madison, 111 Wis. 413, in which case it was held that under a power to "suppress and *restrain* disorderly houses," an ordinance declaring the keeping of such a house to be a misdemeanor and imposing a punishment by fine was valid. See also the title DISORDERLY HOUSES, vol. 9, p. 508.

Restraint — Blockade. (See also the title MARINE INSURANCE, vol. 19, pp. 1029, 1033.) — In Olivera *v.* Union Ins. Co., 3 Wheat. (U. S.) 189, it was said: "If a blockade be a *restraint*, the insured are protected against it, although it be neither an 'arrest' nor a 'detainment.' What, then, according to common understanding, is the meaning of the term *restraint*? Does it imply that the limitation, restriction, or confinement must be imposed by those who are in possession of the person or thing which is limited, restricted, or confined; or is the term satisfied by a restriction created by the application of external force? If, for example, a town be besieged, and the inhabitants confined within its walls by the besieging army, if in attempting to come out they are forced back, would it be inaccurate to say that they are *restrained* within those limits? The court believes it would not; and if it would not, then with equal propriety may it be said, when a port is blockaded, that the vessels within are confined or *restrained* from coming out. The blockading force is not in possession of the vessels inclosed in the harbor, but it acts upon and *restrains* them. It is a *vis major*, applied directly and effectually to them, which prevents them from coming out of port. This appears to the court to be, in correct language, 'a *restraint*' of the power imposing the blockade, and when a vessel attempting to come out is boarded and turned back, this *restraining* force is practically applied to such vessel."

Same — Constraint. — The word *restraint*, in a married woman's acknowledgment, has been held to be equivalent to "constraint." Edmondson *v.* Harris, 2 Tenn. Ch. 433.

2. Not Equivalent to Power to Prohibit or Suppress. (See also REGULATE — REGULATING — REGULATION, *ante*, p. 243, and see the title INTOXICATING LIQUORS, vol. 17, pp. 283, 286.) — Emporia *v.* Shaw, 6 Kan. App. 808; Stebbins *v.* Mayer, 38 Kan. 573, 23 Am. & Eng. Corp. Cas. 140; Matter of Hauck, 70 Mich. 396; *In re* Snell, 58 Vt. 209.

But where the corporate authorities of a town were authorized "to license, tax, regulate, and *restrain*" the retailing of spirituous liquors within the corporate limits, the court, in construing the word *restrain*, as thus used, said: "Its primary meaning is to keep from action; to repress; to prevent; to debar. It is, in the connection here used, the legal equivalent of the verb 'to prohibit.'" Smith *v.* Warrior, 99 Ala. 482.

Some of the significations of the word *restrain* are "to keep in, hold in, abridge, limit, confine. Each of these definitions clearly imports that the thing shall be permitted to exist only in a modified form; that it shall not be suppressed, but regulated." Smith *v.* Madison, 7 Ind. 89, holding that where, by the charter of a city, the common council was empowered to "suppress and restrain" tenpin alleys, etc., the common council might, in its discretion, *restrain* and regulate such places, or might suppress them. Smith *v.* Madison, 7 Ind. 89.

Restrain and Regulate Compared. (See also REGULATE — REGULATING — REGULATION, *ante*, p. 243.) — In Nashville *v.* Linck, 12 Lea (Tenn.) 512, Freeman, J., *concurring*, said: "The word *restrain* is not strictly synonymous with regulate, having a more limited meaning, the essential element of which is 'hold in or back, curb, check.' But the word 'regulate' inevitably involves all that is meant by *restrain*, and more, as it carries with it the affirmative element somewhat of continued action in a defined direction."

But in Chicago Packing, etc., Co. *v.* Chicago, 88 Ill. 226, it was said that "the word *restrain* is not more comprehensive than 'regulate.'"

Restrain and License. — A grant of a power to restrain, in a city charter, has been held to confer the power to license. Chicago Packing, etc., Co. *v.* Chicago, 88 Ill. 226; Smith *v.* Madison, 7 Ind. 86; State *v.* Clarke, 54 Mo. 17; *In re* Snell, 58 Vt. 209. And see the titles INTOXICATING LIQUORS, vol. 17, pp. 283, 284; OCCUPATION, BUSINESS, AND PRIVILEGE TAXES, vol. 21, p. 788.

RESTRAINT OF TRADE.

By Herbert Wharton Beall.

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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see in this work the titles APPRENTICES, vol. 2, p. 488; *BY-LAWS*, vol. 5, p. 86; *CONTRACTS*, vol. 7, p. 88; *GAMBLING CONTRACTS*, vol. 14, p. 612; *GOOD WILL*, vol. 14, p. 1085; *ILLEGAL CONTRACTS*, vol. 15, p. 986; *INTERFERENCE WITH CONTRACT RELATIONS*, vol. 16, p. 1109; *INTERSTATE COMMERCE*, vol. 17, p. 34; *LABOR COMBINATIONS*, vol. 18, p. 80; *LIQUIDATED DAMAGES*, vol. 19, p. 394; *MONOPOLIES AND CORPORATE TRUSTS*, vol. 20, p. 844; *POLICE POWER*, vol. 22, p. 914.

I. Scope of Title. — Restraint of trade may be imposed either by contract between parties or by legislative provisions, such as muncipal and police by-laws and regulations. The bulk of the cases deal with restraint by contract. The title is a very broad one with many ramifications. Various other titles of this work deal with the subject in other of its aspects than those here discussed.

II. Restraint by Contract — 1. The General Rule. — It was a rule of the ancient common law that all contracts in restraint of trade were void. How this rule has been modified and qualified, and exceptions to it admitted, and what is the present state of the law, will be set forth in the following sections.[1]

2. Origin of the Rule. — It has been said that the law in relation to contracts in restraint of trade grew out of the English law of apprenticeship, by which no person could exercise any regular trade or handicraft except after a long apprenticeship and a formal admission to the proper guild or company. Under these early rules a tradesman must continue to work at his trade or go without work, and consequently become a burden upon the community.[2] Several of the cases contain valuable historical discussions of this branch of the law.[3]

1. The General Rule. — It is useless and would be almost impossible to cite all the cases in which this general rule has been laid down, usually as *dictum*. The following leading cases contain valuable discussions either of the general rule or of some of its numerous qualifications.

England. — Badische Anilin, etc., Fabrik *v.* Schott, (1892) 3 Ch. 447; Collins *v.* Locke, 4 App. Cas. 674; Nordenfelt *v.* Maxim-Nordenfelt Guns, etc., Co., (1894) A. C. 535; Homer *v.* Ashford, 3 Bing. 328, 11 E. C. L. 124; Horner *v.* Graves, 7 Bing. 735, 20 E. C. L. 310; Leather Cloth Co. *v.* Lorsont, L. R. 9 Eq. 345; Mallan *v.* May, 11 M. & W. 653; Ward *v.* Byrne, 5 M. & W. 548; Mitchel *v.* Reynolds, 1 P. Wms. 181, 1 Smith Lead. Cas. 417; Whittaker *v.* Howe, 3 Beav. 383; Davies *v.* Davies, 36 Ch. D. 359; Young *v.* Timmins, 1 Tyrw. 226; Atkyns *v.* Kinnier, 4 Exch. 776; Hitchcock *v.* Coker, 6 Ad. & El. 439, 33 E. C. L. 98; Rousillon *v.* Rousillon, 14 Ch. D. 351; Mystery of Gunmakers Soc. *v.* Fell, Willes 388.

United States. — Oregon Steam Nav. Co. *v.* Winsor, 20 Wall. (U. S.) 64; U. S. *v.* Addyston Pipe, etc., Co., (C. C. A.) 85 Fed. Rep. 271.

Alabama. — Mobile *v.* Yuille, 3 Ala. 141; McCurry *v.* Gibson, 108 Ala. 451, 54 Am. St. Rep. 177.

Illinois. — Union Strawboard Co. *v.* Bon field, 193 Ill. 425.

Iowa. — Heichew *v.* Hamilton, 3 Greene (Iowa) 596.

Massachusetts. — Alger *v.* Thacher, 19 Pick. (Mass.) 51, 31 Am. Dec. 119; Anchor Electric Co. *v.* Hawkes, 171 Mass. 104, 68 Am. St. Rep. 403.

Michigan. — Hubbard *v.* Miller, 27 Mich. 19, 15 Am. Rep. 153; Beal *v.* Chase, 31 Mich. 491.

Missouri. — Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 73 Mo. 389, 39 Am. Rep. 519.

New Jersey. — Brewer *v.* Marshall, 19 N. J. Eq. 537, 97 Am. Dec. 679; Trenton Potteries Co. *v.* Oliphant, 58 N. J. Eq. 507, 78 Am. St. Rep. 612.

New York. — Chappel *v.* Brockway, 21 Wend. (N. Y.) 159; Ross *v.* Sadgbeer, 21 Wend. (N. Y.) 166; Lawrence *v.* Kidder, 10 Barb. (N. Y.) 641; Diamond Match Co. *v.* Roeber, 106 N. Y. 485, 60 Am. Rep. 464; Leslie *v.* Lorillard, 110 N. Y. 519.

West Virginia. — West Virginia Transp. Co. *v.* Ohio River Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527.

2. Origin of the Rule. — See 2 Parsons on Contracts 749.

3. See especially Diamond Match Co. *v.*

3. Partiality — *a.* IN GENERAL. — The rule so often repeated, that a contract in total restraint of trade as regards both space and time is void, is in the vast majority of cases in which it is asserted mere *dictum*, since it is difficult to find a case in which the contract provided for a restriction so broad as this. There is, however, a multitude of cases which lay down the rule that a contract by which the rights of one of the parties to exercise his trade are limited within a given area is valid.

b. SPACE — (1) *In General.* — When the courts first began to recognize as valid any restraints upon trade, such restraints were confined within very narrow limits. The limitations which were allowed were such as were clearly necessary to protect the party in the ordinary exercise of his trade or calling. The state of society and the conditions under which business was transacted a century or two ago did not make it necessary, in order to protect the covenantee, to restrict the convenantor beyond the immediate town or city or a narrow area surrounding it. In an early and leading case Lord Macclesfield thought that it was self-evident that a tradesman in London could not possibly be interested in what another tradesman did in Newcastle, and that a restraint, therefore, extending throughout the whole of England would be unreasonable and void.[1]

Same Town. — Arranging the cases as to space in such a way as to indicate a constantly widening area, it will be seen that the courts have universally recognized as valid a restriction by which the covenantor gave up the right to follow his trade or to practice his profession within the same town or village,[2] or within the same city,[3] or in a given parish or neighboring

Roeber, 106 N. Y. 473, 60 Am. Rep. 464; Leslie *v.* Lorillard, 110 N. Y. 519, and U. S. *v.* Addyston Pipe, etc., Co., (C. C. A.) 85 Fed. Rep. 271.

1. Space. — Mitchel *v.* Reynolds, 1 P. Wms. 181.

2. Same Town — *England.* — Fazakerley *v.* Wiltshire, 1 Stra. 468; Allen *v.* Taylor, 24 L. T. N. S. 249, 19 W. R. 556.

Georgia. — Spier *v.* Lambdin, 45 Ga. 319; Ellis *v.* Jones, 56 Ga. 504.

Iowa. — Stark *v.* Noble, 24 Iowa 71; Smalley *v.* Greene, 52 Iowa 243, 35 Am. Rep. 267; Arnold *v.* Kreutzer, 67 Iowa 214; Haldeman *v.* Simonton, 55 Iowa 144.

Kentucky. — Davis *v.* Brown, 98 Ky. 475.

Maryland. — Warfield *v.* Booth, 33 Md. 63.

Massachusetts. — Gilman *v.* Dwight, 13 Gray (Mass.) 356, 74 Am. Dec. 634.

Minnesota. — Kronschnabel-Smith Co. *v.* Kronschnabel, (Minn. 1902) 91 N. W. Rep. 892.

Missouri. — Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 73 Mo. 390, 39 Am. Rep. 519; Gill *v.* Ferris, 82 Mo. 156.

New York. — Mott *v.* Mott, 11 Barb. (N. Y.) 127; Amedon *v.* Gannon, 6 Hun (N. Y.) 384; Booth *v.* Seibold, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 101; Dunlop *v.* Gregory, 10 N. Y. 241, 61 Am. Dec. 746; Francisco *v.* Smith, 143 N. Y. 488; Muller *v.* Vettel, (N. Y. Super. Ct. Spec. T.) 25 How. Pr. (N. Y.) 350.

North Carolina. — King *v.* Fountain, 126 N. Car. 196.

Texas. — Gates *v.* Hooper, 90 Tex. 563.

Vermont. — Clark *v.* Crosby, 37 Vt. 188.

Wisconsin. — Washburn *v.* Dosch, 68 Wis. 436, 60 Am. Rep. 873.

Where the agreement by a physician in the sale of his practice was not to "re-settle" in the same town, it was held that although he might not re-settle there, he might if residing elsewhere practice in the same town. Haldeman *v.* Simonton, 55 Iowa 144.

And where a physician bound himself not to locate in a certain town to practice as a physician and surgeon, it was held that he committed no breach of his agreement by merely practicing in the same territory without locating there. Amedon *v.* Gannon, 6 Hun (N. Y.) 384.

3. Same City — *Alabama.* — McCurry *v.* Gibson, 108 Ala. 451, 54 Am. St. Rep. 177.

Arkansas. — Webster *v.* Williams, 62 Ark. 101.

Georgia. — Swanson *v.* Kirby, 98 Ga. 586.

Illinois. — Hursen *v.* Gavin, 162 Ill. 377; Smith *v.* Leady, 47 Ill. App. 443.

Kansas. — Roller *v.* Ott, 14 Kan. 609.

Maine. — Caswell *v.* Johnson, 58 Me. 164.

Maryland. — Guerand *v.* Dandelet, 32 Md. 561.

Michigan. — Hubbard *v.* Miller, 27 Mich. 15, 15 Am. Rep 153; Timmerman *v.* Dever, 52 Mich. 34, 50 Am. Rep. 240; Up River Ice Co. *v.* Denler, 114 Mich. 297, 68 Am. St. Rep. 480.

New Jersey. — Finger *v.* Hahn, 42 N. J. Eq. 606.

New York. — Maier *v.* Homan, 4 Daly (N. Y.) 168; Ewing *v.* Johnson, (Supm. Ct. Spec. T.) 34 How. Pr. (N. Y.) 202.

Pennsylvania. — Carroll *v.* Hickes, 10 Phila. (Pa.) 308, 32 Leg. Int. (Pa.) 50.

Where the restriction was limited to a given city or "adjacent thereto," it was held that the latter words would embrace a territory which might reasonably be reached by the covenantee in his usual mode of conducting business, Up River Ice Co. *v.* Denler, 114 Mich. 297, 68 Am. St. Rep. 480; and a restraint by a physician covering the city and vicinity was construed as embracing a territory lying

district,[1] or a township or county, or city and county.[2] Moreover, extensions of area from a given business centre, widened almost mile by mile, have been permitted to stand as reasonable.[3]

(2) *General Restraints* — (a) **In England.** — But when such restraint became coextensive with the whole of England or the kingdom of Great Britain, the courts hesitated for some time to admit that such restraint was reasonable or necessary, and contracts covering the area specified were at first generally condemned as too extensive. It was thought, in the language of Chief Justice Best, that any deed by which a person bound himself not to employ his talents, his industry, or his capital in any useful undertaking in the kingdom was void, because no good reason could be imagined why any person should impose such a restraint upon himself.[4] And so an agreement restricting

within ten miles of the city limits, Timmerman *v.* Dever, 52 Mich. 34, 50 Am. Rep. 240.

In Darnell *v.* Geis, 78 Ill. App. 498, the restriction applied to only one store in a large city, and for a limited time. It was, of course, held to be reasonable.

1. Same Parish. — Mitchel *v.* Reynolds, 1 P. Wms. 181, 1 Smith Lead. Cas. 417; Avery *v.* Langford, Kay 663, 18 Jur. 905; Rogers *v.* Maddocks, (1892) 3 Ch. 346; Mumford *v.* Gething, 7 C. B. N. S. 305, 97 E. C. L. 305; Capes *v.* Hutton, 2 Russ. 357.

2. Township or County. — Talcott *v.* Brackett, 5 Ill. App. 60; Cobbs *v.* Niblo, 6 Ill. App. 60; McAlister *v.* Howell, 42 Ind. 15; Dean *v.* Emerson, 102 Mass. 480; Gordon *v.* Mansfield, 84 Mo. App. 367; Weller *v.* Hersee, 10 Hun (N. Y.) 431; Tillinghast *v.* Boothby, 20 R. I. 59.

3. Various Areas. — In the following note the cases are arranged in such a way as to display the judgment of the court upon contracts involving the area indicated.

One-half Mile. — Leigh *v.* Hind, 9 B. & C. 774, 17 E. C. L. 495.

One Mile. — Loe *v.* Lardner, 4 W. R. 597; Pemberton *v.* Vaughan, 10 Q. B. 87, 59 E. C. L. 87; Jacoby *v.* Whitmore, 49 L. T. N. S. 335, 32 W. R. 18, 48 J. P. 325; Love *v.* Stidham, 18 App. Cas. (D. C.) 306.

Two Miles. — Brampton *v.* Beddoes, 13 C. B. N. S. 538, 106 E. C. L. 538; Fairbrother *v.* England, 40 W. R. 220; Smith *v.* Brown, 164 Mass. 584.

Two and One-half Miles. — Atkyns *v.* Kinnier, 4 Exch. 776.

Three Miles. — Benwell *v.* Inns, 24 Beav. 307; Rawlinson *v.* Clarke, 14 M. & W. 187.

Five Miles. — Giles *v.* Hart, 5 Jur. N. S. 1381; Elves *v.* Crofts, 10 C. B. 241, 70 E. C. L. 241; Proctor *v.* Sargent, 2 Scott N. R. 289; Newling *v.* Dobell, 38 L. J. Ch. 111, 19 L. T. N. S. 408; Brown *v.* Kling, 101 Cal. 295; Paxson's Appeal, 106 Pa. St. 429.

Six Miles. — Linn *v.* Sigsbee, 67 Ill. 80.

Seven Miles. — Sainter *v.* Ferguson, 7 C. B. 716, 62 E. C. L. 716; Duignan *v.* Walker, Johns. Ch. (Eng.) 446.

Ten Miles. — King *v.* Hansell, 5 H. & N. 106; Nicoll *v.* Beere, 53 L. T. N. S. 659; Hill *v.* Hill, 55 L. T. N. S. 769, 35 W. R. 137, 51 J. P. 246; Wolmershausen *v.* O'Connor, 36 L. T. N. S. 921; Davis *v.* Mason, 5 T. R. 118; Cook *v.* Johnson, 47 Conn. 175, 36 Am. Rep. 64; Hackett *v.* A. L. & J. J. Reynolds Co., (Supm. Ct. App. T.) 30 Misc. (N. Y.) 733; A. L. & J. J. Reynolds Co. *v.* Dreyer, (N. Y. Super. Ct. Gen. T.) 12 Misc. (N. Y.) 368; Gompers *v.* Rochester, 56 Pa. St. 194; Wolff *v.* Hirschfeld, 23 Tex. Civ. App. 670.

Eleven Miles. — Eisel *v.* Hayes, 141 Ind. 41.

Twelve Miles. — McClurg's Appeal, 58 Pa. St. 51.

Sixteen Miles. — Perls *v.* Saalfeld, (1892) 2 Ch. 149; Rakestraw *v.* Lanier, 104 Ga. 188, 69 Am. St. Rep. 154; Thompson *v.* Means, 11 Smed. & M. (Miss.) 604.

Twenty Miles. — Hayward *v.* Young, 2 Chit. 407, 18 E. C. L. 380; Clarkson *v.* Edge, 33 Beav. 227; National Provincial Bank *v.* Marshall, 40 Ch. D. 112; Pike *v.* Thomas, 4 Bibb (Ky.) 486, 7 Am. Dec. 741; Nobles *v.* Bates, 7 Cow. (N. Y.) 307; Butler *v.* Burleson, 16 Vt. 176.

Twenty-one Miles. — Dendy *v.* Henderson, 11 Exch. 194.

Twenty-five Miles. — Haynes *v.* Doman, (1899) 2 Ch. 13.

Thirty Miles. — Bowser *v.* Bliss, 7 Blackf. (Ind.) 344, 43 Am. Dec. 93.

Fifty Miles. — Howard *v.* Woodward, 5 New Reports 8, 10 Jur. N. S. 1123, 34 L. J. Ch. 47, 13 W. R. 132; Parsons *v.* Cotterell, 56 L. T. N. S. 839, 51 J. P. 679; Bryson *v.* Whitehead, 1 Sim. & St. 77; Davies *v.* Racer, 72 Hun (N. Y.) 43.

Sixty Miles. — Whitney *v.* Slayton, 40 Me. 231.

One Hundred and Fifty Miles. — Tallis *v.* Tallis, 1 El. & Bl. 410, 72 E. C. L. 410; Bunn *v.* Guy, 4 East 190.

Two Hundred Miles. — Harms *v.* Parsons, 32 Beav. 328.

One Hundred Miles — Consideration. — In Horner *v.* Graves, 7 Bing. 735, 20 E. C. L. 310, an agreement by a dentist not to practice over a district one hundred miles in diameter was held to be unreasonable and void, on the ground that the restriction was larger than necessary for the protection of the covenantor, and for the further reason that the consideration was very slender and inadequate, amounting almost to fraudulent imposition.

Restriction Against Every Kind of Business. — A restriction within very narrow limits of space may, of course, be invalid because of other unreasonable terms in the contract, as where one bound himself not to engage in any business whatever within the distance of one mile of a designated point. Baker *v.* Hedgecock, 39 Ch. D. 520. See *infra*, this subsection, *As Affected by Nature of Business.*

4. General Restraints — In England. — Homer *v.* Ashford, 3 Bing. 326, 11 E. C. L. 123.

trade within the cities of London and Westminster or within six hundred miles from the same respectively — evidently intended to be restrictive throughout the whole of England at least — was held good as to the cities named, but void as to the six hundred miles.[1]

Space Test Unsatisfactory. — There is, however, a line of cases which show that the restriction as to space was regarded as unsatisfactory as a test of the validity of such contracts. As early as 1841 a covenant by which an attorney bound himself not to practice his profession anywhere for twenty years was held to be valid by the Court of Chancery;[2] and a little later Lord Romilly recognized it as a principle of the cases that if the nature of the trade required it, the extent excluded might be "very great indeed."[3] Still later, in a case in which the restriction covered not only the United Kingdom, but likewise France, Belgium, Holland, and Canada, it was held that the restraint imposed was not unreasonable, at any rate so far as the United Kingdom was concerned, that the covenant was not void on any ground of public policy, and that the defendant could be restrained from violating his contract.[4] From restrictions embracing the whole of England or the United Kingdom, it is but a short step to restrictions without limit as to space. Reasserting the old rule that general restraints are void, some cases condemn as unreasonable contracts containing such restrictions.[5] Other cases, better considered and later in point of time, have questioned or entirely overthrown the rule.[6]

(b) **In the United States** — *aa.* In General. — Contracts in restraint of trade in this country, on account of the divisions of the country into separate and distinct legislative sovereignties, may be open to condemnation because they embrace either an entire state or the entire United States.

bb. Restrictions Covering a State. — Regarding the territory embraced by a state as equivalent to the whole territory of Great Britain, the majority of the cases in this country have condemned contracts attempting to restrain trade throughout the entire state, on the ground that it is a total restraint. It is considered to be against the policy of the state that the people of the whole state should be deprived of the industry and skill of one engaged in an

1. Price *v.* Green, 16 M. & W. 346. See also Mallan *v.* May, 11 M. & W. 653.

2. Whittaker *v.* Howe, 3 Beav. 383.

3. Harms *v.* Parsons, 32 Beav. 331.

In Tallis *v.* Tallis, 1 El. & Bl. 391, 72 E. C. L. 391, the defendant covenanted not to be concerned directly or indirectly in the canvassing trade in London or within one hundred and fifty miles thereof, or in Dublin, or Edinburgh, or within fifty miles of either, or within any town in Great Britain or Ireland in which the plaintiff or his successors might be doing business. The restriction, therefore, was practically coextensive with Great Britain. Nevertheless, the covenant was held valid. Lord Campbell, C. J., recognized that the "law relating to contracts in restraint of trade has been altered by late decisions," and he quoted with approval the language of the court in Mallan *v.* May, 11 M. & W. 667, that "it would be better to lay down such a limit as under any circumstances would be sufficient protection to the interest of the contracting party, and if the limit stipulated for does not exceed that, to pronounce the contract to be valid." It is clear that Lord Campbell would have admitted a restriction, however great, if reasonably necessary to protect the contracting parties.

4. Underwood *v.* Barker, (1899) 1 Ch. 300, Vaughan Williams, L. J., *dissenting*.

5. **General Restraints Held Bad.** — Hinde *v.* Gray, 1 M. & G. 195, 39 E. C. L. 413; Urmston *v.* Whitelegg, 55 J. P. 453; Allsopp *v.* Wheatcroft, L. R. 15 Eq. 64; Ward *v.* Byrne, 5 M. & W. 548.

6. See Leather-Cloth Co. *v.* Lorsont, L. R. 9 Eq. 345; Rousillon *v.* Rousillon, 14 Ch. D. 351, *per* Fry, J.; Nordenfelt *v.* Maxim Nordenfelt Guns, etc., Co., (1894) A. C. 535, *affirming* (1893) 1 Ch. 630. This case contains exhaustive opinions by Lords Herschell, Watson, Ashbourne, and Macnaghten, summing up practically all that is valuable upon this branch of the subject.

In Badische Anilin, etc., Fabrik *v.* Schott, (1892) 3 Ch. 447, a restriction was similarly world wide and for three years' time. Chitty, J., admitting that the rule down to date was that a restraint general as to space was void, refused to take this test as a guide and held the covenant in question valid because no more than was reasonably necessary for the protection of the covenantee.

It would seem, therefore, to be the rule in *England* at the present time, deducible from the latest cases, that in determining the validity of any contract in restraint of trade, space or area as a factor is entirely eliminated. A restriction extending over a somewhat narrow area may be bad because unreasonable; but under the latest authorities, a restriction without any limits whatever would not be bad for that reason alone.

employment useful to the public, and that he should be compelled either to engage in other business or abandon his citizenship of the state and remove elsewhere in order to support himself and family. Within its own sphere the state, it is said, has a public policy as a commonwealth which the courts of the state regard and enforce as distinct from questions of policy affecting the nation at large.[1] But the doctrine that a contract should be condemned as general because it extends throughout the entire state has been opposed with great vigor and apparently invincible logic. The objection that it compelled the covenantor to move out of the state in order to continue in business has been deemed narrow and provincial.[2]

cc. Restrictions Covering the United States. — Restrictions which cover the entire United States, and those without any limit whatever, are both, for jurisdictional reasons, general restrictions, and as such have been condemned in a majority of the cases.[3] But the later and best-considered decisions in this country, yielding to what seems to be the spirit of the times, have reached the same general conclusion as was reached by the latest English cases, and, it is believed, justify the statement that it is now the better rule that a limitation as to area need no longer be incorporated in a contract in restraint of trade, provided the agreement have the other essential contractual elements, and be reasonably necessary to protect the covenantee in the enjoyment of the property or business purchased.[4] In many cases the courts

1. Restrictions Covering a State. — Union Strawboard Co. *v.* Bonfield, 193 Ill. 425. See also Wright *v.* Ryder, 36 Cal. 342, 95 Am. Dec. 186; More *v.* Bonnet, 40 Cal. 251; Lanzit *v.* Sefton Mfg. Co., 184 Ill. 326, 75 Am. St. Rep. 171; Consumers' Oil Co. *v.* Nunnemaker, 142 Ind. 560, 51 Am. St. Rep. 193; Taylor *v.* Blanchard, 13 Allen (Mass.) 370, 90 Am. Dec. 203; Western Wooden-ware Assoc. *v.* Starkey, 84 Mich. 76; Chappel *v.* Brockway, 21 Wend. (N. Y.) 157; Lawrence *v.* Kidder, 10 Barb. (N. Y.) 655; Holbrook *v.* Waters, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 335; Bingham *v.* Maigne, 52 N. Y. Super. Ct. 92; Oregon Steam Nav. Co. *v.* Hale, 1 Wash. Ter. 283, 34 Am. Rep. 803; Berlin Mach. Works *v.* Perry, 71 Wis. 495, 5 Am. St. Rep. 236.

2. Not Deemed Too Large. — Beal *v.* Chase, 31 Mich 491. See also Oregon Steam Nav. Co. *v.* Winsor, 20 Wall. (U. S.) 64; Paragon Oil Co. *v.* Hall, 4 Ohio Cir. Dec. 576; Diamond Match Co. *v.* Roeber, 106 N. Y. 485, 60 Am. Rep. 464; Cowan *v.* Fairbrother, 118 N. Car. 406, 54 Am. St. Rep. 735; Herreshoff *v.* Boutineau, 17 R. I. 3, 33 Am. St. Rep. 850.

3. Restrictions Covering United States — Bad — *California.* — Callahan *v.* Donnolly, 45 Cal. 153.

Massachusetts. — Stearns *v.* Barrett, 1 Pick. (Mass.) 443, 11 Am. Dec. 223; Palmer *v.* Stebbins, 3 Pick. (Mass.) 188, 15 Am. Dec. 204; Alger *v.* Thacher, 19 Pick. (Mass.) 54, 31 Am. Dec. 119; Gilman *v.* Dwight, 13 Gray (Mass.) 356, 74 Am. Dec. 634; Angier *v.* Webber, 14 Allen (Mass.) 211, 92 Am. Dec. 748; Pierce *v.* Fuller, 8 Mass. 223, 5 Am. Dec. 102; Perkins *v.* Lyman, 9 Mass. 522; Dean *v.* Emerson, 102 Mass. 480; Dwight *v.* Hamilton, 113 Mass. 175; Boutelle *v.* Smith, 116 Mass. 111; Ropes *v.* Upton, 125 Mass. 258; Hanforth *v.* Jackson, 150 Mass. 149; Gamewell F. Alarm Tel. Co. *v.* Crane, 160 Mass. 51, 39 Am. St. Rep. 458. But see Morse Twist Drill, etc., Co. *v.* Morse, 103 Mass. 73, 4 Am. Rep. 513.

Michigan. — Caswell *v.* Gibbs, 33 Mich. 331.

New York. — Maier *v.* Homan, 4 Daly (N. Y.) 168.

Pennsylvania. — Taylor *v.* Saurman, 110 Pa. St. 3.

See also Oregon Steam Nav. Co. *v.* Winsor, 20 Wall. (U. S.) 64; Wiley *v.* Baumgardner, 97 Ind. 66, 49 Am. Rep. 427; Sutton *v.* Head, 86 Ky. 156, 9 Am. St. Rep. 274; Warfield *v.* Booth, 33 Md. 63; Long *v.* Towl, 42 Mo. 545. 97 Am. Dec. 355; Peltz *v.* Eichele, 62 Mo. 171; Curtis *v.* Gokey, 68 N. Y. 300; Thomas *v.* Miles, 3 Ohio St. 274.

4. General Restrictions — Good. — Hubbard *v.* Miller, 27 Mich. 21, 15 Am. Rep. 153; Watertown Thermometer Co. *v.* Pool, 51 Hun (N. Y.) 157; National Wall Paper Co. *v.* Hobbs, 90 Hun (N. Y.) 288; Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 60 Am. Rep. 464; Leslie *v.* Lorillard, 110 N. Y. 519; Matthews *v.* Associated Press, 136 N. Y. 340; Underwood *v.* Smith, (C. Pl. Gen. T.) 19 N. Y. Supp. 380; Ru Ton *v.* Everitt, 35 N. Y. App. Div. 412; National Enameling, etc., Co. *v.* Haberman, (U. S. Cir. Ct. Dist. Conn.) N. Y. L. J. March 28, 1903. And see U. S. *v.* Addyston Pipe, etc., Co., (C. C. A.) 85 Fed. Rep. 271.

In Ru Ton *v.* Everitt, 35 N. Y. App. Div. 412, there were no express words of limitation, but the court thought that such words might be implied as well as expressed. Of course this is a total surrender of the old rule.

Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 60 Am. Rep. 464, has probably, since its decision in 1887, exerted a wider influence in its field than any other American case. A covenantor bound himself not to engage for ninety-nine years in the manufacture or sale of matches within any of the states or territories except Nevada and Montana. Andrews, J., while not in so many words repudiating the old rule, regarded it as arbitrary and said that he was not disposed to put such a construction upon the contract in question as would make it a covenant in general restraint

have been able to save the contract by declaring it divisible and valid within certain limits.[1]

(3) *How Distance Is Measured.* — Where there is a restriction as to space measured from a specified center, it has been held that the distance should be measured by the nearest way of access between such center and the place where the breach is claimed to have taken place.[2] In another case it was held that the distance should be measured by the usual streets or ways of approach,[3] while in still another, it was held that unless the distance is expressly or by necessary implication directed to be measured by the nearest practicable mode of access, it must be measured in a straight line upon a horizontal plane; and if the parties intend it to be measured by roads and streets they should say so.[4]

c. TIME. — A partial restraint is often defined as one restricted in its operation in respect to time and place,[5] but quite often the restriction as to time is omitted and a partial restraint defined as one unlimited as to space.[6]

Distinction Between Space and Time Limits. — It is pretty well recognized that there is a distinction between a general restriction as to place and one as to time, and that an agreement not to engage in a certain business in a stated place or within a reasonably limited territory is not rendered invalid by the failure to specify any limit of time for its duration.[7]

of trade, regarding the exception of Nevada and Montana as real and not colorable.

In National Wall Paper Co. *v.* Hobbs, 90 Hun (N. Y.) 288, the agreement was saved by the exception of the state of Washington from all the states and territories of the United States. In National Enameling, etc., Co. *v.* Haberman, 120 Fed. Rep. 415, Judge Platt, admitting that there was no case either in England or this country, federal or state, in which the controlling feature was purely and simply its unlimited extent, and characterizing all that has been said about such contracts as *obiter dicta*, took a very decided step forward and decided without hesitation or equivocation that a restrictive covenant unlimited as to time and covering the entire United States was reasonable and no broader than was necessary to save to the covenantee the rights and privileges for which he had been paid. This case stands alone in this respect, and unless overruled, as would seem to be not likely, establishes the law for the federal courts to be as stated in the text above.

1. See *infra*, this section, *Severability of the Contract.*

2. **How Distance Is Measured.**— Leigh *v.* Hind, 9 B. & C. 774, 17 E. C. L. 495.

3. Atkyns *v.* Kinnier, 4 Exch. 776.

4. Duignan *v.* Walker, Johns. Ch. (Eng.) 446.

5. **Time** — *England.* — Badische Anilin, etc., Fabrik *v.* Schott, (1892) 3 Ch. 447.

Illinois. — Hursen *v.* Gavin, 162 Ill. 377; Frazer *v.* Frazer Lubricator Co., 18 Ill. App. 450.

Iowa. — Arnold *v.* Kreutzer, 67 Iowa 214; Chapin *v.* Brown, 83 Iowa 156, 32 Am. St. Rep. 297.

Missouri. — Gill *v.* Ferris, 82 Mo. 156; Mallinckrodt Chemical Works *v.* Nemnich, 83 Mo. App. 6.

New Jersey. — Albright *v.* Teas, 37 N. J. Eq. 171.

New York. — Maier *v.* Homan, 4 Daly (N. Y.) 168; Stanley *v.* Pollard, (N. Y. Super. Ct. Gen. T.) 5 Misc. (N. Y.) 492; Booth *v.* Seibold, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 101; Bingham *v.* Maigne, 52 N. Y. Super. Ct. 92.

North Carolina. — King *v.* Fountain, 126 N. Car. 196.

Ohio. — Thomas *v.* Miles, 3 Ohio St. 274.

South Carolina. — Carroll *v.* Giles, 30 S. Car. 412.

Wisconsin. — Washburn *v.* Dosch, 68 Wis. 436, 60 Am. Rep. 873.

6. Webster *v.* Williams, 62 Ark. 101. See cases cited *supra*, this subsection, *Space.*

7. **Distinction Between Space and Time Limits** — *England.* — Davies *v.* Davies, 36 Ch. D. 359; Archer *v.* Marsh, 6 Ad. & El. 959, 33 E. C. L. 254; Hitchcock *v.* Coker, 6 Ad. & El. 438, 33 E. C. L. 98; Catt *v.* Tourle, L. R. 4 Ch. 654; Hastings *v.* Whitley, 2 Exch. 614; Bunn *v.* Guy, 4 East 190; Davis *v.* Mason, 5 T. R. 118; Hayward *v.* Young, 2 Chit. 407, 18 E. C. L. 380; Mallan *v.* May, 11 M. & W. 653; Pemberton *v.* Vaughan, 10 Q. B. 87, 59 E. C. L. 87; Ward *v.* Byrne, 5 M. & W. 548; Elves *v.* Crofts, 10 C. B. 241, 70 E. C. L. 241; Mumford *v.* Gething, 7 C. B. N. S. 317, 97 E. C. L. 317; Atkyns *v.* Kinnier, 4 Exch. 776; Jacobey *v.* Whitmore, 49 L. T. N. S. 335; Tallis *v.* Tallis, 1 El. & Bl. 391, 72 E. C. L. 391; Parsons *v.* Cottrell, 56 L. T. N. S. 839; Haynes *v.* Doman, (1899) 2 Ch. 13.

Alabama. — McCurry *v.* Gibson, 108 Ala. 451, 54 Am. St. Rep. 177.

California. — Brown *v.* Kling, 101 Cal. 295.

Connecticut. — Cook *v.* Johnson, 47 Conn. 175, 36 Am. Rep. 64.

Georgia. — Goodman *v.* Henderson, 58 Ga. 567; Swanson *v.* Kirby, 98 Ga. 586.

Indiana. — Bowser *v.* Bliss, 7 Blackf. (Ind.) 344, 43 Am. Dec. 93; O'Neal *v.* Hines, 145 Ind. 35.

Michigan. — Doty *v.* Martin, 32 Mich. 462; Up River Ice Co. *v.* Denler, 114 Mich. 297, 68 Am. St. Rep. 480.

Missouri. — Gordon *v.* Mansfield, 84 Mo. App. 367.

New York. — Dunlop *v.* Gregory, 10 N. Y.

Unlimited Time Not Favored. — But it is nevertheless true that the courts have very seriously objected to contracts imposing a restraint indefinite in time or for an unreasonably long period of time.[1]

Nature of Business as Influencing Time Limit. — The attitude of the courts is largely determined in such cases by the nature of the business interdicted. It has been thought perfectly proper that the vendor of a business should bind himself by a perpetual restriction not to engage again in the same business, since the purchaser of the goodwill may fairly be supposed to purchase not only for his own immediate use or benefit, but for the use of his personal representatives in the same sense that he purchases personal property or real estate.[2] But an injunction was refused against a physician covenanting not to practice medicine in a given place at any time thereafter.[3] And even in the case of the sale of a mercantile business, the court has at times deemed a restraint unreasonable that extended the covenantor's disability beyond any possible area of competition, and a definite specified time has been cut down to what was deemed to be the plain intention of the parties.[4] This reasoning has, however, not appealed to or occurred to some other courts, and it has been held that when in such a covenant by a physician no time is mentioned, it is to endure during the lifetime of the covenantor, and that the injunction will be made perpetual.[5]

Cases Grouped. — Grouping the cases by the length of time measuring the restriction, they will be seen to cover periods running from a few months up to the lifetime of the covenantor or covenantee, and even "forever." In a great majority of the cases it will be noticed that the restriction was deemed valid, those in which the restraint was held to be too extensive being indicated in the note. In probably the majority of the cases nothing is said about time at all; such cases are, of course, cases of general restraint as to time.[6]

241, 61 Am. Dec. 746; Lawrence *v.* Kidder, 10 Barb. (N. Y.) 653; Holbrook *v.* Waters, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 335; Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 60 Am. Rep. 464.

Pennsylvania. — McClurg's Appeal, 58 Pa. St. 51.

Rhode Island. — French *v.* Parker, 16 R. I. 219, 27 Am. St. Rep. 733; Tillinghast *v.* Boothby, 20 R. I. 59.

Vermont. — Butler *v.* Burleson, 16 Vt. 176. But see Alger *v.* Thacher, 19 Pick. (Mass.) 54.

1. Unlimited Time Not Favored. — Long *v.* Towl, 42 Mo. 545, 97 Am. Dec. 355.

2. Nature of Business as Influencing Time Limit. — Hitchcock *v.* Coker, 6 Ad. & El. 438, 33 E. C. L. 98; Carll *v.* Snyder, (N. J. 1893) 26 Atl. Rep. 977; Swanson *v.* Kirby, 98 Ga. 586.

3. Mandeville *v.* Harman, 42 N. J. Eq. 185; Mott *v.* Mott, 11 Barb. (N. Y.) 132; Rakestraw *v.* Lanier, 104 Ga. 188, 69 Am. St. Rep. 154.

4. Sternberg *v.* O'Brien, 48 N. J. Eq. 370; Ru Ton *v.* Everitt, 35 N. Y. App. Div. 417.

5. Hauser *v.* Harding, 126 N. Car. 295.

6. Various Periods — One Year. — McAlister *v.* Howell, 42 Ind. 15; Davies *v.* Racer, 72 Hun (N. Y.) 43; Gates *v.* Hooper, 90 Tex. 563.

Two Years. — Proctor *v.* Sargent, 2 Scott N. R. 289; Wintz *v.* Vogt, 3 La. Ann. 16; Mollyneaux *v.* Wittenberg, 39 Neb. 547.

Three Years. — Nicoll *v.* Beere, 53 L. T. N. S. 659; Brown *v.* Kling, 101 Cal. 295.

Restraint Too Extensive. — Oppenheimer *v.* Hirsch, 5 N. Y. App. Div. 235.

Five Years. — Mitchel *v.* Reynolds, 1 P. Wms. 181; Love *v.* Stidham, 18 App. Cas. (D. C.) 306; Bullock *v.* Johnson, 110 Ga. 486; Boutelle *v.* Smith, 116 Mass. 111; Bishop *v.* Palmer, 146 Mass. 469, 4 Am. St. Rep. 339; Greite *v.* Henricks, 71 Hun (N. Y.) 7; Sander *v.* Hoffman, 39 N. Y. Super. Ct. 307, *reversed* 64 N. Y. 248; Paragon Oil Co. *v.* Hall, 4 Ohio Cir. Dec. 576; Gompers *v.* Rochester, 56 Pa. St. 194; Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484, 49 Am. St. Rep. 784.

Restraint Too Extensive. — Western Woodenware Assoc. *v.* Starkey, 84 Mich. 76, 22 Am. St. Rep. 686; Mott *v.* Mott, 11 Barb. (N. Y.) 127.

Ten Years. — Whitney *v.* Slayton, 40 Me. 231; Watertown Thermometer Co. *v.* Pool, 51 Hun (N. Y.) 157; Muller *v.* Vettel, (N. Y. Super. Ct. Spec. T.) 25 How. Pr. (N. Y.) 350; Wolff *v.* Hirschfeld, 23 Tex. Civ. App. 670.

Restraint Too Extensive. — Urmston *v.* Whitelegg, 55 J. P. 453; Oregon Steam Nav. Co. *v.* Winsor, 20 Wall. (U. S.) 64; Wright *v.* Ryder, 36 Cal. 342, 95 Am. Dec. 186.

Fourteen Years. — Davis *v.* Mason, 5 T. R. 118.

Fifteen Years. — Underwood *v.* Smith, (C. Pl. Gen. T.) 19 N. Y. Supp. 380.

Twenty Years. — Bryson *v.* Whitehead, 1 Sim. & St. 77; Whittaker *v.* Howe, 3 Beav. 383; Fisheries Co. *v.* Lennen, 116 Fed. Rep. 217.

Twenty-one Years. — Dendy *v.* Henderson, 11 Exch. 194.

Twenty-five Years. — Union Strawboard Co. *v.* Bonfield, 193 Ill. 425.

Restraint Too Extensive. — American Preservers' Trust *v.* Taylor Mfg. Co., 46 Fed. Rep. 152; Lufkin Rule Co. *v.* Fringeli, 4 Ohio Dec. 209.

d. As Affected by Nature of Business. — The validity or invalidity of a given contract in restraint of trade is often dependent as much upon the nature of the business restricted as upon the elements of time and space.[1]

Secret Compositions, Etc. — It has been held that where there is a secret composition or mechanism or process of manufacture, the usual rules do not apply and restrictions are allowed that would invalidate an ordinary contract.[2]

Patents. — The same principle applies to patents and copyrights. The ordinary principles do not apply to them for the reason that the very object of a copyright or patent is to secure a monopoly. This constitutes their value.[3]

Trades and Professions. — It has likewise been said that a distinction exists between the class of contracts binding one to desist from the practice of a learned profession and those which bind one who has sold out a mercantile or other kind of business. The distinction was noted above as applied to a physician.[4]

Quasi-public Corporations. — It has furthermore been recognized that the businesses of railroading, telegraphy, and the manufacture of gas cannot be restrained to any extent whatever without prejudice to the public interest, and that any contract attempting to impose restraints upon them, however partial, would be regarded by the courts as contrary to "public policy" and void.[5]

The Business of Buying, where there is no plant or stock in trade, may be the subject of sale and may, therefore, be sold with a restrictive stipulation.[6]

Restriction Affecting a Portion of the Business. — In several instances the covenantor, upon the sale of his business, has bound himself not again to contract to do business with the old customers. And where such is the evident intent of the parties, the covenant will not be extended beyond it; and if so drawn as unduly to restrain the covenantor beyond the limit evidently intended, it will be pronounced invalid.[7]

Giving up One's Trade. — It has been thought that where one covenants not to

Ninety-nine Years. — Diamond Match Co. *v.* Roeber, 106 N. Y. 485, 60 Am. Rep. 464.

During Life of Covenantor. — Wallis *v.* Day, 2 M. & W. 273; Price *v.* Green, 16 M. & W. 346; Jacoby *v.* Whitmore, 49 L. T. N. S. 335, 32 W. R. 18, 48 J. P. 335.

1. As Affected by Nature of Business. — Fowle *v.* Park, 131 U. S. 88; C. F. Simmons Medicine Co. *v.* Simmons, 81 Fed. Rep. 163; Vickery *v.* Welch, 19 Pick. (Mass.) 527; Garst *v.* Harris, 177 Mass. 74; O. & W. Thum Co. *v.* Tloczynski, 114 Mich. 149, 68 Am. St. Rep. 469; Hard *v.* Seeley, 47 Barb. (N. Y.) 428; Jarvis *v.* Peck, 10 Paige (N. Y.) 118; Alcock *v.* Giberton, 5 Duer (N. Y.) 76; John D. Park, etc., Co. *v.* National Wholesale Druggists Assoc., (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 675, *affirmed* 54 N. Y. App. Div. 223; Tode *v.* Gross, 127 N. Y. 480, 24 Am. St. Rep. 475.

2. Secret Compositions, Etc. — Harrison *v.* Glucose Sugar Refining Co., (C. C. A.) 116 Fed. Rep. 304; Brewer *v.* Lamar, 69 Ga. 656, 47 Am. Rep. 766.

3. Patents — *United States.* — Kinsman *v.* Parkhurst, 18 How. (U. S.) 289; Bowling *v.* Taylor, 40 Fed. Rep. 404.

Massachusetts. — Stearns *v.* Barrett, 1 Pick. (Mass.) 443, 11 Am. Dec. 223; Central Shade Roller Co. *v.* Cushman, 143 Mass. 353.

Missouri. — Billings *v.* Ames, 32 Mo. 265, *followed* Keith *v.* Hobbs, 69 Mo. 89.

New York. — Excelsior Quilting Co. *v.* Creter, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 698; Murphy *v.* Christian Press Assoc. Pub. Co., 38 N. Y. App. Div. 430.

Wisconsin. — Berlin Mach. Works *v.* Perry, 71 Wis. 495, 5 Am. St. Rep. 236.

4. Trades and Professions. — See *supra*, this section, *Time*.

In a Leading English Case Lord Langdale, M. R., felt some doubt as to the policy of allowing professional men to recommend, to those buying out their practice, the clients who were in the habit of relying upon the professional skill and knowledge of one whom they had long employed. Whittaker *v.* Howe, 3 Beav. 383. Such a transaction, however, was recognized as entirely proper by the court of King's Bench. Bunn *v.* Guy, 4 East 190; Candler *v.* Candler, Jac. 231.

5. Quasi-public Corporations. — Chicago Gas Light, etc., Co. *v.* People's Gas Light, etc., Co., 121 Ill. 530, 2 Am. St. Rep. 124; West Virginia Transp. Co. *v.* Ohio River Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527. See *infra*, this section, *Public Policy*.

6. Business of Buying. — Goodman *v.* Henderson, 58 Ga. 570.

7. Restriction Affecting a Portion of the Business. — Hunlocke *v.* Blacklowe, 2 Saund. 156; Ward *v.* Byrne, 5 M. & W. 548; Dubowski *v.* Goldstein, (1896) 1 Q. B. 478; Baines *v.* Geary, 35 Ch. D. 154; Rannie *v.* Irvine, 8 Scott N. R. 674; Mills *v.* Dunham, (1891) 1 Ch. 576; Nicholls *v.* Stretton, 10 Q. B. 346, 59 E. C. L. 346; Warren *v.* Jones, 51 Me. 146; Dethlefs *v.* Tamsen, 7 Daly (N. Y.) 357.

pursue his trade at all, the contract is doubly vicious as injurious to the public and to the individual.[1]

Not to Engage in Similar Business. — There is nothing improper in the covenant not to engage in a similar business to that sold, provided it is not unreasonable in other ways.[2] Such contract, however, may be void because the restriction is unnecessarily extensive.[3]

An Agreement Not to Manufacture a Particular Article is not in restraint of trade.[4]

Restraint as to Particular Property. — An agreement prohibiting the use of a particular piece of property in a specified business, if not larger than necessary, is valid and enforceable.[5]

Giving Up All Business Whatsoever. — A few contracts have, it would seem from oversight, been so drawn as to bind the covenantor not to engage in any business whatever within a given time and area. Such contracts have always been held void.[6] But a contract to give up one's business and enter the service of another as a permanent employee in the same capacity is not unlawful.[7]

A Covenant Not to Manufacture or Sell to any one else than the covenantee one of many articles manufactured is only in partial restraint of trade and is reasonable;[8] and an agreement not to sell any goods except those of the covenantee is legal and proper where the covenantor is an agent of the covenantee.[9]

4. Reasonableness — *a.* IN GENERAL. — It has been seen in the sections preceding this that neither space, nor time, nor both together is any longer regarded as a satisfactory criterion in testing the validity or invalidity of contracts in restraint of trade. Notwithstanding the fact that some authorities seem still blindly to follow the ancient rule, overlooking the reason that was once embodied in it, and the changed conditions, the conviction has been growing stronger and stronger that it is not just to limit the territory within which restraint may be applied by any arbitrary geographical bounds, without regard to the nature and extent of the business in which the restraint is sought to be imposed.[10] The result is that in the best considered cases at the present time the court applies first the test of reasonableness, and looks at the area covered by the restriction only as bearing upon the question of reasonableness.

b. REASONABLENESS DEFINED. — And in deciding whether or not a given restraint is reasonable, the courts have universally adopted the test laid down in a leading case by Chief Justice Tindal: "We do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary

1. Giving Up One's Trade. — Fazakerley *v.* Wiltshire, 1 Stra. 468; Gibbs *v.* Consolidated Gas Co., 130 U. S. 396; Lawrence *v.* Kidder, 10 Barb. (N. Y.) 651.

2. Not to Engage in Similar Business. — Cussen *v.* O'Connor, 32 L. R. Ir. 330; Magnolia Metal Co. *v.* Price, 65 N. Y. App. Div. 276; Erwin *v.* Hayden, (Tex. Civ. App. 1897) 43 S. W. Rep. 610.

3. May Be Void. — Allsopp *v.* Wheatcroft, L. R. 15 Eq. 59; Eisel *v.* Hayes, 141 Ind. 41.

In Davies *v.* Davies, 36 Ch. D. 359, it was held that a covenant to retire from a partnership, and so far as the law allowed, from the business, and not to trade or act in any way so as directly or indirectly to affect the continuing partner, was too vague and indefinite to be enforced.

A restriction not to do business for other persons in the same trade within a particular district was limited to the time the covenantor remained in the covenantee's service. King *v.* Hansell, 5 H. & N. 106.

4. Gillis *v.* Hall, 2 Brews. (Pa.) 342.

5. Restraint as to Particular Property. — Hitchcock *v.* Anthony, (C. C. A.) 83 Fed. Rep. 779. See also New York Bank Note Co. *v.* Hamilton Bank Note Engraving, etc., Co., 83 Hun (N. Y.) 593.

6. Giving Up All Business Whatsoever. — Baker *v.* Hedgecock, 39 Ch. D. 520; Perls *v.* Saalfeld, (1892) 2 Ch. 149.

7. Carnig *v.* Carr, 167 Mass. 545, 57 Am. St. Rep. 488.

8. Blauner *v.* Williams Co., (Supm. Ct. App. T.) 36 Misc. (N. Y.) 173.

9. Weiboldt *v.* Standard Fashion Co., 80 Ill. App. 70.

10. Reasonableness. — Harrison *v.* Glucose Sugar Refining Co., (C. C. A.) 116 Fed. Rep. 304.

protection of the party can be of no benefit to either; it can only be oppressive; and if oppressive it is, in the eye of the law, unreasonable." [1]

c. DIFFERENCE BETWEEN OLD AND NEW RULES. — In view of the fact that the courts have always spoken of a restraint as reasonable or unreasonable, the difference between the old test and the new may not seem to be very real after all. But the great difference lies in this: That whereas in the older cases, and even yet in some jurisdictions, no restraint is deemed reasonable or lawful if it be general, the new rule is that any restraint is good if reasonable, no matter how general it may be.

d. EACH CASE TRIED BY ITS FACTS. — In applying this test to individual contracts in order to ascertain whether or not the exclusion is wider than is required for the protection of the covenantee, and hence in unlawful restraint of trade, each case is to be considered and determined in the light of its own facts and circumstances. And this is one instance where the guide to the interpretation of a contract is not the intention of the parties, but is the relation of the agreement to the thing sold. [2]

If the Contract Is a Reasonable One at the Time It Is Entered Into, it is not rendered unreasonable by subsequent events or because of improbable contingencies. [3]

e. RESTRAINING CONTRACT MUST BE ANCILLARY. — To the rule that the restraint must be only so great as to afford adequate protection to the covenantee, it is a corollary that the contract in which it is contained must be incidental to and in support of another contract or a sale by which the covenantor acquires some interest in the business needing protection. A man cannot, for money alone, where he has no interest in the matter, procure a valid contract in restraint of trade, however limited may be the circle of its

1. Reasonableness Defined.—Horner *v.* Graves, 7 Bing. 743, 20 E. C. L.314.

The following cases have adopted and applied the above test:

England. — Nicoll *v.* Beere, 53 L. T. N. S. 659; Rousillon *v.* Rousillon, 14 Ch. D. 351; Leather Cloth Co. *v.* Lorsont, L. R. 9 Eq. 345; Davies *v.* Davies, 36 Ch. D. 359; Collins *v.* Locke, 4 App. Cas. 674; Baines *v.* Geary, 35 Ch. D 154; Rogers *v.* Maddocks, (1892) 3 Ch. 346; Haynes *v.* Doman, (1899) 2 Ch. 17; Hitchcock *v.* Coker, 6 Ad. & El. 438, 33 E. C. L. 98; Whittaker *v.* Howe, 3 Beav. 383; Nordenfelt *v.* Maxim Nordenfelt Guns, etc., Co., (1894) A. C. 535. But see Badische Anilin, etc., Fabr k *v.* Schott, (1892) 3 Ch. 447.

United States. — Hitchcock *v.* Anthony, (C. C. A.) 83 Fed. Rep. 779; National Enameling, etc., Co. *v.* Haberman, 120 Fed. Rep. 415.

Alabama. — Robbins *v.* Webb, 68 Ala. 393.

California. — Callahan *v.* Donnolly, 45 Cal. 153; Santa Clara Valley Mill, etc., Co. *v.* Hayes, 76 Cal. 387, 9 Am. St. Rep. 211.

Georgia. — Rakestraw *v.* Lanier, 104 Ga. 188, 69 Am. St. Rep. 154.

Illinois. — Linn *v.* Sigsbee, 67 Ill. 80; More *v.* Bennett, 140 Ill. 69, 33 Am. St. Rep. 216.

Indiana. — Wiley *v.* Baumgardner, 97 Ind. 66, 49 Am. Rep. 427; Consumers' Oil Co. *v.* Nunnemaker, 142 Ind. 560, 51 Am. St. Rep. 193.

Minnesota. — National Ben. Co. *v.* Union Hospital Co., 45 Minn. 272.

Missouri. — Mallinckrodt Chemical Works *v.* Nemnich, 83 Mo. App. 6.

Nebraska. — Wittenberg *v.* Mollyneaux, 60 Neb. 583.

New Jersey. — Brewer *v.* Marshall, 19 N. J. Eq. 537, 97 Am. Dec. 679; Mandeville *v.* Harman, 42 N. J. Eq. 185; Sternberg *v.* O'Brien, 48 N. J. Eq. 370; Trenton Potteries Co. *v.* Oliphant, 56 N. J. Eq. 680.

New York. — Dunlop *v.* Gregory, 10 N. Y. 241, 61 Am. Dec. 746; Dethlefs *v.* Tamsen, 7 Daly (N. Y.) 357; Oppenheimer *v.* Hirsch, 5 N. Y. App. Div. 235; Diamond Match Co. *v.* Roeber, 106 N. Y. 482, 60 Am. Rep. 464; Williams *v.* Montgomery, 148 N. Y. 520; Weller *v.* Hersee, 10 Hun (N. Y.) 431; Matthews *v.* Associated Press, 61 Hun (N. Y.) 203; Mackinnon Pen Co. *v.* Fountain Ink Co., 48 N. Y. Super. Ct. 442; Leslie *v.* Lorillard, 110 N. Y. 519.

Ohio. — Lufkin Rule Co. *v.* Fringeli, 4 Ohio Dec. 209; Paragon Oil Co. *v.* Hall, 4 Ohio Cir. Dec. 576.

Pennsylvania. — Erie County Milk Assoc. *v.* Ripley, 18 Pa. Super. Ct. 28; Smith's Appeal, 113 Pa. St. 579.

Rhode Island. — Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484, 49 Am. St. Rep. 784; Tillinghast *v.* Boothby, 20 R. I. 59.

Wisconsin. — Kellogg *v.* Larkin, 3 Pin. (Wis.) 123, 56 Am. Dec. 164; Berlin Mach. Works *v.* Perry, 71 Wis. 495, 5 Am. St. Rep. 236; Richards *v.* American Desk, etc., Co., 87 Wis. 503.

2. Each Case Tried by Its Facts. — Gibbs *v.* Consolidated Gas Co., 130 U. S. 396; Alger *v.* Thacher, 19 Pick. (Mass.) 54, 31 Am Dec. 119; Trenton Potteries Co. *v.* Oliphant, 56 N. J. Eq. 680; Kevil *v.* Standard Oil Co., 11 Ohio Dec. 114.

3. Once Reasonable, Always So. — Rannie *v.* Irvine, 8 Scott N. R. 674; Trenton Potteries Co. *v.* Oliphant, 56 N. J. Eq. 680.

operation.[1] Contracts between parties which have for their object merely the removal of a rival and competitor in a business are not contracts in restraint of trade, and, according to the test here applied, are unlawful under all circumstances.[2]

f. REASONABLENESS NOT THE SAME THING AS PARTIALITY. — The question has arisen and been discussed whether a contract in restraint of trade is reasonable because it is partial or whether the court must go further and decide upon the validity of the partial restraint by applying the test of reasonableness. The latter alternative contains the true rule. The rule is not that a limited restraint is good, but that it may be good. It is valid when the restraint is reasonable, and the restraint is reasonable when it imposes no shackles upon one party which are not beneficial to the other.[3]

Reasonableness and Adequacy of Consideration. — It will be seen in the next section, discussing consideration, that it is a well-established rule that adequacy of consideration is not required. There might appear to be some inconsistency between that statement and the proposition here under discussion, that there must be something shown above and beyond consideration to validate a contract in restraint of trade. There is, however, no inconsistency. The rule that there must appear good reason for the contract results from the proposition laid down in all the older cases, that contracts in restraint of trade are in themselves, if nothing shows them to be reasonable, bad in the eye of the law. Therefore, if there be simply a stipulation, though in an instrument under seal, that a trade or profession shall not be carried on in a particular place, without any recital in the deed, and without any averments showing circumstances which render such a contract reasonable, the instrument is void.[4] What seems to be meant, therefore, is that the contract, in addition to having sufficient consideration to support it, must be shown to be ancillary or subordinate to another contract, as explained in the preceding section.[5]

5. Consideration — *a.* NECESSITY. — A contract in restraint of trade is amenable to the general rule that it must be supported by a consideration.[6]

b. ADEQUACY. — There has, however, been considerable discussion in the cases upon the question of adequacy of consideration. The earlier cases held that there should be a consideration adequate to the restraint; as Lord Ellenborough said: "The restraint on one side meant to be enforced should in reason be coextensive only with the benefits meant to be enjoyed on the other."[7] In a leading case in the Exchequer Chamber, however, the doc-

1. Restraining Contract Must Be Ancillary — *United States.* — Fox Solid Pressed Steel Co. *v.* Schoen, 77 Fed. Rep. 29; U. S. *v.* Addyston Pipe, etc., Co., (C. C. A.) 85 Fed. Rep. 271.

Connecticut. — National Enameling, etc., Co. *v.* Haberman, 120 Fed. Rep. 415.

Indiana. — Wiley *v.* Baumgardner, 97 Ind. 66, 49 Am. Rep. 427.

Iowa. — Chapin *v.* Brown, 83 Iowa 156, 32 Am. St. Rep. 297.

Michigan. — Watrous *v.* Allen, 57 Mich. 362, 58 Am. Rep. 363; Clark *v.* Needham, 125 Mich. 86.

New York. — Chappel *v.* Brockway, 21 Wend. (N. Y.) 162; Ru Ton *v.* Everitt, 35 N. Y. App. Div. 412; Oppenheimer *v.* Hirsch, 5 N. Y. App. Div. 235; Wood *v.* Whitehead Bros. Co., 165 N. Y. 545; Brett *v.* Ebel, 29 N. Y. App. Div. 256.

North Dakota. — Mapes *v.* Metcalf, 10 N. Dak. 601.

Ohio. — Block *v.* Standard Distilling, etc., Co., 11 Ohio Dec. 145; Lufkin Rule Co. *v.* Fringeli, 57 Ohio St. 596, 63 Am. St. Rep. 736; Field Cordage Co. *v.* National Cordage Co., 3 Ohio Cir. Dec. 615; Lange *v.* Werk, 2 Ohio St. 520; Paragon Oil Co. *v.* Hall, 4 Ohio Cir. Dec. 576.

Pennsylvania. — Gompers *v.* Rochester, 56 Pa. St. 194.

Wisconsin. — Palmer *v.* Toms, 96 Wis. 369.

2. Wood *v.* Whitehead Bros. Co., 165 N. Y. 545.

3. Reasonableness Not the Same Thing as Partiality. — Davies *v.* Davies, 36 Ch. D. 359; Weller *v.* Hersee, 10 Hun (N. Y.) 431; Ross *v.* Sadgbeer, 21 Wend. (N. Y.) 166.

4. Reasonableness and Adequacy. — Horner *v.* Graves, 7 Bing. 744, 20 E. C. L. 314; Wallis *v.* Day, 2 M. & W. 276; Mallan *v.* May, 11 M. & W. 665.

5. See *supra*, this subsection, *Restraining Contract Must Be Ancillary.*

6. Consideration. — The proposition is too general to need the citation of cases. See the title CONSIDERATION, vol. 6, p. 667.

7. Adequacy. — Gale *v.* Reed, 8 East 80. See also Young *v.* Timmins, 1 Tyrw. 226; Wallis *v.* Day, 2 M. & W. 273.

trine of the older cases was overruled and the principle established that the court could not inquire into the adequacy of the consideration, provided it was shown to possess some real legal value.[1]

Sale of Business, Consideration for Restraint. — In numerous cases it has been held that the sale of a business is sufficient consideration for the covenant restraining the vendor from the future exercise of his trade or profession, and that anything more than this is not necessary.[2]

c. GOOD REASON FOR IMPOSING RESTRAINT. — There is a peculiar feature attaching to the doctrine of consideration as applied to contracts in restraint of trade; on account of the peculiar character of such contracts, and possibly on account of the disfavor with which such contracts were once, and are in some jurisdictions still, regarded, it is a proposition laid down in many cases that in order to support such a contract, there must be not only a sufficient pecuniary consideration, but a good reason shown for entering into the engagement.[3] It has been said that a contract of this kind requires no greater pecuniary or valuable consideration to support it than any other contract; but such consideration, however valuable, will not of itself support it. Whether it can be supported or not depends upon matters outside of and beyond the abstract fact of the contract or the pecuniary consideration; it will depend upon the situation of the parties, the nature of their business, the interests to be protected by the restriction, and its effect upon the public; in short, upon all the surrounding circumstances.[4] It has been said also, for this reason, that an agreement in restraint of trade is the only exception to the rule that a contract under seal imports a consideration.[5]

6. Public Policy — *a.* IN GENERAL. — The most usual grounds upon which a contract in restraint of trade has been condemned are first, that it is contrary to public policy, and second, that it is a useless restraint upon the

1. Not Essential. — Hitchcock *v.* Coker, 6 Ad. & El. 438, 33 E. C. L. 98. See also Leighton *v.* Wales, 3 M. & W. 545; Archer *v.* Marsh, 6 Ad. & El. 966, 33 E. C. L. 258; Pilkington *v.* Scott, 15 M. & W. 657; Gravely *v.* Barnard, L. R. 18 Eq. 518, 43 L. J. Ch. 659.

The rule in Hitchcock *v.* Coker, 6 Ad. & El. 438, 33 E. C. L. 98, has been recognized and adopted by the American courts. Eisel *v.* Hayes, 141 Ind. 41; Hubbard *v.* Miller, 27 Mich. 21, 15 Am. Rep. 153; McClurg's Appeal, 58 Pa. St. 51.

Notwithstanding the statement that the court will not inquire into the sufficiency of the consideration, such inquiry has been made in many cases. Thus, Tindal, C. J., thought that thirty pounds was a very slender and inadequate consideration for an agreement by which the covenantor restrained himself from earning his livelihood within the large space comprehended within a circle drawn one hundred miles from the city of York. Horner *v.* Graves, 7 Bing. 742, 20 E. C. L. 313. See also Seward *v.* Shields, 18 Pa. Super. Ct. 384.

2. Sale of Business, Consideration for Restraint. — Sainter *v.* Ferguson, 7 C. B. 716, 62 E. C. L. 716; Cobbs *v.* Niblo, 6 Ill. App. 60; Eisel *v.* Hayes, 141 Ind 41; Johnson *v.* Gwinn, 100 Ind. 466; Pierce *v.* Woodward, 6 Pick. (Mass.) 206; Thompson *v.* Means, 11 Smed. & M. (Miss.) 604; Holbrook *v.* Waters, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 335.

Examples of Consideration. — See Marshalltown Stone Co. *v.* Des Moines Brick Mfg. Co., 114 Iowa 574; Grasselli *v.* Lowden, 11 Ohio St. 349; Fuller *v.* Hope, 163 Pa. St. 62; Erie County Milk Assoc. *v.* Ripley, 18 Pa. Super. Ct. 28; Texas, etc., R. Co. *v.* Robards, 60 Tex. 545, 48 Am. Rep. 268.

Consideration in Deeds. — Homer *v.* Ashford, 3 Bing. 328, 11 E. C. L. 124.

Release from Prior Obligation. — Perkins *v.* Clay, 54 N. H. 518. See Crawford *v.* Wick, 18 Ohio St. 190, 98 Am. Dec. 103.

Mutual Covenants. — Dakin *v.* Williams, 11 Wend. (N. Y.) 67; Hartley *v.* Cummings, 5 C. B. 260, 57 E. C. L. 260.

Bond to Do Illegal Act. — Hilton *v.* Eckersley, 6 El. & Bl. 47, 88 E. C. L. 47.

3. Good Reason for Imposing Restraint. — Collins *v.* Locke, 4 App. Cas. 674; Davis *v.* Mason, 5 T. R. 120; California Steam Nav. Co. *v.* Wright, 6 Cal. 258; Linn *v.* Sigsbee, 67 Ill. 80; Talcott *v.* Brackett, 5 Ill. App. 60; Pierce *v.* Fuller, 8 Mass. 223, 5 Am. Dec. 102; Chappel *v.* Brockway, 21 Wend. (N. Y.) 158; Fisher *v.* Bush, 35 Hun (N. Y.) 641; Ross *v.* Sadgbeer, 21 Wend. (N. Y.) 166; Stephens *v.* Aulls, 3 Thomp. & C. (N. Y.) 781; Weller *v.* Hersee, 10 Hun (N. Y.) 431; Keeler *v.* Taylor, 53 Pa. St. 468; Cleaver *v.* Lenhart, 182 Pa. St. 285; West Virginia Transp. Co. *v.* Ohio River Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527; Kellogg *v.* Larkin, 3 Pin. (Wis.) 123, 56 Am. Dec. 164.

4. Hubbard *v.* Miller, 27 Mich. 19, 15 Am. Rep. 153.

In Lawrence *v.* Kidder, 10 Barb. (N. Y.) 649, Selden, J., seemed to think that the doctrine of Hitchcock *v.* Coker, 6 Ad. & El. 438, 33 E C. L. 98, that the courts would not examine into the adequacy of the consideration, had overthrown the doctrine under discussion.

5. Sealed Instrument Needs Consideration. — Gompers *v.* Rochester, 56 Pa. St. 197.

rights of the covenantor. A great many cases base the rule on the former reason, some of them going so far as to say that it is the only consideration underlying the rule.[1] The opinions dealing with the subject show a great deal of confusion and conflict.[2]

b. DEGREE OF RESTRAINT IMMATERIAL. — Where a restraint is admitted or adjudged to be injurious to the public interests, no matter how limited such restraint may be, courts will not stop to inquire as to the degree of injury inflicted. It is enough to know that the natural tendency of such contracts is injurious.[3]

c. RESTRAINTS BENEFICIAL TO THE PUBLIC. — But it has been pointed out that there are contracts restraining trade that are beneficial to the public,[4] and others in which the public can have no possible concern.[5]

d. RIGHT TO CONTRACT. — Furthermore, the courts have in several cases emphasized the fact that public policy demands likewise that every man shall be able to preclude himself from competing with particular persons so far as is necessary in order to obtain the best price for his business or knowledge when he chooses to sell it.[6]

e. COMPETITION AND MONOPOLIES. — A ground upon which agreements restraining trade have often been condemned is that they stifle competition and create or tend to create monopolies.[7] But it has been said that "the tendency of modern thought and of the decisions has been no longer to uphold in its strictness the doctrine which formerly prevailed in respect of agreements in restraint of trade. The severity with which such agreements were at first treated became more and more relaxed by exceptions and qualifications."[8]

Evils of Competition. — It is, moreover, recognized that competition is not an unmixed blessing, and that it is sometimes advantageous to society to have

1. Public Policy. — Gibbs *v.* Consolidated Gas Co., 130 U. S. 396.

2. See Davies *v.* Davies, 36 Ch. D. 359; Egerton *v.* Brownlow, 4 H. L. Cas. 1; Whittaker *v.* Howe, 3 Beav. 383; Homer *v.* Ashford, 3 Bing 326, 11 E. C. L. 123.

Cases Turning upon Public Policy. — The following held the contract in question to be opposed to public policy: Union Strawboard Co. *v.* Bonfield, 193 Ill. 425; Gamewell F. Alarm Tel. Co. *v.* Crane, 160 Mass. 51, 39 Am. St. Rep. 458; Western Wooden-ware Assoc. *v.* Starkey, 84 Mich. 76, 22 Am. St. Rep. 686; Saratoga County Bank *v.* King, 44 N. Y. 87.

In the following the contract was not obnoxious on the ground of public policy: Robbins *v.* Webb, 68 Ala. 393; McCurry *v.* Gibson, 108 Ala. 451, 54 Am. St. Rep. 177; Smith *v.* Leady, 47 Ill. App. 443; Cole *v.* Edwards, 93 Iowa 477; Beal *v.* Chase, 31 Mich. 491; Trenton Potteries Co. *v.* Oliphant, 58 N. J. Eq. 507, 78 Am. St. Rep. 612; Mackinnon Pen Co. *v.* Fountain Ink Co., 48 N. Y. Super. Ct. 442.

Contract Restricting the Retail Traffic of Intoxicating Liquors Not Against Public Policy. — Sell *v.* Branen, 70 Ill. App. 473; McAlister *v.* Howell, 42 Ind. 15; Watrous *v.* Allen, 57 Mich. 362, 58 Am. Rep. 363.

3. Degree of Restraint Immaterial. — Tuscaloosa Ice Mfg. Co. *v.* Williams, 127 Ala. 110; Chicago Gas Light, etc., Co. *v.* People's Gas Light, etc., Co., 121 Ill. 530, 2 Am. St. Rep. 124; Wiley *v.* Baumgardner, 97 Ind. 66, 49 Am. Rep. 427; Nester *v.* Continental Brewing Co., 161 Pa. St. 473, 41 Am. St. Rep. 894; West Virginia Transp. Co. *v.* Ohio River Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527.

4. Restraints Beneficial to the Public. — Palmer *v.* Stebbins, 3 Pick. (Mass.) 188, 15 Am. Dec. 204; Perkins *v.* Lyman, 9 Mass. 522; Beal *v.* Chase, 31 Mich. 491; Skrainka *v.* Scharinghausen, 8 Mo. App. 523; Matthews *v.* Associated Press, 61 Hun (N. Y.) 203.

5. Anderson *v.* Rowland, 18 Tex. Civ. App. 460.

6. Right to Contract. — Dolph *v.* Troy Laundry Machinery Co., 28 Fed. Rep. 553; National Enameling, etc., Co. *v.* Haberman, 120 Fed. Rep. 415; Beal *v.* Chase, 31 Mich. 491; Wood *v.* Whitehead Bros. Co., 165 N. Y. 545; Palmer *v.* Toms, 96 Wis. 369.

In Lawrence *v.* Kidder, 10 Barb. (N. Y.) 650, it was said that "the law will not tolerate a contract which excludes one individual from carrying on his trade in a particular locality, unless the circumstances show that his place is to be supplied by some other person of the same trade." While this is said to be no new rule, but a doctrine deducible from all the cases, it is a rather severe test and one not generally recognized.

It has been held that a contract prohibiting the owner of a water right from selling it to any one without the consent in writing of his four associates, is against public policy in a country where water is necessary for industrial pursuits, such contract being analogous to those in restaint of trade. Ford *v.* Gregson, 7 Mont. 89.

7. See the title MONOPOLIES AND CORPORATE TRUSTS, vol. 20, p. 844.

8. Leslie *v.* Lorrillard, 110 N. Y. 519. See also Marshalltown Stone Co. *v.* Des Moines Brick Mfg. Co., 114 Iowa 574.

it restrained. It is possible to destroy great industries by over competition, and contracts that tend to counteract this tendency are not objectionable on grounds of public policy.[1] Removing one competitor from a field where capital is free to enter does not tend to create a monopoly.[2]

f. EXCLUSIVE PRIVILEGES. — Sometimes a valid restraint of trade takes the form of an exclusive privilege, as, for instance, the exclusive right to furnish beer to a public house,[3] or the sole right to buy and sell certain goods or at a certain price,[4] or to write plays for only one theatre,[5] or not to work for any one but the covenantee,[6] or to publish an advertisement of only one article of a given class.[7] Nor, generally, are contracts containing mutual restrictions void.[8] But exclusive privileges conferred by railways upon telegraph lines, such as the sole right to use the right of way, have been condemned as monopolies and against public policy,[9] and are forbidden by a *United States* statute.[10]

7. Severability of the Contract. — In many cases where the covenant included a greater area than seemed reasonable to the court, an attempt has been made, where the language of the covenant permitted it, to distinguish and separate between what was permissible and what was not. Thus, a covenant not to engage in the business within the state or a specified portion thereof " or elsewhere " has been held enforceable as to the state or specified portion, but void as to the area outside.[11]

When Severance Will Be Made. — But it has been said that where there is a question of severing the good from the bad part of a covenant or agreement of this kind, the court must find in the agreement itself sufficient ground for making the severance; it must take great care not to create a new agreement

1. Evils of Competition. — Haynes *v.* Doman, (1899) 2 Ch. 25; Collins *v.* Locke, 4 App. Cas. 674; Palmer *v.* Stebbins, 3 Pick. (Mass.) 188, 15 Am. Dec. 204; Beal *v.* Chase, 31 Mich. 491; Skrainka *v.* Scharinghausen, 8 Mo. App. 523; Rafferty *v.* Buffalo City Gas Co., 37 N. Y. App. Div. 618.

2. Chappel *v.* Brockway, 21 Wend. (N. Y.) 163; Diamond Match Co. *v.* Roeber, 106 N. Y. 483, 60 Am. Rep. 464; Wood *v.* Whitehead Bros. Co., 165 N. Y. 545.

3. Exclusive Privileges. — Catt *v.* Tourle, L. R. 4 Ch. 654; Thornton *v.* Sherratt, 8 Taunt. 529, 4 E. C. L. 199; Anheuser-Busch Brewing Assoc. *v.* Houck, (Tex. Civ. App. 1894) 27 S. W. Rep. 692. But see Cooper *v.* Twibill, 3 Campb. 286, note; Holcombe *v.* Hewson, 2 Campb. 391; Muller *v.* Bohringer, 3 Pa. Co. Ct. 144.

4. *England.* — Altman *v.* Royal Aquarium Soc., 3 Ch. D. 228; Jones *v.* North, L. R. 19 Eq. 430.

United States. — Carter-Crume Co. *v.* Peurrung, 58 U. S. App. 388.

California. — Schwalm *v.* Holmes, 49 Cal. 665.

Illinois. — Brown *v.* Rounsavell, 78 Ill. 589; Weiboldt *v.* Standard Fashion Co., 80 Ill. App. 70.

Kansas. — Roller *v.* Ott, 14 Kan. 609.

Massachusetts. — Central Shade Roller Co. *v.* Cushman, 143 Mass. 353.

Montana. — Newell *v.* Meyendorff, 9 Mont. 254, 18 Am. St. Rep. 738.

New York. — Van Marter *v.* Babcock, 23 Barb. (N. Y.) 633; Live Stock Assoc. *v.* Levy, 54 N. Y. Super. Ct. 38; Walsh *v.* Dwight, 40 N. Y. App. Div. 513.

Texas. — Crystal Ice Mfg. Co. *v.* San Antonio Brewing Assoc., 8 Tex. Civ. App. 1.

Contra. — Mystery of Gunmakers Soc. *v.* Fell, Willes 388; Clark *v.* Needham, 125 Mich. 86; Central Ohio Salt Co. *v.* Guthrie, 35 Ohio St. 666.

5. Morris *v.* Colman, 18 Ves. Jr. 437.

6. Gale *v.* Reed, 8 East 80.

7. Goddard *v.* American Queen, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 482.

8. Mutual Restrictions. — Hartley *v.* Cummings, 5 C. B. 260, 57 E. C. L. 260; Wiggins Ferry Co. *v.* Ohio, etc., R. Co., 72 Ill. 360; National Ben. Co. *v.* Union Hospital Co., 45 Minn. 272; Koehler *v.* Feuerbacher, 2 Mo. App. 11; Hadden *v.* Dimick, (Supm. Ct. Gen. T.) 31 How. Pr. (N. Y.) 196, *reversed* 13 Abb. Pr. N. S. (N. Y.) 135; Cowan *v.* Fairbrother, 118 N. Car. 406, 54 Am. St. Rep. 733; Butler *v.* Burleson, 16 Vt. 176.

9. Western Union Tel. Co. *v.* American Union Tel. Co., 65 Ga. 160; Cumberland Telephone, etc., Co. *v.* Morgan's Louisiana, etc., R. Co., 51 La. Ann. 29, 72 Am. St. Rep. 442.

10. Rev. Stat. U. S., § 5263; Union Trust Co. *v.* Atchison, etc., R. Co., 8 N. Mex. 327. But see as to sleeping cars, Chicago, etc., R. Co. *v.* Pullman Southern Car Co., 139 U. S. 79.

11. Severability of the Restraint — *England.* — Baines *v.* Geary, 35 Ch. D. 154.

California. — Franz *v.* Bieler, 126 Cal. 176; Ragsdale *v.* Nagle, 106 Cal. 332.

Illinois. — Union Strawboard Co. *v.* Bonfield, 193 Ill. 425.

Massachusetts. — Dean *v.* Emerson, 102 Mass. 480.

Missouri. — Presbury *v.* Fisher, 18 Mo. 50.

New Jersey. — Trenton Potteries Co. *v.* Oliphant, 56 N. J. Eq 680.

Pennsylvania. — Smith's Appeal, 113 Pa. St. 579.

for the parties, nor to carve out of an unreasonable agreement something which would be reasonable for the sake of upholding what would be otherwise void. Upon this principle the court has refused in many cases to sever the contract, declaring it void *in toto*.[1]

When No Time Is Specified. — Likewise an agreement not to engage in the business in a particular place or area, specifying no limit as to time, is not void entirely, but is binding against the covenantor so long as the buyer of the business or any one deriving title from him carries on a like business within the same area.[2]

No Precise Rule Can Be Laid Down for the solution of the question whether a contract is entire or severable; but it must be solved by considering both the language and the subject-matter of the contract.[3]

8. Rights of Assignee. — Where a covenantor upon sale of a business covenants not to engage in a similar business, such an agreement is a valuable right in that the business it was designed to protect may be assigned by the purchaser upon a sale by him of the business, and the assignee may enforce it in the same manner as the assignor could have done had he retained the business.[4]

9. License to Commit Breach. — Where a covenant is not to do a particular act, and a penalty or forfeiture is annexed to the doing of that act, the covenantor is not at liberty to pay the sum specified as a penalty or liquidated damages and to do the act constituting the breach.[5]

The Acceptance of the Resignation of an Employee before the term of employment fixed by the contract expires does not abrogate such employee's restrictive covenant, but leaves the parties in the same situation as they would have

1. When Severance Will Be Made — *England.* — Mills *v.* Dunham, (1891) 1 Ch. 576; Baker *v.* Hedgecock, 39 Ch. D. 520; Harms *v.* Parsons, 32 Beav. 332.

California. — Callahan *v.* Donnolly, 45 Cal. 153; Santa Clara Valley Mill, etc., Co. *v.* Hayes, 76 Cal. 387, 9 Am. St. Rep. 211.

Illinois. — Linn *v.* Sigsbee, 67 Ill. 80.

Indiana. — Consumers' Oil Co. *v.* Nunnemaker, 142 Ind. 560, 51 Am. St. Rep. 193.

Massachusetts. — Bishop *v.* Palmer, 146 Mass. 469, 4 Am. St. Rep. 339.

New Jersey. — Althen *v.* Vreeland, (N. J. 1897) 36 Atl. Rep. 479.

New York. — Saratoga County Bank *v.* King, 44 N. Y. 87.

2. When No Time Is Specified. — Dubowski *v.* Goldstein, (1896) 1 Q. B. 478; Nicholls *v.* Stretton, 10 Q. B. 346, 59 E. C. L. 346; City Carpet Beating, etc., Works *v.* Jones, 102 Cal. 506; Gregory *v.* Spieker, 110 Cal. 150, 52 Am. St. Rep. 70; Thomas *v.* Miles, 3 Ohio St. 274.

So, an Agreement Not to Compete with a business " now or hereafter to be carried on," has been construed to apply to the business then carried on, disregarding the word " hereafter." Davies *v.* Lowen, 64 L. T. N. S. 655.

An Agreement Not to Sell " malt liquors or aerated waters " within certain districts was separated and the covenantor restrained from selling malt liquors alone. Rogers *v.* Maddocks, (1892) 3 Ch. 346.

A Restriction Covering London, and an area embraced within six hundred miles thereof, was held good as to London, though void as to the six hundred miles. Price *v.* Green, 16 M. & W. 346.

And Where the Contract Consists of Two Parts, only one of which the court can enforce, it may grant an injunction notwithstanding the fact that it would not enforce the agreement *in toto*. Rolfe *v.* Rolfe, 15 Sim. 88.

3. No Precise Rule. — More *v.* Bonnet, 40 Cal. 251.

4. Rights of Assignee — *England.* — Hastings *v.* Whitley, 2 Exch. 611; Pemberton *v.* Vaughan, 10 Q. B. 87, 59 E. C. L. 87; Hitchcock *v.* Coker, 6 Ad. & El. 438, 33 E. C. L. 98; Jacoby *v.* Whitmore, 49 L. T. N. S. 335; Smith *v.* Hawthorn, 76 L. T. N. S. 716; Elves *v.* Crofts, 10 C. B. 241, 70 E. C. L. 241; Benwell *v.* Inns, 24 Beav. 307; Baines *v.* Geary, 35 Ch. D. 154.

California. — Ragsdale *v.* Nagle, 106 Cal. 332.

Georgia. — Swanson *v.* Kirby, 98 Ga. 586.

New York. — Greite *v.* Henricks, 71 Hun (N. Y.) 7; Booth *v.* Seibold, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 101; Diamond Match Co. *v.* Roeber, 106 N. Y. 487, 60 Am. Rep. 464; Francisco *v.* Smith, 143 N. Y. 488.

Pennsylvania. — Nester *v.* Continental Brewing Co., 161 Pa. St. 473, 41 Am. St. Rep. 894.

See also New York Bank Note Co. *v.* Hamilton Bank Note Engraving, etc., Co., 83 Hun (N Y.) 593. But see Atkyns *v.* Kinnier, 4 Exch. 776; Boyden *v.* Baldwin, (C. Pl. Gen. T.) 15 Misc. (N. Y.) 103, and Davies *v.* Davies, 36 Ch. D. 359, in which it was held that a covenant not to trade or act in such a way as to affect certain partners was personal to the partners and could not be sued upon by their assignees.

5. License to Commit Breach. — Howard *v.* Woodward, 5 New Reports 8, 34 L. J. Ch. 47; Mumford *v.* Gething, 7 C. B. N. S. 305, 97 E. C. L. 305; French *v.* Macale, 2 Dr. & War. 269, 4 Ir. Eq. R. 573; National Provincial Bank *v.* Marshall, 40 Ch. D. 112; Wilkinson *v.* Colley, 164 Pa. St. 35. See also Maythorne

been at the end of the term if the employee had then left the employer's service.[1]

Consent. — Nor does the employer's consent that the employee shall enter the service of another release his restrictive agreement for the future time.[2] When the covenantor commits the acts with the knowledge and consent of the plaintiff, it is, of course, no breach of the covenant.[3]

10. Construction of Contract — *a.* IN GENERAL. — It is a general rule applicable to all contracts in restraint of trade that the first duty of the court is to interpret the covenant or agreement itself, and to ascertain according to the ordinary rules of construction what is the fair meaning of the parties.[4]

b. STRICT CONSTRUCTION. — It has often been asserted that contracts in restraint of trade are against public policy and therefore presumably bad, and that their provisions should not be extended by construction or implication so as to favor persons desiring to enforce them beyond what the terms would clearly require.[5]

c. LIBERAL CONSTRUCTION. — This rule of construction has been handed down from the old cases, and is founded upon the idea that there is something intrinsically vicious in a contract restraining liberty of trade; but the more recent cases, especially in the more liberal jurisdictions, have denied the existence of any presumption against such contracts, but recognize them as entirely valid and legal, and interpret them not only without any adverse bias but in such a way as to effectuate rather than defeat them. Contracts which at one time would have been considered void *in toto* are now treated as severable if possible, and the legal portion allowed to stand. The legal restraint is not implied from doubtful words, and there is a decided disposition to set aside the arbitrary and narrow rules of construction once prevalent in favor of greater liberality and breadth of view.[6]

d. IN THE LIGHT OF THE FACTS. — Such a contract is to be construed in the light of its subject-matter and the conditions under which it was made, the situation of the parties, the nature of their business, the interests to be protected by the restriction, and its effect upon the public.[7]

v. Palmer, 11 Jur. N. S. 230. Rakestraw *v.* Lanier, 104 Ga. 188, 69 Am. St. Rep. 154.

1. Acceptance of Resignation. — Giles *v.* Hart, 5 Jur. N. S. 1381; Magnolia Metal Co. *v.* Price, 65 N. Y. App. Div. 276.

2. Employer's Consent. — Showell *v.* Winkup, 60 L. T. N. S. 389.

3. Covenantee's Consent. — Rawlinson *v.* Clarke, 14 M. & W. 187.

4. Construction of Contract. — Mills *v.* Dunham, (1891) 1 Ch. 576.

5. Strict Construction — *England.* — Underwood *v.* Barker, (1899) 1 Ch. 300, (*per* Vaughn Williams, L. J.); Mystery of Gunmakers Soc. *v.* Fell, Willes 388; Mitchel *v.* Reynolds, 1 P. Wms. 181, 1 Smith Lead. Cas. 417.

Illinois. — Wiggins Ferry Co. *v.* Ohio, etc., R. Co., 72 Ill. 360; Talcott *v.* Brackett, 5 Ill. App. 60.

Kansas. — Roller *v.* Ott, 14 Kan. 609.

Massachusetts. — Anchor Electric Co. *v.* Hawkes, 171 Mass. 104, 68 Am. St. Rep. 403.

New York. — Weller *v.* Hersee, 10 Hun (N. Y.) 431; Chappel *v.* Brockway, 21 Wend. (N. Y.) 159; Ross *v.* Sadgbeer, 21 Wend. (N. Y.) 166; Stephens *v.* Aulls, 3 Thomp. & C. (N. Y.) 781; Greenfield *v.* Gilman, 140 N. Y. 168; Bingham *v.* Maigne, 52 N. Y. Super. Ct. 92.

Pennsylvania. — Seward *v.* Shields, 9 Pa. Dist. 583.

6. Liberal Construction. — Mumford *v.* Gething, 7 C. B. N. S. 319, 97 E. C. L. 319; Merchants Ad-Sign Co. *v.* Sterling, 124 Cal. 429, 71 Am. St. Rep. 94; Hubbard *v.* Miller, 27 Mich. 19, 15 Am. Rep. 153; Caswell *v.* Gibbs, 33 Mich. 331; Anthony *v.* Hitchcock, 71 Fed. Rep. 659; Trenton Potteries Co. *v.* Oliphant, 58 N. J. Eq. 507, 78 Am. St. Rep. 612; Diamond Match Co. *v.* Roeber, 106 N. Y. 485, 60 Am. Rep. 464; Wood *v.* Whitehead Bros. Co., 165 N. Y. 545. See *supra*, this section, *Severability of the Contract.*

An agreement which is clearly in restraint of trade may be held to be valid in view of the nature of the property which is the subject-matter of the agreement. Meyer *v.* Estes, 164 Mass. 459.

And a contract not void upon its face may be invalid if it be shown that such contract formed part of a plan of the plaintiff to establish a monopoly. Pacific Factor Co. *v.* Adler, 90 Cal. 110.

7. In the Light of the Facts — *England.* — Smith *v.* Hancock, (1894) 2 Ch. 377.

United States. — Oregon Steam Nav. Co. *v.* Winsor, 20 Wall. (U. S.) 64.

California. — More *v.* Bonnet, 40 Cal. 251.

Missouri. — Long *v.* Towl, 42 Mo. 549, 97 Am. Dec. 355.

New Jersey. — Trenton Potteries Co. *v.* Oliphant, 56 N. J. Eq. 680.

Rhode Island. — Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484, 49 Am. St. Rep. 784.

e. IN THE LIGHT OF CHANGED CONDITIONS. — Recognizing the great changes that have taken place in the financial and commercial world by virtue of modern scientific invention and discovery, the courts have often asserted the general principle that such contracts must not be judged by the narrow rules laid down in the older cases, when communities only a few miles apart were isolated by practically impassable barriers of time and space. It is recognized that for certain trades and businesses the world is the market, and even where the older principles have not changed, their application has been widened and extended to correspond with the changed order of things.[1]

f. CONSTRUCTION IS FOR THE COURT. — The construction of a contract in restraint of trade must be made by the court, unless there be latent ambiguity or some other factor requiring a determination by a jury.[2]

11. Breach of the Contract — *a.* BY PHYSICIANS. — Where a physician has made an agreement not to practice medicine within a given radius, the word "practice" means the exercise of his profession. Hence, a single invasion of the prohibited territory has been held a violation of both the letter and spirit of the agreement.[3] Such agreement is likewise broken where the covenantor becomes a member of a firm engaged in the same or similar business within the proscribed limits;[4] and, of course, opening an office in the next house but one from his former office would be a patent breach of the contract.[5] A covenant of a physician not to resume practice in a certain village or its vicinity is not broken by his opening an office four miles distant and there treating patients from the vicinity of the village who come to him without solicitation.[6] But such an agreement would be violated by practicing within the designated limit, although the covenantor reside outside.[7]

b. BY PARTNERS. — There is nothing to prevent a retiring partner from engaging in a similar business in the vicinity of the place of the dissolved firm, unless he has, upon his retirement, entered into a covenant to that effect.[8]

Fraud. — But if such retiring partner, after selling his interest, represents a new business which he establishes to be the same that the dissolved firm carried on, or if he leads customers to believe that he is carrying on business as a successor to the old firm, or if he induces his former partner to buy his interest by falsely stating that he did not intend to engage in a similar business in competition with him, he may be restrained by injunction from continuing to perpetrate the fraud.[9]

Soliciting Old Customers. — Where two partners dissolve, one taking the goodwill and continuing the business, the court will enjoin the retiring partner, if he sets up a similar business in the neighborhood, from soliciting the old

1. In the Light of Changed Conditions. — Maxim-Nordenfelt Guns, etc., Co. *v.* Nordenfelt, (1893) 3 Ch. 122, 62 L. J. Ch. 749; U. S. *v.* Addyston Pipe, etc., Co., (C. C. A.) 85 Fed. Rep. 271; Trenton Potteries Co. *v.* Oliphant, 58 N. J. Eq. 507, 78 Am. St. Rep. 612; Diamond Match Co. *v.* Roeber, 106 N. Y. 485, 60 Am. Rep. 464; Leslie *v.* Lorillard, 110 N. Y. 519.

2. Construction Is for the Court. — Haynes *v.* Doman, (1899) 2 Ch. 24; Mallan *v.* May, 11 M. & W. 653; Linn *v.* Sigsbee, 67 Ill. 80; Wiley *v.* Baumgardner, 97 Ind. 66, 44 Am. Rep. 427; Warren *v.* Jones, 51 Me. 146; Cohen *v.* Berlin, etc., Envelope Co., 166 N. Y. 292; Erie County Milk Assoc. *v.* Ripley, 18 Pa. Super. Ct. 28; Palmer *v.* Toms, 96 Wis. 369.

3. Breach of the Contract. — Gaul *v.* Hoffman, 5 Pa. Co. Ct. 355.

4. Greenfield *v.* Gilman, 140 N. Y. 168.

5. Dwight *v.* Hamilton, 113 Mass. 177.

6. Raub *v.* Van Horn, 133 Pa. St. 573. See also Paxson's Appeal, 106 Pa. St. 429.

7. Smith *v.* Smith, 4 Wend. (N. Y.) 468.

8. By Partners. — White *v.* Jones, (N. Y. Super. Ct. Gen. T.) 1 Abb. Pr. N. S. (N. Y.) 328.

A partner who, upon the dissolution of a firm, covenants not to enter into or in any way be interested in such business within certain limits, violates his contract by forming with a third person a new partnership within such limits to carry on the same business. Dean *v.* Emerson, 102 Mass. 480; Palmer *v.* Graham, 1 Pars. Eq. Cas. (Pa.) 476.

But It Has Been Held that Where Partners Covenanted Jointly and Severally that they would desist from and discontinue their business, an averment that any one of them had carried on the business thereafter was not equivalent to an averment that they had done it, and that to substantiate such an averment the court must construe the contract as though it read "they and each of them would desist." This the court refused to do. Lawrence *v.* Kidder, 10 Barb. (N. Y.) 655.

9. Dethlefs *v.* Tamsen, 7 Daly (N. Y.) 355.

customers of the firm, but will not restrain him from dealing with them.[1]

Use of Names of Old Customers. — A partner restricting himself not to do business within a certain time and area may, after the expiration of the time, resume the business, and after such resumption is entitled to use the names of the old customers of the firm obtained from the books of the firm before he told his interest therein.[2]

c. ENGAGING IN SIMILAR BUSINESS. — The court has often found difficulty in determining whether the business engaged in by the covenantor was the same or so similar as to constitute the acts of the covenantor a breach of his contract. There may be elements of likeness associated with decided dissimilarity. In a leading case the court has laid down the rule that a similar business is one so like another as to compete with it.[3]

To Constitute a Breach of Contract by the Vendor of a business it is not necessary that he should hold himself out to the world as engaging therein. There are many acts short of an open and shameless public breach and defiance of his clear obligations that will subject such covenantor to the interference of the court. As has been said, such a one must act in good faith; he must quit the business; not half quit and half not.[4] A violation of the letter and spirit of a covenant is sufficient to obtain an injunction.[5] And where the agreement is not to engage in a similar business the court need not precisely define the words "engage in business" before granting an injunction where it is evident that the defendant is doing what the agreement intended he should not do.[6] Hence, if a party contracts not to start a shop within a certain territory, he cannot open a shop outside of such territory and solicit patronage within it.[7] Nor can he hold himself out by advertisement, etc., as having removed from his former place of business to another, where he will continue his former business.[8]

Sale of Good Will. — It has been held that upon the sale of the good will of a business the vendor is not precluded from carrying on a precisely similar business, and that in a place next door to where the former business was carried on; and it was regarded as settled that if the purchaser wished to prevent that step from being taken it was his fault if he did not take care to insert provisions to that effect in the deed.[9]

d. ACTING AS AGENT OR EMPLOYEE. — A covenant not to carry on a certain trade is broken where the covenantor does so as the agent, or manager, or employee of another.[10]

Using Name of Son. — The re-establishment of a restricted business in the

1. Leggott *v.* Barrett, 15 Ch. D. 306.

2. Armstrong *v.* Bitner, 71 Md. 118.

3. **Similar Business — Tests** — *England.* — Vernon *v.* Hallam, 34 Ch. D. 748; Pearson *v.* Pearson, 27 Ch. D. 145; Labouchere *v.* Dawson, L. R. 13 Eq. 322; Harms *v.* Parsons, 32 Beav. 332; Cruttwell *v.* Lye, 17 Ves. Jr. 346; Drew *v.* Guy, (1894) 3 Ch. 25; Fitz *v.* Iles, (1893) 1 Ch. 77, *following* Buckle *v.* Fredericks, 44 Ch. D. 244, *distinguishing* Stuart *v.* Diplock, 43 Ch. D. 343.

Maine. — Caswell *v.* Johnson, 58 Me. 164.

Maryland. — Davis *v.* Barney, 2 Gill & J. (Md.) 382.

New Jersey. — Richardson *v.* Peacock, 33 N. J. Eq. 597.

Pennsylvania. — Kelso *v.* Reid, 145 Pa. St. 606, 27 Am. St. Rep. 716.

But see Clark *v.* Durland, (Supm. Ct. Gen. T.) 13 N. Y. St. Rep. 427; Breck *v.* Ringler, (Ct. App.) 42 N. Y. St. Rep. 356.

Clandestinely manufacturing and selling the identical compound by a different name and through a third person is a breach of an agreement not to manufacture or sell such compound. Gregory *v.* Spieker, 110 Cal. 150, 52 Am. St. Rep. 70.

Exporting champagne and affixing to the bottles his own brand, indicating that he was an exporter, was held to be a breach of an agreement not to establish oneself in the champagne trade. Rousillon *v.* Rousillon, 14 Ch. D. 351.

4. **Good Faith Required.** — Heichew *v.* Hamilton, 3 Greene (Iowa) 596.

5. Richardson *v.* Peacock, 28 N. J. Eq. 151.

6. Watts *v.* Smith, 62 L. T. N. S. 453.

7. Duffy *v.* Shockey, 11 Ind. 70, 71 Am. Dec. 348.

8. Wolmershausen *v.* O'Connor, 36 L. T. N. S. 921; Hall's Appeal, 60 Pa. St. 458, 100 Am. Dec. 584.

9. Churton *v.* Douglas, Johns. Ch. (Eng.) 174. But this was said in a case where the good will was sold without any restrictive covenant. See upon this subject the title GOOD WILL, vol. 14.

10. **Acting as Agent or Employee.** — Hill *v.*

name of the covenantor's son is a breach of the covenant of the father, where the name of the son is used as a mere cover and blind to conceal the interest of the father.[1]

After Marriage. — Where the covenantor married a publican and assisted him in his business within the proscribed area, it was held no breach of an agreement not to take, keep, or to be interested in any licensed house.[2]

Covenantor's Lending Money to Business. — A covenant not to be engaged in a specified trade or in anything relating thereto does not prevent the covenantor from loaning money to a person engaging in such trade upon mortgage of his premises, although he may know that the mortgagor has no means of paying the debt except through the profits of the business.[3]

Taking Stock in Rival Corporation. — Where the vendors of a business stipulate that they will not engage in the same business in the same place, neither of them has the right to take stock in or help to organize or manage a corporation formed to compete with the purchasers.[4]

e. SOLICITING OLD CUSTOMERS. — An agreement not to carry on a business such as that sold within a given distance is broken by the vendor's supplying from a place beyond the prescribed limit goods to customers within the district at their solicitation.[5]

In Case of Compulsory Alienation. — It has been held, however, that the rule forbidding the vendor of a business from afterwards soliciting former customers cannot be extended to the case of a compulsory alienation, as where the business is sold in bankruptcy or liquidation proceedings. The purchaser in such a case may set up *bona fide* a fresh business and solicit the customers of the former business.[6]

A Practical Difficulty Has Arisen when an injunction was sought against a vendor supplying old customers, that to enjoin a man against supplying persons whom he has not solicited is not only to enjoin him but to enjoin them, since it deprives them of the liberty which everybody else enjoys, of dealing with whom they choose. Hence, an injunction has been granted against soliciting such customers, but refused against trading with them when they voluntarily apply for goods.[7]

Selling at Lower Price. — A contract whereby a purchaser agrees to maintain certain prices upon certain goods is not in restraint of trade, and it is a breach of such contract to sell such goods at a lower price than that agreed upon, although they were purchased of a third party and not from the covenantee.[8]

12. Remedies — *a.* DAMAGES. — It is ordinary, in contracts restraining trade, to specify a sum to be paid as damages in case of breach; it is usually

Hill, 55 L. T. N. S. 769, 35 W. R. 137; Dales *v.* Weaber, 18 W. R. 993; Jones *v.* Heavens, 4 Ch. D. 636; Newling *v.* Dobell, 38 L. J. Ch. 111; Palmer *v.* Mallet, 36 Ch. D. 411, *distinguishing* Allen *v.* Taylor, 19 W. R. 556; Meyers *v.* Merillion, 118 Cal. 352; Beard *v.* Dennis, 6 Ind. 203, 63 Am. Dec. 380; Finger *v.* Hahn, 42 N. J. Eq. 606; Ewing *v.* Johnson, (Supm. Ct. Spec. T.) 34 How. Pr. (N. Y.) 202; Patterson *v.* Glassmire, 166 Pa. St. 230. But there is considerable authority *contra*. Allen *v.* Taylor, 24 L. T. N. S. 249, 19 W. R. 556; Fairbrother *v.* England, 40 W. R. 220; Tabor *v.* Blake, 61 N. H. 83. See also Josselyn *v.* Parson, L. R. 7 Exch. 127.

Where a covenantor opened a similar business by his servant, it was left to the jury to decide whether there had been a new business opened and whether if so it was really and substantially the business of the defendant and carried on in his behalf. Clark *v.* Howard, 2 F. & F. 125.

1. **Doing Business in Son's Name.** — Guerand *v.* Dandelet, 32 Md. 561.

By Covenantor's Nephew Held to Be No Breach. — Smith *v.* Hancock, (1894) 2 Ch. 377. See also Harkinson's Appeal, 78 Pa. St. 196, 21 Am. Rep. 9.

2. **After Marriage.** — Loe *v.* Lardner, 4 W. R. 597.

3. **Covenantor's Lending Money to Business.** — Bird *v.* Lake, 1 Hen & M. 338.

4. **Taking Stock in Rival Corporation.** — Kramer *v.* Old, 119 N. Car. 1, 56 Am. St. Rep. 650.

5. **Soliciting Old Customers.** — Brampton *v.* Beddoes, 13 C. B. N. S. 538, 106 E. C. L. 538; Turner *v.* Evans, 2 El. & Bl. 512, 75 E. C. L. 512.

6. **In Case of Compulsory Alienation.** — Walker *v.* Mottram, 19 Ch. D. 355. See also Cruttwell *v.* Lye, 17 Ves. Jr. 335.

7. **Injunction, When Granted.** — Leggott *v.* Barrett, 15 Ch. D. 313.

8. Clark *v.* Frank, 17 Mo. App. 602.

stated in such an agreement that the amount specified shall be liquidated damages, and it is usually construed to be such and not a penalty, though there are cases holding the contrary view.[1]

b. INJUNCTION. — It is a general rule that when one has made a valid contract with another that he will not engage in a certain business or occupation, and it is shown by the other party to the contract that the same is being violated to his injury, he is entitled to an injunction restraining the offending party. This is usually upon the ground that, from the nature of the case, just and adequate damages cannot be estimated for a breach of the contract.[2]

To Avoid Multiplicity of Actions. — Injunction may also be granted on the ground that it avoids multiplicity of actions.[3]

Where a Sale and Agreement Are Made by a Firm of two persons, one of whom afterwards goes into business alone and the other as a partner with a third person, who is made defendant, the injunction will be limited, as to such third person, to prevent him simply from engaging in the business as a partner with the other defendant and not to restrain him individually.[4]

The Fact that an Employee Has Deposited Money with his employer to be retained as liquidated damages in case of a violation of the contract will not prevent the issuance of an injunction to restrain such violation.[5]

Specific Performance — Where Area Separable. — It is no ground to refuse an injunction to restrain the violation of a contract that there was some part of the agreement which the court could not compel the defendant specifically to perform,[6] or that the restraint is too broad. If in such case the area be severable, the court may issue an injunction covering the area within which the restraint is legal.[7]

Where the Restriction Is Limited to a Given Area, an injunction restraining the covenantor from engaging in the business "anywhere" is erroneous.[8]

Insolvency of Covenantor. — The fact that the violator of the contract is insolvent is also good ground for granting an injunction to prevent further violation.[9]

Where No Time Is Mentioned in the Contract restraining a physician from the practice of his profession, the injunction may be made perpetual, enduring for the lifetime of the covenantor.[10]

Where Law Is Unsettled. — But a complainant is not in a position to ask for an injunction, even preliminary, when the rights on which he founds his claim are, as a matter of law, unsettled.[11]

And Where a Stipulation Is Unreasonable it should not be enforced by injunction.[12]

1. See for a full discussion, the title LIQUIDATED DAMAGES, vol. 19, p. 420.

2. **Injunction** — *England.* — Nicoll *v.* Beere, 53 L. T. N. S. 659.
California. — Ragsdale *v.* Nagle, 106 Cal. 332.
Georgia. — Brewer *v.* Lamar, 69 Ga. 656, 47 Am. Rep. 766; Spier *v.* Lambdin, 45 Ga. 319.
Illinois. — Cobbs *v.* Niblo, 6 Ill. App. 60.
Indiana. — O'Neal *v.* Hines, 145 Ind. 35.
Maryland. — Guerand *v.* Dandelet, 32 Md. 561, 3 Am. Rep. 164.
Michigan. — Hubbard *v.* Miller, 27 Mich. 15, 15 Am. Rep. 153.
New Jersey. — Richardson *v.* Peacock, 33 N. J. Eq. 597.
New York. — Dethlelfs *v.* Tamsen, 7 Daly (N. Y.) 355; Davies *v.* Racer, 72 Hun (N. Y.) 43; Muller *v.* Vettel, (N. Y. Super. Ct. Spec. T.) 25 How. Pr. (N. Y.) 350; Diamond Match Co. *v.* Roeber, 106 N. Y. 486, 60 Am. Rep. 464; Francisco *v.* Smith, 143 N. Y. 488.
North Carolina. — Baumgarten *v.* Broadaway, 77 N. Car. 8; Kramer *v.* Old, 119 N. Car. 1, 56 Am. St. Rep. 650.
Pennsylvania. — Wilkinson *v.* Colley, 164 Pa. St. 35; Gaul *v.* Hoffman, 5 Pa. Co. Ct. 355.
Texas. — Patterson *v.* Crabb, (Tex. Civ. App. 1899) 51 S. W. Rep. 870.
But see Carroll *v.* Giles, 30 S. Car. 412.

3. **To Avoid Multiplicity of Actions.** — Sutton *v.* Head, 86 Ky. 156 9 Am St. Rep. 274.

4. **As Affecting Third Person.** — Hubbard *v.* Miller, 27 Mich. 15, 15 Am. Rep. 153.

5. **Notwithstanding Deposit of Money.** — A. L. & J. J. Reynolds Co. *v.* Dreyer, (N. Y. Super. Ct. Gen. T.) 12 Misc. (N. Y.) 368.

6. **Where Specific Performance Impossible.** — Whittaker *v.* Howe, 3 Beav. 383.

7. **Where Area Is Separable.** — Althen *v.* Vreeland, (N. J. 1897) 36 Atl. Rep. 479.

8. **Injunction Too Broad.** — Talcott *v.* Brackett, 5 Ill. App. 60.

9. **Insolvency of Covenantor.** — Paragon Oil Co. *v.* Hall, 4 Ohio Cir Dec. 576.

10. **Injunction Perpetual.** — Hauser *v.* Harding, 126 N. Car. 295.

11. **Where Law Is Unsettled.** — Mandeville *v.* Harman, 42 N. J. Eq. 185.

12. **Unreasonable Stipulation.** — Berger *v.* Arm-

Laches. — And so where the complainant is guilty of laches.[1]

Nominal Damages. — Where the contract in restraint of trade is valid and the complaint states a breach of it, the plaintiff is entitled to injunction to prevent its violation, even if only nominal damages can be proved.[2]

III. LEGISLATIVE RESTRAINT. — There has been much legislation upon the subject of restraint of trade, in the way of statutes, state and federal, town ordinances, police regulations, by-laws, and by guilds and other labor organizations. Many of these topics are discussed elsewhere in this work.[3]

strong, 41 Iowa 450; Oppenheimer *v.* Hirsch, 5 N. Y. App. Div. 235.

1. **In Case of Laches.** — Smith *v.* Brown, 164 Mass. 584.

2. **Nominal Damages.** — Brown *v.* Kling, 101 Cal. 295.

3. **Legislative Restraint.** — See the titles APPRENTICES, vol. 2, p. 488; BENEVOLENT OR BENEFICIAL ASSOCIATIONS, vol. 3, p. 1061; BY-LAWS, vol. 4, p. 86; GAMBLING CONTRACTS, vol. 7, pp. 90, 117; ILLEGAL CONTRACTS, vol. 15, p. 986; INTERFERENCE WITH CONTRACT RELATIONS, vol. 16, pp. 1109, 1114; INTOXICATING LIQUORS, vol. 17, p. 317, LABOR COMBINATIONS, vol. 18, p. 80; MONOPOLIES AND CORPORATE TRUSTS, vol. 20, pp. 845, 848, 851 (2), 852, 869; POLICE POWER, vol. 22, p. 915.

A Georgia Statute in legislating against contracts opposed to the policy of the law includes among them "contracts in general in restraint of trade." (Code of Ga. 1895, vol. 2, § 3668 (2750).) This language would seem to condemn all contracts in restraint of trade, but it has been held that contracts in partial restraint of trade are valid if they are based upon a reasonable consideration. Brewer *v.* Lamar, 69 Ga. 656, 47 Am. Rep. 766.

New York Statute — Journeymen. — An agreement procured by manufacturers from their workmen not to exercise their trade thereafter "either in the city of New York or within a radius of two hundred and fifty miles therefrom, so long as plaintiffs, their survivors or successors shall continue such business," was held to be against the spirit if not the letter of a statute providing that no person shall accept from his journeymen or apprentices any contract or agreement that after their term of service shall expire, such journeymen or apprentices shall not set up their trade in any particular place or, etc. Rev. Stat. (7th ed.), vol. 3, p. 2353, § 39; Bingham *v.* Maigne, 52 N. Y. Super. Ct. 92.

Northern Securities Case. — In a recent case in the United States Circuit Court, it was held that the act known as the "Sherman Anti Trust Act," did not condemn unreasonable or partial restraint of trade alone, but any restraint thereof; and that an agreement between competing railroads which required them to act in concert in fixing the rate for the carriage of passengers or freight over their respective lines from one state to another, and which by that means restricted temporarily the right of any one of such carriers to name such rates for the carriage of such freight or passengers over its road as it pleased, was a contract in direct restraint of commerce within the meaning of the act, in that it tended to prevent competition; and that it mattered not whether while acting under such a contract the rate fixed was reasonable or unreasonable; the vice of such a contract or combination being that it conferred the power to establish unreasonable rates, and directly restrain commerce by placing obstacles in the way of free and unrestricted competition upon carriers who are natural rivals for patronage. U. S. *v.* Northern Securities Co., 120 Fed. Rep. 721 (Apr. 1893).

Among the numerous discussions of this case in current literature, special reference is made to the Harvard Law Review, June, 1903, and to Law Notes, May, 1903.

RESTRAINTS ON ALIENATION.

By Charles H. Street.

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Restraints on Transfer of Shares of Stock, see the title BY-LAWS, vol. 5, p. 93.
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I. Estates in Fee Simple — 1. Absolute Restraints — *a.* General Rule. The right of alienation is an inherent and inseparable quality of an estate

in fee simple, and therefore a condition against all alienation in a grant or devise of such an estate, or a limitation over upon alienation, or a provision forbidding all alienation, is void, because repugnant to the estate granted or devised.[1] As regards the application of this rule it is immaterial whether the estate is legal or equitable, or whether or not it is vested in possession. Absolute restraints upon the alienation of equitable estates in fee,[2] or vested remainders in fee,[3] stand in the same category as like restraints upon the alienation of legal estates, or estates vested in possession. And the same rule applies to absolute interests in personal property or chattels real.[4] But provisions in wills and conveyances creating base or determinable fees should be carefully distinguished from provisions which attempt to restrain alienation of estates in fee simple.[5]

Conveyance or Devise Free from Debts of Beneficiary. — Aside from statutory exemptions, liability for debts is also an incident of property held in fee simple, and

1. Absolute Restraints on Alienation of Fee Void — *England.* — Ware *v.* Cann, 10 B. & C. 433, 21 E. C. L. 104; Doe *v.* Carter, 8 T. R. 57; *In re* Machu, 21 Ch. D. 838, 30 W. R. 837; *In re* Jones, 23 L. T. N. S. 211; Marshall *v.* Aizlewood, 43 L. T. N. S. 752.

Canada. — Gallinger *v.* Farlinger, 6 U. C. C. P. 512; *Re* Thomas, 30 Ont. 49; *Re* Shanacy, 28 Ont. 372; *Re* Casner, 6 Ont. 282.

United States. — Potter *v.* Couch, 141 U. S. 296.

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Florida. — Robinson *v.* Randolph, 21 Fla. 629, 58 Am. Rep. 692.

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Indiana. — Conger *v.* Lowe, 124 Ind. 368; Allen *v.* Craft, 109 Ind. 476, 58 Am. Rep. 425; Langdon *v.* Ingram, 28 Ind. 360.

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Kentucky. — Kean *v.* Kean, (Ky. 1892) 18 S. W. Rep. 1032.

Maine. — Deering *v.* Tucker, 55 Me. 284.

Maryland. — Stansbury *v.* Hubner, 73 Md. 229, 25 Am. St. Rep. 584; Smith *v.* Towers, 69 Md. 77, 9 Am. St. Rep. 398; Smith *v.* Clark, 10 Md. 186.

Massachusetts. — Winsor *v.* Mills, 157 Mass. 362; Sparhawk *v.* Cloon, 125 Mass. 263; Lane *v.* Lane, 8 Allen (Mass.) 350; Simonds *v.* Simonds, 3 Met. (Mass.) 562; Blackstone Bank *v.* Davis, 21 Pick. (Mass.) 42, 32 Am. Dec. 241; Gray *v.* Blanchard, 8 Pick. (Mass.) 284.

Missouri. — McDowell *v.* Brown, 21 Mo. 57.

New Hampshire. — Hunt *v.* Wright, 47 N. H. 396, 93 Am. Dec. 451.

New Jersey. — Magie *v.* German Evangelical Dutch Church, 13 N. J. Eq. 77.

New York. — Oxley *v.* Lane, 35 N. Y. 340; Lovett *v.* Gillender, 35 N. Y. 617; Jackson *v.* Schutz, 18 Johns. (N. Y.) 174, 9 Am. Dec. 195.

North Carolina. — Munroe *v.* Hall, 97 N. Car. 210; Pardue *v.* Givens, 1 Jones Eq. (54 N. Car.) 306.

Ohio. — Anderson *v.* Cary, 36 Ohio St. 506, 38 Am. Rep. 602; Hobbs *v.* Smith, 15 Ohio St. 419; Jenkins *v.* Artz, 6 Ohio Dec. 439.

Pennsylvania. — Yard's Appeal, 64 Pa. St. 95; Kepple's Appeal, 53 Pa. St. 211; Jauretche *v.* Proctor, 48 Pa. St. 466; M'Cullough *v.* Gilmore, 11 Pa. St. 370; M'Williams *v.* Nisly, 2 S. & R. (Pa.) 507, 7 Am. Dec. 654.

Tennessee. — Lawrence *v.* Singleton, (Tenn. 1875) 17 S. W. Rep. 265.

Texas. — Laval *v.* Staffel, 64 Tex. 370.

Virginia. — Camp *v.* Cleary, 76 Va. 140.

Wisconsin. — Van Osdell *v.* Champion, 89 Wis. 661, 46 Am. St. Rep. 864.

And see the cases cited under the titles CONDITIONS, vol. 6, p. 509; ESTATES, vol. 11, p. 368.

As to the Development of the Power of Alienation, see the title DEEDS, vol. 9, p. 94 *et seq.*

Fee Not Cut Down to Life Estate. — Where the words of a deed or will are appropriate for the creation of an estate in fee, such estate will not be cut down to a life estate on account of provisions forbidding alienation, unless such provisions are as clear and explicit as those which create the estate. Allen *v.* Craft, 109 Ind. 476, 58 Am. Rep. 425; English *v.* Beehle, 32 Mo. 186, 82 Am. Dec. 126.

2. Absolute Restraint on Alienation of Equitable Fee Void. — Potter *v.* Couch, 141 U. S. 296; Robinson *v.* Randolph, 21 Fla. 629, 58 Am. Rep. 692; Sparhawk *v.* Cloon, 125 Mass. 267; Keyser's Appeal, 57 Pa. St. 236; Turley *v.* Massengill, 7 Lea (Tenn.) 353; Camp *v.* Cleary, 76 Va. 140.

3. Absolute Restraint on Alienation of Vested Remainder in Fee Void. — Freeman *v.* Phillips, 113 Ga. 589; Doebler's Appeal, 64 Pa. St. 9.

4. Absolute Restraint on Alienation of Absolute Interest in Personal Property or Chattels Real Void. — Bradley *v.* Peixoto, 3 Ves. Jr. 324; McCleary *v.* Ellis, 54 Iowa 311, 37 Am. Rep. 205; Blackstone Bank *v.* Davis, 21 Pick. (Mass.) 42, 32 Am. Dec. 241; Jauretche *v.* Proctor, 48 Pa. St. 466.

Sale of Slaves. — For an apparent exception to the general rule formerly prevailing in regard to the sale of slaves, see Turner *v.* Johnson, 7 Dana (Ky.) 435; Steuart *v.* Williams, 3 Md. 425; Williams *v.* Ash, 1 How. (U. S.) 1.

5. Provisions Creating Base or Determinable Fees Valid. — Jackson *v.* Schutz, 18 Johns. (N. Y.) 174, 9 Am. Dec. 195; Overton *v.* Lea, 108 Tenn. 505. And see the title ESTATES, vol. 11, p. 364.

therefore a condition or provision annexed to a grant in fee that the thing granted shall be exempt from such liability is void.[1]

Covenant Against Alienation Contained in Separate Instrument. — The rule against restraints on alienation does not depend upon the mere form in which the restraint is imposed. It avoids covenants of the grantee against alienation as well as conditions of like nature imposed by the grantor.[2]

Conditions Not Amounting to Restraints on Alienation — Provisions Against Partition. — Conditions imposed upon devises in fee do not amount to restraints on alienation where they are capable of being performed by third persons as well as by the devisee.[3] Nor does a proviso in a deed or will forbidding partition constitute an absolute restraint on alienation.[4]

Reason for Rule. — Before the enactment of the statute *quia emptores*, the grantor of an estate in fee simple might restrain the alienation thereof by the grantee, as there was a possibility of reverter in certain contingencies,[5] and the reason sometimes advanced for the rule against restraints on alienation of estates in fee, which has prevailed since the enactment of that statute, is that there is no longer any possibility of reverter in the grantor;[6] but a better reason for the rule seems to be that such restraints are void as against public policy.[7] The rule against absolute restraints on alienation of vested estates in fee simple should not be confounded with the rule against perpetuities.[8]

Rule of Civil Law. — Under the civil law a prohibition to alienate things sold or conveyed by purely onerous title is void.[9]

b. EXCEPTIONS TO RULE — (1) *Gifts to Charities.* — Where a charitable use is created by gift, the donor may impose conditions and limitations which will prevent the diversion of the trust estate from the uses upon which it was granted, either by the voluntary or involuntary act of the donee. Such gifts are not within the rule invalidating restraints on alienation.[10] But a charitable corporation cannot create a trust in its own favor by inserting, in a deed of

1. Conveyance or Devise of Fee Free from Debts of Beneficiary Void. — McCleary *v.* Ellis, 54 Iowa 311, 37 Am. Rep. 205; Sparhawk *v.* Cloon, 125 Mass. 267; Blackstone Bank *v.* Davis, 21 Pick. (Mass.) 42, 32 Am. Dec. 241; Camp *v.* Cleary, 76 Va. 140; Van Osdell *v.* Champion, 89 Wis. 661, 46 Am. St. Rep. 864. And see Harvey *v.* Palmer, 15 Jur. 982.

Provision that Equitable Fee Shall Not Be Liable for Debts Void. — Keyser's Appeal, 57 Pa. St. 236; Turley *v.* Massengill, 7 Lea (Tenn.) 353.

An Attempt to Establish a Legacy Charge against an estate devised in fee simple, in case such estate is sold by judicial sale for the debts of the devisee, is an attempt to restrain alienation and therefore void. Wieting *v.* Bellinger, 50 Hun (N. Y.) 324.

2. Restriction Imposed by Means of Covenant in Separate Contract Void. — Prey *v.* Stanley, 110 Cal. 423.

3. Conditions Not Amounting to Restraints on Alienation. — Simonds *v.* Simonds, 3 Met. (Mass.) 562.

4. Provisions Against Partition Not Restraints on Alienation. — Roederer *v.* Hess, (Ky. 1902) 66 S. W. Rep. 1012; Hunt *v.* Wright, 47 N. H. 396, 93 Am. Dec. 451.

5. Restraints Valid Before Statute Quia Emptores. — Mandlebaum *v.* McDonell, 29 Mich. 78, 18 Am. Rep. 61; De Peyster *v.* Michael, 6 N. Y. 467, 57 Am. Dec. 470.

6. Reason for Rule — No Possibility of Reverter. — Murray *v.* Green, 64 Cal. 363; McCleary *v.* Ellis, 54 Iowa 311, 37 Am. Rep. 205; Bennet *v.* Washington Cemetery, (Supm. Ct.) 24 Abb. N. Cas. (N. Y.) 459; Van Rensselaer *v.* Dennison, 35 N. Y. 393.

7. Restraints Void as Against Public Policy. — Morse *v.* Blood, 68 Minn. 442.

8. Rule Not Aimed Against Perpetuities. — Mandlebaum *v.* McDonell, 29 Mich. 78, 18 Am. Rep. 61. See also Winsor *v.* Mills, 157 Mass. 362, and the title PERPETUITIES AND TRUSTS FOR ACCUMULATION, vol. 22, p. 704.

9. Rule of Civil Law. — Fraser *v.* Pouliot, 4 Can. Sup. Ct. 515. And see Dougal *v.* Fryer, 3 Mo. 40, 22 Am. Dec. 458.

For an Extended Discussion of the Roman Law in regard to restraints on alienation, see the article by Mr. Proudfoot, 16 Can. L. T. 101.

10. Gifts to Charities Not Within Rule Against Restraints on Alienation. — Jones *v.* Habersham, 3 Woods (U. S.) 443, 107 U. S. 174; Perin *v.* Carey, 24 How. (U. S.) 494; Mills *v.* Davison, 54 N. J. Eq. 659, *reversing* 53 N. J. Eq. 413; Magie *v.* German Evangelical Dutch Church, 13 N. J. Eq. 77; Congregational Unitarian Soc. *v.* Hale, 29 N. Y. App. Div. 396; Yard's Appeal, 64 Pa. St. 95. *Compare* McDonogh *v.* Murdoch, 15 How. (U. S.) 367. And see the title CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 902.

Implied Condition Against Alienation. — Where land and a building are devised to a religious society "as a place of worship in perpetuity," a contract for the sale of the property for the purpose of reinvesting the proceeds in other property works a reversion to the heirs of the testator as of the date of the contract. General Assembly of Presb. Church *v.* Alexander, (Ky. 1898) 46 S. W. Rep. 503.

land purchased by it for a valuable consideration, a provision that such land shall not be subject to the claims of its creditors.[1]

(2) *Grants by Government.* — The rule against absolute restraints on the alienation of estates in fee does not apply to legislative grants of land by the government, and restrictions on the power of alienation contained in such grants are valid.[2]

(3) *Separate Equitable Estates of Married Women.* — Restraints upon both alienation and anticipation, or either, to be effectual during coverture, may be annexed to the separate equitable estates of married women, as well where such estates are in fee as where they are for life only.[3]

(4) *Grants to Corporations.* — Under the ancient common law it was held that in a grant to a corporation, on the dissolution of which there would be a reverter to the grantor, a condition against alienation was valid, but it is apprehended that this rule has little if any force under the modern law of corporations.[4]

2. Qualified or Partial Restraints — *a.* IN GENERAL. — While it is well settled that absolute restraints on the alienation of estates in fee are void, there is a decided conflict of authority as to the validity of qualified or partial restraints.[5]

What Not Restraint on Alienation. — A provision in a deed of land to a church that the seats in the church erected on the land shall forever be free does not constitute a restraint on the alienation of the land conveyed; but all subsequent conveyances must contain a like provision. Woodworth *v.* Payne, 5 Hun (N. Y.) 551.

Power of Court to Decree Sale Notwithstanding Condition Against Alienation. — In a proper case a court of equity will make a decree allowing land donated to a charity to be sold for the good of the charity, notwithstanding a condition against alienation attached to the gift. Jones *v.* Habersham, 107 U. S. 174, 3 Woods (U. S.) 443.

The Execution of a Power to Mortgage, inserted in a deed of trust, does not destroy the entire trust. The trust remains encumbered only by the mortgage. A purchaser at a foreclosure sale takes the premises by a title free from the trust; but the surplus money arising from such sale belongs to the donee, to be held upon the original trust. Mills *v.* Davison, 54 N. J. Eq. 659, *reversing* 53 N. J. Eq. 413.

1. Trust Created by Charitable Corporation Itself Void. — Magie *v.* German Evangelical Dutch Church, 13 N. J. Eq. 77.

2. Restraints Imposed by Governmental Grant Valid. — Smythe *v.* Henry, 41 Fed. Rep. 705; Farrington *v.* Wilson, 29 Wis. 383.

Deed Made by Grantee in Violation of Restriction Void. — Smythe *v.* Henry, 41 Fed. Rep. 705.

Provision for Fine upon Alienation Valid in Grant by King. — De Peyster *v.* Michael, 6 N. Y. 467, 57 Am. Dec. 470, *citing* Co. Litt. 223*a*, *b*; Touchstone, p. 130.

3. Restraints on Alienation of Separate Estates of Married Women Valid. — Baggett *v.* Meux, 1 Coll. Ch. Cas. 138; Robinson *v.* Randolph, 21 Fla. 629, 58 Am. Rep. 692; Weeks *v.* Sego, 9 Ga. 199; Wells *v.* McCall, 64 Pa. St. 207; Camp *v.* Cleary, 76 Va. 140; Nixon *v.* Rose, 12 Gratt. (Va.) 425. But see Deering *v.* Tucker, 55 Me. 284; Pacific Nat. Bank *v.* Windram, 133 Mass. 175.

"It makes no difference that the grant or devise so restrained was made or took effect while the daughter was single. If before disposing of the estate she marry, the limitation or restraint becomes effectual upon, and it continues so throughout the duration of, such marriage; should she become discovert, and marry again without having in the interim parted with her property, the restraint again becomes effectual for such subsequent marriage. It is true that during the period she is single the restraint is not binding, and in such unmarried state she may act as if it was not expressed or clearly implied in the deed or will under which she takes." Robinson *v.* Randolph, 21 Fla. 629, 58 Am. Rep. 692, *per* Raney, J.

In *Pennsylvania* such a restraint cannot be sustained unless there is a marriage in immediate view when the trust is created; and on the termination of the coverture the trust falls and is not revived by a second marriage. That a marriage is in view need not, however, appear by the instrument creating the trust. Wells *v.* McCall, 64 Pa. St. 207.

4. Grant to Corporation — Restraint Valid at Common Law. — Murray *v.* Green, 64 Cal. 363; De Peyster *v.* Michael, 6 N. Y. 467, 57 Am. Dec. 470.

5. Authorities Conflicting as to Validity of Partial Restraints on Alienation. — Oxley *v.* Lane, 35 N. Y. 340; De Peyster *v.* Michael, 6 N. Y. 467, 57 Am. Dec. 470; Laval *v.* Staffel, 64 Tex. 370. And see the title CONDITIONS, vol. 6, p. 509 *et seq.*

Partial Restraints Valid. — *In re* Macleay, L. R. 20 Eq. 186; Munroe *v.* Hall, 97 N. Car. 210; M'Cullough *v.* Gilmore, 11 Pa. St. 370; Overton *v.* Lea, 108 Tenn. 505; Camp *v.* Cleary, 76 Va. 140.

Partial Restraint Invalid. — Murray *v.* Green, 64 Cal. 363.

Rule in Province of Ontario. — For an extended discussion of the law in the Province of Ontario regarding the validity of partial restraints upon alienation, with full citation of authorities, see the article in 16 Can. L. T. 1, and also the article by Mr. Marsh, 17 Can. L. T. 105, 136.

b. PROHIBITION OF ALIENATION FOR LIMITED TIME — **In General.** — There are many dicta, as well as a few direct authorities, to the effect that restraints on alienation for a limited time are valid,[1] but in a number of cases the validity of such restraints has been said to be doubtful;[2] and on principle, and according to the weight of authority, a restriction, whether by way of condition, or of limitation over, or of bare prohibition against any and all alienation, although for a limited time, of a vested estate in fee, whether in possession or remainder, is void.[3] In the case of a contingent remainder, however, or of any other interest not vested, a restriction upon the power of alienation to last as long as the interest remains contingent is valid.[4]

Provision for Cesser of Estate on Alienation Essential. — Even in those jurisdictions where restraints upon alienation for a limited time are upheld, it is generally considered essential to their validity that they be accompanied by provisions for a cesser of the estate upon alienation, by way either of condition or conditional limitation.[5]

Restraints Amounting to Perpetuities Invalid. — In jurisdictions where restraints for a limited time are held to be valid, it is evident that they cannot be allowed to continue beyond the period fixed by the rule against perpetuities.[6]

1. Restraints on Alienation for Limited Time Valid — *England.* — *In re* Macleay, L. R. 20 Eq. 186.

Canada. — Earls *v.* McAlpine, 27 Grant Ch. (U. C.) 161, 6 Ont. App. 145; Pennyman *v.* McGrogan, 18 U. C. C. P. 132; Chisholm *v.* London, etc., Trusts Co., 28 Ont. 347.

United States. — Cowell *v.* Colorado Springs Co., 100 U. S. 55.

Indiana. — Langdon *v.* Ingram, 28 Ind. 360.

Kentucky. — Wallace *v.* Smith, (Ky. 1902) 68 S. W. Rep. 131; Kean *v.* Kean, (Ky. 1892) 18 S. W. Rep. 1032; Stewart *v.* Brady, 3 Bush (Ky.) 623.

Massachusetts. — Simonds *v.* Simonds, 3 Met. (Mass.) 562; Blackstone Bank *v.* Davis, 21 Pick. (Mass.) 42, 32 Am. Dec. 241; Gray *v.* Blanchard, 8 Pick. (Mass.) 284.

Missouri. — Dougal *v.* Fryer, 3 Mo. 40, 22 Am. Dec. 458.

New York. — Jackson *v.* Schutz, 18 Johns. (N. Y.) 174, 9 Am. Dec. 195.

North Carolina. — *Ex p* Watts, 130 N. Car. 237.

Pennsylvania. — Jauretche *v.* Proctor, 48 Pa. St. 466; Hartman *v.* Herbine, 7 Pa. Co. Ct. 630; McWilliams *v.* Nisly, 2 S. & R. (Pa.) 507, 7 Am. Dec. 654.

2. Validity Said to Be Doubtful. — Oxley *v.* Lane, 35 N. Y. 340; De Peyster *v.* Michael, 6 N. Y. 467, 57 Am. Dec. 470; Camp *v.* Cleary, 76 Va. 140.

For cases in which temporary restraints upon alienation were imposed, but in which their validity was not directly passed upon by the courts, see Grigg *v.* Landis, 21 N. J. Eq. 494; Laval *v.* Staffel, 64 Tex. 370; Baker *v.* Newton, 2 Beav. 112.

3. Restraint on Alienation for Limited Time Void — *England.* — *In re* Rosher, 26 Ch. D. 801.

Canada. — Heddlestone *v.* Heddlestone, 15 Ont. 280.

United States. — Potter *v.* Couch, 141 U. S. 296.

California. — Murray *v.* Green, 64 Cal. 363.

Georgia. — Freeman *v.* Phillips, 113 Ga. 589.

Illinois. — Jones *v.* Port Huron Engine, etc., Co., 171 Ill. 502; Smith *v.* Kenny, 89 Ill. App. 293.

Massachusetts. — Winsor *v.* Mills, 157 Mass. 362; Hall *v.* Tufts, 18 Pick. (Mass.) 455.

Michigan. — Bennett *v.* Chapin, 77 Mich. 538; Mandlebaum *v.* McDonell, 29 Mich. 78, 18 Am. Rep. 61.

Minnesota. — Morse *v.* Blood, 68 Minn. 442.

New York. — Roosevelt *v.* Thurman, 1 Johns. Ch. (N. Y.) 220.

North Carolina. — Latimer *v.* Waddell, 119 N. Car. 370; Hardy *v.* Galloway, 111 N. Car. 519, 32 Am. St. Rep. 828; Twitty *v.* Camp, Phil. Eq. (62 N. Car.) 61.

Ohio. — Wuest *v.* Wuest, 11 Ohio Dec. 147; Anderson *v.* Cary, 36 Ohio St. 506, 38 Am. Rep. 602.

Wisconsin. — Zillmer *v.* Landguth, 94 Wis. 607.

Large's Case Not Authority in Favor of Restraints for Limited Time. — In Mandlebaum *v.* McDonell, 29 Mich. 78, 18 Am. Rep. 61, it was shown conclusively that Large's Case, Leon. (pt. II.) 82, Leon. (pt. III.) 182, which is frequently cited by judges and text writers as an authority in favor of restraints on alienation for a limited time, is not, in fact, an authority in favor of such restraints as regards vested estates.

4. Restraint to Last as Long as Interest Remains Contingent Valid. — Churchill *v.* Marks, 1 Coll. Ch. Cas. 441; Marks *v.* Churchill, 9 Jur. 155; Mandlebaum *v.* McDonell, 29 Mich. 78, 18 Am. Rep. 61.

5. Provision for Cesser on Alienation Essential. — Fowlkes *v.* Wagoner, (Tenn. Ch. 1898) 46 S. W. Rep. 586; Bouldin *v.* Miller, 87 Tex. 359; Heddlestone *v.* Heddlestone, 15 Ont. 280 (*citing* Renaud *v.* Tourangeau, L. R. 2 P. C. 4; Armstrong *v.* McAlpine, 4 Ont. App. 254). And see Mandlebaum *v.* McDonell, 29 Mich. 78, 18 Am. Rep. 61. But to the contrary see Kean *v.* Kean, (Ky. 1892) 18 S. W. Rep. 1032.

6. Restraints Amounting to Perpetuities Invalid. — Winsor *v.* Mills, 157 Mass. 362; Oxley *v.* Lane, 35 N. Y. 340; Hartman *v.* Herbine, 7 Pa. Co. Ct. 630. And see Coleman *v.* Coleman, (Ky. 1901) 65 S. W. Rep. 832.

Where Legal Title Is Vested in Trustees. — It seems that a valid restraint upon the alienation of an estate in fee, for a limited time, may be effected by conveying the legal title to trustees, with instructions as to the time of sale, in which case the validity of the restriction will depend mainly upon the question whether the period exceeds that allowed by the rule against perpetuities.[1]

c. PROHIBITION OF ALIENATION TO PARTICULAR PERSONS. — In many cases there are dicta to the effect that provisions forbidding alienation to particular persons or classes of persons are valid;[2] but in other well-considered decisions the validity of such provisions is said to be doubtful,[3] and in others still they have been held to be void.[4]

d. PROHIBITION OF ALIENATION EXCEPT TO PARTICULAR PERSONS. — By the weight of authority provisions forbidding alienation except to particular persons or classes of persons are invalid,[5] although there are some authorities to the contrary.[6]

e. CONDITION TO OFFER TO SPECIFIED PERSON BEFORE SALE. — A pro-

1. Where Legal Title Is Vested in Trustees. — Langdon *v.* Ingram, 28 Ind. 360; Mandlebaum *v.* McDonell, 29 Mich. 78, 18 Am. Rep. 61. And see Wuest *v.* Wuest, 11 Ohio Dec. 147; Beurhaus *v.* Cole, 94 Wis. 617.

2. Prohibition of Alienation to Particular Persons Valid. — *England.* — *In re* Macleay, L. R. 20 Eq. 186.

Canada. — Gallinger *v.* Farlinger, 6 U. C. C. P. 512.

United States. — Cowell *v.* Colorado Springs Co., 100 U. S. 55.

Indiana. — Langdon *v.* Ingraham, 28 Ind. 360.

Kentucky. — Kean *v.* Kean, (Ky. 1892) 18 S. W. Rep. 1032.

Massachusetts. — Winsor *v.* Mills, 157 Mass. 362; Blackstone Bank *v.* Davis, 21 Pick. (Mass.) 42, 32 Am. Dec. 241; Gray *v.* Blanchard, 8 Pick. (Mass.) 284.

New York. — Jackson *v.* Schutz, 18 Johns. (N. Y.) 174, 9 Am. Dec. 195.

Pennsylvania. — M'Cullough *v.* Gilmore, 11 Pa. St. 370; M'Williams *v.* Nisly, 2 S. & R. (Pa.) 507, 7 Am. Dec. 654; Hartman *v.* Herbine, 7 Pa. Co. Ct. 630.

Tennessee. — Overton *v.* Lea, 108 Tenn. 505.

Virginia. — Camp *v.* Cleary, 76 Va. 140.

Provision for Cesser of Estate on Alienation Essential. — A bare provision against alienation to certain persons or classes of persons, without any provision for forfeiture or limitation over upon such alienation is void. Fowlkes *v.* Wagoner, (Tenn. Ch. 1898) 46 S. W. Rep. 586; Bouldin *v.* Miller, 87 Tex. 359.

3. Validity of Prohibition of Alienation to Particular Persons Doubtful. — Murray *v.* Green, 64 Cal. 363; Mandlebaum *v.* McDonell, 29 Mich. 78, 18 Am. Rep. 61; Morse *v.* Blood, 68 Minn. 442; Oxley *v.* Lane, 35 N. Y. 340; De Peyster *v.* Michael, 6 N. Y. 467, 57 Am Dec. 470.

4. Prohibition of Alienation to Particular Persons Void. — Ludlow *v.* Bunbury, 35 Beav. 36; Barnard *v.* Bailey, 2 Harr. (Del.) 56.

When Restraint Is Practically Absolute. — Conceding that, as a general proposition, a condition against alienation to particular classes of persons is good, still such a condition may be so vexatious as practically to prohibit all alienation for at least a limited time, in which case it is void. Morse *v.* Blood, 68 Minn. 442.

5. Prohibition of Alienation Except to Particular Persons Void. — Attwater *v.* Attwater, 18 Beav. 330; Gallinger *v.* Farlinger, 6 U. C. C. P. 512; Maynard *v.* Polhemus, 74 Cal. 141; Schermerhorn *v.* Negus, 1 Den. (N. Y.) 448.

Leading Case. — In Attwater *v.* Attwater, 18 Beav. 330, where a testator gave an estate to A., to become his property on attaining the age of twenty-five years, with an injunction never to sell it out of the family, but, if sold at all, it must be sold to one of his brothers, the court, ruling against the validity of the provision, said: "Notwithstanding the case of Doe *v.* Pearson, 6 East 173, this appears to me to be a condition repugnant to the quality of the estate given. It is obvious that if the introduction of one person's name, as the only person to whom the property may be sold, renders such a proviso valid, a restraint on alienation may be created as complete and perfect as if no person whatever was named; inasmuch as the name of a person who alone is permitted to purchase might be so selected as to render it reasonably certain that he would not buy the property, and that the property could not be aliened at all. It appears to me, also, that this is the true construction of the words used by the testator; it is, in truth, an injunction never to sell the hereditaments devised at all. The words 'out of the family' are merely descriptive of the effect of the sale, and not of the person to whom it might be sold, as is shown by the two last clauses of a similar character relating to the devises to William and Edward Attwater, which, in referring to this clause, state that the property is not to be sold out of the family, as before specified."

6. Prohibition of Alienation Except to Particular Persons Valid. — *In re* Macleay, L. R. 20 Eq. 186; Doe *v.* Pearson, 6 East 173. And see Daniel *v.* Ubley, W. Jones 137.

Provision Valid in Deed of Gift. — In Rice *v.* Hall, (Ky. 1897) 42 S. W. Rep. 99, it was held that the donor in a deed of gift had the right to make the gift upon such terms as he wished, and, therefore, a provision in such deed that the donee should sell the land in question to a named person, at a specified price, was valid.

vision that the grantee or devisee of an estate in fee shall not sell it without first offering it to a specified person is invalid.[1]

f. PROHIBITION OF ALIENATION BY SALE. — According to some authorities a provision forbidding the sale of property granted or devised in fee is legal, as it does not take away all power of alienation, but enables the grantee or devisee to dispose of the property by any means other than a sale thereof.[2]

g. PROHIBITION OF ALIENATION EXCEPT BY WILL. — According to the authorities in the United States, a prohibition of alienation except by will is invalid,[3] but in the province of Ontario there is a series of cases which uphold the validity of such prohibitions.[4]

h. PROHIBITION OF ALIENATION WITHOUT CONSENT OF SPECIFIED PERSON. — By the weight of authority a provision forbidding alienation without the consent of a specified person is void,[5] although there are a few decisions to the contrary.[6]

i. FINES AND QUARTER SALES ON ALIENATION. — A condition that the grantee of an estate in fee shall not alien without paying a sum of money to his grantor constitutes an unlawful restraint on alienation, and is void.[7]

j. ATTEMPTS TO CONTROL PROPERTY NOT DISPOSED OF BY FIRST TAKER. — Where land is granted or devised in fee, with full power to the grantee or devisee to dispose of it, a subsequent provision that if such grantee or devisee shall die seized of the property or any part thereof it shall go to a third person[8] or revert to the grantor is void.[9]

k. PROVISION THAT EASEMENT SHALL NOT BE SOLD SEPARATELY FROM DOMINANT ESTATE. — A condition that the owner of an easement shall not sell or dispose thereof separately from the dominant tenement merely annexes a servitude upon one estate to another, and does not constitute an objectionable restraint on alienation.[10]

II. ESTATES TAIL. — A provision that the devisee of an estate tail shall not suffer a common recovery is invalid.[11] But where a married woman who has

1. Condition to Offer to Specified Person Before Sale Invalid. — *In re* Rosher, 26 Ch. D. 801; De Peyster *v.* Michael, 6 N. Y. 467, 57 Am. Dec. 470; Hardy *v.* Galloway, 111 N. Car. 519, 32 Am. St. Rep. 828. But see Winsor *v.* Mills, 157 Mass. 362; Jackson *v.* Schutz, 18 Johns. (N. Y.) 174, 9 Am. Dec. 195.

2. Prohibition of Alienation by Sale Valid. — *In re* Macleay, L. R. 20 Eq. 186; O'Sullivan *v.* Phelan, 17 Ont. 730.

3. Prohibition of Alienation Except by Will Void. — Fristoe *v.* Latham, (Ky. 1896) 36 S. W. Rep. 920; Pritchard *v.* Bailey, 113 N. Car. 521; Jauretche *v.* Proctor, 48 Pa. St. 466. But see Hicks *v.* Cochran, 4 Edw. (N. Y.) 107.

4. Prohibition of Alienation Except by Will Valid. — *Re* Bell, 30 Ont. 318; *Re* Northcote, 18 Ont. 107; *Re* Winstanley, 6 Ont. 315; Smith *v.* Faught, 45 U. C. Q. B. 484. But to the contrary see Heddlestone *v.* Heddlestone, 15 Ont. 280.

5. Prohibition of Alienation Without Consent of Specified Person Void. — Prey *v.* Stanley, 110 Cal. 423; Murray *v.* Green, 64 Cal. 363; Muhlke *v.* Tiedemann, 177 Ill. 606; Winsor *v.* Mills, 157 Mass. 362; McRae *v.* McRae, 30 Ont. 54 (Meredith, J., *dissenting*).

6. Contra — Provision Valid. — Earls *v.* McAlpine, 6 Ont. App. 145, 27 Grant Ch. (U. C.) 161. And see Miller *v.* Denny, 99 Ky. 53; Dougal *v.* Fryer, 3 Mo. 40, 22 Am. Dec. 458; Hicks *v.* Cochran, 4 Edw. (N. Y.) 107.

7. Condition Not to Alien Without Paying Fine Void. — De Peyster *v.* Michael, 6 N. Y. 467, 57 Am. Dec. 470, *citing* King *v.* Burchell, Ambl. 379; and Livingston *v.* Stickles, 7 Hill (N. Y.) 257, and *distinguishing* Jackson *v.* Schutz, 18 Johns. (N. Y.) 174, 9 Am. Dec. 195.

Exception to Rule. — Where a deed conveying land for a cemetery is merely an executory agreement, under which the grantor is not divested of either title or possession until compliance by the grantee with the terms of the covenants contained therein, a provision in such deed that the grantee shall pay to the grantor a certain sum on the sale of each cemetery lot is valid. Bennet *v.* Washington Cemetery, (Supm. Ct.) 24 Abb. N. Cas. (N. Y.) 459.

8. Limitation Over of Property Not Disposed of by First Taker. — Van Horne *v.* Campbell, 100 N. Y. 287, 53 Am. Rep. 166.

9. Provision for Reverter of Property Not Disposed of by Grantee. — Case *v.* Dwire, 60 Iowa 442, Rothrock, J., *dissenting*.

10. Provision that Easement Shall Not Be Sold Separately from Dominant Estate. — Warren *v.* Syme, 7 W. Va. 474.

11. Provision that Tenant in Tail Shall Not Suffer Common Recovery Void. — Portington's Case, 10 Coke 35; Mildmay's Case, 6 Coke 40; Doe *v.* Carter, 8 T. R. 57; Bradley *v.* Peixoto, 3 Ves. Jr. 324; Hawley *v.* Northampton, 8 Mass. 3, 5 Am. Dec. 66; Yard's Appeal, 64 Pa. St. 95; Walker *v.* Vincent, 19 Pa. St. 369.

Implied Condition Against Alienation of Fee Tail. — In Stansbury *v.* Hubner, 73 Md. 229, 25 Am. St. Rep. 584, where land was devised

a separate equitable estate tail in certain lands bars the entail, and converts the fee tail into a fee simple, all fetters on alienation which were attached to the estate tail apply equally to the fee simple so created.[1]

III. ESTATES FOR LIFE — 1. Legal Life Estates. — In a conveyance or devise of a legal life estate provisions that the property conveyed or devised shall not be aliened by the grantee or devisee, or be subject to the claims of his creditors, are void.[2] But property may be granted or devised in such a way as to make the estate of the first taker determinable by way of cesser, or by limitation over to another, upon the occurrence of a designated event, such as alienation or bankruptcy.[3]

2. Equitable Life Estates — *a.* IN GENERAL — (1) *Rule in England.* — It has long been the settled doctrine of the English courts that one to whom an equitable life estate or interest in property has been conveyed, devised, or bequeathed cannot enjoy its beneficial use freed from the claims of his creditors, or be restrained, by a bare provision against alienation, from disposing thereof. But it is also a well-established rule of the same courts that a conveyance, devise, or bequest of property in trust with a condition that the estate or interest of the beneficiary shall be divested by an attempt to convey it, or an attempt by creditors to seize it, is valid and enforceable, particularly where the estate or interest is limited over to another person upon the occurrence of the designated event.[4]

(2) *Rule in United States.* — In this country the courts of some of the states have approved and adopted the *English* rule stated above, holding that bare provisions against alienation or liability for debts, attached to equitable life estates, are invalid, but that an equitable estate may be limited to the beneficiary until alienation or bankruptcy, with a provision for cesser on the occurrence of such event.[5] In other states, however, and in the federal

to a grandson "and the heirs of his body so long as they hold and till the same," it was held that the implied condition against alienation was invalid, as repugnant to the estate devised.

1. Separate Equitable Estate Tail of Feme Covert. — Cooper *v.* Macdonald, 7 Ch. D. 288.

2. Legal Life Estates — Provision Against Alienation Invalid. — Brandon *v.* Robinson, 18 Ves. Jr. 429; Rochford *v.* Hackman, 9 Hare 475, 16 Jur. 212; Robinson *v.* Randolph, 21 Fla. 629, 58 Am. Rep. 692; Henderson *v.* Harness, 176 Ill. 302; McCormick Harvesting Mach. Co. *v.* Gates, 75 Iowa 343; Todd *v.* Sawyer, 147 Mass. 570; Gleason *v.* Fayerweather, 4 Gray (Mass.) 348; Ehrisman *v.* Sener, 162 Pa. St. 577; Van Osdell *v.* Champion, 89 Wis. 661, 46 Am. St. Rep. 864; Bridge *v.* Ward, 35 Wis. 687. And see *infra*, this section, *Equitable Life Estates*.

3. Limitation of Estate until Alienation or Bankruptcy Valid. — Brandon *v.* Robinson, 18 Ves. Jr. 429; *In re* Machu, 21 Ch. D. 838; Donohoe *v.* Mooney, 27 L. R. Ir. 26; Conger *v.* Lowe, 124 Ind. 368; De Peyster *v.* Michael, 6 N. Y. 467, 57 Am. Dec. 470; Wieting *v.* Bellinger, 50 Hun (N. Y.) 324; Camp *v.* Cleary, 76 Va. 140; Van Osdell *v.* Champion, 89 Wis. 661, 46 Am. St. Rep. 864; Bridge *v.* Ward, 35 Wis. 687. And see *infra*, this section, *Equitable Life Estates*.

4. Equitable Life Estates — English Rule. — Brandon *v.* Robinson, 18 Ves. Jr. 429; Snowdon *v.* Dales, 6 Sim. 524; Graves *v.* Dolphin, 1 Sim. 66; Younghusband *v.* Gisborne, 1 Coll. Ch. Cas. 400, 10 Jur. 419; Rochford *v.* Hackman, 9 Hare 475, 16 Jur. 212; Day *v.* Day, 1 Drew 569, 17 Jur. 586; Green *v.* Spicer, 1 Russ. & M. 395; Lewis *v.* Butler, 16 W. R. 681; Kiallmark *v.* Kiallmark, 26 L. J. Ch. 1; Longworth *v.* Bellamy, 40 L. J. Ch. 513; *Re* Muggeridge, Johns. Ch. (Eng.) 625; Joel *v.* Mills, 3 Kay & J. 458; Shee *v.* Hale, 13 Ves. Jr. 404; Hatton *v.* May, 3 Ch. D. 148; Newton *v.* Reid, 4 Sim. 141.

For Leading United States Cases in Which the English Rule Is Stated and commented upon, see Nichols *v.* Eaton, 91 U. S. 716; Steib *v.* Whitehead, 111 Ill. 247; Sparhawk *v.* Cloon, 125 Mass. 263; Weller *v.* Noffsinger, 57 Neb. 455.

Provision for Cesser of Estate Sufficient — Limitation Over Unnecessary. — Joel *v.* Mills, 3 Kay & J. 458.

5. English Rule Followed — Bare Provision Against Alienation or Liability for Debts Void. — Smith *v.* Moore, 37 Ala. 327; Robinson *v.* Randolph, 21 Fla. 629, 58 Am. Rep. 692; Bailie *v.* McWhorter, 56 Ga. 183; Mebane *v.* Mebane, 4 Ired. Eq. (39 N. Car.) 131, 44 Am. Dec. 102; Dick *v.* Pitchford, 1 Dev. & B. Eq. (21 N. Car.) 480; Hobbs *v.* Smith, 15 Ohio St. 419; Tillinghast *v.* Bradford, 5 R. I. 205; Heath *v.* Bishop, 4 Rich. Eq. (S. Car.) 46, 55 Am. Dec. 654.

Statutory Provisions. — In Bramhall *v.* Ferris, 14 N. Y. 41, 67 Am. Dec. 113, there are dicta to the effect that, aside from statutes, provisions exempting equitable life estates from the claims of creditors would be invalid. But in that state, and in some others, the validity of such trusts, where the fund proceeds from the bounty of another, is sanctioned by express statutes. See the title SPENDTHRIFTS AND SPENDTHRIFT TRUSTS.

courts, it has been held in well-considered decisions that the founder of a trust may secure the enjoyment of it to other persons, the objects of his bounty, by providing that it shall not be alienable by them, or be subject to be taken by their creditors; and that his intentions in this regard, when clearly expressed, must be carried out by the courts.[1]

b. WHERE TRUSTEES HAVE DISCRETION AS TO PAYMENT TO BENEFICIARY. — The donor of an equitable life estate may place his bounty beyond the reach of creditors of the beneficiary by making it optional with the trustees whether they will pay the income to such beneficiary;[2] but where the trustees have no power to apply the trust otherwise than for the benefit of the *cestui que trust* during his life, provisions that he shall have no power to sell, mortgage, or anticipate the income are ineffectual.[3]

c. LIMITATION OVER TO WIFE OR CHILDREN OF FIRST TAKER. — In a will or trust deed a direction that the trust to the first taker shall cease on his bankruptcy and go over to his wife or children is valid, and the entire interest passes to them to the exclusion of the assignees in bankruptcy.[4] And it seems that the same rule applies where the devise over is for the support of the bankrupt and his family, in such manner as the trustees may think proper.[5] But where a devise is to a man and his wife or children, or if he is in any way to receive a vested interest, that interest may be separated from those of his wife or children and be paid over to the assignee in bankruptcy.[6]

d. TRUST CREATED BY BENEFICIARY IN HIS OWN PROPERTY. — A man cannot settle his own property upon a trust in his own favor and exempt it from the claims of his creditors by a limitation over to another in case of

In Kentucky it is expressly provided by statute that estates held in trust shall be subject to the debts of the beneficiary. Parsons *v.* Spencer, 83 Ky. 305. *Compare* Pope *v.* Elliott, 8 B. Mon. (Ky.) 56; Kean *v.* Kean, (Ky. 1892) 18 S. W. Rep. 1032. And see the title SPENDTHRIFTS AND SPENDTHRIFT TRUSTS.

1. Bare Provisions Against Alienation or Liability for Debts Valid. — *United States.* — Potter *v.* Couch, 141 U. S. 296; Hyde *v.* Woods, 94 U. S. 526; Nichols *v.* Eaton, 91 U. S. 716. But see Sanford *v.* Lackland, 2 Dill. (U. S.) 6; Nichol *v.* Levy, 5 Wall. (U. S.) 441.

Illinois. — Henderson *v.* Harness, 176 Ill. 302; Steib *v.* Whitehead, 111 Ill. 247.

Maine. — Roberts *v.* Stevens, 84 Me. 325.

Maryland. — Baker *v.* Keiser, 75 Md. 332; Smith *v.* Towers, 69 Md. 77, 9 Am. St. Rep. 398.

Massachusetts. — Broadway Nat. Bank *v.* Adams, 133 Mass. 170, 43 Am. Rep. 504; Foster *v.* Foster, 133 Mass. 179; Sparhawk *v.* Cloon, 125 Mass. 263; Braman *v.* Stiles, 2 Pick. (Mass.) 464, 13 Am. Dec. 445; Perkins *v.* Hays, 3 Gray (Mass.) 405.

Missouri. — Lampert *v.* Haydel, 96 Mo. 439, 9 Am. St. Rep. 358; Schoeneich *v.* Field, 73 Mo. App. 452.

Nebraska. — Weller *v.* Noffsinger, 57 Neb. 455.

Pennsylvania. — Thackara *v.* Mintzer, 100 Pa. St. 151; Rife *v.* Geyer, 59 Pa. St. 393, 98 Am. Dec. 351; Shankland's Appeal, 47 Pa. St. 113; Barnett's Appeal, 46 Pa. St. 392, 86 Am. Dec. 502; Brown *v.* Williamson, 36 Pa. St. 338; Holdship *v.* Patterson, 7 Watts (Pa.) 547; Fisher *v.* Taylor, 2 Rawle (Pa.) 33.

Tennessee. — Gray *v.* Ward, (Tenn. Ch. 1898) 52 S. W. Rep. 1028; Jourolmon *v.* Massengill, 86 Tenn. 81.

Texas. — Monday *v.* Vance, 92 Tex. 428; Wallace *v.* Campbell, 53 Tex. 229.

Vermont. — Barnes *v.* Dow, 59 Vt. 530; White *v.* White, 30 Vt. 344.

Virginia. — Garland *v.* Garland, 87 Va. 758, 24 Am. St. Rep. 682; Nickell *v.* Handly, 10 Gratt. (Va.) 336.

Wisconsin. — Van Osdell *v.* Champion, 89 Wis. 661, 46 Am. St. Rep. 864.

In Connecticut the Cases Are Conflicting. — See Leavitt *v.* Beirne, 21 Conn. 8; Easterly *v.* Keney, 36 Conn. 18.

Where Trustee Is Also Cestui Que Trust. — There can be no valid exemption from the claims of creditors where the trustee is also the *cestui que trust* with the absolute ownership of the subject of the trust, whether income or principal. Hahn *v.* Hutchinson, 159 Pa. St. 133; Ehrisman *v.* Sener, 162 Pa. St. 577. And see Keyser's Appeal, 57 Pa. St. 236.

2. Where Absolute Discretion Is Vested in Trustees. — Nichols *v.* Eaton, 91 U. S. 716; Lampert *v.* Haydel, 96 Mo. 439, 9 Am. St. Rep. 358.

3. Where Trustees Have No Discretion. — Green *v.* Spicer, 1 Russ. & M. 395; Younghusband *v.* Gisborne, 1 Coll. Ch. Cas. 400, 10 Jur. 419; Davidson *v.* Chalmers, 10 Jur. N. S. 910. But see *In re* Bullock, 64 L. T. N. S. 736, 60 L. J. Ch. 341; Twopeny *v.* Peyton, 10 Sim. 487.

4. Limitation Over to Wife or Children of Beneficiary. — Longworth *v.* Bellamy, 40 L. J. Ch. 513; Nichols *v.* Eaton, 91 U. S. 716.

5. Godden *v.* Crowhurst, 10 Sim. 642; Nichols *v.* Eaton, 91 U. S. 716.

6. Wallace *v.* Anderson, 16 Beav. 533; Page *v.* Way, 3 Beav. 20; Rippon *v.* Norton, 2 Beav. 63; Kearsley *v* Woodcock, 3 Hare 185, 8 Jur. 120; Lord *v.* Bunn, 2 Y. & C. Ch. 98; Nichols *v.* Eaton, 91 U. S. 716.

bankruptcy or insolvency.[1] According to the *English* cases, however, a limitation over in case of voluntary alienation is valid in such a settlement.[2] And a wife's property may be settled upon her husband until bankruptcy or alienation, and then over to the wife and children.[3]

e. SEPARATE ESTATES OF MARRIED WOMEN. — A gift in trust for the separate use of a married woman for life, or in contemplation of her marriage, may be coupled with a provision against alienation or anticipation, and such provision is valid.[4]

IV. ESTATES FOR YEARS. — As regards estates for years, conditions against alienation are valid.[5]

V. EFFECT OF ILLEGAL ATTEMPTS TO RESTRAIN ALIENATION. — Invalid conditions or provisions against alienation in a deed or will do not defeat the estate to which they are annexed. In such cases the gift stands, and the invalid condition or provision is rejected.[6]

VI. CONSTRUCTION OF CONDITIONS AND PROVISIONS AGAINST ALIENATION — 1. Restraints on Alienation Construed Strictly. — It is generally agreed that conditions and provisions against alienation are to be construed strictly.[7]

1. Trust Created by Beneficiary in His Own Property — Conditional Limitation Against Bankruptcy Void. — *In re* Pearson, 3 Ch. D. 807; Knight *v.* Browne, 7 Jur. N. S. 894; Higinbotham *v.* Holme, 19 Ves. Jr. 88; Clarke *v.* Chambers, 8 Ir. Ch. 26; Pacific Nat. Bank *v.* Windram, 133 Mass. 175; McIlvaine *v.* Smith, 42 Mo. 45, 97 Am. Dec. 295; Hahn *v.* Hutchinson, 159 Pa. St. 133; Mackason's Appeal, 42 Pa. St. 330, 82 Am. Dec. 517.

Rule Applicable to Married Women in Massachusetts. — Pacific Nat. Bank *v.* Windram, 133 Mass. 175.

2. Limitation Over on Voluntary Alienation Valid. — *In re* Detmold, 40 Ch. D. 585; Brooke *v.* Pearson, 27 Beav. 181; Knight *v.* Browne, 7 Jur. N. S. 894.

3. Settlement of Wife's Property Valid. — Lockyer *v.* Savage, 2 Stra. 947; Montefiore *v.* Behrens, 35 Beav. 95; Lester *v.* Garland, 5 Sim. 205; *Ex p.* Hinton, 14 Ves. Jr. 598; *Ex p.* Cooke, 8 Ves. Jr. 353; *Re* Muggeridge, Johns. Ch. (Eng.) 625; Lewis *v.* Butler, 16 W. R. 681.

4. Restraints on Alienation of Separate Life Estates of Married Women Valid — *England.* — Brandon *v.* Robinson, 18 Ves. Jr. 429; Peillon *v.* Brooking, 25 Beav. 218; Tullett *v.* Armstrong, 1 Beav. 1; Clark *v.* Jaques, 1 Beav. 36; Goulder *v.* Camm, 1 De G. F. & J. 146.

Canada. — Foot *v.* Foot, 15 Can. Sup. Ct. 699.

Georgia. — Freeman *v.* Flood, 16 Ga. 528; Fears *v.* Brooks, 12 Ga. 195.

Missouri. — Lampert *v.* Haydel, 96 Mo. 439, 9 Am. St. Rep. 358.

North Carolina. — Mebane *v.* Mebane, 4 Ired. Eq. (39 N. Car.) 131, 44 Am. Dec. 102.

Texas. — Simonton *v.* White, 93 Tex. 50, 77 Am. St. Rep. 824; Mouday *v.* Vance, 92 Tex. 428.

And see *supra*, this title, *Separate Equitable Estates of Married Women;* and also the title SEPARATE PROPERTY OF MARRIED WOMEN.

Rule Not Applicable to Life Estate of Feme Sole. — Newton *v.* Reid, 4 Sim. 141; Massey *v.* Parker, 2 Myl. & K. 174.

Under the Massachusetts Statutes taking away the disabilities of married women during coverture, it seems that restraints on the alienation of separate life estates of married women are no longer operative. Pacific Nat. Bank *v.* Windram, 133 Mass. 175. And see Todd *v.* Sawyer, 147 Mass. 570.

5. Estates for Years — Conditions Against Alienation Valid. — Doe *v.* Carter, 8 T. R. 57; Murray *v.* Green, 64 Cal. 363; Conger *v.* Lowe, 124 Ind. 368; De Peyster *v.* Michael, 6 N. Y. 467, 57 Am. Dec. 470; Bennet *v.* Washington Cemetery, (Supm. Ct.) 24 Abb. N. Cas. (N. Y.) 459; Camp *v.* Cleary, 76 Va. 140.

Power of Executors to Alien. — Where a lessee of real property dies his executors may dispose of the lease as a part of the assets of the decedent, notwithstanding a proviso against alienation contained in the lease. It seems that a man may, by a clause in his will, provide that in case of a devolution to executors the property shall not be alienable by them, but in order to be operative such provision must be very special. Seers *v.* Hind, 1 Ves. Jr. 294.

6. Effect of Illegal Restraint — Gift Not Defeated. — Bradley *v.* Peixoto, 3 Ves. Jr. 324; McDonogh *v.* Murdoch, 15 How. (U. S.) 367; McDowell *v.* Brown, 21 Mo. 57; Oxley *v.* Lane, 35 N. Y. 340; Schermerhorn *v.* Negus, 1 Den. (N. Y.) 448; Anderson *v.* Cary, 36 Ohio St. 506, 38 Am. Rep. 602; Hartman *v.* Herbine, 7 Pa. Co. Ct. 630; M'Williams *v.* Nisly, 2 S. & R. (Pa.) 507, 7 Am. Dec. 654; Laval *v.* Staffel, 64 Tex. 370.

Distinction Between Restraints on Alienation and Perpetuities. — In Beurhaus *v.* Cole, 94 Wis. 617, the court said: "This is plainly not a case where a fee has been devised and a repugnant condition attached, and where the condition is held void. * * * But, as indicated, it is a future estate which illegally suspends the power of alienation, and hence the estate itself is void in its creation." And see the title PERPETUITIES AND TRUSTS FOR ACCUMULATION, vol. 22, p. 701.

7. Restraints on Alienation Construed Strictly. — Rogers *v.* Birkhead, 3 Jur. N. S. 405; Smith *v.* Faught, 45 U. C. Q. B. 484; Roederer *v.* Hess, (Ky. 1902) 66 S. W. Rep. 1012.

Where the parties to a deed covenanted that the one making the largest offer for the premises of the other should at any time have the pre-emptive right, and that they would not

2. Clause Construed as Bare Prohibition Rather than Conditional Limitation. — Where there is room for doubt whether provisions in a will were intended to operate as a limitation of the estate devised, or as bare provisions against alienation, the courts will favor the latter construction.[1]

VII. Breach of Conditions Against Alienation. — Conceding that a particular condition against alienation or bankruptcy is valid, the question then arises whether or not it has been violated, and the *English* reports abound with cases in which this question has arisen, particularly in regard to conditions attached to equitable life estates. Many cases of this nature are cited in the notes,[2] but the solution of the question depends so much upon the particular circumstances of each case that it is almost impossible to formulate any general rules upon the subject. It may be said, however, that there is a distinction between voluntary alienation by act of the beneficiary and involuntary alienation by act of the law, and that involuntary alienation does not constitute a breach of a condition against voluntary alienation.[3] Thus, tak-

sell their respective premises to any third party without the written consent of the other party, it was held that such covenant was not applicable to a sale of the right to use engines, boilers, and other machinery erected on the premises in question, or to a sale made by a receiver of either of the parties. Hill *v.* Hill, 43 Pa St. 528.

Restriction Not Implied from Ambiguous Words. — Drew *v.* McGowan, 1 Ont. L. Rep. 575.

1. Fowlkes *v.* Wagoner, (Tenn. Ch. 1898) 46 S. W. Rep. 586.

2. Bankruptcy Existing at Date of Will or Trust Deed. — Trappes *v.* Meredith, L. R. 7 Ch. 248; Manning *v.* Chambers, 1 De G. & Sm. 282, 11 Jur. 466.

Bankruptcy Subsequently Annulled. — *In re* Carew, (1896) 2 Ch. 311; *In re* Loftus-Otway, (1895) 2 Ch. 235; Metcalfe *v.* Metcalfe, (1891) 3 Ch. 1; *In re* Parnham, L. R. 13 Eq. 413; Cox *v.* Fonblanque, L. R. 6 Eq. 482; White *v.* Chitty, L. R. 1 Eq. 372; Ancona *v.* Waddell, 10 Ch. D. 157; Robins *v.* Rose, 30 L. T. N. S. 152.

Foreign Bankruptcy. — *In re* Hayward, (1897) 1 Ch. 905.

Accrued Shares Forfeited by Bankruptcy. — Dorsett *v.* Dorsett, 30 Beav. 256.

Insolvency in General. — *In re* Aylwin, L. R. 16 Eq. 585.

Insolvency During Life of Testator. — *In re* Draper, 57 L. J. Ch. 942; Seymour *v.* Lucas, 1 Drew. & Sm. 177; Yarnold *v.* Moorhouse, 1 Russ. & M. 364.

Insolvency Proceedings Subsequently Annulled. — *In re* Broughton, 57 L. T. N. S. 8; Seymour *v.* Lucas, 1 Drew. & Sm. 177.

Execution of Mortgage in General. — Hennessey *v.* Bray, 33 Beav. 96.

Execution of Mortgage While Ignorant of Condition. — Carter *v.* Carter, 3 Kay & J. 618, 4 Jur. N. S. 63.

Execution of Mortgage Subject to Condition. — Samuel *v.* Samuel, 12 Ch. D. 152.

Execution of Mortgage and Subsequent Bankruptcy. — Brooke *v.* Pearson, 27 Beav. 181.

Mortgage of Share Not Yet Payable. — *In re* Payne, 25 Beav. 556.

Registration of Judgment as Mortgage. — *In re* Moore, 17 L. R. Ir. 549.

Sale of Annuity by Unstamped Agreement. — Stephens *v.* James, 4 Sim. 499.

Ineffectual Attempt to Sell or Charge. — Jones *v.* Wyse, 2 Keen 285, 2 Jur. 44; Graham *v.* Lee, 23 Beav. 388, 3 Jur. N. S. 550; *In re* Porter, (1892) 3 Ch. 481.

Agreement to Settle Property on Wife and Children. — *In re* Crawshay, (1891) 3 Ch. 176.

Equitable Charge Made in Ignorance of Condition. — Hurst *v.* Hurst, 21 Ch. D. 278.

Execution of Equitable Assignment. — *In re* Sheward, (1893) 3 Ch. 502.

Assignment of Accrued Income. — Stulz's Will, 4 De G. M. & G. 404.

Execution of Power of Attorney to Receive Income. — Cox *v.* Bockett, 35 Beav. 48; Wilkinson *v.* Wilkinson, 3 Swanst. 515; Oldham *v.* Oldham, L. R. 3 Eq. 404.

Assignment for Benefit of Creditors. — Matter of Waley, 3 Drew 165, 1 Jur. N. S. 338.

Writ of Elegit Sued Out by Creditor. — Stockwell *v.* Yeates, 19 L. T. N. S. 328.

Charging Order Obtained by Judgment Creditor. — Roffey *v.* Bent, L. R. 3 Eq. 759.

Issuance of Writ of Sequestration. — Dixon *v.* Rowe, 35 L. T. N. S. 548.

Appointment of Receiver. — Blackman *v.* Fysh, 64 L. T. N. S. 590.

Execution of Composition Deed. — Billson *v.* Crofts, L. R. 15 Eq. 314.

Execution of Deed of Inspectorship. — Freeman *v.* Bowen, 35 Beav. 17; Montefiore *v.* Enthoven, L. R. 5 Eq. 35.

Imprisonment for Debt and Execution of Vesting Order. — Howard *v.* Howard, 4 Jur. N. S. 1270; Pym *v.* Lockyer, 12 Sim. 394.

Execution of Receiving Order. — *In re* Sartoris, (1892) 1 Ch. 11.

Marriage of Beneficiary. — Craven *v.* Brady, L. R. 4 Ch. 296; Rogers *v.* Birkhead, 3 Jur. N. S. 405; Bonfield *v.* Hassell, 32 Beav. 217, 9 Jur. N. S. 453.

Outlawry of Beneficiary. — Rex *v.* Robinson, 12 Rev. Rep. 739, Wightw. 386.

Conviction of Felony. — *In re* Dash, 57 L. T. N. S. 219.

3. Involuntary Alienation Not Breach of Condition Against Voluntary Alienation. — Henderson *v.* Harness, 176 Ill. 302. But see Stewart *v.* Brady, 3 Bush (Ky.) 623.

What Constitutes Attempt to Subject Property to Process of Law. — Bryan *v.* Dunn, 120 N. Car. 36.

The Sale of a Lease under Execution, on a judgment entered by confession, does not constitute

ing the benefit of an insolvency act amounts to voluntary alienation within the meaning of a condition against such alienation,[1] but it seems that bankruptcy does not.[2] It seems that the giving of a mortgage constitutes a breach of a condition against sale or transfer.[3] A condition against anticipation attached to the separate estate of a married woman is not breached by an attempt to anticipate.[4]

RESTRICT. — The word "restrict" means to restrain within bounds.[5]

RESTRICTIVE INDORSEMENT. — See the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 272.

RESULT. — See note 6.

RESULTING TRUST. — See the title IMPLIED TRUST, vol. 15, p. 1119.

RESUME — RESUMPTION. — See note 7.

a breach of a covenant by the lessee not to assign, sell, or otherwise part with his interest. Doe *v.* Carter, 8 T. R. 57.

1. Condition Against Voluntary Alienation Violated by Insolvency. — Rochford *v.* Hackman, 9 Hare 475, 16 Jur. 212; Marks *v.* Churchill, 9 Jur. 155; Brandon *v.* Aston, 2 Y. & C. Ch. 24, 7 Jur. 10; Townsend *v.* Early, 34 Beav. 23; Shee *v.* Hale, 13 Ves. Jr. 404; Martin *v.* Maugham, 14 Sim. 230, 8 Jur. 609.

2. Bankruptcy Not Breach of Condition Against Voluntary Alienation. — Wilkinson *v.* Wilkinson, Coop. t. Eld. 259; Whitfield *v.* Prickett, 2 Keen 608, 2 Jur. 344; Lear *v.* Leggett, 1 Russ. & M. 690; *In re* Harvey, 60 L. T. N. S. 710, 37 W. R. 620; Graham *v.* Lee, 23 Beav. 388, 3 Jur. N. S. 550. But to the contrary see Cooper *v.* Wyatt, 5 Madd. 482; *In re* Throckmorton, 37 L. T. N. S. 447, 26 W. R. 181; *In re* Amherst, L. R. 13 Eq. 464; Dommett *v.* Bedford, 3 Ves. Jr. 149.

3. Mortgage Breach of Condition Against Sale or Transfer. — Earls *v.* McAlpine, 27 Grant Ch. (U. C.) 161. But see Earls *v.* McAlpine, 6 Ont. App. 145; Smith *v.* Faught, 45 U. C. Q. B. 484.

4. Condition Against Anticipation Not Breached by Attempt to Anticipate. — *In re* Wormald, 43 Ch. D. 630.

5. Restrict — Limitation of Carrier's Liability. (See generally the titles CARRIERS OF GOODS, vol. 5, p. 288; CARRIERS OF LIVE STOCK, vol. 5, p. 453; CARRIERS OF PASSENGERS, vol. 5, p. 608.) — Gulf, etc., R. Co. *v.* Trawick, 68 Tex. 319, in which case it was held that the word, as used in the *Texas* statute providing that carriers shall not limit or *restrict* their common law liability, "was evidently used to prohibit the carrier from so contracting as to make his liability to depend on facts other than such as would fix liability under the settled rules of the common law."

6. Result — Attorney's Compensation. (See also the title ATTORNEY AND CLIENT, vol. 3, p. 423.) — In Haish *v.* Munday, 12 Ill. App. 547, it was said: "The general rule is well settled in Eggleston *v.* Boardman, 37 Mich. 18, to the effect that the professional skill and standing of the person employed, his experience, the nature of the controversy, both in regard to the amount involved and the character and nature of the questions raised in the case, as well as the *result*, should all be taken into consideration in fixing the value of the services rendered. The *result*, as mentioned in that statement, means the way in which the litigation terminated, and not that the party performing the services may trace out ultimate benefits to his client with the view of enhancing the value of his services."

Service and Product. — In Jensen *v.* Barbour, 15 Mont. 592, it was said: "The respondent argues that Vaughn represented the will of his employer only as to the *result* of his work, and not as to the manner of its performance; that is to say, that Vaughn contracted to deliver to his employer the *result* of putting the car over the track once a day by his own methods. But so it might be argued that one's coachman contracts to produce the *result* of conveying his master from his house to his office, or wherever he may wish to go; or one's cook contracts to produce the *result* of placing before his master his daily food. But such is not the sense in which the word *result* is used in the rule. We think that the word *result*, as so used, means a production or product of some sort, and not a service. One may contract to produce a house, a ship, or a locomotive, and such house, or ship, or locomotive produced is the *result*. Such *results* produced are often, and probably generally, by independent contractors. But we do not think that plowing a field, mowing a lawn, driving a carriage or a horsecar for one trip or for many trips a day, is a *result* in the sense that the word is used in the rule. Such acts do not *result* in a product. They are simply a service."

Patent Law. — See the title PATENTS, vol. 22, p. 277.

Direct Result. — See DIRECT, vol. 9, p. 458.

Result in Sense of Judgment Rendered or Final Order Made in Proceeding. — See Sorensen *v.* Sorensen, 56 Neb. 734.

7. Resume. — In Ft. Wayne Electric Corp. *v.* Franklin Electric Light Co., 57 N. J. Eq. 12, it was held that a statute requiring, as a condition precedent to the appointment of a receiver, proof that an insolvent corporation would not be able to *resume* its business with safety to the public and advantage to its stockholders within a short time did not predicate a complete suspension of business. The court said: "I agree that the word *resume*, as used in the statute, predicates some interruption of the insolvent's business, but I do not understand that it contemplates an entire suspension of all its workings."

Eminent Domain. (See also the title EMINENT DOMAIN, vol. 10, p. 1048.) — In Opinion of Justices, 66 N. H. 635, it was said: "The act

RESURVEY. — See note 1.

RETAIL. (See also the title INTOXICATING LIQUORS, vol. 17, p. 189.) — To retail means generally to sell in small quantities, in broken parts, in small lots or parcels, not in bulk or in gross.[2]

RETAILER — RETAIL DEALER. (See also the title INTOXICATING LIQUORS, vol. 17, p. 189.) — A retailer is defined to be one who sells goods by small quantities or parcels.[3]

of taking the road from its owners was called a *resumption*. The word *resume* is used in this connection, in the books, as an allusion to one of the alleged sources of the public right to take private property, whether held in fee or otherwise, and not as a suggestion that the owner's title is exceptionally defeasible. * * * In such phrases, and when the state is said to *resume* turnpikes, railroads, or sites for public buildings which it compels the owners to sell, the words 'revert' and *resume* are neither obscure nor misleading."

Resumption of Work — Mines and Mining Claims. — See the title MINES AND MINING CLAIMS, vol. 20, p. 738.

Resumed Area. — See Colless *v.* Minister for Lands, (1899) A. C. 95.

1. Resurvey — See Cragin *v.* Powell, 128 U. S. 698, and see the title STATE AND PUBLIC LANDS.

2. Retail. — L'Association Pharmaceutique *v.* Livernois, 31 Can. Sup. Ct. 45; Harris *v.* Livingston, 28 Ala. 577; Bridges *v.* State, 37 Ark. 224; Com. *v.* Kimball, 7 Met. (Mass.) 308; State *v.* Hawkins, 91 N. Car. 627; State *v.* Lowenhaught, 11 Lea (Tenn.) 15.

The term wholesale "implies the selling in unbroken pieces or parcels, as by the barrel, pipe, cask, etc., or in a number of such pieces or parcels; while the word *retail* implies the cutting or dividing up such pieces, parcels, or casks into small quantities, and selling to customers in such manner." Gorsuth *v.* Butterfield, 2 Wis. 243

Retailing Held Not to Import Consideration. — In Markle *v.* Akron, 14 Ohio 591, it was said: "To *retail* is to dispose of in small quantities, and may be either for or without a consideration. It may be a distribution of a whole into parcels."

Single Sale. — In People *v.* Abraham, 16 N. Y. App. Div. 62, it was said: "'To *retail*' is differentiated from 'to wholesale,' and there can be no doubt that the selling of one bottle is a clear sale at *retail*." See also U. S. *v.* Alexis Club, 98 Fed. Rep. 727.

License. — In State *v.* Hawkins, 91 N. Car. 627, it was held that one was indictable for the violation of an act prohibiting gambling "in any house wherein spirituous liquors are *retailed*," whether such *retailing* was with or without a license. The court said of the term *retail*, as used in the above provision: "There is nothing in the statute that goes to show this term is used in any restricted or limited sense, or that it does not imply any *retailing*, either rightful or wrongful."

Quantity. — The charter of a city authorized the municipal authorities to license the *retailing* of spirituous liquors, or, if they deemed proper, to restrain or prohibit sales by *retail*. It was held that the term *retailing*, construed with reference to the general policy of the law in relation to the sale of ardent spirits, meant selling in small quantities; and that, though the charter authorized the entire prohibition of *retailing*, yet an ordinance which prohibited, under a penalty, the sale of spirituous liquors in less quantities than twenty gallons, without a license, was unauthorized and void. Harris *v.* Livingston, 28 Ala. 577.

See also as to *retailers* under special statutes Beiser *v.* State, 79 Ga. 326.

Title of Act. (See also the title STATUTES.) — The title of an act was as follows: "An act to prevent the sale of spirituous or malt liquors near the Ridge Valley Iron Works, in Floyd county." The body of the act provided that "there shall not be delivered, sold, or furnished by *retail*, as a beverage, any spirituous or malt liquors within the radius of two and a half miles from said Ridge Valley Iron Works," etc. It was held that a reasonable construction should be given to the statute, and so construing it, the words "delivered" and "furnished" were both qualified by the words "by *retail*," which meant by sale in quantities of less than one quart. In this view, the body of the act did not contain matter different from its title. McArthur *v.* State, 69 Ga. 444.

3. Retailer. — Campbell *v.* Anthony, 40 Kan. 654.

Whether Confined to Liquor Dealers. — The charter of the city of Washington authorized it "to provide for licensing, taxing, and regulating auctions, *retailers*, ordinaries, and taverns, hackney carriages," etc. It was contended that a person who sold perfumery was a *retailer*, but the court said: "The word in the charter, as I apprehend, means exclusively *retailers* of 'wine, rum, brandy, whiskey, or other distilled spirituous liquor, strong beer, or cider.' These were the only *retailers* known in the Maryland statutes at the time of the separation of this part of the district from that state to whom a license could be granted." Carey *v.* Washington, 5 Cranch (C. C.) 17. See also Washington *v.* Barber, 5 Cranch (C. C.) 157. But see Washington *v.* Casanave, 5 Cranch (C. C.) 500, where it was held that a keeper of a woodyard was a *retailer*.

Same — Lumber Dealer. — A statute authorized cities to levy license taxes on merchants and *retailers*. It was held that a lumber dealer was included in the ordinary signification of both a merchant and a *retailer*. Campbell *v.* Anthony, 40 Kan. 654.

Retail Dealer. — "Retailing is selling by small quantities, to suit customers, articles which are bought in larger amounts generally. Now one who sells in this way, or whose business is so to sell, is a *retail dealer;* one who sells by the nature of his business in gross, and not by the small quantity or parcel to consumers, is a wholesale dealer." State *v.* Lowenhaught, 11 Lea (Tenn.) 15.

Same — Single Sale. — In U. S. *v.* Alexis

RETAIN. (See also HOLD, HOLDING, ETC., vol. 15, p. 510; KEEP, KEEPER, ETC., vol. 18, p. 56.) — To retain means to continue to hold, to keep in possession.[1] The term also means to keep in pay; to hire.[2]

RETAINER. — 1. The term "retainer" signifies the act of a client by which he engages an attorney or counselor to manage a cause, either by prosecuting it, when he is plaintiff, or defending it, when he is defendant; also, the retaining fee.[3] 2. At common law, an executor or administrator of a deceased person who was also the creditor of the deceased had the right to retain out of the assets enough to pay his own debt in priority to any creditor whose debt was of equal degree. This was called the right of retainer or redress by retainer, and was allowed because the representative could not sue himself, and there was no one else whom he could sue.[4] 3. A retainer is a dependent; a hanger on.[5]

RETAINING FEE. — See RETAINER, *ante*.

RETAINING LIEN. — See RETAINER, *ante*.

RETIRE. — As applied to bills of exchange, the word "retire" is ambiguous. It is commonly used of an indorser who takes up a bill by handing the amount to the transferee, after which the indorser holds the instrument with all his remedies intact. But it is sometimes used of an acceptor, by whom, when the bill is taken up or retired at maturity, it is in effect paid and all the remedies on it are extinguished.[6]

Club, 98 Fed. Rep. 727, it was held that a single sale of spirituous wine by any person, in a smaller quantity than five gallons, constituted the seller a *retail dealer*, within a United States revenue act. See also People *v.* Abraham, 16 N. Y. App. Div. 62.

Social Club Held to Be a Retail Dealer. — U. S. *v.* Alexis Club, 98 Fed. Rep. 727; State *v.* Boston Club, 45 La. Ann. 585. But see Tennessee Club *v.* Dwyer, 11 Lea (Tenn.) 461, where it was held that a social club was not a *retail dealer*, within a license act.

The Gratuitous Distribution of ardent spirits at a public gaming-table does not constitute the proprietor a *retailer* of spirituous liquors. U. S. *v.* Mickle, 1 Cranch (C. C.) 268.

1. Retain.—Richardson *v.* Seevers, 84 Va. 269.

Retain Distinguished from Receive. — See RECEIVE — RECEIVING, ETC., vol. 23, p. 990.

2. Hire. (See also HIRE, HIRER, ETC., vol. 15, p. 508.) — Elderton *v.* Emmons, 6 C. B. 176. 60 E. C. L. 176.

Neutrality Act — "Hire or Retain Another Person to Enlist," Etc. — See U. S. *v.* Kazinski, 2 Sprague (U. S.) 14. See also the title INTERNATIONAL LAW, vol. 16, p. 1166.

3. Retainer — Attorney and Client. (See also the titles ATTORNEY AND CLIENT, vol. 3, p. 278; PRIVILEGED COMMUNICATIONS, vol. 23, p. 62.) — Bouv. L. Dict., *followed* in Knight *v.* Russ, 77 Cal. 410.

In Blackman *v.* Webb, 38 Kan. 668, the court, *per* Valentine, J., said, after giving the above definition: "'The act of employing or engaging an advocate, barrister, attorney, counselor, solicitor, or proctor to appear and prosecute or defend. The word is also used for the notice served by an attorney, etc., on the opposite party or attorney that he has been *retained*, in which use it is by elision for notice of *retainer;* and for the fee paid to a lawyer upon his undertaking a cause, in which use it is by elision for *retaining* fee.' (Abb. L. Dict.) It will be seen that the word *retainer* as used in cases of this kind means: First, the act of the client in employing his attorney or counsel; second, the notice of the *retainer* served upon the opposite party or his attorney; third, the *retaining* fee."

General and Special Retainers. — "First, general *retainers*. These have for their object the securing beforehand of the services of a particular attorney or counselor for any emergency that may afterwards arise. They have no reference to any particular service, but take in the whole range of possible future contention which may render attorneyship necessary or desirable. Counsel thus *retained* is not at liberty to accept employment or render service adversary to the interest of the client thus *retaining* him. He is, as to such client, monopolized. A special *retainer* has reference to a particular case or to a particular service. * * * It, however, imposes obligations, *pro hac vice*, equally binding with those enjoined by a general *retainer*. It forbids the acceptance of adversary employment, or the performance of adversary services. It exacts undivided loyalty and allegiance to the client, equal to that demanded by the veriest despot that ever scourged a people." Agnew *v.* Walden, 84 Ala. 504.

A Retaining Fee is a fee given to counsel on being consulted, in order to insure his future services. Bouv. L. Dict. See also the title ATTORNEY AND CLIENT, vol. 3, p. 440.

A Retaining Lien is a lien which an attorney has on all the papers of his client in his possession, by virtue of which he may retain all such papers until his claim for services has been discharged. Goodrich *v.* McDonald, 112 N. Y. 162. See also the title ATTORNEY AND CLIENT, vol. 3, p. 447.

4. Retainer. — See the titles DEBTS OF DECEDENTS, vol. 8, p. 1057; EXECUTORS AND ADMINISTRATORS, vol. 11, p. 789. 4 Min. Inst. 154.

5. "Retainer to the Camp." — Luty *v.* Purdy, 2 Overt. (Tenn.) 167.

6. Retire. — Wood's Byles on Bills and Notes (8th ed.) 226.

RETRAXIT. (See also the title RETRAXIT, 18 ENCYC. OF PL. AND PR. 898.) — A retraxit is a public voluntary renunciation by the plaintiff of his suit or cause of action in open court.[1]

RETREATING TO WALL. — See note 2.

RETRIBUTION. — See note 3.

RETROACTIVE OR RETROSPECTIVE LAWS. (See also the titles CONSTITUTIONAL LAW, vol. 6, pp. 897, 917 *et seq.*, 937 *et seq.*; EX POST FACTO LAWS, vol. 12, p. 525; STATUTES.) — "Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective" in its operation, and opposed to those principles of jurisprudence which have been universally recognized as sound.[4]

"This word is susceptible of various meanings, according as it is applied to various circumstances. If an acceptor *retires* a bill at maturity he takes it entirely from circulation and the bill is in effect paid; but if an indorser *retires* it, he merely withdraws it from circulation in so far as he himself is concerned, and may hold the bill with the same remedies as he would have had had he been called upon in due course and had paid the amount to his immediate indorsee. We think this is the ordinary meaning of the word *retire*." Elsam *v.* Denny, 15 C. B. 94, 80 E. C. L. 94.

Retire and Extinguish. — In Park *v.* Candler, 114 Ga. 466, it was said that the same meaning could not be given to the words "apply," *retire*, and "extinguish," when applied to a debt.

1. Retraxit. — Justices *v.* Selman, 6 Ga. 437. See also Cox *v.* Griffin, 17 Ga. 249; Lowry *v.* McMillan, 8 Pa. St. 157, 49 Am. Dec. 501.

In Westbay *v.* Gray, 116 Cal. 660, it was said: "A *retraxit* occurred at common law when a plaintiff came into court in person and voluntarily renounced his suit or cause of action; and when this was done, and a judgment was entered in favor of defendant, the plaintiff's cause of action was forever gone." *Citing* 3 Black. Com. 296.

A judgment of *retraxit* is entered against a plaintiff when, after appearance and before judgment, he enters upon the record that he withdraws his suit. Thomason *v.* Odum, 31 Ala. 113, 68 Am. Dec. 159.

Settled and Dismissed. — "A *retraxit* is a renunciation of his suit by the plaintiff." Eagin *v.* Musgrove, Phil. L. (61 N. Car.) 14, in which case it was held that the entry of the words "settled and dismissed," made by the plaintiff upon the appearance docket before return term of the writ, did not amount to a *retraxit*.

Retraxit and Nonsuit Distinguished. (See also NONSUIT, vol. 21, p. 548, note 2.) — In Herring *v.* Poritz, 6 Ill. App. 211, *quoting* 3 Black. Com. 296, it was said: "A *retraxit* differs from a nonsuit in that the one is negative and the other positive. The nonsuit is a mere default and neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs; but a *retraxit* is an open and voluntary renunciation of his suit in court, and by this he forever loses his action."

Retraxit and Nolle Prosequi. (See also NOLLE PROSEQUI, vol. 21, p. 542.) — In Noke *v.* Ingham, 1 Wils. C. Pl. 90, it was said: "A *retraxit* is a total relinquishment of the suit, and has a very different operation from a *nolle prosequi*."

In Broward *v.* Roche, 21 Fla. 477, it was said: "It [a *retraxit*] differs from a *nolle prosequi* in that it is 'a bar to any future action for the same cause, whereas the *nolle prosequi* is not unless made after judgment.'"

Obsolete — Minnesota. — In Walker *v.* St. Paul City R. Co., 52 Minn. 130, it was said: "A *retraxit* at common law was an open and voluntary renunciation by the plaintiff in open court of his suit or cause of action, and on the entry of judgment thereon by defendant the plaintiff's right of action was forever gone. It has long been practically obsolete in England (Chit. Gen. Pr. 1515), and certainly has never been recognized in this state or the earlier territory."

2. Retreating to Wall. (See also the title SELF-DEFENSE.) — In State *v.* Partlow, 90 Mo. 628, it was said: "Treating of this subject of *retreating to the wall*, Mr. Wharton aptly says: 'The true view is that a "wall" is to be presumed whenever a *retreat* cannot be further continued without probable death, and when the only apparent means of escape is to turn and attack the pursuer. And *retreat* need not be attempted when the attack is so fierce that the assailed, by *retreating*, will apparently expose himself to death.' Whart. Hom., § 485."

3. Retribution — Damages. (See also the title EXEMPLARY DAMAGES vol. 12, p. 2.) — In Van Ingen *v.* Star Co., 1 N. Y. App. Div. 433, it was said: "As to the exception taken to the word *retribution*, in the charge, as relating to the amount of damages that the plaintiff is entitled to as compensation for the wrong, the context shows that that word was used not in relation to punishment, but to the fixing by the jury of such a sum of money as will furnish the plaintiff a fair and just compensation for the wrong."

4. Retroactive or Retrospective Laws — Story's Definition. — Society, etc., *v.* Wheeler, 2 Gall. (U. S.) 139. See also as following this definition the following cases:

United States. — Sturges *v.* Carter, 114 U. S. 519.

Colorado. — Denver, etc., R. Co. *v.* Woodward, 4 Colo. 162; Evans *v.* Denver, 26 Colo. 193; Perry *v.* Denver, 27 Colo. 93; Day *v.* Maddend, 9 Colo. App. 464.

Nevada. — State *v.* Manhattan Silver Min. Co., 4 Nev. 333.

New Hampshire. — Kennett's Petition, 24 N.

RETROCESSION. — In the civil law, when the assignee of heritable rights conveys his rights back to the cedent, the act is called a "retrocession." [1] "A retrocession means the restitution of an ancient title to a true owner. Such an act confers no new title; it merely recognizes and confirms a previously existing title in another." [2]

RETURN. — 1. To return is defined as to come or go back to the same place; to revisit.[3] 2. The ordinary meaning of the noun "return" is a formal report of duty discharged.[4] 3. For other senses of the term and phrases in

H. 139; Dow *v.* Norris, 4 N. H. 16; Clark *v.* Clark, 10 N. H. 380; Greenlaw *v.* Greenlaw, 12 N. H. 200.

Ohio. — Rairden *v.* Holden, 15 Ohio St. 210.

Texas. — Sutherland *v.* De Leon, 1 Tex. 250, 46 Am. Dec. 100.

Virginia. — Richmond *v.* Henrico County, 83 Va. 212.

Other Definitions. — In Chicago, etc., R. Co. *v.* State, 47 Neb. 564, it was said: "A *retrospective law* has been defined as one intended to affect transactions which occurred or rights which accrued before it became operative as such, and which ascribes to them effects not inherent in their nature in view of the law in force at the time of their occurrence."

In Peacock *v.* Republic of Hawaii, 11 Hawaii 409, it was said: "What are *retrospective laws?* The definition is not wholly etymological; it is largely historical. To hold that every law that 'looks backward' is unconstitutional would be absurd; it would tie the hands of the legislature so as to prevent all sorts of salutary laws harmful to no one. *Retrospective laws* have, therefore, come to have much the same meaning as '*ex post facto* laws,' 'laws impairing the obligation of contracts,' etc. While these phrases apply in whole or in part to different subject-matters, they in general mean laws that impair vested rights; and in general so long as laws do not impair vested rights they are not unconstitutional because *retrospective*."

"The Words Retrospective and Retroactive, as applied to laws, seem to be synonymous." Rairden *v.* Holden, 15 Ohio St. 210.

Technical Term. — In Rich *v.* Flanders, 39 N. H. 319, it was said: "We conclude that the word *retrospective*, as used in our Bill of Rights, and as generally used in a legal sense, is a technical term, not to be understood in a literal sense, but one that must receive, and has received, a legal interpretation."

Retrospective Laws and Ex Post Facto Laws Distinguished. (See also the titles CONSTITUTIONAL LAW, vol. 6, p. 939; EX POST FACTO LAWS, vol. 12, p. 526.) — The term "*ex post facto* laws" relates to criminal and the term *retrospective laws* relates to civil cases. "Every *ex post facto* law must necessarily be *retrospective*, but every *retrospective law* is not an *ex post facto* law." Boston *v.* Cummins, 16 Ga. 106, 60 Am. Dec. 719. See also Harmanson *v.* Wilson, 1 Hughes (U. S.) 207, 11 Fed. Cas. No. 6,074.

1. Retrocession. — Ersk. Inst. 3, 5, 1. *cited* in Black's L. Dict., and Bouv. L. Dict.

2. Amet *v.* Boyer, 43 La. Ann. 578, *citing* Rev. Civ. Code La., art. 2272 *et seq.*, and Payne *v.* Nowell, 41 La. Ann. 852.

3. Return — Change in Boundaries of Political Divisions. — Waterbury First Soc. *v.* Platt, 12 Conn. 187. In this case it was held that a man cannot be said to *return* to a place, and yet never actually change his location. Although a man's residence is at one time within the political division of A, and then by a change of the boundaries is thrown out of such division, and the boundaries are once more changed, bringing his residence again within A, it cannot be said that he has *returned* to A. *Compare* REMOVE — REMOVAL, *ante*.

A condition to a legacy that the legatee *return* to a place means that he shall come back to that place; and the condition is not performed if he dies, or is lost at sea while returning. Priestley *v.* Holgate, 3 Kay & J. 286, 26 L. J. Ch. 448; Sprigg *v.* Sprigg, 2 Vern. 394. See also Burgess *v.* Robinson, 3 Meriv. 7. and see the titles LEGACIES AND DEVISES, vol. 18, p. 731; WILLS.

Limitation of Actions. — In Whitcomb *v.* Keator, 59 Wis. 612, it was said: "It may be said that the word *return* necessarily implies that the debtor had previously resided in, or had been in, this state. But in the language of Chief Justice Bigelow, in Milton *v.* Babson, 6 Allen (Mass.) 324, 'in the interpretation of statutes a narrow and close verbal criticism can rarely be adopted as a safe mode of ascertaining the real intent and purpose which a particular enactment was designed to accomplish.' We have no doubt, therefore, that the word *return* applies as well to persons coming from another state, where they reside, as to persons residing in this state going abroad for a temporary purpose and then *returning*." But see Hyman *v.* Bayne, 83 Ill. 260, where it was said: "A person cannot *return* to a place until he has previously been at that place." See further the title LIMITATION OF ACTIONS, vol. 19, pp. 228, 233, and see Palmer *v.* Shaw, 16 Cal. 96; Fowler *v.* Hunt, 10 Johns. (N. Y.) 465.

4. Report of Duty Discharged. (See also the title RETURNS, 18 ENCYC. OF PL. AND PR. 901.) — Field *v.* Field, 38 N. J. L. 294.

Return of Officer — Return of Process. — "The *return* of an officer is the written statement of what he has done under the process in his hands." Davis *v.* Reaves, 7 Lea (Tenn.) 590, *citing* Hill *v.* Hinton, 2 Head (Tenn.) 127.

In State *v.* Bulkeley, 61 Conn. 363, it was said: "When a command has been issued from some superior authority to an officer, the *return* is the official statement by the officer of what he has done in obedience to the command or why he has done nothing. Whatever thing the superior authority may require the officer to do, of the doing of that thing it may require him to make *return*."

Reply to Mandate of Court. — A statute provided that all judgments thereafter rendered

which it occurs, see note 1.

RETURNABLE. — Returnable is defined as capable of being returned; on which no execution should issue or on which if execution was sued out no *return* should be made within seven years from the date of the judgment should be void. In construing this statute the court said: "The point of the act is that the plaintiff, once in seven years at least, shall so use his judgment as that the proper officer has a *return* to make to the court. * * * Now, anything is a *return* which is a reply to the mandate of the court requiring the officer to make the money. An entry of a levy of payment, satisfaction, are each *returns*, and show action. A *return* of no property, of the dismissal of a levy, of the postponement of a levy, have each been held by this court as sufficient." Battle *v.* Shivers, 39 Ga. 413.

Return of Execution. — "The *return* of an execution is the statement by the officer, certified to the court under the sanction of his official oath and responsibility, of what he has done touching the execution of the writ according to its commands and the requirements of the law." Hutton *v.* Campbell, 10 Lea (Tenn.) 173.

Return of Execution Held to Mean Return upon Execution. — Lovegrove *v.* Brown, 60 Me. 592.

Filing. — In Easton *v.* Childs, 67 Minn. 244, it was said: "We concede that technically and literally that word [*return*], as applied to a writ (which a summons, under our practice, is not), includes not only the certificate of the sheriff, but also the filing of it in court. But frequently in statutes, and usually in common speech, the word *return* means merely the certificate, without regard to whether it has been filed or not."

Return in Sense of Return Day. (See also RETURN DAY, *post.*) — In Aldrich *v.* Maitland, 4 Mich. 211, it was said: "The justice's docket, as appeared from the transcript, stated that the cause was called on and judgment rendered on the *return* of process. By *return* was evidently meant *return* day, and not the actual *return* of process. The two forms of expression are very frequently used as synonymous."

Return and Default. — In Longley *v.* Daly, 1 S. Dak. 267, it was said: "The words 'in case a *return* cannot be had' are equivalent to the words 'in default thereof.'"

Due Return. — See DUE, vol. 10, p. 284, note.

1. Election Returns. (See also the title ELECTIONS, vol. 10, p. 737.) — In Luce *v.* Mayhew, 13 Gray (Mass.) 85, it was held that a certificate of the number of votes given at an election for county commissioner and of the result of the election, signed "Attest: J. T.," without showing that it was a copy of the town record, or that J. T. was town clerk, was not a *return* which the board of examiners was authorized to receive or would be required by mandamus to consider in determining who was elected county commissioner. The court said: "The *return* required by Rev. Stat., c. 14, § 17, is a copy of the town record, signed by the selectmen and attested by the town clerk. The board of examiners were not required by law to receive, examine, or treat as a *return* any paper which did not appear upon its face to be such a *return*."

In People *v.* Stewart, 132 Cal. 284, the court said: "The authority of the board of supervisors to call a special election depended upon its substantial compliance with the provisions of the law — that is to say, upon a canvass of the *returns* as provided by Pol. Code Cal., §§ 1278, 1280 *et seq.*, with result appearing therefrom that there was no choice of candidates. Pol. Code, §§ 1066, 1067. The *returns* referred to in these provisions are the sealed packages containing the register, lists, papers, and ballots, prescribed by §§ 1261 and 1263 of the Political Code, which 'in section 1268 of the Political Code are spoken of as *returns*.'" *Quoting* Carlson *v.* Burt, 111 Cal. 131.

Same — Kentucky Statute. — See Houston *v.* Steele, 98 Ky. 596.

Same — Canvass Returns. — See CANVASS, vol. 5, p. 132, note.

Will. (See also the title WILLS.) — Where a testator devised land to his sons during their lives and provided that in "default of male issue the land shall *return*" to such sons, *return* was construed as equivalent to "remain," in order to give effect to the testator's intention. Den *v.* McMurtrie, 15 N. J. L. 276.

Same — To Go or to Pass. — Where a testatrix devised land to F., and provided that upon a certain contingency it should *return* to her legatees as F. should direct, it was said that "the word '*return*' as used by the testatrix obviously means the same as to go or to pass;" and, again, that "to *return* is to come back to him from whom it was given; but to come back from him to him is inconceivable and contradictory." Den *v.* Crawford, 8 N. J. L. 112.

Same — Return and Belong to My Heirs. — A father made a deed of gift of a slave to his daughter in the following terms: "During her natural life, and at her death to the child or children of my said daughter; * * * but in case of the death of my said daughter L. without lawful issue of her body, then the said negro girl, and her issue or increase, to *return* and belong to my other heirs." In construing this gift the court said that it seemed probable "from the use of the word *return*, taken in connection with the words which immediately follow it, that in the event his daughter died without children, his intention was that the property designed for them should come back and pass as if no conveyance had been made." Couch *v.* Anderson, 26 Ala. 681.

Returned to Place of Service — Mileage. — By statute mileage was to be computed from the place where the process was *returned* to the place of service. In Matter of Crittenden, 2 Flipp. (U. S.) 212, 6 Fed. Cas. No. 3,393, it was held that the very term *return* implied that the process was taken back to the place whence it was issued. The court said: "A thing delivered by one person to another is not *returned* when it is delivered to a stranger, and at a place other than the place of original

legally required to be returned; as, a writ returnable at a certain day; a verdict returnable to the court.[1]

RETURN DAY. — Return day is the day appointed by law when writs are to be returned and filed.[2]

REV. (See also the title ABBREVIATIONS, vol. 1, p. 97; and see REVEREND, *post.*) — See note 3.

REVEALED LAW. — See note 4.

REVEL. — To revel is to behave in a noisy, boisterous manner, like a bacchanalian.[5]

REVENDICATION. — In civil law, revendication is the right of an unpaid vendor, upon the insolvency of the vendee, to reclaim, in specie, such part of the goods as remains in the hands of the vendee entire, and without having changed in quality.[6]

delivery." See also Watson *v.* Mitchell, 108 N. Car. 364.

Return by Governor. (See also the title STATUTES.) — In Harpending *v.* Haight, 39 Cal. 199, it was said: "We think it clear that the presentation of a bill to the governor made by the legislature, under such circumstances as that he is prevented from considering its provisions, and a *return* of a bill made to the house in which it originated by the executive — but so made that the house can neither reconsider the bill nor examine the objections to its passage — do not in either case constitute the presentation or *return* required by the constitution."

The Constitution of *Massachusetts* provides: "In order to prevent unnecessary delays, if any bill or resolve shall not be *returned* by the governor within five days after it shall have been presented, the same shall have the force of a law." In construing this statute the court said: "It cannot be contended that the provision that the governor shall *return* the bill or resolve to the branch in which it originated contemplates that he shall personally *return* the same; it means that he shall cause it to be *returned*, or 'sent down.'" Opinion of Justices, 135 Mass. 598.

Public Lands. (See also the title STATE AND PUBLIC LANDS.) — In Snider *v.* Methvin, 60 Tex. 487, it was held that the word *return*, as used in the *Texas* government land statutes, meant the transmission to and deposit of a certificate in the general land office with the intent that it should there remain, and not a reindorsement and deposit after the certificate of survey had once been deposited in the general land office and afterwards withdrawn.

Returned Unpaid — Notice of Dishonor. (See also the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 421.) — In Brewster *v.* Arnold, 1 Wis. 275, it was said: "When the words '*returned unpaid*' are used, we think it would be difficult to arrive at any other conclusion than that the bill or note had at least been sent somewhere for payment, and yet it may not have been in fact presented."

1. Returnable. — Daniels *v* Lewis, 7 Colo. 434, *quoting* Webst. Dict.

2. Return Day. — Bankers' Iowa State Bank *v.* Jordan, 111 Iowa 324, *citing* Bouv. L. Dict. The court said further: "To say they are to be returned on the last day of service might, in some instances, require an impossibility. There is no apparent necessity for their return before the time when the court may be called upon to take some action in the case, and this would be the second day of the term, or default day, which must be regarded as *return day* within the meaning of this statute." See also Wilkins *v.* Troutner, 66 Iowa 560.

In Carlson *v.* Burt, 111 Cal. 131, it was said: "The phrase *return day* has been long a familiar phrase in legal practice. Blackstone says (3 Black. Com. 277) that they are called days in bank; that is, days of appearance in the court of common bench. They were stated days in the term on which writs were returnable. These were original writs by which suits were commenced. If the defendant did not then appear and submit to the jurisdiction, process was issued to compel him to do so. In analogy, the last day on which any process can be returned is called *return day;* or, in case of an order to show cause, the day of the hearing." And in this case it was held that a *return day*, within a statute providing that a voter contesting an election must file a statement within a certain time after the *return day* of such election, was not the day on which the result of the election was known, but the day on which the canvass began.

3. Rev. — In Magill *v.* State, (Tex. Crim. 1902) 67 S. W. Rep. 1018, it was said: "The indictment charged the ownership in '*Rev.* Henry.' This witness testified: 'My name is W. M. Henry. I am commonly known as *Rev.* Henry. I am a minister of the gospel. Have been preaching over twenty years, and am a Holiness preacher.' The defendant asked a special charge to the effect that if the word *Rev.* was intended for 'Reverend' it would simply be an appellation or title, and would be no name at all. This was refused. We would suggest that if the word *Rev.* means, or was intended to mean, 'Reverend,' it would simply be a title, and no name at all. Bell *v.* State, 25 Tex. 574; Beaumont *v.* Dallas, 34 Tex. Crim. 68; White's Ann. Code Crim. Pro., § 340. If as a matter of fact he was commonly known as '*Rev.* Henry,' and not 'Reverend Henry,' and was as well known by the name *Rev.* as 'W. M. Henry,' then, perhaps, this would be sufficient designation as the owner of the property."

4. Revealed Law. — See Mayer *v.* Frobe, 40 W. Va. 246.

5. Revel. — Began's Petition, 12 R. I. 310, in which case it was held that a complaint that charged that the defendant "did *revel*, quarrel," etc., was not bad for uncertainty.

6. Revendication. — Benedict *v.* Schaettle, 12 Ohio St. 520, *quoting In re* Westzynthius, 2 N.

REVENUE. (See also the titles REVENUE LAWS, *post;* TAXATION.) — "Revenue, when used of individuals, is equivalent to income, which is the true sense generally used to designate the annual receipts, and includes receipts from all sources — at least, all permanent sources of profits or rent. Revenue is more generally used to designate the income of the government arising from taxation, duties, and the like. The proceeds of lands or public stock sold would not be included as a part of the revenue of a state." [1] Thus, revenue has been defined to mean "the annual produce of taxes, excise, customs, duties, rents, etc., which a nation or state collects and receives into the treasury for public use." [2] But a broader meaning is sometimes given to the term as applied to the government, and it is held to include funds of the government from whatever source derived.[3]

& M. 650, note. In these cases it was said that the common-law doctrine of stoppage *in transitu* was derived from this *revendication* of the civil law. See generally the title STOPPAGE IN TRANSITU.

1. Revenue. — People *v.* New York Cent. R. Co., 24 N. Y. 489.

Gross Receipts. — *Revenue* from water rates has been held to mean the gross receipts derived from the water rates, and not the net receipts after deducting therefrom the various items of expense incurred in conducting the waterworks. Bates *v.* Porter, 74 Cal. 224.

License. — As to *revenue* in the sense of money received from a license, see Vansant *v.* Harlem Stage Co., 59 Md. 334.

Revenue of Canal. — In People *v.* New York Cent. R. Co., 34 Barb. (N. Y.) 131, *affirmed* 24 N. Y. 485, it was said: "We perceive no reason or rule of construction which would authorize or require us to hold that the tolls payable by railroads to the commissioners of the canal fund constituted a part of the canals. If they are a part of the *revenues* of the canals, which is the fundamental proposition upon which the main argument for the plaintiff rests, they are not a part of the canals. The *revenues* of a person, natural or artificial, are not the person, nor in any proper use of language a part of the person."

Budget Estimate. — An act provided that the city council of a municipality should not, under any pretext whatever, appropriate funds for the government of the corporation to the full extent of the *revenue.* In construing this provision it was held that the word *revenue* necessarily meant the budget estimate of *revenue,* because otherwise it would be a mathematical impossibility to frame the budget in accordance with the requirements of the city charter. State *v.* New Orleans, 40 La. Ann. 299.

Income and Revenue. — See INCOME, vol. 16, pp. 150, 151, notes.

2. Revenue — Taxation. — Fletcher *v.* Oliver, 25 Ark. 300; Bates *v.* Porter, 74 Cal. 239; Yancey *v.* New Manchester Mfg. Co., 33 Ga. 624.

The word *revenue* means income of a government arising from taxation, excise, and the like. State *v.* School Fund, 4 Kan. 268.

In Laughlin *v.* Santa Fe County, 3 N. Mex. 266, it was said: "The term *revenue,* when used with reference to funds derived from taxation, is best interpreted, in the absence of qualifying words or circumstances implying a different signification, as confined to the usual public income taxation."

Illinois Statute — Sale of Land for Taxes. — Under the Illinois statute providing that appeals in all cases relating to *revenue* should be taken directly to the Supreme Court, it was held in Webster *v.* People, 98 Ill. 343, that the word *revenue,* as used in the statute, embraced all taxes and assessment imposed by public authority, and that appeals from judgments of the County Court for the sale of land for taxes were to be taken directly to the Supreme Court.

Same — Suit to Restrain Collection of Revenue. — In Phœnix Grain, etc., Exch. *v.* Gleason, 22 Ill. App. 373, it was held that a suit to restrain the collection of *revenue* was a suit relating to a *revenue.*

Same — Special Assessment. — In Potwin *v.* Johnson, 106 Ill. 532, it was held that special assessments were embraced within the meaning of the term *revenue.* See also People *v.* Springer, 106 Ill. 542; Herhold *v.* Chicago, 106 Ill. 547; Schlierbach *v.* Pana, 13 Ill. App. 382.

3. Broad Sense. — State *v.* Ewing, 22 Kan. 712.

In Donelson *v.* State, 3 Lea (Tenn.) 695, it was said of the term *revenue*: "Perhaps in its exact definition it may be confined to money raised by some of the modes of taxation, but in one sense all money belonging to the state is *revenue.*"

In U. S. *v.* Norton, 91 U. S. 568, it was said: "The lexical definition of the term *revenue* is very comprehensive. It is thus given by Webster: 'The income of a nation, derived from its taxes, duties, or other sources, for the payment of the national expenses.' The phrase 'other sources' would include the proceeds of the public lands, those arising from the sale of public securities, the receipts of the patent office in excess of its expenditures, and those of the post-office department, when there should be such excess as there was for a time in the early history of the government. Indeed, the phrase would apply in all cases of such excess. In some of them the result might fluctuate, there being excess at one time and deficiency at another."

Postal Revenue. — In U. S. *v.* Bromley, 12 How. (U. S.) 97, it was said: "*Revenue* is the income of a state, and the *revenue* of the post-office department, being raised by a tax on mailable matter conveyed in the mail, and which is disbursed in the public service, is as much a part of the income of the government

as moneys collected for duties on imports." See also U. S. *v.* James, 13 Blatchf. (U. S.) 209.

Bill for Raising Revenue. (See also the titles STATUTES; TAXATION.) — In Com. *v.* Bailey, 81 Ky. 399, it was said: "'A bill for raising *revenue*,' as we understand it from the debates on the Federal Constitution, authorities, and text writers, embraces all appropriations of money for the public treasury where the bill either provides for the levy of duties or taxes, capitation or *ad valorem*, upon the people, or is a part of a system of laws or another bill which does so provide." See also Fletcher *v.* Oliver, 25 Ark. 299.

Same — Act Incorporating Town. — In Harper *v.* Elberton, 23 Ga. 570, it was held that an act incorporating a town was not an act for raising *revenue*, although the act might, among the powers conferred upon the town, confer the power to tax.

Same — Postage. — In U. S. *v.* James, 13 Blatchf. (U. S.) 207, it was held that a bill establishing rates of postage was not a bill for raising *revenue*.

Same — Postal Orders. — In U. S. *v.* Norton, 91 U. S. 566, it was held that a bill to establish a postal money-order system was not a bill to raise *revenue*.

Same — Appropriation. — In Curryer *v.* Merrill, 25 Minn. 1, it was held that an act which merely made an appropriation for public money was not a bill for raising *revenue*, though it might lead to the necessity of taxation.

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By Charles H. Street.

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CROSS-REFERENCES.

Income Taxes, see the title TAXATION.
Taxes on Gross Receipts, see the title TAXATION (CORPORATE)
Inheritance, Legacy, and Transfer Taxes, see the title SUCCESSION TAXES.
And see generally the titles INTOXICATING LIQUORS, vol. 17, p. 189; *OCCUPATION, BUSINESS, AND PRIVILEGE TAXES*, vol. 21, p. 770.

I. Scope of Article. — The present article treats of the general construction and operation of laws imposing customs duties and internal revenue taxes. Many of the definitions of words and phrases, to be found elsewhere in the Encyclopædia, have reference to such words and phrases as used in revenue laws, and the question whether a certain article is dutiable under a

particular clause of the tariff, being chiefly one of definition, does not properly fall within the scope of this title. As regards internal revenue this article is limited to the stamp tax on documents and to the taxes on tobacco, spirituous liquors, and other specific articles, other internal revenue taxes being treated elsewhere, as shown by the list of cross-references given above.

II. DEFINITION. — The term "revenue law" means a law imposing duties on imports or tonnage, or a law providing in terms for revenue.[1] By the weight of authority it includes laws relating to internal revenue, as well as those relating to customs duties.[2]

III. CONSTITUTIONALITY OF REVENUE LAWS. — Congress is empowered by the Constitution "to lay and collect taxes, duties, imposts, and excises."[3] Provisions of an act imposing an internal revenue tax which are intended to facilitate the collection of revenue, and not to operate as police regulations, are constitutional;[4] and such a statute is not invalid because it may incidentally operate to protect trade-marks or to prevent frauds upon the public.[5] The law prohibiting the packing of coupons in tobacco packages has been held to be constitutional.[6]

Application of Uniformity Clause of Constitution. — Taxes imposed by Congress must be geographically uniform within the limits of the United States,[7] but they need not be intrinsically equal and uniform in their operation upon individuals.[8]

Application of Provision Forbiding Tax on Exports. — The word "exported," as used in that article of the Constitution which provides that no tax or duty shall be laid on articles exported from any state, means exported to a foreign country, and therefore a law imposing a tax on exports from the United States to Porto Rico was held to be constitutional.[9] Nor is this provision of the Constitution violated by a law requiring an internal revenue stamp to be affixed to packages of manufactured tobacco intended for exportation.[10]

Apportionment of Direct Taxes. — An internal revenue tax on sales or agreements for the sale of any products or merchandise at any exchange or board of trade is not a direct tax within the constitutional provision that direct taxes shall be apportioned.[11]

IV. CONSTRUCTION OF REVENUE LAWS — 1. In General. — Revenue laws are not, like penal laws, to be strictly construed, nor are they, like remedial statutes, to be construed with extraordinary liberality; but they should be

1. **"Revenue Law" Defined.** — U. S. *v.* Hill, 123 U. S. 686.

2. **Internal Revenue Laws Included.** — Pettigrew *v.* U. S., 97 U. S. 385. And see U. S. *v.* Hill, 123 U. S. 686; Prather *v.* U. S., 9 App. Cas. (D. C.) 82.

When Not Included. — "The general terms 'revenue laws of the United States,' used in the Act of March 2, 1833, undoubtedly might, if standing alone, include all revenue laws of every description; but used as they are in the act entitled 'An act further to provide for the collection of duties on imports,' they must be considered as not intended to include laws for the collection of internal duties." Stevens *v.* Mack, 5 Blatchf. (U. S.) 514, *per* Benedict, J.

3. Henderson's Distilled Spirits, 14 Wall. (U. S.) 44.

Tariff Act of 1890 Held Constitutional. — *In re* Sternbach, 45 Fed. Rep. 175, *affirmed* 143 U. S. 649.

The Duties Imposed by the Civil Governor prior to the extension of the United States revenue laws to California were valid. Cross *v.* Harrison, 16 How. (U. S.) 164.

4. **Internal Revenue Tax on Sale of Oleomargarine Held Constitutional.** — Dougherty *v.* U. S., (C. C. A.) 108 Fed. Rep. 56, *following In re* Kollock, 165 U. S. 526.

5. **Tax Statute Incidentally Protecting Trademarks Not Unconstitutional.** — U. S. *v.* Campe, 89 Fed. Rep. 697; U. S. *v.* One Hundred and Thirty-Two Packages Spirituous Liquors, (C. C. A.) 76 Fed. Rep. 364, *reversing* 65 Fed. Rep. 980; U. S. *v.* Loeb, 49 Fed. Rep. 636.

6. **Law Prohibiting Coupons in Tobacco Packages Constitutional.** — Felsenheld *v.* U. S., 186 U. S. 126; U. S. *v.* 288 Packages Merry World Tobacco, 103 Fed. Rep. 453.

7. **Geographical Uniformity Essential.** — Dooley *v.* U. S., 183 U. S. 151; Downes *v.* Bidwell, 182 U. S. 244.

8. **Uniformity as to Operation upon Individuals Not Required.** — Knowlton *v.* Moore, 178 U. S. 41; Nicol *v.* Ames, 173 U. S. 509, *affirming* 89 Fed. Rep. 144.

9. **Tax on Goods Exported to Porto Rico Constitutional.** — Dooley *v.* U. S., 183 U. S. 151.

10. Turpin *v.* Burgess, 117 U. S. 504; Pace *v.* Burgess, 92 U. S. 372.

11. Nicol *v.* Ames, 173 U. S. 509; U. S. *v.* Thomas, 115 Fed. Rep. 207.

construed fairly and reasonably, in such manner as most effectually to accomplish the intention of the legislature in passing them.[1] Even provisions for forfeiture of property for violation of such laws are not to be interpreted strictly.[2]

2. Laws Construed as System — Repeal by Implication Not Favored. — All existing laws on the same subject should be considered together in construing any one of them and no disturbance of existing legislative rules of general application should be allowed beyond the clear intention of Congress.[3] The doctrine of repeal by implication is not favored by the courts as applied to revenue laws.[4] There must be a manifest and irreconcilable repugnancy between two acts in order to warrant the conclusion that the old law is abrogated; and even then the repeal is only *pro tanto*, to the extent of the repugnancy.[5] Where, however, two provisions of the tariff laws are clearly inconsistent, the later will be held to supersede the earlier.[6] This rule applies with particular force where the later statute is a complete revision of the particular subject to which the earlier statute related, and where the new legislation is manifestly intended as a substitute for former laws.[7]

3. Ambiguities Resolved in Favor of Importer. — In cases of serious ambiguity in the language of a tariff act, or doubtful classification of articles, the construction is to be in favor of the importer, as duties are never imposed on the citizen upon vague or doubtful interpretations.[8] This rule of construction,

1. Construed to Carry Out Intention of Legislature. — U. S. *v.* Stowell, 133 U. S. 1; Smythe *v.* Fiske, 23 Wall. (U. S.) 380; Cliquot's Champagne, 3 Wall. (U. S.) 114; Rankin *v.* Hoyt, 4 How. (U. S.) 327; Taylor *v.* U. S., 3 How. (U. S.) 197; De Bary *v.* Souer, (C. C. A.) 101 Fed. Rep. 425; U. S. *v.* Sapinkow, 90 Fed. Rep. 654; Anglo-California Bank *v.* Secretary of State, (C. C. A.) 76 Fed. Rep. 742; Rice *v.* U. S., (C. C. A.) 53 Fed. Rep. 910; U. S. *v.* Wolters, 46 Fed. Rep. 509; U. S. *v.* Allen, 38 Fed. Rep. 736; U. S. *v.* Wigglesworth, 2 Story (U. S.) 369; U. S. *v.* Breed, 1 Sumn. (U. S.) 160; The Missouri, 3 Ben. (U. S.) 508; Prather *v.* U. S., 9 App. Cas. (D. C.) 82.

2. Provisions for Forfeiture Not Construed Strictly. — U. S. *v.* Stowell, 133 U. S. 1; Smythe *v.* Fiske, 23 Wall. (U. S.) 374; The Coquitlam, (C. C. A.) 77 Fed. Rep. 744. *Contra*, U. S. *v.* 1150½ Pounds Celluloid, (C. C. A.) 82 Fed. Rep. 627; U. S. *v.* Eighty-four Boxes Sugar, 7 Pet. (U. S.) 453.

Penal Statutes Strictly Construed. — In U. S. *v.* Stege, 87 Fed. Rep. 553, which was an indictment for shipping liquors under a name or brand other than the proper one known to the trade, it was said *obiter* that the statute creating the offense was highly penal and must be construed strictly.

3. Laws Construed as System. — Saxonville Mills *v.* Russell, 116 U. S. 13; Stuart *v.* Maxwell, 16 How. (U. S.) 160; Dieckerhoff *v.* Miller, (C. C. A.) 93 Fed. Rep. 651; U. S. *v.* Sapinkow, 90 Fed. Rep. 654; U. S. *v.* Collier, 3 Blatchf. (U. S.) 325; Wilson *v.* Maxwell, 2 Blatchf. (U. S.) 316.

An enactment that the duty on ale, porter, and beer in bottles shall be so much per gallon cannot be regarded as an enactment that there shall be no additional duty on the bottles, when there is another provision of law which imposes an *ad valorem* duty on bottles not otherwise provided for, filled with articles. Schmidt *v.* Badger, 107 U. S. 85; Merritt *v.* Park, 108 U. S. 109. But see U. S. *v.* Dickson, 73 Fed. Rep. 195; U. S. *v.* Keane, 84 Fed. Rep. 330.

4. Repeal by Implication Not Favored.— Saxonville Mills *v.* Russell, 116 U. S. 21; U. S. *v.* Claflin, 97 U. S. 546; Kohlsaat *v.* Murphy, 96 U. S. 153; Fabbri *v.* Murphy, 95 U. S. 196; U. S. *v.* Sixty-seven Packages Dry Goods, 17 How. (U. S.) 85; *In re* Puget Sound Reduction Co., 96 Fed. Rep. 90; U. S. *v.* Sapinkow, 90 Fed. Rep. 654; Wilson *v.* Maxwell, 2 Blatchf. (U. S.) 316; Butler *v.* Russel, 3 Cliff. (U. S.) 251; U. S. *v.* Halberstadt, Gilp. (U. S.) 262.

But it is still true that repeal or no repeal, substitution or no substitution, is a question of legislative intention and there are acknowledged rules for ascertaining that intention. U. S. *v.* Claflin, 97 U. S. 546.

5. No Repeal Unless Acts Are Clearly Repugnant. — Fabbri *v.* Murphy, 95 U. S. 191; Wood *v.* U. S., 16 Pet. (U. S.) 342.

6. Later Provision Supersedes Earlier When Repugnant. — U. S. *v.* Auffmordt, 122 U. S. 197; Schmid *v.* U. S., 66 Fed. Rep. 744; *In re* Straus, 46 Fed. Rep. 522; U. S. *v.* Sixty-five Terra-Cotta Vases, 18 Fed. Rep. 508, 21 Blatchf. (U. S.) 511; Powers *v.* Barney, 5 Blatchf. (U. S.) 202; U. S. *v.* One Case Hair Pencils, 1 Paine (U. S.) 400. And see U. S. *v.* Schoverling, 146 U. S. 76.

7. U. S. *v.* Ranlett, 172 U. S. 133; U. S. *v.* Allen, 163 U. S. 499; U. S. *v.* Saunders, 98 Fed. Rep. 196; Kent *v.* U. S., (C. C. A.) 73 Fed. Rep. 680; Butler *v.* Russel, 3 Cliff. (U. S.) 251.

8. Ambiguities Resolved in Favor of Importer. — American Net, etc., Co. *v.* Worthington, 141 U. S. 468; Hartranft *v.* Wiegmann, 121 U. S. 609; U. S. *v.* E. L. Goodsell Co., 78 Fed. Rep. 806; Anglo-California Bank *v.* Secretary of Treasury, (C. C. A.) 76 Fed. Rep. 742; *In re* Buffalo Natural Gas Fuel Co., 73 Fed. Rep. 191; Matheson *v.* U. S., (C. C. A.) 71 Fed. Rep. 394; Schmid *v.* U. S., 66 Fed. Rep. 744; U. S. *v.* Davis, (C. C. A.) 54 Fed. Rep. 147; Rice *v.* U. S., (C. C. A.) 53 Fed. Rep. 910; Mc-

however, is subject to a number of qualifications.[1] Thus, it does not apply in cases where duties are clearly and distinctly imposed, and where there is no real ambiguity,[2] nor does it override the general principle that exemptions are to be construed strictly as against the persons who claim them.[3]

4. Words Used in Commercial Sense — In General. — It is well settled that in construing tariff acts words are to be understood in their commercial signification when they have one,[4] but unless it is satisfactorily proved that they have a special commercial meaning, their meaning as used in ordinary speech will control;[5] or, as it is sometimes expressed, they will be understood to have the same meaning in commerce that they have in popular speech unless the contrary is shown.[6] As between the ordinary commercial meaning of a word and its scientific or technical meaning, the former will prevail.[7]

Commercial Meaning Determined by Usage in Domestic Markets When Act Was Passed. — The trade usage which is to determine the meaning of words used in a tariff act is that which prevailed among commercial men in the markets of the United States at the time when the act was passed;[8] and as a general rule,

Coy *v.* Hedden, 38 Fed. Rep. 89; Ross *v.* Fuller, 17 Fed. Rep. 226; Powers *v.* Barney, 5 Blatchf. (U. S.) 202; U. S. *v.* Wigglesworth, 2 Story (U. S.) 369; Adams *v.* Bancroft, 3 Sumn. (U. S.) 384.

Illustration of Rule. — The rule stated in the text was applied in a case where an article which appeared in the free list in a tariff act was also named in another section as subject to duty. U. S. *v.* Merck, 91 Fed. Rep. 639.

1. Qualifications of Rule. — See U. S. *v.* Wetherell, (C. C. A.) 65 Fed. Rep. 987.

2. Earnshaw *v.* Cadwalader, 145 U. S. 247.

3. U. S. *v.* Allen, 163 U. S. 499.

4. Words Understood in Commercial Sense When They Have One. — Bogle *v.* Magone, 152 U. S. 623; Hedden *v.* Richard, 149 U. S. 346; American Net, etc., Co. *v.* Worthington, 141 U. S. 468; Schmieder *v.* Barney, 113 U. S. 645; Arthur *v.* Lahey, 96 U. S. 112; Arthur *v.* Morrison, 96 U. S. 108; U. S. *v.* Buffalo Natural Gas Fuel Co., 172 U. S. 339; Stuart *v.* Maxwell, 16 How. (U. S.) 163; Curtis *v.* Martin, 3 How. (U. S.) 106; *In re* John Hope, etc., Engraving, etc., Co., 100 Fed. Rep. 286; Nordlinger *v.* U. S., 115 Fed. Rep. 828; Fox *v.* Cadwalader, 42 Fed. Rep. 209; Weilbacher *v.* Merritt, 37 Fed. Rep. 85; Roosevelt *v.* Maxwell, 3 Blatchf. (U. S.) 391; U. S. *v.* Sarchet, Gilp. (U. S.) 273; Elliott *v.* Swartwout, 10 Pet. (U. S.) 137; U. S. *v.* One Hundred and Twelve Casks Sugar, 8 Pet. (U. S.) 277; Barlow *v.* U. S., 7 Pet. (U. S.) 404; Bacon *v.* Bancroft, 1 Story (U. S.) 341; Lee *v.* Lincoln, 1 Story (U. S.) 610; and see the note to Dennison Mfg. Co. *v.* U. S., 38 U. S. App. 234.

Where General Terms Are Used the terms are to be taken in their ordinary and comprehensive meaning unless it is shown that they have in their commercial use acquired a special and restricted meaning. Arthur *v.* Morrison, 96 U. S. 108.

Where the Statute Contains Its Own Definition of the Terms Used, or when it is clear from its language that such terms are not used in the commercial sense, the meaning given by the act must be adopted without reference to the commercial meaning. Dwight *v.* Merritt, 140 U. S. 213; Roosevelt *v.* Maxwell, 3 Blatchf. (U. S.) 391.

Change of Commercial Designation. — Where an article has been so advanced by separate processes as to be adapted to use for a special purpose different from the original purpose, and to sale to a different class of persons, and may be known under special commercial designations, it is no longer included under the original commercial designation. McLeod *v.* U. S., 75 Fed. Rep. 927.

A Term Used to Designate a Special Group of Articles may have a trade meaning as such, even though none of the articles are bought and sold specifically by that name. *In re* Herrman, 52 Fed. Rep. 941, *affirmed* (C. C. A.) 56 Fed. Rep. 477.

5. Meaning in Ordinary Speech Controls in Absence of Commercial Meaning. — Patton *v.* U. S., 159 U. S. 500; Tiffany *v.* U. S., 103 Fed. Rep. 619; Farbenfabriken of Elberfeld *v.* U. S., 102 Fed. Rep. 603, 42 C. C. A. 525; Bour *v.* U. S., 91 Fed. Rep. 533; Fox *v.* Cadwalader, 42 Fed. Rep. 209.

6. Commercial and Ordinary Meaning Presumed to Be Same in Absence of Proof.—Hedden *v.* Richard, 149 U. S. 346; Schmieder *v.* Barney, 113 U. S. 645; Greenleaf *v.* Goodrich, 101 U. S. 278; Swan *v.* Arthur, 103 U. S. 597; Weilbacher *v.* Merritt, 37 Fed. Rep. 85.

7. Ordinary Commercial Meaning Preferred to Scientific Meaning. — American Net, etc., Co. *v.* Worthington, 141 U. S. 468; *In re* Wieland, 98 Fed. Rep. 99; U. S. *v.* Buffalo Natural Gas Fuel Co., (C. C. A.) 78 Fed. Rep. 110; Zante Currants, 73 Fed. Rep. 183; *In re* Herrman, 52 Fed. Rep. 941, *affirmed* (C. C. A.) 56 Fed. Rep. 477; U. S. *v.* Breed, 1 Sumn. (U. S.) 159.

The Vocabulary of Merchants Will Be Preferred to That of Mechanics. U. S. *v.* Sarchet, Gilp. (U. S.) 273.

8. Usage in Domestic Markets When Act Was Passed. — Toplitz *v.* Hedden, 146 U. S. 252; American Net, etc., Co. *v.* Worthington, 141 U. S. 468; Arthur *v.* Cumming, 91 U. S. 363; Curtis *v.* Martin, 3 How. (U. S.) 106; McCoy *v.* Hedden, 38 Fed. Rep. 89; Ross *v.* Fuller, 17 Fed. Rep. 224; Rheimer *v.* Maxwell, 3 Blatchf. (U. S.) 124; Roosevelt *v.* Maxwell, 3 Blatchf. (U. S.) 391; Two Hundred Chests Tea, 9 Wheat. (U. S.) 430.

If an article has one appellation abroad and another at home, not with one class of citizens merely, whether merchants, or grocers, or

the only competent evidence as to commercial meaning is such as tends to prove what that meaning was when the words were used by Congress.[1] But this latter principle does not apply where the phrase used is descriptive, and has no peculiar trade meaning, and where the article is to be classified according to its use.[2]

Usage Must Be Definite, Uniform, and General. — In order that the commercial meaning of a word used in a tariff law may prevail over its ordinary meaning the usage which establishes such designation must be definite, uniform, and general, and not partial, local, or personal.[3]

Commercial Designation Matter of Proof. — The commercial designation of an article is not a matter of which the courts can take judicial notice, but is a fact to be proved by evidence.[4]

When Rule as to Commercial Designation Does Not Apply. — The rule as to commercial designation does not apply where the term used is descriptive, and is not a commercial or trade designation.[5]

5. Specific Designation to Prevail over General Description. — Where Congress has designated an article by a specific name and imposed a duty upon it, general terms in the same or in another act, though sufficiently broad to comprehend such article, are not applicable to it; in other words, the article will be classified by its specific designation rather than under a general description.[6]

6. Each Paragraph of Act Held Effective if Possible. — The rule that each paragraph of a statute shall be held effective if possible applies to the construction of tariff acts.[7]

manufacturers, but with the community at large, who are buyers and sellers, doubtless our laws are to be interpreted according to that domestic sense. But where the foreign name is well known here, and no different appellation exists in domestic use, we must presume that, in a commercial law, the legislature used the word in the foreign sense. U. S. *v.* Breed, 1 Sumn. (U. S.) 159.

1. Evidence Generally Limited to Meaning at Passage of Act. — U. S. *v.* Roessler, etc., Chemical Co., (C. C. A.) 79 Fed. Rep. 313.

2. When Not So Limited. — Pickhardt *v.* Merritt, 132 U. S. 252; Matheson *v.* U. S., 90 Fed. Rep. 276; U. S. *v.* Roessler, etc., Chemical Co., (C. C. A.) 79 Fed. Rep. 313.

In Pickhardt *v.* Merritt, 132 U. S. 252, it was held that evidence to show what the goods in question were called in trade at the time of the trial was admissible, though the trial occurred five years after the entry of the goods, and ten years after the passage of the act under which the duties were claimed.

3. Usage Must Be Definite, Uniform, and General. — Sonn *v.* Magone, 159 U. S. 417; Maddock *v.* Magone, 152 U. S. 368; Berbecker *v.* Robertson, 152 U. S. 373; Nordlinger *v.* U. S., 115 Fed. Rep. 828; Carson *v.* Nixon, (C. C. A.) 90 Fed. Rep. 409; Dodge *v.* Hedden, 42 Fed. Rep. 446.

4. Commercial Designation Matter of Proof. — Seeberger *v.* Schlesinger, 152 U. S. 581; Stuart *v.* Maxwell, 16 How. (U. S.) 163; Nordlinger *v.* U. S., 115 Fed. Rep. 828; U. S. *v.* Jonas, (C. C. A.) 83 Fed. Rep. 167.

While the Language of the Retail Trade Is Insufficient to establish commercial designation, it does not follow that retail dealers are incompetent to testify at all upon the subject. Nordlinger *v.* U. S., 115 Fed. Rep. 828.

5. Field *v.* U. S., (C. C. A.) 90 Fed. Rep. 412; Carson *v.* Nixon, (C. C. A.) 90 Fed. Rep. 409.

"To constitute a name or designation, as contradistinguished from description, the words, it would seem, should be used in an unvarying or stereotyped order." Field *v.* U. S., (C. C. A.) 90 Fed. Rep. 412, *per* Woods, C. J.

6. Specific Designation to Prevail over General Description. — Chew Hing Lung *v.* Wise, 176 U. S. 156; Bogle *v.* Magone, 152 U. S. 623; American Net, etc., Co. *v.* Worthington, 141 U. S. 468; Arthur *v.* Rheims, 96 U. S. 143; Arthur *v.* Davies, 96 U. S. 135; Arthur *v.* Stephani, 96 U. S. 125; Arthur *v.* Zimmerman, 96 U. S. 124; Arthur *v.* Lahey, 96 U. S. 112; Movius *v.* Arthur, 95 U. S. 144; Dieckerhoff *v.* Miller, (C. C. A.) 93 Fed. Rep. 651; Zante Currants, 73 Fed. Rep. 183; U. S. *v.* Davis, (C. C. A.) 54 Fed. Rep. 147; Smythe *v.* Fiske, 23 Wall. (U. S.) 374; Reiche *v.* Smythe, 13 Wall. (U. S.) 162; Homer *v.* Collector, 1 Wall. (U. S.) 486.

The same rule applies where an article is specifically designated as exempt from duty. Chew Hing Lung *v.* Wise, 176 U. S. 156.

Exceptions to Rule. — Where the act did not levy a duty on "worsted dress goods" *eo nomine*, but the description was addressed to the quality and material of the goods, namely, women's and children's dress goods made of wool, worsted, etc., it was held that the rule stated in the text did not apply. U. S. *v.* Klumpp, 169 U. S 209.

Nor does such rule apply where the language of the later act manifests a plain intention to substitute that tariff act in the place of all prior tariff legislation, so far as such legislation lays duties upon imported articles of any kind. *In re* Straus, 46 Fed. Rep. 522.

7. Each Paragraph Held Effective if Possible. — *In re* De Long, 70 Fed. Rep. 775, *affirmed* (C. C. A.) 76 Fed. Rep. 453.

7. Articles Grouped Together to Be Deemed of Kindred Nature. — "One of the best-settled rules of interpretation of laws of this sort is that the articles, grouped together, are to be deemed to be of a kindred nature and of kindred materials, unless there is something in the context which repels that inference. *Noscitur a sociis* is a well-founded maxim, applicable to revenue as well as to penal laws." [1]

8. Protective Feature of Tariff Acts Recognized by Courts. — In construing tariff acts the courts will recognize the fact that such acts are generally intended for the protection of American industries; [2] but this principle is subordinate to the rule that the particular intent of a law will prevail over its general intent.[3]

9. Reference to Proceedings in Congress as Aids to Interpretation. — While the statements made and the opinions advanced by the promoters of the act in the legislative body are inadmissible as bearing upon its construction, yet reference to the proceedings of such body may properly be made to inform the court of the exigencies of the interests involved and the reasons for fixing the duty at the amount adopted.[4]

10. Construction by Treasury Department Entitled to Consideration. — While the practical construction placed upon revenue statutes by the secretary of the treasury is not controlling, still it is entitled to respectful consideration by the courts, and where it has been acquiesced in for a long time, and rights of parties have been adjusted by it for many years, it will not be disregarded without the most cogent and persuasive reasons.[5]

11. Priority as Between Tariff Acts and Treaties. — The provisions of a tariff act supersede all previous treaty obligations when inconsistent therewith, since a treaty is of no higher authority than an act of Congress.[6]

12. Internal Revenue Statutes Applicable to District of Columbia. — It is pro-

1. Noscitur a Sociis. — Adams *v.* Bancroft, 3 Sumn. (U. S.) 384, *per* Story, J. To the same effect see Dodge *v.* U. S., (C. C. A.) 84 Fed. Rep. 449; U. S. *v.* Sixty-Five Terra-Cotta Vases, 18 Fed. Rep. 508; Tide Water Oil Co. *v.* U. S., 31 Ct. Cl. 90.

2. Protective Principle Recognized by Courts. — Arnold *v.* U. S., 147 U. S. 494; Downs *v.* U. S., (C. C. A.) 113 Fed. Rep. 144; U. S. *v.* Eschwege, (C. C. A.) 98 Fed. Rep. 600.

3. When Protective Principle Does Not Prevail. — *In re* Schallenberger, 72 Fed. Rep. 491.

4. Reference to Proceedings in Congress. — American Net, etc., Co. *v.* Worthington, 141 U. S. 468.

Where Congress has failed to alter a clause in a proposed tariff law in answer to an objection by an importer, it must be presumed that the clause is intended to have the effect objected to by the importer. *In re* Gerdau, 54 Fed. Rep. 143.

Where the Proper Classification of an Article Is Perfectly Clear, a report of a senate committee on the act cannot be referred to for the purpose of changing such classification. *In re* Downing, (C. C. A.) 56 Fed. Rep. 470.

5. Weight of Construction by Treasury Department. — Merritt *v.* Cameron, 137 U. S. 542; Robertson *v.* Downing, 127 U. S. 607; Smythe *v.* Fiske, 23 Wall. (U. S.) 374; Greely *v.* Thompson, 10 How. (U. S.) 225; Anglo-California Bank *v.* Secretary of Treasury, (C. C. A.) 76 Fed. Rep. 742; Lennig *v.* Maxwell, 3 Blatchf. (U. S.) 125; Munsell *v.* Maxwell, 3 Blatchf. (U. S.) 364.

Questions Not Within Jurisdiction of Treasury Department. — Where a reciprocal trade agreement between the United States and a foreign country does not apply to the colonies of that country, the question whether the place from which certain goods have been imported is an integral part of such foreign country, or is simply one of its colonies, is for the courts, and not for the Treasury Department. Tartar Chemical Co. *v.* U. S., 116 Fed. Rep. 726.

Construction of Internal Revenue Acts by Commissioner. — As to the force and effect of the construction placed upon internal revenue acts by the commissioner of internal revenue, see Peabody *v.* Stark, 16 Wall. (U. S.) 240; Dollar Sav. Bank *v.* U. S., 19 Wall. (U. S.) 227.

6. Priority as Between Tariff Acts and Treaties. — Whitney *v.* Robertson, 124 U. S. 190, 21 Fed. Rep. 566; Kelly *v.* Hedden, 124 U. S. 196, 31 Fed. Rep. 607; Bartram *v.* Robertson, 122 U. S. 116; Taylor *v.* Morton, 2 Curt. (U. S.) 454. And see the title TREATIES.

A treaty provision with Denmark that no higher duties shall be imposed on Danish goods than on goods from any other country does not *ipso facto*, and without compensation made by Denmark, operate to admit Danish sugar free of duty where the duty on Hawaiian sugar has been repealed in consideration of compensation made by Hawaii. Bartram *v.* Robertson, 122 U. S. 116; Netherclift *v.* Robertson, 27 Fed. Rep. 737.

The question whether the duty levied upon a product of a certain country is or is not higher than a just interpretation and application of the treaty with the sovereign of that country would allow is for the political department of the government and not for the courts. Taylor *v.* Morton, 2 Curt. (U. S.) 454.

vided by statute [1] that the word "state," when used in internal revenue laws, shall be construed to include the territories and the District of Columbia.[2]

V. Operation of Revenue Laws — 1. Laws Imposing Customs Duties — *a.* Property Subject to Duties — (1) *Articles Imported from Foreign Countries.* — Customs duties are levied only on goods imported from foreign countries.[3] They cannot be levied on merchandise shipped from one domestic port to another, even though the vessel has touched on the way at an intermediate foreign port.[4] But where foreign goods which have been once lawfully introduced into the United States are taken out of the country and landed at a foreign port, whence they are reshipped to the United States, their return to this country constitutes an importation from a foreign country.[5]

(2) *Exported Articles Reimported.* — By statute articles grown, produced, or manufactured in the United States and exported to foreign countries are entitled to free entry on reimportation provided they are returned in the same condition,[6] and a similar provision exists in regard to grain bags manufactured in this country and exported filled with American products, but subsequently returned empty.[7] When, however, articles of the former class are exported without the payment of any internal revenue tax to which they may be subject, they are dutiable, on reimportation, in an amount equal to such tax.[8]

(3) *What Constitutes Importation.* — To constitute an importation there must be an actual arrival within the limits of a port of entry with intent to unload the cargo there.[9] The arrival of goods from abroad within the limits of the United States, and of a collection district, but outside the limits of any port of entry, does not constitute an importation.[10] Nor are goods shipped

1. Rev. Stat. U. S., § 3140.

2. Knowlton *v.* Moore, 178 U. S. 41, holding that by virtue of the incorporation of this section of the Revised Statutes in the War Revenue Act of 1898, such act applies to the District of Columbia.

3. **Porto Rico and the Phillipines Not Foreign Countries as Regards Custom Duties.** — De Lima *v.* Bidwell, 182 U. S. 1; Dooley *v.* U. S., 182 U. S. 222; Armstrong *v.* U. S., 182 U. S. 243; Goetze *v.* U. S., 182 U. S. 221, *reversing* 103 Fed. Rep. 72; Fourteen Diamond Rings *v.* U. S., 183 U. S. 176. And see Dooley *v.* U. S., 183 U. S. 151; Downes *v.* Bidwell, 182 U. S. 244.

Goods from Port in Military Possession of United States. — Goods brought into the United States from a port which, though at the time in the military possession of the United States, is not within the territorial limits of the country as established by treaty or act of Congress, and which has no United States custom house, are imported from a foreign country within the purview of the revenue laws. Fleming *v.* Page, 9 How. (U. S.) 603.

Whale Oil Manufactured on High Seas. — Where whales are caught and whale oil is manufactured from them on the high seas by the crew of an American vessel, the oil is not the product of "foreign fishing," though it has since been owned and brought into port by persons in a foreign service. U. S. *v.* Burdett, 2 Sumn. (U. S.) 336.

4. U. S. *v.* The Steamboat Forrester, Newb. Adm. 88.

5. Ten Cases Opium, Deady (U. S.) 62.

6. **Exported Articles Entitled to Free Entry on Reimportation in Same Condition.** — Rev. Stat. U. S., § 2505; Bartram *v.* U. S., 77 Fed. Rep. 604; Hensel *v.* U. S., 72 Fed. Rep. 52.

What Constitutes Change of Condition Making Goods Dutiable. — Knight *v.* Schell, 24 How. (U. S.) 526; Belcher *v.* Linn, 24 How. (U. S.) 533; U. S. *v.* Dunbar, (C. C. A.) 67 Fed. Rep. 783; Bark Edwards, 12 Fed. Rep. 508.

7. **Exported Grain Bags Returned Empty.** — Brewer *v.* U. S., 84 Fed. Rep. 149; Balfour *v.* Sullivan, 19 Fed. Rep. 578.

8. **Articles Exported Without Payment of Internal Revenue Tax.** — Rev. Stat. U. S., § 2500.

In McGlinchy *v.* U. S., 4 Cliff. (U. S.) 312, and Perkins *v.* U. S., 4 Cliff. (U. S.) 321, it was held that distilled spirits so reimported were liable to duty even though they had never been actually landed in a foreign port. But in Flagler *v.* Kidd (C. C. A.) 78 Fed. Rep. 341, it was held that spirituous liquors exported without payment of the internal revenue tax, under Rev. Stat. U. S., § 3330, could not be reimported on payment of such tax, or of any other rate of duty.

9. **What Constitutes Importation.** — U. S. *v.* Vowell, 5 Cranch (U. S.) 368; U. S. *v.* Arnold, 1 Gall. (U. S.) 348; Meredith *v.* U. S., 13 Pet. (U. S.) 486; U. S. *v.* Lindsey, 1 Gall. (U. S.) 365; Prince *v.* U. S., 2 Gall. (U. S.) 204; Arnold *v.* U. S., 9 Cranch (U. S.) 104; McLean *v.* Hager, 31 Fed. Rep. 602; U. S. *v.* Ten Thousand Cigars, 2 Curt. (U. S.) 436.

10. **Arrival Outside Limits of Port of Entry Not Importation.** — U. S. *v.* Vowell, 5 Cranch (U. S.) 368; Arnold *v.* U. S., 9 Cranch (U. S.) 119.

Thus, the mere transit of a vessel through a river which forms the boundary between the United States and a foreign country, for the purpose of proceeding to a foreign port, is not an arrival within the limits of the United States. The Apollon, 9 Wheat. (U. S.) 362.

from one foreign port to another by way of a United States port, where they are transferred from one vessel to another, imported into this country, as in such a case the intent to land the goods is wanting.[1] In an early case it was held that goods brought into California after execution of the treaty by which Mexico ceded California to the United States were imported within the meaning of the revenue laws, though at the time of the importation such laws had not been put into effective operation in California.[2]

Goods Brought into the United States Against the Will of Their Owner, either by superior force, accident, stress of weather, or other inevitable necessity, are not imported and therefore are not subject to duty.[3] But if such goods are sold afterwards and pass into consumption within the United States, they become dutiable.[4]

Property Brought into United States for Temporary Use. — Property brought into the United States from foreign countries for temporary use here is subject to duty unless expressly exempted by statute.[5]

(4) *Statutory Exemptions.* — Goods imported by the United States are not subject to duty.[6] Neither are sea stores,[7] nor ship's furniture,[8] nor articles the importation of which is prohibited by statute.[9]

b. UNDER WHAT ACT DUTIABLE. — As will be seen hereafter, the liability for duties accrues immediately on importation, that is to say, on arrival of the goods at the proper port of entry with intent to unload;[10] but where tariff acts are amended, or new acts are passed, a question sometimes arises as to the proper rate of duties on goods imported pending the change in the statutes. The decisions on this point are not entirely harmonious, the conflict probably being due to varying provisions found in particular statutes, as to the time when they shall take effect.[11] It is well settled, however, that so long as the

1. No Importation Without Intent to Land Goods. — McLean *v.* Hager, 31 Fed. Rep. 602.

2. Cross *v.* Harrison, 16 How. (U. S.) 164.

3. Goods Brought into United States Against Will of Owner Not Dutiable. — The Gertrude, 3 Story (U. S.) 68; The Brig Concord, 9 Cranch (U. S.) 387; Merritt *v.* One Package Merchandise, 30 Fed. Rep. 195, 32 Fed. Rep. 111.

4. Goods Afterwards Sold Become Dutiable. — Merritt *v.* One Package Merchandise, 30 Fed. Rep. 195, 32 Fed. Rep. 111; The Brig Concord, 9 Cranch (U. S.) 387.

Goods Captured and Brought into Port for Adjudication, then sold by order of court, and the proceeds ultimately restored to a neutral claimant as his property, are dutiable as goods imported in foreign bottoms. The Nereid, 1 Wheat. (U. S.) 171; The Brig Concord, 9 Cranch (U. S.) 387.

5. U. S. *v.* One Sorrel Stallion, 51 Fed. Rep. 877, holding that horses loaned by a citizen and resident of Mexico to a person residing in the United States, for temporary use, were dutiable.

A horse driven from Canada into the United States as a mere means of conveyance, in the prosecution of a temporary visit to this country, is not imported, since it is not brought in as merchandise. U. S. *v.* One Sorrel Horse, 22 Vt. 655.

6. U. S. *v.* Lutz, 2 Blatchf. (U. S.) 383, holding that where such property was wrongfully sold by a collector for nonpayment of duties, and possession taken by the purchaser, the United States might recover possession by an action of replevin.

Where Prize Goods Are Brought into Port by United States Naval Vessels, the interest of the United States in the goods is not dutiable, but the rule is otherwise as to the interest of the officers and crew of the capturing ship. The Liverpool Hero, 2 Gall. (U. S.) 184.

7. Sea Stores Not Dutiable. — An Ullage Box Sugar, 1 Ware (U. S.) 350; and see U. S. *v.* Twenty-three Coils Cordage, Gilp. (U. S.) 299.

What may be a reasonable allowance to a vessel as sea stores rests in the judgment of the collector, and in the absence of fraud his decision as to this point is conclusive. If the goods, having been passed as sea stores, are afterwards used as merchandise and for sale, the master who knows and is party to the design thus to defraud the United States of the duties may be liable to the penalty of false swearing. And if the owners take them and offer them for sale, they will be liable to an action for the duties. An Ullage Box Sugar, 1 Ware (U. S.) 350.

8. Ship's Furniture Not Dutiable. — U. S. *v.* Chain Cable, 2 Sumn. (U. S.) 362; Weld *v.* Maxwell, 4 Blatchf. (U. S.) 136. And see U. S. *v.* Twenty-three Coils Cordage, Gilp. (U. S.) 299.

9. Articles Which Cannot Lawfully Be Imported Not Dutiable. — M'Lane *v.* U. S., 6 Pet. (U. S.) 404. The reason is that such goods become forfeited by the very act of importation.

10. See *infra*, this title, *Collection and Payment of Revenue.*

11. Dutiable under Act in Force at Time of Entry. — *In re* Gardiner, (C. C. A.) 53 Fed. Rep. 1013. But see to the contrary McAndrew *v.* Robertson, 24 Blatchf. (U. S.) 170, holding that goods are dutiable under the law in force at the time when the vessel arrives in port.

goods remain in charge of the customs officers, either on shipboard or in warehouse, and are not delivered to the importer, they are subject to any duties that Congress may see fit to impose.[1]

2. Internal Revenue Laws — *a.* PERSONS AND PROPERTY SUBJECT TO TAXES — (1) *In General.* — In determining whether or not a certain article is subject to an internal revenue tax, the intent of the statute imposing the tax is of primary importance.[2]

(2) *Proprietors of Distilleries.* — Under the statutory provision [3] that every proprietor of any still shall be liable for taxes on the spirits produced, the word "proprietor" is used in the sense of "owner," one who, whether in personal possession or not, has the exclusive right to and control over the premises.[4] And the holders of stock in a corporation engaged in the business of distilling are interested in the use of the distillery within the meaning of the statute.[5] If a city distils and sells spirits, whether under authority of its charter or not, it must pay the internal revenue tax.[6]

(3) *Wholesale Liquor Dealers.* — An organization of retail liquor dealers which purchases beer at less than usual retail rates is liable to a tax as a wholesale liquor dealer.[7] Such tax may also be collected from a commission merchant who purchases large quantities of spirits for foreign correspondents, and adds costs and commissions to the purchase price, even though such purchases are only occasional.[8]

(4) *Retail Liquor Dealers.* — Laws imposing internal revenue taxes upon

Where Act Takes Effect from Time of Passage. — Where an act levies duties on goods imported from and after its passage, goods which come into a collection district on the very day the act is passed are dutiable under it. U. S. *v.* Arnold, 1 Gall. (U. S.) 348; Arnold *v.* U. S., 9 Cranch (U. S.) 119; U. S. *v.* Williams, 1 Paine (U. S.) 261.

Where Act Takes Effect from Time of Approval. — But where a tariff act takes effect only from the exact moment of its approval by the President, goods imported and entered for consumption before such approval are not dutiable thereunder, even though such importation and entry took place on the day of approval. U. S. *v.* Stoddard, (C. C. A.) 91 Fed. Rep. 1005, *affirming* 89 Fed. Rep. 699; U. S. *v.* Iselin, 87 Fed. Rep. 194.

The courts may look back of the record to determine the actual date of the approval of the act by the President, where the date is not stated in the act itself. Gardner *v.* Collector, 6 Wall. (U. S.) 499.

1. Goods in Possession of Customs Officers Subject to Change in Duties. — Sherman *v.* Robertson, 136 U. S. 570; Hartranft *v.* Oliver, 125 U. S. 525; Fabbri *v.* Murphy, 95 U. S. 197; Oppenheimer *v.* U. S., 90 Fed. Rep. 796; U. S. *v.* E. L. Goodsell Co., (C. C. A.) 84 Fed. Rep. 439, 78 Fed. Rep. 806; U. S. *v.* Benzon, 2 Cliff. (U. S.) 525; Westfall *v.* Shook, 5 Blatchf. (U. S.) 383.

The tariff act of Oct. 1, 1890, reduced the duty on lumber from two dollars to one dollar per thousand feet, but provided that lumber imported from any country which maintained an export duty on logs should be dutiable at the old rate. The Canadian export duty on logs was removed Oct. 13, 1890. In *In re* Mathews, 45 Fed. Rep. 850, it was held that lumber imported from Canada on Sept. 27, 1890, deposited at once in bond, and not withdrawn until Oct. 16, 1890, was dutiable at only one dollar per thousand.

Where Statute Saves Accrued Rights and Liabilities. — Where duties were paid as estimated, and the goods delivered to the importer, under a certain tariff law, but such duties were not liquidated until the day after a new tariff act went into effect, it was held that the rate of duty prescribed by the old law must control; especially as the new law expressly saved all rights and liabilities of the government or any other persons which had accrued before its passage. U. S. *v.* Burr, 159 U. S. 78, *reversing* Burr *v.* U. S., 66 Fed. Rep. 742.

2. Hunter *v.* Corning, (C. C. A.) 86 Fed. Rep. 913, holding that the soakage of barrels of distilled spirits is taxable if extracted from the wood so as to become an article of commerce.

Foreign Cigars Admitted Free of Duty as Personal Effects of a Traveler are not subject to the internal revenue tax. Nichols *v.* U. S., (C. C. A.) 106 Fed. Rep. 672.

Cigars Pledged Not Subject to Tax on Cigars Sold. — A statute requiring cigars manufactured and sold or removed for consumption and use to be stamped does not apply to cigars which are pledged. Combs *v.* Tuchelt, 24 Minn. 423.

3. Rev. Stat. U. S., § 3251.

4. Who Is Proprietor of Distillery. — U. S. *v.* Van Slyke, 8 Biss. (U. S.) 227.

A person who owns a still and keeps mash, wort, or wash intended for the manufacture of vinegar, and which could not yield spirits when distilled, is not a distiller. U. S. *v.* Frerichs, 16 Blatchf. (U. S.) 547.

5. Stockholders in Distilling Company Liable for Tax. — U. S. *v.* Wolters, 46 Fed. Rep. 509.

6. City Engaged in Distilling Business Liable for Tax. — Salt Lake City *v.* Hollister, 3 Utah 200.

7. Who Liable to Tax on Wholesale Liquor Dealers. — U. S. *v.* Kallstrom, 30 Fed. Rep. 184.

8. Quinn *v.* Dimond, (C. C. A.) 72 Fed. Rep. 993.

retail liquor dealers apply to persons who buy beer by the case for sale to the public generally, without special orders;[1] to incorporated social clubs which sell liquor to their members in small quantities;[2] and to druggists who sell intoxicating liquors for use as beverages, and not *bona fide* for medicinal purposes;[3] but such taxes cannot be collected from an officer in charge of an army post exchange,[4] or from a grocer who, in a single instance, purchases a barrel of whiskey to oblige a customer and makes no profit on the sale.[5]

(5) *Dealers in Oleomargarine.* — A person who comes within the statutory definition of a retail dealer in oleomargarine is liable for the internal revenue tax irrespective of his knowledge that the article which he sells is oleomargarine.[6]

b. UNDER WHAT ACT TAXABLE. — An act increasing the tax on tobacco does not apply to tobacco which is stamped, sold, and removed on the very day the act goes into effect, but before it has been approved by the President.[7] And where such an act provided that tobacco manufactured and removed from factories before its passage, and held for sale at that time, should pay a tax equal to one-half the difference between the old tax and the new, it was held that tobacco on which the tax had been paid under the old law, and on which the stamp had been canceled, was removed from the factory within the meaning of the statute, although no physical removal had taken place.[8] An act which requires payment of a tax on distilled spirits on the basis of the quantity manufactured, and which, by its terms, applies to all distilled spirits on which the tax prescribed by law has not been paid, lays a tax upon every gallon of spirits that is in bond at the time of its passage, which tax is payable upon any quantity that may thereafter evaporate or leak away, but it cannot operate upon spirits that have ceased to exist before its passage.[9]

VI. REVENUE OFFICERS — 1. Powers of Revenue Officers — *a.* IN GENERAL — COLLECTORS AND DEPUTY COLLECTORS. — The collection of duties is in charge of collectors appointed by the President. Their powers are defined by statute, and they cannot exceed their statutory authority,[10] nor waive the requirements of the revenue laws,[11] nor bind the United States by any acts or declarations beyond or contrary to the authority given to them by the laws.[12] A collector cannot act as such after he has ceased to hold the office,[13] nor can he act

1. Who Liable to Tax on Retail Liquor Dealers. — U. S. *v.* Allen, 38 Fed. Rep. 736.

2. U. S. *v.* Alexis Club, 98 Fed. Rep. 725.

3. U. S. *v.* Wilson, 69 Fed. Rep. 144; U. S. *v.* White, 42 Fed. Rep. 138.

4. Dugan *v.* U. S., 34 Ct. Cl. 458.

5. U. S. *v.* Howell, 20 Fed. Rep. 718.

6. Who Liable to Tax on Dealers in Oleomargarine. — Eagle *v.* Nowlin, 94 Fed. Rep. 646.

7. Under What Act Taxable. — Burgess *v.* Salmon, 97 U. S. 381. And see U. S. *v.* O'Neill, 19 Fed. Rep. 567, holding that a taxpayer could not question the validity of an assessment on the ground that a new statute, increasing the rate of the tax, was in force during the last day of the period covered by such assessment.

8. Robards Tobacco Co. *v.* Franks, 103 Fed. Rep. 276, *affirmed* (C. C A.) 112 Fed. Rep. 784.

9. Burrough *v.* Abel, 100 Fed. Rep. 66, *affirmed* 102 Fed. Rep. 131.

10. Collector Cannot Exceed Statutory Powers. — Badger *v.* Gutierez, 111 U. S. 734; Lennig *v.* Maxwell, 3 Blatchf. (U. S.) 125; Munsell *v.* Maxwell, 3 Blatchf. (U. S.) 364; Carnes *v.* Maxwell, 3 Blatchf. (U. S.) 420; U. S. *v.* Lyman, 1 Mason (U. S.) 482; U. S. *v.* One Case Hair Pencils, 1 Paine (U. S.) 400; Rowland *v.* Miln, 2 Hilt. (N. Y.) 150.

11. No Power to Waive Statutory Requirements. — *In re* Guggenheim Smelting Co., (C. C. A.) 112 Fed. Rep. 517; U. S. *v.* One Sorrel Stallion, 51 Fed. Rep. 877; 134,901 Feet Pine Lumber, 4 Blatchf. (U. S.) 182; Bas *v.* Steel, Pet. (C. C.) 406.

12. Government Not Bound by Unauthorized Acts of Officers. — U. S. *v.* Two Thousand One Hundred and Seventeen Bushels Malt, 8 Fed. Rep. 224; Andrae *v.* Redfield, 12 Blatchf. (U. S.) 407; Johnson *v.* U. S., 5 Mason (U. S.) 425.

Rule Applicable to Collectors of Internal Revenue. — A lien in favor of the United States for unpaid internal revenue taxes is not waived or affected by any statements made by a collector or his deputy to a purchaser of the property affected by the lien, to the effect that the government has no claim against the property and that there are no unpaid taxes thereon. Alkan *v.* Bean, 8 Biss. (U. S.) 83.

13. Thus, after his removal from office, a collector cannot collect duties that accrued during his term of office. Sthreshley *v.* U. S., 4 Cranch (U. S.) 169.

Neither can he, after such removal, appropriate money of the United States, in his hands, to the payment of fees due to officers of the customs, since that is an official act, and can properly be done only by the collector actually in office. Champney *v.* Bancroft, 1 Story (U. S.) 423.

outside of his district.[1] Where the collector has discretionary powers given to him, the courts will not, in the absence of fraud, interfere with their exercise.[2]

Deputy Collectors. — Collectors have power to appoint deputies.[3] The persons thus appointed are officers of the customs, not merely agents of the collectors,[4] and unless restricted, are clothed with the same powers as collectors.[5]

b. POWER TO MAKE RULES AND REGULATIONS. — Under the customs laws the secretary of the treasury is invested, in the collection of duties, with a large discretion in the exercise of his administrative functions. He has the power to prescribe rules and regulations as to the modes of collection, etc., but he cannot, in the exercise of this power, alter or amend the provisions of the statutes.[6] Similarly the commissioner of internal revenue, with the approval of the secretary of the treasury, has power to make such regulations as he deems necessary in the matter of the assessment and collection of internal revenue. Such regulations have the force of statutes; and the acts of the commissioner, in matters relating to the revenue, are presumed to be the acts of the secretary.[7] But it does not follow that acts required by such

It seems that a collector is to all intents *functus officio*, as soon as a removal takes place by the appointment of another person in his stead. Johnson *v.* U. S., 5 Mason (U. S.) 425.

1. The decisions of the secretary of the treasury as to the boundaries of collection districts are not binding on the courts unless made so by statute. U. S. *v.* McNelly, 28 Fed. Rep. 609.

Within the limits of his district, the collector may move the custom house from one port to another when the former port is in the possession of a public enemy. U. S. *v.* Hayward, 2 Gall. (U. S.) 485.

"**In Defining Collection Districts It Is the Policy of the Government,** in cases of small bodies of water, such as rivers and narrow bays, not to divide the jurisdiction of the waters thereof by locating one side in one district and the other side in another district. This would operate as a great inconvenience in conducting intercourse between the shores of such waters." U. S. *v.* McNelly, 28 Fed. Rep. 609, *per* Welker, J.

2. Thus, the decision of the collector as to the amount of goods which a vessel may carry as sea stores will not be reviewed by the courts. The Brig Isabella, 1 Paine (U. S.) 1.

3. Collectors May Appoint Deputies. — Rev. Stat. U. S., § 2630; Schmaire *v.* Maxwell, 3 Blatchf. (U. S.) 408.

4. U. S. *v.* Barton, Gilp. (U. S.) 439, holding that where an oath is required to be administered by a collector, a deputy collector can administer it.

Deputy Collectors of Internal Revenue. — Where the commission of a deputy collector of internal revenue is signed and placed in the post office for transmission by mail, and he is notified thereof by telegram, he becomes a deputy collector immediately, with full authority to seize property for a violation of the revenue laws. The actual receipt of the commission is not essential to the investiture of the office. U. S. *v.* Sykes, 58 Fed. Rep. 1000.

5. Deputies Have Same Powers as Collectors unless Restricted. — Schmaire *v.* Maxwell, 3 Blatchf. (U. S.) 408; Falleck *v.* Barney, 5 Blatchf. (U. S.) 38.

A Deputy Collector of Internal Revenue, by virtue of his ordinary duties as such, has no power to remit penalties and to stamp or authorize the stamping of instruments or appeal bonds where they have been left unstamped from inadvertence or mistake, except when, from the inability or sickness of the collector, he acts by special authority in such collector's place. Brown *v.* Crandal, 23 Iowa 112.

6. Power of Secretary to Make Regulations — Rules — Contravening Statutes Invalid. — Merritt *v.* Cameron, 137 U. S. 542; Morrill *v.* Jones, 106 U. S. 466; *In re* Puget Sound Reduction Co., 96 Fed. Rep. 90; U. S. *v.* Three Barrels Whisky, 77 Fed. Rep. 963; Anglo-California Bank *v.* Secretary of Treasury, (C. C. A.) 76 Fed. Rep. 742; Pascal *v.* Sullivan, 21 Fed. Rep. 496; Balfour *v.* Sullivan, 19 Fed. Rep. 578. And see U. S. *v.* Mora, 97 U. S. 413.

Where the statute provides that animals specially imported for breeding purposes shall be admitted free, upon proof thereof satisfactory to the secretary of the treasury, the secretary cannot confine the exemption to animals of superior stock. Morrill *v.* Jones, 106 U. S. 466.

Under a statute authorizing the secretary of the treasury to prescribe regulations as to the return of grain bags, he has no power to impose a duty on them. Balfour *v.* Sullivan, 19 Fed. Rep. 578.

When by statute the secretary of the treasury was authorized and directed to classify as woolen cloths all imports of worsted cloths, it was held that by the terms of the act itself, and irrespective of any action by the secretary, the duties on worsted cloths became the same as those on woolen cloths. U. S. *v.* Ballin, 144 U. S. 1, *reversing* 45 Fed. Rep. 170.

Power to Fix Standard of Teas for Importation. — The officers of the treasury are empowered by statute to fix annually the standard of quality of teas for importation and to provide for the exclusion of teas which do not come up to the required standard. The word "quality" as used in the statute covers more than mere purity and wholesomeness. Buttfield *v.* Bidwell, 94 Fed. Rep. 126, *affirmed* (C. C. A.) 96 Fed. Rep. 328; Cruikshank *v.* Bidwell, 86 Fed. Rep. 7, *affirmed* 176 U. S. 73.

7. Power of Commissioner of Internal Revenue to Make Regulations. — *In re* Kollock, 165 U. S. 526; Thacher's Distilled Spirits, 103 U. S.

regulations are acts required by law in such a sense as to make the neglect to perform them a criminal offense, in the absence of a statute making such neglect an offense.[1] Nor can the officers of internal revenue prescribe rules or regulations in contravention of the statutes.[2]

2. Liabilities of Revenue Officers — *a.* IN GENERAL. — A collector may render himself liable to a suit by an importer because of his negligence or misconduct in his execution of the revenue laws.[3] For official acts not warranted by law he is liable in damages though innocent of any illegal purpose.[4]

b. LIABILITY FOR LOSS OF GOODS IN BONDED WAREHOUSE. — A collector cannot be held liable for goods lost while deposited in a bonded warehouse, unless it is shown that their loss was due to his personal negligence, misfeasance, or wrong in regard to their safe keeping,[5] but a government gauger in charge of a distillery warehouse is liable in a case where spirits are lost through his gross negligence.[6]

c. LIABILITY FOR EXACTION OF ILLEGAL FEES. — Illegal fees exacted by a collector may be recovered back by action;[7] and officers of the customs are also liable to penalties for extortion.[8]

d. LIABILITY FOR WRONGFUL DETENTION OF GOODS. — A refusal by a collector to deliver goods to an importer, after the proper duties thereon have been paid or secured, constitutes a tortious conversion of the property for which an action of trespass or trover will lie.[9]

e. LIABILITY FOR WRONGFUL SEIZURE OF PROPERTY. — A revenue officer may render himself liable to an action for damages for the wrongful seizure

679; *In re* Huttman, 70 Fed. Rep. 699; Prather *v.* U. S., 9 App. Cas. (D. C.) 82.

A commissioner of internal revenue has power to make a rule forbidding collectors to produce their records or to give in evidence information derived therefrom in criminal prosecutions of liquor dealers in state courts. *In re* Huttman, 70 Fed. Rep. 699; *In re* Weeks, 82 Fed. Rep. 729.

The Court Will Take Judicial Notice of Regulations prescribed by the commissioner of internal revenue, in pursuance of statute, and such regulations need not be specially proved on the trial of an indictment for violation of the statutes. Prather *v.* U. S., 9 App. Cas. (D. C.) 82.

1. Failure to Comply with Regulations Not Criminal Offense. — U. S. *v.* Eaton, 144 U. S. 677; U. S. *v.* One Package Distilled Spirits, 88 Fed. Rep. 856.

Where the Offense Is Fully Described by the Statute and a penalty or its violation is imposed, the rule stated in the text has no application. U. S. *v.* Ford, 50 Fed. Rep. 467, *distinguishing* U. S. *v.* Eaton, 144 U. S. 677. To the same effect see *In re* Kollock, 165 U. S. 526; Prather *v.* U. S., 9 App. Cas. (D. C.) 82.

2. Regulations Void When in Contravention of Statute. — A regulation requiring the assessment and collection of an internal revenue tax monthly is void where the statute levying the tax clearly requires that such tax be paid annually. Spreckels Sugar Refining Co. *v.* McClain, (C. C. A.) 113 Fed. Rep. 244.

A commissioner of internal revenue cannot, by order or regulation, relieve the owner of spirituous liquors from a statutory obligation to pay a tax thereon, or permit him to discharge his liability by payment of a smaller sum than that prescribed by statute. Burrough *v.* Abel, 100 Fed. Rep. 66, *affirmed* 102 Fed. Rep. 131.

3. Collector Liable for Negligence or Misconduct. — M'Lane *v.* U. S., 6 Pet. (U. S.) 404; Burke *v.* Trevitt, 1 Mason (U. S.) 96.

4. Illegal Purpose Not Essential to Liability. — Badger *v.* Gutierez, 111 U. S. 734; Ogden *v.* Maxwell, 3 Blatchf. (U. S.) 319.

To render a collector liable in damages for his conduct it must be proved that he exercised his powers in cases not within his jurisdiction, or in a manner not confided to him, or with malice, or with wilful oppression. Gould *v.* Hammond, McAll. (U. S.) 235.

5. Brissac *v.* Lawrence, 2 Blatchf. (U. S.) 121, holding that, as against the collector, negligence could not be inferred from the loss of the goods, although the rule might be different as against the storekeeper who had charge of them.

6. Rock Spring Distilling Co. *v.* Thruston, (Ky. 1897) 39 S. W. Rep. 253.

7. Ogden *v.* Maxwell, 3 Blatchf. (U. S.) 319, holding that illegal fees charged for granting constructive permits to land goods might be recovered back; that no written protest against the exaction of such fees was essential; and that the collector was personally liable for the act of his deputy in exacting illegal fees.

8. Customs Officers Liable to Penalties for Extortion. — Hedden *v.* Iselin, 31 Fed. Rep. 266.

The Exaction of a Fee for the Services of Merchant Appraisers, although illegal, does not render the collector liable to the statutory penalty for extortion when he exacts the fee in the honest discharge of his duties, and in obedience to the regulations of the secretary of the treasury. Hedden *v.* Iselin, 31 Fed. Rep. 266, *reversing* on this point Iselin *v.* Hedden, 28 Fed. Rep. 416.

9. Liability for Wrongful Detention of Goods. — Conard *v.* Pacific Ins. Co., 6 Pet. (U. S.) 262; Tracy *v.* Swartwout, 10 Pet. (U. S.) 80.

of property;[1] but such liability cannot accrue until a final decree in favor of the claimant has been rendered in the proceedings to forfeit the goods seized.[2] And when a recovery is had against the officer, in an action for wrongful seizure of property, he may, in a proper case, relieve himself of personal liability to execution on the judgment by procuring from the court a certificate that there was probable cause for the seizure, or that he acted under the direction of the secretary of the treasury or other proper officer of the government.[3] A collector of internal revenue who seizes property by virtue of an assessment for taxes which is regular on its face may avail himself of such assessment as a defense to an action for wrongful seizure, even though it has since been declared invalid by the courts.[4]

f. Liability to United States for Loss of Government Money. — A collector of customs is not liable to the United States for money stolen from a deputy collector where the loss did not result from any default or negligence on his part.[5]

3. Compensation of Revenue Officers. — The compensation of revenue officers is wholly a matter of statutory regulation.[6] Under former laws collectors of customs were entitled in certain cases to share in penalties imposed for violations of the revenue laws, and in the proceeds arising from the condemnation and sale of seized property.[7] But at present it is provided that in such cases suitable compensation shall be made to the customs officers by the secretary of the treasury, out of money specifically appropriated by Congress.[8] A statute authorizing a collector to pay the fees of customs officers out of the moneys of the United States, arising from the revenue and in his hands, does not specifically appropriate these moneys to the payment of such fees so as to create a lien thereon in favor of any officer.[9]

4. Removal of Customs Officers. — It has been held that the President of the United States may lawfully remove a general appraiser from office without assigning specific reasons for such removal.[10]

VII. Collection and Payment of Revenue — 1. Customs Duties — *a.* Report of Arrival and Presentation of Manifest. — In order to facilitate the collection of customs duties the master of every vessel arriving within the United States is required by statute to report its arrival within twenty-four hours to the chief officer of customs in the district.[11] It has been

1. McLean *v.* Hager, 31 Fed. Rep. 602, holding also that the owner of the property need not first appeal to the secretary of the treasury, as is necessary in actions to recover back duties improperly exacted.

2. Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246.

3. **Certificate of Probable Cause.** —Rev. Stat. U. S., § 989.

When Officer Is Not Entitled to Certificate. — A certificate that the collector acted under the directions of the secretary of the treasury or other proper officer of the government cannot be given where the proof shows that he acted under the directions of a revenue agent or other officer who had no authority to give such directions. Nor can the court grant a certificate of "probable cause" in such an action where an application for a certificate of "reasonable cause," made in the original proceedings for condemnation of the property seized, has been refused. Frerichs *v.* Coster, 22 Fed. Rep. 637.

4. **Assessment as Defense to Action for Wrongful Seizure.** — Harding *v.* Woodcock, 137 U. S. 43.

5. **Liability for Loss of Government Money.** — U. S. *v.* Collier, 3 Blatchf. (U. S.) 325.

6. **Statutes Relating to Compensation of Collectors of Customs Construed.** — U. S. *v.* Saunders, 98 Fed. Rep. 196; U. S. *v.* Collier, 3 Blatchf. (U. S.) 325.

Right of Inspector to Extra Compensation for Overtime Work. — U. S. *v.* Garlinger, 169 U. S. 316, *reversing* 30 Ct. Cl. 208.

7. **Additional Duties Imposed for Undervaluation** are not fines and penalties in which the collector is entitled to a share. The collector's right does not attach to the property itself but only to the proceeds of its sale. U. S. *v.* Collier, 3 Blatchf. (U. S.) 325.

8. 18 U. S. Stat. at L. 186, c. 391, § 3.

Rewards for Detection of Smuggling. — The statute requiring an officer who claims a reward for "furnishing information" as to smuggled goods to procure a judge's certificate as to the value of his services does not apply to an officer who himself discovers and seizes such goods; nor is an inspector who discovers a fraud upon the revenue entitled to a reward when such discovery is the direct result of a visiting inspector's action and instructions. Eager *v.* U. S., 32 Ct. Cl. 571.

9. Champney *v.* Bancroft, 1 Story (U. S.) 423.

10. Shurtleff *v.* U. S., 36 Ct. Cl. 34.

11. **Arrival of Vessel Must Be Reported.**—Rev.

held, however, that this statute does not apply where the arrival is caused by accident, stress of weather, or other necessity, and is not from choice.[1] And where such report is made in apt time and contains all the required particulars, the fact that it is not made at the office of the principal officer of customs does not render it invalid.[2]

Presentation of Manifest. — In addition to reporting the arrival of his vessel the master must also present his manifest to the collector.[3] The law is not complied with unless the manifest delivered is a true one.[4] Where the manifest and the cargo do not agree the master or other person having command of the ship is liable to a penalty,[5] and all merchandise not included in the manifest, belonging or consigned to the master, mate, officers, or crew, is forfeitable.[6]

b. ENTRY AND INVOICE — (1) *Entry Defined.* — The term "entry," as used in the customs laws, may mean either the written bill of entry which the importer is required to deliver to the proper officer or the series of acts required to be performed in entering the goods.[7]

(2) *By Whom Made.* — The entry should be made by the original consignee or the indorsee of the bill of lading.[8] Where the consignee is not the owner of the merchandise [9] he must make the declaration accompanying the entry as

Stat. U. S., § 2774; Shelton *v.* Austin, 1 Cliff. (U. S.) 388.

Ships of War, Including Privateers, are not subject to the statute. The Brig Wilson *v.* U. S., 1 Brock. (U. S.) 423.

1. Report Unnecessary Where Arrival Is from Accident or Stress of Weather. — The Javirena, (C. C. A.) 67 Fed. Rep. 152; U. S. *v.* Shackford, 5 Mason (U. S.) 445. *Contra*, U. S. *v.* Webber, 1 Gall. (U. S.) 392. And see Harrison *v.* Vose, 9 How. (U. S.) 372; Toler *v.* White, 1 Ware (U. S.) 277.

Report Essential in All Cases. — "On the whole, as I cannot perceive any sufficient ground on which to rest an exception, in the face of the positive language of the act, I am of opinion that the section equally applies whether the arrival be from necessity or from choice, and whether the port be or be not the port of destination or delivery of the whole or any part of the cargo." U. S. *v.* Webber, 1 Gall. (U. S.) 392, *per* Story, J.

What Not Arrival Within Statute. — A statute imposing upon the master of every foreign vessel arriving under the conditions mentioned therein the duty of reporting its arrival, and providing that the vessel shall not proceed further inland, either to unload or take in cargo, without a special permit, is not violated where a master merely brings his vessel within the waters of the United States and fails to report her presence there; the penalty is incurred only in case such vessel proceeds further inland to load or unload a cargo. The Coquitlam, (C. C. A.) 77 Fed. Rep. 744, *reversing* 57 Fed. Rep. 706.

2. Failure to Report at Office of Principal Officer Immaterial. — U. S. *v.* Rendell, 1 Curt. (U. S.) 369, *affirming* U. S. *v.* Randall, 1 Sprague (U. S.) 546. *Contra*, U. S. *v.* Galacar, 1 Sprague (U. S.) 545.

The Burden of Proving a Failure to Report at the proper place is upon the government. U. S. *v.* Galacar, 1 Sprague (U. S.) 545.

3. Presentation of Manifest Essential. — 134,901 Feet Pine Lumber, 4 Blatchf. (U. S.) 182; Shelton *v.* Austin, 1 Cliff. (U. S.) 388.

A forfeiture for want of a manifest cannot be averted by making out a manifest and tendering it to the officers after the cargo has been seized by them. The Coquitlam, 57 Fed. Rep. 706, *reversed* on another point (C. C. A.) 77 Fed. Rep. 744.

4. Manifest Must Be Correct. — Phile *v.* The Ship Anna, 1 Dall. (Pa.) 197; 134,901 Feet Pine Lumber, 4 Blatchf. (U. S.) 182.

5. Penalty for Disagreement Between Manifest and Cargo. — U. S. *v.* Fairclough, 4 Wash. (U. S.) 398.

6. Omitted Merchandise Belonging to Officers and Crew Forfeitable. — U. S. *v.* Ten Thousand Cigars, 2 Curt. (U. S.) 436.

Merchandise Belonging or Consigned to Other Persons Not Forfeitable. — The Coquitlam, (C. C. A.) 77 Fed. Rep. 744, *reversing* 57 Fed. Rep. 706.

7. Entry Defined. — U. S. *v.* Legg, (C. C. A.) 105 Fed. Rep. 930; U. S. *v.* Cargo Sugar, 3 Sawy. (U. S.) 46.

Meaning of Term as Used in Statute. — A statute providing that goods imported before its passage, but not entered until after it has gone into effect, shall pay the rates of duty prescribed therein refers to the written bill of entry and not to the acts performed in entering the goods. U. S. *v.* Legg, (C. C. A.) 105 Fed. Rep. 930.

8. Who May Make Entry. — Harris *v.* Dennie, 3 Pet. (U. S.) 292; Conard *v.* Pacific Ins. Co., 6 Pet. (U. S.) 262; U. S. *v.* Aborn, 3 Mason (U. S.) 126; Knox *v.* Devens, 5 Mason (U. S.) 380; Childs *v.* Shoemaker, 1 Wash. (U. S.) 494.

A subpurchaser, after importation, cannot make entry. U. S. *v.* Lyman, 1 Mason (U. S.) 482.

In an early case it was held that the executor of a deceased importer might make entry. U. S. *v.* Aborn, 3 Mason (U. S.) 126.

9. Consignment to Person Other than Owner Valid. — Section 1 of the Customs Administrative Act of 1890, providing that all merchandise imported shall, for the purpose of the act, be deemed the property of the consignee, was intended to prevent frauds upon the United States by collusive transfers, and it does not invalidate consignments of merchandise to persons other than the real owners thereof. Burke *v.* Davis, 63 Fed. Rep. 456.

consignee, and not as owner, and must state in such declaration the name of the true owner.[1]

(3) *Time of Entry.* — Merchandise may be entered before the entry of the vessel on which it arrives.[2]

(4) *False Statements in Declaration for Entry.* — A person who knowingly makes a false statement in a declaration filed with the collector at the time of making entry is liable to indictment.[3]

(5) *Entry of Baggage by Passengers.* — Passengers coming into the United States must enter their baggage and disclose to the proper officer, at the time of entry, any dutiable articles contained therein. Dutiable articles not so disclosed are forfeitable without regard to the intent of the owner.[4]

(6) *Necessity for Invoice.* — Where the goods exceed one hundred dollars in value the entry must be accompanied by a duly certified invoice, or by a statement in the form of an invoice, together with an affidavit showing why the original invoice is not produced.[5] In the latter case a bond must also be given to produce a duly certified invoice.[6] And where, for want of the original invoice, goods are entered without specification of particulars, they must be stored by the collector until their value has been ascertained.[7] The rule requiring an invoice applies to free goods as well as to those subject to duty.[8]

(7) *Requisites of Invoice.* — The invoice should be made out in the currency of the country of exportation.[9] If the merchandise was obtained by purchase it must state the actual cost thereof, or, if obtained otherwise than by purchase, the actual market value in the country of exportation.[10]

1. Declaration for Entry Must State Name of True Owner When Made by Consignee. — U. S. *v.* Fawcett, 86 Fed. Rep. 900.

2. Merchandise May Be Entered Before Vessel. — U. S. *v.* Legg, (C. C. A.) 105 Fed. Rep. 930.

3. False Statement in Declaration for Entry. — U. S. *v.* Fawcett, 86 Fed. Rep. 901.

Duplicates of the invoice produced by the consignee at the time of entry are not "other invoices" within the meaning of the statute requiring the person making entry to swear that he does not know of any other invoice than that then produced by him. U. S. *v.* Harrison, 32 Fed. Rep. 386.

4. Entry and Examination of Baggage. — U. S. *v.* One Pearl Necklace, (C. C. A.) 111 Fed. Rep. 164.

5. Invoice Essential. — 26 U. S. Stat. at L. 131, c. 407, § 4; Hoeninghaus *v.* U. S., 172 U. S. 622; Belcher *v.* Linn, 24 How. (U. S.) 508.

Omission of Goods from Entry Proof of Nonpayment of Duties. — If an entry does not contain part of the goods consigned by the same invoice and bill of lading, it is *prima facie* evidence that the duties have not been paid. U. S. *v.* Certain Hogsheads Molasses, 1 Curt. (U. S.) 276.

6. U. S. *v.* Cutajar, (C. C. A.) 67 Fed. Rep. 530, holding that on breach of such bond the importer was liable only for actual damages, and not for the sum named therein as a penalty.

7. Goods Entered Without Specification of Particulars Must Be Stored. — Rev. Stat. U. S., § 2926; Robertson *v.* Bradbury, 132 U. S. 491.

Charges for Transportation and Storage.—Where goods are unclaimed on importation a person who subsequently enters them without invoice is chargeable with the costs of transportation and storage, even though their value is less than one hundred dollars. Kennedy *v.* Magone, 158 U. S. 212, *affirming* 41 Fed. Rep. 768. And see Hempstead *v.* Cadwalader, 42 Fed. Rep. 529.

Duty of Importer to Demand Appraisal. — If, when an importer or consignee points out an imperfection in the invoice and asks to have it corrected, he is met by a declaration of the officers that he must enter the goods at the value expressed in the invoice and in no other way, and is given to understand that that is the only thing he can do, and he is compelled to do that in order to proceed at all, then he is not bound to ask for an appraisement under the statute. Robertson *v.* Bradbury, 132 U. S. 491.

8. Invoice Necessary with Free Goods. — Phelps *v.* Siegfried, 142 U. S. 602, *overruling* 40 Fed. Rep. 660; U. S. *v.* Mosby, 133 U. S. 273.

9. Invoice Made Out in Foreign Currency. — 26 U. S. Stat. at L. 131, c. 407, § 2; De Forest *v.* Redfield, 4 Blatchf. (U. S.) 478.

10. Actual Cost or Market Value to Be Stated.— Hoeninghaus *v.* U. S., 172 U. S. 622; 3,109 Cases Champagne, 1 Ben. (U. S.) 241; U. S. *v.* Twelve Casks Cudbear, Gilp. (U. S.) 507. And see U. S. *v.* Fourteen Packages Pins, Gilp. (U. S.) 235.

Statement in Sums Total Not Essential. — The statute does not require that the actual cost be stated in any sums total, nor prohibit stating it by reference to prices of measurable quantities or qualities. U. S. *v.* American Sugar-Refining Co., 71 Fed. Rep. 951.

Where Imported Goods Are the Property of the Manufacturer, the invoice need only state their fair market value at the place of manufacture. U. S. *v.* Auffmordt, 122 U. S. 197. And see Sinn *v.* U. S., 14 Blatchf. (U. S.) 550; Ninety-five Bales Paper *v.* U. S., 1 Paine (U. S.) 149.

(8) *Entry by Means of False or Fraudulent Invoice.* — Entry of merchandise by means of a false or fraudulent invoice is made a criminal offense by statute,[1] and the merchandise so entered, or its value, is liable to forfeiture.[2] An invoice containing a discount which the purchaser of the goods did not receive is a false invoice within the statute.[3] It is not essential to a forfeiture that the collector be deceived by the false invoice.[4] And if it is in fact false, the goods are forfeited, even though the person making the entry was innocent of fraud;[5] but a forfeiture cannot be had where the entry is made by a trespasser who has no right to the goods.[6]

Evidence of Other False Invoices Admissible. — In a proceeding to enforce the forfeiture evidence of other false invoices made by the same party is admissible.[7]

(9) *Additional Duties for Undervaluation.* — Where the value of merchandise as fixed by the appraisers exceeds the value declared in the entry, additional duties may be assessed thereon for undervaluation;[8] and if such undervaluation is fraudulent the merchandise is forfeitable.[9] The statute providing for additional duties in such cases makes no distinction between specific and *ad valorem* duties, or between undervaluations that may affect the amount of regular duties and those that will not.[10] The additional duties are pay-

1. Entry by False or Fraudulent Invoice. — The crime is committed by an entry of imported merchandise by means of a false invoice, notwithstanding that the merchandise is subject to a specific duty of so much a pound as ascertained by weighing it at its landing. The fact that no loss of duties results to the government is immaterial. U. S. *v.* Cutajar, 60 Fed. Rep. 744.

A person who procures the entry of merchandise free of duty by means of a false and fraudulent letter may be indicted. There is nothing in the statute which limits its application, as regards attempts to enter goods, to proceedings at the custom house only. U. S. *v.* Boyd, 24 Fed. Rep. 692.

2. Forfeiture of Merchandise for Fraudulent Entry. — Bollinger's Champagne, 3 Wall. (U. S.) 560; U. S. *v.* Sixty-seven Packages Dry Goods, 17 How. (U. S.) 85; Sinn *v.* U. S., 14 Blatchf. (U. S.) 550; Wright *v.* U. S., 2 Paine (U. S.) 184.

In U. S. *v.* Auffmordt, 122 U. S. 197, it was held that under the statute then in force the merchandise alone was subject to forfeiture, and not its value; but the present statute provides for an alternative forfeiture. See 26 U. S. Stat. at L. 135, c. 407, § 9.

What Not Fraudulent Invoice. — Malt invoiced for importation at the rate and upon the scale of thirty-six pounds to the bushel, under an agreement to sell it in the United States at a certain price per bushel of thirty-four pounds, is not fraudulently invoiced so as to warrant a forfeiture where the proof shows that it is sold and purchased in the general trade of the country of exportation upon a scale of thirty-six pounds to the bushel, but in the United States upon a scale of thirty-four pounds. U. S. *v.* Two Thousand One Hundred and Seventeen Bushels Malt, 8 Fed. Rep. 224.

3. Invoice Containing Discount Not Allowed to Purchaser. — U. S. *v.* Two Thousand One Hundred and Seventeen Bushels Malt, 8 Fed. Rep. 224.

4. Deception of Collector Not Essential to Forfeiture. — U. S. *v.* Cargo Sugar, 3 Sawy. (U. S.) 46.

5. Fraudulent Intent Not Material Where Invoice Is False. — U. S. *v.* Nineteen Bales Tobacco, 112 Fed. Rep. 779. And see Cliquot's Champagne, 3 Wall. (U. S.) 114.

6. No Forfeiture for Fraudulent Entry by Trespasser. — U. S. *v.* 1,150½ Pounds Celluloid, (C. C. A.) 82 Fed. Rep. 627.

7. Evidence of Other False Invoice Admissible. — Buckley *v.* U. S., 4 How. (U. S.) 251; U. S. *v.* 146,650 Clapboards, 4 Cliff. (U. S.) 301.

8. Additional Duties Assessable for Undervaluation. — Hoeninghaus *v.* U. S., 172 U. S. 622; Passavant *v.* U. S., 148 U. S. 214; Baldwin *v.* U. S., (C. C. A.) 113 Fed. Rep. 217; U. S. *v.* American Sugar-Refining Co., 71 Fed. Rep. 951; Sampson *v.* Peaslee, 20 How. (U. S.) 571; U. S. *v.* Sixty-seven Packages Dry Goods, 17 How. (U. S.) 85; Yznaga *v.* Redfield, 4 Blatchf. (U. S.) 469; Bennandahl *v.* Redfield, 4 Blatchf. (U. S.) 223; Harriman *v.* Maxwell, 3 Blatchf. (U. S.) 421; Schmaire *v.* Maxwell, 3 Blatchf. (U. S.) 408; Crowley *v.* Maxwell, 3 Blatchf. (U. S.) 384; Vaccari *v.* Maxwell, 3 Blatchf. (U. S.) 368; Morris *v.* Maxwell, 3 Blatchf. (U. S.) 143; Belmont *v.* Lawrence, 3 Blatchf. (U. S.) 119; Goddard *v.* Maxwell, 3 Blatchf. (U. S.) 131; Christ *v.* Maxwell, 3 Blatchf. (U. S.) 129; Durand *v.* Lawrence, 2 Blatchf. (U. S.) 396; Thomson *v.* Maxwell, 2 Blatchf. (U. S.) 385; Wilson *v.* Maxwell, 2 Blatchf. (U. S.) 316.

Liability of Customs Broker for Additional Duties. — Baldwin *v.* U. S., (C. C. A.) 113 Fed. Rep. 217.

Rule Where Invoice Is Divided for Convenient Entry. — Sampson *v.* Peaslee, 20 How. (U. S.) 571.

Rule Where Invoice Comprises Several Articles. — Schmeider *v.* Barney, 6 Fed. Rep. 150.

9. Merchandise Forfeitable for Fraudulent Undervaluation. — 26 U. S. Stat. at L. 134, c. 407, § 7; 30 U. S. Stat. at L. 212, c. 11, § 7. And see Buckley *v.* U. S., 4 How. (U. S.) 251; 3,109 Cases Champagne, 1 Ben. (U. S.) 241.

10. No Distinction Between Specific and Ad Valorem Duties. — Hoeninghaus *v.* U. S., 172 U. S. 622; Pings *v.* U. S., (C. C. A.) 72 Fed. Rep. 260.

able, except in cases arising from a manifest clerical error, irrespective of any question of fraudulent undervaluation on the part of the importer.[1]

(10) *Additions to Invoice Value.* — If the merchandise was obtained by actual purchase the importer may, at the time of making entry, make such addition to the invoice value as in his opinion will raise it to the actual market value in the country of exportation.[2]

(11) *Amendment of Invoice and Entry.* — Where there is a manifest clerical error in the original invoice a corrected invoice may be filed, and the entry be amended to correspond therewith, at any time before action has been taken upon the original entry,[3] and the secretary of the treasury is empowered by statute to correct clerical errors in entries within one year from the date thereof,[4] but in the absence of fraud or protest the original entry is conclusive on all parties after the expiration of one year.[5] It has been held that the collector may refuse to receive an amendment of an entry made in order to avoid a penalty.[6]

c. PERMIT TO LAND GOODS — **Permit Necessary in General.** — Goods imported in vessels from foreign ports are required to be landed in open day; and they cannot be landed or delivered from the vessel until a permit has been granted by the proper officer of the customs. Persons violating the law in this regard are subjected to penalties, and the goods unlawfully landed are forfeited.[7]

Payment or Securing of Duties Condition Precedent. — Where goods are entered for consumption, no permit to land them can be granted until the duties thereon have been paid or secured.[8]

When Permit Not Necessary. — The revenue laws do not require any permit to be given before the landing of any of the ship's appurtenances or equipments;[9] and exceptions to the general rule requiring a permit are also made

1. Additional Duties Payable Irrespective of Fraud. — U. S. *v.* 1,621 Pounds Fur Clippings, (C. C. A.) 106 Fed. Rep. 161; U. S. *v.* Strauss, 55 Fed. Rep. 388; Gray *v.* U. S., (C. C. A.) 113 Fed. Rep. 213; Falleck *v.* Barney, 5 Blatchf. (U. S.) 38.

2. U. S. *v.* Merck, 91 Fed. Rep. 641.

Under Former Statutes such addition was also permitted where the goods were procured otherwise than by purchase. Harding *v.* Whitney, 4 Cliff. (U. S.) 96; Vaccari *v.* Maxwell, 3 Blatchf. (U. S.) 368; Focke *v.* Lawrence, 2 Blatchf. (U. S.) 508.

Addition Marked on Invoice Itself Sufficient. — U. S. *v.* Merck, 91 Fed. Rep. 641.

3. Clerical Error in Invoice May Be Corrected. — Schmeider *v.* Barney 6 Fed. Rep. 150; Howland *v.* Maxwell, 3 Blatchf. (U. S.) 146. And see U. S. *v.* Brewer, 84 Fed. Rep. 147.

What Sufficient Excuse for Error in Entry. — U. S. *v.* Nine Packages Linen, 1 Paine (U. S.) 129.

Where a Fraud Has Been Committed upon the Importer by a misdescription in the invoice of the goods entered, the assessment of duties should be corrected accordingly. Lillie *v.* Redfield, 4 Blatchf. (U. S.) 41.

When Mistake Cannot Be Corrected. — Where the invoice, although manifestly erroneous in its statements of value, does not show on its face the amount of the error, the importer is not entitled to have his entry corrected upon a new invoice, on the hearing before the general appraisers; but the secretary of the treasury may relieve him from the hardship resulting from the mistake. Roebling *v.* U. S., 77 Fed. Rep. 601.

4. Secretary of Treasury Empowered to Correct Clerical Error in Entry. — 26 U. S. Stat. at L. 140, c. 407, § 24. And see Roebling *v.* U. S., 77 Fed. Rep. 601.

5. Entry Conclusive After One Year in Absence of Fraud or Protest. — U. S. *v.* Seidenberg, 17 Fed. Rep. 230.

Where a picture which was free of duty was brought into the United States without entry, it was held that all questions as to the entry were barred after one year. U. S. *v.* One Oil Painting, 31 Fed. Rep. 881.

The year begins to run from the date of the original entry. U. S. *v.* Seidenberg, 17 Fed. Rep. 227; U. S. *v.* Frazer, 10 Ben. (U. S.) 347.

6. Collector May Refuse Amendment to Avoid Penalty. — Harriman *v.* Maxwell, 3 Blatchf. (U. S.) 421.

7. Permit to Land Goods Essential. — Four Packages *v.* U. S., 97 U. S. 404; Fabbri *v.* Murphy, 95 U. S. 191; The Cargo Ex Lady Essex, 39 Fed. Rep. 765; Ten Cases Opium, Deady (U. S.) 62

Forfeiture of Vessel for Unloading Before Entry. — Phile *v.* The Ship Anna, 1 Dall. (Pa.) 197.

What Not Unlawful Transfer of Cargo from One Vessel to Another. — The Coquitlam, (C. C. A.) 77 Fed. Rep. 744, *reversing* 57 Fed. Rep. 706.

8. Duties Must Be Paid or Security Given. — Rev. Stat. U. S., § 2869; Fabbri *v.* Murphy, 95 U. S. 191; U. S. *v.* Boyd, 24 Fed. Rep. 692; Kohne *v.* North America Ins. Co., 1 Wash. (U. S.) 158.

9. Ship's Appurtenances and Equipments May Be Landed Without Permit. — U. S. *v.* Fry, 48 Fed. Rep. 713; The Gertrude, 3 Story (U. S.) 68; U. S. *v.* Chain Cable, 2 Sumn. (U. S.) 362.

in cases of unavoidable accident, necessity, or stress of weather.[1]

d. Appraisement, Reappraisement, and Appeal on Question of Value — (1) *Necessity for Appraisement.* — By statute it is made the duty of the collector to cause all merchandise imported within his district to be appraised.[2] Under former statutes the necessity for an appraisal was limited to cases where the goods were subject to an *ad valorem* duty,[3] or where the collector suspected that the goods were invoiced below their value;[4] but as the law now stands an appraisement is necessary in all cases where the duty to be imposed depends in any manner upon the value of the goods, whether such duty be called *ad valorem* or specific.[5]

(2) *Place of Appraisement.* — The appraisement is to be made at the first port of entry, unless such port is one of those mentioned in the statute at which goods can be imported and shipped to an interior port of destination without appraisement.[6]

(3) *Designation and Production of Packages for Examination.* — The collector designates on the invoice the packages of merchandise which are to be appraised, and orders the same to the public stores for the purposes of the appraisal.[7] Where the appraisers are unable to determine the character of the merchandise from an examination of the sample packages, they may require additional packages to be produced,[8] and if the shipment is without an invoice, all of the packages imported must be produced for appraisal.[9]

(4) *Requisites of Appraisement.* — In making the appraisement the officers must conform to the requirements of the statute.[10] Failure to comply with a rule of the treasury department does not render the appraisement invalid where such rule is directory merely and not mandatory.[11]

Examination of Merchandise. — The appraisers must personally examine and inspect the merchandise.[12] An examination such as is usually made by merchants when purchasing the article is sufficient,[13] as is also a fair examination by sample.[14]

1. No Permit Necessary Where Landing Is from Necessity. — The Cargo Ex Lady Essex, 39 Fed. Rep. 765; U. S. *v.* Hunter, Pet. (C. C.) 10.

Rule Where Vessel Is in Danger of Capture by Enemy. — U. S. *v.* Hayward, 2 Gall. (U. S.) 485.

2. Appraisement Required by Statute. — 26 U. S. Stat. at L. 134, c. 407, § 7.

3. Rule under Former Statute. — Thomson *v.* Maxwell, 2 Blatchf. (U. S.) 385; Focke *v.* Lawrence, 2 Blatchf. (U. S.) 508.

4. U. S. *v.* Tappan, 11 Wheat. (U. S.) 419.

5. Appraisement Essential Whether Duty Is Ad Valorem or Specific. — Hoeninghaus *v.* U. S., 172 U. S. 622; Pings *v.* U. S., (C. C. A.) 72 Fed. Rep. 260. And see U. S. *v.* Fox, 53 Fed. Rep. 531; Rankin *v.* Hoyt, 4 How. (U. S.) 327; Bollinger's Champagne, 3 Wall. (U. S.) 560.

6. Appraisement Made at First Port of Entry. — Saltonstall *v.* Russell, 152 U. S. 628.

At Custom House. — Under the Act of 1842, the appraisal had to be made at the custom house. Howland *v.* Maxwell, 3 Blatchf. (U. S.) 146.

7. Collector Designates Packages for Appraisal. — Knight *v.* Schell, 24 How. (U. S.) 526; Belcher *v.* Linn, 24 How. (U. S.) 508.

Statute Not Mandatory. — The statute providing that the collector shall designate, and the appraisers examine, at least one package of every invoice, and one out of every ten packages of merchandise, is for the benefit of the government, and not mandatory, and official acts are not invalidated for want of strict compliance therewith. U. S. *v.* Ranlett, 172 U. S. 133; Erhardt *v* Schroeder, 155 U. S. 124. *Compare* Burgess *v.* Converse, 2 Curt. (U. S.) 216.

8. Appraisers May Call for Additional Packages. — Weil *v.* U. S., 115 Fed. Rep. 592.

9. Where Shipment Is Without Invoice. — Kennedy *v.* Magone, 158 U. S. 212.

10. Compliance with Statutory Requirements. — An appraisement is valid under the statute although the appraisers make their additions to value by percentages and do not state upon the invoice the value per unit of quantity in the foreign currency. U. S. *v.* Loeb, (C. C. A.) 107 Fed. Rep. 692.

In Comacho *v.* U. S , 115 Fed. Rep. 191, it was held that where the appraisers were unable to find an open market price, their action in estimating the price of the merchandise when received in this country, after deducting all expenses, for the purpose of determining the wholesale price after exportation in the markets of the country from which it was imported, was not unreasonable or erroneous.

11. U. S. *v.* Loeb, (C. C. A.) 107 Fed. Rep. 692.

12. Personal Examination of Merchandise by Appraisers Essential. — Oelbermann *v.* Merritt, 123 U. S. 356; Greely *v.* Thompson, 10 How. (U. S.) 225; U. S. *v.* Thurber, 28 Fed. Rep. 56; Ystalifera Iron Co. *v.* Redfield, 23 Fed. Rep. 650; U. S. *v.* Frazer, 10 Ben. (U. S.) 347; Gibb *v.* Washington, McAll. (U. S.) 430.

13. Sampson *v.* Peaslee, 20 How. (U. S.) 571.

14. Fair Examination by Sample Sufficient. — Gibb *v.* Washington, McAll. (U. S.) 430. But

Appraisement by Part of Appraisers. — An appraisement made by only part of the appraisers is good where no objection is made on that account.[1]

Power of Appraisers to Examine Importer. — Where there is no charge of fraud, the appraisers cannot compel the importer to disclose the meaning of the cipher in which the values are stated in the invoice.[2]

(5) *Basis of Valuation* — (a) **In General.** — In making the appraisement the appraisers should value the goods at their actual market value or wholesale price at the time of exportation to the United States in the principal markets of the country whence they have been exported;[3] or, if they are unable to ascertain the market value of manufactured articles to their satisfaction, then they must ascertain the total cost of production of such articles.[4]

Under Former Statutes the proper time for fixing the value of imported goods was not the time of their shipment, but of their procurement or purchase in the foreign country.[5]

Articles Which Lose in Weight or Quantity During Voyage. — Where the article imported is one which loses in weight or quantity during the voyage without any decrease in value, the proper basis of valuation is its value in the foreign market in the condition in which it arrives in the United States.[6]

What Markets of a Foreign Country Are the Principal Ones for a particular article is a question of fact to be decided by the appraisers, and their decision is conclusive upon both the importer and the government.[7]

(b) **Discounts from Market Value Not Taken into Account.** — Discounts from the market value, made to purchasers, should not be taken into account in fixing

see Converse *v.* Burgess, 18 How. (U. S.) 413.

Appraisement by samples is conceded to be lawful where the goods imported are such as by commercial usage are bought and sold in that manner in the market, provided due care is taken that the samples are properly and fairly selected from one in ten of the packages as designated on the invoice, and provided the samples, when exhibited to the appraisers and examined by them, are fully identified as the ones selected for the purpose. Yznaga *v.* Peaslee, 1 Cliff. (U. S.) 493.

1. Appraisement by Part of Appraisers Valid. — McCall *v.* Lawrence, 3 Blatchf. (U. S.) 360; U. S. *v.* Fourteen Packages Pins, Gilp. (U. S.) 235.

2. U. S. *v.* Doherty, 27 Fed. Rep. 730.

3. Basis of Valuation in General. — 26 U. S. Stat. at L. 136, c. 407, § 10; U. S. *v.* Passavant, 169 U. S. 16; Muser *v.* Magone, 155 U. S. 240, 41 Fed. Rep. 877; *In re* Schefer, 49 Fed. Rep. 216; U. S. *v.* Loeb, (C. C. A.) 107 Fed. Rep. 692; U. S. *v.* Two Thousand One Hundred and Seventeen Bushels Malt, 8 Fed. Rep. 224; U. S. *v.* Herrman, (C. C. A.) 91 Fed. Rep. 116; U. S. *v.* Knauth, 77 Fed. Rep. 599; U. S. *v.* Gabriel, 36 Fed. Rep. 888; Riess *v.* Redfield, 4 Blatchf. (U. S.) 381; Morris *v.* Maxwell, 3 Blatchf. (U. S.) 144; 3,109 Cases Champagne, 1 Ben. (U. S.) 241; Harding *v.* Whitney, 4 Cliff. (U. S.) 96; Ballard *v.* Thomas, 19 How. (U. S.) 382; Stairs *v.* Peaslee, 18 How. (U. S.) 521; Cliquot's Champagne, 3 Wall. (U. S.) 114.

Rule Where Appraisers Are Unable to Determine Open Market Price. — Comacho *v.* U. S., 115 Fed. Rep. 191.

Date Vessel Sailed from Foreign Port True Period of Exportation. — Sampson *v.* Peaslee, 20 How. (U. S.) 571.

What Evidence of Market Value Admissible. — Cliquot's Champagne, 3 Wall. (U. S.) 114; 3,109 Cases Champagne, 1 Ben. (U. S.) 241.

Meaning of Word "Country" in Revenue Laws. — The word "country" in the revenue laws of the United States has always been construed to embrace all the possessions of a foreign state, however widely separated, which are subject to the same supreme executive and legislative control. Stairs *v.* Peaslee, 18 How. (U. S.) 521.

A Royalty Paid by a Purchaser of Patented Machinery for its use in the United States, and which forms no part of its price in the foreign country, is not an item of dutiable value. U. S. *v.* Leigh, 39 Fed. Rep. 764.

4. Muser *v.* Magone, 155 U. S. 240, holding that the decision of the appraisers that they would not ascertain the true market value was conclusive.

5. Rule under Former Statutes. — Greely *v.* Thompson, 10 How. (U. S.) 225; Maxwell *v.* Griswold, 10 How. (U. S.) 242; Ballard *v.* Thomas, 19 How. (U. S.) 382; Morlot *v.* Lawrence, 3 Blatchf. (U. S.) 122; Maillard *v.* Lawrence, 3 Blatchf. (U. S.) 378.

Where imported goods have been purchased in a foreign country, their true valuation is the actual cost at which they were purchased. U. S. *v.* Twelve Casks Cudbear, Gilp. (U. S.) 510; Tappan *v.* U. S., 2 Mason (U. S.) 393; 3,109 Cases Champagne, 1 Ben. (U. S.) 241.

But an accepted order for goods to be manufactured does not constitute such a purchase as will determine the dutiable value. Pierson *v.* Lawrence, 2 Blatchf. (U. S.) 495; Pierson *v.* Maxwell, 2 Blatchf. (U. S.) 507; Wilson *v.* Lawrence, 2 Blatchf. (U. S.) 514; Focke *v.* Lawrence, 2 Blatchf. (U. S.) 508.

6. American Sugar-Refining Co. *v.* U. S., 181 U. S. 610, 99 Fed. Rep. 716, 91 Fed. Rep. 646.

7. Stairs *v.* Peaslee, 18 How. (U. S.) 521.

the value of the merchandise.[1]

(c) **Cost of Coverings and Other Costs and Charges.** — The cost of the coverings in which goods are imported, and all other costs, charges, and expenses incident to placing the goods in condition for shipment, are included in the market value upon which the duty is to be assessed.[2] Unusual coverings, designed for use otherwise than in *bona fide* transportation to the United States, are dutiable separately from the goods.[3]

(d) **Export Duties.** — Export duties,[4] or duties levied by the foreign country upon its own manufactures when sold for consumption within its limits, are to be included in the market value.[5]

(e) **Commissions Paid by Importer.** — Commissions paid by the importer are not to be added to the market value;[6] but the appraisers have power to inquire as to the real character of charges which are alleged to be commissions and to disallow them when they are really a part of the price of the merchandise.[7]

(f) **Importer Not Estopped to Dispute Invoice Value.** — The importer is not estopped from asserting that the goods are worth less than the values entered on the invoice.[8]

(6) *Importer Liable for Expense of Gauging.* — Where gauging is rendered necessary by the failure of the importer to state accurately the quantity of his goods, he is liable for the expense thereof.[9]

(7) *Correction of Clerical Error in Appraisement.* — A correction of a clerical error which amounts to a change in the appraisement cannot be permitted after the appraisement has been returned to the importer and accepted by him.[10]

1. Discounts Not Taken into Account. — Riess *v.* Redfield, 4 Blatchf. (U. S.) 381; Ballard *v.* Thomas, 19 How. (U. S.) 382.

But where goods are invoiced at more than their true market value and then reduced to such value by means of a discount, the invoice price less the discount is the value on which the duties should be estimated. Gray *v.* Lawrence, 3 Blatchf. (U. S.) 117; Arthur *v.* Goddard, 96 U. S. 145.

2. Cost of Coverings and Other Costs and Charges. — 26 U. S. Stat. at L. 139, c. 407, § 19; American Sugar-Refining Co. *v.* U. S., (C. C. A.) 99 Fed. Rep. 716, *affirmed* 181 U. S. 610. And see Robertson *v.* Bradbury, 132 U. S. 491; Barnard *v.* Morton, 1 Curt. (U. S.) 404; Harding *v.* Whitney, 4 Clift. (U. S.) 96; Bullock *v.* Magone, 39 Fed. Rep. 191; U. S. *v.* Keane, 84 Fed. Rep. 330. But *compare* U. S. *v.* Dickson, (C. C. A.) 73 Fed. Rep. 195.

Under the Act of 1874 the cost of transporting imported goods to the port of shipment from another country was not to be included in estimating their dutiable value. Robertson *v.* Downing, 127 U. S. 607; Barnard *v.* Morton, 1 Sprague (U. S.) 186; Gant *v.* Peaslee, 2 Curt. (U. S.) 250; Grinnell *v.* Lawrence, 1 Blatchf. (U. S.) 346; Wilbur *v.* Lawrence, 2 Blatchf. (U. S.) 314; Griswold *v.* Maxwell, 3 Blatchf. (U. S.) 145.

Under the Act of 1883 the cost of the coverings and other costs and charges incurred in preparing the merchandise for shipment were not to be included in estimating the dutiable value. Oberteuffer *v.* Robertson, 116 U. S. 499; Bullock *v.* Magone, 39 Fed. Rep. 191; Morris *v.* Cadwalader, 33 Fed. Rep. 243; Tryon *v.* Hartranft, 31 Fed. Rep. 443; Glanz *v.* Spalding, 24 Fed. Rep. 20.

3. Unusual Coverings Dutiable Separately from Goods. — 26 U. S. Stat. at L. 139, c. 407, § 19; U. S. *v.* Thurber, 28 Fed. Rep. 56.

What Not Unusual Coverings. — Matthews *v.* U. S., 72 Fed. Rep. 43; U. S. *v.* Richards, 66 Fed. Rep. 730; Slattery's Appeal, 59 Fed. Rep. 450.

Conclusiveness of Appraiser's Decision. — U. S. *v.* Thurber, 28 Fed. Rep. 56.

4. Export Duties Included in Market Value. — Belcher *v.* Linn, 24 How. (U. S.) 508. But see Riess *v.* Redfield, 4 Blatchf. (U. S.) 381.

5. Duties Levied by Foreign Country on Articles Sold for Consumption. — U. S. *v.* Passavant, 169 U. S. 16.

6. Commissions Paid by Importer Not to Be Added to Market Value. — U. S. *v.* Herrman, (C. C. A.) 91 Fed. Rep. 116, *reversing* 84 Fed. Rep. 151.

7. Appraiser May Disallow Commissions Improperly Claimed. — U. S. *v.* Herrman, (C. C. A.) 91 Fed. Rep. 116; U. S. *v.* Kenworthy, (C. C. A.) 68 Fed. Rep. 904.

8. Importer Not Estopped to Dispute Invoice Value. — Yanada *v.* Spaulding, 24 Fed. Rep. 21.

Formerly, Where the Goods Had Been Damaged During the Voyage of importation the importer might demand an appraisement, even after they had been entered at their full invoice value and the duties as estimated on such valuation had been paid. U. S. *v.* Phelps, 107 U. S. 320.

But as to the present rule regarding damaged goods, see *infra*, this section, *Liquidation, Reliquidation, and Appeal to General Appraisers.*

Where a Corrected Invoice Has Been Filed and the original entry amended to correspond therewith, the valuation of the goods is properly made upon such corrected invoice. Schmeider *v.* Barney, 6 Fed. Rep. 150.

9. Importer Liable for Expense of Gauging. — Casado *v.* Schell, 33 Fed. Rep. 332.

10. When Clerical Error Cannot Be Corrected. — U. S. *v.* Morewood, 94 Fed. Rep. 639.

(8) *Reappraisement* — (a) **In General.** — After the goods have been appraised the collector may, if dissatisfied with the result, direct a reappraisement by one of the general appraisers, and the importer, if dissatisfied, may notify the collector, who will in such case order a reappraisement.[1] A demand for reappraisement is proper where the question at issue is one of valuation simply, and not of classification, the remedy in the latter case being by protest and appeal.[2] If the collector refuses to order a reappraisement, the only remedy of the importer is an action against him for breach of duty.[3]

Reappraisement Formerly Before Merchant Appraisers. — Before the Act of 1890 the reappraisement was had before merchant appraisers,[4] who were required to be discreet and experienced merchants, familiar with the character and value of the goods in question.[5]

(b) **Examination of Merchandise on Reappraisement.** — While, as a general rule, the packages of goods themselves must be examined on reappraisal,[6] an examination by sample is sufficient where the merchandise throughout the package is uniform in character,[7] or where the only question at issue is as to the propriety of allowing a discount.[8] A reappraisement is not void for failure to examine all of the packages sent to the public store by the collector unless the latter officer has directed that they shall all be examined,[9] but a reappraisement made without examining either the goods themselves or any samples thereof is invalid.[10]

A Reappraisement Had in the Absence of the Importer is valid where he has received sufficient notice thereof, and in such a case the court will not interfere with the discretion of the appraisers in refusing to postpone the hearing.[11]

1. Right to Reappraisement in General. — 26 U. S. Stat. at L. 136, c. 407, § 13; U. S. *v.* Ranlett, 172 U. S. 133; Schoenfeld *v.* Hendricks, 152 U. S. 691; U. S. *v.* Strauss, 55 Fed. Rep. 388; U. S. *v.* McDowell, 21 Fed. Rep. 563. And see Harding *v.* Whitney, 4 Cliff. (U. S.) 96.

Where the Goods Are Subject to a Specific Duty no right to reappraisement exists. U. S. *v.* Fox, 53 Fed. Rep. 531.

Right of Collector to Order Reappraisement After Delivery to Consignee. — Iasigi *v.* Collector, 1 Wall. (U. S.) 375.

Goods Imported by Manufacturer Entitled to Reappraisement. — Bannendahl *v.* Redfield, 4 Blatchf. (U. S.) 223.

2. When Reappraisement and Not Appeal Is Proper Remedy. — U. S. *v.* Passavant, 169 U. S. 16; Origet *v.* Hedden, 155 U. S. 228; Oberteuffer *v.* Robertson, 116 U. S. 499; Cottier *v.* U. S., 101 Fed. Rep. 423; Dickson *v.* U. S., 68 Fed. Rep. 534, *affirmed* (C. C. A.) 73 Fed. Rep. 195; Wanamaker *v.* Cooper, 69 Fed. Rep. 329.

Although a protest may amount to a notice of dissatisfaction with the appraisement, if delivered without qualification, yet an assertion of the importers, at the same time, to the collector, that they do not ask a reappraisement takes from it that effect. Fielden *v.* Lawrence, 3 Blatchf. (U. S.) 120.

3. Remedy Where Collector Refuses to Order Reappraisement. — Schmaire *v.* Maxwell, 3 Blatchf. (U. S.) 408.

4. Reappraisement Formerly Before Merchant Appraisers. — Auffmordt *v.* Hedden, 137 U. S. 319; Hilton *v.* Merritt, 110 U. S. 97; Belcher *v.* Linn, 24 How. (U. S.) 508; Schmaire *v.* Maxwell, 3 Blatchf. (U. S.) 408.

Reappraisement Void Where Merchant Appraiser Was Sworn by Official Appraiser. — Vaccari *v.* Maxwell, 3 Blatchf. (U. S.) 368.

Removal of Merchant Appraiser Without Sufficient Cause Invalidates Reappraisement. — Greely *v.* Thompson, 10 How. (U. S.) 225.

Importer Not Obliged to Pay for Reappraisement by Merchant Appraiser. — Hedden *v.* Iselin, 31 Fed. Rep. 266; Iselin *v.* Hedden, 28 Fed. Rep. 416; Auffmordt *v.* Hedden, 30 Fed. Rep. 360. But see Fielden *v.* Lawrence, 3 Blatchf. (U. S.) 120.

5. Qualifications of Merchant Appraisers. — Oelbermann *v.* Merritt, 123 U. S. 356; Magone *v.* Origet, (C. C. A.) 70 Fed. Rep. 778. And see Auffmordt *v.* Hedden, 137 U. S. 310.

The importer was entitled to have a merchant appraiser who answered these qualifications, and was entitled to raise the question of a want of qualification by a protest and appeal to the secretary of the treasury, and in a suit at law brought thereafter to recover back duties paid. Oelbermann *v.* Merritt, 123 U. S. 356; Magone *v.* Origet, (C. C. A.) 70 Fed. Rep. 778. But see Falleck *v.* Barney, 5 Blatchf. (U. S.) 38.

Merchant Appraiser Not Within Provisions of Civil Service Law. — Auffmordt *v.* Hedden, 137 U. S. 310.

6. Packages Must Be Examined on Reappraisement. — Knight *v.* Schell, 24 How. (U. S.) 526; U. S. *v.* Fox, 53 Fed. Rep. 531; Burgess *v.* Converse, 2 Curt. (U. S.) 216.

7. When Examination by Sample Is Sufficient. — U. S. *v.* Fox, 53 Fed. Rep. 531.

8. U. S. *v.* McDowell, 21 Fed. Rep. 563.

9. When Unnecessary to Examine All Packages. — Origet *v.* Hedden, 155 U. S. 228.

10. Reappraisement Without Any Examination Invalid. — U. S. *v.* Phillips, 46 Fed. Rep. 466; Ystalifera Iron Co. *v.* Redfield, 23 Fed. Rep. 650.

11. Reappraisement in Absence of Importer. — Earnshaw *v.* U. S., 146 U. S. 60, *affirming* 30

(c) **Reappraisement Not Judicial Proceeding.** — A reappraisement is not a judicial proceeding as regards rules of evidence and procedure, and the importer is not entitled to cross-examine the witnesses or to be informed of all the evidence offered.[1] The reappraisers act without regard to the value declared in the entry,[2] and they may increase the value fixed by the local appraiser, even though the reappraisement is had at the demand of the importer.[3]

(d) **Irregularities in Appraisement Cured by Valid Reappraisement.** — Where the proceedings of the reappraisers are regular, irregularities in the proceedings of the local appraisers are cured thereby.[4]

(e) **Appraisement Stands Where Reappraisement Is Abandoned.** — Where the proceedings for reappraisement are abandoned, the original appraisement is final and conclusive.[5]

(9) *Appeal on Question of Value.* — An appeal lies from the decision of a general appraiser, or from reappraisement, to the board of general appraisers,[6] whose decision as to value is made final and conclusive by statute.[7] The board acquires jurisdiction of the appeal by the transmission to it of the papers designated by the statute, and no formal notice of dissatisfaction by either the importer or the collector is requisite to confer such jurisdiction.[8] An appraisement made by the board without personal examination or investigation of the merchandise, or of any samples thereof, is invalid.[9]

(10) *Conclusiveness of Valuation by Appraisers.* — While the general rule is that the valuation by the local appraisers, in the absence of notice of dissatisfaction, or that by a general appraiser on reappraisement, in the absence of appeal, or that by the board of general appraisers on appeal, is conclusive upon all parties,[10] nevertheless the appraisement is subject to impeachment where the appraiser or collector has proceeded on a wrong principle, contrary to law, or has transcended the power conferred by statute, or has not complied with statutory provisions.[11]

e. LIQUIDATION, RELIQUIDATION, AND APPEAL TO GENERAL APPRAISERS — (1) *Liquidation Defined.* — So far as a liquidation is determined by the law, it is the decision by the collector of the amount of duties, charges, and

Fed. Rep. 672. And see Bangs *v.* Maxwell, 3 Blatchf. (U. S.) 135.

1. Reappraisement Not Judicial Proceeding. — Origet *v.* Hedden, 155 U. S. 228; Hedden *v.* Iselin, 142 U. S. 679; Auffmordt *v.* Hedden, 137 U. S. 310.

2. Reappraisers Not Bound by Value Declared in Entry. — Yanada *v* Spalding, 24 Fed. Rep. 21.

3. Increase of Valuation on Appeal by Importer Valid. — *In re* Megroz, 49 Fed. Rep. 828.

4. Irregularities in Appraisement Cured. — Burgess *v.* Converse, 2 Curt. (U. S.) 216.

5. Appraisement Stands Where Reappraisement Is Abandoned.— Schmaire *v.* Maxwell, 3 Blatchf. (U. S.) 408.

6. Appeal on Questions of Value. — 26 U. S. Stat. at L. 136, c. 407, § 13; Schoenfeld *v.* Hendricks, 152 U. S. 691; U. S. *v.* Loeb, (C. C. A.) 107 Fed. Rep. 692.

Power of General Appraisers to Correct Clerical Errors in Appraisement. — U. S. *v.* Benjamin, 72 Fed. Rep. 51.

7. Decision of General Appraisers Conclusive as to Value. — Schoenfeld *v.* Hendricks, 152 U. S. 691; Auffmordt *v.* Hedden, 137 U. S. 310. And see *infra*, this division of this subsection, *Conclusiveness of Valuation by Appraisers.*

The statute providing that the decision of the board of general appraisers shall be final and conclusive as to value is constitutional. Passavant *v.* U. S., 148 U. S. 214; Auffmordt *v.* Hedden, 137 U. S. 310; Hilton *v.* Merritt, 110 U. S. 97.

8. U. S. *v.* Loeb, (C. C. A.) 107 Fed. Rep. 692, holding that the board had jurisdiction where the collector appealed by order of the treasury department, although he himself was satisfied with the reappraisement; and *overruling* on this point U. S. *v.* Loeb, 99 Fed. Rep. 723.

9. Appraisement Without Examination Invalid. — U. S. *v.* Loeb, (C. C. A.) 107 Fed. Rep. 692.

10. Valuation by Appraisers Generally Conclusive. — Erhardt *v.* Schroeder, 155 U. S. 124; Muser *v.* Magone, 155 U. S. 240; Auffmordt *v.* Hedden, 137 U. S. 310; Belcher *v.* Linn, 24 How. (U. S.) 508; Iasigi *v.* Collector, 1 Wall. (U. S.) 375; *In re* Passavant, 50 Fed. Rep. 788, *affirmed* 148 U. S. 214; U. S. *v.* McDowell, 21 Fed. Rep. 563; Roller *v.* Maxwell, 3 Blatchf. (U. S.) 142; Morris *v.* Maxwell, 3 Blatchf. (U. S.) 143; McCall *v.* Lawrence, 3 Blatchf. (U. S.) 360.

11. When Valuation Is Not Conclusive.—U. S. *v.* Passavant, 169 U. S. 16; Muser *v.* Magone, 155 U. S. 240; Robertson *v.* Frank Bros. Co., 132 U. S. 17; Oelbermann *v.* Merritt, 123 U. S. 356; Mustin *v.* Cadwalader, 123 U. S. 369; U. S. *v.* Loeb, (C. C. A.) 107 Fed. Rep. 692; Hermann *v.* U. S., 84 Fed. Rep. 151; Magone *v.* Origet, (C. C. A.) 70 Fed. Rep. 778; U. S. *v.* Thurber, 28 Fed. Rep. 56.

exactions required to be paid on the merchandise.[1]

(2) *By Whom Made.* — As indicated by the foregoing definition, the liquidation is made in the first instance by the collector.[2]

(3) *Time of Liquidation.* — The statute does not designate any particular period of time within which the liquidation must be made.[3]

(4) *Place of Liquidation.* — Unless the port of destination of the merchandise is one of those mentioned in the statute as ports at which liquidation of duties may be made, such liquidation should be made at the port of first arrival.[4]

(5) *Basis of Liquidation* — (a) **In General.** — In liquidating the duties upon imported merchandise the collector must follow the valuation of the appraisers as long as such valuation remains unimpeached;[5] and the duties cannot be assessed upon any amount less than the entered or invoice value.[6]

(b) **Duty to Be Estimated on Quantity of Goods Received.** — The duty is to be estimated upon the quantity of goods that actually arrives at the port of entry, and not upon the quantity shipped.[7] Where merchandise shrinks in weight during the voyage the duties should be estimated upon the actual weight when received at the port of entry.[8] But if the shrinkage in weight is accompanied by an increase in value per pound, the assessment should be upon the actual quantity received at its increased value per pound.[9]

(c) **Allowance for Damage Received During Voyage.** — No allowance is to be made for damage received by goods in transit; but the consignee may abandon to the United States part of the goods, not less than one-tenth part of the invoice, and thus relieve himself from liability for duties on the goods so abandoned.[10]

1. **Liquidation Defined.** — U. S. *v.* Seidenberg, 17 Fed. Rep. 227. And see U. S. *v.* De Rivera, 73 Fed. Rep. 679.

2. **Liquidation Made by Collector.** — Arthur *v.* Unkart, 96 U. S. 118.

3. **Time for Liquidation Not Fixed by Statute.** — Gandolfi *v.* U. S., (C. C. A.) 74 Fed. Rep. 549; U. S. *v.* De Rivera, 73 Fed. Rep. 679.

Liquidation of Duties upon Merchandise Entered in Bond for Warehouse should take place, in the regular course of business, as soon after the entry as is convenient. It need not be postponed until the importer withdraws his goods for consumption. Merritt *v.* Cameron, 137 U. S. 542.

4. **Liquidation Generally Made at Port of First Arrival.** — Saltonstall *v.* Russell, 152 U. S. 628.

5. **Collector Must Follow Valuation by Appraisers.** — Schoenfeld *v.* Hendricks, 152 U. S. 691; Rankin *v.* Hoyt, 4 How. (U. S.) 327; Thomson *v.* Maxwell, 2 Blatchf. (U. S.) 385.

Where the Goods Are Subject to a Specific Duty the collector must follow the report of the gauger as to quantity. Giglio *v.* U. S., 91 Fed. Rep. 758.

Right of Appraiser to Amend Report to Collector Regarding Valuation. — Hilton *v.* Merritt, 110 U. S. 97.

6. **Collector Cannot Go Below Invoice Value.** — Vantine *v.* U. S., 91 Fed. Rep. 519; Roebling *v.* U. S., 77 Fed. Rep. 601; Harding *v.* Whitney, 4 Cliff. (U. S.) 96.

The Rule Stated in the Text Has No Application where a fraud has been committed upon the importers by a misdescription in the invoice of the goods entered. Lillie *v.* Redfield, 4 Blatchf. (U. S.) 41.

Or where the true invoice value of the goods has been increased through the unauthorized addition, by a United States consul, of the ocean freight thereon. U. S. *v.* Zuricaldy, 71 Fed. Rep. 955.

Or where the invoice states that charges forming no part of the true dutiable value of the merchandise are included in the invoice value, and such charges are also written separately on the invoice in such manner that their amount is readily ascertainable. Tryon *v.* Hartranft, 31 Fed. Rep. 443.

7. **Duty Estimated on Quantity of Merchandise Received.** — Robertson *v.* Bradbury, 132 U. S. 491; Belcher *v.* Linn, 24 How. (U. S.) 508; Lawrence *v.* Caswell, 13 How. (U. S.) 488; Marriott *v.* Brune, 9 How. (U. S.) 619; U. S. *v.* Southmayd, 9 How. (U. S.) 637; Schuchardt *v.* Lawrence, 3 Blatchf. (U. S.) 397; Wilson *v.* Maxwell, 2 Blatchf. (U. S.) 316; Shelton *v.* Austin, 1 Cliff. (U. S.) 388; Shaw *v.* Dix, 72 Fed. Rep. 166; Louisville Public Warehouse Co. *v.* Collector of Customs, (C. C. A.) 49 Fed. Rep. 561; Weaver *v.* Saltonstall, 38 Fed. Rep. 493.

Report of Shortage by Appraiser Sufficient Evidence Thereof. — U. S. *v.* Park, 77 Fed. Rep. 608.

No Allowance for Loss After Arrival. — No allowance can be made for loss by leakage or evaporation after the arrival and entry of the merchandise at the custom house, except in cases provided for by Act of Oct. 1, 1890, § 50. Louisville Public Warehouse Co. *v.* Collector of Customs, (C. C. A.) 49 Fed. Rep. 561. And see Belcher *v.* Linn, 24 How. (U. S.) 508.

8. **Rule Where Merchandise Shrinks in Weight During Voyage.** — Balfour *v.* Sullivan, 8 Sawy. (U. S.) 648, 17 Fed. Rep. 231. But see Robertson *v.* Bradbury, 132 U. S. 491.

9. **Rule Where Shrinkage in Weight Is Accompanied by Increase in Value.** — Reiss *v.* Magone, 39 Fed. Rep 105.

10. **Rule as to Goods Damaged During Voyage.** — 26 U. S. Stat. at L. 140, c. 407, § 23; Shaw *v.* Dix, 72 Fed. Rep. 166; U. S. *v.* Bache, (C. C. A.) 59 Fed. Rep. 762.

(d) **Allowance for Tare, Draught, and Impurities.** — Allowances for tare are regulated by statute;[1] and by the same statute it is provided that in no case shall there be any allowance for draught.[2] Nor can any allowance be made for the water physically or chemically combined with imported iron ore.[3]

(e) **Goods Admitted Free of Duty for Temporary Use and Not Re-exported.** — Where articles which have been admitted free of duty, for temporary use, are not re-exported at the end of the period prescribed in the re-exportation bond, the duties thereon must be liquidated at the rate prescribed by the statute in force at the time of importation, and not according to a new tariff law which has taken effect during the interval.[4]

(6) *Assessment of Additional or Countervailing Duties.* — It is the duty of the collector, in proper cases, to levy and assess the additional or countervailing duties provided for by the statutes.[5]

(7) *Goods Entitled to Free Entry.* — In order to enter goods free of duty the importer must furnish the proof required by statute or by the regulations of the Treasury Department that such goods are free of duty under the tariff laws.[6] And if free and dutiable goods are mingled in the same importation, he must also segregate from the rest those entitled to free entry.[7]

(8) *Goods Invoiced in Foreign Currency.* — Where goods are invoiced in a foreign currency, the value of the foreign coins as ascertained by the director of the mint and proclaimed by the secretary of the treasury is conclusive upon custom-house officers and importers.[8] Such value is based upon the intrinsic or pure metal value of the coins, and not upon the exchange value,[9]

Shortage Resulting from Entire Destruction of Specific Articles Not Damage. — Shaw *v.* Dix, 72 Fed. Rep. 166.

The Portion Abandoned Must Amount to at Least Ten per Centum of the total value or quantity of the invoice, and not merely ten per centum of the amount which reaches the United States. Stone *v.* Lawder, (C. C. A.) 101 Fed. Rep. 710.

No Abandonment Allowed Unless Goods Are Damaged. — U. S. *v.* One Case Paintings, etc., (C. C. A.) 99 Fed. Rep. 426.

Rule under Former Statutes. — Before the passage of the law of 1890 it was necessary to ascertain before entry the extent to which the goods had been damaged in transit, and proof of the damage had to be lodged in the custom house of the port of entry within ten days after the goods had been landed. Shelton *v.* Collector, 5 Wall. (U. S.) 113; Shelton *v.* Austin, 1 Cliff. (U. S.) 388; Earnshaw *v.* Cadwalader, 145 U. S. 247.

Rule as to Goods Recovered from Wreck. — U. S. *v.* Cook, 1 Sprague (U. S.) 213.

1. Allowance for Tare. — Fachri *v.* Magone, 53 Fed. Rep. 789; Wilson *v.* Maxwell, 2 Blatchf. (U. S.) 316.

2. Where the Article Is Subject to a Specific Duty a deduction may be made for impurities, notwithstanding the statute which forbids any allowance for draught Seeberger *v.* Wright, etc., Oil, etc., Mfg. Co., 157 U. S. 183, *affirming* 44 Fed. Rep. 258.

3. No Allowance for Water in Iron Ore. — Earnshaw *v.* Cadwalader, 145 U. S. 247.

4. U. S. *v.* Russell, (C. C. A.) 84 Fed. Rep. 878, *reversing* 78 Fed. Rep. 808.

5. Additional or Countervailing Duties — When Properly Assessed. — Downs *v.* U. S., (C. C. A.) 113 Fed. Rep. 144; U. S. *v.* Hills Bros. Co., (C. C. A.) 107 Fed. Rep. 107, *reversing* 99 Fed. Rep. 425.

Conclusiveness of Decision of Secretary of Treasury as to Amount of Countervailing Duty. — Downs *v.* U. S., (C. C. A.) 113 Fed. Rep. 144.

6. Proof of Right to Free Entry Essential. — U. S. *v.* Brewer, (C. C. A.) 92 Fed. Rep. 343; Eimer *v.* U. S., 87 Fed. Rep. 202; Brewer *v.* U. S., 84 Fed. Rep. 149; Beck *v.* U. S., 84 Fed. Rep. 150; U. S. *v.* Dominici, (C. C. A.) 78 Fed. Rep. 334; Bark Edwards, 12 Fed. Rep. 508.

For Qualifications of the Rule Stated in the Text, see U. S. *v.* E. L. Goodsell Co., (C. C. A.) 91 Fed. Rep. 519; Hensel *v.* U. S., 72 Fed. Rep. 52; Bartram *v.* U. S., 77 Fed. Rep. 604.

7. Free and Dutiable Goods Must Be Separated. — U. S. *v.* Brewer, (C. C. A.) 92 Fed. Rep. 343.

Where merchandise liable in large part to duty is entered as exempt therefrom, the collector has the right to assume that the mingling was intentional and with design to evade the revenue laws; and hence even where the confusion of goods is accidental or not fraudulent in fact, and forfeiture is not incurred, it yet devolves on the importer to show what part of the whole he contends should not be taxed. If, however, such proof is furnished in the Circuit Court, and it appears that no fraud on the revenue was intended, the duties levied on the free merchandise may be refunded. U. S. *v.* Ranlett, 172 U. S. 133.

8. Proclaimed Value of Foreign Coins Conclusive on Customs Officers. — U. S. *v.* Klingenberg, 153 U. S. 93; Hadden *v.* Merritt, 115 U. S. 25; Cramer *v.* Arthur, 102 U. S. 612; U. S. *v.* Knauth, 77 Fed. Rep. 599; Meyer *v.* Cooper, 44 Fed. Rep. 55; Gordon *v.* Magone, 40 Fed. Rep. 747.

Rule Where Goods Are Invoiced in More than One Foreign Currency. — U. S. *v.* Klingenberg, 77 Fed. Rep. 279; *In re* McCarty, 46 Fed. Rep. 360.

Standard Followed Must Be Real and Not Nominal Standard. — U. S. *v.* Knauth, 77 Fed. Rep. 599.

9. Pure Metal Value the Basis. — U. S. *v.* Newhall, 91 Fed. Rep. 525; U. S. *v.* Beebe, 117 Fed. Rep. 670.

and the collector has no power to disregard the proclaimed value on proof that the exchange value of the foreign currency was, at the date of certification, ten per centum more or less than such proclaimed value,[1] nor can the secretary of the treasury order a reliquidation on such proof.[2] But where the goods are invoiced in a depreciated currency, allowance is to be made for the depreciation, provided the invoice is accompanied by the required consular certificate.[3] The value of the foreign currency at the time the merchandise was exported from the foreign country is the value to be taken.[4]

(9) *General Rules of Classification.*—The dutiable classification of an article imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported,[5] and such classification is to be determined as of the date when the law imposing the duty was passed.[6]

Use of Article as Determining Classification. — Where there is any doubt as to the classification of an imported article, the use for which it is designed is an important element in determining its classification,[7] especially if the article is new, and is used as a substitute for other articles.[8] But there is no rule which requires articles to be classified in all cases according to their use or the purpose of their importation.[9]

Specific Designation to Prevail over General Description. — An article which is dutiable by its specific designation will not be affected by the general words of the same or another statute which would otherwise include it, whether such general words would reduce or increase the duty.[10]

Application of Similitude Clause. — Imported articles not specially named in the tariff acts, but which bear a similitude, either in material, quality, texture, or use, to enumerated dutiable articles, are dutiable at the same rate as the articles which they most resemble.[11] This similitude must be a substantial

1. Adoption of Exchange Value Erroneous. — U. S. *v.* Beebe, (C. C. A.) 106 Fed. Rep. 75; U. S. *v.* Beebe, 103 Fed. Rep. 785; U. S. *v.* Newhall, 91 Fed. Rep. 525.

2. U. S. *v.* Beebe, 117 Fed. Rep. 670.

3. Allowance Made for Depreciated Currency. — Cramer *v.* Arthur, 102 U. S. 612; De Forest *v.* Redfield, 4 Blatchf. (U. S.) 478; Rich *v.* Maxwell, 3 Blatchf. (U. S.) 127; Alsop *v.* Maxwell, 3 Blatchf. (U. S.) 399; Alsop *v.* Maxwell, 2 Blatchf. (U. S.) 557; Grant *v.* Maxwell, 2 Blatchf. (U. S.) 220; Loewenstein *v.* Maxwell, 2 Blatchf. (U. S.) 401; Dutilh *v.* Maxwell, 2 Blatchf. (U. S.) 541.

A Consular Certificate attached to the invoice, stating the value of the currency in which the invoice is made out, is conclusive evidence of such value. Cramer *v.* Arthur, 102 U. S. 612. *Compare* De Forest *v.* Redfield, 4 Blatchf. (U. S.) 478.

And where no such certificate is attached, the depreciation of the currency cannot be shown by parol evidence. Dutilh *v.* Maxwell, 2 Blatchf. (U. S.) 541.

4. Value of Currency at Time of Exportation Governs. — U. S. *v.* Knauth, 77 Fed. Rep. 599; Wood *v.* U. S., (C. C. A.) 72 Fed. Rep. 254, *distinguishing* Heinemann *v.* Arthur, 120 U. S. 82.

5. Classification Determined by Examination of Article Itself. — Dwight *v.* Merritt, 140 U. S. 213; Worthington *v.* Robbins, 139 U. S. 337.

6. Classification as of Date When Act Was Passed Correct. — Rossman *v.* Hedden, 145 U. S. 561.

7. Use of Article Important in Determining Classification. — Robertson *v.* Oelschlaeger, 137 U. S. 436; Russell *v.* U. S., 15 Blatchf. (U. S.) 26; Hagedon *v.* Seeberger, 38 Fed. Rep. 401; Zucker, etc., Chemical Co. *v.* Magone, 37 Fed. Rep. 776; U. S. *v.* Eleven Horses, 30 Fed. Rep. 916.

Chief or Predominant Use Controlling. — Sonn *v.* Magone, 159 U. S. 417; Meyer *v.* Cadwalader, (C. C. A.) 89 Fed. Rep. 963; U. S. *v.* Roessler, etc., Chemical Co., (C. C. A.) 79 Fed. Rep. 313.

Medicinal Use to Prevail over Chemical Composition. — U. S. *v.* Fougera, 90 Fed. Rep. 801.

Common Use Not Essential. — An article which is actually, practically, and commercially fit for a certain purpose may be said to be suitable for that purpose even though it is not commonly used therefor. White *v.* U. S., 69 Fed. Rep. 93.

8. Koch *v.* Seeberger, 30 Fed. Rep. 424.

9. Use Not Decisive in All Cases. — Seeberger *v.* Schlesinger, 152 U. S. 581; Dwight *v.* Merritt, 140 U. S. 213; Worthington *v.* Robbins, 139 U. S. 337; U. S. *v.* Nichols, 46 Fed. Rep. 359; Jessup, etc., Paper Co. *v.* Cooper, 46 Fed. Rep. 186. And see Chew Hing Lung *v.* Wise, 176 U. S. 156.

10. Specific Designation Prevails over General Description. — Arthur *v.* Rheims, 96 U. S. 143; Movius *v.* Arthur, 95 U. S. 144; Homer *v.* Collector, 1 Wall. (U. S.) 486. And see the cases cited *supra*, this title, *Construction of Revenue Laws — Specific Designation to Prevail over General Description.*

11. Application of Similitude Clause in General. — Schmieder *v.* Barney, 113 U. S. 645; Arthur *v.* Fox, 108 U. S. 125.

Similitude Clause Not Applicable to Enumerated Articles. — Arthur *v.* Sussfield, 96 U. S. 128.

The Phrase "of Similar Description" Is Not a Commercial Term, and if certain articles are

similitude, and not a mere adaptability to sale as a substitute for another article,[1] but it need not apply to all the four particulars of material, quality, texture, and use.[2] The similitude clause is to be applied in preference to the general residuary clause.[3]

Articles Manufactured from Two or More Materials. — Articles manufactured from two or more materials are dutiable at the highest rates at which the component material of chief value is chargeable.[4]

Articles Produced in Country Other than That of Exportation. — Articles imported from a country other than that of their production, which have been changed in their condition in the country of exportation without destroying their identity, are dutiable as products of the country where they were first produced.[5]

(10) *Reliquidation.* — In the absence of fraud or of a protest by the importer, the liquidation is conclusive as against all parties after the expiration of one year from the date of entry, and no reliquidation can be had after that time.[6] Before the expiration of that period, however, a reliquidation may be had in a proper case,[7] and the statute providing that the collector's decision as to the rate and amount of duties shall be final, in the absence of protest and appeal by the importer, does not prevent such reliquidation.[8]

(11) *Appeal to General Appraisers.* — An appeal lies from the collector to the board of general appraisers as to the rate and amount of duties, including all dutiable costs and charges, and as to all fees and exactions of whatever character, except duties on tonnage.[9] In the absence of an appeal the decision of the collector as to these matters is final and conclusive, provided he has

similar to others in product, in adaptation to uses, and in uses, they are of similar description, even though in commerce they might be classed as different articles. Schmieder *v.* Barney, 113 U. S. 645, *citing* Greenleaf *v.* Goodrich, 101 U. S. 278.

1. Substantial Similitude Essential. — Murphy *v.* Arnson, 96 U. S. 131; Sykes *v.* Magone, 38 Fed. Rep. 494.

2. Similitude as to All Particulars Not Essential. — Arthur *v.* Fox, 108 U. S. 125; Weilbacher *v.* Merritt, 37 Fed. Rep. 85. But see Lazard *v.* Magone, 40 Fed. Rep. 662.

3. Similitude Clause Applied in Preference to General Residuary Clause. — Hahn *v.* U. S., (C. C. A.) 100 Fed. Rep. 635.

4. Rule as to Articles Manufactured from Two or More Materials. — Arthur *v.* Fox, 108 U. S. 125.

The component materials are to be valued as of the time when they are put together in the completed article and not as of the time when they are received by the manufacturer in their raw and unmanufactured condition. Seeberger *v.* Hardy, 150 U. S. 420.

5. Thus, the advancing in England to tram, thrown, and organzine, of raw silk produced in India does not make the silk any the less the production of India. Strange *v.* Barney, 35 Fed. Rep. 196.

And the cleaning in England of rice grown in India does not so change its identity as to cause it to cease to be an Indian product. Williams *v.* Barney, 5 Blatchf. (U. S.) 219.

6. No Reliquidation After One Year from Entry. — Beard *v.* Porter, 124 U. S. 437; U. S. *v.* Fox, 53 Fed. Rep. 531; U. S. *v.* Seidenberg, 17 Fed. Rep. 227; U. S. *v.* Frazer, 10 Ben. (U. S.) 347; U. S. *v.* Phelps, 17 Blatchf. (U. S.) 312.

Rule Not Applicable to Original Liquidation. — Gandolfi *v.* U. S., (C. C. A.) 74 Fed. Rep. 549.

What Not Reliquidation. — Jacot *v.* U. S., 84 Fed. Rep. 159.

7. Reliquidation May Be Had Before Expiration of Year. — U. S. *v.* Fox, 53 Fed. Rep. 531; U. S. *v.* McDowell, 21 Fed. Rep. 563.

After the Goods Are Delivered to the Importer, and neither the goods, nor any part of them, nor samples, are accessible for examination for the purpose of appraisement or classification, the collector has no power to reliquidate the duty upon the report of an appraiser who never examined the goods. U. S. *v.* Frazer, 10 Ben. (U. S.) 347.

8. U. S. *v.* Phelps, 17 Blatchf. (U. S.) 312.

9. Right of Appeal to General Appraisers in General. — 26 U. S. Stat. at L. 137, c. 407, § 14; U. S. *v.* Passavant, 169 U. S. 16; U. S. *v.* Newhall, 91 Fed. Rep. 525; U. S. *v.* Park, 77 Fed. Rep. 608; U. S. *v.* Klingenberg, 77 Fed. Rep. 279; Gandolfi *v.* U. S., (C. C. A.) 74 Fed. Rep. 549; Foster *v.* Vocke, 60 Fed. Rep. 745.

Under Former Statutes the Appeal Was to the Secretary of the Treasury. Auffmordt *v.* Hedden, 137 U. S. 310; Arthur *v.* Unkart, 96 U. S. 118; Westray *v.* U. S., 18 Wall. (U. S.) 322; U. S. *v.* Earnshaw, 45 Fed. Rep. 782.

A Question as to the Right of an Importer to an Allowance on account of a shortage in an importation is one on which an appeal may be taken to the board of general appraisers. U. S. *v.* Park, 77 Fed. Rep. 608.

As to the Manner of Taking the Appeal, the questions open for review before the board of general appraisers, and subsequent review by the Circuit Court, see *infra*, this title, *Review of Collector's Decision — Return of Duties Illegally Assessed.*

not exceeded the scope of his authority.[1]

f. BONDS AND BONDED WAREHOUSES — (1) *Bonds for Duties Before Bonded-warehouse Act.* — Before the enactment of the bonded-warehouse act importers were allowed to land their goods and take them away upon giving bond, with sureties, for the payment of the duties within a stated period.[2] A mere informality in the form of such bond would not avoid it,[3] nor would a cancellation fraudulently made by the collector without the payment of the duties.[4]

(2) *Transportation Bonds.* — Provision has been made by statute in accordance with which merchandise imported at certain ports, consigned to one of the ports afterwards named in the statute, may be entered for warehouse and immediate transportation, and examined, and the duties estimated at the port of first arrival, but the appraisement and liquidation of duties made at the port of destination.[5] In such cases the importer is required to furnish a transportation bond conditioned for the delivery of the merchandise to the collector at the latter port.[6]

(3) *Bonds Required Where Merchandise Is Delivered Before Final Liquidation.* — Where goods are delivered to the importer on payment of the duties as estimated, before liquidation, a bond may be required conditioned for the payment of any further amount that may be found due on such liquidation,[7] or for the return of the packages delivered, on demand by the collector, for the purpose of further examination.[8]

(4) *Bonded Warehouses* — (a) **In General.** — Imported merchandise may now be entered for warehousing without paying the duties at the time of entry, in which event the goods are delivered to the collector and are deposited in a bonded warehouse. Both the duties and expenses are required to be ascertained at the time of the entry of the goods for warehousing, and the duties and charges are to be secured by bond of the importer, with surety or sureties to the satisfaction of the collector, the goods being at all times, within three years of the date of entry, subject to the orders of the depositor, upon payment of the proper duties and expenses.[9] Where the custom-house officers unlawfully allow the goods to be withdrawn from the warehouse without full payment of duty, the owner is not thereby relieved of liability for such duties.[10]

1. **Decision Conclusive in Absence of Appeal.** — U. S. *v.* Passavant, 169 U. S. 16; Arthur *v.* Unkart, 96 U. S. 118; Gandolfi *v.* U. S., (C. C. A.) 74 Fed. Rep. 549; U. S. *v.* Earnshaw, 45 Fed. Rep. 782; U. S. *v.* McDowell, 21 Fed. Rep. 563; Westray *v.* U. S., 18 Wall. (U. S.) 322.

2. **Bonds for Duties.** — Knox *v.* Devens, 5 Mason (U. S.) 380.

In the Case of Teas the duties could be secured by the individual bond of the importer with a deposit of the teas. U. S. *v.* 350 Chests Tea, 12 Wheat. (U. S.) 486.

3. **Bond Not Void for Informality.** — U. S. *v.* Pingree, 1 Sprague (U. S.) 339.

4. **Bond Not Avoided by Fraudulent Cancellation.** — U. S. *v.* Williams, 1 Ware (U. S.) 175; Johnson *v.* U. S., 5 Mason (U. S.) 425.

What Sufficient to Discharge Bond. — In U. S. *v.* Rousmaniere, 2 Mason (U. S.) 373, it was held that where such a bond was placed by the government in a bank for collection and the bank discounted for the principal obligor notes having forged indorsements, and placed the proceeds to the credit of the United States in discharge of the bond, the bond was thereby discharged.

5. **Merchandise Entered for Immediate Transportation.**—Saltonstall *v.* Russell, 152 U. S. 628.

6. **Transportation Bond Required.** — Belcher *v.* Linn, 24 How. (U. S.) 508.

Amount of Bond — Additional Duty for Failure to Rewarehouse Goods. — U. S. *v.* Pingree, 1 Sprague (U. S.) 339.

7. U. S. *v.* Cobb, 11 Fed. Rep. 76, holding also that the secretary of the treasury had the right to change an erroneous ruling by virtue of which goods had been delivered to an importer free of duty.

8. **Bond for Return of Packages — Amount Recoverable for Breach.** — U. S. *v.* Dieckerhoff, 103 Fed. Rep. 789.

9. **Bonded Warehouses in General.** — Fabbri *v.* Murphy, 95 U. S. 191; Matter of Clifford, 2 Sawy. (U. S.) 428; Clark *v.* Peaslee, 1 Cliff. (U. S.) 545.

Rights Confined to Ports of Entry unless extended by secretary of treasury to ports of delivery, see Tremlett *v.* Adams, 13 How. (U. S.) 295.

Charges for Storage Where Goods Are Deposited in Importer's Own Warehouse.— Clark *v.* Peaslee, 1 Cliff. (U. S.) 545; Corkle *v.* Maxwell, 3 Blatchf. (U. S.) 413.

As to the Rights and Liabilities of Sureties in Warehouse Bonds, see U. S. *v.* De Visser, 10 Fed. Rep. 642.

10. Minturn *v.* U. S., 106 U. S. 437.

The obligor in a warehouse bond can be relieved of a forfeiture, in equity, only upon payment of all the duties secured by the bond. The payment of a lesser amount is of no avail, even though such amount is named in the bond as an alternative penalty.[1]

(b) **Rate of Duty Payable on Withdrawal of Goods.** — Under the law as it formerly stood, goods remaining in a bonded warehouse for more than a year were chargeable with an additional duty of ten per cent.[2] But the law imposing this additional duty has been repealed, and goods may now be withdrawn from a bonded warehouse at any time within three years from the date of original importation, on payment of the duties and charges to which they are subject by law at the date of such withdrawal.[3] A statute providing that where the duties upon goods are assessed according to their weight, such weight shall be taken as of the time when the goods are withdrawn from a bonded warehouse, does not apply to spirituous liquors upon which duties are assessed by the gallon, and such liquors, when withdrawn from the warehouse, must pay duty according to their measurement at the time when they were imported.[4]

(c) **Goods Abandoned to Government After Three Years.** — Goods remaining in the public stores or bonded warehouses beyond three years are thereby abandoned to the government, and must be sold in accordance with the provisions of the statute;[5] and the time that the goods remain on shipboard after the arrival of the ship in port is included in this period.[6] After payment of the duties, charges, and expenses out of the proceeds of the sale, the surplus, if any remain, may be paid to the importer.[7]

(d) **Perishable Goods to Be Sold.** — Perishable goods deposited in a bonded warehouse must be sold in accordance with the provisions of the statute;[8] and the collector is the one to determine whether the goods are perishable.[9]

(e) **Sale of Goods in Bond.** — Goods may be sold in bond, the vendee paying the duties upon withdrawal.[10]

(f) **Collector Not Responsible for Goods Lost While in Warehouse.** — The collector is not responsible for goods lost while in warehouse, unless the loss is caused by his personal negligence.[11]

g. RECOVERY OF DUTIES — (1) *Liability in General.* — It is well settled that the right of the government to duties is not limited to its lien on the goods, or to a bond given for their payment.[12] The duties constitute a per-

1. Westray *v.* U. S., 18 Wall. (U. S.) 322.

2. **Goods Formerly Subject to Additional Duty After One Year.**—Fabbri *v.* Murphy, 95 U. S. 191.

Where goods imported at one port were consigned to another as the port of final destination, it was held that the year ran from the time of their arrival at the first port of entry, and not from the time that they were warehoused at the interior port of destination. Seeberger *v.* Schweyer, 153 U. S. 609, *overruling* Farwell *v.* Spalding, 24 Fed. Rep. 18.

3. **Additional Duties No Longer Assessable.** — Schmid *v.* U. S., 66 Fed. Rep. 744; *In re* Schmid, 54 Fed. Rep. 145. And see Merritt *v.* Cameron, 137 U. S. 542; U. S. *v.* Benzon, 2 Cliff. (U. S.) 512.

4. Louisville Public Warehouse Co. *v.* Collector of Customs, (C. C. A.) 49 Fed. Rep. 561, *affirming* Louisville Public Warehouse Co. *v.* Louisville, 48 Fed. Rep. 372.

5. **Goods Abandoned to Government After Three Years.** — Rev. Stat. U. S., § 2971; Buxbaum *v.* U. S., (C. C. A.) 80 Fed. Rep. 885; Anglo-California Bank *v.* Secretary of Treasury, (C. C. A.) 76 Fed. Rep. 742; *In re* Secretary of Treasury, 71 Fed. Rep. 505; U. S. *v.* De Visser, 10 Fed. Rep. 642.

Surety Discharged by Postponement of Sale. — A surety in a warehouse bond is discharged of liability by an unlawful postponement of the sale of abandoned goods, but this rule does not apply to the principal in the bond. U. S. *v.* De Visser, 10 Fed. Rep. 642.

6. Hartranft *v.* Oliver, 125 U. S. 525.

7. **Surplus Proceeds of Sale Paid to Importer.** — Rev. Stat. U. S., § 2972; Anglo-California Bank *v.* Secretary of Treasury, (C. C. A.) 76 Fed. Rep. 742; U. S. *v.* De Visser, 10 Fed. Rep. 642.

8. Rev. Stat. U. S., § 2975.

9. **Collector Determines Whether Goods Are Perishable.** — Gould *v.* Hammond, McAll. (U. S.) 235

10. **Sale of Goods in Bond — Obligors in Bond Not Released By.** — Minturn *v.* U. S., 106 U. S. 437.

11. **Collector Not Responsible for Goods Lost in Warehouse.** — Brissac *v.* Lawrence, 2 Blatchf. (U. S.) 121.

12. **Government Right Not Limited to Lien or Bond.** — U. S. *v.* Cobb, 11 Fed. Rep. 76; U. S. *v.* Lyman, 1 Mason (U. S.) 482; Meredith *v.* U. S., 13 Pet. (U. S.) 486; U. S. *v.* Phelps, 17 Blatchf. (U. S.) 312.

sonal debt or charge upon the importer, which accrues immediately upon the arrival of the goods at the proper port of entry with intent to unlade.[1] They are due although the goods have been smuggled, or for any reason have never come to the hands of the customs officers, or the statute proceedings have never been instituted, or through accident or mistake or fraud no duties or short duties have been paid, and the importer is not discharged from his debt by the delivery to him of the goods without payment.[2] Nor does the accidental destruction of the goods after importation,[3] or their forfeiture and sale for fraud upon the revenue, relieve the importer from the liability for duties thereon.[4]

The Consignee of Imported Goods Is the One Personally Liable for the duties.[5]

Where Property Is Brought into the United States by Salvors or Privateers and is afterwards sold here with the consent of the owner, it then becomes dutiable.[6] The liability in such case relates back to the time of the importation.[7]

(2) *Lien for Duties.* — The government has a lien for duties on imported goods which, however, does not extend to other property of the importer,[8] or prevent the consignee from passing title to the goods subject thereto.[9] It attaches to imported articles at the moment of importation, and is not discharged by an unauthorized and illegal removal of the goods from the custody of the customs officers.[10] The collector has the right to hold possession of the goods until the duty is paid or secured.[11]

Lien Inferior to that of Salvors. — The lien of the government for duties is inferior to that of salvors.[12]

(3) *Recovery by Action* — **In General.** — As unpaid duties constitute a personal debt to the United States from the importer or owner, it follows that

1. Unpaid Duties Personal Debt — When Liability Accrues. — U. S. *v.* Dodge, Deady (U. S.) 124; Arnold *v.* U. S., 9 Cranch (U. S.) 120; U. S. *v.* Vowell, 5 Cranch (U. S.) 368; McAndrew *v.* Robertson, 24 Blatchf. (U. S.) 170, 29 Fed. Rep. 246; U. S. *v.* Boyd, 23 Blatchf. (U. S.) 299; U. S. *v.* Phelps, 17 Blatchf. (U. S.) 312; Meredith *v.* U. S., 13 Pet. (U. S.) 486; U. S. *v.* Ten Thousand Cigars, 2 Curt. (U. S.) 436; Prince *v.* U. S., 2 Gall. (U. S.) 208; U. S. *v.* Lindsey, 1 Gall. (U. S.) 365; Perots *v.* U. S., Pet. (C. C.) 256; Flagler *v.* Kidd, (C. C. A.) 78 Fed. Rep. 341; McLean *v.* Hager, 31 Fed. Rep. 602; U. S. *v.* Boyd, 24 Fed. Rep. 692; U. S. *v.* Cobb, 11 Fed. Rep. 76.

2. Duties Due at All Events. — U. S. *v.* Boyd, 24 Fed. Rep. 690; U. S. *v.* Koblitz, 15 Fed. Rep. 900; U. S. *v.* Cobb, 11 Fed. Rep. 76; U. S. *v.* Goodwin, 4 Mason (U. S.) 128; U. S. *v.* Lyman, 1 Mason (U. S.) 482.

Liability of Purchaser of Smuggled Goods. — But if goods are purchased after they have been imported and have passed the custom house without the payment of duty, the purchaser is not liable for the duty, unless he has connived at and is shown to have been privy to the importation, and to passing the goods without the payment of duty. U. S. *v.* Koblitz, 15 Fed. Rep. 900.

3. Liability Not Avoided by Destruction of Goods. — Wolfe *v.* Howard Ins. Co., 1 Sandf. (N. Y.) 124, *affirmed* 7 N. Y. 583.

4. Liability Not Avoided by Forfeiture of Goods. — U. S. *v.* Gray, 107 Fed. Rep. 104, *affirmed* (C. C. A.) 113 Fed. Rep. 213; Baldwin *v.* U. S., (C. C. A.) 113 Fed. Rep. 217; U. S. *v.* One Case Paintings, etc., (C. C. A.) 99 Fed. Rep. 426; U. S. *v.* Boyd, 23 Blatchf. (U. S.) 299, 24 Fed. Rep. 690.

Liability Not Released by Abandonment of Goods Not Damaged. — U. S. *v.* One Case Paintings, etc., (C. C. A.) 99 Fed. Rep. 426.

5. Consignee Person Liable. — U. S. *v.* Murdoch, 2 Cranch (C. C.) 486; U. S. *v.* Phelps, 17 Blatchf. (U. S.) 312.

Remedy of Sureties Who Are Obliged to Pay Duties. — Where a consignee gives a bond for the payment of duties, the sureties thereon, if obliged to pay the duties, must look to the consignee for repayment, and they have no remedy over against the owner of the goods. Knox *v.* Devens, 5 Mason (U. S.) 380; Childs *v.* Shoemaker, 1 Wash. (U. S.) 494.

6. The Brig Concord, 9 Cranch (U. S.) 387; Merritt *v.* One Package Merchandise, 30 Fed. Rep. 195, 32 Fed. Rep. 111.

7. Prince *v.* U. S., 2 Gall. (U. S.) 204.

8. Government Has Lien for Duties. — Harris *v.* Dennie, 3 Pet. (U. S.) 292.

Extent of Lien — Whether Applicable to Whole Consignment or Part Only. — Hendricks *v.* Schmidt, (C. C. A.) 68 Fed. Rep. 425.

9. Consignee May Sell Goods Subject to Lien. — Howland *v.* Harris, 4 Mason (U. S.) 497; D'Wolf *v.* Harris, 4 Mason (U. S.) 515.

10. Lien Attaches Immediately on Importation. — U. S. *v.* 350 Chests Tea, 12 Wheat. (U. S.) 486.

Specific Lien Relinquished by Acceptance of Security and Delivery of Goods. — U. S. *v.* Murdoch, 2 Cranch (C. C.) 486.

11. Collector May Hold Goods until Duty Is Paid or Secured. — Tracy *v.* Swartwout, 10 Pet. (U. S.) 80.

Attachment of Goods by State Officers Void as Interference with Lien. — Harris *v.* Dennie, 3 Pet. (U. S.) 292.

12. Lien Inferior to That of Salvors. — Merritt *v.* One Package Merchandise, 30 Fed. Rep. 195, 32 Fed. Rep. 111.

they may be recovered by suit,[1] the proper form of action being debt [2] or assumpsit.[3] As a general rule, the amount recoverable is determined by the original liquidation.[4] But where the amount of duties is increased upon a valid reliquidation, after payment of the duties originally assessed, the government may sue to recover the additional amount,[5] provided the suit is brought within one year from entry.[6]

When Appraisement and Liquidation Are Not Conditions Precedent. — Where the importer has by his fraudulent acts deprived the government of a chance to appraise the goods and liquidate the duties thereon, he cannot insist on appraisement and liquidation as conditions precedent to the action.[7]

Presumptions and Burden of Proof. — In an action to recover duties the government must prove the facts constituting the defendant's liability;[8] but where any attack is made upon any of the proceedings for assessing or liquidating the duty, the presumption is in favor of the regularity and correctness of such proceedings.[9]

Valuation and Assessment Generally Conclusive in Absence of Appeal. —No question can be raised as to the value fixed by the appraisers, or the amount of duties assessed by the collector, unless these officers have proceeded upon a wrong principle, contrary to law, and the importer has protested and appealed.[10]

Dismissal of Former Suit Defense. — Where the suit is brought against a bailee, it is a good defense that a suit therefor against the owner of the goods was dismissed by the government after plea filed, and that four years elapsed between the dismissal of such suit and the commencement of the suit against

1. Action Lies to Recover Duties. — U. S. *v.* Boyd, 23 Blatchf. (U. S.) 299, 24 Fed. Rep. 690; U. S. *v.* Phelps, 17 Blatchf. (U. S.) 312; U. S. *v.* Dodge, Deady (U. S.) 124; Meredith *v.* U. S., 13 Pet. (U. S.) 493; U. S. *v.* Cobb, 11 Fed. Rep. 76.

2. "Debt" Proper. — U. S. *v.* Boyd, 24 Fed. Rep. 690; U. S. *v.* Goodwin, 4 Mason (U. S.) 130; U. S. *v.* Hathaway, 3 Mason (U. S.) 324; U. S. *v.* Lyman, 1 Mason (U. S.) 482; An Ullage Box Sugar, 1 Ware (U. S.) 350.

3. "Assumpsit" Proper. — U. S. *v.* Howland, 2 Cranch (C. C.) 508.

Lien for Duties Not Enforceable by Libel in Admiralty. — U. S. *v.* 350 Chests Tea, 12 Wheat. (U. S.) 487.

4. After duties have been paid as liquidated, a suit cannot be maintained for duties alleged to be due in excess of the liquidation on account of fraud in the appraisal. U. S. *v.* McDowell, 21 Fed. Rep. 563.

5. Recovery of Additional Amount Found Due on Reliquidation. — Where imported goods have been withdrawn from the warehouse upon giving bond conditioned for the payment of duties within a year, payment of the duties as liquidated within that time operates as a satisfaction of the bond, even though the duties have in the meantime been reliquidated at a larger sum and the sureties on the bond are not liable for the additional amount, but the importer is still liable in an action independent of the bond. U. S. *v.* Georgi, 44 Fed. Rep. 255.

No Recovery Where Reliquidation Is Invalid. — U. S. *v.* Phillips, 46 Fed. Rep. 466.

6. U. S. *v.* Fox, 53 Fed. Rep. 531, holding that the refunding of duties paid under protest upon reliquidation did not constitute a bar to an action based on a second reliquidation. And see U. S. *v.* De Rivera, 73 Fed. Rep. 679.

7. U. S. *v.* Boyd, 23 Blatchf. (U. S.) 299, 24 Fed. Rep. 690.

8. The Burden of Proof Is on the Government to show that the defendant did import the goods without payment of the duty required to be paid by statute, and also to show the quantity so imported by him. This must be done by a fair preponderance of evidence. It need not be done, in this form of action, beyond a reasonable doubt, as in a criminal prosecution. In the importation of goods, the defendant is to be held responsible for whatever was done by his agents or employees under his direction. U. S. *v.* Koblitz, 15 Fed. Rep. 900.

9. Proceedings on Liquidation Presumed Correct. — U. S. *v.* Patton, 46 Fed. Rep. 461, *affirmed* 159 U. S. 500; U. S. *v.* Midgley, 42 Fed. Rep. 668.

Qualification of Rule. — Where the classification of goods has been changed several times the original opinion of the government examiner, as shown by the first classification, is admissible in evidence in favor of the importer to impeach the testimony of expert witnesses for the government. U. S. *v.* Midgley, 42 Fed. Rep. 668.

10. Valuation and Assessment Generally Conclusive in Absence of Appeal. — U. S. *v.* Kenworthy, (C. C. A.) 68 Fed. Rep. 904, *reversing* 59 Fed. Rep. 570; U. S. *v.* Earnshaw, 45 Fed. Rep. 782; U. S. *v.* Phelps, 17 Blatchf. (U. S.) 312; Watt *v.* U. S., 15 Blatchf. (U. S.) 29; U. S. *v.* Cousinery, 7 Ben. (U. S.) 251.

Action of Appraiser Reviewable Where He Has Proceeded on Wrong Principle. — U. S. *v.* Thurber, 28 Fed. Rep. 56.

When Liquidation Is Not Conclusive. — Where the suit is based on a reliquidation of duties, the defendant may, if he has protested and appealed, show in defense that the further assessment was illegal. U. S. *v.* Schlesinger, 120 U. S. 109.

the bailee, during which time the bailee had paid over the proceeds of the goods to the owner.[1]

(4) *Sale of Property for Duties.* — It has been held that the owner of property sold for nonpayment of customs duties may bid in such property at the sale, in a case where there is no evidence of any effort or intention on his part to defraud the United States.[2]

h. PAYMENT OF DUTIES. — Customs duties can be paid only in money.[3] To constitute a payment upon any particular consignment of goods there must be an intent on the part of the importer to pay the duties upon such consignment and a corresponding intent upon the part of the collector to apply that payment upon the same consignment.[4] Except in cases where goods are permitted by statute to be shipped through to an interior port of destination before the duties are paid, such payment should be made at the first port of entry.[5]

i. REFUNDING OF DUTIES. — Where goods are accidentally destroyed while in possession of the customs officers, the secretary of the treasury, upon proper proof of their destruction, has power to refund the duties paid on such goods, or to relieve the importer from liability for duties thereon.[6]

j. DRAWBACK — (1) *In General.* — When imported merchandise is, within three years of the time of the entry, exported directly from the custody of the customs officers, the importer is entitled to a return of the duties paid by him, less one per cent. thereof, which is retained by the government.[7] And provision is also made by statute for the allowance of a drawback on exported articles manufactured in the United States from imported materials on which duties have been paid;[8] and for the re-exportation of imported goods without payment of the duties thereon, where the importer gives a bond that the merchandise shall be landed outside of the United States.[9] Statutes providing for drawbacks do not apply to additional duties levied on imported goods as a penalty for violation of the revenue laws.[10]

(2) *Action to Recover Drawback.* — If payment of a drawback is refused, the person entitled thereto may sue the United States to recover it.[11] The statute of limitation runs from the date when the goods are exported;[12] and as the person exporting the goods is the one primarily entitled to the drawback, although he is not the owner of the goods, he may sue without

1. **Dismissal of Former Suit Defense.** — Pettigrew *v.* U. S., 97 U. S. 385.

2. **Sale of Property for Duties — Right of Owner to Purchase.** — Ney *v.* Ladd, (Tex. Civ. App. 1902) 68 S. W. Rep. 1014.

3. Rev. Stat. U. S., §§ 3009, 5182.

Payment by a Bank Check which is not honored by the bank is a nullity, even though the collector receives the check as payment and gives his receipt acknowledging payment of the duties. Such a receipt is only *prima facie* evidence of payment. Johnson *v.* U. S., 5 Mason (U. S.) 425; U. S. *v.* Williams, 1 Ware (U. S.) 175.

4. Hendricks *v.* Schmidt, (C. C. A.) 68 Fed. Rep. 425, holding that there was no payment upon a particular consignment where the check given by the importer to pay the duties was stolen, but afterwards came into the hands of the collector and was applied to the payment of duties upon a different consignment of goods.

5. **Payment Generally Made at First Port of Entry.** — Saltonstall *v.* Russell, 152 U. S. 628; Guesnard *v.* Louisville, etc., R. Co., 76 Ala. 453.

6. Ferry *v.* U. S., (C. C. A.) 85 Fed. Rep. 550, holding that the decision of the secretary upon such a claim was final, and not reviewable by the courts; but that the statute authorizing the remission of duties did not apply to goods destroyed after delivery to the importer under a bond for redelivery.

7. Rev. Stat. U. S., §§ 2977, 3015.

Goods Which Have Not Been Landed Cannot Be Re-exported. — Kohne *v.* North America Ins. Co., 1 Wash. (U. S.) 158.

8. **Drawback on Exported Articles Manufactured from Imported Materials.** — Tide Water Oil Co. *v.* U. S., 171 U. S. 210; Anglo-American Provision Co. *v.* U. S., (C. C. A.) 116 Fed. Rep. 248; Kennedy *v.* U. S., (C. C. A.) 95 Fed. Rep. 127, 79 Fed. Rep. 893; U. S. *v.* Dean Linseed-Oil Co., (C. C. A.) 87 Fed. Rep. 453.

9. Rev. Stat. U. S., § 2979.

As to the Amount Recoverable upon Breach of the Bond, see The S. Oteri, (C. C. A.) 67 Fed. Rep. 146.

10. **No Drawback of Additional Duties.** — Bartlett *v.* Kane, 16 How. (U. S.) 263.

11. **Action Lies to Recover Drawback.** — Campbell *v.* U. S., 107 U. S. 407.

12. **Statute of Limitations.** — Kennedy *v.* U. S., 79 Fed. Rep. 893.

compliance with the statute regarding the assignment of claims against the United States.[1]

Where Goods Are Entered for Drawback in the Name of the Exporter's Agents, and the debentures therefor are issued to them, the exporter has a right of action against such agents for the drawback which they have received.[2]

(3) *False Entry for Drawback.* — A false entry for drawback renders the goods so entered liable to forfeiture, unless the entry was made by mistake or accident and without intention to defraud the revenue.[3]

2. Internal Revenue Taxes — *a.* How Collected. — Where the mode or time of collecting an internal revenue tax is not prescribed by statute, the commissioner of internal revenue has power to establish it by regulation.[4] If the act imposing the tax authorizes the secretary of the treasury to direct the manner of its collection, the method which he prescribes must be followed.[5] The assessment, collection, and enforcement of internal revenue taxes imposed by the United States are not within the administrative control of the authorities of a state.[6]

b. When Tax Accrues. — The tax on spirituous liquors attaches as soon as they come into existence,[7] and cannot be evaded except upon satisfactory proof, under the statute, that they have been destroyed by fire or other casualty.[8]

c. Assessment of Tax. — A formal assessment by an officer is not a condition precedent to the collection of an internal revenue tax in a case where the statute imposing such tax prescribes the amounts to be paid;[9] but assessment is essential under the statutes imposing taxes on distilled spirits.[10] Wholesale dealers in oleomargarine cannot be compelled by the collector to produce their books for inspection.[11] But the commissioner of internal revenue may require rectifiers to file with the collector statements describing all casks and packages that they propose to empty in order to rectify the liquor in them.[12]

d. Survey of Distilleries. — As a general rule, a distiller is not liable for the capacity tax until a copy of the survey of his distillery has been delivered to him;[13] but if he indorses on the report of such survey that it is

1. Assignment of Claim to Drawback — When Unnecessary. — Kennedy *v.* U. S., (C. C. A.) 95 Fed. Rep. 127, 79 Fed. Rep. 893.

2. Exporter May Recover Drawback Allowed to Agent. — Lake *v.* Devoe Mfg. Co., 7 Daly (N. Y.) 161.

3. Goods Forfeited for False Entry for Drawback. — Rev. Stat. U. S., §§ 3050, 3051; Barlow *v.* U. S., 7 Pet. (U. S.) 404; U. S. *v.* Eighty-five Hogsheads Sugar, 2 Paine (U. S.) 54, in which latter case it was held that the mistake necessary to relieve a person from the forfeiture was a mistake of fact and not a mistake as to the construction or application of the law.

4. Power of Commissioner to Prescribe Method of Collection. — Rev. Stat. U. S., § 3447; Spreckels Sugar-Refining Co. *v.* McClain, 109 Fed. Rep. 76.

5. Rules Prescribed by Secretary of Treasury Must Be Followed. — Westfall *v.* Shook, 5 Blatchf. (U. S.) 383.

6. Collection of Internal Revenue Taxes Not Within State Control. — Dinsmore *v.* Southern Express Co., 92 Fed. Rep. 714.

7. Tax Attaches as Soon as Spirits Come into Existence. — Thompson *v.* U. S., 142 U. S. 471; Greenbrier Distillery Co. *v.* Johnson, (C. C. A.) 88 Fed. Rep. 638; Alkan *v.* Bean, 8 Biss. (U. S.) 83.

8. Thompson *v.* U. S., 142 U. S. 471; Greenbrier Distillery Co. *v.* Johnson, (C. C. A.) 88 Fed. Rep. 638.

9. When Formal Assessment Unnecessary. — Dollar Sav. Bank *v.* U. S., 19 Wall. (U. S.) 227; U. S. *v.* Halloran, 14 Blatchf. (U. S.) 1. And see Spreckels Sugar-Refining Co. *v.* McClain, 109 Fed. Rep. 76.

10. Assessment and Reassessment of Tax on Distilled Spirits. — In U. S. *v.* O'Neill, 19 Fed. Rep. 567, it was held that the tax upon distilled spirits removed from the distillery and not deposited in a bonded warehouse as required by law might be assessed at any time when knowledge of the fact was obtained by the commissioner; that a reassessment of an internal revenue tax for the purpose of correcting an error need not be made within the fifteen months prescribed by statute as the period within which the commissioner may correct the list of assessments delivered to the collector; and that it would not be presumed, in absence of proof, that two liquor assessments for practically the same period covered the same spirits.

11. *In re* Kearns, 64 Fed. Rep. 481. And see *In re* Kinney, 102 Fed. Rep. 468.

12. Thacher's Distilled Spirits, 103 U. S. 679.

13. Survey of Distillery Essential. — Peabody *v.* Stark, 16 Wall. (U. S.) 240.

accepted as binding, he thereby waives his right to demand a copy.[1]

e. METHOD OF ESTIMATING TAX ON SPIRITS. — The measure of taxation is the producing capacity of the distillery, and not the amount of spirits actually produced.[2] Thus, a distiller is bound to pay taxes on the statutory percentage of the producing capacity of his distillery, even though he does not actually produce that much;[3] or, if the spirits produced exceed the statutory percentage of capacity, he is liable for taxes on the excess;[4] and a distiller who uses material in excess of the producing capacity of his distillery is also liable to an assessment for the spirits that should have been produced from such excess of material.[5]

f. BONDS AND BONDED WAREHOUSES — (1) *Distillers' Bonds.* — Distillers are required by statute to give annual bonds conditioned faithfully to comply with all the provisions of law relating to their business.[6]

(2) *Bonded Warehouses* — (a) **In General.** — Distilled spirits deposited in a bonded warehouse or distillery warehouse are at the owner's risk and expense.[7] The distiller and the sureties on his bond are not relieved from liability for the tax where such spirits are destroyed by fire,[8] or stolen,[9] or removed from the warehouse without payment of the tax, by permission of the collector, contrary to law.[10] But where spirits in a warehouse are seized and sold by a marshal for the fraudulent acts of the distiller, and the taxes are paid out of the proceeds, the sureties on the warehouse bond are discharged.[11] And a like discharge of sureties takes place where the United States, by purchasing spirits in a warehouse and removing them therefrom, deprives such sureties of their security, although in such a case the distiller remains liable.[12]

(b) **Cancellation of Taxes When Spirits Are Destroyed by Accident.** — When distilled spirits are destroyed by accidental fire or other casualty while in a general bonded warehouse or distillery warehouse, and in the custody of the revenue officers, the unpaid taxes thereon may be cancelled by the secretary of the treasury.[13]

(c) **Payment of Taxes on Spirits in Bonded Warehouse.** — The tax on spirituous liquors deposited in a bonded warehouse must be paid before their removal there-

1. Waiver of Right to Copy of Survey. — Wright *v.* U. S., 108 U. S. 281.

2. Tax Measured by Producing Capacity of Distillery. — Rev. Stat. U. S., § 3309; U. S. *v.* Halloran, 14 Blatchf. (U. S.) 1.

3. Distiller Liable to Deficiency Assessment. — Stoll *v.* Pepper, 97 U. S. 438; U. S. *v.* Ferrary, 93 U. S. 625; U. S. *v.* Nissley, 1 Dill. (U. S.) 586; U. S. *v.* Singer, 15 Wall. (U. S.) 111.

Assessment on Deficiency Caused by Defective Still — When Erroneous. — U. S. *v.* Nebraska Distilling Co., (C. C. A.) 80 Fed. Rep. 285.

4. Distiller Liable for Tax on Excessive Production. — U. S. *v.* Singer, 15 Wall. (U. S.) 111.

5. Rev. Stat. U. S., § 3309.

Rule Where Capacity Is Legally Reduced by Closing Tubs. — Weitzel *v.* Rabe, 103 U. S. 340.

The Assessment Cannot Be Made Where the distiller, in the regular course of his business, has already paid the taxes upon his entire production. Stoll *v.* Pepper, 97 U. S. 438.

Or where the apparent excess above the daily average in one month is balanced by a corresponding deficiency in the next month. Chicago Distilling Co. *v.* Stone, 140 U. S. 647.

6. Rev. Stat. U. S., § 3260.

Sureties on General Bond Not Liable for Taxes on Spirits in Bonded Warehouse. — U. S. *v.* National Surety Co., 112 Fed. Rep. 336.

Sureties Released by Unauthorized Change in Bond. — U. S. *v.* O'Neill, 19 Fed. Rep. 567.

7. Spirits at Risk and Expense of Owner While in Warehouse. — U. S. *v.* Witten, 143 U. S. 76; Farrell *v.* U. S., 99 U. S. 221.

8. Destruction of Spirits Does Not Release Tax. — Farrell *v.* U. S., 99 U. S. 221, 8 Biss. (U. S.) 259. But see Rev. Stat. U. S., § 3221.

9. Theft of Spirits Does Not Release Tax. — U. S. *v.* Witten, 143 U. S. 76.

10. Unlawful Removal from Warehouse Does Not Release Tax. — Hart *v.* U. S., 95 U. S. 316.

11. When Sureties on Warehouse Bond Are Discharged. — U. S. *v.* Ulrici, 111 U. S. 38.

12. U. S. *v.* Aiken, 110 Fed. Rep. 370.

13. Unpaid Taxes Cancelled Where Spirits Are Destroyed by Accident. — Rev. Stat. U. S., § 3221; 28 U. S. Stat. at L. 565, c. 349, § 56; Farrell *v.* U. S., 99 U. S. 221; Greenbrier Distillery Co. *v.* Johnson, (C. C. A.) 88 Fed. Rep. 638.

What Destruction Not Within Statute. — A loss of spirits caused by undiscoverable wormholes, or by the warping of the barrels from excessive summer heat, or by unusual evaporation from such heat, is not within the statute. Crystal Spring Distillery Co. *v.* Cox, (C. C. A.) 49 Fed. Rep. 559, *affirming* 47 Fed. Rep. 693.

Statute Not Applicable to Spirits Lost in Transit from Distillery Warehouse to General Warehouse. — Greenbrier Distillery Co. *v.* Johnson, (C. C. A.) 88 Fed. Rep. 638.

from,[1] or within three years from the date of entry.[2] And the commissioner of internal revenue may order a withdrawal of the spirits before the expiration of the three years upon proof of an excessive loss in quantity, in which case the tax is collected upon the quantity entered.[3] A penalty imposed for failure to pay the internal revenue tax within three years is a lien on all the property of the delinquent and is not discharged by the exportation of the liquor.[4]

(d) **Sale of Tobacco in Bonded Warehouse.** — Under a statute requiring revenue stamps to be affixed to tobacco on its removal from a bonded warehouse, the owner of tobacco in such a warehouse may sell it without affixing stamps thereto, as long as it is not removed.[5]

g. LIEN FOR UNPAID TAXES. — Where the taxes on distilled spirits are not paid, the government has a lien on the distillery, the spirits distilled, and the real and personal property used in connection with the distillery.[6] Such lien is not released by a release of the distillery property on bond in proceedings for forfeiture;[7] nor can it be waived by any statements made by the revenue officers to a purchaser of the property to the effect that the government has no claim for unpaid taxes.[8] A person who purchases spirits in a bonded warehouse takes them subject to the lien of the government.[9]

h. ACTION TO RECOVER TAX. — Taxes accruing under the internal revenue laws may be sued for and recovered in an action at law[10] brought either in the district where the liability for the tax occurs or in the district where the delinquent resides.[11] But as against other lienholders and parties other than the distiller, the lien of the government on distillery property can be enforced only by a suit in equity in which all persons interested are made parties.[12]

Assessment Not Conclusive Evidence of Amount Due. — In an action against a distiller to recover taxes on spirits alleged to have been produced at his distilllery, the assessment by the commissioner of internal revenue is only *prima facie* evidence of the amount due, and may be contested.[13]

1. Destruction by Fire Removal Within Statute. — U. S. *v.* Peace, (C. C. A.) 53 Fed. Rep. 999, *reversing* 48 Fed. Rep. 714.

Requisites of Lawful Removal. — In order to constitute a lawful removal of distilled spirits from a distiller's bonded warehouse under the Act of 1866, it was necessary that the casks or barrels should be inspected, gauged, proved, and marked or branded as prescribed by law, and a transportation bond or other security duly executed. U. S. *v.* 508 Barrels Distilled Spirits, 5 Blatchf. (U. S.) 407.

2. Taxes Must Be Paid Within Three Years from Entry. — Clay *v.* Swope, 38 Fed. Rep. 396.

3. Commissioner May Order Withdrawal Where Loss Is Excessive. — Crystal Spring Distillery Co. *v.* Cox, (C. C. A.) 49 Fed. Rep. 555.

4. Penalty for Nonpayment a Lien on Property of Delinquent. — Clay *v.* Swope, 38 Fed. Rep. 396.

5. Jones *v.* Van Benthuysen, 115 U. S. 464, holding also that a dealer in tobacco was not liable for the tax on the stamps unless they were affixed at the time of the sale.

6. Lien for Unpaid Taxes. — Hartman *v.* Bean, 99 U. S. 393.

Waiver of Liens by Other Lienors. — Rev. Stat. U. S., § 3262, provides that where a distiller does not own the land on which his distillery is situated, he must file with the collector the written consent of the owner of the fee, or of any mortgagee, judgment creditor, or other person having a lien thereon, that the premises may be used for such purpose, and stipulating that the lien of the United States for taxes shall take precedence of such mortgage and other liens. In the case of Mansfield *v.* Excelsior Refining Co., 135 U. S. 326, the court held that the consent provided for passed no interest in the land to the distiller, but merely gave to the United States a first lien thereon.

7. Release of Lien — What Is Not. — Alkan *v.* Bean, 8 Biss. (U. S.) 83.

8. Revenue Officers Cannot Waive Lien. — Alkan *v.* Bean, 8 Biss. (U. S.) 83.

9. Purchaser Takes Subject to Lien. — Hartman *v.* Bean, 99 U. S. 393.

10. Action Lies to Recover Internal Revenue Taxes. — Rev. Stat. U. S., § 733; Dollar Sav. Bank *v.* U. S., 19 Wall. (U. S.) 227; U. S. *v.* Halloran, 14 Blatchf. (U. S.) 1.

11. Rev. Stat. U. S., § 733; U. S. *v.* New York, etc., R. Co., 10 Ben. (U. S.) 144.

12. Lien Enforceable by Suit in Equity.—Mansfield *v.* Excelsior Refining Co., 135 U. S. 326. *Compare* Alkan *v.* Bean, 8 Biss. (U. S.) 83.

13. Assessment Not Conclusive Evidence of Amount Due. — U. S. *v.* Rindskopf, 105 U. S. 418.

The statutes prohibiting suits to restrain the collection of internal revenue taxes, and providing that no suit to recover back illegal taxes shall be brought until after appeal to the commissioner of internal revenue, do not apply to cases where the government sues for the tax, and therefore the defendant in such a

i. PAYMENT OF INTERNAL REVENUE TAXES. — Special taxes are generally payable in advance.[1] Where the statute imposing the tax makes it payable annually, the commissioner of internal revenue has no power to change, by regulation, the period thus prescribed.[2]

Place of Payment. — Wholesale liquor dealers must pay the internal revenue tax at the place where their sales are made. If all sales are made at the principal office, additional taxes cannot be collected at other places where agencies are maintained.[3] But payment of a special tax and procurement of a license to retail liquors at a distillery does not protect sales made at other places.[4]

Effect of Payment of Tax by Firm. — Payment of the special tax for one year by a firm of brewers protects a partner who retains the business on dissolution of the firm, and relieves him from paying any further tax during that year.[5]

j. REFUNDING OF INTERNAL REVENUE TAXES. — The commissioner of internal revenue, subject to regulations prescribed by the secretary of the treasury, has power to refund internal revenue taxes erroneously or illegally assessed or collected.[6] The decision of the commissioner is final,[7] and when approved by the secretary of the treasury it constitutes an award which may be sued upon.[8] A surety on a distiller's bond may recover the amount allowed to his principal as a refund where the circumstances are such that the latter cannot receive the money.[9]

k. DRAWBACK OR REBATE. — Where distilled spirits on which the tax has been paid are exported, the owner is entitled to a drawback; and spirits may also be withdrawn from a bonded warehouse and exported in the original casks without payment of the taxes due thereon. In the former case, however, the owner is not entitled to a drawback upon any deficiency occurring prior to the last regauge of the spirits, and in the latter he must pay the tax upon spirits lost between the time when they are regauged, as provided by statute, and the time when they are actually exported.[10] Where a statute providing for a rebate of an internal revenue tax makes the right to repayment conditional upon compliance with regulations to be established by the secretary of the treasury, no right vests in the party paying the tax until such regulations have been made.[11]

l. SUIT TO RESTRAIN COLLECTION OF TAX. — Suits to restrain the collection of internal revenue taxes are forbidden by statute. The only remedy of a person who considers himself aggrieved is by an action to recover back the amount paid.[12]

suit may dispute the validity of the assessment even though he has not appealed to the commissioner. U. S. *v.* Nebraska Distilling Co., (C. C. A.) 80 Fed. Rep. 285.

1. **Special Taxes Payable in Advance.** — U. S. *v.* Clare, 14 Phila. (Pa.) 543, 37 Leg. Int. (Pa.) 126.

2. **Commissioner Cannot Change Period of Payment by Regulation.** — Spreckels Sugar Refining Co. *v.* McClain, (C. C. A.) 113 Fed. Rep. 244.

3. **Place of Payment.** — U. S. *v.* Chevallier, (C. C. A.) 107 Fed. Rep. 434; U. S. *v.* Chevallier, 102 Fed. Rep. 125; De Bary *v.* Souer, (C. C. A.) 101 Fed. Rep. 425. And see the title OCCUPATION, BUSINESS, AND PRIVILEGE TAXES, vol. 21, p. 770.

4. U. S. *v.* Durham, 33 Fed. Rep. 834.

5. **Effect of Payment of Tax by Firm.** — U. S. *v.* Glab, 99 U. S. 225. See also Spielman *v.* State, 27 Md. 520; U. S. *v.* Davis, 37 Fed. Rep. 468. And see the title OCCUPATION, BUSINESS, AND PRIVILEGE TAXES, vol. 21, p. 770.

6. **Commissioner of Internal Revenue Has Power to Refund Taxes.** — Rev. Stat. U. S., § 3220; Corning *v.* U. S., 34 Ct. Cl. 271.

What Not Final Award by Commissioner. — Stotesbury *v.* U. S., 146 U. S. 196, *affirming* 23 Ct. Cl. 285.

Regauging of Spirits Condition Precedent to Claim for Remission of Tax. — Corning *v.* U. S., 34 Ct. Cl. 271

When Tax Cannot Be Refunded. — There is no law which authorizes a refund to one person of a tax imposed on the property of another, or of a tax which was legally imposed and collectible when it was paid. Logan County *v.* U. S., 31 Ct. Cl. 23.

7. **Commissioner's Decision Final.** — Corning *v.* U. S., 34 Ct. Cl. 271; Louisville *v.* U. S., 31 Ct. Cl. 1. And see Dugan *v.* U. S., 34 Ct. Cl. 458.

8. **Suit Lies on Commissioner's Award.** — Louisville *v.* U. S., 31 Ct. Cl. 1.

9. **Surety May Recover on Award.** — Shwarz *v.* U. S., 35 Ct. Cl. 303.

10. **Right to Drawback.**—Thompson *v.* U. S., 142 U. S. 471.

11. Dunlap *v.* U. S., 173 U. S. 65.

12. Rev. Stat. U. S., § 3224; Alkan *v.* Bean,

VIII. Review of Collector's Decision — Return of Duties Illegally Assessed — 1. Right of Review in General — *a.* Action Against Collector Before Act of 1890. — At an early date it was held that an importer might maintain a common-law action against a collector of customs, to recover back illegal or excessive duties paid under protest.[1] This common-law right of action, which was taken away for a time by the Act of 1839,[2] was restored in 1845 by a statute which authorized an action on compliance with certain requirements as to protest, payment of duties, and appeal to the secretary of the treasury.[3]

b. Review under Act of 1890. — In 1890 Congress effected a radical change in the form of the importer's remedy by taking away the right to bring suit directly against the collector,[4] except in certain cases which do not fall within the statute,[5] and substituting an appeal from the collector's decision to the board of general appraisers, whose decision may be reviewed in turn by the Circuit Court, in a proper case.[6]

c. Claim Not Assignable. — A claim to recover back duties alleged to have been illegally exacted is not assignable, and a stranger to whom such claim has been assigned cannot recover thereon;[7] but a person who has acquired an interest in the merchandise itself, by purchase, stands in a different position from a bare assignee of the claim, and may recover back the duties.[8]

2. Protest, Appeal, and Payment of Duties — *a.* Necessity for Protest. — Under the old law an importer could not sue a collector to recover back duties alleged to have been illegally exacted unless he had filed a protest against the collector's liquidation,[9] and by the Act of 1890 it is likewise pro-

8 Biss. (U. S.) 83, in which case an injunction was refused on allegations that the assessment was irregular, in violation of law, and void.

1. Common-law Action Against Collector to Recover Back Duties. — Elliott *v.* Swartwout, 10 Pet. (U. S.) 137; Curtis *v.* Fiedler, 2 Black. (U. S.) 461; Schmeider *v.* Barney, 13 Blatchf. (U. S.) 37; Knoedler *v.* Schell, 4 Blatchf. (U. S.) 484.

2. Right of Action Taken Away by Act of 1839. — Cary *v.* Curtis, 3 How. (U. S.) 236; Schmeider *v.* Barney, 13 Blatchf. (U. S.) 37; Knoedler *v.* Schell, 4 Blatchf. (U. S.) 484; Curtis *v.* Fiedler, 2 Black (U. S.) 461.

3. Right of Action Restored by Act of 1845. — Schell *v* Fauché, 138 U. S. 562; Schmeider *v.* Barney, 13 Blatchf. (U. S.) 37; Knoedler *v.* Schell, 4 Blatchf. (U. S.) 484; Curtis *v.* Fiedler, 2 Black (U. S.) 461; *In re* Collector of Customs, (C. C. A.) 55 Fed. Rep. 276.

No Right to Recover Interest Where Principal Had Been Repaid. — Riley *v.* Maxwell, 4 Blatchf. (U. S.) 237.

Voluntary Tender by Collector Barred Suit. — Tremlett *v.* Adams, 13 How. (U. S.) 295.

4. Right of Action Against Collector Taken Away by Act of 1890. — 26 U. S. Stat. at L. 141, c. 407, § 25; Schoenfeld *v.* Hendricks, 152 U. S. 691; Loeb *v.* Hendricks, 57 Fed. Rep. 568, *affirmed* 152 U. S. 691; *In re* Collector of Customs, (C. C. A.) 55 Fed. Rep. 276.

This section exempted the collector from suit in respect to any rulings or decisions as to the classification of merchandise; the duties charged thereon; the collection of any dues, charges, or duties on or on account of said merchandise, or any other matter or thing as to which the importer might under the act be entitled to appeal from the decision of the collector or other officer, or from any board of appraisers provided for in the act; and its operation is not confined to rulings and decisions of the collector from which an appeal will ultimately lie to the Circuit Court. Schoenfeld *v.* Hendricks, 152 U. S. 691.

5. An Importer May Still Bring an Action Against a Collector to recover back duties assessed upon goods which were never really imported, where he has paid such duties under protest. De Lima *v.* Bidwell, 182 U. S. 1; Dooley *v.* U. S., 182 U. S. 223, Armstrong *v.* U. S., 182 U. S. 243; Downes *v.* Bidwell, 182 U. S. 244; *In re* Fassett, 142 U. S. 479. But not where the payment was voluntary. Dewell *v.* Mix, 116 Fed. Rep. 664.

6. 26 U. S. Stat. at L. 137, c. 407, §§ 14, 15.

7. Claim Not Assignable. — Seeberger *v.* Castro, 153 U. S. 32; Hager *v.* Swayne, 149 U. S. 242; John Shillito Co. *v.* McClung, (C. C. A.) 51 Fed. Rep. 868.

It does not follow that devisees, representatives of the estate of deceased persons, or assignees in bankruptcy or by operation of law, are excluded from bringing suit, for they take by devolution, and are regarded as succeeding in interest to the original party. But the statute does not contemplate that a stranger may bring the action, and such is a voluntary assignee of the mere naked right. Hager *v.* Swayne, 149 U. S. 242.

8. Purchaser of Merchandise May Recover. — Seeberger *v.* Castro, 153 U. S. 32, 40 Fed. Rep. 531; Spalding *v.* Castro, 153 U. S. 38.

9. Protest Essential. — Cadwalader *v.* Partridge, 137 U. S. 553; Arthur *v.* Unkart, 96 U. S. 118; Frazee *v.* Moffitt, 20 Blatchf. (U. S.) 267; Crocker *v.* Redfield, 4 Blatchf. (U. S.) 378; Westray *v.* U. S., 18 Wall. (U. S.) 322; Bodart *v.* Schell, 33 Fed. Rep. 825.

vided that the decision of the collector as to the rate and amount of duties shall be final and conclusive, unless the importer gives notice to the collector of his objection thereto.[1] This notice of objection is merely the protest of the old law under another name.[2] A protest is also essential to the recovery back of additional duties assessed for undervaluation,[3] or of money deposited with the collector as security for duties and applied by him to their payment.[4] And a decision reversing a previous erroneous ruling of the Treasury Department is of no aid to an importer who has not duly protested against a similar ruling with respect to another importation.[5]

b. TIME OF FILING. — The protest must be filed within ten days after the liquidation of the duties,[6] and it cannot be filed before such liquidation.[7] The ten days begin to run immediately upon liquidation of the duties, even though no notice thereof is given to the importer.[8]

Where Merchandise Is Entered for Transportation to Interior Port. — Where merchandise imported at one port is entered for immediate transportation to another, the decision of the collector at the first port of entry as to the rate and amount of duties is a liquidation of the duties by the proper officers of the customs, and the importer must file his protest within ten days thereafter.[9]

Power of Collector to Extend Time. — The collector has no power to waive the requirements of the statute as to the time of filing the protest.[10]

Validity of Protest After Payment of Duties. — A voluntary payment of duties alleged to be illegal or excessive cannot be recovered back,[11] and on this account it has been held in a number of cases that the protest must either precede or accompany the payment of the duties;[12] but in a recent case a protest made after payment of the duties, but before the expiration of the ten days limited by statute, was held to be valid.[13]

Prospective Protests. — Under former statutes it was held that an importer might make a protest which would cover not only goods actually imported at the time of the protest, but also his subsequent importations of similar goods.[14]

1. Gandolfi *v.* U. S., (C. C. A.) 74 Fed. Rep. 549.

2. **Protest and Notice of Objection the Same.** — *In re* Downing, 45 Fed. Rep. 412.

3. **Protest Essential to Recovery Back of Additional Duties Assessed for Undervaluation.** — Maillard *v.* Lawrence, 3 Blatchf. (U. S.) 378.

4. Borroughs *v.* Erhardt, (C. C. A.) 88 Fed. Rep. 256.

5. Cadwalader *v.* Partridge, 137 U. S. 553.

6. **Protest Must Be Filed Within Ten Days of Liquidation.** — 26 U. S. Stat. at L. 137, c. 407, § 14; Merritt *v.* Cameron, 137 U. S. 542; Cadwalader *v.* Partridge, 137 U. S. 553; Davies *v.* Arthur, 96 U. S. 148; Westray *v.* U. S., 18 Wall. (U. S.) 322; Stern *v.* U. S., 77 Fed. Rep. 607.

Validity of Protest Filed After Business Hours on Last Day. — Frankenburg *v.* U. S., 77 Fed. Rep. 606.

Validity of Protest Without Date. — Schell *v.* Fauché, 138 U. S. 562.

Rule Where First Liquidation Is Corrected. — Robertson *v.* Downing, 127 U. S. 607; Stern *v.* U. S., 77 Fed. Rep. 607.

Where the Goods Are Entered in Bond a protest delivered more than ten days after liquidation comes too late, even though its delivery takes place less than ten days after their withdrawal for consumption. Merritt *v.* Cameron, 137 U. S. 542; Cadwalader *v.* Partridge, 137 U. S. 553.

7. **Protest Before Liquidation Void.** — *In re* Bailey, 112 Fed. Rep. 413.

Under the Old Law a protest delivered after the collector's estimation of the duties had been made, but before the final liquidation had been stamped on the entry, was in apt time. Davies *v.* Miller, 130 U. S. 284.

8. **Importer Not Entitled to Notice of Liquidation.** — Westray *v.* U. S., 18 Wall. (U. S.) 322.

9. **Rule Where Merchandise Is Entered for Transportation.** — Saltonstall *v.* Russell, 152 U. S. 628.

10. **Collector Cannot Extend Time.** — *In re* Guggenheim Smelting Co., (C. C. A.) 112 Fed. Rep. 517.

11. **Voluntary Payment of Duties Cannot Be Recovered Back.** — Dewell *v.* Mix, 116 Fed. Rep. 664; Elliott *v.* Swartwout, 10 Pet. (U. S.) 137. And see Corkle *v.* Maxwell, 3 Blatchf. (U. S.) 413; Harriman *v.* Maxwell, 3 Blatchf. (U. S.) 421.

12. **Protest Must Precede or Accompany Payment of Duties.** — Barney *v.* Rickard, 157 U. S. 352; Schell *v.* Fauché, 138 U. S. 562; Drake *v.* Redfield, 4 Blatchf. (U. S.) 116; Crocker *v.* Redfield, 4 Blatchf. (U. S.) 378; Thomson *v.* Maxwell, 2 Blatchf. (U. S.) 385; Curtis *v.* Fiedler, 2 Black (U. S.) 461.

For an Exception to the Rule Stated in the Text see Strange *v.* Barney, 35 Fed. Rep. 196.

13. **Contra — Protest After Payment Valid.** — Saltonstall *v.* Birtwell, 164 U. S. 54, *affirming* 66 Fed. Rep. 969.

14. **Prospective Protests Valid under Former Statutes.** — Schell *v.* Fauché, 138 U. S. 570; Davies *v.* Miller, 130 U. S. 284; Marriott *v.*

But under the present law, which requires notice in respect to each entry and provides that it shall not be served before the liquidation of the duties it seems that prospective protests are not permissible.[1]

c. By Whom Made. — The protest is to be made by the importer, consignee, or agent of the merchandise, and it cannot be made by any other person.[2]

d. Form and Requisites. — The protest must be in writing [3] and signed by the claimant.[4] As protests are commercial and not legal documents, the courts are liberal in construing them as regards their form and phraseology.[5] But the statute requires that they shall set forth distinctly and specifically the reasons of the importer's objections to the decision of the collector,[6] and in accordance with this requirement it has been held that they must specify clearly and distinctly each substantive ground of objection to the payment of the duties, so as to show that the particular objection subsequently relied upon was in the mind of the importer at the time, and in such manner as to notify the collector of the true nature and character of the objection, to the end that

Brune, 9 How. (U. S.) 619; Steegman *v.* Maxwell, 3 Blatchf. (U. S.) 365; Haynes *v.* Brewster, 46 Fed. Rep. 475. And see Sorchan *v.* Schell, 33 Fed. Rep. 580; Herman *v.* Schell, 18 Fed. Rep. 891, 21 Blatchf. (U. S.) 560; Baxter *v.* Maxwell, 4 Blatchf. (U. S.) 32.

1. Prospective Protests No Longer Allowable. — 26 U. S. Stat. at L. 137, c. 407, § 14.

2. Protest by Stranger Invalid. — Abegg *v.* U. S., 71 Fed. Rep. 960.

3. Protest Must Be in Writing. — Schell *v.* Fauché, 138 U. S. 562; Davies *v.* Arthur, 96 U. S. 148; Nicholl *v.* U. S., 7 Wall. (U. S.) 122; Drake *v.* Redfield, 4 Blatchf. (U. S.) 116; Focke *v.* Lawrence, 2 Blatchf. (U. S.) 508; Thomson *v.* Maxwell, 2 Blatchf. (U. S.) 385; Curtis *v.* Fiedler, 2 Black. (U. S.) 461; Saltonstall *v.* Birtwell, (C. C. A.) 66 Fed. Rep. 969, *affirmed* 164 U. S. 54.

4. Protest Must Be Signed. — Schell *v.* Fauché, 138 U. S. 562; Davies *v.* Arthur, 96 U. S. 148; Thomson *v.* Maxwell, 2 Blatchf. (U. S.) 385; Curtis *v.* Fiedler, 2 Black (U. S.) 461.

It is immaterial whether the signature is in writing made with ink or pencil, or is stamped or printed. Bodart *v.* Schell, 33 Fed. Rep. 825.

Where the Goods Are Imported by a Firm, the signature of a member of the firm is sufficient. Herman *v.* Schell, 21 Blatchf. (U. S.) 560.

Signature of the Protest by an Agent of the importer was formerly held to be sufficient. Gray *v.* Lawrence, 3 Blatchf. (U. S.) 117; Bodart *v.* Schell, 33 Fed. Rep. 825. But the correctness of this ruling would seem to be doubtful under the present statute, which requires the protest to be made by the importer, consignee, or agent of the merchandise. See *supra*, this subdivision of this section, *By Whom Made.*

5. Protests Liberally Construed by Courts. — Presson *v.* Russell, 152 U. S. 577; Davies *v.* Arthur, 96 U. S. 148; Vaccari *v.* Maxwell, 3 Blatchf. (U. S.) 368; Thomson *v.* Maxwell, 2 Blatchf. (U. S.) 385; Fauché *v.* Schell, 33 Fed. Rep. 336; Herman *v.* Schell, 18 Fed. Rep. 891.

A protest which indicates to an intelligent man the ground of the importer's objection to the duty levied upon the articles should not be discarded because of the brevity with which the objection is stated. Schell *v.* Fauché, 138 U. S. 562.

Protest Valid though Multifarious. — *In re* Downing, 45 Fed. Rep. 412.

6. Requisites of Protest. — 26 U. S. Stat. at L. 137, c. 407, § 14; U. S. *v.* Salambier, 170 U. S. 621; Herrman *v.* Robertson, 152 U. S. 521; Presson *v.* Russell, 152 U. S. 577; Heinze *v.* Arthur, 144 U. S. 28; Schell *v.* Fauché, 138 U. S. 562; Arthur *v.* Morgan, 112 U. S. 495; Davies *v.* Arthur, 96 U. S. 148; Frazee *v.* Moffitt, 20 Blatchf. (U. S.) 267, 18 Fed. Rep. 584; Baxter *v.* Maxwell, 4 Blatchf. (U. S.) 32; Ponsot *v.* Maxwell, 4 Blatchf. (U. S.) 43; Drake *v.* Redfield, 4 Blatchf. (U. S.) 116; Boker *v.* Bronson, 4 Blatchf. (U. S.) 472; Schmaire *v.* Maxwell, 3 Blatchf. (U. S.) 408; Schuchardt *v.* Lawrence, 3 Blatchf. (U. S.) 397; Crowley *v.* Maxwell, 3 Blatchf. (U. S.) 383, 401; Maillard *v.* Lawrence, 3 Blatchf. (U. S.) 378; Steegman *v.* Maxwell, 3 Blatchf. (U. S.) 365; Vaccari *v.* Maxwell, 3 Blatchf. (U. S.) 368; Stalker *v.* Maxwell, 3 Blatchf. (U. S.) 138; Hertz *v.* Maxwell, 3 Blatchf. (U. S.) 137; Sadler *v.* Maxwell, 3 Blatchf. (U. S.) 135; Bangs *v.* Maxwell, 3 Blatchf. (U. S.) 135; Christ *v.* Maxwell, 3 Blatchf. (U. S.) 129; Goddard *v.* Maxwell, 3 Blatchf. (U. S.) 131; Focke *v.* Lawrence, 2 Blatchf. (U. S.) 508; Pierson *v.* Lawrence, 2 Blatchf. (U. S.) 495; Loewenstein *v.* Maxwell, 2 Blatchf. (U. S.) 401; Thomson *v.* Maxwell, 2 Blatchf. (U. S.) 385; Durand *v.* Lawrence, 2 Blatchf. (U. S.) 396; Curtis *v.* Fiedler, 2 Black. (U. S.) 461; Burgess *v.* Converse, 2 Curt. (U. S.) 216; Kriesler *v.* Morton, 1 Curt. (U. S.) 413; Swanston *v.* Morton, 1 Curt. (U. S.) 294; Norcross *v.* Greely, 1 Curt. (U. S.) 114; Converse *v.* Burgess, 18 How. (U. S.) 413; Shaw *v.* U. S., 117 Fed. Rep. 366; *In re* Guggenheim Smelting Co., (C. C. A.) 112 Fed. Rep. 517; *In re* Hagop Bogigian Co., 104 Fed. Rep. 75; Cottier *v.* U. S., 101 Fed. Rep. 423; U. S. *v.* Pilditch, 99 Fed. Rep. 938; Hempstead *v.* U. S., 94 Fed. Rep. 484; Dieckerhoff *v.* Miller, (C. C. A.) 93 Fed. Rep. 651; Richards *v.* U. S., 91 Fed. Rep. 516; Smith *v.* U. S., 91 Fed. Rep. 757; Hahn *v.* Erhardt, (C. C. A.) 78 Fed. Rep. 620; Shaw *v.* Prior, 68 Fed. Rep. 421; Boussod Valadon Co. *v.* U. S., 66 Fed. Rep. 718; *In re* Herter, (C. C. A.) 53 Fed. Rep. 913; *In re* Downing, 45 Fed. Rep. 412; Fauché *v.* Schell, 33 Fed. Rep. 336; Smith *v.* Schell, 27 Fed. Rep. 648; Cummins *v.* Robertson, 27 Fed. Rep. 654.

he may ascertain the precise facts and have an opportunity to correct the mistake and cure the defect if it is one which can be obviated.[1] A collector has no power to waive defects in a protest.[2]

Alternative Protests. — Protests in the alternative are held to be valid.[3]

e. AMENDMENT OF PROTEST. — A protest cannot be amended, as regards its statement of the importer's objection to the liquidation of duties by the collector, after the expiration of the original period for filing it.[4] Nor can the board of general appraisers, or the Circuit Court, allow the importer to make a new protest by amendment.[5]

f. SERVICE OF PROTEST. — The protest may be served upon the collector, or his subordinate officer, or the person who receives the entry or payment of duties.[6]

g. APPEAL. — Under the old law an appeal to the secretary of the treasury within thirty days from the date of liquidation of the duties was a condition precedent to an action to recover back duties paid.[7] Under the present law the filing of the protest with the collector and the payment of the duties, where the goods are entered for consumption, effects an appeal to the board of general appraisers which corresponds to the former appeal to the secretary.[8]

h. PAYMENT OF DUTIES. — Where the goods are entered for consumption, payment of the duties is a condition precedent to a review of the collector's decision by the board of general appraisers, but it is not necessary that they be paid within the ten days limited for filing the protest.[9] The payment must be made in order to obtain possession of the goods; otherwise it will be considered voluntary.[10]

1. Presson *v.* Russell, 152 U. S. 577; Heinze *v.* Arthur, 144 U. S. 28; Davies *v.* Arthur, 96 U. S. 148.

2. Collector Cannot Waive Defects in Protest. — U. S. *v.* Scheter, 71 Fed. Rep. 959.

3. Protests in Alternative Valid. — Koechl *v.* U. S., (C. C. A.) 91 Fed. Rep. 110; Blumenthal *v.* U. S., 72 Fed. Rep. 48.

Where the protest was in the alternative, and the importer discontinued his suit as to one claim in such protest, upon the voluntary reliquidation of the duties and refunding of the excess in accordance with such claim it was held that, in the absence of any adjudication or release, he was not estopped from bringing a second action based upon the other claim stated in the protest. Robertson *v.* Edelhoff, (C. C. A.) 91 Fed Rep. 642.

4. Amendment of Protest Not Allowed. — *In re* Sherman, 49 Fed. Rep. 224, *affirmed* (C. C. A.) 55 Fed. Rep. 276.

5. *In re* Collector of Customs, (C. C. A.) 55 Fed. Rep. 276.

6. Upon Whom Protest May Be Served. — Schell *v.* Fauché, 138 U. S. 570, *affirming* 33 Fed. Rep. 336.

Where protests are produced under subpœna, at the trial, from the proper repository, where they appear to have been lying for a long time, it is not unreasonable to infer that the usual course was pursued and the protest served according to the custom of the office. Schell *v.* Fauché, 138 U. S. 562.

7. Appeal to Secretary of Treasury Formerly Required. — Rev. Stat. U. S., § 3011; Arthur *v.* Unkart, 96 U. S. 118; Westray *v.* U. S., 18 Wall. (U. S.) 322; U. S. *v.* Cousinery, 7 Ben. (U. S.) 251; Wat *v.* U. S., 15 Blatchf. (U. S.) 29; U. S. *v.* Cobb, 11 Fed. Rep. 76; Chase *v.* U. S., 9 Fed. Rep. 882; U. S. *v.* Sowers, 14 Phila. (Pa.) 525, 36 Leg. Int. (Pa.) 488.

Abandoned Appeal Ineffectual. — Bartlett *v.* Kane, 16 How. (U. S.) 263.

No Right of Appeal Prior to Final Liquidation. — Watt *v.* U. S., 15 Blatchf. (U. S.) 29.

Power of Assistant Secretaries to Hear and Decide Appeals. — John Shillito Co. *v.* McClung, (C. C. A.) 51 Fed. Rep. 868, 45 Fed. Rep. 778.

A Distinct Appeal Was Required upon Each Entry. The importer could not take a continuing appeal, applicable to future like entries, in analogy to the principle of prospective protest. Haynes *v.* Brewster, 46 Fed. Rep. 471.

8. Appeal Now Taken to General Appraisers. — 26 U. S. Stat. at L. 137, c. 407, § 14.

9. Payment Essential Where Goods Are Entered for Consumption. — U. S. *v.* Goldenberg, 168 U. S. 95.

Where Duties Are Paid by Third Persons upon their withdrawing the goods from custody on the written authorization of the importer, it will be assumed in an action by the importer for the recovery of such duties that they were paid in his behalf. Simpson *v.* Schell, 14 Fed. Rep. 286.

10. Payment Must Be Made to Obtain Possession of Goods. — Robertson *v.* Bradbury, 132 U. S. 491; Maxwell *v.* Griswold, 10 How. (U. S.) 242; Crocker *v.* Redfield, 4 Blatchf. (U. S.) 378; Drake *v.* Redfield, 4 Blatchf. (U. S.) 116; Marshall *v.* Redfield, 4 Blatchf. (U. S.) 221; Fauché *v.* Schell, 33 Fed. Rep. 336. But see Robertson *v.* Frank Brothers Co., 132 U. S. 17.

The insertion by an importer of additional charges in the invoices in order to avoid penalties imposed by the appraisers for their omission renders payment of the duties involuntary, though the penalties were illegal. Robertson *v.* Frank Brothers Co., 132 U. S. 17.

Payment to Obtain Possession of Package Retained for Examination Not Voluntary. — Erhardt *v.* Winter, (C. C. A.) 92 Fed. Rep. 918.

3. Review Before General Appraisers — In General. — The board of general appraisers has power to review the action of the collector in refusing to be governed by the proclaimed value of foreign coins,[1] or in assessing the duty on a valuation in the currency of a country other than that of exportation,[2] or his action in regard to the date at which the valuation of foreign coins is to be estimated;[3] but it has no jurisdiction to determine a question as to whether the merchandise was imported from a foreign country.[4]

The Valuation of the Merchandise as Fixed by the Appraisers cannot be questioned on an appeal of this nature unless the appraisers have acted on a wrong principle, contrary to law.[5]

The Burden of Proof is upon the importer, and the board cannot reverse the classification by the collector, even though it is erroneous, unless the importer proves that the classification contended for in his protest is the correct one.[6]

The Invoice Is Not Conclusive upon the General Appraisers, and even though the imported articles are invoiced as entireties and valued accordingly, the board has power to assess duties upon separate parts of such articles if, in their opinion, separate rates of duty are properly assessable.[7]

Original Testimony Not Necessary on Hearing. — On appeal to the general appraisers the collector sends up the record and all papers and exhibits that were before him, and where such record and papers afford a sufficient basis for the judgment of the board, there is nothing in the law which requires it to hear original testimony.[8]

Power of Appraisers to Allow Copy of Lost Protest to Be Filed. — Where it is satisfactorily proved that an original protest, filed in time, has been lost, the board of general appraisers, on appeal, has power to allow a copy to be filed in its place.[9]

Duty to Pass upon Questions of Fact. — It is the duty of the board to pass upon the questions of fact raised by the importer.[10]

4. Review in Circuit Court — Action Against Collector Before 1890 — *a.* In General. — The collector may appeal to the Circuit Court from the decision of the general appraisers without first obtaining leave from the secretary of the treasury,[11] but neither the collector nor the importer can have the decision of the board reviewed in the Circuit Court upon an appeal by the adverse party, where they themselves have not taken any steps to procure a review.[12] The proper tribunal for such proceedings is the Circuit Court of the district in which the merchandise is entered.[13] Upon the review the board must, when ordered by the court, return the record and evidence taken by it, together

1. **What Questions Are Open Before General Appraisers.** — U. S. *v.* Beebe, 117 Fed. Rep. 670; U. S. *v.* Beebe, 103 Fed. Rep. 785; U. S. *v.* Newhall, 91 Fed. Rep. 525.

2. U. S. *v.* Klingenberg, 77 Fed. Rep. 279.

3. Wood *v.* U. S., (C. C. A.) 72 Fed. Rep. 254.

4. **General Appraisers Cannot Determine Whether Merchandise Was Imported from Foreign Country.** — De Lima *v.* Bidwell, 182 U. S. 1; Goetze *v.* U. S., 182 U. S. 221; *In re* Fassett, 142 U. S. 479.

5. **As to the Conclusiveness of the Valuation Fixed by Appraisers,** see *supra*, this title, *Collection and Payment of Revenue — Customs Duties — Appraisement, Reappraisement, and Appeal on Question of Value — Conclusiveness of Valuation by Appraisers.*

6. **Burden of Proof upon Importer.** — Tiffany *v.* U. S., 105 Fed. Rep. 766; *In re* Sherman, 49 Fed. Rep. 224; *In re* Collector of Customs, (C. C. A.) 55 Fed. Rep. 276.

In *In re* Crowley, (C. C. A.) 55 Fed. Rep. 283, where the importer protested that all the articles contained in the invoice were dutiable under a certain paragraph, it was held that the board of general appraisers might adjudge that a part of the articles was dutiable under that paragraph and that the residue had been assessed for duty at the proper rate.

7. *In re* Crowley, (C. C. A.) 55 Fed. Rep. 283.

8. **Original Testimony Not Necessary on Hearing.** — *In re* Hempstead, 95 Fed. Rep. 967.

9. **Appraiser May Allow Copy of Lost Protest to Be Filed.** — Marine *v.* Lyon, (C. C. A.) 65 Fed. Rep. 992.

10. **General Appraisers Must Pass upon Questions of Fact.** — *In re* Blumlein, 45 Fed. Rep. 236; *In re* Sternbach, 44 Fed. Rep. 413.

11. **Collector May Appeal to Circuit Court.** — Zante Currants, 73 Fed. Rep. 183.

12. **No Review on Appeal by Adverse Party.** — U. S. *v.* Lies, 170 U. S. 628, *affirming* 74 Fed. Rep. 546; *In re* Crowly, 50 Fed. Rep. 465, *affirmed* (C. C. A.) 55 Fed. Rep. 283.

13. **Circuit Court of District of Entry Has Jurisdiction.** — *In re* Wyman, 45 Fed. Rep. 469.

with a certified statement of the facts involved in the case and its decision thereon.[1]

b. TIME LIMITATIONS — **Before Act of 1890.** — Under former statutes authorizing actions against collectors, it was held that as the right of action was statutory, a recovery depended upon strict conformity with the requirements of the statutes.[2] The time within which the action might be brought was regulated by the United States laws, regardless of state statutes of limitations,[3] and was limited to a period of ninety days after the decision of the secretary of the treasury upon appeal.[4] Nor could it be brought before the decision unless such decision was delayed more than ninety days from the time of appeal.[5] The secretary was not obliged to notify the importer of his decision, nor was the collector required to give such notice.[6]

Under Act of 1890. — Under the present law the application for review by the Circuit Court must be made within thirty days of the decision by the general appraisers.[7]

c. QUESTIONS OPEN FOR REVIEW. — The Circuit Court has jurisdiction to hear and determine the questions of law and fact involved in the decision of the general appraisers respecting the classification of the merchandise and the rate of duty imposed under such classification;[8] and, according to some decisions, the right of review in that court is coextensive with the right of appeal to the general appraisers as to all questions except the dutiable value of the merchandise.[9] But the valuation fixed by the appraisers is not open to question as long as such officers acted without fraud, and within the scope of their authority.[10]

d. BURDEN OF PROOF AND ADMISSIBILITY OF EVIDENCE — **Burden of Proof.** — Upon review in the Circuit Court the presumption is that the collector imposed the proper duty,[11] and therefore the burden of proof is upon the importer.[12] In order to recover he must prove that the duties paid by him

1. General Appraisers Must Return Record and Statement of Facts and Decision. — *In re* Sternbach, 44 Fed. Rep. 413.

Where the Return Is Not Sufficient the court will order the board to make a further return. *In re* Downing, 45 Fed. Rep. 412; *In re* Dieckerhoff, 45 Fed. Rep. 235; *In re* Blumlein, 45 Fed. Rep. 236.

2. Compliance with Statutory Requirements Essential. — Arnson *v.* Murphy, 109 U. S. 238, 115 U. S. 579; Richardson *v.* Curtis, 3 Blatchf. (U. S.) 385; Wedemeyer *v.* Lancaster, 30 Fed. Rep. 670.

3. State Statute of Limitations Not Applicable. — Arnson *v.* Murphy, 109 U. S. 238, 115 U. S. 579.

4. Action to Be Commenced Within Ninety Days of Decision by Secretary of Treasury. — Beard *v.* Porter, 124 U. S. 437; Arnson *v.* Murphy, 109 U. S. 238, 115 U. S. 579; Arthur *v.* Unkart, 96 U. S. 118; John Shillito Co. *v.* McClung (C. C. A.) 51 Fed. Rep. 868, *affirming* 45 Fed. Rep. 778.

5. No Right to Sue Before Decision of Secretary of Treasury. — Arnson *v.* Murphy, 109 U. S. 238.

Where the Decision Was Delayed More than Ninety Days the importer had his option to sue pending the appeal or to wait for a decision and sue within ninety days thereafter. Arnson *v.* Murphy, 109 U. S. 238, 115 U. S. 579.

Rule Where Suit Was Premature as to Part of Claims. — Moller *v.* Merritt, 29 Fed. Rep. 678.

6. Importer Not Entitled to Notice of Decision of Appeal. — Arnson *v.* Murphy, 115 U. S. 579, 24 Fed. Rep. 355; John Shillito Co. *v.* McClung, (C. C. A.) 51 Fed. Rep. 868, 45 Fed. Rep. 778; Chung Yune *v.* Shurtleff, 7 Sawy. (U. S.) 448.

7. 26 U. S. Stat. at L. 138, c. 407, § 15.

8. Questions Open for Review. — U. S. *v.* Jahn 155 U. S. 109; Foster *v.* Vocke, 60 Fed. Rep. 745; *In re* Schefer, 49 Fed. Rep. 216.

9. Review Coextensive with Appeal to General Appraisers. — U. S. *v.* Passavant, 169 U. S. 16; U. S. *v.* Klingenberg, 153 U. S. 93. But see Foster *v.* Vocke, 60 Fed. Rep. 745.

10. Valuation by Appraisers Not Open to Question. — Passavant *v.* U. S., 148 U. S. 214; Auffmordt *v.* Hedden, 137 U. S. 310; Hilton *v.* Merritt, 110 U. S. 97; U. S. *v.* Thurber, 28 Fed. Rep. 56; U. S. *v.* McDowell, 21 Fed. Rep. 563.

For Cases in Which It Was Held that the Appraisement Might Be Questioned, see Erhardt *v.* Schroeder, 155 U. S. 124; Badger *v.* Cusimano, 130 U. S. 39; Oelbermann *v.* Merritt, 123 U. S. 356; Mustin *v.* Cadwalader, 123 U. S. 369; Maillard *v.* Lawrence, 3 Blatchf. (U. S.) 378.

11. Presumption in Favor of Collector's Decision. — Hagedon *v.* Seeberger, 38 Fed. Rep. 401; Fisk *v.* Seeberger, 38 Fed. Rep. 718; Walker *v.* Seeberger, 38 Fed. Rep. 724, *reversed* on another point 149 U. S. 541; Weilbacher *v.* Merritt, 37 Fed. Rep. 85.

12. Burden of Proof upon Importer. — Erhardt *v.* Schroeder, 155 U. S. 124; Earnshaw *v.* Cadwalader, 145 U. S. 247; Arthur *v.* Unkart, 96 U. S. 118; Davies *v.* Miller, (C. C. A.) 91 Fed. Rep. 647; Merwin *v.* Magone, (C. C. A.) 70 Fed. Rep. 776; U. S. *v.* Rosenwald, (C. C. A.) 67 Fed. Rep. 323, *reversing* 59 Fed. Rep. 765;

were not authorized by law;[1] that he duly protested and appealed;[2] that he paid the duties in order to obtain possession of the goods;[3] and that his suit was begun within the time limited by statute.[4] The collector may defend on the theory that the goods were subject to the duty exacted under another provision of the tariff laws than that on which he founded his assessment.[5]

Admissibility of Evidence. — All the evidence taken by and before the general appraisers is competent evidence before the Circuit Court;[6] and the board must embody all such evidence in its return.[7] The right to offer new evidence in the Circuit Court is coextensive with the right to appeal.[8] The court has no power, in cases of this nature, to issue commissions to examine foreign witnesses.[9]

e. IMPORTER CONFINED TO OBJECTIONS SPECIFIED IN PROTEST. — The importer cannot set up any objections to the proceedings of the officers of the customs which he has not specified in his protest.[10]

f. QUESTIONS OF LAW AND FACT. — In actions against collectors under the old law it was held that the interpretation of nontechnical words was for the court,[11] but the question whether particular articles were included in some particular name used in the tariff laws was for the jury,[12] as were also ques-

Jessup, etc., Paper Co. *v.* Cooper, 46 Fed. Rep. 186; Dodge *v.* Hedden, 42 Fed. Rep. 446.

1. Importer Must Prove that Duties Were Erroneous. — Drake *v.* Redfield, 4 Blatchf. (U. S.) 116.

Where the importer does not prove that the classification for which he contends is the correct one, the classification of the collector must be affirmed even though it is erroneous. *In re* Gerdau, 54 Fed. Rep. 143.

2. Proof of Protest and Appeal Essential. — Bodart *v.* Schell, 33 Fed. Rep. 825; Arnson *v.* Murphy, 24 Fed. Rep. 355.

It Is Necessary to Prove the Signature to the Protest even though the protest has been accepted by the collector. Grandmange *v.* Schell, 32 Fed. Rep. 655.

The Production of the Protest from the Proper Repository gives rise to the presumption that it was duly served upon the proper officer on the day of its date, even though no record of the protest has been made by the officers of the customs. Schell *v.* Fauché, 138 U. S. 562.

3. Proof of Payment of Duties Essential. — Porter *v.* Beard, 124 U. S. 429; Rossman *v.* Hedden, 37 Fed. Rep. 99, *affirmed* 145 U. S. 561; Grandmange *v.* Schell, 32 Fed. Rep. 655.

4. Proof that Suit Was Brought in Time Essential. — Arnson *v.* Murphy, 115 U S. 579.

5. Collector May Rely on Provision Other than That under Which Duties Were Assessed. — Herrman *v.* Arthur, 127 U. S. 363.

6. Evidence Taken Before General Appraisers Admissible. — *In re* Muser, 49 Fed. Rep. 831.

7. Evidence Must Be Embodied in Return of General Appraisers. — *In re* Van Blankensteyn, (C. C. A.) 56 Fed. Rep. 474.

Presumption Where Return Is Not Signed by General Appraisers Who Took Evidence. — Mexican Onyx, etc., Co. *v.* U. S., 66 Fed. Rep. 732.

8. Lesser *v.* U. S., 89 Fed. Rep. 197, in which case the importer had failed to offer any evidence before the general appraisers as to one of his protests.

For Rulings as to Evidence in Cases Depending upon Particular Facts, see Barney *v.* Rickard, 157 U. S. 352; Origet *v.* Hedden, 155 U. S. 228; Earnshaw *v.* Cadwalader, 145 U. S. 247.

9. Commissions to Examine Foreign Witnesses Not Issuable. — Bartram *v.* U. S., 106 Fed. Rep. 878.

10. Importer Confined to Objections Specified in Protest. — Origet *v.* Hedden, 155 U. S. 228; Davies *v.* Arthur, 96 U. S. 148; Battle, etc., Chemists' Corp. *v.* U. S., 108 Fed. Rep. 216; Tuska *v.* U. S., 84 Fed. Rep. 442; Dodge *v.* U. S., (C. C. A.) 84 Fed. Rep. 449; U. S. *v.* Perkins, (C. C. A.) 66 Fed. Rep. 50; *In re* Collector of Customs, (C. C. A.) 55 Fed. Rep. 276; Fisk *v.* Seeberger, 38 Fed. Rep. 718; Chung Yune *v.* Kelly, 8 Sawy. (U. S.) 415; Falleck *v.* Barney, 5 Blatchf. (U. S.) 38; Warburg *v.* Maxwell, 3 Blatchf. (U. S.) 382; Maillard *v.* Lawrence, 3 Blatchf. (U. S.) 378; Crowley *v.* Maxwell, 3 Blatchf. (U. S.) 401; Fielden *v.* Lawrence, 3 Blatchf. (U. S.) 120; Cornett *v.* Lawrence, 2 Blatchf. (U. S.) 512; Wilson *v.* Lawrence, 2 Blatchf. (U. S.) 514; Tucker *v.* Maxwell, 2 Blatchf. (U. S.) 517; Thomson *v.* Maxwell, 2 Blatchf. (U. S.) 385; Durand *v.* Lawrence, 2 Blatchf. (U. S.) 396; Burgess *v.* Converse, 2 Curt. (U. S.) 216; Swanston *v.* Morton, 1 Curt. (U. S.) 294; Kriesler *v.* Morton, 1 Curt. (U. S.) 413; Iasigi *v.* Collector, 1 Wall. (U. S.) 375.

But a protest which claims that the goods are "seine twine" may be supported by proof that they are "gilling twine," under a statute which imposes a certain duty on "seine and gilling twine," as the terms are convertible. McNab *v.* Seeberger, 39 Fed. Rep. 759.

11. Interpretation of Nontechnical Words for Court. — Sonn *v.* Magone, 159 U. S. 417; Nix *v.* Hedden, 149 U. S. 304, *affirming* 39 Fed. Rep. 109; Toplitz *v.* Hedden, 146 U. S. 252; Marvel *v.* Merritt, 116 U. S. 11; Vom Cleff *v.* Magone, 57 Fed. Rep. 198; Erhardt *v.* Ullman, (C. C. A.) 51 Fed. Rep. 414.

12. Inclusion of Article under Particular Name Question for Jury. — Hedden *v.* Richard, 149 U. S. 346; Toplitz *v.* Hedden, 146 U. S. 252; Robertson *v.* Salomon, 144 U. S. 603; Robertson *v.* Oelschlaeger, 137 U. S. 436; Recknagel *v.* Murphy, 102 U. S. 197; Arthur *v.* Herold, 100 U. S. 75; Wilkinson *v.* Greely, 1 Curt. (U. S.) 439; Zante Currants, 73 Fed. Rep. 183;

tions of similitude [1] and use, where the evidence was conflicting.[2]

g. CONCLUSIVENESS OF FINDINGS OF LAW AND FACT BY APPRAISERS. — The Circuit Court should not disturb the findings of the board of general appraisers upon doubtful questions of fact;[3] but when a finding of fact is wholly without evidence to support it, or when it is clearly contrary to the weight of the evidence, it is the duty of the court to disregard it.[4] Findings on questions of law by the board of general appraisers are not conclusive upon review in the Circuit Court,[5] especially where additional testimony is taken.[6]

h. ORDER FOR RETURN OF EXCESSIVE OR ILLEGAL DUTIES. — Where the Circuit Court finds in favor of the importer, it may order that the excessive or illegal duties be returned to him.[7]

i. INTEREST NOT RECOVERABLE. — As a general rule, the importer cannot recover interest.[8]

j. PAYMENT OF JUDGMENTS. — Under the old law a collector against whom judgment had been rendered might relieve himself from personal liability to execution thereon by procuring a certificate of probable cause from the court.[9] Under the Act of 1890, where the judgment is merely for the return of duties illegally exacted it is payable out of the United States Treasury, as a matter of course.[10]

5. Review by Circuit Court of Appeals and United States Supreme Court. — The Act of 1890 provides for a review of the decision of the Circuit Court by the Supreme Court of the United States, upon certain contingencies,[11] but jurisdiction of such appeals has since been transferred to the Circuit Court of Appeals, except as to questions of jurisdiction, which may still be certified to the Supreme Court.[12] Upon such review the collector cannot set up a new theory as to the proper classification of the goods.[13] Findings of fact by the general appraisers, affirmed by the Circuit Court, will not be disturbed unless

Vom Cleff *v.* Magone, 57 Fed. Rep. 198; Weilbacher *v.* Merritt, 37 Fed. Rep. 85; Ross *v.* Fuller, 17 Fed. Rep. 224.

1. Question of Similitude for Jury. — Herrman *v.* Arthur, 127 U. S. 363; Wills *v.* Russell, 100 U. S. 621.

2. Question of Use of Article for Jury. — Magone *v.* Heller, 150 U. S. 70.

3. Findings upon Doubtful Questions of Fact Not Disturbed. — Bader *v.* U. S., 116 Fed. Rep. 541; Myers *v.* U. S., 110 Fed. Rep. 940; Belcher *v.* U. S., 91 Fed. Rep. 975; Klipstein *v.* U. S., 91 Fed. Rep. 520; *In re* Buffalo Natural Gas Fuel Co., 73 Fed. Rep. 191, (C. C. A.) 78 Fed. Rep. 110; *In re* Bing, 66 Fed. Rep. 727; Marine *v.* Lyon, (C. C. A.) 65 Fed. Rep. 992; U. S. *v.* Perkins, (C. C. A.) 66 Fed. Rep. 50; *In re* Van Blankensteyn, (C. C. A.) 56 Fed. Rep. 474; *In re* White, 53 Fed. Rep. 787; *In re* Kursheedt Mfg. Co., 49 Fed. Rep. 633, (C. C. A.) 54 Fed. Rep. 159.

4. When Proper to Disregard Findings of Fact. — Morris European, etc., Express Co. *v.* U. S., 94 Fed. Rep. 643, (C. C. A.) 101 Fed. Rep. 111; *In re* Van Blankensteyn, (C. C. A.) 56 Fed. Rep. 474.

5. Findings of Law Not Conclusive. — Dana *v.* U. S., 91 Fed. Rep. 522. *Compare* U. S. *v.* Hahn, 91 Fed. Rep. 755, (C. C. A.) 100 Fed. Rep. 635.

6. Zante Currants, 73 Fed. Rep. 183.

7. Court May Order Return of Excessive or Illegal Duties. — U. S. *v.* Davis, (C. C. A.) 54 Fed. Rep. 147.

Assignment of Judgment Against Collector. — Burke *v.* Davis, 63 Fed. Rep. 456.

8. Interest Not Recoverable. — Marine *v.* Lyon, (C. C. A.) 62 Fed. Rep. 153. And see U. S. *v.* Sherman, 98 U. S. 565; White *v.* Arthur, 20 Blatchf. (U. S.) 237.

An Importer Who Has Been Guilty of Laches is not entitled to recover interest for the time during which his laches continued. Stewart *v.* Schell, 31 Fed. Rep. 65.

Exception to Rule. — But where there was a judgment and a certificate of probable cause, and thus a case for payment out of the treasury, and then, by direction of the government, a writ of error was taken which operated as a stay, interest on the judgment during the stay was allowed. Schell *v.* Cochran, 107 U. S. 625.

9. Certificate of Probable Cause. — White *v.* Arthur, 20 Blatchf. (U. S.) 237; Cox *v.* Barney, 14 Blatchf. (U. S.) 289; Andrae *v.* Redfield, 12 Blatchf. (U. S.) 407.

10. Judgment under Act of 1890 Payable Out of Treasury. — 26 U. S. Stat. at L. 138, c. 407, § 15; U. S. *v.* Davis, (C. C. A.) 54 Fed. Rep. 147.

11. 26 U. S. Stat. at L. 138, c. 407, § 15.

12. Judgment of Circuit Court Reviewable by Circuit Court of Appeals. — Passavant *v.* U. S., 148 U. S. 214; Louisville Public Warehouse Co. *v.* Collector of Customs, (C. C. A.) 49 Fed. Rep. 561.

Appeal and Not Writ of Error Proper Method of Review. — U. S. *v.* Diamond Match Co., (C. C. A.) 115 Fed. Rep. 288.

Questions of Jurisdiction May Be Certified to Supreme Court. — Passavant *v.* U. S., 148 U. S. 214.

Time of Taking Appeal. — Marine *v.* Lyon, (C. C. A.) 62 Fed. Rep. 153.

13. Seeberger *v.* Schlesinger, 152 U. S. 581.

clearly erroneous.[1] And it is not within the province of the court to grant or to withhold leave to apply to an officer of the customs for a remission of duties, or, in case a judgment of the Circuit Court is affirmed, to direct or suggest its action in regard to new trials.[2]

IX. Recovery Back of Internal Revenue Taxes Illegally Exacted. — Internal revenue taxes illegally exacted may be recovered back by action,[3] but it is an imperative prerequisite to such an action that a claim be filed with the commissioner of internal revenue within two years after payment of the tax. A mere protest on a return for taxation is not sufficient.[4]

X. Violations of Revenue Laws — 1. What Constitutes Violation — *a.* In General. — A person who performs an overt act with the intention of fraudulently evading the payment of customs duties or internal revenue taxes is guilty of a violation of the revenue laws.[5] And acts which result in a fraud upon the revenue may constitute such violation, even though performed without fraudulent intent,[6] but as a general rule, forfeitures are not incurred where the violation is purely accidental.[7]

Unexecuted Intention to Violate Law Not Punishable. — A mere unexecuted intention to violate the revenue laws is not punishable.[8]

Change in Use of Property Admitted Free of Duty Not Offense. — Although property has been admitted free of duty because imported for a certain purpose, it is no violation of law to use it for another purpose where the change of use is *bona fide*, and not a device to defraud the government.[9]

Employer Liable for Unlawful Acts of Agent. — An employer is liable for violations of the revenue laws by his authorized agents or servants.[10]

Ignorance of Law No Defense. — Ignorance of the law does not render innocent a wilful infraction of the revenue laws.[11]

1. Apgar *v.* U. S., (C. C. A.) 78 Fed. Rep. 332; White *v.* U. S., (C. C. A.) 72 Fed. Rep. 251.

2. *In re* Marquand, (C. C. A.) 57 Fed. Rep. 189.

3. **Right to Recover Back Taxes Illegally Exacted.** — See the authorities cited in the notes immediately following.

A distiller cannot recover back a tax exacted on a fraction of a gallon left in a package of spirits after the whole number of gallons has been counted. Stuart *v.* Barnes, 43 Fed. Rep. 281.

As to the Right to Recover Interest in Such Cases, see McClain *v.* Pennsylvania Co., (C. C. A.) 108 Fed. Rep. 618, 105 Fed. Rep. 367; Burrough *v.* Abel, 105 Fed. Rep. 366; Stuart *v.* Barnes, 43 Fed. Rep. 281.

4. **Appeal to Commissioner Condition Precedent.** — Rev. Stat. U. S., § 3228; Kings County Sav. Inst. *v.* Blair, 116 U. S. 200; Stuart *v.* Barnes, 43 Fed. Rep. 281; Alkan *v.* Bean, 8 Biss. (U. S.) 83.

5. **Removal of Spirits to Bonded Warehouse with Intent to Defraud Government.** — Henderson's Distilled Spirits, 14 Wall. (U. S.) 44.

Change of Condition of Merchandise to Evade Payment of Duties. — U. S. *v.* Patton, 46 Fed. Rep. 461. *Compare* U. S. *v.* Breed 1 Sumn. (U. S.) 159.

A Person Who Goes to Canada for the Purpose of Buying Clothes which he wears back without entering them at the custom house or paying duty on them is guilty of smuggling. Simmons's Case, Brown Adm. 128.

Failure to Enter Free Goods. — The fact that a picture which is entitled to be entered free of duty is brought into the country in a trunk, without entry, does not show an intent to defraud. U. S. *v.* One Oil Painting, 31 Fed. Rep. 881.

6. **Importation of Dutiable Goods Through Mail.** — Dutiable goods cannot be imported through the foreign mail, even though there is no fraudulent intent in the sending. Cotzhausen *v.* Nazro, 107 U. S. 215, 15 Fed. Rep. 891.

7. **No Forfeiture for Accidental Violation of Law.** — U. S. *v.* 9 Casks, etc., Distilled Spirits, 51 Fed. Rep. 191; U. S. *v.* Fourteen Packages Pins, Gilp. (U. S.) 235; Fairclough *v.* Gatewood, 4 Call. (Va.) 158.

8. **Unexecuted Intention to Violate Law Not Punishable.** — Keck *v.* U. S., 172 U. S. 434; U. S. *v.* Loup, 1 McCrary (U. S.) 168; U. S. *v.* Riddle, 5 Cranch (U. S.) 311; Le Tigre's Case, 3 Wash. (U. S.) 576.

Thus, the making of a fraudulent invoice, when not followed up by an attempt to use it in entering the goods, is not a violation of law. U. S. *v.* Twenty-eight Packages Pins, Gilp. (U. S.) 306; Goodwin *v.* U. S., 2 Wash. (U. S.) 493.

9. **Change in Use of Property Admitted Free of Duty Not Offense.** — U. S. *v.* One Hundred and Ninety-Six Mares, 29 Fed. Rep. 139; An Ullage Box Sugar, 1 Ware (U. S.) 350.

10. **Employer Liable for Unlawful Acts of Agent.** — U. S. *v.* White, 42 Fed. Rep. 138; Bush *v.* U. S., 24 Fed. Rep. 917; Prather *v.* U. S., 9 App. Cas. (D. C.) 82. But see U. S. *v.* Halberstadt, Gilp. (U. S.) 262.

11. **Ignorance of Law No Defense.** — U. S. *v.* Cargo Sugar, 3 Sawy. (U. S.) 46; Barlow *v.* U. S., 7 Pet. (U. S.) 404.

Rule Where Party Violating Law Is Foreigner. — Cambioso *v.* Maffet, 2 Wash. (U. S.) 98.

b. SPECIFIC VIOLATIONS AND OFFENSES — **Sale of Liquors by Druggist Who Has Not Paid Tax.** — It is a violation of law for a druggist or a physician to sell spirituous liquor, as a beverage, without paying the tax required of retail liquor dealers.[1]

Working in Distillery Which Has No Sign. — It is a criminal offense to work in a distillery on which no sign is placed and kept.[2]

Retailing Liquor at Place Where Tax Has Not Been Paid. — Retailing liquor at another place than that for which the dealer has paid a special tax is made an offense by statute.[3]

Sale of Cigars at Factory. — A manufacturer of cigars has no right to sell at his factory cigars there made by him, even though he has paid a special tax as a dealer in tobacco.[4]

Failure to Procure Wholesale Liquor Dealer's License. — A retail liquor dealer who enters into a "protective union" which sells beer at wholesale to its members, without taking out a wholesale dealer's license, is guilty of a violation of law.[5]

Obstructing or Resisting Revenue Officers. — Masters of vessels are liable to penalties for obstructing or hindering revenue officers in the execution of their duties.[6] Resistance to revenue officers in general is a criminal offense,[7] unless in a case where the officer is attempting to make a seizure without probable cause.[8]

Miscellaneous Offenses. — Decisions in regard to various offenses against the revenue laws, not susceptible of general classification, are cited in the notes.[9]

2. Seizure of Property — *a.* IN GENERAL. — The usual remedy for a violation of the revenue laws is a seizure of the offending property, preparatory to its condemnation and forfeiture, and such seizure may take place even

1. Sale of Liquors by Druggist Who Has Not Paid Tax. — U. S. *v.* Smith, 45 Fed. Rep. 115; U. S. *v.* White, 42 Fed. Rep. 138; U. S. *v.* Starnes, 37 Fed. Rep. 665; U. S. *v.* Stafford, 20 Fed. Rep. 720; U. S. *v.* Cota, 17 Fed. Rep. 734.

Qualifications of Rule. — It is not a violation of law for an apothecary to use spirituous liquor in the preparation of medicine without paying the special tax required of retail liquor dealers. U. S. *v.* Calhoun, 39 Fed. Rep. 604.

Nor is it a violation of law for him to use alcohol in the preparation of cologne water. U. S. *v.* White, 42 Fed. Rep. 138. And see the title INTOXICATING LIQUORS, vol. 17, p. 189.

2. Working in Distillery Which Has No Sign. — Rev. Stat. U. S., § 3279; U. S. *v.* Flynn, 15 Blatchf. (U. S.) 302.

But this does not apply to one who merely works in putting up a building in which an illicit still is set up. U. S. *v.* Burgess, 33 Fed. Rep. 833.

3. Retailing Liquor at Place Where Tax Has Not Been Paid. — U. S. *v.* Durham, 33 Fed. Rep. 834; U. S. *v.* Shriver, 23 Fed. Rep. 134.

On Removal from the Place Mentioned in His License, a dealer may continue his business at the place to which he has removed without paying an additional special tax. U. S. *v.* Davis, 37 Fed. Rep. 468.

4. Sale of Cigars at Factory. — Ludloff *v.* U. S., 108 U. S. 176.

5. Failure to Procure Wholesale Liquor Dealer's License. — U. S. *v.* Kallstrom, 30 Fed. Rep. 184.

6. Master of Vessel Liable to Penalty for Obstructing Revenue Officer. — Rev. Stat. U. S., § 3068.

The Refusal of a Vessel to Slacken Speed so as to allow a revenue officer to board her is a violation of this statute. The Barracouta, 42 Fed. Rep. 160.

7. Resistance to Revenue Officers Criminal Offense. — U. S. *v.* Sears, 1 Gall. (U. S.) 215.

Where Several Persons Are Concerned in Resisting a Revenue Officer, each person is guilty of a several offense and is liable for the entire penalty. U. S. *v.* Babson, 1 Ware (U. S.) 450.

Resisting Seizure Not Concealment of Goods. — Resisting a seizure of goods by a revenue officer does not constitute the offense of concealing the goods. U. S. *v.* Farnsworth, 1 Mason (U. S.) 1.

8. Resistance of Seizure Without Probable Cause Not Offense. — U. S. *v.* Gay, 2 Gall. (U. S.) 359.

9. Change or Alteration of Marks or Stamps on Distilled Spirits. — U. S. *v.* Bardenheier, 49 Fed. Rep. 846.

Failure to Mark or Stamp Distilled Spirits. — U. S. *v.* Three Barrels Whisky, 77 Fed. Rep. 963.

Substituting Spirits of Lower Proof in Stamped and Branded Package. — U. S. *v.* 9 Casks, etc., Distilled Spirits, 51 Fed. Rep. 191.

Sale of Oleomargarine in Packages Other than Those Prescribed by Law. — Dougherty *v.* U. S., (C. C. A.) 108 Fed. Rep. 56.

Bringing Merchandise into United States Contrary to Law. — U. S. *v.* Kee Ho, 33 Fed. Rep. 333; U. S. *v.* Ortega, 66 Fed. Rep. 713.

Maliciously Breaking into Bonded Freight Car. — U. S. *v.* Durwood, 49 Fed. Rep. 446.

Shipping Liquors under Name or Brand Other than That Known to Trade. — U. S. *v.* Stege, 87 Fed. Rep. 553.

Making False Statement in Declaration for Entry of Imported Goods. — U. S. *v.* Fawcett, 86 Fed. Rep. 900.

after the duties on imported goods have been paid and the goods delivered to the consignee.[1] Seizure, however, is not a jurisdictional prerequisite to a suit to enforce a lien on the property for the penalty imposed for violation of a revenue law.[2] A seizure is not invalidated by mere irregularities,[3] nor by a subsequent judgment declaring invalid the assessment to enforce which it was made.[4] An actual taking possession of the property is necessary to constitute a valid seizure,[5] and a subsequent abandonment of the property by the seizing officer renders it ineffectual.[6]

b. Liability of Officers for Wrongful Seizures. — Revenue officers are liable in damages for wrongful seizures of property, made without reasonable or probable cause.[7] But where judgment is rendered in favor of the claimant in a proceeding for forfeiture of the property seized, the officer may protect himself from liability to an action for damages by procuring a certificate of reasonable cause;[8] and, in like manner, an officer against whom judgment has been rendered in an action for wrongful seizure may relieve himself of personal liability to execution by procuring a certificate of probable cause.[9] What constitutes probable cause for a seizure is a question of law for the court.[10]

c. Attempt to Rescue Seized Property an Offense. — An attempt to rescue seized property, by force or intimidation, constitutes a criminal offense.[11]

3. Proceedings for Condemnation and Forfeiture — *a.* In General. — Where the property seized exceeds five hundred dollars in value, proceedings must be instituted for its condemnation.[12] The suit for condemnation and forfeiture is a civil and not a criminal proceeding,[13] and is independent of a criminal prosecution for the offense.[14] Where the seizure takes place upon navigable

1. Goods May Be Seized After Delivery to Consignee. — Wood *v.* U. S., 16 Pet. (U. S.) 342; Clifton *v.* U. S., 4 How. (U. S.) 242.

2. Seizure Not Jurisdictional Prerequisite. — The Paolina S., 11 Fed. Rep. 171; The Missouri, 3 Ben. (U. S.) 508.

3. Seizure Not Invalidated by Irregularities. — Taylor *v.* U. S., 3 How. (U. S.) 197; U. S. *v.* 508 Barrels Distilled Spirits, 5 Blatchf. (U. S.) 407.

Collector Need Not Make Seizure in Person. — Schooner Bolina, 1 Gall. (U. S.) 75; Taylor *v.* U. S., 3 How. (U. S.) 197. And see U. S. *v.* Sykes, 58 Fed. Rep. 1000.

4. Seizure Valid though Assessment Invalid. — Harding *v.* Woodcock, 137 U. S. 43.

5. Actual Taking of Property Essential to Valid Seizure. — The Schooner Silver Spring, 1 Sprague (U. S.) 551.

6. Abandonment of Property Nullifies Seizure. — The Josefa Segunda. 10 Wheat. (U. S.) 312; Ninety-Two Barrels Rectified Spirits, 5 Ben. (U. S.) 323; The Brig Ann, 9 Cranch (U. S.) 289; U. S. *v.* Cook, 1 Sprague (U. S.) 213.

7. Officers Liable in Damages for Wrongful Seizure. — Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246; M'Lane *v.* U. S., 6 Pet. (U. S.) 404; Burke *v.* Trevitt, 1 Mason (U. S.) 96; Hall *v.* Warren, 2 McLean (U. S.) 332; U. S. *v.* Cook, 1 Sprague (U. S.) 213.

Action of Trover Does Not Lie. — McGuire *v.* Winslow, 23 Blatchf. (U. S.) 425.

8. Certificate of Reasonable Cause. — Rev. Stat. U. S., § 970; The Conqueror, 166 U. S. 110; U. S. *v.* Frerichs, 16 Blatchf. (U. S.) 547; Hoit *v.* Hook, 14 Mass. 210.

9. Certificate of Probable Cause. — Rev. Stat. U. S., § 989; U. S. *v.* The Ship Recorder, 2 Blatchf. (U. S.) 119.

Probable Cause Same as Reasonable Cause. — Frerichs *v.* Coster, 22 Fed. Rep. 637.

A Doubt Respecting the Law constitutes good reason for granting a certificate of probable cause. U. S. *v.* Riddle, 5 Cranch (U. S.) 311.

10. Probable Cause Question for Court.—U. S. *v.* Gay, 2 Gall. (U. S.) 359.

11. Attempt to Rescue Seized Property Offense.— U. S. *v.* Ford, 33 Fed. Rep. 861.

12. Proceedings for Condemnation — When Essential. — Conway *v.* Stannard, 17 Wall. (U. S.) 398; Burke *v.* Trevitt, 1 Mason (U. S.) 96; Hall *v.* Warren, 2 McLean (U. S.) 332; Wessels *v.* Beeman, 87 Mich. 481.

District Court of District in Which Seizure Was Made Has Jurisdiction. — Four Packages *v.* U. S., 97 U. S. 404.

13. Suit for Forfeiture Civil Proceeding. — U. S. *v.* Zucker, 161 U. S. 475; Friedenstein *v.* U. S., 125 U. S. 224; Lilienthal's Tobacco *v.* U. S., 97 U. S. 237; U. S. *v.* A Lot Jewelry, 59 Fed. Rep. 684; A Quantity Manufactured Tobacco, 10 Ben. (U. S.) 447.

Similar to Criminal Prosecution in Some Respects. — Such action is so akin to a criminal prosecution that a general verdict on several counts seeking the same object under different forms should be sustained if any one count is good. Snyder *v.* U. S., 112 U. S. 216; Coffey *v.* U. S., 116 U. S. 436.

14. Independent of Criminal Prosecution for Offense. — Origet *v.* U. S., 125 U. S. 240; U. S. *v.* 1,150⅛ Pounds Celluloid, (C. C. A.) 82 Fed. Rep. 627; Fein *v.* U. S., 1 Wyo. 246.

waters the court sits as a court of admiralty, but in all cases of seizure upon land it sits as a court of common law.[1]

b. WHAT MUST BE PROVED — **Knowledge or Acquiescence of Claimant.** — As a general rule, it is necessary to show that the acts complained of were done with the knowledge or acquiescence of the claimant of the property of which forfeiture is sought,[2] but the rule is not without exception.[3]

Intent to Defraud Government. — It was formerly held that an intent to defraud the government must be shown, and the statute provided that the court should submit the question of fraudulent intent to the jury as a distinct and separate proposition, and require a special finding thereon,[4] but this statute has since been repealed.[5]

c. BURDEN OF PROOF AND ADMISSIBILITY OF EVIDENCE. — The burden of proof is, in the first instance, upon the government;[6] but after it has shown probable cause for the seizure the burden shifts, and the claimant must then prove the innocence of the transaction.[7] A preponderance of the evidence in favor of the government is sufficient to justify a judgment of forfeiture.[8] The official appraisement of the goods seized is admissible in

1. Form of Proceedings for Condemnation — Whether in Admiralty or at Common Law. — The Sarah, 8 Wheat. (U. S.) 391; U. S. *v.* One Hundred and Thirty Barrels Whisky, 1 Bond (U. S.) 587. And see U. S. *v.* Winchester, 99 U. S. 372.

Libel in Admiralty Against Vessel to Enforce Penalty Against Master. — U. S. *v.* The Steamship Missouri, 9 Blatchf. (U. S.) 433; The C. G. White, (C. C. A.) 64 Fed. Rep. 579.

2. Knowledge or Acquiescence of Claimant Must Be Shown. — U. S. *v.* Two Barrels Whisky, (C. C. A.) 96 Fed. Rep. 479; U. S. *v.* The Walla Walla, 44 Fed. Rep. 796; The Snow Drop, 30 Fed. Rep. 79; The Saratoga, 15 Fed. Rep. 382; Gregory *v.* U. S., 17 Blatchf. (U. S.) 325.

If Goods Are Stolen from the Owner, or if a person has obtained possssion of them fraudulently or without authority, no act of his can forfeit them as against the true owner. The Lady Essex, 39 Fed. Rep. 765; U. S. *v.* Two Hundred and Eight Bags Kainit, 37 Fed. Rep. 326; U. S. *v.* 350 Chests Tea, 12 Wheat. (U. S.) 486.

3. Exceptions to Rule — When Knowledge or Acquiescence Need Not Be Shown. — U. S. *v.* Stowell, 133 U. S. 1; Thacher's Distilled Spirits, 103 U. S. 679; U. S. *v.* Two Hundred and Twenty Patented Machines, 99 Fed. Rep. 559; U. S. *v.* Two Bay Mules, 36 Fed. Rep. 84; U. S. *v.* Certain Diamonds, 30 Fed. Rep. 364; U. S. *v.* Two Horses, 9 Ben. (U. S.) 529; U. S. *v.* The Steamship Missouri, 9 Blatchf. (U. S.) 433; The Brig Ploughboy, 1 Gall. (U. S.) 41.

Where the cause of forfeiture was a false oath made by an agent on entry of goods, it was held that his ignorance of the falsity of his statements would not save the property from forfeiture when it was shown that his principal had knowledge of the facts and had devised the fraud. U. S. *v.* Cargo Sugar, 3 Sawy. (U. S.) 46; U. S. *v.* Newmark, 3 Sawy. (U. S.) 584.

4. Proof of Fraudulent Intent Formerly Essential — Submission of Issue to Jury. — U. S. *v.* Two Hundred and Eight Bags Kainit, 37 Fed. Rep. 326; The Purissima Concepcion, 24 Fed. Rep. 358; U. S. *v.* One Hundred and Twenty-Nine Bales Merchandise, 46 Fed. Rep. 468; U. S. *v.* Two Thousand One Hundred and Seventeen Bushels Malt, 8 Fed. Rep. 224; Lewey *v.* U. S., 15 Blatchf. (U. S.) 1; U. S. *v.* Newmark, 3 Sawy. (U. S.) 584. But see Four Packages *v.* U. S., 97 U. S. 404; U. S. *v.* Three Trunks, 7 Sawy. (U. S.) 364; U. S. *v.* Fourteen Packages Pins, Gilp. (U. S.) 235.

5. Proof of Fraudulent Intent No Longer Essential. — U. S. *v.* Ortega, 66 Fed. Rep. 713; U. S. *v.* One Sorrel Stallion, 51 Fed. Rep. 877. And see U. S. *v.* One Pearl Necklace, (C. C. A.) 111 Fed. Rep. 164.

6. Burden of Proof upon Government in First Instance. — U. S. *v.* One Package Distilled Spirits, 88 Fed. Rep. 856; U. S. *v.* Fourteen Packages Whisky, (C. C. A.) 66 Fed. Rep. 984; U. S. *v.* One Hundred and Twenty-Nine Bales Merchandise, 46 Fed. Rep. 468; U. S. *v.* Two Thousand One Hundred and Seventeen Bushels Malt, 8 Fed. Rep. 224; The Schooner Abigail, 3 Mason (U. S.) 331; U. S. *v.* Twenty-Six Diamond Rings, 1 Sprague (U. S.) 294.

Qualification of Rule. — Where cigars are found in other boxes than those specified in the internal revenue laws, the presumption is that they were removed from the factory while in said boxes. Jackson *v.* U. S., 21 Fed. Rep. 35.

7. Burden of Proof Shifted After Probable Cause Shown. — Cliquot's Champagne, 3 Wall. (U. S.) 114; Buckley *v.* U. S., 4 How. (U. S.) 251; The Schooner Thomas and Henry *v.* U. S., 1 Brock. (U. S.) 367; 3,109 Cases Champagne, 1 Ben. (U. S.) 241; U. S. *v.* A Lot Jewelry, 59 Fed. Rep. 684; U. S. *v.* Seven Hundred and Forty Tins Opium, 44 Fed. Rep. 798; Three Thousand Eight Hundred and Eighty Boxes Opium *v.* U. S., 23 Fed. Rep. 367, 9 Sawy. (U. S.) 259; U. S. *v.* 3,880 Boxes Opium, 8 Sawy. (U. S.) 129.

Where the Defense Relied on Is Mistake, the fact that proof of probable cause has been made does not require the claimant to produce more than the ordinary proof of mistake. U. S. *v.* Nine Packages Linen, 1 Paine (U. S.) 129. But the mistake must be clearly proved. U. S. *v.* Fairclough, 4 Wash. (U. S.) 398. And it must be one of fact in order to be a defense. U. S. *v.* Eighty-Five Hogsheads Sugar, 2 Paine (U. S.) 54.

8. Preponderance of Evidence in Favor of Government Sufficient. — The Good Templar, 97

evidence,[1] as are also other invoices of similar goods made by the same importer.[2]

d. DELIVERY OF GOODS TO CLAIMANT UNDER BOND. — The claimant in a proceeding for forfeiture may obtain possession of the goods seized by giving a satisfactory bond for their value.[3]

e. JUDGMENT OF FORFEITURE. — Judgment of forfeiture can be entered only in cases where it is authorized by statute.[4] The judgment may provide for the sale of the forfeited goods, even though they will not sell for enough to pay both the internal revenue taxes and the customs duties.[5] Where a forfeiture is made absolute by an act of Congress, a judgment of forfeiture relates back to the date of the commission of the illegal act and avoids all intermediate sales or alienations, even to purchasers in good faith.[6]

f. EXTENT OF FORFEITURE. — Where the laws relating to the business of distilling are violated, the forfeiture extends to all personal property found upon the premises and actually used in the business with the knowledge of its owner, whether he is the distiller or some other person;[7] to all distilled spirits owned by the distiller when found, without regard to the place where they may be found;[8] and to the interest of the distiller in the lands and buildings used for the distillery, or the interest of such other persons as have consented to the carrying on of the business upon the premises.[9] The forfeitures imposed upon cigar manufacturers for violation of the law are very similar to those imposed for illicit distilling.[10]

4. Criminal Prosecutions. — Prosecutions for fines imposed for violations of the revenue laws are criminal proceedings, and should be begun by indictment.[11]

Persons Aiding or Abetting Liable as Principals. — A person who aids or abets in the removal of distilled spirits on which the proper tax has not been paid is liable as a principal in the offense.[12]

Evidence. — Evidence that goods were taken from a vessel to the wharf at night, and then returned to the vessel, is not sufficient to show an illegal landing.[13] Proof of partial rectification is sufficient to convict one of carrying on the business of a rectifier with intent to defraud the government.[14]

Liability Dependent upon Intention. — Whether a defendant is liable depends upon his good faith and his real intention.[15]

Fed. Rep. 651; Three Thousand Eight Hundred and Eighty Boxes Opium *v.* U. S., 23 Fed. Rep. 367. But see U. S. *v.* 117 Packages Plug Tobacco, 10 Ben. (U. S.) 343.

1. Official Appraisement Admissible in Evidence. — Buckley *v.* U. S., 4 How. (U. S.) 251; U. S. *v.* Fourteen Packages Pins, Gilp. (U. S.) 235.

2. Other Invoices Admissible in Evidence. — U. S. *v.* 146,650 Clapboards, 4 Cliff. (U. S.) 301.

3. Claimant May Obtain Goods by Giving Bond. — U. S. *v.* Eight Cases Paper, 98 Fed. Rep. 416; U. S. *v.* Cargo of Sugar, 3 Sawy. (U. S.) 27.

4. No Judgment of Forfeiture unless Authorized by Statute. — An Ullage Box Sugar, 1 Ware (U. S.) 350; U. S. *v.* One Case Stereoscopic Slides, 1 Sprague (U. S.) 467.

5. Provision for Sale of Forfeited Goods. — U. S. *v.* Fifty-Nine Demijohns Aguadiente, 39 Fed. Rep. 401.

6. Judgment Relates Back to Commission of Illegal Act. — U. S. *v.* Stowell, 133 U. S. 1; U. S. *v.* One Copper Still, 8 Biss. (U. S.) 270; U. S. *v.* 1,960 Bags Coffee, 8 Cranch (U. S.) 416; Henderson's Distilled Spirits, 14 Wall. (U. S.) 44; Fontaine *v.* Phœnix Ins. Co., 11 Johns. (N. Y.) 293.

7. Personal Property on Distillery Premises Forfeited. — U. S. *v.* Stowell, 133 U. S. 1; U. S. *v.* One Copper Still, 8 Biss. (U. S.) 270.

8. Spirits Owned by Distiller Forfeited. — Boyd *v.* U. S., 14 Blatchf. (U. S.) 317.

Spirits Owned by Other Persons Not Forfeited. — U. S. *v.* 372 Pipes Distilled Spirits, 5 Sawy. (U. S.) 421.

9. Extent of Forfeiture of Real Property. — U. S. *v.* Stowell, 133 U. S. 1; Glenn *v.* Winstead, 116 N. Car. 451.

10. Forfeiture for Violation of Laws Regarding Manufacture of Cigars. — U. S. *v.* 246½ Pounds Tobacco, 103 Fed. Rep. 791.

11. Prosecutions for Fines to Be by Indictment. — U. S. *v.* Johannesen, 35 Fed. Rep. 411.

Action of Debt Does Not Lie. — U. S. *v.* Claflin, 97 U. S. 546.

12. U. S. *v.* Sykes, 58 Fed. Rep. 1000.

13. Evidence Insufficient to Show Illegal Landing of Goods. — U. S. *v.* Smith, 2 Wash. (U. S.) 310.

14. Proof of Partial Rectification of Spirits Sufficient for Conviction. — U. S. *v.* Byrne, 19 Blatchf. (U. S.) 259.

15. Liability Dependent upon Intention.—U. S. *v.* Smith, 27 Fed. Rep. 854; U. S. *v.* Buchanan, 4 Hughes (U. S.) 487.

One accused of transporting empty barrels on which were uneffaced and unobliterated revenue stamps is bound to know whether there were such stamps on the barrels

5. Remission of Penalties and Forfeitures. — Any person who has incurred any fine, penalty, or forfeiture for violation of the revenue laws may file with the district judge a petition to have such penalty remitted or mitigated. The judge thereupon investigates the case in a summary manner and reports his findings of facts to the secretary of the treasury. The secretary may thereupon mitigate or remit such fine, penalty, or forfeiture if, in his opinion, it was incurred without wilful negligence or fraudulent intent.[1] The remission may be partial or conditional, at the discretion of the secretary,[2] and may be had even after a judgment of forfeiture has been rendered.[3] But under former statutes, where the collector was entitled to share in the forfeiture, it was held that the power of remission could not be exercised after he had received his share.[4]

6. Contracts in Violation of Revenue Laws. — A contract in violation of the revenue laws is void.[5] But this rule does not apply to contracts in violation of the revenue laws of foreign countries.[6]

XI. Documentary Stamp Taxes — 1. Power of Congress to Impose. — Agencies, means, or instrumentalities employed by the states to execute or enforce their own laws are not taxable by the federal government, and it is accordingly held that laws imposing documentary stamp taxes do not apply to instrumentalities employed by a state or its governmental subdivisions in the discharge of their ordinary governmental functions.[7] And it has also been held by several state courts that Congress has no power to require a revenue stamp to be affixed to process of state courts,[8] or to tax deeds executed under the laws of a state, unless the state consents thereto.[9]

2. Construction of Stamp Laws. — In construing laws imposing stamp taxes ambiguities are to be resolved in favor of the person opposing the payment of the tax.[10] When a tax is imposed on documents of a special character, to determine whether a stamp is required in any given case, the form of the document is to be looked to rather than the transaction of which it is a part.[11]

transported by him. U. S. *v.* Goodrich Transp. Co., 8 Biss. (U. S.) 224.

1. Remission of Penalties and Forfeitures. — The Laura, 114 U. S. 411; Dorsheimer *v.* U. S., 7 Wall. (U. S.) 166; Ferry *v.* U. S., (C. C. A.) 85 Fed. Rep. 550; U. S. *v.* One Sorrel Stallion, 51 Fed. Rep. 877; Macheca *v.* U. S., 26 Fed. Rep. 845; Petrel Guano Co. *v.* Jarnette, 25 Fed. Rep. 675; The Palo Alto, 2 Ware (U. S.) 344, 18 Fed. Cas. No. 10,700; Sinn *v.* U. S., 14 Blatchf. (U. S.) 550; Murray *v.* Arthur, 13 Blatchf. (U. S.) 429; Powell *v.* Redfield, 4 Blatchf. (U. S.) 45; The Margaretta, 2 Gall. (U. S.) 515; U. S. *v.* One Case Hair Pencils, 1 Paine (U. S.) 400.

2. Remission May Be Partial or Conditional. — Murray *v.* Arthur, 13 Blatchf. (U. S.) 429; Jungbluth *v.* Redfield, 4 Blatchf. (U. S.) 219; U. S. *v.* One Case Hair Pencils, 1 Paine (U. S.) 400; The Palo Alto, 2 Ware (U. S.) 344, 18 Fed. Cas. No. 10,700.

3. Remission May Be Had After Judgment of Forfeiture. — The Laura, 114 U. S. 411, 8 Fed. Rep. 617; U. S. *v.* Morris, 10 Wheat. (U. S.) 246; Dorsheimer *v.* U. S., 7 Wall. (U. S.) 166; M'Lane *v.* U. S., 6 Pet. (U. S.) 404. *Contra*, The Brig Hollen, 1 Mason (U. S.) 431; The Margaretta, 2 Gall. (U. S.) 515.

4. No Remission After Collector Had Received His Share of Forfeiture. — U. S. *v.* Collier, 3 Blatchf. (U. S.) 325; U. S. *v.* Morris, 10 Wheat. (U. S.) 246; Dorsheimer *v.* U. S., 7 Wall. (U. S.) 166.

5. Contract in Violation of Revenue Laws Void. — Petrel Guano Co. *v.* Jarnette, 25 Fed. Rep. 675; Biggs *v.* Lawrence, 3 T. R. 454. But see Wessels *v.* Beeman, 87 Mich. 481; Combs *v.* Tuchelt, 24 Minn. 423; Ross *v.* Crow, 9 Baxt. (Tenn.) 420. And see *infra*, this title, *Documentary Stamp Taxes*.

6. Contract Violating Revenue Laws of Foreign Country Not Void. — Kohn *v.* Schooner Renaissance, 5 La. Ann. 25; Ludlow *v.* Van Rensselaer, 1 Johns. (N. Y.) 94. And see Cambioso *v.* Maffet, 2 Wash. (U. S.) 98.

7. What Documents Not Taxable — Instrumentalities Employed by State or Its Subdivisions. — Warwick *v.* Bettman, 201 Fed. Rep. 127; U. S. *v.* Owens, 100 Fed. Rep. 70; Stirneman *v.* Smith, (C. C. A.) 100 Fed. Rep. 600; Noble *v.* Citizens' Bank, (Neb. 1902) 89 N. W. Rep. 400; Sanborne *v.* Lindley, (Neb. 1902) 88 N. W. Rep. 869; Cobb *v.* Steiger, 9 Pa. Dist. 147. But see U. S. *v.* Ambrosini, 105 Fed. Rep. 239; Farmers' L. & T. Co. *v.* Council Bluffs Gas, etc., Co., 90 Fed. Rep. 806.

8. No Power to Tax Process of State Courts. — Smith *v.* Short, 40 Ala. 385; Warren *v.* Paul, 22 Ind. 276; Fifield *v.* Close, 15 Mich. 505; Walton *v.* Bryenth, (Supm. Ct. Spec. T.) 24 How. Pr. (N. Y.) 357; Jones *v.* Keep, 19 Wis. 369. *Contra*, German Liederkranz *v.* Schiermann, (N. Y. Super. Ct. Spec. T.) 25 How. Pr. (N. Y.) 388.

9. No Power to Require Stamp on Tax Deeds. — Sayles *v.* Davis, 22 Wis. 225.

10. Ambiguities Resolved in Favor of Person Opposing Payment of Tax. — White *v.* Treat, 100 Fed. Rep. 290.

11. Form of Document Decisive of Liability. — Merchants' Warehouse Co. *v.* McClain, 112

3. By Whom Stamp Should Be Affixed. — As a general rule, the person executing a document which requires a stamp is the one to affix it.[1] Where an appeal bond was executed by two obligors, it was held that the attachment and cancellation of the stamp by one of them was sufficient.[2]

4. Number and Amount of Stamps Required. — A written agreement signed by four persons, jointly and severally promising to pay to a fifth person the sums set opposite their names, requires but a single agreement stamp.[3] Where a life insurance policy for one year embraced four separate insurance contracts, the premium being payable in quarterly instalments, it was held that it must be stamped as a contract for one year on the first payment.[4]

5. Validity of Unstamped Documents. — In the absence of a fraudulent intent to evade the provisions of the law, failure to stamp an instrument requiring a stamp does not render it invalid,[5] or inadmissible in evidence.[6] Moreover, it is generally held that the provisions of the United States internal revenue laws do not affect the use as evidence in state courts of instruments from which stamps have been omitted, but apply only to the federal courts.[7] And the omission of a stamp required by the laws of England does not affect the validity of an instrument or its admissibility in evidence in the courts of the United States.[8] An act providing that unstamped instruments shall not be recorded applies only to records pursuant to United States statutes.[9]

6. Right to Post-stamp Documents. — Where stamps have been omitted from a document at the time of its execution, by accident or inadvertence, and without fraudulent intent, it may be stamped at any time before it is offered in evidence.[10] And a substitute for a lost instrument may, with the consent

Fed. Rep. 787; Granby Mercantile Co. *v.* Webster, 98 Fed. Rep. 604.

1. Stamp to Be Affixed by Person Executing Document. — Myers *v.* Smith, 48 Barb. (N. Y.) 614. But see Schermerhorn *v.* Burgess, 55 Barb. (N. Y.) 422.

Sender of Telegram Proper Person to Affix and Cancel Stamp. — Kirk *v.* Western Union Tel. Co., 90 Fed. Rep. 809; Gray *v.* Western Union Tel. Co., 85 Mo. App. 123.

Either Party to a Contract may affix the stamp thereto. Adams *v.* Dale, 29 Ind. 273.

Duty of Referee to Affix Stamps to Deed Given at Judicial Sale. — Loring *v.* Chase, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 318.

2. Teagarden *v.* Garver, 24 Ind. 399.

3. Number of Stamps Required on Joint Agreement. — Ballard *v.* Burnside, 49 Barb. (N. Y.) 102.

4. Amount of Stamp Tax on Insurance Policy. — Buckalew *v.* U. S., (C. C. A.) 102 Fed. Rep. 320.

5. Unstamped Instruments Valid in Absence of Fraudulent Intent. — Hallock *v.* Jaudin, 34 Cal. 167; Dudley *v.* Wells, 55 Me. 145; Govern *v.* Littlefield, 13 Allen (Mass.) 127, note; Tobey *v.* Chipman, 13 Allen (Mass.) 123; Willey *v.* Robinson, 13 Allen (Mass.) 128, note; Schermerhorn *v.* Burgess, 55 Barb. (N. Y.) 422; Gregory *v.* Hitchcock Pub. Co., (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 173; Harper *v.* Clark, 17 Ohio St. 190; Cassidy *v.* St. Germain, 22 R. I. 53; Hitchcock *v.* Sawyer, 39 Vt. 412; Weltner *v.* Riggs, 3 W. Va. 445. *Contra*, Blake *v.* Hall, 19 La. Ann. 49; Wayman *v.* Torreyson, 4 Nev. 124.

Failure to Stamp an Assignment of a Judgment does not affect the validity of the judgment or of the execution thereon, but only of the assignment itself. Campbell *v.* Johnston, 3 Del. Ch. 94.

Failure to Cancel a revenue stamp does not render the instrument void. Adams *v.* Dale, 29 Ind. 273.

6. Unstamped Instruments Admissible in Evidence in Absence of Fraudulent Intent. — Hooper *v.* Whitaker, 130 Ala. 324; Latham *v.* Smith, 45 Ill. 29; State *v.* Glucose Sugar Refining Co., (Iowa 1902) 91 N. W. Rep. 794; Harvey *v.* Wieland, (Iowa 1902) 88 N. W. Rep. 1077; Green *v.* McCracken, 64 Kan. 330; Lerch *v.* Snyder, 112 Pa. St. 161; Smith *v.* Nelson, 18 Vt. 511. *Contra*, Barney *v.* Ivins, 22 Iowa 163; McLearn *v.* Skelton, 18 La. Ann. 514.

Unstamped Promissory Note Admissible under Common Counts. — Jacquin *v.* Warren, 40 Ill. 459; Israel *v.* Redding, 40 Ill. 362; McAfferty *v.* Hale, 24 Iowa 355; Wilson *v.* Carey, 40 Vt. 179.

7. Unstamped Instruments Admissible in State Courts. — Garland *v.* Gaines, 73 Conn. 662; Small *v.* Slocumb, 112 Ga. 279; Richardson *v.* Roberts, 195 Ill. 27; Wade *v.* Foss, 96 Me. 230; Wade *v.* Curtis, 96 Me. 309; Spoon *v.* Frambach, 83 Minn. 301; Cassidy *v.* St. Germain, 22 R. I. 53; Kennedy *v.* Roundtree, 59 S. Car. 324; Southern Ins. Co. *v.* Estes, 106 Tenn. 472; Watson *v.* Mirike, (Tex. Civ. App. 1901) 61 S. W. Rep. 538; Dawson *v.* McCarty, 21 Wash. 314, 75 Am. St. Rep. 841.

8. Instrument Not Stamped According to Laws of England Admissible in United States Courts. — Linton *v.* National L. Ins. Co., (C. C. A.) 104 Fed. Rep. 584.

9. Unstamped Instrument May Be Recorded under State Statutes. — People *v.* Fromme, 35 N. Y. App. Div. 459.

10. Post-stamping Allowed.—Green *v.* Lowry, 38 Ga. 548; Sioux City First Nat. Bank *v.* Stone, (Iowa 1902) 91 N. W. Rep. 1076; Harvey *v.* Wieland, (Iowa 1902) 88 N. W. Rep. 1077; Wingert *v.* Zeigler, 91 Md. 318; Schermerhorn

of the court, be stamped during the trial in which it is to be used, so as to give validity to the original instrument.[1]

7. How Collected. — In the absence of express provisions to the contrary, the only lawful method of collecting stamp taxes is by the sale of the stamps.[2]

8. Penalties for Failure to Stamp Documents. — A person who fails to stamp a document as required by law is liable to fine or imprisonment.[3] Under the Act of 1866, the penalty imposed for omitting to stamp an instrument which required a revenue stamp might be remitted by the collector.[4]

9. Recovery Back of Stamp Taxes Illegally Exacted. — Stamp taxes illegally exacted may be recovered back by action.[5]

10. Redemption of Stamps Accidentally Destroyed. — Where stamps have been accidentally spoiled or destroyed before being used, the commissioner of internal revenue, upon satisfactory proof of that fact, has power to make allowance for or to redeem such stamps; and upon refusal of the Treasury Department to allow the claim, the claimant may sue thereon in the Court of Claims.[6]

11. Right to Shift Burden of Tax. — Considerable controversy has arisen as to the right of express companies and other common carriers of goods to shift the burden of the stamp tax imposed upon receipts or bills of lading by increasing their rates by an amount sufficient to cover the cost of the stamp. By the weight of authority a reasonable increase of rates for this purpose is valid.[7]

REVEREND. — See note 8.

REVERSE — REVERSAL. — To reverse is to set aside, to annul, or to vacate.[9] Reversal is the annulling or setting aside of a judgment, usually by an appellate court, for error or irregularity.[10]

v. Burgess, 55 Barb. (N. Y.) 422; Jones *v.* Western Mfg. Co., 27 Wash. 136. But see Wayman *v.* Torreyson, 4 Nev. 124.

1. Substitute for Lost Instrument Stamped on Trial. — Dowler *v.* Cushwa, 27 Md. 354.

2. Stamp Taxes Collected by Sale of Stamps. — Fleshman *v.* McClain, 105 Fed. Rep. 610, *affirmed* (C. C. A.) 106 Fed. Rep. 880.

3. Person Violating Law Subject to Fine or Imprisonment. — Fleshman *v.* McClain, 105 Fed. Rep. 610, *affirmed* McClain *v.* Fleshman, (C. C. A.) 106 Fed. Rep. 880.

No Forfeiture for Accidental Omission of Stamp under Act of 1864. — Hitchcock *v.* Sawyer, 39 Vt. 412.

4. But this could be done only in case of accident or mistake. The decision of the collector, in such case, was conclusive. Peoria M. & F. Ins. Co. *v.* Perkins, 16 Mich. 380.

A deputy collector had no power to make such remission or to post-stamp an instrument and cancel the stamp. McAfferty *v.* Hale, 24 Iowa 355; Brown *v.* Crandal, 23 Iowa 112.

5. Stamp Taxes Illegally Exacted May Be Recovered Back. — McClain *v.* Fleshman, (C. C. A.) 106 Fed. Rep. 880.

6. Redemption of Stamps Accidentally Destroyed. — U. S. *v.* American Tobacco Co., 166 U. S. 468.

7. Reasonable Increase of Rates to Shift Burden of Tax Valid. — Crawford *v.* Hubbell, 177 U. S. 419, 89 Fed. Rep. 961; American Express Co. *v.* Michigan, 177 U. S. 404 [*reversing* Atty.-Gen. *v.* American Express Co., 118 Mich. 682]; People *v.* Wells, 135 Cal. 503. But see Trammell *v.* Dinsmore, 102 Fed. Rep. 794, 183 U. S. 115; U. S. Express Co. *v.* People, 80 Ill. App. 446.

8. Reverend. — In Keet *v.* Smith, 1 P. D. 73, 45 L. J. P. C. 10, it was held that the word *reverend* was not a title of honor or dignity, but was merely a laudatory epithet or mark of respect, and that a person prefixing the word to his name did not thereby claim to be a person in holy orders.

9. Reverse. — Laithe *v.* McDonald, 7 Kan. 268.

In Moore *v.* Taylor, 1 Idaho 630, it was held that although the word *reverse* was used in a judgment of the Supreme Court, yet if it could be ascertained from the judgment and the proceedings leading thereto that it was intended only to modify and not to vacate the judgment of the court below, it would be considered as an affirmance of such judgment as modified.

10. Reversal — Appellate Court. — Upon the meaning of the word *reversal*, as used in a statute protecting a purchaser at a foreclosure sale where the foreclosure decree was ultimately *reversed* on error, the court said: "We do not think that section 508 [of Code Civ. Pro. Neb.], in using the word *reversal*, contemplated only a *reversal* by an appellate court. It meant a *reversal* by any court authorized to set aside the judgment. Its policy was to protect purchasers at sales under judgments which had been rendered by courts of competent jurisdiction in the premises, no matter how erroneous might be the proceedings leading to the judgment." Manfull *v.* Graham, 55 Neb. 645.

REVERSION. — See the title REMAINDERS AND EXECUTORY INTERESTS, *ante.*

REVERT. (See also the titles REMAINDERS AND EXECUTORY INTERESTS, *ante;* WILLS; and see REVERTER, *post.*) — "The usual and ordinary meaning of 'revert' is to return, to come back; from the Latin *revertere*, to turn backward. Its legal or technical signification is for property to go back, or return, to a person who formerly owned it, but who parted with the possession or title to it, by creating an estate in another which has terminated by his act or by operation of law." [1]

REVERTER. (See also the title REMAINDERS AND EXECUTORY INTERESTS, *ante;* and see REVERT, *ante.*) — A possibility of reverter is that species of reversionary interest which exists when the grant is so limited that it may possibly terminate.[2]

REVIEW. (See also the title HIGHWAYS, vol. 15, p. 343; and see the title REVIEW, 18 ENCYC. OF PL. AND PR. 989.) — A review is a second examination with a view to amendment; reconsideration; revision. The term is used more particularly to designate the examination of a cause by an appellate court or

1. **Revert.** — And. L. Dict., *quoted* in Pearce *v.* Lott, 101 Ga. 399.

Technical Sense. — See Thompson *v.* West, 56 N. J. Eq. 660; Robinson *v.* Ostendorff, 38 S. Car. 66.

Same — Right of Way. — A statute provided that in case of the abandonment or nonuser of a right of way, it should *revert* to the owner of the fee. In construing this statute the court said: "*Revert*, as here used, is a technical word, and is to be accorded a meaning as such. Code, § 48, par. 2. It is the return to the owner of the fee of the easement formerly appropriated, or, perhaps, more accurately speaking, the removal of the burden cast upon the fee." Remey *v.* Iowa Cent. R. Co., (Iowa 1902) 89 N. W. Rep. 220.

Revert in Sense of Go Back To. — In Ingraham *v.* Ingraham, 169 Ill. 460, it was said: "That sentence provides that any portion of the one hundred thousand dollars authorized to be appropriated to the relief of his needy nephews and nieces therein referred to, which should not be so appropriated, should '*revert* to the use of said hospital fund,' that is to say, should go back to said hospital fund from which it had been withdrawn. * * * The construction here given to the word *revert* is not inconsistent with anything said in Thomas *v.* Miller, 161 Ill. 60, because here the fund had been previously given to the hospital, and therefore could *revert* or return to it."

Revert in Sense of Go To. — In Beatty *v.* Cory Universalist Soc., 39 N. J. Eq. 463, it was said: "The question propounded is, what is meant by the provision that it shall *revert* back to his lawful heirs? By the term *revert* he meant 'go to,' and by 'lawful heirs' he meant his children, or, in case of their death, those who should legally represent them." See also Robinson *v.* Ostendorff, 38 S. Car. 66.

Devisee Taking as Purchaser. — By his will a testator gave to his wife the income and improvement of his house during her life, and charged his estate with her maintenance, and then provided as follows: "All the rest and residue of my estate, real or personal, of every name and nature, I give the income and the improvement of the same to my children, to wit, J. and S., wife of G., and at their decease the said real and personal estate shall *revert* to their children, and also the above-described estate given to my beloved wife after her decease, to them and their heirs forever." In construing this will the court said: "The inartificial use of the word *revert* no more obscures the plain meaning that the children are to take as purchasers than 'descend to his legal heirs' in White *v.* Woodberry, 9 Pick. (Mass.) 138, or 'inherit' in Moore *v.* Weaver, 16 Gray (Mass.) 305." Dole *v.* Keyes, 143 Mass. 239.

Remainder. — A testator devised to his son Henry a tract of land, "to hold the same during his natural life; and from and immediately after the death of my said son, I give and bequeath the said premises unto his lawful issue, if such he shall have any to survive him. But if my said son should die without such issue to survive him, then, and in that case, the said premises shall *revert* to my estate and be sold by my executors, and the proceeds distributed among my surviving heirs hereinafter named, agreeably to the intestate laws of Pennsylvania." In construing this provision the court said: "In regarding the principal clause, it is very apparent that the testator does not use the word *revert* in the strict legal sense; for he certainly means to exclude Henry from having any share in the *reversion*. In other words, the estate which the devisees or legatees take is not by way of *reversion*, but a gift of the *reversion*. It is intended for only some of his heirs, and is therefore only a remainder." Passmore's Appeal, 23 Pa. St. 381. See also Snell *v.* Snell, 38 N. J. Eq. 124.

2. **Reverter.** — 1 Washburn on Real Prop. (5th ed.) 63.

A testator devised land to be used for a certain purpose, and provided that if it should cease to be used for such purpose the land should *revert* to his heirs at law. In construing this devise in Lougheed *v.* Dykeman Baptist Church, (Supm. Ct. Spec. T.) 40 N. Y. Supp. 586, the court said: "The testator reserved to his heirs at law an interest in the property which was not exactly a reversion, but was rather the possibility of a reversion, which is sometimes called a *reverter*."

the second examination of a proposed public road by a jury of viewers, or, as they are sometimes called, a "jury of review." In the first sense it signifies any of the different modes by which a judicial act may be revised, as appeal, writ of error, rehearing, etc.[1]

REVIEW, BILL OF. — See BILL OF REVIEW, vol. 4, p. 59; and see the title BILLS OF REVIEW, 3 ENCYC. OF PL. AND PR. 569.

REVISE — REVISION. (See also the title STATUTES.) — To revise is to review, alter, and amend.[2] The word "revision" means a review; re-examination; looking at again.[3]

REVISED STATUTES. (See also the title STATUTES.) — See note 4.

REVIVAL OF ACTIONS. — See the titles LIMITATION OF ACTIONS, vol. 19, p. 136; SCIRE FACIAS; and see the title REVIVOR OF SUITS AND ACTIONS, 18 ENCYC. OF PL. AND PR. 1094.

REVIVE — REVIVAL. (See also the references under REVIVAL OF ACTIONS, *ante*.) — The word "revive" means to bring again to life; to reanimate; to renew; to bring into action after a suspension; as, to revive a project or scheme which has been laid aside.[5] The primary meaning of "revive" is to "give life to again."[6]

1. Review. — See Leighton *v.* Bates, 24 Colo. 303.

Additional Testimony. — In Leighton *v.* Bates, 24 Colo. 317, it was said: "While a *review* is ordinarily had of the record only, and as made by the lower tribunal, yet it may not be so limited, but on the contrary, because of accompanying or explanatory words, may be enlarged so as to embrace the taking of additional evidence, or practically to constitute a trial *de novo*."

Review or Report Assessing Damages for Taking Land. — See Central Pac. R. Co. *v.* Pearson, 35 Cal. 247. See also the title EMINENT DOMAIN, vol. 10, p. 1043.

2. Revise. — Webst. Dict., *followed* in Vinsant *v.* Knox, 27 Ark. 272, in which case it was held that a power to "*revise* and rearrange the statute law" of the state could not be held to include power to "originate" laws for adoption by the legislature.

3. Revision. — Goodwin *v.* Prime, 92 Me. 355, *quoting* Cent. Dict.

Repeal. (See also the title STATUTES.) — In Atty. Gen. *v.* Parsell, 100 Mich. 173, it was said: "It would seem in accordance with reason to hold that when the legislature *revises* and consolidates certain acts, and covers the entire subject, the act as *revised* and consolidated supersedes and repeals all other acts in relation thereto. The very terms *revise* and 'consolidate' imply the intention to include in such act entire control over the subject, and to exclude all prior enactments."

In Helena *v.* Rogan, (Mont. 1902) 69 Pac. Rep. 710, it was said: "*Revision* of statutes implies a re-examination of them. A *revision* is intended to take the place of the law as previously formulated, and operates to repeal it. Where a provision is amended by an act using the words 'to read as follows,' it must be the intention of the lawmakers to make the amendment a substitute for the old provision, and to have it take its place exclusively."

But in Falconer *v.* Robinson, 46 Ala. 348, it was said: "A law is *revised* or amended, not when it is repealed, but when it is, in whole or in part, permitted to remain, and something is added to or taken from it, or it is in some way changed or altered to make it more complete or perfect, or to fit it the better to accomplish the object or purpose for which it was made, or some other object or purpose."

4. Revised Statutes. — See Matter of Norton, 39 N. Y. App. Div. 369, *affirmed* 160 N. Y. 684.

5. Revive — Limitation of Actions. — Webst. Dict., *followed* in Lindsey *v.* Lyman, 37 Iowa 207.

In Briscoe *v.* Anketell, 28 Miss. 373, it was said: "The term *revive*, in its strict import, would apply to demands already barred. But the language,' no promise shall operate to *revive* any action from the bar and limitations,' etc., is too loose to justify the application of critical rules in interpreting it. * * * In view of the entire section, we think it was the manifest intention of the legislature to establish a new rule of evidence, whether to *revive* a cause of action already barred or to continue one not barred." See also the title LIMITATION OF ACTIONS, vol. 19, p. 136.

6. *In re* Bank of Commerce, 153 Ind. 470.

The term *revive* means to restore or bring again to life. Brier *v.* Traders' Nat. Bank, 24 Wash. 709.

Revive and Create. — In *In re* Bank of Commerce, 153 Ind. 470, it was said: "If it is a creative act to give life to dead matter once, it is no less a creative act to give life again to the same matter when it becomes dead. In the word *revive* the syllable 're' indicates the use of old matter, and the syllable 'vive' means 'to give life to,' which is one of the primary meanings of the word 'create.' The quality of the act inheres in the giving of life, not in the material that is vivified. Nor is the quality of the act changed by repetition."

Revived, Saved, and Enacted. — It has been held that the terms "*revived*, saved, and enacted," in the saving clause of a statute, meant such acts as had been expressly *revived* and enacted, and not acts *revived* by the repeal of a repealing act. State *v.* Maryland Bank, 6 Gill & J. (Md.) 224. See also the title STATUTES.

Revival — Material Change. — In Kelsey *v.* Smith, 1 How. (Miss.) 84, it was said: "A

REVIVOR, BILL OF. — See the title REVIVOR OF SUITS AND ACTIONS, 18 ENCYC. OF PL. AND PR. 1094.

REVOCATION. (As to the revocation of probate and letters of administration, see the title PROBATE AND LETTERS OF ADMINISTRATION, vol. 23, p. 109. As to the revocation of wills, see the title WILLS.) — See note 1.

REVOKE. — To revoke is to recall what one has done or promised.[2]

REVOLT. — See note 3.

revival can mean nothing more than giving energy and efficacy to that which was dormant; and if it be materially changed by the act which produced the suspension of its being, it is not a *revival*."

1. **Revocation.** — ***Revocation*** not only means the recalling of a power, but may also denote the vacating of a grant for cause. Houston *v.* Houston City St. R. Co., 83 Tex. 557.

Revocation of Franchise. (See also the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 1030.) — In Wilmington City R. Co. *v.* Wilmington, etc., R. Co., (Del. Ch. 1900) 46 Atl. Rep. 18, it was said: "There is no decision of any sort in opposition to the plain, logical interpretation of the phrase,' reserved power of ***revocation*** by the legislature,' as meaning the power to revoke, at the pleasure of the legislature, any or all of the franchises granted to a corporation, the power to recall all the rights, privileges, or franchises granted to a corporation, or any number less than all, or any single right, privilege, or franchise; * * * it cannot mean less than this, and * * * it cannot mean more."

2. **Revoke.** — Langdon *v.* Astor, 16 N. Y. 40.

Change of Mind. — In Hargroves *v.* Redd, 43 Ga. 152, it was said: "The very meaning of the word ***revoke*** involves a change of mind in the testator."

3. **Revolt.** — As to what constitutes an endeavor to make a ***revolt*** against the master of a vessel, see U. S. *v.* Kelly, 4 Wash. (U. S.) 530. See also the title SEAMEN.

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CROSS-REFERENCES.

For matters of PROCEDURE, see the ENCYCLOPÆDIA OF PLEADING AND PRACTICE, vol. 18, p. 1151.
For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see in this work such titles as, AGENCY, vol. 1, p. 930; *CONTRACTS*, vol. 7, p. 88; *LOST PROPERTY*, vol. 19, p. 583; *SPECIFIC PERFORMANCE.*

I. DEFINITIONS. — A reward is "an offer of recompense by the government, or by a private person, to whoever will perform some special act;"[1] the recompense actually so paid.[2]

II. THE OFFER — 1. Nature and Elements — In General. — An offer of reward is in its very nature essentially conditional. It is a mere invitation to those to whom it is made to do certain things, coupled with a voluntary promise of remuneration contingent upon the doing of the things specified.[3] Being

1. **Definition.** — Cyclopedic Law Dictionary.
2. Bouvier's Law Dictionary.
Reward and Bounty Distinguished. — Kircher *v.* Murray, 54 Fed. Rep. 624; Ingram *v.* Colgan, 106 Cal. 113, 46 Am. St. Rep. 221; Eichelberger *v.* Sifford, 27 Md. 320; Abbe *v.* Allen, (Supm. Ct.) 39 How. Pr. (N. Y.) 481.
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California. — Wilson *v.* Stump, 103 Cal. 255, 42 Am. St. Rep. 111; Ryer *v.* Stockwell, 14 Cal. 134, 73 Am. Dec. 634.
Connecticut. — Bull *v.* Talcot, 2 Root (Conn.) 119, 1 Am. Dec. 62.
Delaware. — Gilkey *v.* Bailey, 2 Harr. (Del.) 359.
Georgia. — Can obell *v.* Mercer, 108 Ga. 103; Biggers *v.* Owen, 79 Ga. 658.
Illinois. — Williams *v.* West Chicago St. R. Co., 191 Ill. 610.
Indiana. — Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1; Harson *v.* Pike, 16 Ind. 140.
Maine. — Mitchell *v.* Abbott, 86 Me. 338, 41 Am. St. Rep. 559.
Massachusetts. — Loring *v.* Boston, 7 Met. (Mass.) 411; Freeman *v.* Boston, 5 Met. (Mass.)

voluntary and conditional, no contractual liability attaches thereto until it becomes a part of a complete contract by virtue of acceptance and performance, and until then it may be withdrawn at the pleasure of the offerer.[1]

Conditions of Offer. — The offerer may make his offer subject to any conditions he may see fit, and all conditions so imposed will be material elements of the offer.[2]

Motives for Making Offer. — The offerer's undisclosed motives for making the offer form no part of the offer, nor of the contract arising therefrom.[3]

Intention to Contract Necessary. — As in the case of any proposal to contract, the offer must be made with a view to entering into a contract. Declarations made under strong excitement, and which, as shown by the circumstances under which they are made, are neither intended nor understood as a contractual proposal, will not be construed as an offer, though in terms they are such;[4] nor will declarations which are manifestly mere boasts be held to be an offer under similar circumstances.[5]

2. Capacity to Make — *a.* In General. — Any person having the capacity to make a valid contract may make a valid offer of reward.[6]

Interest in the Subject-matter is not essential to the validity of the offer.[7]

b. Persons Acting in Representative Capacity — (1) *Agents.* — An agent may make an offer of reward binding upon his principal to the same extent that he may make contracts in general, the sole test of the validity of the offer being whether it is within the scope of the agent's authority,[8] which will usually depend upon the acts or object for which it is made.[9]

(2) *Public Officers* — **In General.** — Public officers who are charged with governmental duties have no implied power to offer rewards even for matters within the scope of their general authority.[10]

Governor. — For example, a governor, though the chief executive of the state, cannot, without express authority, bind the state by offers of reward for the arrest or conviction of criminals.[11]

Sheriff. — Nor can a sheriff bind his county by an offer of reward for the capture of a criminal, though such capture is directly within the scope of the sheriff's duties.[12]

(3) *Executors and Administrators.* — The authority of an executor or administrator as regards offers of reward which will be binding upon the estate

57; Wentworth *v.* Day, 3 Met. (Mass.) 352, 37 Am. Dec. 145.

New Hampshire. — Janvrin *v.* Exeter, 48 N. H. 83, 2 Am. Rep. 185; Morse *v.* Bellows, 7 N. H. 549, 28 Am. Dec. 372.

New York. — Pierson *v.* Morch, 82 N. Y. 503; Grady *v.* Crook, (Brooklyn City Ct. Gen. T.) 2 Abb. N. Cas. (N. Y.) 53, *affirmed* 72 N. Y. 612.

Pennsylvania. — Patton *v.* Hassinger, 69 Pa. St. 311; Cummings *v.* Gann, 52 Pa. St. 484.

Texas. — Kasling *v.* Morris, 71 Tex. 584, 10 Am. St. Rep. 797.

1. Offer Revocable. — See *infra*, 8. *Revocation and Expiration.*

2. Right to Impose Conditions. — Shuey *v.* U. S., 92 U. S. 73; Amis *v.* Conner, 43 Ark. 337; Williams *v.* West Chicago St. R. Co., 191 Ill. 610; Jones *v.* Phœnix Bank, 8 N. Y. 228.

3. Motives of Offer. — Kasling *v.* Morris, 71 Tex. 584, 10 Am. St. Rep. 797.

4. Declaration under Excitement Held Not Offer. — Stamper *v.* Temple, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296.

5. Mere Boast Held Not Offer. — Higgins *v.* Lessig, 49 Ill. App. 459.

6. Any One May Make Offer. — Williams *v.* Carwardine, 5 C. & P. 566, 24 E. C. L. 457; Campbell *v.* Mercer, 108 Ga. 103; Mountain *v.* Multnomah County, 16 Oregon 279.

7. Interest Not Essential. — Williams *v.* Carwardine, 5 C. & P. 566, 24 E. C. L. 457; Campbell *v.* Mercer, 108 Ga. 103; Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1; Marking *v.* Needy, 8 Bush (Ky.) 22; Furman *v.* Parke, 21 N. J. L. 310.

8. Offers Within Scope of Agent's Authority. — Briggs's Case, 15 Ct. Cl. 48; Gibbs's Case, 14 Ct. Cl. 544; Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 7 Am. St. Rep. 48; Minneapolis Bank *v.* Griffin, 168 Ill. 314.

9. See *infra*, 4. *For What May Be Made — c. Offers by Agents.*

10. Murray *v.* Kennedy, 15 La. Ann. 385, 77 Am. Dec. 189; Day *v.* Otis, 8 Allen (Mass.) 477; Bemis *v.* Rice County, 23 Minn. 73; Timken *v.* Tallmadge, 54 N. J. L. 117; Belknap *v.* Reinhart, 2 Wend. (N. Y.) 375, 20 Am. Dec. 621. See also *infra*, 4. *For What May Be Made — c. Offers by Agents* — (3) *Public Officers.*

11. Offer by Governor. — Lees *v.* Colgan, 120 Cal. 262; Jones *v.* Gibbs, 51 Miss. 401.

12. Offer by Sheriff. — Crawford County *v.* Spenney, 21 Ill. 288.

seems to be coextensive with his authority to contract in regard to such estate.[1]

c. CORPORATIONS — (1) *In General.* — A corporation may offer rewards to the same extent that it may contract.[2] An offer which is *ultra vires* is void, as would be a like contract;[3] and whether the offer be *ultra vires* or not depends upon the object for which it is made.[4]

(2) *Counties.* — A county, besides being a local governmental subdivision of the state, is, for many purposes, a corporation charged with various duties of a purely business nature. In the performance of these duties, it may offer rewards to the same extent as may any other corporation;[5] and, as in the case of other corporations, the validity of its offer depends upon the object for which it is made.[6]

(3) *Towns.* — A town may make such offers of reward as come within the scope of the powers and duties expressly conferred and imposed by its charter.[7] Whether any particular offer is within the scope of the charter power, depends upon the provisions of the charter and the object for which the offer is made.[8]

3. To Whom May Be Made. — The offer may be made to a particular person,[9] a class of persons,[10] or the community at large.[11]

To Whom Actually Made is a question of construction treated under another topical head.[12]

4. For What May Be Made — *a.* IN GENERAL. — An offer of reward being contractual in its nature,[13] the objects for which it may be made are coextensive with those which may form the basis of a valid contract, and seem never to have been questioned, except on account of some relation between the one making the offer and him to whom it is made, the illegality of the object, or the incapacity of certain persons and of corporations to contract except with reference to certain objects. All these phases of the question as to the objects for which a reward may be offered — except illegality, which is treated as a separate topic[14] — are dealt with in the next following subdivisions.

b. PERFORMANCE OF DUTY. — **An Offer of Reward by a Master to a Servant** for the performance by the latter of acts which, under his contract, he is already bound to perform, is void for want of consideration;[15] likewise, an offer of reward to a public officer for the performance of his duties.[16]

Detection of Crime. — Attempts have been made to bring all offers of reward for the detection and conviction of criminals within this rule, on the ground that it is the duty of every citizen to assist in such matters without reward;

1. Offers by Executors and Administrators. — Campbell *v.* Mercer, 108 Ga. 103.

2. Offers Binding on Corporations. — Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 7 Am. St. Rep. 48; Louisville, etc., R. Co. *v.* Goodnight, 10 Bush (Ky.) 552, 19 Am. Rep. 80.

3. Ultra Vires Offer. — Winchester *v.* Redmond, 93 Va. 711, 57 Am. St. Rep. 822. See generally the title ULTRA VIRES.

4. See *infra*, 4. *For What May Be Made — d. Offers by Corporations.*

5. Valid Offer by County. — Hawk *v.* Marion County, 48 Iowa 472.

Basis of Offer Must Be Benefit to County. — Stamp *v.* Cass County, 47 Mich. 330.

6. See *infra*, 4. *For What May Be Made — d. Offers by Corporations* — (2) *Counties.*

7. Murphy *v.* Jacksonville, 18 Fla. 318, 43 Am. Rep. 323; Patton *v.* Stephens, 14 Bush (Ky.) 324; Codding *v.* Mansfield, 7 Gray (Mass.) 272; Crawshaw *v.* Roxbury, 7 Gray (Mass.) 374; Bangs *v.* Snow, 1 Mass. 181; Gale *v.* South Berwick, 51 Me. 174; Janvrin *v.* Exeter, 48 N. H. 83, 2 Am. Rep. 185; York *v.* Forscht, 23 Pa. St. 391; Winchester *v.* Redmond, 93 Va. 711, 57 Am. St. Rep. 822; Cornwall *v.* West Nissouri Tp., 25 U. C. C. P. 9.

8. See *infra*, 4. *For What May Be Made.*

9. Offer to Particular Person. — Franklin *v.* Heiser, 6 Blatchf. (U. S.) 426; Marking *v.* Needy, 8 Bush (Ky.) 22.

10. Offer to Class of Persons. — Ryer *v.* Stockwell, 14 Cal. 134, 73 Am. Dec. 634.

11. Offer to Community at Large. — Marking *v.* Needy, 8 Bush (Ky.) 22; Freeman *v.* Boston, 5 Met. (Mass.) 56; Pierson *v.* Morch, 82 N. Y. 503; Butler County *v.* Leibold, 107 Pa. St. 407; Cummings *v.* Gann, 52 Pa. St. 484.

12. See *infra*, 6. *Scope.*

13. See *supra*, 1. *Nature and Elements;* 2. *Capacity to Make.*

14. See *infra*, 7. *Illegal Offers.*

15. Offer to Servant for Performance of Duty. — Harris *v.* Carter, 3 El. & Bl. 559, 77 E. C. L. 559; Stilk *v.* Myrick, 2 Campb. 317.

16. Offer to Public Officer for Performance of Duty. — St. Louis, etc., R. Co. *v.* Grafton, 51 Ark. 504, 14 Am. St. Rep. 66; Smith *v.* Whildin, 10 Pa. St. 39, 49 Am. Dec. 572. See also *infra*, 7. *Illegal Offers.*

but this contention has been repudiated by the courts.[1]

c. OFFERS BY AGENTS — (1) *In General.* — An agent has implied power to offer rewards in the name of his principal for the performance of such acts as will assist the agent to perform the duties expressly intrusted to him.[2] Thus, a railroad superintendent may bind his company by an offer of reward for the arrest and conviction of trespassers against the company's property;[3] and a bank president may offer a reward in the name of the bank for the arrest of one who has embezzled the bank money.[4]

(2) *Government Agents.* — The rule announced above applies as well to government as to private agents; and, accordingly, it has been held that a government agent who was in charge of a government depository might bind the government by an offer of reward for the recovery of property stolen from such depository,[5] and that the commissioner of internal revenue might, under an express authority to expend money for the detection of delinquents against the revenue laws, bind the government by offers of reward for such detection.[6]

(3) *Public Officers.* — A distinction seems to be drawn between public agents intrusted with mere fiscal or business matters and those charged with the execution of the law. The former may, as has been seen,[7] bind the government by offers of reward within the scope of their authority; while the latter, usually called public officers, cannot. Unless they have express power so to do, governors,[8] sheriffs,[9] mayors,[10] and United States marshals[11] cannot bind their respective government principals by offers of reward for the arrest of criminals. Nor can an army officer bind the government by an offer of reward for the arrest of a deserter.[12]

d. OFFERS BY CORPORATIONS — (1) *In General.* — A corporation has implied power to make such offers of reward as will tend to protect its property or otherwise assist in carrying out the purposes for which it was chartered. Under this rule it has been held that rewards may be offered by a railroad company for the arrest and conviction of trespassers against its property;[13] by a bank for the arrest and conviction of one who has embezzled its funds,[14] or who has robbed it,[15] or for the recovery of money stolen from it;[16] by a manufacturing corporation for proof of any case in which its goods fail to accomplish the results which they are advertised to accomplish;[17] by a business corporation for the arrest of persons interfering with its property or business.[18]

(2) *Counties* — (a) **In General.** — A county may, without express authority, offer rewards for the performance of acts which will be of benefit to it as a civil and political body corporate.[19] Thus, it may offer a reward for the recovery of money which has been stolen from it,[20] but not for the finding of

1. Offer for Detection of Crime. — Salbadore *v.* Crescent Mut. Ins. Co., 22 La. Ann. 338; Wilmoth *v.* Hensel, 151 Pa. St. 200, 31 Am. St. Rep. 738; Bledsoe *v.* Jackson, 4 Sneed (Tenn.) 429.

2. Norwood *v.* Andrews, 71 Miss. 641.

3. Offer by Railroad Superintendent. — Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 7 Am. St. Rep. 48.

4. Offer by Bank President. — Minneapolis Bank *v.* Griffin, 168 Ill. 314.

5. Recovery of Property Stolen from Depository. — Gibbs's Case, 14 Ct. Cl. 544.

6. Detection of Delinquents Against Revenue Laws. — Briggs's Case, 15 Ct. Cl. 48.

7. See *supra*, (2) *Government Agents.*

8. Offer by Governor. — Lees *v.* Colgan, 120 Cal. 262; Jones *v.* Gibbs, 51 Miss. 401.

9. Offer by Sheriff. — Crawford County *v.* Spenney, 21 Ill. 288.

10. Offer by Mayor. — Timken *v.* Tallmadge, 54 N. J. L. 117.

11. Offer by United States Marshal.—Murray *v.* Kennedy, 15 La. Ann. 385, 77 Am. Dec. 189.

12. Offer by Army Officer. — Belknap *v.* Reinhart, 2 Wend. (N. Y.) 375, 20 Am. Dec. 621.

13. Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 7 Am. St. Rep. 48; Chicago, etc., R. Co. *v.* Sebring, 19 Ill. App. 222.

14. Minneapolis Bank *v.* Griffin, 168 Ill. 314.

15. Stacy *v.* State Bank, 5 Ill. 91.

16. Stacy *v.* State Bank, 5 Ill. 91.

17. Carlill *v.* Carbolic Smoke Ball Co., (1893) 1 Q. B. 256.

18. Norwood *v.* Andrews, 71 Miss. 641.

19. Object Must Be for Benefit of County. — Stamp *v.* Cass County, 47 Mich. 330.

20. Recovery of Stolen Property. — Hawk *v.* Marion County, 48 Iowa 472.

a missing man, when such finding will not be a benefit to the county or the taxpayers thereof.[1]

(b) **Detection of Crime — In General.** — It is primarily the duty of the state to cause the arrest and conviction of those who violate its laws, and a county, as such, has no interest therein, and cannot offer rewards therefor.[2]

Where Express Authority Is Invoked to sustain the validity of an offer of reward by a county for matters outside of the general scope of its powers, the validity of the offer depends upon whether the object thereof is included in the authorizing statute, and the question becomes one of construction.[3]

(3) *Towns* — (a) **In General.** — Under an express charter power to legislate for the general welfare of its citizens, a town undoubtedly has implied power to offer rewards for such services as will be of benefit to its citizens as distinguished from those of the state at large.[4] But just what matters are included in this category is a question as to which there is conflict of opinion, the principal conflict arising as to what crimes, if any, affect the citizens of a town to such an extent that the detection thereof may be the object of an offer of reward by the town.

(b) **Detection of Crime — Crimes in General.** — The authorities are almost unanimous that towns have no implied power to offer rewards for the detection of crimes against the state, or for the arrest and conviction of the criminals.[5]

Arson, however, has been held to be fraught with dangers peculiar to the inhabitants of towns wherein it is committed, as distinguished from the citizens of the state at large, and there is strong authority sustaining the implied power of a town to offer rewards for the arrest and conviction of persons committing such crime therein.[6] But the distinction between arson and any other crime against the state committed in a town has not been universally recognized.[7]

5. **How Made.** — An offer may be made orally,[8] or by statute,[9] newspaper,[10]

1. Finding of Missing Man. — Scheiber *v.* Von Arx, (Minn. 1902) 92 N. W. Rep. 3.

2. Detection of Crime. — Huthsing *v.* Bousquet, 2 McCrary (U. S.) 152; Crawford County *v.* Spenney, 21 Ill. 288; Grant County *v.* Bradford, 72 Ind. 455, 37 Am. Rep. 174; Hawk *v.* Marion County, 48 Iowa 472; Mountain *v.* Multnomah County, 16 Oregon 279. But see Martin County *v.* Pipher, 98 Ind. 124, wherein the court expressly refrained from passing on the point.

3. Express Authority Construed. — Butler *v.* McLean County, 32 Ill. App. 397. See *infra*, 6. *Scope.*

4. People *v.* Holly, 119 Mich. 637. See also Lee *v.* Flemingsburg, 7 Dana (Ky.) 28; Stetson *v.* Kempton, 13 Mass. 272, 7 Am. Dec. 145; Bangs *v.* Snow, 1 Mass. 187; Gale *v.* South Berwick, 51 Me. 174; Winchester *v.* Redmond, 93 Va. 711, 57 Am. St. Rep. 822.

5. Detection of Crime in General. — Baker *v.* Washington, 7 D. C. 134; Hanger *v.* Des Moines, 52 Iowa 193, 35 Am. Rep. 266; Patton *v.* Stephens, 14 Bush (Ky.) 324; Lee *v.* Flemingsburg, 7 Dana (Ky.) 29; Gale *v.* South Berwick, 51 Me. 174; Loveland *v.* Detroit, 41 Mich. 367; Abel *v.* Pembroke, 61 N. H. 359; Butler *v.* Milwaukee, 15 Wis. 498; Cornwall *v.* West Nissouri Tp., 25 U. C. C. P. 9. But see York *v.* Forscht, 23 Pa. St. 391.

In New Hampshire towns have statutory authority to offer rewards for the detection of violations of the state laws. Abel *v.* Pembroke, 61 N. H. 357; Janvrin *v.* Exeter, 48 N. H. 83, 2 Am. Rep. 185.

6. Arson. — Brown *v.* Bradlee, 156 Mass. 28, 32 Am. St. Rep. 430; Loring *v.* Boston, 7 Met. (Mass.) 411; Shute *v.* Taylor, 5 Met. (Mass.) 61; Freeman *v.* Boston, 5 Met. (Mass.) 56; Crawshaw *v.* Roxbury, 7 Gray (Mass.) 374; Codding *v.* Mansfield, 7 Gray (Mass.) 272; People *v.* Holly, 119 Mich. 637; Shaub *v.* Lancaster, 156 Pa. St. 366; York *v.* Forscht, 23 Pa. St. 391.

7. No Distinction Between Arson and Other Crimes. — Crofut *v.* Danbury, 65 Conn. 294; Murphy *v.* Jacksonville, 18 Fla. 318, 43 Am. Rep. 323; Loveland *v.* Detroit, 41 Mich. 367; Winchester *v.* Redmond, 93 Va. 711, 57 Am. St. Rep. 822. It is to be noted, however, as to Murphy *v.* Jacksonville, 18 Fla. 318, 43 Am. Rep. 323, that the charter of the defendant town contained no general welfare clause.

8. Oral Offer. — Wilson *v.* McClure, 50 Ill. 366; Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1; Reif *v.* Paige, 55 Wis. 496, 42 Am. Rep. 731.

9. Statutory Offer. — Cornelson *v.* Sun Ins. Co., 7 La. Ann. 345; Porterfield *v.* State, 92 Tenn. 289.

10. Newspaper Advertisement. — Williams *v.* Carwardine, 4 B. & Ad. 621, 24 E. C. L. 126; Ryer *v.* Stockwell, 14 Cal. 134, 73 Am. Dec. 634; Symmes *v.* Frazier, 6 Mass. 344, 4 Am. Dec. 142; Loring *v.* Boston, 7 Met. (Mass.) 409; Pierson *v.* Morch, 82 N. Y. 503.

circular letter,[1] telegram,[2] postal card,[3] handbill or poster,[4] proclamation,[5] or agreement made with a special person.[6]

6. Scope — A Question of Construction — *a.* IN GENERAL. — The scope of an offer of reward presents a question of construction which must be answered according to the same rules which are applicable to any other contractual offer. Under these rules it is the intent of the offerer that must be sought in order to ascertain the scope of the offer, but such intent must be gathered from the terms of the offer itself, extraneous evidence being inadmissible to show a different intent from that expressed.[7] But when the terms of the offer are ambiguous, extraneous evidence is admissible to relieve the ambiguity; and the circumstances of the offerer, the purpose of the offer, and the amount of compensation offered may be considered.[8]

The Grammatical Construction of the offer is sometimes determinative of its scope. Thus, where a certain reward was offered for the capture of two persons, or one-half of the amount for the capture of one of them out of the state, or one-fourth of such amount for the capture of one of them within the state, it was held that the total reward was offered only for the capture of both out of the state.[9]

Words. — The construction may depend entirely upon a construction of words.[10]

The Interest of the Offerer in the performance of the services for which the offer is made is often sufficient to explain equivocal words and terms. Thus, it has been held that an offer by a state for the arrest and conviction of train robbers referred only to conviction in the state courts, and not to conviction in the federal courts, the only interest of the state in such matters being the enforcement of its own laws.[11] Likewise, an offer by a railroad company for the arrest of persons guilty of injuring persons or property by throwing stones at the trains of such company, has been construed to apply only to the arrest of persons committing such trespasses out of malice towards the company or its employees, or from mere wantonness, and not to a case where such trespass is committed during an encounter between a passenger or a trainman and a stranger.[12]

The Real Intent of the offerer, when it can be ascertained, will prevail over even the express words of the offer. Thus, an offer by a shopowner for the conviction of one guilty of breaking into and stealing from his shop on a certain night has been held applicable to a conviction for larceny from such shop on a different night, but near or about the same time, there being nothing to show that two offenses of a similar nature were committed within the time covered by the two dates.[13]

b. TO WHOM MADE. — **A General Offer**, without specification as to whom made, applies to the public at large, to any one willing and able to perform

1. **Circular Letter.** — Briggs's Case, 15 Ct. Cl. 48; Madison First Nat. Bank *v.* Hart, 55 Ill. 62.

2. **Telegram.** — Cummings *v.* Gann, 52 Pa. St. 484.

3. **Postal Card.** — Swanton *v.* Ost, 74 Ill. App. 281; State *v.* Woodruff, 47 Kan. 151, 27 Am. St. Rep. 285.

4. **Handbill or Poster.** — Lockhart *v.* Barnard, 14 M. & W. 674; Tarner *v.* Walker, L. R. 1 Q. B. 641, *affirmed* by L. R. 2 Q. B. 301; Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 7 Am. St. Rep. 48; Harson *v.* Pike, 16 Ind. 140.

5. **Proclamation.** — Auditor *v.* Ballard, 9 Bush (Ky.) 572, 15 Am. Rep. 728.

When Complete. — An offer of reward by proclamation of a governor is complete as soon as it is signed by him and is entered upon the executive journals. Auditor *v.* Ballard, 9 Bush (Ky.) 572, 15 Am. Rep. 728.

6. **Special Agreement.** — Franklin *v.* Heiser, 6 Blatchf. (U. S.) 426; Campbell *v.* Mercer, 108 Ga. 103.

7. **Extraneous Evidence.** — Salbadore *v.* Crescent Mut. Ins. Co., 22 La. Ann. 338.

8. Commercial Bank *v.* Pleasants, 6 Whart. (Pa.) 375.

9. **Grammatical Construction.** — Washburn *v.* Humphreys, 13 Ired. L. (35 N. Car.) 88.

10. **Construction of Words.** — Juniata County *v.* McDonald, 122 Pa. St 115; Com. *v.* Edwards, 10 Phila. (Pa.) 215. See *infra*, (5) *Particular Services — Words and Phrases Construed.*

11. Sias *v.* Hallock, 14 Nev. 332.

12. Chicago, etc., R. Co. *v.* Sebring, 19 Ill. App. 222.

13. **Real Intent Prevails.** — Williams *v.* Nicholas, 7 Montreal Leg. N. 75.

the acts for which the offer is made.[1]

An Offer to Any One who will do a certain thing is of the same scope as a general offer, and applies to the public at large.[2]

An Offer to Whosoever shall do a certain thing applies to all persons. Accordingly it has been held that such an offer, made for the apprehension of a horse thief, applied even to the owner of the horse stolen.[3]

An Offer to Any Person Who Shall, in Consequence of the Offer, do a certain thing, applies only to those who, with a view of obtaining the reward, undertake to do the thing specified.[4]

Persons Ignorant of Offer. — The question whether an offer of reward applies to persons who perform the specified acts in ignorance of the offer is treated as a separate topic.[5]

c. FOR WHAT MADE — (1) *In General.* — The fundamental basis of construction of offers of reward, as regards the objects for which they are made, is that they must be deemed to have been made for a purpose, and not for bare acts alone. The offer must be deemed to have been made primarily for the accomplishment of a certain purpose or result,[6] regardless of the manner or method adopted by the acceptor, except that his acts must be the proximate cause of such result.[7]

(2) *Past or Future* — **Services.** — A general offer of reward for services will usually be held to apply to future services only;[8] likewise where the offer is to reward any one who, "in consequence of such offer," shall perform the services.[9] But it has been held that an offer for the apprehension and delivery of a criminal applied to a case in which only the delivery was made after the offer, the apprehension having been made previously.[10]

Detection of Crime. — A general offer for the arrest and conviction of criminals applies to both past and future crimes;[11] but if the intention to confine the offer to past offenses is manifest, the offer will be so construed.[12]

(3) *The Offer an Entirety.* — An offer of reward is generally held to be an entirety, which cannot be split up so as to form the basis of several contracts or of any contract other than that which may arise from acceptance as an entirety, and the performance of all the acts or services called for therein; and this although the offer be for the performance of several distinct acts or services.[13] Under this rule, the following objects of offers of reward have been held inseparable: arrest and conviction;[14] arrest of two or more;[15] arrest of a thief and recovery of the property stolen;[16] arrest and delivery at a certain

1. **General Offer.** — Washburn *v.* Humphreys, 13 Ired. L. (35 N. Car.) 88; Ryer *v.* Stockwell, 14 Cal. 134, 73 Am. Dec. 634; Furman *v.* Parke, 21 N. J. L. 310; Pierson *v.* Morch, 82 N. Y. 503; Cummings *v.* Gann, 52 Pa. St. 484.

2. **Offer to Any One.** — Bull *v.* Talcot, 2 Root (Conn.) 119, 1 Am. Dec. 62; Newton County *v.* Doolittle, 72 Miss. 929; Itawamba County *v.* Candler, 62 Miss. 193; Reif *v.* Paige, 55 Wis. 496, 42 Am. Rep. 731.

3. **To Whom Made.** — Butler County *v.* Leibold, 107 Pa. St. 407.

4. Abel *v.* Pembroke, 61 N. H. 357.

5. See *infra*, IV. *The Performance — d. Performance Without Knowledge of Offer.*

6. **Offer Made Not for Mere Acts, but for Results.** — Rollins *v.* Clement, 25 S. Car. 601.

7. See *infra*, IV. *The Performance* — 2. *Sufficiency — a. In General.*

8. **Offers Generally Applicable to Future Services Only.** — Fitch *v.* Snedaker, 38 N. Y. 248, 97 Am. Dec. 791.

9. Abel *v.* Pembroke, 61 N. H. 357. See also Christian *v.* Glen, 17 N. Y. Wkly. Dig. 62.

10. Coffey *v.* Com., (Ky. 1896) 37 S. W. Rep. 575.

11. Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 7 Am. St. Rep. 48; Salbadore *v.* Crescent Mut. Ins. Co., 22 La. Ann. 338.

12. Freeman *v.* Boston, 5 Met. (Mass.) 56.

13. **The Offer an Entirety.** — Williams *v.* West Chicago St. R. Co., 191 Ill. 610. But see *infra*, (4) *Apportionable Offer.*

14. **Arrest and Conviction.** — Van Horn *v.* Ricks Water Co., 115 Cal. 448; Williams *v.* West Chicago St. R. Co., 191 Ill. 610; Hogan *v.* Stophlet, 179 Ill. 150; Stone *v.* Wickliffe, 106 Ky. 252; Pool *v.* Boston, 5 Cush. (Mass.) 219; Fitch *v.* Snedaker, 38 N. Y. 248, 97 Am. Dec. 791.

15. **Arrest of Two.** — Williams *v.* West Chicago St. R. Co., 191 Ill. 610; Furman *v.* Parke, 21 N. J. L. 310; Blain *v.* Pacific Express Co., 69 Tex. 74.

16. **Arrest of Thief and Recovery of Property.** — Williams *v.* West Chicago St. R. Co., 191 Ill. 610; Besse *v.* Dyer, 9 Allen (Mass.) 151, 85 Am. Dec. 747; Jones *v.* Phœnix Bank, 8 N. Y. 228.

place;[1] recovery of property and delivery at a certain place;[2] conviction for several crimes.[3]

(4) *Apportionable Offer* — **Recovery of Lost Property.** — It has been held that a general offer for the recovery of lost property is apportionable, and may be accepted and performed in part by the recovery of a portion of the property, thereby entitling the party so accepting and performing to a proportionate part of the reward.[4]

Offer Expressly Apportionable. — An offer for information which expressly stipulates that the offerer will pay for all information furnished by second or third parties is apportionable, and any one furnishing a portion of the desired information may recover a proportionate part of the reward.[5]

(5) *Particular Services — Words and Phrases Construed.* — The determination of the objects or services for which an offer is made often involves the construction of the word or phrase employed by the offerer to indicate his intention in this regard. Immediately hereafter following are various words and phrases with the construction placed upon them by the courts in determining the scope of offers of reward.

Apprehension means manual caption, and it seems that nothing short of this fills the full measure of the word.[6] The same construction is given the phrase "pursue and apprehend."[7]

Arrest must not be construed literally as the mere formal act of taking into custody.[8] On the other hand, mere information which has to be supplemented by further investigation, and which is acted upon by others independently and without direction or control by the informer, does not constitute an arrest.[9] Information, however, sufficient of itself to authorize and cause an arrest by the proper authorities, has been held to be an arrest, within the meaning of an offer of reward.[10] The true construction, and the one which seems to be the real basis of the various decisions on this point, is that an offer for an arrest contemplates acts which are the proximate cause of the arrest.[11]

Arrest Applicable Only to Legal Arrests. — If it be illegal or unauthorized, it is not an arrest, within the meaning of an offer of reward.[12]

Arrest and Delivery has been held applicable to a case where the party arrested died before delivery could be made, from the effect of a wound received while he was being captured.[13]

1. Arrest and Delivery at Certain Place. — Williams *v.* West Chicago St. R. Co., 191 Ill. 610; Stone *v.* Dysert, 20 Kan. 123; Partin *v.* Snider, 8 Ky. L. Rep. 616; Juniata County *v.* McDonald, 122 Pa. St. 115; Clanton *v.* Young, 11 Rich. L. (S. Car.) 546.

2. Recovery of Property and Delivery at Certain Place. — Commercial Bank *v.* Pleasants, 6 Whart (Pa.) 375.

3. Conviction of Several Criminals. — Furman *v.* Parke, 21 N. J. L. 310.

4. Offer for Recovery of Property Apportionable. — Hawk *v.* Marion County, 48 Iowa 472; Deslondes *v.* Wilson, 5 La. 397, 25 Am. Dec. 187; Symmes *v.* Frazier, 6 Mass. 344, 4 Am. Dec. 142; Jones *v.* Phœnix Bank, 8 N. Y. 228.

5. Offer Expressly Apportionable. — Fisher *v.* Martin, (Supm Ct. Gen. T.) 6 N. Y. St. Rep. 102.

6. Apprehension Means Manual Caption. — Shuey *v.* U. S., 92 U. S. 73; Lovejoy *v.* Atchison, etc., R. Co., 53 Mo. App. 386. But see Crawshaw *v.* Roxbury, 7 Gray (Mass.) 374.

7. Pursue and Apprehend. — Walker's Case, 23 Pa. Co. Ct. 305, wherein it was held that an arrest upon information furnished by another was an apprehension; Com. *v.* Edwards, 14 York Leg. Rec. (Pa.) 22, wherein it was held that complaint and prosecution were not apprehension.

8. Arrest Not the Mere Act of Taking into Custody. — Swanton *v.* Ost. 74 Ill. App. 281; Stone *v.* Wickliffe, 106 Ky. 252. See also Adair *v.* Cooper, 25 Tex. 548.

9. Information Leading to Arrest Not an Arrest. — Burke *v.* Wells, 50 Cal. 218; Austin *v.* Milwaukee County, 24 Wis. 278.

10. Information Causing Arrest Equivalent to Arrest. — Williams *v.* West Chicago St. R. Co., 191 Ill. 610; Besse *v.* Dyer, 9 Allen (Mass.) 151, 85 Am. Dec. 747; Haskell *v.* Davidson, 91 Me. 488, 64 Am. St. Rep. 254.

11. The True Construction, as stated in the text, will become manifest by a comparison of the following cases: Burke *v.* Wells, 50 Cal. 218; Williams *v.* West Chicago St. R. Co., 191 Ill. 610; Swanton *v.* Ost, 74 Ill. App. 281; Stone *v.* Wickliffe, 106 Ky. 252; Besse *v.* Dyer, 9 Allen (Mass.) 151, 85 Am. Dec. 747; Haskell *v.* Davidson, 91 Me. 488, 64 Am. St. Rep. 254; Currie *v.* Swindall, 11 Ired. L. (33 N. Car.) 361; Adair *v.* Cooper, 25 Tex. 548; Austin *v.* Milwaukee County, 24 Wis. 278.

12. Arrest Means Legal Arrest. — Marking *v.* Needy, 8 Bush (Ky.) 22; Morris *v.* Kasling, 79 Tex. 141.

13. Arrest and Delivery Applicable to Delivery Dead. — Mosley *v.* Stone, (Ky. 1900) 56 S. W. Rep. 965.

Before Arrest. — One who, after arrest by a party not an officer, escapes and flees, has been held to be a person fleeing before arrest.[1]

Capture. — The mere giving of information which enables others, acting independently of the informer, to make the formal arrest, is not a capture.[2]

Concerned in Crime. — An offer for the conviction of any one concerned in a certain crime is not applicable to an attempt to commit such crime.[3]

Conviction means final conviction,[4] but does not require sentence.[5] "Conviction before a jury" contemplates merely a verdict of guilty, without regard to subsequent proceedings.[6] A confession of guilt after capture by the claimant of the reward has been held equivalent to a conviction, where formal conviction was prevented by the action of the state.[7]

Conviction Not Construed Literally. — Since no person can himself actually convict another, conviction must be construed to mean the furnishing of the information or evidence necessary and sufficient to cause a conviction, and actually causing it;[8] but mere information which has to be acted on and supplemented by others, in order to secure a conviction, is not equivalent to a conviction.[9]

Detection means the furnishing of information as to who the criminal is. It contemplates neither arrest nor conviction.[10]

Evidence has been construed to mean the furnishing of the means of procuring evidence, especially in a case where the evidence required, from its very nature, could not be supplied in form of writings or documents.[11]

Fleeing from Justice means actual attempt to escape arrest. The phrase has been held not applicable to one who was arrested while on his way to the town where he lived, and who, when arrested, maintained that he was on his way to surrender;[12] nor to one who, though he went to another state several days after the crime was committed, made no attempt to conceal himself either before or after leaving the state;[13] nor to one who has been tried by a magistrate and discharged.[14] But where one who has been tried for assault and battery with intent to kill, and has been discharged, but after the death of his victim, flees, he will be deemed to be one fleeing from justice.[15]

Information applies only to such information as is given with a view to its being acted upon.[16] But it need not be given directly to the party offering the reward; it will be sufficient if it be given to some one authorized to act upon it and to procure the result desired.[17]

Information Leading to Arrest is construed literally. Under such an offer, the

1. **Before Arrest.** — Wilson *v.* Wallace, 64 Miss. 13; Itawamba County *v.* Candler, 62 Miss. 193.

2. **Capture.** — Everman *v.* Hyman, (Ind. App. 1891) 28 N. E. Rep. 1022; Juniata County *v.* McDonald, 122 Pa. St. 115.

3. **Concerned in Crime.** — Cornelson *v.* Sun Ins. Co., 7 La. Ann. 345.

4. **Conviction Means Final Conviction.** — Stone *v.* Wickliffe, 106 Ky. 252.

5. **Conviction Does Not Require Sentence.** — Wilmoth *v.* Hensel, 151 Pa. St. 200, 31 Am. St. Rep. 738.

6. **Verdict of Guilty Equivalent to Conviction Before Jury.** — Buckley *v.* Schwartz, 83 Wis. 304.

7. **Confession Equivalent to Conviction.** — Louisville, etc., R. Co. *v.* Goodnight, 10 Bush (Ky.) 552, 19 Am. Rep. 80.

8. **Information Causing Conviction Equivalent to Conviction.** — Williams *v.* West Chicago St. R. Co., 191 Ill. 610; Swanton *v.* Ost, 74 Ill. App. 281; Crawshaw *v.* Roxbury, 7 Gray (Mass.) 374; Besse *v.* Dyer, 9 Allen (Mass.) 151 85 Am. Dec. 747; Haskell *v.* Davidson, 91 Me. 488, 64 Am. St. Rep. 254.

9. **Information Leading to Conviction Not Equivalent to Conviction.** — Burke *v.* Wells, 50 Cal. 218; Lovejoy *v.* Atchison, etc., R. Co., 53 Mo. App. 386.

10. **Detection Calls Only for Information.** — Stacy *v.* State Bank, 5 Ill. 91.

11. **Evidence Held to Mean Furnishing Means of Procuring Evidence.** — Huckins *v.* East Saginaw Second Nat. Bank, 47 Mich. 92.

12. **Fleeing from Justice Not Applicable to One on His Way to Surrender.** — Oktibbeha County *v.* Cottrell, 70 Miss. 117.

13. **No Attempt at Concealment.** — Monroe County *v.* Bell, (Miss. 1895) 18 So. Rep. 121.

14. **After Discharge by Magistrate.** — Itawamba County *v.* Candler, 62 Miss. 193.

15. **Discharge on Lesser Charge, and Flight to Avoid Greater.** — Newton County *v.* Doolittle, 72 Miss. 929.

16. **Must Be Given with View to Being Acted upon.** — Lockhart *v.* Barnard, 14 M. & W. 674.

17. **To Whom Given.** — Lancaster *v.* Walsh, 4 M. & W. 16.

party furnishing the information is entitled to the reward, and not the party who makes the arrest.[1]

Kill. — An offer for the arrest of one who has killed another, and is fleeing from justice, applies to the arrest of one who has mortally wounded another, and is fleeing, when the death of his victim occurs soon after the arrest.[2]

Lost. — An offer of reward for the return of lost property is predicated upon the supposition that the property is really lost, and does not apply to a return of property which has been merely mislaid, though the owner thought it was lost when he made the offer.[3]

Means of Convicting. — An offer of reward to any one who shall be the means of convicting criminals has been held applicable to one who procures corroborative evidence which secures the conviction of one already under arrest.[4]

Original Information. — Where a reward is offered for original information leading to the arrest and conviction of criminals, one who furnishes information upon which some members of a band of conspirators are arrested will be deemed to have furnished original information as to the others, who are arrested upon information derived from the confession of those already implicated.[5]

Recovery of Property. — Information given to the police whereby they are enabled to recover stolen property has been held equivalent to a recovery, within the meaning of an offer of reward for such recovery.[6]

7. Illegal Offers — *a.* OFFERS VOID AS AGAINST PUBLIC POLICY — **In General.** — Public policy forbids that anything should be accomplished by means of an offer of reward which could not be accomplished by means of a contract; and hence the question whether or not an offer of reward is void as against public policy is merely a question whether or not the object sought to be accomplished by such offer is such as might be made the subject of a valid contract.

Rule Applied. — Under this rule it has been held that offers of reward for the following objects are void: to parents or guardians for obtaining the consent of their children or wards to marry;[7] for testimony in favor of the offerer in a legal proceeding;[8] for information of any case in which a lottery has not promptly paid a prize drawn by the holder of one of its tickets;[9] for illegal arrest;[10] for performance of duty by a public officer.[11]

Detection of Crime. — The question has been raised as to whether or not offers of reward for the detection of crimes which may be committed in the future, and for the arrest and conviction of the criminals, are against public policy; but the question has been answered in the negative, and such offers upheld.[12] A like question has been raised as to offers by private persons for the arrest and conviction of criminals, and has been also answered in the negative.[13]

b. CRIMINAL OFFERS — **Offer to Reward a Voter.** — In order to constitute an offer of reward to a voter, it must appear that voters who would be benefited by the reward offered were influenced by the offer made.[14]

1. Information Leading to Arrest Construed Literally. — Ward *v.* Keystone Land, etc., Co., (Tex. Civ. App. 1896) 38 S. W. Rep. 532.

2. Martin *v.* Copiah County, 71 Miss. 407.

3. Return of Lost Property — Property Must Be Lost. — Kincaid *v.* Eaton, 98 Mass. 139, 93 Am. Dec. 142; Commercial Bank *v.* Pleasants, 6 Whart. (Pa.) 375.

4. Corroborative Evidence Equivalent to Means of Conviction. — Matter of Kelly, 39 Conn. 159.

5. Original Information, What Is. — U. S. *v.* Simons, 7 Fed. Rep. 709.

6. Franklin *v.* Heiser, 6 Blatchf. (U. S.) 426.

7. Illegal Offers. — Keat *v.* Allen, 2 Vern. 588; Stribblehill *v.* Brett, 2 Vern. 445; Peyton *v.* Bladwell, 1 Vern. 240; Crawford *v.* Russell, 62 Barb. (N. Y.) 92.

8. Boehmer *v.* Foval, 55 Ill. App. 71.

9. Dieckhoff *v.* Fox, 56 Minn. 438.

10. Marking *v.* Needy, 8 Bush (Ky.) 23.

11. Morrell *v.* Quarles, 35 Ala. 544; St. Louis, etc., R. Co. *v.* Grafton, 51 Ark. 504, 14 Am. St. Rep. 66; Kick *v.* Merry, 23 Mo. 72, 66 Am. Dec. 658; Gilmore *v.* Lewis, 12 Ohio 281; Ring *v.* Devlin, 68 Wis. 384. See also *infra*, III. *The Acceptance* — 2. *Who May Accept.*

12. Wilmoth *v.* Hensel, 151 Pa. St. 200, 31 Am. St. Rep. 738.

13. Marking *v.* Needy, 8 Bush (Ky.) 23; Furman *v.* Parke, 21 N. J. L. 310.

14. Offer to Reward a Voter. — State *v.* Dustin, 5 Oregon 375, 20 Am. Rep. 746.

Contempt of Court. — An offer of reward by a defendant, of a libelous nature, and tending to prejudice and discredit the plaintiff in the assertion of his rights, is a contempt of court;[1] likewise an advertisement by a defendant denying charges made against him in the declaration and offering a reward for the discovery of the authors thereof.[2]

By the English Larceny Act, 1861, §§ 18–22, offers of reward for the return of stolen property, which are coupled with a stipulation that no questions will be asked, are made criminal; and it has been held that such an offer for the return of a dog was within the act.[3]

8. Revocation and Expiration — *a.* REVOCATION — **Before Performance.** — The offer being a mere proposal and not a contract,[4] it may be revoked at any time before the performance of the specified service.[5]

The Effect of Revocation is to place the offerer in the same position as to liability for the performance of the specified services as if no offer had ever been made.[6]

After Performance the proposal to contract becomes merged in a binding contract, and, of course, cannot be revoked.[7]

After Part Performance. — Offers of reward generally being entireties and non-apportionable, part performance will not destroy the right of revocation.[8] An apportionable offer, however, cannot be withdrawn as to any separable portion thereof which has been performed.[9]

After Acceptance. — The question as to the right to revoke a general offer of reward after acceptance seems never to have been raised, there being usually no acceptance except by way of performance.[10] It seems, however, that where an offer is made directly to a particular person, and is by him accepted to the knowledge of the offerer, the latter cannot, without the consent of the former, revoke the offer,[11] and it has been held that he cannot by revocation escape liability for the value of services already performed when the offer is revoked.[12]

b. EXPIRATION — **Lapse of Time.** — An offer of reward being a mere proposal must be acted upon within a reasonable time, or it will conclusively be presumed to have been revoked.[13]

What Is a Reasonable Time depends upon the circumstances of each particular case. It has been held that an offer will be presumed to be open on the fifth day after it is made,[14] but that after twelve years it will be presumed to have been revoked.[15] An offer by a town for the arrest and conviction of future incendiaries has been held presumptively revoked by a lapse of seventeen years;[16] likewise by a lapse of three years and eight months.[17] But an offer

1. Offer by Defendant Libelous Against Plaintiff. — Butler *v.* Butler, 13 P. D. 73.

2. Brodribb *v.* Brodribb, 11 P. D. 66.

3. Mirams *v.* Our Dogs Pub. Co., (1901) 2 K. B. 564.

4. Offer Not a Contract. — See *supra*, II. *The Offer* — 1. *Nature and Elements.*

5. Offer Revocable Before Performance. — Shuey *v.* U. S., 92 U. S. 73; Ryer *v.* Stockwell, 14 Cal. 134, 73 Am. Dec. 634; Biggers *v.* Owen, 79 Ga. 658; Bronnenberg *v.* Coburn, 110 Ind. 169; Harson *v.* Pike, 16 Ind. 140; Wentworth *v.* Day, 3 Met. (Mass.) 352, 37 Am. Dec. 145.

6. Effect of Revocation. — Shuey *v.* U. S., 92 U. S. 73; Biggers *v.* Owen, 79 Ga. 658.

7. Offer Not Revocable After Performance. — Harson *v.* Pike, 16 Ind. 140; Wentworth *v.* Day, 3 Met. (Mass.) 352, 37 Am. Dec. 145. See *infra*, IV. *The Performance — Effect.*

8. After Part Performance. — Biggers *v.* Owen, 79 Ga. 658. See *supra*, 6. *Scope — c. For What Made* — (3) *The Offer an Entirety.*

9. Apportionable Offer. — See *supra*, 6. *Scope — c. For What Made* — (4) *Apportionable Offer.*

10. Nature of Acceptance.—See *infra*, III. *The Acceptance* — 1. *Nature and Elements.*

11. Bronnenberg *v.* Coburn, 110 Ind. 169.

12. Bronnenberg *v.* Coburn, 110 Ind. 169. See also Biggers *v.* Owen, 79 Ga. 658.

13. Offer Expires After Reasonable Time. — Loring *v.* Boston, 7 Met. (Mass.) 409; Mitchell *v.* Abbott, 86 Me. 338, 41 Am. St. Rep. 559; State *v.* Clark, 61 Mo. 263; Shaub *v.* Lancaster, 156 Pa. St. 362. *Compare* Matter of Kelly, 39 Conn. 163, wherein a distinction is drawn between offers for the conviction of a future criminal and those for conviction of one who has already committed a crime. In the latter case, it was held that the offer will not expire until the limitation has run against the prosecution of the criminal.

14. Wilson *v.* Stump, 103 Cal. 255, 42 Am. St. Rep. 111.

15. Mitchell *v.* Abbott, 86 Me. 338, 41 Am. St. Rep. 559.

16. Shaub *v.* Lancaster, 156 Pa. St. 362.

17. Loring *v.* Boston, 7 Met. (Mass.) 409.

for the arrest of a fugitive from justice has been held operative after a lapse of ten years.[1]

When the Statutory Limitation Has Run against the prosecution of a criminal, an offer of reward, previously made, for his conviction, is inoperative.[2]

After the Reason of the Offer Has Ceased to exist, the offer itself will expire, as where an offer is made for the arrest of a fugitive from justice, and the fugitive ceases to be such before the offer is acted upon.[3]

Offer for Arrest of Criminal — Payment for Arrest of Wrong Person. — Where an offer is made for the arrest and conviction of a criminal, and after the supposed criminal has been arrested and convicted and the reward has been paid it develops that the party convicted was not the criminal whose conviction was desired, it has been questioned whether the offer will still be open for the arrest and conviction of the real criminal.[4]

III. THE ACCEPTANCE — 1. Nature and Elements. — The acceptance of an offer of reward is the second element of the proposed contract.[5] No notice of the acceptance need be given the offerer, provided none is specifically required by the offer;[6] acceptance being necessarily implied from performance of the acts or services for which the offer is made.[7]

Knowledge of Offer. — By analogy between an offer of reward and other contractual offers, it would seem that there could be no acceptance of such offer without knowledge thereof, and so it is held in a strong line of cases; but another line, equally strong perhaps, holds that performance without knowledge of the offer is sufficient to complete the contract.[8]

2. Who May Accept — *a.* IN GENERAL. — Any one to whom the offer applies[9] may accept it and undertake to perform the acts or services required.[10]

Ratification of an Unauthorized Acceptance by accepting the benefits of the services rendered will place the party performing such services in the same position as regards his right to the reward as if he had originally been included in the class of persons to whom the offer was made.[11]

b. PUBLIC OFFICERS — **Offer for Services Within Scope of Officers' Duty.** — It is well settled, upon the ground of public policy, that a public officer cannot accept an offer of reward for the performance of any act or service which it is his duty to perform.[12] This prohibition attaches to persons called by special deputation

1. Drummond *v.* U. S., 35 Ct. Cl. 356. But see State *v.* Clark, 61 Mo. 263.

2. Matter of Kelly, 39 Conn. 159.

3. State *v.* Clark, 61 Mo. 263.

4. Burke *v.* Wells, 34 Cal. 60.

5. **Acceptance of Offer.** — Williams *v.* West Chicago St. R. Co, 191 Ill. 610; Pierson *v.* Morch, 82 N. Y. 503; Howland *v.* Lounds, 51 N. Y. 604, 10 Am. Rep. 654; Fitch *v.* Snedaker, 38 N. Y. 248, 97 Am. Dec. 791.

6. **Notice of Acceptance Unnecessary.** — Carlill *v.* Carbolic Smoke Ball Co., (1893) 1 Q. B. 256; Wilson *v.* McClure, 50 Ill. 366; Reif *v.* Paige, 55 Wis. 496, 42 Am. Rep. 731.

7. **Acceptance Implied from Performance.** — Carlill *v.* Carbolic Smoke Ball Co., (1893) 1 Q. B. 256; Campbell *v.* Mercer, 108 Ga. 103; Patton *v.* Hassinger, 69 Pa. St. 311.

8. **Knowledge of Offer.** — See *infra*, IV. *The Performance — 2. Sufficiency — d. Performance Without Knowledge of Offer.*

9. **To Whom Offer Applies.** — See *supra*, II. 6. *Scope — b. To Whom Made.*

10. **Any One to Whom Offer Applies May Accept.** — Ryer *v.* Stockwell, 14 Cal. 134, 73 Am. Dec. 634; Bull *v.* Talcot, 2 Root (Conn.) 119, 1 Am. Dec. 62; Madison First Nat. Bank *v.* Hart, 55 Ill. 62; Wilson *v.* Wallace, 64 Miss. 13; Furman *v.* Parke, 21 N. J. L. 310; Pierson *v.* Morch, 82 N. Y. 503; Butler County *v.* Leibold, 107 Pa. St. 407; Cummings *v.* Gann, 52 Pa. St. 484.

11. **Effect of Ratification of Acceptance.** — Madison First Nat. Bank *v.* Hart, 55 Ill. 62.

12. **Public Officers** — *England.* — Thatcher *v.* England, 3 C. B. 254, 54 E. C. L. 254; Bent *v.* Wakefield, etc., Bank, 4 C. P. D. 6.

United States. — Witty *v.* Southern Pac. Co., 76 Fed. Rep. 217.

Arkansas. — St. Louis, etc., R. Co. *v.* Grafton, 51 Ark. 504, 14 Am. St. Rep. 66.

California. — Lees *v.* Colgan, 120 Cal. 262.

Connecticut. — Matter of Russell, 51 Conn. 577, 50 Am. Rep. 55.

Illinois. — Hogan *v.* Stophlet, 179 Ill. 150; Mahoney *v.* Whyte, 49 Ill. App. 97.

Indiana. — Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1.

Iowa. — Means *v.* Hendershott, 24 Iowa 78.

Kentucky. — Smitha *v.* Gentry, (Ky. 1898) 45 S. W. Rep. 515; Riley *v.* Grace, (Ky. 1895) 33 S. W. Rep. 208; Harris *v.* Beaven, 11 Bush (Ky.) 258; Marking *v.* Needy, 8 Bush (Ky.) 23.

Massachusetts. — Davies *v.* Burns, 5 Allen (Mass.) 349; Pool *v.* Boston, 5 Cush. (Mass.) 219.

Minnesota. — Day *v.* Putnam Ins. Co., 16 Minn. 408; Warner *v.* Grace, 14 Minn. 487.

to assist a regular officer,[1] and has even been extended so as to debar a postmaster from accepting an offer of reward for the arrest of one who has stolen money from his post office.[2]

Where the Offer Relates to Matters Not Within the Scope of the Officer's Duty. — It is equally well settled that a public officer may accept an offer of reward for acts or services which are not within the scope of his duties.[3]

Illustrations of the application of the general principles stated above belong more properly to other titles wherein the duties of various public officers are discussed. In the note, however, will be found various cases in which these principles have been applied.[4]

Mississippi. — Monroe County *v.* Bell, (Miss. 1895) 18 So. Rep. 121; *Ex p.* Gore, 57 Miss. 251.

Missouri. — Thornton *v.* Missouri Pac. R. Co., 42 Mo. App. 58.

Nebraska. — Miller *v.* Hogeboom, 56 Neb. 434.

New York. — Hatch *v.* Mann, 15 Wend. (N. Y.) 44; City Bank *v.* Bangs, 2 Edw. (N. Y.) 95.

Ohio. — Gilmore *v.* Lewis, 12 Ohio 281; Rea *v.* Smith, 2 Handy (Ohio) 193, 5 Am. Law Reg. 98.

Pennsylvania. — Com. *v.* Harshman, 20 Pa. Co. Ct. 656; Smith *v.* Whildin, 10 Pa. St. 39, 49 Am. Dec 572; Com. *v.* Riker, 6 Lack. Leg. N. (Pa.) 46, 14 York Leg. Rec. (Pa.) 24; Commonwealth *v.* Edwards, 6 Lack. Leg. N. (Pa.) 44, 14 York Leg. Rec. (Pa.) 22.

South Carolina. — Williams *v.* Thweatt, 12 Rich. L. (S. Car.) 478.

Tennessee. — Stamper *v.* Temple, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296.

Vermont. — Brown *v.* Godfrey, 33 Vt. 120.

Wisconsin. — Ring *v.* Devlin, 68 Wis. 384; Reif *v.* Paige, 55 Wis. 496, 42 Am. Rep. 731.

1. Special Deputies. — St. Louis, etc., R. Co. *v.* Crafton, 51 Ark. 504, 14 Am. St. Rep. 66; Malpass *v.* Caldwell, 70 N. Car. 130.

2. Spinney *v.* U. S., 32 Ct. Cl. 397.

3. Matters Not Within Scope of Officer's Duties — *England.* — England *v.* Davidson, 3 Per. & Dav. 594, 11 Ad. & El. 856, 39 E. C. L. 254; Neville *v.* Kelly, 12 C. B. N. S. 740, 104 E. C. L. 740, 32 L. J. C. Pl. 118; Smith *v.* Moore, 1 C. B. 438, 50 E. C. L. 438.

United States. — Matthews *v.* U. S., 32 Ct. Cl. 123.

Alabama. — Morrell *v.* Quarles, 35 Ala. 544.

California. — Harris *v.* More, 70 Cal. 502.

Delaware. — Creamer *v.* Hall, 2 Del. Co. Rep. (Pa.) 378.

Indiana. — Bronnenberg *v.* Coburn, 110 Ind. 169; Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1.

Iowa. — Means *v.* Hendershott, 24 Iowa 78.

Louisiana. — Pilie *v.* New Orleans, 19 La. Ann. 274.

New York. — Gregg *v.* Pierce, 53 Barb. (N. Y.) 387.

Pennsylvania. — McCain's Petition, 4 Pa. Co. Ct. 9; Pyle *v.* Sweigart, 18 Lanc. L. Rev. 81.

Texas. — Morris *v.* Kasling, 79 Tex. 141; Kasling *v.* Morris, 71 Tex. 584, 10 Am. St. Rep. 797.

Vermont. — Russell *v.* Stewart, 44 Vt. 170; Davis *v.* Munson, 43 Vt. 676, 5 Am. Rep. 315.

Wisconsin. — Reif *v.* Paige, 55 Wis. 496, 42 Am. Rep. 731.

4. Sheriff Cannot Accept Offer — *For Arrest of Fugitive from Another State.* — Monroe County *v.* Bell, (Miss. 1895) 18 So. Rep. 121.

For Arrest and Conviction of One Whom It Is His Duty to Arrest. — Hogan *v.* Stophlet, 179 Ill. 150.

Sheriff May Accept Offer — *For an Arrest When He Has No Process in His Hands*, and makes arrest without warrant. Russell *v.* Stewart, 44 Vt. 170; Davis *v.* Munson, 43 Vt. 676, 5 Am. Rep. 315.

For an Arrest in Another State of one who had fled from the sheriff's own state. Gregg *v.* Pierce, 53 Barb. (N. Y.) 387.

For an Arrest Outside of His Jurisdiction. — Brown *v.* Godfrey, 33 Vt. 120.

Deputy Sheriff Cannot Accept Offer — *For Arrest of One in His County, though He Has No Warrant*, and makes the arrest without one. Witty *v.* Southern Pac. Co., 76 Fed. Rep. 217; Warner *v.* Grace, 14 Minn. 487.

For Arrest of Fugitive from Another County. — Warner *v.* Grace, 14 Minn. 487.

Special Deputies Cannot Accept Offer — *For the Arrest Which They Were Deputized to Make.* — Malpass *v.* Caldwell, 70 N. Car. 130.

For Arrest of Persons Injuring Property Which They, the Deputies, Were Deputized to Guard. — St. Louis, etc., R. Co. *v.* Grafton, 51 Ark. 504, 14 Am. St. Rep. 66.

Constable Cannot Accept Offer — *For Arrest Outside of His Bailiwick, When He Has a Warrant* for the person arrested. Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1.

Constable May Accept Offer — *For Arrest of Unknown Criminals for Whom He Has No Warrant.* — Kasling *v.* Morris, 71 Tex. 584, 10 Am. St. Rep. 797.

For Arrest of Unknown Criminals, though He Makes the Arrest under a Warrant Procured by Him for That Purpose. — McCain's Petition, 4 Pa. Co. Ct. 9.

For Arrest Which He Is Not Authorized by Warrant to Make. — Creamer *v.* Hall, 2 Del. Co. Rep. (Pa.) 378.

For Arrests Outside of His Bailiwick. — Brown *v.* Godfrey, 33 Vt. 120.

Special Constable May Accept Offer — *For an Arrest Which He Is Not Specially Authorized to Make.* — Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1.

Police Officer Cannot Accept Offer — *For Arrest in His Jurisdiction, though He Has No Warrant.* — Smitha *v.* Gentry, (Ky. 1898) 42 L. R. A. 302; City Bank *v.* Bangs, 2 Edw. (N. Y.) 95.

For Arrests for Injury to Property Which It Is His Duty to Protect. — Thornton *v.* Missouri Pac. R. Co., 42 Mo. App. 58.

A Person Assisting a Public Officer in the performance of an act which it is the officer's duty to do cannot accept an offer of reward for such act, even though the act might never have been accomplished but for such assistance.[1]

Extra Exertions and Expenses made and incurred by a public officer in the performance of an act within the scope of his duty will not authorize him to accept an offer of reward for such act.[2]

Who Are Public Officers, within the prohibition against accepting offers of reward, is a question which seems seldom to have arisen, and hence may be best answered by inquiring who is not a public officer within such prohibition. A deputy marshal is not,[3] neither is a private detective.[4]

A Statutory Offer may be accepted by public officers where they are embraced in the general description in the statute of those to whom the offer is made.[5]

In Pennsylvania it seems that a police officer may, with the consent of the mayor, accept an offer of reward.[6]

c. EMPLOYEES. — **An Employee Cannot Accept** an offer of reward made by his employer for acts or services which it is the employee's contractual duty to perform.[7]

Trustees. — The same rule applies to persons occupying fiduciary positions. They cannot accept offers of reward made by their *cestuis que trustent* for matters within the scope of their duties, though they receive no compensation for the performance of such duties.[8]

An Employee May Accept an Offer made by his employer for acts or services which the employee owes no contractual duty to perform;[9] and the fact that in performing such services he does nothing except what he is specially directed to do will not bring such services within the scope of his regular duties so as to deprive him of the benefit of his acceptance of the offer.[10]

For Arrest and Conviction of Persons Whom It Is His Duty to Arrest.— Day *v.* Putnam Ins. Co., 16 Minn. 408.

For Arrest though Made While Off Duty. — Matter of Russell, 51 Conn. 577, 50 Am. Rep. 55.

For Arrest for a Crime Committed in Another County. — Lees *v.* Colgan, 120 Cal. 262.

Police Officer May Accept Offer — *For Arrest of Fugitive from Another State.* — Morrell *v.* Quarles, 35 Ala. 544.

For Arrest While Temporarily Suspended. — Smith *v.* Moore, 1 C. B. 438, 50 E. C. L. 438.

For Information Concerning a Crime in His District. — England *v.* Davidson, 3 Per. & Dav. 594, 11 Ad. & El. 856, 39 E. C. L. 254.

A City Marshal May Accept Offer — *For Arrest in Another County.*— Bronnenberg *v.* Coburn, 110 Ind. 169.

A Peace Officer May Accept Offer — *For Arrest of Unknown Criminal for Whom He Has No Warrant.* — Morris *v.* Kasling, 79 Tex. 141.

A City Watchman Cannot Accept Offer — *For Arrest of an Incendiary.* — Pool *v.* Boston, 5 Cush. (Mass.) 219.

A Railroad Policeman May Accept Offer — *For Arrest of One Guilty of Crimes Other than Those Which It Is His Special Duty to Prevent.* — Pyle *v.* Sweigart, 18 Lanc. L. Rev. 81.

A Fireman May Accept Offer — *For a Rescue, Where the Performance Will Be at the Risk of His Life.* — Reif *v.* Paige, 55 Wis. 496, 42 Am. Rep. 731.

A Commonwealth's Attorney Cannot Accept Offer — *For Obtaining Conviction*, though he obtains it while acting as a private prosecutor. Harris *v.* Beaven, 11 Bush (Ky.) 258.

A Superintendent of an Insane Asylum Cannot Accept Offer — *For Return of a Lunatic under His Charge to Another Asylum.* — Ring *v.* Devlin, 68 Wis. 384.

A Customs Officer Cannot Accept Offer — *For Information Concerning Smuggglery, Which He Obtains While Performing His Duties.* — Davies *v.* Burns, 5 Allen (Mass.) 349.

City Surveyor May Accept Offer — *For Discovery of Land Belonging to City.* — Pilie *v.* New Orleans, 19 La. Ann. 274.

1. **Persons Assisting Officers.** — Dunham *v.* Stockbridge, 133 Mass. 233.

2. **Extra Exertions.** — Hogan *v.* Stophlet, 179 Ill. 150, *affirming* 74 Ill. App. 631. *Compare* Riley *v.* Grace, (Ky. 1895) 33 S. W. Rep. 208.

3. Matthews *v.* U. S., 32 Ct. Cl. 123.

4. Minneapolis Bank *v.* Griffin, 66 Ill. App. 577.

5. **Statutory Offer, When Officer May Accept.** — U. S. *v.* Matthews, 173 U. S. 381.

6. **Acceptance by Police.** — Appel's Petition, 18 Phila. (Pa.) 476, 43 Leg. Int. (Pa.) 108; Com. *v.* Chester, 18 Phila. (Pa.) 454, 42 Leg. Int. (Pa.) 276.

7. **Employees.** — Harris *v.* Watson, Peake N. P. (ed. 1795) 72; Van Horn *v.* Ricks Water Co., 115 Cal. 448; Callagan *v.* Hallett, 1 Cai. (N. Y.) 104; Bartlett *v.* Wyman, 14 Johns. (N. Y.) 260.

8. **Trustees.** — Stacy *v.* State Bank, 5 Ill. 91.

9. **Matters Not Within Scope of Employee's Duties.** — Chicago, etc., R. Co. *v.* Sebring, 19 Ill. App. 222; Chicago, etc., R. Co. *v.* Sebring, 16 Ill. App. 181; Bagnall *v.* Barnard, 59 Hun (N. Y.) 151. See also Crane *v.* U. S., 23 Ct. Cl. 94.

10. Chicago, etc., R. Co. *v.* Sebring, 16 Ill. App. 181.

d. ACCEPTANCE BY SEVERAL. — Since acceptance is presumed from attempted performance,[1] and since any one of the class to whom an offer is made may accept it and attempt to perform the required services,[2] it necessarily follows that an offer of reward may often be accepted by several different parties. But as no contract can arise except by performance, no priority, as between several acceptors, can be obtained by reason of acceptance alone. A conflict of claims of several acceptors can arise only after performance, and this question is treated under another topical head.[3]

e. SPECIAL INCAPACITY. — **Fraud** will render the party practising it incapable of accepting an offer of reward rendered necessary thereby. Thus, one who secretes a criminal in order to induce an offer of reward for his arrest cannot accept such offer when made.[4]

Accessories to crime cannot accept an offer of reward necessitated by or growing out of the crime. For example, one who is implicated in a theft cannot accept an offer for the return of the property stolen.[5] Nor can an accessory to the escape of a prisoner accept an offer of reward for his recapture.[6]

IV. THE PERFORMANCE — 1. Effect.— Performance by any one authorized to accept an offer of reward is the last element of the contract, and makes the theretofore conditional and revocable proposal a part of a completed contract, with an executed consideration on the one side and a binding promise to pay on the other.[7]

2. Sufficiency — *a.* IN GENERAL. — The scope of offer having been ascertained,[8] the next question is, whether the acts relied on as the consideration for the promise contained in the offer constitute a performance of the services for which the offer was made.

Must Be Coextensive with Offer. — The performance must have been coextensive with the offer; otherwise, there has been no performance at all, and hence there is no contract.[9]

Substantial Performance is usually held sufficient. Offers of reward are usually

1. See *supra*, this section, *Nature and Elements*.
2. See *supra*, this section, *In General*.
3. See *infra*, IV. *The Performance*.
4. **Fraud.** — Bledsoe *v.* Jackson, 4 Sneed (Tenn.) 429.
5. **Accessories.** — Jenkins *v.* Kelren, 12 Gray (Mass.) 330, 74 Am. Dec. 596.
6. Hassan *v.* Doe, 38 Me. 45.
7. **Performance Creates Contract** — *England.* — Carlill *v.* Carbolic Smoke Ball Co., (1893) 1 Q. B. 256.
United States. — Briggs's Case, 15 Ct. Cl. 48.
Alabama. — Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 7 Am. St. Rep. 48; Morrell *v.* Quarles, 35 Ala. 544.
California. — Wilson *v.* Stump, 103 Cal. 255, 42 Am. St. Rep. 111; McLeod *v.* Meade, 77 Cal. 87; Ryer *v.* Stockwell, 14 Cal. 134, 73 Am. Dec. 634.
Georgia. — Campbell *v.* Mercer, 108 Ga. 103.
Indiana. — Bronnenberg *v.* Coburn, 110 Ind. 169; Harson *v.* Pike, 16 Ind. 140.
Kentucky. — Auditor *v.* Ballard, 9 Bush (Ky.) 573, 15 Am. Rep. 728.
Louisiana. — Murray *v.* Kennedy, 15 La. Ann. 385, 77 Am. Dec. 189; Deslondes *v.* Wilson, 5 La. 397, 25 Am. Dec. 187.
Maine. — Mitchell *v.* Abbott, 86 Me. 338, 41 Am. St. Rep. 559.
Massachusetts. — Wentworth *v.* Day, 3 Met. (Mass.) 352, 37 Am. Dec. 145; Besse *v.* Dyer, 9 Allen (Mass.) 151, 85 Am. Dec. 747.
New Hampshire. — Morse *v.* Bellows, 7 N. H. 549, 28 Am. Dec. 372.
New Jersey. — Furman *v.* Parke, 21 N. J. L. 310.
New York. — Pierson *v.* Morch, 82 N. Y. 503; White *v.* Drew, (Supm. Ct. Spec. T.) 56 How. Pr. (N. Y.) 53; Grady *v.* Crook, (Brooklyn City Ct. Gen. T.) 2 Abb. N. Cas. (N. Y.) 53, *affirmed* 72 N. Y. 612.
Ohio. — Gilmore *v.* Lewis, 12 Ohio 281.
Pennsylvania. — Wilmoth *v.* Hensel, 151 Pa. St. 200, 31 Am. St. Rep. 738.
Texas. — Kasling *v.* Morris, 71 Tex. 584, 10 Am. St. Rep. 797.
8. **Scope of Offer.**— See *supra*, II. *The Offer*— 6. *Scope*.
9. **Performance Must Be Coextensive with Offer** — *Arkansas.* — Amis *v.* Conner, 45 Ark. 337.
California. — Van Horn *v.* Ricks Water Co., 115 Cal. 448.
Indiana. — Everman *v.* Hyman, (Ind. App. 1891) 28 N. E. Rep. 1022.
Kansas. — Stone *v.* Dysert, 20 Kan. 123.
Kentucky. — Stone *v.* Wickliffe, 106 Ky. 252; Partin *v.* Snider, 8 Ky. L. Rep. 616.
Louisiana. — Cornelson *v.* Sun Ins. Co., 7 La. Ann. 345.
Maryland. — Goldsborough *v.* Cradie, 28 Md. 477.
Massachusetts. — Besse *v.* Dyer, 9 Allen (Mass.) 151, 85 Am. Dec. 747.
Missouri. — Lovejoy *v.* Atchison, etc., R. Co., 53 Mo. App. 386.
New Jersey. — Furman *v.* Parke, 21 N. J. L. 310.
Pennsylvania. — Juniata County *v.* McDonald, 122 Pa. St. 115; Commercial Bank *v.*

made for substantial objects, for the accomplishment of certain results, and not for bare acts; and hence it is that the accomplishment of the result contemplated by the offer is held to be a substantial performance of the services which constitute the consideration for the promise of reward, regardless of the manner or method by which that result is reached.[1]

Proximate Cause. — Substantial performance being sufficient, as has just been seen, and itself being dependent upon the accomplishment of certain results aimed at by the offer, it follows, according to the accepted doctrine of cause and effect, that if the acts or services relied on as constituting the consideration for a promise of reward constitute the proximate cause of the result contemplated by the offer, the consideration will be held to be substantially performed, and the contract to be complete.[2] Thus, it has been held that a reward for information which will lead to a certain result is earned by the person who gives the first effective information which will lead to such result and be connected therewith in the relation of cause and effect;[3] that one who causes an arrest earns a reward for the arrest,[4] though others assist him,[5] and the formal arrest be made by an officer,[6] and even though the claimant be not personally present when the arrest is made;[7] that a reward for arrest and conviction is earned by information causing the arrest and sufficient to cause conviction, but for the confession of the accused;[8] and that an offer for an arrest is earned by one who persuades the guilty party to surrender.[9] Other illustrations of this principle will be found in a preceding part of this title.[10] Conversely, where the acts relied on as constituting the consideration are not the proximate cause of the result aimed at by the offer, there has been no substantial performance of the offer.[11] Thus, a reward for an arrest is not earned by information which has to be supplemented by investigation by others.[12]

Jury Question. — Whether the acts relied on as the consideration for a promise of reward are the proximate cause of the result aimed at by the offer, and thus constitute sufficient performance, is a question for the jury.[13]

Performance Prevented by anything beyond the control of the party offering the reward will defeat all claim for the reward, though but for such interference the performance would have been completed. Thus, an offer for information leading to the conviction of a certain criminal is not earned by furnishing information sufficient to convict, actual conviction being prevented by the suicide of the accused.[14] But if performance is prevented by the action of the

Pleasants, 6 Whart. (Pa.) 375; Com. *v.* Edwards, 6 Lack. Leg. N (Pa.) 44.

South Carolina. — Canton *v.* Young, 11 Rich. L. (S. Car.) 546.

Texas. — Adair *v.* Cooper, 25 Tex. 548.

1. Substantial Performance Sufficient. — City Bank *v.* Bangs, 2 Edw (N. Y.) 95; Williams's Case, 12 Ct. Cl. 192; Gilkey *v.* Bailey, 2 Harr. (Del.) 359; Bull *v.* Talcot, 2 Root (Conn.) 119, 1 Am. Dec. 62; Matter of Kelly, 39 Conn. 159; Besse *v.* Dyer, 9 Allen (Mass.) 151, 85 Am. Dec. 747; Martin *v.* Copiah County, 71 Miss. 407; Porterfield *v.* State, 92 Tenn. 289.

2. Tarner *v.* Walker, L. R. 1 Q. B. 641, *affirmed* L. R. 2 Q. B. 301.

3. Illustrations of Proximate Cause. — One Hundred Barrels Whiskey, 2 Ben. (U. S.) 14; Gilkey *v.* Bailey, 2 Harr. (Del.) 359; Brown *v.* Bradlee, 156 Mass. 28, 32 Am. St. Rep. 430.

4. Rinehart *v.* Lancaster, 18 W. N. C. (Pa.) 364.

5. Montgomery County *v.* Robinson, 85 Ill. 174.

6. Haskell *v.* Davidson, 91 Me. 488, 64 Am. St. Rep. 254.

7. Stone *v.* Wickliffe, 106 Ky. 252.

8. Crawshaw *v.* Roxbury, 7 Gray (Mass.) 374.

9. Hogg *v.* Com., 3 Ky. L. Rep. 470.

10. See *supra*, II. *The Offer*—6. *Scope*—*c. For What Made.*

11. Bent *v.* Wakefield, etc., Bank, 4 C. P. D. 1, 39 L. T. N. S. 576; Witty *v.* Southern Pac. Co., 76 Fed. Rep. 217; Codding *v.* Mansfield, 7 Gray (Mass.) 272; Furman *v.* Parke, 21 N. J. L. 310.

12. Austin *v.* Milwaukee County, 24 Wis. 278. See, for other examples of the principle, *supra*, II. *The Offer* — 6. *Scope* — *c. For What Made.*

13. Whether There Has Been Performance, a Jury Question. — Tarner *v.* Walker, L. R. 1 Q. B. 641, *affirmed* L. R. 2 Q. B. 301; Brown *v.* Bradlee, 156 Mass. 28, 32 Am. St. Rep. 430; Huckins *v.* East Saginaw Second Nat. Bank, 47 Mich. 92; Elkhorn Valley Lodge No. 57 *v.* Hudson, 59 Neb. 672; Pierson *v.* Morch, 82 N. Y. 503; Buckley *v.* Schwartz, 83 Wis. 304.

14. Performance Prevented.—Fortier *v.* Wilson, 11 U. C. C. P. 495.

offerer, acts sufficient to produce the result contemplated by the offer will be deemed a sufficient performance; as where a reward is offered for the capture and conviction of a criminal, and after his capture, indictment, and confession of guilt, the indictment is dismissed on the application of him who made the offer.[1]

Time of Performance. — The services for which a reward is offered must be rendered before the offerer has, to the knowledge of the acceptor, practically obtained the result contemplated by the offer. Thus, where one offers a reward for the arrest and conviction of a certain person, another cannot, after he has learned that the offerer has obtained sufficient information to accomplish his desired result, earn the reward by causing an arrest and conviction.[2]

Notice of performance is not essential. The contract is complete immediately upon performance.[3]

The Motives of performance are immaterial.[4]

b. PERFORMANCE BY AGENT. — Acts or services for which a reward is offered may be performed through the agency of another employed for that purpose.[5]

c. PARTIAL PERFORMANCE. — Generally, an offer of reward is not apportionable,[6] and under the rule that the performance must be coextensive with the offer,[7] partial performance creates no contractual liability whatever.

An Apportionable Offer, however, being susceptible of division, partial performance of the services mentioned therein creates a contract for the payment of a proportionate part of the reward.[8]

d. PERFORMANCE WITHOUT KNOWLEDGE OF OFFER. — There is much conflict of authority as to whether knowledge of an offer of reward, when the services therein specified are performed, is essential to the right to claim the reward.

Knowledge Essential. — If the liability for the payment of a reward is really contractual, it would certainly seem that knowledge of the offer would be essential to bring about *aggregatio mentium,* which is the very foundation of a contract — at least of every other species of contract, express or implied — and this doctrine is in fact upheld by a strong line of authority.[9]

Knowledge Not Essential. — Another line of authority, perhaps equally strong, holds that knowledge of the offer at the time of the performance is not essential to the right to claim the reward and to enforce payment thereof.[10]

1. Louisville, etc., R. Co. *v.* Goodnight, 10 Bush (Ky.) 552, 19 Am. Rep. 80.

2. Van Horn *v.* Ricks Water Co., 115 Cal. 448.

3. **Notice.** — Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1.

4. **Motives of Performance Are Immaterial,** as where one, solely from motives of revenge against another, makes disclosures as to him for which a reward has been offered. Williams *v.* Carwardine, 4 B. & Ad. 621, 24 E. C. L. 126. But see *infra, d. Performance Without Knowledge of Offer; e. Performance Without Intent to Claim Reward.*

5. **Agency.** — Pruitt *v.* Miller, 3 Ind. 16; Grady *v.* Crook, (Brooklyn City Ct. Gen. T.) 2 Abb. N. Cas. (N. Y.) 53, *affirmed* 72 N. Y. 612.

Reward for Arrest May Be Earned Through Agent. — Montgomery County *v.* Robinson, 85 Ill. 174; Stephens *v.* Brooks, 2 Bush (Ky.) 137.

6. **Offer Not Apportionable.** — See *supra,* II. *The Offer* — 6. *Scope* — *c. For What Made* — (3) *The Offer an Entirety.*

7. **Performance Must Be Coextensive with Offer.** — See *supra,* this section, *In General.*

8. **Apportionable Offers.** — See *supra,* II. *The Offer* — 6. *Scope* — *c. For What Made* — (4) *Apportionable Offer.*

9. **Knowledge of Offer Essential** — *California.* — Wilson *v.* Stump, 103 Cal. 255, 42 Am. St. Rep. 111; Hewitt *v.* Anderson, 56 Cal. 476, 38 Am. Rep. 65.

Connecticut. — See Marvin *v.* Treat, 37 Conn. 96, 9 Am. Rep. 307.

Illinois. — Williams *v.* West Chicago St. R. Co., 191 Ill. 610; Ensminger *v.* Horn, 70 Ill. App. 605; Chicago, etc., R. Co. *v.* Sebring, 16 Ill. App. 181.

Kentucky. — Lee *v.* Flemingsburg, 7 Dana (Ky.) 29. But see Auditor *v.* Ballard, 9 Bush (Ky.) 572, 15 Am. Rep. 728.

New York. — Howland *v.* Lounds, 51 N. Y. 604, 10 Am. Rep. 654; Fitch *v.* Snedaker, 38 N. Y. 248, 97 Am. Dec. 791; Vilty *v.* Eley, 51 N. Y. App. Div. 44.

Ohio. — Rea *v.* Smith, 2 Handy (Ohio) 193.

Pennsylvania. — Fink *v.* Meyers, 4 Kulp (Pa.) 145.

Tennessee. — Stamper *v.* Temple, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296.

10. **Knowledge of Offer Not Essential** — *England.* — Williams *v.* Carwardine, 4 B. & Ad.

e. PERFORMANCE WITHOUT INTENT TO CLAIM REWARD — **Intention to Claim Reward Essential.** — The same line of authority which holds that knowledge of the offer is essential to the right to claim the reward [1] holds that performance of the services for which a reward is offered, without the intention of claiming the reward offered therefor, creates no contract between the parties, and cannot thereafter be made the basis of a claim for the reward.[2]

Intention to Claim the Reward Not Essential. — The authorities holding that knowledge of the offer is not essential to the right to claim the reward, necessarily hold that intention to claim the reward at the time of the performance is not essential to a recovery.[3]

3. Performance by Several. — For a discussion of this matter reference is made to a succeeding part of this title.[4]

V. THE CONTRACT — 1. Nature and Consideration. — The contract resulting from an offer of reward, acceptance, and performance of the specified acts or services, is somewhat analagous to the contract arising from the performance of labor upon request,[5] the consideration for the promise to pay being the services performed.[6]

2. The Claim — *a.* WHEN ACCRUES. — The claim for a reward accrues immediately upon the performance of the acts or services for which the reward was offered.[7] In some cases, however, the sufficiency of the performance cannot be determined until the happening of a certain event; as, where a reward is offered for the arrest of the perpetrator of a crime, the sufficiency of the performance cannot be determined until the trial of the person arrested. In such cases, the claim accrues upon the happening of the determinative event — in the case cited, the conviction of the person arrested.[8]

b. WHO ENTITLED TO RECOVER — (1) *In General.* — No authority need be cited to sustain the proposition that a party to a contract who has performed his portion thereof is entitled to enforce against the other party the payment or the execution of the consideration promised by the latter. Since, then, an offer of reward, followed by acceptance and performance, creates a contract for the payment of the reward,[9] the question as to who is entitled to recover the reward resolves itself into the inquiry as to who, with the capacity to accept the offer, has in fact accepted it, and performed the services, or obtained the result contemplated by the offer. This question must be determined in any particular case by the application of the principles discussed in the preceding topical divisions of this article. Specifically stated, however, he is entitled to recover who, with the capacity to accept, has accepted the offer, and has, with knowledge of the offer, where knowledge is required, and with the intention

621, 24 E. C. L. 126; Neville *v.* Kelly, 12 C. B. N. S. 740, 104 E. C. L. 740.

United States. — Drummond *v.* U. S., 35 Ct. Cl. 356.

Delaware. — Eagle *v.* Smith, 4 Houst. (Del.) 293.

Indiana. — Everman *v.* Hyman, 3 Ind. App. 459. See also Monroe County *v.* Wood, 39 Ind. 345; Dawkins *v.* Sappington, 26 Ind. 199.

Kentucky. — Auditor *v.* Ballard, 9 Bush (Ky.) 572, 15 Am. Rep. 728.

Vermont. — Russell *v.* Stewart, 44 Vt. 170.

Wisconsin. — Reif *v.* Paige, 55 Wis. 496, 42 Am. Rep. 731.

1. Authorities Holding Knowledge of Offer Essential. — See *supra*, *d. Performance Without Knowledge of Offer.*

2. Intention to Claim Reward. — Lockhart *v.* Barnard, 14 M. & W. 674; Hewitt *v.* Anderson, 56 Cal. 476, 38 Am. Rep. 65; Chicago, etc., R. Co. *v.* Sebring, 16 Ill. App. 181; Howland *v.* Lounds, 51 N. Y. 604, 10 Am. Rep. 654; Fitch *v.* Snedaker, 38 N. Y. 248, 97 Am. Dec. 791; Vitty *v.* Eley, 51 N. Y. App. Div. 44; City Bank *v.* Bangs, 2 Edw. (N. Y.) 95; Fink *v.* Meyers, 4 Kulp (Pa.) 145; Stamper *v.* Temple, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296.

3. Williams *v.* Carwardine, 4 B. & Ad. 621, 24 E. C. L. 126. See also *supra*, *d. Performance Without Knowledge of Offer.*

4. See *infra*, V. *The Contract* — 2. *The Claim* — *b. Who Entitled to Recover.*

5. Nature of Contract. — Williams *v.* West Chicago St. R. Co., 191 Ill. 610.

6. The Consideration. — See *supra*, IV. *The Performance* — 1. *Effect.*

7. When Claim Accrues. — Bronnenberg *v.* Coburn, 110 Ind. 169.

8. Ryer *v.* Stockwell, 14 Cal. 134, 73 Am. Dec. 634; Bronnenberg *v.* Coburn, 110 Ind. 171; Anderson *v.* Pierce County, 40 Neb. 481.

9. Offer, Acceptance, and Performance Create Contract. — See *supra*, IV. *The Performance* — 1. *Effect.*

of claiming the reward, where such intention is required, personally, or through his agent, accomplished the result aimed at by the offer.[1]

(2) *Several Claimants* — (a) **Joint Claims.** — Where the result for the accomplishment of which a reward has been offered is obtained by several persons acting in concert, the claim for the reward will be a joint one in favor of the parties so acting, to be equitably distributed among them.[2]

Co-operation Is Essential to the creation of a joint claim for a reward. Mere contemporaneous action is insufficient. Thus, where several persons make a simultaneous search for a dead body, for the recovery of which a reward has been offered, and one of such persons, acting independently of the others though in company with them, finds the body, he alone is entitled to the reward.[3]

Co-operation Alone Insufficient. — But co-operation alone is insufficient to give rise to a joint claim. There must be a co-operation of independent minds; and hence, where one party merely assists another, without any promise of a share of the reward, the principal alone is entitled to the fruits of the joint success.[4] Likewise, where one furnishes another with information, without any idea of earning the reward, and the latter, acting upon such information, performs the services, he alone is entitled to the reward.[5] And where, after stolen property has been practically located, an officer is called to make a legal search therefor, he will not thereby be entitled to share in a reward offered for the recovery of the property.[6]

Waiver of Claim for Entire Reward. — Where several claimants of a reward consent to the adjudication of their claims by the party paying the reward, and accept the portions allotted to them by such party, none of them can thereafter claim the whole reward.[7]

Not a Partnership Claim. — The claim arising from joint performance, by several, of the services specified in an offer of reward is not a partnership claim, and if one of such performers receives the whole reward, the other or others may enforce against him their claims for their shares by an action at law.[8]

The Receipt of the Whole Reward by One Joint Claimant will not affect the right of the others to enforce their claim against the offerer.[9]

(b) **Conflicting Claims — In General.** — Offers of reward being made for the attainment of a certain result,[10] after that result has been attained or accomplished by one person, there can be no further performance by another, even though the latter perform the specific acts set forth in the offer.[11] Hence it is that only one person or set of persons can recover a single reward; and where

1. Who Entitled to Recover. — Lancaster *v.* Walsh, 4 M. & W. 16; Williams *v.* Carwardine, 4 B. & Ad. 621, 24 E. C. L. 126; U. S. *v.* Simons, 7 Fed. Rep. 709; U. S. *v.* George, 6 Blatchf. (U. S.) 406; U. S. *v.* The Bark Isla de Cuba, 2 Cliff. (U. S.) 458; Sawyer *v.* Steele, 3 Wash. (U. S.) 464; City Bank *v.* Bangs, 2 Edw. (N. Y.) 95; Rollins *v.* Clement, 25 S. Car. 601. See also *supra*, II. *The Offer;* III. *The Acceptance;* IV. *The Performance.*

2. Joint Performance Creates Joint Claim — *England.* — Williams *v.* Carwardine, 4 B. & Ad. 621, 24 E. C. L. 126.

United States. — Matthews *v.* U. S., 32 Ct. Cl. 123.

Louisiana. — Deslondes *v.* Wilson, 5 La. 397, 25 Am. Dec. 187.

Maryland. — Goldsborough *v.* Cradie, 28 Md. 477.

New York. — Fargo *v.* Arthur, (Supm. Ct. Spec. T.) 43 How. Pr. (N. Y.) 193; Peel *v.* Metropolitan Police, 5 Am. L. Reg. N. S. 98; Rea *v.* Smith, 2 Handy (Ohio) 193, 5 Am. L. Reg. 98.

New Hampshire. — Whitcher *v.* State, 68 N. H. 605; Janvrin *v.* Exeter, 48 N. H. 83, 2 Am. Rep. 185.

Pennsylvania. — Matter of Distribution of Reward, 18 Phila. (Pa.) 478, 43 Leg. Int. (Pa.) 195.

3. Co-operation Essential to Joint Claim. — Elkhorn Valley Lodge No. 57 *v.* Hudson, 59 Neb. 672.

4. Stroud *v.* Garrison, 24 Ark. 53. See also *infra*, (*b*) *Conflicting Claims.*

5. Fallick *v.* Barber, 1 M. & S. 108.

6. City Bank *v.* Bangs, 2 Edw. (N. Y.) 95.

7. Prentiss *v.* Farnham, 22 Barb. (N. Y.) 519.

8. Joint Claim Not a Partnership Claim. — Dawson *v.* Gurley, 22 Ark. 381.

9. Swanton *v.* Ost, 74 Ill. App. 281.

10. See *supra*, II. *The Offer* — 6. *Scope.*

11. The purpose of an offer for information sufficient to convict is accomplished by the first person who furnishes such information; and subsequent information, though sufficient to convict, will not constitute a performance. Rollins *v.* Clement, 25 S. Car. 601.

there has been an attempted performance by several, that one is entitled to recover who first accomplishes the result for which the reward was offered.[1]

Who Is the First Performer. — The inquiry as to who is the first performer is merely a question as to who is the real performer, since, as has just been seen, there can be but one performance; and as the sufficiency of performance has been discussed elsewhere,[2] it is unnecessary to elaborate on this point. Each case will depend upon its own peculiar circumstances, and generally may be determined by the application of the principles discussed in the preceding divisions of this article.

Principal and Agent. — Where one acts as the agent of another in performing the services for which a reward has been offered, his principal will be entitled to the reward.[3]

Estoppel. — Where one who has assisted in performing the services for which a reward was offered, expressly admits to the offerer that others are entitled to the reward, he is estopped from thereafter claiming the reward.[4]

A Reward Paid to the Wrong Person may be recovered from him by the person actually entitled;[5] but one who himself has no just claim to the reward cannot complain because it has been paid to another who, likewise, has no claim thereto.[6]

c. WAIVER OF CLAIM — **Acts Done to Enforce Payment.** — Returning lost property, for which a reward has been offered, through an agent, who refuses to deliver it or to reveal the name of the finder until payment of the reward, and who even indulges in threats to enforce such payment, will not constitute a waiver of the claim for the reward, so as to entitle the offerer to recover it back after it has been paid.[7]

Insisting on Identification of Lost Property as a condition of its delivery will not constitute a waiver of the claim for a reward which has been offered for its return.[8]

3. The Liability — *a.* IN GENERAL. — Since an offer of reward, its acceptance, and the performance of the services specified, create a contract for the payment of the reward,[9] the party making the offer is, under the principles applicable to contracts in general, necessarily the party who is liable for the payment of the reward.

Liability under a Statutory Offer, however, may constitute an exception to this rule. The liability under such an offer will depend upon the provisions of the statute.[10]

b. UPON OFFERS BY AGENTS — (1) *In General.* — If an agent, public or

1. First Performer Entitled to Reward — *England.* — Williams *v.* Carwardine, 4 B. & Ad. 621, 24 E. C. L. 126; Lancaster *v.* Walsh, 4 M. & W. 16; Bent *v.* Wakefield, etc., Bank, 4 C. P. D. 1; Thatcher *v.* England, 3 C. B. 254, 54 E. C. L. 254; Fallick *v.* Barber, 1 M. & S. 108; Gibbons *v.* Proctor, 64 L. T. N. S. 594.

United States. — U. S. *v.* Simons, 7 Fed. Rep. 709; U. S. *v.* George, 6 Blatchf. (U. S.) 406; U. S. *v.* The Bark Isla de Cuba, 2 Cliff. (U. S.) 458; Sawyer *v.* Steele, 3 Wash. (U. S.) 464; One Hundred Barrels Whiskey, 2 Ben. (U. S.) 14; Fifty Thousand Cigars, 1 Lowell (U. S.) 22.

Illinois. — Higgins *v.* Lessig, 49 Ill. App. 459.

Mississippi. — Wilson *v.* Wallace, 64 Miss. 13.

New York. — City Bank *v.* Bangs, 2 Edw. (N. Y.) 95.

2. See *supra*, IV. *The Performance* — 2. *Sufficiency.*

3. Reward Earned by Agent. — Gibbons *v.* Proctor, 64 L. T. N. S. 594; Montgomery County *v.* Robinson, 85 Ill. 174; Pruitt *v.* Miller, 3 Ind. 16; Grady *v.* Crook. (Brooklyn City Ct. Gen. T.) 2 Abb. N. Cas. (N. Y.) 53.

4. Estoppel Against Subsequent Claim. — Witty *v.* Southern Pac. Co., 76 Fed. Rep. 217.

5. Reward Paid to Wrong Person. — Stephens *v.* Brooks, 2 Bush (Ky.) 137; Williams *v.* Thweatt, 12 Rich. L. (S. Car.) 478. See also Sergeant *v.* Stryker, 16 N. J. L. 464, 32 Am. Dec. 404.

6. Fink *v.* Meyers, 4 Kulp (Pa.) 145.

7. Waiver. — Grady *v.* Crook, (Brooklyn City Ct. Gen. T.) 2 Abb. N. Cas. (N. Y.) 53, *affirmed* 72 N. Y. 612.

8. Wood *v.* Pierson, 45 Mich. 313.

9. See *supra*, IV. *The Performance* — 1. *Effect.*

10. Liablity under Statutory Offer — *Kentucky Statute.* — Under Gen. Stat. Ky., c. 29, art. 15, § 4, providing for offers of rewards for the recapture of escaped convicts, the keeper of the penitentiary at the time when an escaped convict is returned is liable for the reward. South *v.* Julian, 5 Ky. L. Rep. 425.

Ontario Statute. — See 36 Vict., c. 48, § 396, Ont.; *In re* Robinson, 7 Ont. Pr. 239.

private, has authority to offer a reward for the benefit of his principal, the principal will be liable for the payment of the reward when the specified services have been performed, as he would be under any other contract.[1] The more important question arises when the offer by the agent is unauthorized. Under the general principles of contracts and of principal and agent it would seem that an agent would, in general, be liable personally upon a contract arising out of an unauthorized offer. The cases, however, as to an agent's liability in such instances seem confined entirely to the liability of public officers, and the authorities are not at all harmonious on this point.

(2) *Public Officers.* — **The Authorities Are Conflicting** as to whether an offer of reward by a public officer in excess of his authority will bind him personally after acceptance and performance.

Not Personally Liable. — The following offers by public officers in excess of authority have been held not to render the officers making them personally liable: by county commissioners for finding a missing man;[2] by treasury supervisors for the conviction of one who has robbed the treasury;[3] by an army officer for the arrest of a deserter.[4]

Personally Liable. — The following offers by public officers in excess of authority have been held to render such officers personally liable: by selectmen of a town for the arrest of a criminal;[5] by a mayor for the apprehension of a fugitive municipal officer;[6] by a sheriff[7] or United States marshal,[8] for arrest of one who has escaped from his custody. In *Kentucky* the question seems to be unsettled.[9]

c. LIABILITY BY ESTOPPEL. — A corporation has been held liable under an offer of reward made with its knowledge and approval;[10] but where an offer of reward was published in a newspaper without the authority or consent of the purported offerer, it was held that his mere failure to object to such publication did not estop him from disclaiming liability thereunder, though he had full knowledge thereof.[11]

VI. REWARD FOR LOST PROPERTY — LIEN OF FINDER. — Where a definite reward has been offered for the recovery of lost property, the finder of such property has a lien thereon for the payment of the reward, and he may retain the property until it is paid;[12] but if the offer be that a reward will be paid for such recovery, without any specification of the amount which will be paid, the finder has no lien.[13]

Merger of Lien in Judgment. — A judgment for the amount of the reward will not destroy the finder's lien so as to require him to surrender the property before payment.[14]

VII. EVIDENCE — 1. Burden of Proof. — The burden is upon the party claiming a reward of proving the offer, its acceptance, and the performance of the services for which the reward was offered.[15]

1. Offer by Agent Binds Principal. — Gibbs's Case, 14 Ct. Cl. 544; Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 7 Am. St. Rep. 48; Norwood *v.* Andrews, 71 Miss. 641. See also *supra*, II. *The Offer* — 2. *Capacity to Make.*

2. Offers by Public Officers. — Scheiber *v.* Von Arx, (Minn. 1902) 92 N. W. Rep. 3.

3. Huthsing *v.* Bousquet, 2 McCrary (U. S.) 152.

4. Belknap *v.* Reinhart, 2 Wend. (N. Y.) 375, 20 Am. Dec. 621.

5. Brown *v.* Bradlee, 156 Mass. 28, 32 Am. St. Rep. 430.

6. Timken *v.* Tallmadge, 54 N. J. L. 117.

7. Crawford County *v.* Spenney, 21 Ill. 288.

8. Murray *v.* Kennedy, 15 La. Ann. 385, 77 Am. Dec. 189.

9. Quære in Kentucky whether trustees of a town would be personally liable under an unauthorized offer for the arrest of a criminal. Lee *v.* Flemingsburg, 7 Dana (Ky.) 29.

10. Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 7 Am. St. Rep. 48; Minneapolis Bank *v.* Griffin, 66 Ill. App. 577.

11. Hugill *v.* Kinney, 9 Oregon 250, 42 Am. Rep. 801.

12. Finder of Lost Property. — See the title LOST PROPERTY, vol. 19, p. 583. See also Everman *v.* Hyman, 3 Ind. App. 459.

13. See the title LOST PROPERTY, vol. 19, p. 584.

14. Lien Not Destroyed by Judgment for Reward. — Everman *v.* Hyman, 3 Ind. App. 459.

15. Burden of Proof on Claimant. — Shuey *v.* U. S., 92 U. S. 73; Franklin *v.* Heiser, 6 Blatchf. (U. S.) 426; Amis *v.* Conner, 43 Ark. 337; Howland *v.* Lounds, 51 N. Y. 604, 10 Am. Rep. 654.

2. Evidence of Offer — Admissibility. — On an issue as to whether the defendant made an offer for certain information, it is admissible to show that at the time of the alleged offer he already had such information.[1] On an issue as to the making of an offer by a governor by proclamation, a copy of such proclamation, certified by the officer with whom the original is deposited, is admissible in evidence.[2]

3. Evidence of Acceptance. — No notice of an acceptance of an offer of reward being required,[3] no acceptance need be proved other than that which is implied from performance of the services for which the offer was made.[4]

4. Evidence of Performance — Rewards for Arrest and Conviction. — Where a reward is offered for the arrest and conviction of the perpetrator of a certain crime, the record of conviction of a certain person for such crime is admissible in an action for the reward, as evidence of the conviction of the guilty party;[5] and it has further been held that such record is *prima facie* proof of such fact.[6] It has also been held that an admission of guilt by the accused is admissible for the same purpose;[7] and even that proof of the arrest of one charged with a crime makes a *prima facie* case against one who has offered a reward for the arrest of the perpetrator of such crime.[8]

RIDER. — See note 9.

RIDGLING. (See also GELDING, vol. 14, p. 947; and see the title HORSES, vol. 15, p. 750.) — A "ridgling" is an animal half castrated; a male of any beast half gelt.[10]

RIGGING. — See note 11.

RIGHT. — 1. A right, in jurisprudence, is an enforceable claim or title to any subject-matter whatever, either to possess and enjoy tangible things, or to do any act, pursue any course, enjoy any means of happiness, be exempt from any cause of annoyance, etc. It is often used to denote one's claim to something out of his possession. On the other hand, it is not always restricted to a claim to property, or in the nature of property, but is often used to designate power, prerogative, and privilege, especially when applied to corporations.[12]

1. Evidence of Offer. — Higgins *v.* Lessig, 49 Ill. App. 459.

2. McPeek *v.* Western Union Tel. Co., 107 Iowa 356, 70 Am. St. Rep. 205.

3. See *supra*, III. *The Acceptance — Nature and Elements.*

4. See *supra*, III. *The Acceptance — Nature and Elements.*

5. Record of Conviction. — Brown *v.* Bradlee, 156 Mass. 28, 32 Am. St. Rep. 430; York *v.* Forscht, 23 Pa. St. 391. *Contra*, Burke *v.* Wells, 34 Cal. 60, wherein it was held that the record of conviction is admissible to show a conviction, but not to show the guilt of the accused.

6. Brown *v.* Bradlee, 156 Mass. 28, 32 Am. St. Rep. 430.

7. Admission of Accused. — Brown *v.* Bradlee, 156 Mass. 28, 32 Am. St. Rep. 430.

8. Brennan *v.* Haff, 1 Hilt. (N. Y.) 151.

9. Rider. — In Com. *v.* Barnett, 199 Pa. St. 172, it was said: "A still more objectionable practice grew up of putting what is known as a *rider*, that is, a new and unrelated enactment or provision, on the appropriation bills, and thus coercing the executive to approve obnoxious legislation or bring the wheels of the government to a stop for want of funds."

10. Ridgling. — Webst. Dict., *followed* in Brisco *v.* State, 4 Tex. App. 221, stated under GELDING, vol. 14 p. 947.

"A 'gelding' is a fully castrated horse, in distinction to a 'stallion,' who is possessed of all his parts, and a '*ridgling*,' which is deprived of half of them." State *v.* McDonald, 10 Mont. 22.

11. Rigging the Market "is going into the market pretending to buy shares by a person whom you put forward to buy them, who is not really buying them, but only pretending to buy them, in order that they may be quoted in the public papers as bearing a premium, which premium is never paid." Rubery *v.* Grant, L. R. 13 Eq. 447.

12. Right. — Abb. L. Dict. See also Union Nat. Bank *v.* Byram, 131 Ill. 100; People *v.* Dikeman, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 130; Smith *v.* Cornell University, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 225; State *v.* Barr, 8 Ohio Dec. 546.

A ***right*** is "that which one has a legal claim to do; legal power; authority; immunity granted by authority." U. S. *v.* Patrick, 54 Fed. Rep. 348.

"An individual ***right*** is that which a person is entitled to have or receive from others or do under the protection of the law." State *v.* Austin, 114 N. Car. 862, *per* Avery, J., *dissenting*. See also Atchison, etc., R. Co. *v.* Baty, 6 Neb. 40, 15 Am. R. Rep. 63.

Well-founded Claim. — In Mellinger *v.* Houston, 68 Tex. 45, it was said: "A ***right*** has

A right, in its most general sense, is either the liberty (protected by law) of acting or abstaining from acting in a certain manner, or the power (enforced by law) of compelling a specific person to do or abstain from doing a particular thing.[1] A legal right may therefore be defined as a capacity residing in one man of controlling, with the assent and assistance of the state, the actions of others.[2]

2. In an abstract sense, the term means justice, ethical correctness, or consonance with the rules of law and principles of morals, but is difficult to define more precisely.[3]

3. For the construction of the term by the courts as used in particular connections and for particular phrases of which the word forms a part, see note 4.

been well defined to be a well-founded claim, and a well-founded claim means nothing more nor less than a claim recognized or secured by law."

Generic Term. — "The word *rights* is generic; common; embracing whatever may be lawfully claimed." Lonas *v.* State, 3 Heisk. (Tenn.) 306.

Rights and Franchises — Railroads. — In Alexandria, etc., R. Co. *v.* Alexandria, etc., R. Co., 75 Va. 780, 40 Am. Rep. 743, it was held that the taking and condemnation by a railroad company of part of the roadbed of another company was an interference with the *rights* and franchises of such other company.

Right in the Sense of Authority, Prerogative — Appointment of Public Officers. — In State *v.* Barr, 8 Ohio Dec. 546, it was said: "The *right* meant by the statute, then, is a prerogative, authority, a legal power. Does the ordinance in controversy create such a *right*? We think it does. It confers upon the director of public safety certain fixed powers. It gives to him the authority, the *right*, to appoint one hundred and five patrolmen and numerous other officers. It is the act of the city of Columbus, through its lawmaking power, creating in one of its officers the power, the authority, the *right*, to select nearly one hundred and fifty of its employees."

Right and Privilege Distinguished. — See PRIVILEGE, vol. 23, p. 45.

Rights and Privileges — Exemption from Taxation. — See the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 294.

Actions, Privileges, and Mortgages. — In Sprigg *v.* Beaman, 6 La. 60, it was held that the word *rights*, as used in Code La., art. 2156 (Rev. Civ. Code La. 1900, art. 2160), embraces everything included in the words "actions, privileges, and mortgages," which follow it.

Right in Sense of Power. — A statute provided that a husband should have no *right* to sell community real estate unless joined by his wife. It was held that *right*, as thus used, meant power. Mabie *v.* Whittaker, 10 Wash. 656. See generally the title COMMUNITY PROPERTY, vol. 6, p. 293.

Investment of Money. — A statute providing for the organization of fire and marine insurance companies saved the corporate existence of all companies organized previous to its adoption and continued to them the *rights* they previously had. It was held that where such companies had the power to make certain investments, they retained such power under this saving clause. St. Joseph F. & M. Ins. Co. *v.* Hauck, 63 Mo. 118.

Turnpike Companies. — A charter of a turnpike company provided that it should not be lawful to open or establish any other road so near as to injure or prejudice the company. Another section provided that all the *rights*, privileges, and immunities granted to the original members or stockholders of the company should pass to and vest in their successors. In construing this provision, the court said: "It is not necessary to give any technical definition of the terms *rights* and privileges and immunities, as used in the charter. It is sufficient to say that under these terms are embraced such things as are valuable to the company in the exercise of the franchises conferred upon it. There can be no serious doubt but that the legislature could grant to the complainant company such a *right*, privilege, or immunity as is contained in this act." Nashville, etc., Turnpike Co. *v.* Davidson County, 106 Tenn. 262.

Rights Improperly Used for Powers. — Dubuque *v.* Illinois Cent. R. Co., 39 Iowa 65.

1. Sweet's L. Dict.

2. Holland's Jurisprudence 56; State *v.* Barr, 8 Ohio Dec. 546.

3. Right in Sense of Moral Obligation or Claim in Natural Justice. — Le Roy *v.* Crowninshield, 2 Mason (U. S.) 171; Allen *v.* Ferguson, 18 Wall. (U. S.) 1; Goodman *v.* Munks, 8 Port. (Ala.) 93.

In Allen *v.* Ferguson, 18 Wall. (U. S.) 1, it was said: "There can be no more uncertain rule of action than that which is furnished by an intention to do *right*. How or by whom is the *right* to be ascertained? What is *right* in a particular case? Archbishop Whately says: 'That which is conformable to the supreme will is absolutely *right*, and is called *right* simply, without reference to a special end. The opposite to *right* is wrong.' This announces a standard of *right*, but it gives no practical aid. * * * What is or what may be *right* depends upon many circumstances. The principle is impracticable as a rule of action to be administered by the courts." And in this case it was held that a promise from a debtor to his creditor in the following language: "Be satisfied; all will be *right*. * * * All will be *right* betwixt me and my just creditors," was not such a new promise as would revive a debt barred by a discharge in bankruptcy. See generally as to what is a "new promise" the titles INSOLVENCY AND BANKRUPTCY, vol. 16, p. 789; LIMITATION OF ACTIONS, vol. 19, p. 288.

4. Absolute Right. — See ABSOLUTE, vol. 1, p. 207, note.

All Right. — An agent of an undertaker asked the defendant who was responsible for the burial of one B., and the defendant replied that he supposed he would have to be. He also told the agent that he would go with him and pick out a casket. The agent left the defendant and returned shortly, saying that Mrs. B. had selected the casket, and the defendant said "all *right*." It was held that this was not sufficient evidence to hold the defendant responsible for the price of the casket. Burgdorf *v.* Odell, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 59, 53 Hun (N. Y.) 631.

But in Tummonds *v.* Moody, 51 Hun (N. Y.) 637, 3 N. Y. Supp. 714, it was held that the statement by a creditor, when told of a payment to his wife, that "it was all *right*" if it had been so made, amounted to a ratification of the wife's authority.

Same — Horse. (See also the titles FRAUD AND DECEIT, vol. 14, p. 12; HORSES, vol. 15, p. 750; WARRANTY.) — In Waterman *v.* State, 114 Ga. 263, it was said. "While representations that a horse is 'sound and all *right* and a good work horse' are very general, they are neither vague nor indefinite; they mean nothing more nor less than that the horse has no disease, no material defects, and no infirmities in body or disposition which would prevent him from doing the work of a good, safe horse." See also Rainey *v.* State, 94 Ga. 599.

Same — Estoppel. — See Cloud *v.* Whiting, 38 Ala. 57; Brooks *v.* Martin, 43 Ala. 360; Hefner *v.* Dawson, 63 Ill. 403; Jaqua *v.* Montgomery, 33 Ind. 36; Koons *v.* Davis, 84 Ind. 389; Allen *v.* Frazee, 85 Ind. 283; Plummer *v.* Farmers Bank, 90 Ind. 386; Bates *v.* Leclair, 49 Vt. 229. See also the titles AGENCY, vol. 1, pp. 1185–1187; ESTOPPEL, vol. 11, p. 385.

Civil Right. — See the title CIVIL RIGHTS, vol. 6, p. 68.

Civil and Political Rights. (See also the title CIVIL RIGHTS, vol. 6, p. 70.) — In Fletcher *v.* Tuttle, 151 Ill. 53, it was said: "As defined by Anderson, a civil *right* is 'a *right* accorded to every member of a distinct community or nation,' while a political *right* is a '*right* exercisable in the administration of government.' * * * Says Bouvier: 'Political *rights* consist in the power to participate, directly or indirectly, in the establishment or management of government.'"

Color of Right. — See COLOR, vol. 6, p. 212.

Corporate Rights. — See CORPORATE, vol. 7, p. 618.

Estate and Right. (See also ESTATE, vol. 11, p. 358.) — "*Right* doth also include the estate *in esse* in conveyances; and therefore if tenant in fee simple make a lease for years, and release all his *right* in the land to the lessee and his heirs, the whole estate in fee simple passeth." Co. Litt. 345*a*, *quoted* in Hoge *v.* Hollister, 2 Tenn. Ch. 609. See also Northern Pac. R. Co. *v.* Amacker, 53 Fed. Rep. 56.

In *In re* Devon, (1896) 2 Ch. 568, it was said: "*Right*, for instance, applies to the case of an estate turned to a *right* which could be enforced only in a real action."

Legal Right. — See LEGAL, vol. 18, p. 812, note.

Litigious Right. — See LITIGIOUS RIGHT, vol. 19, p. 426.

Natural and Acquired Rights. — "All *rights* which appertain to man are of one or the other of two classes — that is to say, 1st, natural *rights*; or, 2d, acquired *rights*. The former are such as appertain originally and essentially to man, such as are inherent in his nature and which he enjoys as a man, independent of any particular act on his side. The latter, on the contrary, are those which he does not naturally enjoy, but are owing to his own procurement. The *right* of providing for one's preservation is of the one class; while sovereignty, or the *right* of commanding, or the *right* to property, are of the other class." Borden *v.* State, 11 Ark. 527, 54 Am. Dec. 221. See also ACQUIRED, vol. 1, p. 571, note; NATURE — NATURAL, vol. 21, p. 422, note.

Nonexisting Thing. — The *right* "to connect with any passenger railway now constructed or hereafter to be constructed" was granted to a railroad corporation. In construing this provision the court said: "Now though terms of present grant are here used, they cannot be interpreted as a present grant, but only as a promise to grant, for the very simple reason that there can be no *right* existing or actually granted in a nonexisting thing or *right*. Of course we are not expected to enforce a legislative promise. A *right* is a relation of a person or persons to some thing or person and from its very nature it cannot arise or exist in advance of the persons and things related, and of which it expresses the relation. Neither the road of the defendants nor the *right* to make it existed when the plaintiffs were incorporated with the *right* insisted on, and of course their alleged *right* attached to nothing, and was therefore no *right* at all." North Branch Pass. R Co. *v.* City Pass. R. Co., 38 Pa. St. 367.

Patent Right. (See also the title PATENTS, vol. 22, p. 260.) — In Com. *v.* Central Dist., etc., Tel. Co., 145 Pa. St. 127, it was said: "A 'patent *right*' is the *right*, protected by letters patent, to use the process, combination, or appliance discovered by the patentee, for the production of a certain result. It is an incorporeal *right*, conferred by the government, by way of encouragement to and as compensation for the employment of time and labor and money in the discovery of new and useful things, to minister to the comfort and aid in the progress of the public."

Perfect Right. — "A perfect *right* is that which is accompanied by the *right* of compelling those who refuse to fulfil the correspondent obligation." Aycock *v.* Martin, 37 Ga. 128. See also Vattel's Law of Nations, prelim., § 17.

Public and Private Rights. — In Dubuque *v.* Illinois Cent. R. Co., 39 Iowa 65, it was said: "It is a misuse of terms to distinguish *rights* as public and private, thereby implying that the one class differs from the others as to the security guaranteed by the law thereto or the remedies provided for their deprivation. The *right* of property is as sacred when held by a public corporation as when secured to a private person."

Public Offices. — In Hennepin County *v.* Jones, 18 Minn. 199, it was said that "neither the offices themselves nor their emoluments are *rights* or privileges secured to any citizen of the state."

Right Acquired. (See also ACQUIRED, vol. 1, p. 571, note.) — In Starey *v.* Graham, (1899) 1 Q. B. 406, it was held that the *right* which a person had prior to the passing of the English Patents, Designs, and Trademarks Act, 1888, to practice as a patent agent and describe himself as such was not a "*right* acquired" which was saved from the operation of the act by section 27. Channell, J., said: "It is suggested that the phrase '*right* acquired' nullifies altogether the whole act so far as regards persons who have been in practice as patent agents down to the commencement of the act. The answer to that seems to me to be that '*right* acquired' means some specific *right* which in one way or another has been acquired by an individual, and which some persons have got and others have not got. It does not mean *right* in the sense in which it is often popularly used. In one sense, no doubt, every one has a *right* to do that which the law does not forbid."

Right Acquired or Accrued. (See also ACCRUE — ACCRUED — ACCRUING, vol. 1, p. 479.) — In *In re* Chaffers, 15 Q. B. D. 470, it was held that the *right* of a solicitor who had neglected to renew his certificate to apply for a fresh one was not a *right* acquired or accrued within the statute 40 & 41 Vict., c. 25, § 23. Manisty, J., said: "The *right* which the applicant claims to have acquired is a *right* to take out his annual certificate. He had no such *right*. There was a form by which he might come and acquire the *right*, but he had no absolute *right*."

Right and Claim — Possibility of Reversion. — In Richardson *v.* Cambridge, 2 Allen (Mass.) 121, it was held that a deed or mortgage which conveyed all the land and *right* and claim to land which the grantor then had in the town of C. did not include land therein to which he had only a possibility of reversion on the nonperformance of a condition subsequent.

Rights and Credits — Right of Redemption. — A statute required a garnishee after judgment to answer all interrogatories touching the goods, chattels, *rights*, and credits of the judgment debtor, and also provided that the garnishee should be liable in all respects as in case of garnishees before judgment. In construing this statute in Burnham *v.* Doolittle, 14 Neb. 218, the court said: "It would seem that the words here used — particularly '*rights* and credits,' concerning which such garnishees must make disclosure, are sufficiently comprehensive to include the *right* of redemption in mortgaged or pledged personal property, even without the supplementary declaration that the liability shall be the same as that of 'garnishees before judgment.'"

Right of Dower. — See the title DOWER, vol. 10, p. 122.

Right, Debt, or Duty. — A *Vermont* statute (Stat. Vt. 1894, § 4965) pronounces null and void as against the person aggrieved all judgments, bonds, fraudulent conveyances, etc., made or had to avoid "the *right*, debt, or duty" of another person. It has been held that although the words *right* and "duty," in the statute, are limited to such *rights* and duties as are of the nature of debts existing *ex contractu*, yet, even with that limitation, they are far more extensive in their signification than "debt" in its strict sense. Beach *v.* Boynton, 26 Vt. 736. And so the inchoate right of a wife to alimony was held to be within the statute. Green *v.* Adams, 59 Vt. 610, 59 Am. Rep. 761. See generally DUTY, vol. 10, p. 351, and the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 210. See also Brooks *v.* Clayes, 10 Vt. 54; Fairbanks *v.* Benjamin, 50 Vt. 102.

Right of Entry. (See also ENTER — ENTRY, vol. 11, p. 42.) — In De Peyster *v.* Michael, 6 N. Y. 506, it was said: "It is not a reversion, nor is it the possibility of reversion, nor is it any estate in the land; it is a mere *right* or chose in action, and if enforced, the grantor would be in by the forfeiture of a condition, and not by a reverter." See also Upington *v.* Corrigan, 79 Hun (N. Y.) 490; Nicoll *v.* New York, etc., R. Co., 12 N. Y. 121.

Right Existing or Accrued. — The term "proceeding taken" has been held to have a broader meaning than "*right* existing or accrued." Murphy *v.* Utter, 22 Supm. Ct. Rep. 782.

Right Growing Out of Property — Interest. — An *Oregon* statute provided that should either the husband or wife obtain possession or control of property belonging to the other, either before or after marriage, the owner of the property might maintain an action therefor or for any *right* growing out thereof. It was held that under this provision the wife might maintain an action for interest on money loaned by her to her husband. Grubbe *v.* Grubbe, 26 Oregon 363. See generally the title HUSBAND AND WIFE, vol. 15, p. 785.

Right to Indemnity or Damages for Injuries. — An act providing for the reorganization of school districts saved causes of action existing in favor of a party by contract, obligation, or *right*, or lien. In construing this provision the court said: "What was here intended by the use of the word *right*? The word is of broad signification, and has a wide scope of meaning in its various legal applications. It must here embrace some other *right* than those arising under a contract, obligation, or lien. I see no reason why it should not include the *right* to indemnity or damages, for injuries of such a nature as are stated in the complaint." Gould *v.* Sub-Dist. No. 3, 7 Minn. 203.

Rights and Liberty. — See Caldwell *v.* State, 1 Stew. & P. (Ala.) 441, stated under LIBERTY, vol. 18, p. 1124.

Right and License. (See also the title LICENSE (REAL PROPERTY), vol. 18, p. 1127.) — In Morgan's Case, 14 Ct. Cl. 328, it was said: "A *right* in the premises was in no sense a favor dependent upon the will of the other party, and was directly opposed to the very definition of a license."

Right of Pre-emption. — See the title STATE AND PUBLIC LANDS.

Right to Proceeds. — See Woodruff's Case, 7 Ct. Cl. 613.

Right to Profits. — See the title PROFIT A PRENDRE, vol. 23, p. 186.

Right and Remainder. — See the title REMAINDERS AND EXECUTORY INTERESTS, *ante*.

Right to Redeem. — In Millett *v.* Mullen, 95 Me. 417, it was said that a *right* to redeem "implies more than a *right* to acquire. It

RIGHT AWAY. — See note 1.

implies a ***right*** to disencumber, to liberate from a lien or claim." *Citing* Cent. Dict.

Right to Redeem Distinguished from Opportunity to Redeem. — See Case *v.* Cherokee Lanyon Spelter Co., 62 Kan. 69.

Right of Redemption. — See the titles EQUITY OF REDEMPTION, vol. 11, p. 205; TAX TITLES.

Right and Remedy. (See also REMEDY, *ante.*) — In Miller *v.* Jefferson College, 5 Smed. & M. (Miss.) 661, it was said: "Generally, in a legal sense, the idea of a ***right*** necessarily embraces within it, as necessary to its existence, the idea of a remedy. A ***right*** consists in the power to enforce it."

"The very idea of a legal ***right*** is that it is one which is enforced and protected by law; and as this can only be done by the remedy, the coercive means, whatever they may be, which the law affords for that purpose, it is plain that no one can have a legal ***right*** in that which another may take and apply to his use, and for doing so the law will afford no redress." Stanley *v.* Earl, 5 Litt. (Ky.) 282, 15 Am. Dec. 66. See also Robinson *v.* Steamboat Red Jacket, 1 Mich. 175.

Right and Remedy Distinguished. — See Goodman *v.* Munks, 8 Port. (Ala.) 93. See also the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 1030.

The saving clause of an act adopting a revision of statutes was to the effect that the repeal of any statute by such revision should not affect any ***right*** accrued before such repeal. It was held that the word ***right*** meant a substantive ***right***, as distinguished from a remedy. The court said: "It was not the intention of the legislature that the remedies by which such ***rights*** are given effect, when omitted from such revision, should still remain in force." National Bank *v.* Williams, 38 Fla. 315.

Rights Secured — Public Land. — See Kellom *v.* Easley, 1 Dill. (U. S.) 281. And see the title STATE AND PUBLIC LANDS.

Right of Suit — Divorce. — A statute provided that when suit for divorce should be brought for certain enumerated causes, the defendant might admit the charge and show in bar of suit that the act complained of had not been committed within one year after the ***right*** of suit accrued. It was held that ***right*** of suit meant a present ***right*** to resort to the court for redress. Jacobsen *v.* Jacobsen, 11 Oregon 455.

Right of Stoppage in Transitu. — See the title STOPPAGE IN TRANSITU.

Right of Suffrage. — See the title ELECTIONS, vol. 10, p. 552.

Right, Title, and Interest — Assignment of Judgment. — See INTEREST — INTERESTED, vol. 16 p. 1102.

Right of Trial by Jury. — In State *v.* Worden, 46 Conn. 363, it was held that the word ***right***, as used in the section of the Constitution of *Connecticut* providing that "the ***right*** of trial by jury shall remain inviolate," must be given its ordinary meaning and is not to be taken in the sense of "law." See generally the title CONSTITUTIONAL LAW, vol. 6, p. 974 *et seq.*

Share of Stock. — An *Illinois* statute (Starr & Curt. Annot. Stat. Ill. 1896, c. 11, par. 8) provides that writs of attachment shall be executed upon the debtor's "lands, tenements, goods, chattels, ***rights***, credits, moneys, and effects." In Union Nat. Bank *v.* Byram, 131 Ill. 100, it was held that "the words ***rights*** and 'effects' can certainly be held to embrace within the scope of their signification the shares of a stockholder in an incorporated company." Magruder, J., said: "Bouvier defines a ***right*** as 'a well-founded claim.' Whatever may be the correct definition of the word ***rights***, as used in section 8, it refers to some kind of property interest which is incorporeal in its nature, and not to that species of property which is capable of being actually and corporeally seized by the sheriff."

Title and Right Compared. (See also the titles COVENANTS, vol. 8, p. 71; TITLE, OWNERSHIP, AND POSSESSION.) — The word "title" includes the ***right***, but is the more general word. Pratt *v.* Fountain, 73 Ga. 262. See also Hoge *v.* Hollister, 2 Tenn. Ch. 609.

In Wallace *v.* Taliaferro, 2 Call (Va.) 481, Lyons, J., said: "Ask a plain man the meaning of the words '***right***, property, and interest' in any thing. The answer would be, the complete title to the thing, without condition, reservation, or restraint. Ask a lawyer what those words would mean in a deed or will. The answer would be that they conveyed an unconditional estate."

In Pratt *v.* Fountain, 73 Ga. 262, it was said: "The conclusion appears to us irresistible that an affidavit that one claims the legal title to the possession of land is equivalent to an oath that he has the legal ***right*** to it. Such a one cannot be an intruder if he proves on the hearing what he affirms in his pleading."

Vested Right. — See VESTED RIGHTS.

Water Rights. — See the titles IRRIGATION, vol. 17, p. 485; WATERS AND WATERCOURSES; WATERWORKS AND WATER COMPANIES.

Wife's Choses in Action. — In Johnson *v.* Fleetwood, 1 Harr. (Del.) 442, it was said: "By marriage the husband acquires an absolute unqualified interest in the personal chattels of the wife. Her choses in action vest in him at the marriage and he acquires in them a qualified interest or property, that is, he may reduce them to possession, and thus make them his property absolutely. These choses in action are nothing more than ***rights*** arising from contracts expressed or implied, and these ***rights*** of the wife become on the marriage the ***rights*** of the husband; they remain in him; he can control, dispose of, or reduce them to possession and make his title absolute, but whether this be done or not they continue during the union his ***rights***."

1. Right Away. — In Lorimer *v.* Boylan, 98 Mich. 22, the words ***right away***, occurring in a letter from a landowner to a landbroker, accepting an offer to purchase the land "if the sale is made ***right away***," was held to give to the broker a reasonable time to bring about the negotiations with the proposed purchaser. The court said: "They could not be construed to mean instantaneously, but within a reasonable time, in view of the particular facts."

RIGHTFUL. — See note 1.

RIGHT HEIRS. — See note 2.

RIGHT IN ACTION. — See CHOSES IN ACTION, vol. 6, p. 2.

RIGHT OF ACTION. (See also CAUSES OF ACTION, vol. 5, p. 777, note; CHOSES IN ACTION, vol. 6, p. 2.) — The terms "cause of action" and "right of action" are synonymous.[3]

RIGHT OF COMMON. — See COMMON, vol. 6, p. 232, note, and the title PROFIT À PRENDRE, vol. 23, p. 186.

RIGHT OF DRAINAGE. (See also the titles DRAINS AND SEWERS, vol. 10, p. 220; SURFACE WATERS.) — "The right of drain, *jus aquæductus*, is an easement which gives the owner of land the right to bring down water through or from the land of another, either from its source or from any other place." [4]

RIGHT OF LIEN. (See also the title LIENS, vol. 19, p. 3.) — The word "lien" is of the same origin as the word "liable," and the right of lien expresses the liability of certain property for a certain legal duty, or a right to resort to it in order to enforce the duty.[5]

RIGHT OF POSSESSION. (See also the title TITLE, OWNERSHIP, AND POSSESSION.) — The right to possession which may reside in one man while another has the actual possession, being the right to enter and turn out such actual occupant; *e. g.*, the right of a disseisee. An apparent right of possession is one which may be defeated by a better; an actual right of possession, one which will stand the test against all opponents.[6]

RIGHT OF POSTLIMINIUM. — See note 7.

RIGHT OF PROPERTY. — The term "right of property" signifies the abstract right which remains to the owner of land after he has lost the right of possession, and to recover which the writ of right was given. United with possession and the right of possession, this right constitutes a complete title to lands, tenements, and hereditaments.[8] The phrase "right of property" is also used, in a different sense from the above, as synonymous with "property."[9]

1. Rightful Subjects of Legislation. (See also the title TERRITORIES.) — An Act of Congress provided that the legislative power of a territory should extend to all ***rightful*** subjects of legislation not inconsistent with the Constitution and laws of the United States. In construing this provision in McRae *v.* Cochise County, (Ariz. 1896) 44 Pac. Rep. 301, the court said: "We think the phrase '***rightful*** subject of legislation,' used in said act of Congress, must be construed to mean the same thing as the phrase 'public use.'"

In Baca *v.* Perez, 8 N. Mex. 200, it was said: "***Rightful***, as a qualification of 'subjects of legislation,' is a synonym for legitimate, and does not signify just, legislation — legislation consonant to justice. A subject may be ***rightful***, but legislation upon it may be wrongful, in that it may be in excess of power; in that it may transcend the limitations of the constitution and laws."

Rightful Possession and Legal Possession Distinguished. — See LEGAL, vol. 18, p. 810, note.

2. Right Heirs. (See also the title HEIR, HEIRS, AND THE LIKE, vol. 15, p. 318.) — In Garland *v.* Beverley, 9 Ch. D. 220, Fry, J., said: "In my judgment, the expression 'my own ***right heir***' or ***right heirs*** means, according to the law of *England*, the heir or heirs of the testator at common law. About that, as a general proposition, I imagine no doubt can be entertained. Then, is that meaning altered by the fact that the testator was possessed of gavelkind lands? In my opinion it is not. Is it altered by the fact tha he devises gavelkind lands? In my opinion it is not." See also *In re* Ferguson, 24 Ont. App. 61.

"A limitation to one and his ***right heirs*** is the same as to his 'heirs' simply; and a limitation directly to the ***right heirs*** of one carries a fee without adding the words 'and their heirs.'" 1 Washburn on Real Prop. (5th ed.) 57. See also Harison *v.* Jones, 82 Ga. 603.

Children. — Where a testator provided that after the death of all his children, during whose lives the property was devised in trust, the residue of his real estate should go to the "***right heirs*** of my said children in fee simple," it was held that the words ***right heirs*** meant children. Ballentine *v.* Wood, 42 N. J. Eq. 552.

3. Right of Action. — Lewis *v.* Hyams, (Nev. 1900) 63 Pac. Rep. 127.

4. Right of Drainage. — Bouv. Inst., § 1625, *cited* in Nellis *v.* Munson, 108 N. Y. 459.

5. Right of Lien. — Wood's Appeal, 30 Pa. St. 277.

6. Right of Possession. — Bouv. L. Dict.; 2 Black. Com. 196.

7. Right of Postliminium. — See the title INTERNATIONAL LAW, vol. 16, p. 1158; and see POSTLIMINY, vol. 22, p. 1082. See also Leitensdorfer *v.* Webb, 1 N. Mex. 44; Vattel's Law of Nations, bk. 3, § 204.

8. Right of Property. — Black's L. Dict., *citing* 2 Black. Com. 197.

9. Synonymous with Property. — See the title

RIGHT OF SEARCH. —See the titles INTERNATIONAL LAW, vol. 16, p. 1184 *et seq.;* SEARCHES AND SEIZURES.

RIGHT OF WAY. (See also the titles EASEMENTS, vol. 10, p. 397; HIGHWAYS, vol. 15, p. 343; PRIVATE WAYS, vol. 23, p. 2; RAILROADS, vol. 23, p. 695; and see ROAD, *post;* ROADBED — ROADWAY, *post.*) — A right of way, in the legal sense of the term, is a right to pass for all or for certain purposes, at all or at certain times, over and upon another man's land or close.[1] The term, however, has a twofold signification. It is sometimes used to mean the mere intangible right to cross the land of another — the right of passage — and it is also used to describe that strip of land which a railroad company appropriates for its use and upon which it builds its roadbed — that is, the land itself, and not the mere right of passage over it.[2]

PROPERTY, vol. 23, p. 261, and see Bruch *v.* Carter, 32 N. J. L. 561.

"The ***right of property*** consists in the absolute dominion over a thing, in the use, enjoyment, and disposal of it, without any control or diminution, save only by the laws of the land." Toledo Bank *v.* Toledo, 1 Ohio St. 662.

Contingent Interest. — In Nash *v.* Nash, 12 Allen (Mass.) 348, it was said: "A contingent interest which nothing but the death of the bankrupt can prevent vesting in him may without any forced construction be regarded as a ***right of property***; and we are of opinion that it is included in the terms and the meaning of the statute, and passes to the assignee."

Debts. (See also the title PROPERTY, vol. 23, p. 264.) — ***Rights of property*** have been held to include debts. Bowen *v.* Delaware, etc., R. Co., 153 N. Y. 476; Jenkins *v.* International Bank, 106 U. S. 571; Doty *v.* Johnson, 6 Fed. Rep. 481.

1. Right of Way. — Stuyvesant *v.* Woodruff, 21 N. J. L. 136. See also Bodfish *v.* Bodfish, 105 Mass. 319; Lanier *v.* Booth, 50 Miss. 413; Cass County *v.* Chicago, etc., R. Co., 25 Neb. 348.

In Manbeck *v.* Jones, 190 Pa. St. 171, it was said: "'A ***right of way*** over the land of another is designated in the common law as an 'easement,' and in the civil, as a 'servitude,' and is defined to be a charge imposed upon one heritage for the use and advantage of a heritage belonging to another proprietor.'" See also Kieffer *v.* Imhoff, 26 Pa. St. 442.

In Wild *v.* Deig, 43 Ind. 458, it was said: "By the term ***right of way*** is generally meant a private way, which is an incorporeal hereditament of that class of easements in which a particular person, or particular description of persons, may have an interest and a right, though another person is the owner of the fee of the land in which it is claimed." *Quoting* Angell on Highways 1.

"A ***right of way*** is defined to be 'the privilege which an individual, or a particular description of persons, such as the inhabitants of the village of A, or the owners or occupiers of the farm of B, may have of going over another person's grounds. It is an incorporeal hereditament of a real nature; entirely different from the king's highway, which leads from town to town; and also from the common way, which leads from a village into the fields.'" Dinehart *v.* Wells, 2 Barb. (N. Y.) 435, *quoting* 3 Cruise's Dig. 100.

And that a ***right of way*** is an incorporeal hereditament, see North Beach, etc., R. Co.'s Appeal, 32 Cal. 506; Wagner *v.* Hanna, 38 Cal. 116; Lanier *v.* Booth, 50 Miss. 410, Taylor *v.* Albemarle Steam Nav. Co., 105 N. C. 488.

In Gross. — A ***right of way*** may be in gross or appendant. Lanier *v.* Booth, 50 Miss. 410.

Dominant and Servient Tenement. — In Wagner *v.* Hanna, 38 Cal. 116, it was said: "To the creation of a ***right of way*** that amounts to an easement, and not merely to a ***right of way*** in gross, two tenements are necessary — the dominant, to which the ***right of way*** belongs, and the servient, upon which the obligation rests."

Way and Right of Way. — In Chollar-Potosi Min. Co. *v.* Kennedy, 3 Nev. 373, it was said: "'Way,' in its legal, technical sense, means nearly the same thing as ***right of way***, or, in other words, the right of one person, of several persons, or of the community at large, to pass over the land of another."

Highways. — In Dinehart *v.* Wells, 2 Barb. (N. Y.) 435, a public highway was held not to be included in the term ***right of way.***

2. Twofold Meaning. — Central Trust Co. *v.* Wabash, etc., R. Co., 29 Fed. Rep. 555; Keener *v.* Union Pac. R. Co., 31 Fed. Rep. 128; Joy *v.* St. Louis, 138 U. S. 1; New Mexico *v.* U. S. Trust Co., 172 U. S. 182; Maysville, etc., R. Co. *v.* Ball, (Ky. 1900) 56 S. W. Rep. 191; Uhl *v.* Ohio River R. Co., 51 W. Va. 106.

In Atlantic, etc., R. Co. *v.* Lesueur, (Ariz. 1888) 19 Pac. Rep. 157, 37 Am. & Eng. R. Cas. 368, it was said that the words ***right of way*** in a grant describe the tenure, not the land granted.

Prima Facie Easement. — Thus, the words ***right of way*** *prima facie* imply only an easement — a right of crossing.

California. — San Francisco *v.* Grote, (Cal. 1897) 47 Pac. Rep. 939; North Beach, etc., R. Co.'s Appeal, 32 Cal. 506; Wagner *v.* Hanna, 38 Cal. 116.

Indiana. — Cincinnati, etc., R. Co. *v.* Geisel, 119 Ind. 77.

Iowa. — Barlow *v.* Chicago, etc., R. Co., 29 Iowa 276; Vermilva *v.* Chicago, etc., R. Co., 66 Iowa 606; Ottumwa, etc., R. Co. *v.* McWilliams, 71 Iowa 164.

Louisiana. — Shreveport, etc., R. Co. *v.* Hinds, 50 La. Ann. 781; Postal Tel. Cable Co. *v.* Louisiana Western R. Co., 49 La. Ann. 1278.

Michigan. — Jones *v.* Van Bochove, 103 Mich. 98.

RIGHT TO BEGIN. — See the title OPEN AND CLOSE, 15 ENCYC. OF PL. AND PR. 181.

Montana. — Northern Pac. R. Co. *v.* Carland, 5 Mont. 157.

North Carolina. — Taylor *v.* Albemarle Steam Nav. Co., 105 N. Car. 489.

Texas. — Calcasieu Lumber Co. *v.* Harris, 77 Tex. 18.

Virginia. — Home *v.* Richards, 4 Call (Va.) 441, 2 Am. Dec. 574.

Washington — Biles *v.* Tacoma, etc., R. Co., 5 Wash. 509.

West Virginia. — Uhl *v.* Ohio River R. Co., 51 W. Va. 106.

Wisconsin. — Williams *v.* Western Union R. Co., 50 Wis. 71.

And see the preceding note.

In Williams *v.* Western Union R. Co., 50 Wis. 76, it was said: "***Right of way***, in its strict meaning, is 'the right of passage over another man's ground;' and in its legal and generally accepted meaning, in reference to a railway, it is a mere easement in the lands of others, obtained by lawful condemnation to public use or by purchase. Mills on Em. Dom., § 110. It would be using the term in an unusual sense, by applying it to an absolute purchase of the fee simple of lands to be used for a railway or any other kind of way."

Same — Minerals. — In Uhl *v.* Ohio River R. Co., 51 W. Va. 106, it was held that a railroad company had no right to take minerals from a strip of land granted to it as a ***right of way.***

Fee — Land Itself. — But the second meaning of the text, *i. e.*, the land itself, is often given to the term. Thus, the Constitution of *Kansas* provided that no ***right of way*** should be appropriated to the use of any corporation until full compensation should be made. In construing this provision in Challiss *v.* Atchison, etc., R. Co., 16 Kan. 127, the court said: "If the term ***right of way*** is here used in its restricted, technical sense, as referring simply to a mere easement, it would have the power to take the fee unrestricted in the matter of compensation. We think it should be construed not as defining the quantity of interest to be transferred, but as meaning the right of passage through the grounds of others, irrespective of the interest or title to be acquired."

And the grant of a ***right of way*** has been held to pass the fee of the land itself. Indianapolis, etc., R. Co. *v.* Rayl, 69 Ind. 429; Chicago, etc., R. Co. *v.* Titterington, 84 Tex. 218.

So the term ***right of way*** may apply to land held in fee by a railroad company. See Keener *v.* Union Pac. R. Co., 31 Fed. Rep. 126; New Mexico *v.* U. S. Trust Co., 172 U. S. 182; Joy *v.* St. Louis, 138 U. S. 1; Missouri, etc., R. Co. *v.* Roberts, 152 U. S. 114; Central Trust Co. *v.* Wabash, etc., R. Co., 29 Fed. Rep. 555; Maysville, etc., R. Co. *v.* Ball, (Ky. 1900) 56 S. W. Rep. 191; Uhl *v.* Ohio River R. Co., 51 W. Va. 106.

Same — Jurisdiction. — A statute provided that where a right was claimed over or upon an easement or ***right of way*** extending into or through more counties than one, the whole right and controversy might be heard and determined in one county into or through which such easement or ***right of way*** extended. In holding that the terms ***right of way*** and "easement" were not used synonymously, the court said: "Popularly speaking, the ***right of way*** of a railroad company — that which is understood when the term is used — is the track and that part of land on each side of it used and possessed for the purpose of passing through the country from one point to another." Postal Tel. Cable Co. *v.* Southern R. Co., 90 Fed. Rep. 32.

Same — Additional Land. — In Oregon Short-Line R. Co. *v.* Gooding, (Idaho 1899) 59 Pac. Rep. 822, it was said: "The term ***right of way*** can only be understood as embracing the land used as a way for the road, and not such additional ground as may be used for the convenience of the railroad, but not a part of its way." See also Chicago, etc., R. Co. *v.* Paddock, 75 Ill. 616; Chicago, etc., R. Co. *v.* People, 136 Ill. 660; Chicago, etc., R. Co. *v.* People, 195 Ill. 184; Maysville, etc., R. Co. *v.* Ball, (Ky. 1900) 56 S. W. Rep. 191.

Same — Sidetracks. — In Chicago, etc., R. Co. *v.* People, 98 Ill. 350, it was held that a tract of land could not be regarded as ***right of way*** merely because one or even two or more sidetracks might be constructed upon or over it; but that to constitute a ***right of way***, the land must be appropriated for that purpose.

In Akers *v.* United New Jersey R., etc., Co., 43 N. J. L. 110, it was held, where a statute authorized railroad corporations to condemn land "adjoining their road as constructed on their ***right of way*** as located," that this did not apply to land which merely adjoined a sidetrack leading from the railway route to a freight house.

But in Chicago, etc., R. Co. *v.* People, 98 Ill. 356, it was said: "We can see no reason why the term ***right of way*** should be confined to the land over which the main track of a railroad should be constructed. The land upon which a sidetrack, a switch, or a turnout is built and in actual use by the company, in the business for which it was organized, for all practical purposes, is as much held for ***right of way*** as is the land upon which the main track is constructed." See also Chicago, etc., R. Co. *v.* Cass County, 8 N. Dak. 20; Chicago, etc., R. Co. *v.* People, 99 Ill. 464.

Superstructure. — In Atlantic, etc., R. Co. *v.* Lesueur, (Ariz. 1888) 19 Pac. Rep. 157, 37 Am. & Eng. R. Cas. 368, it was held that an exemption of a ***right of way*** from taxation did not exempt the superstructure — that is to say, the railroad thereon.

Bridge. — In Cass County *v.* Chicago, etc., R. Co., 25 Neb. 348, it was held that a railroad bridge across a navigable stream, owned, used, and operated by a railroad company as a part of its line of road, was not within the terms "roadbed," ***right of way***, and "superstructures," as used in a tax act. But this case was *overruled* in Chicago, etc., R. Co. *v.* Richardson County, 61 Neb. 519.

Lines. — Where a statute authorized railroad companies to straighten or widen their lines when necessary, it was held that "lines" referred to the ***right of way***, and that under such an authority a railroad could not widen

RIGIDLY. — See note 1.

RING DROPPING. (See also the titles FALSE PRETENSES AND CHEATS, vol. 12, p. 807, note; LARCENY, vol. 18, p. 456.) — In the practice of ring dropping the person obtaining the money usually makes use of a pretense of finding a valuable ring, and offers to leave it in the custody of the person from whom he obtains the money, provided the latter deposits money as security. A person who induces another to deliver banknotes or other valuables to him by the practice of ring dropping, on the condition that if he does not restore them in a certain time the entire value of the ring will belong to the person delivering the notes, is guilty of larceny; for although the possession of the notes is parted with, the property still remains in the owner.[2]

RINGING OUT — RINGING UP. — See note 3.

RINGLEADER. — See note 4.

its gauge. Western New York, etc., R. Co. *v.* Buffalo, etc., R. Co., 193 Pa. St. 127.

Road and Right of Way. — In an action for the killing of a horse by a railroad company the complainant alleged that the *right of way* of the corporation was not securely fenced. The defendant objected that this was insufficient because it did not aver that the railroad was not securely fenced. The court said: "To say that the *right of way* was not securely fenced was substantially saying that the road was not securely fenced. This objection is without merit, especially when first made after the trial and finding of the court." Louisville, etc., R. Co. *v.* Hixon, 101 Ind. 340.

1. Rigidly. — Upon a prosecution for receiving stolen goods the trial court charged: "If you find that all the facts and circumstances surrounding the receiving of the goods by defendant were such as would reasonably satisfy a man of defendant's age and intelligence that the goods were stolen, or if he failed to follow up such inquiry so suggested, for fear he would learn the truth and know that the goods were stolen, then the defendant should be as *rigidly* held responsible as if he had actual knowledge." The use of the word *rigidly* was objected to, but the Appellate Court held that taken in connection with the whole instruction it meant no more than "to the same extent," or "exactly," and therefore it was not erroneous. State *v.* Feuerhaken, 96 Iowa 301.

2. Ring Dropping. — Rex *v.* Watson, 2 Leach C. C. 640, 2 East P. C. 680; Rex *v.* Patch, 1 Leach C. C. 238, 2 East P. C. 678; Rex *v.* Marsh, 1 Leach C. C. 345.

3. Ringing Out — Ringing Up. — See the titles GAMBLING CONTRACTS, vol. 14, pp. 606, 609; STOCKBROKERS; and see Board of Trade *v.* O'Dell Commission Co., 115 Fed. Rep. 577.

The transaction is not unlike those conducted by clearing houses. See the title CLEARING HOUSE, vol. 6, p. 113.

4. Ringleader is used by old writers in the sense of leader or chief, and is therefore not slanderous in itself. Miller *v.* David, L. R. 9 C. P. 125, in which case Coleridge, C. J., said: "Dr. Johnson points out the mistake of supposing that the word is by any means necessarily a word of bad import, for, amongst other authorities, he cites Barrow as calling Saint Peter the *ringleader* of the apostles."

RIOT.

By Thomas Johnson Michie.

I. Definition, 971.
II. Elements, 971.
III. Evidence, 976.
IV. Indictment for Riot, Conviction of Another Offense — Jeopardy, 976.

CROSS-REFERENCES.

As to liability of counties and municipalities for damages to property by riots see the titles COUNTIES, vol. 7, p. 949; MUNICIPAL CORPORATIONS, vol. 20, p. 1206.

For other matters of SUBSTANTIVE LAW *and* EVIDENCE *related to this subject see the titles* AFFRAY, vol. 1, p. 915; FIRE INSURANCE, vol. 13, p. 86; LIFE INSURANCE, vol. 19, p. 39; MARINE INSURANCE, vol. 19, p. 930; STRIKES; TREASON. *And see* MOB, vol. 20, p. 835; ROUT, *post.*

For matters of PROCEDURE, *see the* ENCYCLOPÆDIA OF PLEADING AND PRACTICE, vol. 18, p. 1196.

I. DEFINITION. — A riot is a tumultuous disturbance of the peace by three or more persons, assembling of their own authority, with an intent mutually to assist each other against any who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act inflicted is of itself lawful or unlawful.[1]

II. ELEMENTS — Number of Persons. — At common law and by statute in most jurisdictions the concurrence of three or more persons is necessary to constitute a riot;[2] but by statute in a few states two or more may be guilty of a

1. Definition. — Reg. *v.* Cunninghame, 16 Cox C. C. 427; Whitley *v.* State, 66 Ga. 656; Dixon *v.* State, 105 Ga. 793; Bankus *v.* State, 4 Ind. 114; State *v.* Russell, 45 N. H. 84; People *v.* Judson, 11 Daly (N. Y.) 1; State *v.* Connolly, 3 Rich. L. (S. Car.) 337; State *v.* Cole, 2 McCord L. (S. Car.) 120. See also State *v.* Dillard, 5 Blackf. (Ind.) 365, 35 Am. Dec. 128; State *v.* Scaggs, 6 Blackf. (Ind.) 37; State *v.* Acra, 2 Ind. App. 384; Sloan *v.* State, 9 Ind. 565; Kiphart *v.* State, 42 Ind. 273; State *v.* Snow, 18 Me. 346; People *v.* O'Loughlin, 3 Utah 147; McKinney *v.* State, (Tex. Crim. 1902) 68 S. W. Rep. 176.

Blackstone's Definition. — Riot at common law was defined by Sir William Blackstone as follows: "A riot is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel; * * * or do any other unlawful act with force or violence; or even do a lawful act * * * in a violent and tumultuous manner." 4 Black. Com. 146, *quoted* in Green *v.* State, 109 Ga. 538. See also State *v.* Sims, 16 S. Car. 486.

Two Sets of Rioters. — In *Georgia* it has been held that if the evidence shows that the defendants were guilty of the offense of a riot as defined by the Code, it is immaterial that another set of rioters banded against them was also guilty, or that the defendants were badly worsted in the rencounter, and there being evidence enough to support the verdict against those on trial, it will be upheld as legal without regard to what may be the result of the trial of the other set. Whitley *v.* State, 66 Ga. 656.

Riot a Misdemeanor. — See McKinney *v.* State, (Tex. Crim. 1902) 68 S. W. Rep. 176.

A party participating in an ordinary riot is guilty only of a misdemeanor; but by statute in *South Dakota*, if a person carries, at the time of such riot, a deadly or dangerous weapon, he is guilty of a felony. State *v.* Page, 15 S. Dak. 613, in which case it was held that the term "deadly or dangerous weapon," as used in the statute, did not include a strong and heavy whip, some six feet in length.

Riot Made Felony by Statute. — See People *v.* O'Loughlin, 3 Utah 143.

2. Three or More Persons Necessary — *England.* — Rex *v.* Sudbury, 12 Mod. 262; Rex *v.* Heaps, 2 Salk. 593; Reg. *v.* Ellis, Holt K. B. 636; Rex *v.* Scott, 3 Burr. 1262, 1 W. Bl. 350; Reg. *v.* Soley, 11 Mod. 115, 2 Salk. 594.

Indiana. — Hardebeck *v.* State, 10 Ind. 459; Turpin *v.* State, 4 Blackf. (Ind.) 72.

Massachusetts. — Com. *v.* Gibney, 2 Allen (Mass.) 152.

Missouri. — State *v.* Kuhlmann, 5 Mo. App. 587.

riot.[1] One person cannot be guilty of a riot.[2]

Joint Action Required. — To commit the offense of riot, the joint action or concurrence of the requisite number of persons is necessary. Therefore, in a given case, if it is shown that the requisite number of persons were in company, and one was guilty of an unlawful act of violence, but the evidence fails to disclose any participation by the other or others in such act, and there were no circumstances from which a common intent to do the act might be inferred, a conviction cannot lawfully be sustained.[3]

Acts of One Acts of All. — Each one of an assembly for an unlawful purpose is guilty of all acts done in execution of or contributing to that purpose.[4]

Presence. — And to constitute a person a rioter it is not necessary that he should be actively engaged in a riot; it is sufficient that he be present giving countenance, support, or acquiescence.[5] But mere presence alone is not

New York. — See People *v.* White, 55 Barb. (N. Y.) 606.

Oklahoma. — Simmons *v.* Territory, (Okla. 1902) 69 Pac. Rep. 787.

Pennsylvania. — Com. *v.* Edwards, 1 Ashm. (Pa.) 46.

South Carolina. — State *v.* O'Donald, 1 McCord L. (S. Car.) 532, 10 Am. Dec. 691.

Tennessee. — State *v.* Allison, 3 Yerg. (Tenn.) 428.

Texas. — Blackwell *v.* State, 30 Tex. App. 672.

Two Persons Cannot Be Guilty of Riot. — Rex *v.* Sudbury, 12 Mod. 262, *sub nom.* Rex *v.* Heaps, 2 Salk. 593.

Slaves. — In State *v.* Jackson, 1 Spears L. (S. Car.) 13, it was held that a negro slave, whether acting under the commands of his master or independently, might in contemplation of law be one of the three persons necessary to constitute the offense of riot. See also State *v.* Thackam, 1 Bay (S. Car.) 358; State *v.* Calder, 2 McCord L. (S. Car.) 463; State *v.* Blair, 13 Rich. L. (S. Car.) 93.

One Person Convicted and Another Acquitted. — In Martin *v.* State, 115 Ga. 255, where, under an indictment charging named persons together with others with the offense of riot, one of the persons named was convicted and the other acquitted, it was held that the conviction would be sustained under evidence showing that any other person capable of committing the crime participated with the person convicted in the criminal act charged in the indictment.

In Turpin *v.* State, 4 Blackf. (Ind.) 72, an indictment was against three persons for a riot. There was a verdict of guilty as to one and of not guilty as to the others. It was held that upon this verdict judgment could not be rendered against the defendant found guilty, though it would have been otherwise if the indictment had been against the defendants together with others whose names were unknown. *Citing* Reg. *v.* Soley, 2 Salk. 594; Rex *v.* Scott, 3 Burr. 1262.

Subsequent Acquittal of Codefendants — Arrest of Judgment. — When one of three persons indicted for a riot has been tried separately and convicted, he is concluded by the record in such case, and the subsequent acquittal of another of the joint defendants, in a separate trial, will not entitle the one convicted to a new trial or a discharge. Simmons *v.* Territory, (Okla. 1902) 69 Pac. Rep. 787.

When one of three persons indicted for a riot is tried separately, and then a second is tried and acquitted, the court cannot arrest the judgment upon the finding of the jury against the first, but must enter judgment upon the verdict. State *v.* Allison, 3 Yerg. (Tenn.) 428.

1. Two or More. — Prince *v.* State, 30 Ga. 27; Davenport *v.* State, 38 Ga. 184; Stafford *v.* State, 93 Ga. 207; Dixon *v.* State, 105 Ga. 787; Green *v.* State, 109 Ga. 538; Tripp *v.* State, 109 Ga. 489; Coney *v.* State, 113 Ga. 1060; Dougherty *v.* People, 5 Ill. 179; Bell *v.* Mallory, 61 Ill. 167; Scott *v.* U. S., Morr. (Iowa) 145; People *v.* O'Loughlin, 3 Utah 147.

2. Robinson *v.* State, 84 Ga. 674; Com. *v.* Berry, 5 Gray (Mass.) 94; State *v.* Craig, Add. (Pa.) 190.

3. Joint Action Required. — Dixon *v.* State, 105 Ga. 795; Tripp *v.* State, 109 Ga. 489; Coney *v.* State, 113 Ga. 1060; Hardebeck *v.* State, 10 Ind. 459; Com. *v.* Berry, 5 Gray (Mass.) 94.

In State *v.* Craig, Add. (Pa.) 190, it was held that to make a man a party to a riot, he must be active in doing or supporting, or being ready to support, the unlawful act.

Actual Participation. — In Scott *v.* U. S., Morr. (Iowa) 145, it was said: "Our law defines a riot to consist in two or more persons actually doing an unlawful act with force and violence against the person or property of another, etc. The rule of construction in relation to penal statutes which guards against inferential crimes seems to require that two or more persons should be actually engaged in some physical act of violence, to constitute a riot under our statute."

Presence. — In Nicholson's Case, 1 Lewin C. C. 300, it was held that on an indictment for a riot the parties charged must be proved to have been present before the fact of the riot could be given in evidence.

4. Unlawful Acts of One Are Unlawful Acts of All Confederates. — Green *v.* State, 109 Ga. 536; Bell *v.* Mallory, 61 Ill. 167; People *v.* Judson, 11 Daly (N. Y.) 3; Newby *v.* Territory, 1 Oregon 163; State *v.* Cribs, Add. (Pa.) 277.

In State *v.* Blair, 13 Rich. L. (S. Car.) 93, it was held that one who begins a riot, but leaves before it is over, is responsible for all acts done in completion of the offense.

5. Presence. — Treat *v.* Jones, 28 Conn. 334; Green *v.* State, 109 Ga. 536; Bell *v.* Mallory, 61 Ill. 167; Williams *v.* State, 9 Mo. 270; Newby *v.* Territory, 1 Oregon 163; State *v.*

sufficient to constitute one a rioter.[1]

Intent. — To sustain a conviction for a riot it is necessary that persons doing the unlawful act or acting in a violent or tumultuous manner must have done the act with a common intent.[2] But such intent may be inferred from the acts done.[3]

Unlawful Assembly. — An unlawful assembly is a necessary element of a riot at common law.[4] But though the assembly may not have been unlawful on

Craig, Add. (Pa.) 190; State *v.* Cole, 2 McCord L. (S. Car.) 117; State *v.* Brazil, Rice L. (S. Car.) 257; State *v.* Jackson, 1 Spears L. (S. Car.) 13.

This doctrine would seem, however, not to have been recognized to its full extent in Scott *v.* U. S., Morr. (Iowa) 142.

In State *v.* Straw, 33 Me. 554, it was held that in a prosecution for a riot it is no defense that two persons only were engaged in the illegal physical act, if a third person was at the time aiding and abetting them by his presence.

In Rex *v.* Hunt, 1 Ken. K. B. 108, it was held that all persons who by their presence countenance a riot are liable as rioters.

Inciting. — It is not necessary that those who incited the riot should be present, to be guilty of it. U. S. *v.* Fenwick, 4 Cranch (C. C.) 675.

Thus, in Reg. *v.* Sharpe, 3 Cox C. C. 288, where persons were assembled to the number of three or more, and speeches were made to those persons to excite and inflame them, with a view to incite them to acts of violence, and that same meeting was so connected, in point of circumstances, with a subsequent riot that the incitement which was used could not reasonably be severed from the riot, it was held that those who incited such riot were guilty, although not present when it occurred.

Person at Some Distance. — Hibbs *v.* State, 24 Ind. 140.

But in Sloan *v.* State, 9 Ind. 565, it was held that if a person who is at some distance when the riot is committed comes up immediately afterwards, and does violence on the same object, he is not guilty of a riot.

1. Persons Present, but Not Assisting. — In Reg. *v.* Atkinson, 11 Cox C. C. 330, it was held that on an indictment for a riot, persons are not liable merely on account of their having been present and among the mob, even although they had the power of preventing it, unless they by word or act helped, incited, or encouraged it. See also the title AIDER AND ABETTOR, vol. 2, p. 33, note.

In State *v.* McBride, 19 Mo. 239, it was held that it is not a presumption of law that every one present at a riot, and not actually aiding in the suppression, is guilty unless he proves his noninterference.

2. Common Intent Necessary.—Prince *v.* State, 30 Ga. 27; Dixon *v.* State, 105 Ga. 787; Com. *v.* Gibney, 2 Allen (Mass.) 152; Spruill *v.* North Carolina Mut. L. Ins. Co., 1 Jones L. (46 N. Car.) 127.

A mutual intent to assist one another must exist. Dixon *v.* State, 105 Ga. 794.

In State *v.* Kempf, 26 Mo. 429, it was said: "To constitute a riot the common intent of at least three persons to do any unlawful act must exist, either at the time of their assembling, or be formed with the agreement of mutual assistance after they have assembled."

Exploding Firecrackers. — In Aron *v.* Warsaw, 98 Wis. 592, it was held that where a person was injured while driving along a street on the Fourth of July, by the explosion of a cannon cracker, thrown and exploded by some one among a crowd of thirty or more people who were obstructing the sidewalk and unlawfully and in a tumultuous manner engaged in exploding firecrackers, etc., but where there was nothing to show that there was any common intent or purpose to injure the plaintiff or any other person, there was no riot. But see Madisonville *v.* Bishop, (Ky. 1902) 67 S. W. Rep. 269.

Fighting. — Where the persons accused of a riot were not acting in execution of a common intent, but were engaged in a fight with each other, it was held that they were not guilty of a riot. Prince *v.* State, 30 Ga. 27. See also Stafford *v.* State, 93 Ga. 207. And see *infra*, this section, the paragraph *Unlawful Assembly*.

3. Intent May Be Inferred from Acts Done. — U. S. *v.* Fenwick, 4 Cranch (C. C.) 675; U. S. *v.* McFarland, 1 Cranch (C. C.) 140, 26 Fed. Cas. No. 15,674.

In U. S. *v.* Stockwell, 4 Cranch (C. C.) 671, it was held that upon an indictment for a riot it is not necessary to prove an agreement or proposal to do the unlawful act before it was done, or at the time of doing it; but from the doing of the act, accompanied by declarations of an intent to do it, the jury may infer a previous intent and agreement to do it and mutually to assist each other in doing it. See also State *v.* Kempf, 26 Mo. 430.

It is not necessary that the parties should deliberate beforehand or interchange views with each other before entering upon the execution of their designs; if there is concert of action it is sufficient, although such concert exists only in the execution of the act. People *v.* Judson, 11 Daly (N. Y.) 2.

Evidence of Intent. — "The intent is proved in this, as in every other case, by proving facts from which the jury may fairly presume it." Com. *v.* Gibney, 2 Allen (Mass.) 150, *quoting* Archbold's Crim. Pr. 589.

In U. S. *v.* Dunn, 1 Cranch (C. C.) 165, 25 Fed. Cas. No. 15,007, the witnesses for the defendants were not allowed by the court to give evidence of their intention in meeting, they having testified that they were of the party concerned in the riot.

4. Unlawful Assembly Necessary. — Reg. *v.* Soley, 2 Salk. 594 11 Mod. 115; Rex *v.* Birt, 5 C. & P. 154, 24 E. C. L. 252; State *v.* Stalcup, 1 Ired. L. (23 N. Car.) 30, 35 Am. Dec. 732; State *v.* Hughes, 72 N. Car. 25; Blackwell *v.* State, 30 Tex. App. 672.

Illinois. — But under the Criminal Code of

the first coming together of the parties, it becomes so by their engaging in a common cause, to be accomplished by violence and in a tumultuous manner.[1]

Unlawful Act — Lawful Act — Violence and Turbulence. — The gist of the offense is the violence and turbulence of the rioters;[2] and whether their purpose is lawful[3]

Illinois it has been held that it is not necessary that there should be an unlawful assemblage to constitute a riot. It is sufficient to constitute this offense if two or more persons, being together, actually do an unlawful act, with force and violence, against the person or property of another. Dougherty *v.* People, 5 Ill. 179.

1. Assembly May at First Be Lawful and Afterwards Become Unlawful. — U. S. *v.* McFarland, 1 Cranch (C. C.) 140, 26 Fed. Cas. No. 15,674; State *v.* Johnson, 89 Iowa 594; State *v.* Snow 18 Me. 346; Com. *v.* Gibney, 2 Allen (Mass.) 152; Lycoming F. Ins. Co. *v.* Schwenk, 95 Pa. St. 89, 40 Am. Rep. 629; State *v.* Cole, 2 McCord L. (S. Car.) 120; Blackwell *v.* State, 30 Tex. App. 672.

If a lawful assembly proceeds to an unlawful act it is a riot. State *v.* Cribs, Add. (Pa.) 277.

If persons innocently and lawfully assembled afterwards confederate to do an unlawful act of violence, suddenly proposed and assented to, and thereupon do an act of violence in pursuance of such purpose, although their whole purpose should not be consummated, it is a riot. State *v.* Snow, 18 Me. 346.

In McWaters *v.* State, 10 Mo. 167, it was held that it is not necessary to charge that the defendants assembled unlawfully; it is sufficient to show an unlawful act done.

Affray or Riot. — In Reg. *v.* Ellis, Holt K. B. 636, it was said: "If three or more are lawfully assembled, and quarreling among themselves all fall upon one of their own company, this is no riot; but if it be on a stranger, the very moment the quarrel begins they are an unlawful assembly, and their concurrence is evidence of an evil intention, so that it is a riot in them that act and in no more." See also Anonymous, 6 Mod. 43; Davison *v.* Barber, Hob. 183; Reg. *v.* Soley, 11 Mod. 115, 2 Salk. 594; Rachels *v.* State, 51 Ga. 374. And see the title AFFRAY, vol. 1, p. 915.

If any number of persons meet on a lawful occasion and on a sudden quarrel engage in a fight, they are not guilty of a riot, but are guilty of a sudden affray only. State *v.* Kempf, 26 Mo. 430. See *supra*, this section, the paragraph *Intent*.

Prize-fight. — In Reg. *v.* Hunt, 1 Cox C. C. 177, it was held that the principals and seconds in a prize-fight could not be indicted for a riot. But see the cases cited in the title PRIZE-FIGHTS, vol. 23, p. 104, note 6.

2. Violence and Turbulence Criterion — *England.* — Reg. *v.* Cunninghame, 16 Cox C. C. 427.

United States. — U. S. *v.* Stockwell, 4 Cranch (C. C.) 671; U. S. *v.* Fenwick, 4 Cranch (C. C.) 675.

Illinois. — Darst *v.* People, 51 Ill. 286.

Indiana. — Kiphart *v.* State, 42 Ind. 273.

Maine. — State *v.* Boies, 34 Me. 235.

North Carolina. — State *v.* Bennett, 4 Dev. & B. L. (20 N. Car.) 43; State *v.* York, 70 N. Car. 66; State *v.* Hughes, 72 N. Car. 25.

South Carolina. — State *v.* Blair, 13 Rich. L. (S. Car.) 93.

Tennessee. — State *v.* Whitesides, 1 Swan (Tenn.) 88; Douglass *v.* State, 6 Yerg. (Tenn.) 525.

Texas. — Blackwell *v.* State, 30 Tex. App. 672.

Virginia. — Henderson *v.* Com., 8 Gratt. (Va.) 708, 56 Am. Dec. 160; Samanni *v.* Com., 16 Gratt. (Va.) 543.

In some cases of riot the gist of the offense consists solely in the terror of the public inspired by the conduct of the parties; in others it consists in the unlawful act. Com. *v.* Runnels, 10 Mass, 519, 6 Am. Dec. 148; State *v.* Sims, 16 S. Car. 486; State *v.* Whitesides, 1 Swan (Tenn.) 88.

Absence of Violence and Turbulence. — In Riley *v.* People, 29 Ill. App. 139, it was held that an owner of land having the right to immediate possession might enter thereon with his servants, though it was occupied by another, and remove a fence wrongfully erected thereon, and that the owner and his servants would not be guilty of a riot in removing the fence, unless they acted in a violent and tumultuous manner against the person or property of the trespasser.

3. Act Need Not Be Unlawful if Conduct of Rioters Is Violent and Tumultuous. — Reg. *v.* Cunninghame, 16 Cox C. C. 427; Jacobs *v.* State, 20 Ga. 841; Carnes *v.* State, 28 Ga. 192; Green *v.* State, 109 Ga. 541; Kiphart *v.* State, 42 Ind. 273; State *v.* Brooks, 1 Hill L. (S. Car.) 361.

Tumultuous and violent proceedings constitute a riot although there is no unlawful act. People *v.* O'Loughlin, 3 Utah 133.

In State *v.* Blair, 13 Rich. L. (S. Car.) 93, it was said: "It is not necessary to the consummation of a riot that the act of the rioters should be in fulfilment of an unlawful purpose."

A riot may be perpetrated by doing an unlawful act of violence or any other act in a violent or tumultuous manner. Jacobs *v.* State, 20 Ga. 839.

No Act of Violence. — In Reg. *v.* Soley, 11 Mod. 115, Lord Holt said that "if a number of men assemble with arms, *in terrorem populi*, though no act is done it is a riot." See also Howard *v.* Bell, Hob. 91.

Examples. — Tearing down an inclosure under claim of right in a riotous manner is a riot. Rex *v.* Wyvill, 7 Mod. 286.

In Stokes *v.* State, 73 Ga. 816, it was held that where two or more persons, with a common intent to force another to divide fish caught by all in a certain way, pursued him with rocks tumultuously to his home, they were guilty of a riot.

A forcible entry into a house, though with a lawful pretense, is a riot. Rex *v.* Stroude, 2 Show. 149.

In State *v.* Jackson, 1 Spears L. (S. Car.) 13, it was held that the possession of a club and the use of threatening language constituted

or unlawful[1] is immaterial, if it is carried out in a turbulent and violent manner.

such a show of force as would make out the offense of riot.

Charivari — Noise. — In State *v.* Brown, 69 Ind. 95, 35 Am. Rep. 210, it was held that persons conducting a charivari, or serenade with bells, horns, tin pans, guns, etc., were guilty of a riot. See also Higgins *v.* Minaghan, 78 Wis. 602, 23 Am. St. Rep. 428.

In Bankus *v.* State, 4 Ind. 114, it was held that where several persons marched back and forth along a highway, blowing a horn and singing songs and hallooing, they were guilty of a riot.

But in Barron *v.* State, 74 Ga. 833, it was held that the mere making of a noise or behaving tumultuously would not alone constitute a riot in the absence of any violence. See also Coney *v.* State, 113 Ga. 1060.

Discharging Firearms in a peaceful neighborhood, to the terror of the citizens, is a riot. Com. *v.* Armstrong, 11 Phila. (Pa.) 656.

Levy of Execution. — A sheriff who attempted to levy an execution by breaking doors at night with a posse has been held to be guilty of a riot. State *v.* Thackam, 1 Bay (S. Car.) 358.

And breaking in the door of a house in a disorderly and riotous manner has been held to constitute a riot. Douglass *v.* State, 6 Yerg. (Tenn.) 525, in which case the officer was attempting to serve an execution.

Disturbing Peace. — In State *v.* Cribs, Add. (Pa.) 277, it was held that a riot is committed if a number of persons assemble in the dead of night in a town and disturb peaceable citizens.

Pole Raising. — Raising a liberty pole in a street in a riotous and tumultuous manner has been held to constitute a riot. State *v.* Morrison, Add. (Pa.) 274.

Private Purpose — Treason. — In a certain sense the rioters must be engaged in a private purpose, that is, as distinguished from a public attempt to overthrow or subvert the government by arms, force, or violence, which is treason. People *v.* Judson, 11 Daly (N. Y.) 2. *Compare* State *v.* Russell, 45 N. H. 86. See also Homestead Case, 1 Pa. Dist. 785, and see *supra*, this title, *Definition*. See also the title Treason.

1. Unlawful Acts. — Jacobs *v.* State, 20 Ga. 839; Com. *v.* Runnels, 10 Mass. 519, 6 Am. Dec. 148; State *v.* Sims, 16 S. Car. 486; State *v.* Whitesides, 1 Swan (Tenn.) 88; Blackwell *v.* State, 30 Tex. App. 672.

Examples. — Where a party went in a frolic to a stable at midnight and shaved a horse's tail, arousing the prosecutor and alarming his family by their noise, it was held that they were guilty of a riot. State *v.* Alexander, 7 Rich. L. (S. Car.) 5.

Attempting to Commit Act of Violence. — In State *v.* York, 70 N. Car. 66, it was said: "It is not necessary, to constitute a riot, that the facts charged should amount to a distinct and substantive indictable offense. It is sufficient to complete this offense that the facts charged shall constitute an attempt to commit an act of violence which, if completed, would be an indictable offense."

Arson. — A coal breaker was burned at night by a party who fired shots and drove away the watchman. This was held to constitute a riot. Lycoming F. Ins. Co. *v.* Schwenk, 95 Pa. St. 89, 40 Am. Rep. 629.

Where five masked men assembled in the nighttime and forcibly broke into a dwelling house and compelled the occupants to vacate under threats of personal violence, and then burned down the building, this was held to constitute a riot. Germania F. Ins. Co. *v.* Deckard, 3 Ind. App. 361.

Assault. — Assault by the requisite number of persons may be riot. Stafford *v.* State, 93 Ga. 207; Perkins *v.* State, 78 Ga. 316; Bolden *v.* State, 64 Ga. 361; Rachels *v.* State, 51 Ga. 374; Lambert *v.* People, 34 Ill. App. 637.

In Logg *v.* People, 92 Ill. 598, it was held that if two persons, while endeavoring to separate two others and prevent their quarreling and fighting, were struck, the one by one of the combatants and the other by the other of the combatants, both acting together, this was *prima facie* a riot on the part of the persons so striking.

Same — Threat. — It has been held that if three or more persons assemble riotously and tumultuously threaten to beat, cut, or shoot another person, they are guilty of a riot. State *v.* Acra, 2 Ind. App. 384.

Disturbing Others in Enjoyment of Lawful Right. — In Com. *v.* Runnels, 10 Mass. 518, 6 Am. Dec. 148, it was held that if a number of persons assemble and disturb others in the enjoyment of a lawful right, it is a riot.

A disturbance of another in the use of his just franchise is a riot. Reg. *v.* Soley, 2 Salk. 594, 11 Mod. 115.

Destroying House Held to Be Riot. — Reg. *v.* Howell, 9 C. & P. 437, 38 E. C. L. 179; Reg. *v.* Phillips, 2 Moody 252.

Destruction of the Door and Windows of a House has been held to constitute a riotous act. Samanni *v.* Com., 16 Gratt. (Va.) 543.

Unlawfully bursting open the door of another person's dwelling house is a riot. State *v.* Scaggs, 6 Blackf. (Ind.) 37.

Breaking the windows of a house in the night and disturbing the peace and quiet of a family living in the house has been held to constitute a riot. State *v.* Batchelder, 5 N. H. 549.

Interrupting Theatrical Performance. — In Clifford *v.* Brandon, 2 Campb. 358, it was held that if a number of persons, having come to the theatre with a predetermined purpose of interrupting the performance, for this purpose make a great noise and disturbance, so as to render the actors entirely inaudible, though without offering personal violence to any individual or doing any injury to the house, they are, in point of law, guilty of a riot.

Obstruction of Justice. — In State *v.* Boies, 34 Me. 235, it was held that to obstruct and break up a justice's court in a violent and tumultuous manner was a riot.

Resisting Officer Held to Be Riot. — Bonneville *v.* State, 53 Wis. 680.

In Green *v.* State, 109 Ga. 544, it was held that if a number of persons assembled to pre-

Proclamation to Disperse. — A proclamation to disperse is not necessary, as such a proclamation is not an element of riot,[1] although provided for by statute in *England*.[2]

III. Evidence. — Evidence of riotous assemblages in former years is incompetent, either as tending to rebut the defense that the assemblage in question was of a peaceful character or as tending in the first instance to characterize the assemblage in question.[3] Nor may it be shown that the defendant had been engaged in riotous proceedings in former years.[4] Proof of an agreement or proposal to do the unlawful act need not be made.[5] And an allegation that some of the rioters are unknown need not be proved.[6]

IV. Indictment for Riot, Conviction of Another Offense — Jeopardy. — It has been held that under an indictment for a riot a conviction for an assault,[7]

vent an arresting officer from removing a prisoner, and did actually prevent him by intimidation arising from the possession of arms and the use of threats to shoot and kill, it was a riot.

Rescue. — An attempt of a number of parties by menaces and threats, in a violent and tumultuous manner, to rescue a prisoner from the hands of an officer will constitute a riot. Fisher *v.* State, 78 Ga. 258.

Title. — In State *v.* Wilson, 1 Ired. L. (23 N. Car.) 32, it was said: "The law owes its protection to the citizen in the quiet and peaceable possession of his houses, fences, fixtures, etc., against the unlawful acts of rioters. The state is never called upon, in an indictment for a riot or trespass, to establish a possession by a paper title; parol evidence of such a possession is sufficient." See also State *v.* Bennett, 4 Dev. & B. L. (20 N. Car.) 43.

Removal of Trespasser. — In Scott *v.* U. S., Morr. (Iowa) 142, it was held that a riot could not be justified to remove a trespasser, even if the rioters had a just right to the possession of the lands trespassed upon.

Searches and Seizures. — Unlawful seizure of property may constitute a riot. Darst *v.* People, 51 Ill. 286; Bell *v.* Mallory, 61 Ill. 167. See also the title Searches and Seizures.

In Sanders *v.* State, 60 Ga. 126, it was held that where armed men, without any authority of law, invaded the premises of a citizen in a violent and tumultuous manner in order to search the premises, they were guilty of a riot.

1. Proclamation to Disperse Not Necessary. — Rex *v.* Kennett, 5 C. & P. 282, 24 E. C. L. 321; Rex *v.* Fursey, 6 C. & P. 81, 25 E. C. L. 293; State *v.* Russell, 45 N. H. 83. See also Com. *v.* Runnels, 10 Mass. 518, 6 Am. Dec. 148.

2. "In England, under the Riot Act of 1 Geo. I., c. 5, the parties are guilty of a capital offense if they do not disperse within one hour after such proclamation, and yet the parties are held guilty of a riot although no such proclamation was made, upon the ground that it was a misdemeanor at common law." State *v.* Russell, 45 N. H. 83, *citing* Rex *v.* Fursey, 6 C. & P. 81, 25 E. C. L. 293. See also Rex *v.* James, 5 C. & P. 153, 24 E. C. L. 251; Rex *v.* Wollcock, 5 C. & P. 516, 24 E. C. L. 434; Rex *v.* Child, 4 C. & P. 442, 19 E. C. L. 465.

3. Former Riotous Assemblages. — State *v.* Renton, 15 N. H. 169.

4. Other Riotous Acts. — State *v.* Renton, 15 N. H. 169.

In Com. *v.* Campbell, 7 Allen (Mass.) 541, 83 Am. Dec. 705, it was held that upon an indictment for murder committed during a riot in which the prisoner was engaged, evidence was incompetent to prove other riotous acts by him at a different place several hours earlier, where it was not shown that all the various acts were parts of one continuous transaction.

Aggravation. — Where there were five counts in an indictment for a riot and breaking into a smokehouse or outhouse by an officer and others, proof that the smokehouse was within the curtilage, and that the lock was broken off in a riotous manner, without any demand of or refusal to admit, was held to be competent and necessary testimony under the count for a riot, and to be admissible under either count in aggravation of the offense, notwithstanding neither count charged the breaking into a house within the curtilage. Douglass *v.* State, 6 Yerg. (Tenn.) 525.

5. Proof of Agreement to Do Act Unnecessary. — U. S. *v.* Stockwell, 4 Cranch (C. C.) 671, U. S. *v.* Fenwick, 4 Cranch (C. C.) 675.

Secret Society. — In State *v.* Johnson, 43 S. Car. 123, it was held that upon a trial for a riot, evidence might be received to show that the defendants were members of the same secret society.

6. State *v.* Blair, 13 Rich. L. (S. Car.) 93.

7. Under Indictment for Riot Conviction for Assault May Be Had. — Rex *v.* Hemings, 2 Show. 93. And see *supra*, this title, *Elements*, par. *Unlawful Act — Lawful Act — Violence and Turbulence.*

On an indictment for a riot and a riotous assault and battery by four persons, one of them may be convicted of the assault and battery and the others acquitted of the whole. Shouse *v.* Com., 5 Pa. St. 83.

But in Ferguson *v.* People, 90 Ill. 510, it was held that a conviction could not be had for an assault and battery under an indictment for a riot, they being two distinct offenses. See also Freeland *v.* People, 16 Ill. 380.

Jeopardy — Riot and Disturbing Religious Meeting. — In State *v.* Townsend, 2 Harr. (Del.) 543, where a riot took place at a religious meeting, it was held that the rioters could not be indicted both for the riot and for disturbing the religious meeting, as the punishment for the former covered the latter offense. See generally the title Jeopardy, vol. 17, p. 602.

an unlawful assembly,[1] or a rout may be had.[2] One cannot, however, be charged with manslaughter by reason of his participation in a riot in which those suppressing it killed an innocent person.[3]

RIOTOUS. (See also the title RIOT, *ante*.) — "Riotous" is defined as partaking of the nature of an unlawful assembly or its acts; seditious; tumultuous.[4]

RIP. — See note 5.

RIPARIAN — RIPARIOUS. (See also the title RIPARIAN RIGHTS, *post*, and the references there given.) — The word "riparian" is defined as relating to the bank of a stream or other water — river, lake, or sea; as, riparian proprietors, rights, states.[6]

RIPARIAN OWNER OR PROPRIETOR. (See also the title RIPARIAN RIGHTS, *post*, and the references there given.) — A riparian owner or proprietor is one who owns land bounded upon a watercourse or lake.[7]

1. Persons Indicted for Riot May Be Convicted of Unlawful Assembly. — Rex *v.* Cox, 4 C & P. 538, 19 E. C. L. 516.

2. Rout. — State *v.* Sumner, 2 Spears L. (S. Car.) 599, 42 Am. Dec. 387.

3. Com. *v.* Campbell, 7 Allen (Mass.) 541, 83 Am. Dec. 705.

4. Riotous. — Madisonville *v.* Bishop, (Ky. 1902) 67 S. W. Rep. 270, *quoting* Webst. Dict.

"Riotous" Equivalent to "Violent." — An affidavit on a prosecution for a riot used the words "*riotous* and tumultuous" to describe the offense, instead of the statutory word "violent." It was held that *riotous* in this connection was substantially equivalent to "violent." State *v.* Kutter, 59 Ind. 574.

5. Rip. — A statute provided that if any person should steal, or should *rip* or cut or break, with intent to steal, any lead or iron bar, iron rail, iron gate, or iron palisade, he should be deemed guilty of a misdemeanor. In construing this statute in State *v.* Stone, 30 N. J. L. 300, the court said: "The verb *rip*, also in the act, applies properly to lead in sheets, on the roofing, or in other shapes than bars. Bars of lead or iron might be broken or cut, but with respect to lead in that shape the legislature would hardly apply the term *rip*."

6. Riparian. — And. L. Dict., *quoted* in Bathgate *v.* Irvine, 126 Cal. 135. See also Lyon *v.* Fishmongers' Co., 1 App. Cas. 662; Meyers *v.* St. Louis, 8 Mo. App. 273; Delaplaine *v.* Chicago, etc., R. Co., 42 Wis. 229.

Riparious Estates. — See Morgan *v.* Livingston, 6 Mart. (La.) 224, set out under FACE, vol. 12, p. 611.

7. Riparian Owner. — Grant *v.* Hemphill, 92 Iowa 218; Schlosser *v.* Cruickshank, 96 Iowa 414. See also Yates *v.* Milwaukee, 10 Wall. (U. S.) 497; Potomac Steamboat Co. *v.* Upper Potomac Steamboat Co., 109 U. S. 682; Bardwell *v.* Ames, 22 Pick. (Mass.) 355.

"The owners of watercourses are denominated by the civilians *riparian proprietors*, and the use of the same significant and convenient term is now fully introduced into the common law." Angell on Watercourses (7th ed.), § 10, *quoted* in Thorp *v.* Freed, 1 Mont. 671. See also Starr *v.* Child, 20 Wend. (N. Y.) 149.

In Fitzgerald *v.* Faunce, 46 N. J. L. 594, it was held that the words "owner of lands situate along or upon tidewaters" and the words *riparian owner* were identical in meaning.

A Water Company owning land bordering on a river is a *riparian proprietor*. Indianapolis Water Co. *v.* American Strawboard Co., 53 Fed. Rep. 970.

Tidewaters. — "The words *riparian proprietor* have been heedlessly extended from rivers and streams to the shores of the sea. If it is necessary to express it by a single adjective, the term 'littoral proprietor' * * * is more accurate," when the shore of the sea is in question. Com. *v.* Roxbury, 9 Gray (Mass.) 521, note. See also Boston *v.* Lecraw, 17 How. (U. S.) 432; West Roxbury *v.* Stoddard, 7 Allen (Mass.) 167; Hamilton *v.* Menifee, 11 Tex. 718; Smith *v.* Power, 14 Tex. 146.

Thus, in Gough *v.* Bell, 22 N. J. L. 464, it was said: "I use the term *riparian proprietors*, not in its strictly appropriate common-law sense, as indicating the owner of the *ripa* or bank of streams not navigable, but in the sense in which it is frequently used in the books to indicate the owner of the land adjoining the shore of tidewaters above the ordinary flow of the tide."

RIPARIAN RIGHTS.

By Alexander Stronach.

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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW *and* EVIDENCE *related to this subject, see the following titles in this work:* *ACCRETION*, vol. 1, p. 467; *BOOM COMPANIES*, vol. 4, p. 707; *BOUNDARIES*, vol. 4, p. 756; *BRIDGES*, vol. 4, p. 918; *CANALS*, vol. 5, p. 111; *DAMS*, vol. 8, p. 699; *FERRIES*, vol. 12, p. 1086; *FISH AND FISHERIES*, vol. 13, p. 554; *FLOODS*, vol. 13, p. 685; *ICE*, vol. 15, p. 907; *IRRIGATION*, vol. 17, p. 485; *ISLANDS*, vol. 17, p. 530; *LAKES AND PONDS*, vol. 18, p. 129; *LOGS AND LUMBER*, vol. 19, p. 522; *NAVIGABLE WATERS*, vol. 21, p. 424; *SHIPS AND SHIPPING; WATERS AND WATERCOURSES; WATERWORKS AND WATER COMPANIES; WHARVES AND WHARFINGERS.*

I. Scope of Title. — As particular riparian rights are made the subject of specific treatment in other titles in this work, this article will be confined to a statement of the general principles underlying such rights, and to an enumeration of only the most important of such rights by way of illustration.

II. Definition. — Riparian rights are those which attach to the ownership of land through, or past which, a river runs.[1] The rights of owners of land bounded by or abutting on the sea or great lakes are, more properly speaking, denominated littoral rights,[2] but these terms are frequently used interchangeably.

III. What Rights Included — 1. In General. — Owing to the lack of uniformity in the decisions it can be safely said only that the rights of riparian owners upon navigable waters depend upon local statute, custom, and usage.[3]

1. Riparian Rights Defined. — Bouv. L. Dict.; And. L. Dict.; Rap. & Law. L. Dict. See also Lyon *v.* Fishmongers' Co., 1 App Cas. 662; Indianapolis Water Co. *v.* American Strawboard Co., 53 Fed. 970; Sullivan Timber Co. *v.* Mobile, 110 Fed. Rep. 186; Bathgate *v.* Irvine, 126 Cal. 135, 77 Am. St. Rep. 158; Jacob Tome Institute *v.* Crothers, 87 Md. 569.

2. Littoral Rights Defined. — Bouv. L. Dict.; And. L. Dict.; Rap. & Law. L. Dict.; Com. *v.* Roxbury, 9 Gray (Mass.) 521, note. See also Boston *v.* Lecraw, 17 How. (U. S.) 433; Chamberlain *v.* Hemingway, 63 Conn. 1, 38 Am. St. Rep. 330; Child *v.* Starr, 4 Hill (N. Y.) 375.

3. Local Law Determines Rights. — Shively *v.* Bowlby, 152 U. S. 9; Sullivan Timber Co. *v.* Mobile, 110 Fed. Rep. 186; Revell *v.* People, 177 Ill. 468, 69 Am. St. Rep. 257. And see the title Navigable Waters, vol. 21, p. 437.

2. Right of Access. — The right of a riparian owner upon navigable water to have access to the channel or navigable part of the adjacent water, and for that purpose to erect a wharf or pier, is generally recognized.[1] But in exercising this right, a riparian owner must take care that he does not encroach upon navigable waters, and that vessels are not impeded in their passage, nor precluded from the use of all parts of the water which are navigable in fact.[2]

3. Right to Accretions. — The right of riparian owners to accretions is made the subject of special treatment elsewhere.[3]

4. Right to Fish. — Among the important rights of riparian owners is that of fishing in the adjacent waters, and this subject is fully discussed elsewhere in this work.[4]

5. Right to Flow and Use. — The general rule is that every riparian proprietor has an equal right to have the stream which flows through or by his land flow as it was wont, without material diminution in quantity or alteration in quality. This general rule is qualified, however, by the well-recognized limitation that each of such proprietors is entitled to a reasonable use of the water for domestic, agricultural, and manufacturing purposes.[5]

1. Right of Access and Wharfage. — Lyon *v.* Fishmongers' Co., 1 App. Cas. 662; Leverich *v.* Mobile, 110 Fed. Rep. 170; Sullivan Timber Co. *v.* Mobile, 110 Fed. Rep. 186; Ockerhausen *v.* Tyson, 71 Conn. 31; Revell *v.* People, 177 Ill. 468, 69 Am. St. Rep. 257; State *v.* Longfellow, 169 Mo. 109; People *v.* Woodruff, 157 N. Y. 709, *affirming* 30 N. Y. App. Div. 43; Montgomery *v.* Shaver, 40 Oregon 244; Cohn *v.* Wausau Boom Co., 47 Wis. 322; Priewe *v.* Wisconsin State Land, etc., Co., 93 Wis. 534. And see the titles LAKES AND PONDS, vol. 18, p. 135; NAVIGABLE WATERS, vol. 21, p. 438; WHARVES AND WHARFINGERS.

Extension of Lots into Public Waters Authorized by Statute. — Jacob Tome Institute *v.* Crothers, 87 Md. 569.

2. Limitation upon Right. — Paine Lumber Co. *v.* U. S., 55 Fed. Rep. 854.

3. See the titles ACCRETION, vol. 1, p. 467; ISLANDS, vol. 17, p. 536. See also Ockerhausen *v.* Tyson, 71 Conn. 31; Revell *v.* People, 177 Ill. 468, 69 Am. St. Rep. 257.

Right to Sand Deposits. — Freeland *v.* Pennsylvania R. Co., 197 Pa. St. 529.

4. See the title FISH AND FISHERIES, vol. 13, p. 568.

5. Rule as to Flow and Use — *England.* — Mason *v.* Hill, 5 B. & Ad. 1, 27 E. C. L. 11; Wood *v.* Waud, 3 Exch. 748; Embrey *v.* Owen, 6 Exch. 353; Hodgkinson *v.* Ennor, 4 B. & S. 229, 116 E. C. L. 229; Medway River Nav. Co. *v.* Romney, 9 C. B. N. S. 575, 99 E. C. L. 575; Miner *v.* Gilmour, 12 Moo. P. C. 131; Crossley *v.* Lightowler, L. R. 2 Ch. 478; Gaved *v.* Martyn, 19 C. B. N. S. 732, 115 E. C. L. 732; Sampson *v.* Hoddinott, 1 C. B. N. S. 590, 87 E. C. L. 590. See also Chasemore *v.* Richards, 2 H. & N. 181, 7 H. L. Cas. 349· Swindon Waterworks Co. *v.* Wilts, etc., Canal Nav. Co., L. R. 7 H. L. 697.

Canada. — Ellis *v.* Clemens, 21 Ont. 227.

United States. — Tyler *v.* Wilkinson, 4 Mason (U. S.) 397; Atchison *v.* Peterson, 20 Wall (U. S.) 507; Indianapolis Water Co. *v.* American Strawboard Co., 53 Fed. Rep. 970; Schwab *v.* Beam, 86 Fed. Rep. 41; Pine *v.* New York, 103 Fed. Rep. 337, (C. C. A.) 112 Fed. Rep. 98.

Alabama. — Lewis *v.* Stein, 16 Ala. 214, 50 Am. Dec. 177; Stein *v.* Burden, 29 Ala. 127, 65 Am. Dec. 394; Tennessee Coal, etc., R. Co. *v.* Hamilton, 100 Ala. 252, 46 Am. St. Rep. 48; Drake *v.* Lady Ensley Coal, etc , R. Co., 102 Ala. 501, 48 Am. St. Rep. 77.

California. — Lux *v.* Haggin, 69 Cal. 255; Gould *v.* Stafford, 77 Cal. 66; Vernon Irrigation Co. *v.* Los Angeles, 106 Cal. 237; Hargrave *v.* Cook, 108 Cal. 72; Bathgate *v.* Irvine, 126 Cal. 135, 77 Am. St. Rep. 158; Senior *v.* Anderson, 130 Cal. 290; Fisher *v.* Feige, 137 Cal. 39.

Connecticut. — Buddington *v.* Bradley, 10 Conn. 213, 26 Am. Dec. 386; Agawam Canal Co. *v.* Edwards, 36 Conn. 476.

Delaware. — Delaney *v.* Boston, 2 Ha[illegible]. (Del.) 439.

Illinois. — Elgin Hydraulic Co. *v.* Elgin, 194 Ill. 476, *affirming* 85 Ill. App. 182.

Indiana. — Schwartz *v.* Nie, (Ind. App. 1902) 64 N. E. Rep. 619.

Maine. — Pillsbury *v.* Moore, 44 Me. 154, 69 Am. Dec. 91.

Massachusetts. — Cary *v.* Daniels, 8 Met. (Mass.) 477; Whitney *v.* Eames, 11 Met. (Mass.) 517; Merrifield *v.* Lombard, 13 Allen (Mass.) 16, 90 Am. Dec. 172; Merrifield *v.* Worcester, 110 Mass. 216, 14 Am. Rep. 592; Dwight Printing Co. *v.* Boston, 122 Mass. 583.

Nebraska. — Plattsmouth Water Co. *v.* Smith, 57 Neb. 579; Slattery *v.* Harley, 58 Neb. 575; Crawford Co. *v.* Hathaway, 60 Neb. 754.

New Jersey. — Holsman *v.* Boiling Spring Bleaching Co., 14 N. J. Eq. 335.

New York. — Clinton *v.* Myers, 46 N. Y. 511, 7 Am. Rep. 373; Smith *v.* Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Gallagher *v.* Kingston Water Co., 164 N. Y. 602, *affirming* 25 N. Y. App. Div. 82.

Ohio. — Canton *v.* Shock, 66 Ohio St. 19.

Oregon. — See Salem Flouring Mills Co. *v.* Lord, (Oregon 1902) 69 Pac. Rep. 1033.

Pennsylvania. — Sanderson *v.* Pennsylvania Coal Co., 86 Pa. St. 401, 113 Pa. St. 136; Irving *v.* Media, 194 Pa. St. 648.

Texas. — Barrett *v.* Metcalfe, 12 Tex. Civ. App. 247.

Vermont. — Davis *v.* Fuller, 12 Vt. 178, 36 Am. Dec. 334.

Washington. — Benton *v.* Johncox, 17 Wash. 277, 61 Am. St. Rep. 912.

Reasonable Use. — What is reasonable use is a question of fact to be determined by the jury in view of all the circumstances of the case.[1] It depends upon a variety of conditions, such as the size and character of the stream, the nature of the banks, and the uses to which such stream can be and is applied.[2]

Obstruction, Diversion, and Pollution. — It follows from the general rule that for any unreasonable diversion or obstruction, or for any corruption and pollution caused by the unreasonable use of the stream, a riparian owner is liable in damages to other riparian owners who are injured thereby.[3] The extent to which waters may be lawfully obstructed by booms, bridges, dams, wharves, and other structures is explained elsewhere.[4] The right of riparian owners to use water for such purposes as irrigation, mining, and waterworks is also fully treated in other titles.[5]

Entitled Only to Use of Water. — A riparian proprietor has no property in the water itself, but is entitled merely to the usufruct of the stream while it flows through or by his land.[6]

Increase of Flow. — A riparian owner may recover for damages caused by the increase of the quantity of water which usually and naturally flows by or through his land, if such increase is caused by the unreasonable use of the water by another riparian owner.[7]

Rule Applicable to Navigable Waters. — A riparian owner on a navigable river, in addition to the right connected with navigation to which he is entitled as one of the public, retains his rights as an ordinary riparian owner underlying and controlled by, but not extinguished by, the public right of navigation.[8]

Artificial Watercourses. — The right of riparian proprietors to use the water in canals and other artificial watercourses is discussed elsewhere.[9]

IV. Upon What Rights Depend. — The ownership of land under water is

And see the title Waters and Watercourses.

Rights Prior to Those Below and Subsequent to Those Above. — Merrifield *v.* Worcester, 110 Mass. 216, 14 Am. Rep. 592.

"Without Any Essential Diminution." — Canton *v.* Shock, 66 Ohio St. 19.

Entitled to Have Water Flow from Land Naturally. — Warren *v.* Westbrook Mfg. Co., 86 Me. 32.

1. Reasonableness Question of Fact. — Pool *v.* Lewis, 41 Ga. 162, 5 Am. Rep. 526; Phillips *v.* Sherman, 64 Me. 171; Holden *v.* Winnipiseogee Lake Cotton, etc., Co., 53 N. H. 552; Clinton *v.* Myers, 46 N. Y. 511, 7 Am. Rep. 373; Hartzall *v.* Sill, 12 Pa. St. 248; Hazeltine *v.* Case, 46 Wis. 391, 32 Am. Rep. 715; Ellis *v.* Clemens, 21 Ont. 227.

Reasonable Use Defined. — Rindge *v.* Sargent, 64 N. H. 294.

2. Baltimore *v.* Appold, 42 Md. 422; Hayes *v.* Waldron, 44 N. H. 580, 84 Am. Dec. 105.

3. Liability for Obstruction, Diversion, and Pollution. — Wood *v.* Waud, 3 Exch. 748; Crossley *v.* Lightowler, L. R. 2 Ch. 478; Indianapolis Water Co. *v.* American Strawboard Co., 53 Fed. Rep. 970.

Extent to Which Pollution Allowed. — Simmons *v.* Paterson, 60 N. J. Eq. 385.

Pollution by Mining Operations. — Pennsylvania Coal Co. *v.* Sanderson, 113 Pa. St. 126, 57 Am. Rep. 445; Elder *v.* Lykens Valley Coal Co., 157 Pa. St. 490, 37 Am. St. Rep. 742.

Pollution by Sewers. — Merrifield *v.* Worcester, 110 Mass. 216, 14 Am. Rep. 592. See also the title Drains and Sewers, vol. 10, p. 220.

4. See such titles as Boom Companies, vol. 4, p. 707; Bridges, vol. 4, p. 918; Dams, vol. 8, p. 699, and Wharves and Wharfingers.

Right to Build Fence Across. — Griffith *v.* Holman, 23 Wash. 347.

5. See such titles as Irrigation, vol. 17, p. 485; Mines and Mining Claims, vol. 20, p. 699; Waters and Watercourses, and Waterworks and Water Companies.

6. No Property in Water. — Embrey *v.* Owen, 6 Exch. 353; Indianapolis Water Co. *v.* American Strawboard Co., 53 Fed. Rep. 970; Canal Fund Com'rs *v.* Kempshall, 26 Wend. (N. Y.) 404; Smith *v.* Rochester, 92 N. Y. 463, 43 Am. Rep. 393; Sweet *v.* Syracuse, 129 N. Y. 316; Rigney *v.* Tacoma Light, etc., Co., 9 Wash. 576.

7. Damages for Increase of Flow. — Plattsmouth Water Co. *v.* Smith, 57 Neb. 579; East Jersey Water Co. *v.* Bigelow, 60 N. J. L. 201. See also Chapman *v.* Thames Mfg. Co., 13 Conn. 269, 33 Am. Dec. 401; *In re* Minnetonka Lake Imp., 56 Minn. 513, 45 Am. St. Rep. 494; Gerrish *v.* New Market Mfg. Co., 30 N. H. 478; Tillotson *v.* Smith, 32 N. H. 90, 64 Am. Dec. 355. And see the title Floods, vol. 13, p. 688.

8. Right Exists Though River Navigable. — 3 Kent's Com. 427; Lyon *v.* Fishmongers' Co., 1 App. Cas. 662; Canal Fund Com'rs *v.* Kempshall, 26 Wend. (N. Y.) 404; Smith *v.* Rochester, 92 N. Y. 463, 44 Am. Rep. 393. See also Ockerhausen *v.* Tyson, 71 Conn. 31; Williams *v.* Fulmer, 151 Pa. St. 405, 31 Am. St. Rep. 767.

No Right of Water Power on Navigable River. — Williams *v.* Fulmer, 151 Pa. St. 405, 31 Am. St. Rep. 767.

9. See the titles Canals, vol. 5, p. 112. Waters and Watercourses.

not the foundation of riparian rights properly so called, because the word "riparian" is relative to the bank, and not to the bed of the water.[1] Riparian rights depend upon the ownership of land which is contiguous to, and touches upon, the water,[2] and lateral contact is as good as vertical.[3]

Reservation of Right of Way. — A mere right of way along the bank reserved in a grant of land bounded by a river, being a mere easement, does not deprive the grantee of his rights as a riparian proprietor.[4]

Division of Land. — If land adjacent to water is divided, and a part is separated entirely from the water, as to such part it seems that riparian rights cease; but if each part retains a water frontage, riparian rights attach to each of such parts.[5]

The Ownership of Land under Water and the rights derived therefrom are fully discussed elsewhere in this work.[6]

V. NATURE OF RIGHTS. — The right of a riparian owner to the flow and use of the natural stream is not an easement in, or an appurtenance to, the land, but is an incident annexed by the operation of law to the land itself,[7] and passes with the land without any express grant thereof,[8] unless especially reserved.[9]

Are Property. — According to the weight of authority, riparian rights are property of which the owner cannot be deprived even for a public use except by due process of law and upon just compensation.[10] Riparian owners are not,

1. Not Dependent upon Ownership of Bed. — Lyon *v.* Fishmongers' Co., 1 App. Cas. 662; Indianapolis Water Co. *v.* American Strawboard Co., 53 Fed. Rep. 970; Cohn *v.* Wausau Boom Co., 47 Wis. 322. See also Priewe *v.* Wisconsin State Land, etc., Co., 93 Wis. 534.

2. Dependent upon Ownership of Banks or Shores. — Lyon *v.* Fishmongers' Co., 1 App. Cas. 662; Indianapolis Water Co. *v.* American Strawboard Co., 53 Fed. Rep. 970; Bathgate *v.* Irvine, 126 Cal. 135, 77 Am. St. Rep. 158; Axline *v.* Shaw, 35 Fla. 305; Hopkinsville Bank *v.* Western Kentucky Asylum, (Ky. 1900) 56 S. W. Rep. 525; Potter *v.* Indiana, etc., R. Co., 95 Mich. 389; Sparks Mfg. Co. *v.* Newton, 57 N. J. Eq. 367; Schlag *v.* Jones, 131 Pa. St. 62. See also Miner *v.* Gilmour, 12 Moo. P. C. 131; Chasemore *v.* Richards, 7 H. L. Cas. 349; Montgomery *v.* Shaver, 40 Oregon 244; Salem Flouring Mills Co. *v.* Lord, (Oregon 1902) 69 Pac. Rep. 1033; Priewe *v.* Wisconsin State Land, etc., Co., 93 Wis. 534.

No Rights Attach to Ownership of Land Beyond Watershed. — Bathgate *v.* Irvine, 126 Cal. 135, 77 Am. St. Rep. 158.

Mere Intruder Without Riparian Rights. — Watkins *v.* Holman, 16 Pet. (U. S.) 25.

Being Merely a Possessor of Unsurveyed Government Land does not entitle to riparian rights. Lake *v.* Tolles, 8 Nev. 285.

A Sluiceway Is Not a Watercourse, and adjacent owners do not have riparian rights. Chamberlain *v.* Hemingway, 63 Conn. 1, 38 Am. St. Rep. 330.

Riparian Rights When Street or Public Property Adjacent to Water. — See Barney *v.* Keokuk, 94 U. S. 324; Potomac Steamboat Co. *v.* Upper Potomac Steamboat Co., 109 U. S. 672; St. Paul, etc., R. Co., *v.* Schurmeir, 7 Wall. (U. S.) 272; New Orleans Water-Works Co. *v.* Ernst, 32 Fed. Rep. 5; Godfrey *v.* Alton, 12 Ill. 29, 52 Am. Dec. 476; Rowan *v.* Portland, 8 B. Mon. (Ky.) 232; Brisbine *v.* St. Paul, etc., R. Co., 23 Minn. 114; People *v.* Lambier, 5 Den. (N. Y.) 9; Prior *v.* Comstock, 17 R. I. 1. If a public street or highway exists so that its boundary line and the waters of a navigable lake meet, the riparian rights incident to the land composing the street belong to the public. In such a situation there is no zone of private right between the street and the lake, but the public right is continuous from the street to the waters of the lake, and from the waters of the lake to the street. Pewaukee *v.* Savoy, 103 Wis. 271, 74 Am. St. Rep. 859.

3. Lateral Contact Sufficient. — Lyon *v.* Fishmongers' Co., 1 App. Cas. 662.

4. Effect of Reservation of Right of Way. — Indianapolis Water Co. *v.* American Strawboard Co., 53 Fed. Rep. 970; Hagan *v.* Campbell, 8 Port. (Ala.) 9, 33 Am. Dec. 267.

5. Rights When Land Divided. — Stockport Waterworks Co. *v.* Potter, 3 H. & C. 300.

6. See the title BOUNDARIES, vol. 4, p. 756, and the cross-references there given.

7. Right Annexed to Land Itself. — Wood *v.* Waud, 3 Exch. 748; Embrey *v.* Owen, 6 Exch. 353; Dickinson *v.* Grand Junction Canal Co., 7 Exch. 282; Tyler *v.* Wilkinson, 4 Mason (U. S.) 397; Pine *v.* New York, 103 Fed. Rep. 337, (C. C. A.) 112 Fed. Rep. 98; Lux *v.* Haggin, 69 Cal. 255; Hargrave *v.* Cook, 108 Cal. 72; Bathgate *v.* Irvine, 126 Cal. 135, 77 Am. St. Rep. 158; Crook *v.* Hewitt, 4 Wash. 749; Benton *v.* Johncox, 17 Wash. 277, 61 Am. St. Rep. 912.

8. Express Grant Unnecessary.— Northern Pac. R. Co. *v.* Scott, etc., Lumber Co., 73 Minn. 25.

9. Express Reservation Necessary to Preserve. — Benton *v.* Johncox, 17 Wash. 277, 61 Am. St. Rep. 912.

10. Rights Are Property — *United States.* — Yates *v.* Milwaukee, 10 Wall. (U. S.) 497; St. Anthony Falls Water Power Co. *v.* St. Paul Water Com'rs, 168 U. S. 349; Paine Lumber Co. *v.* U. S., 55 Fed. Rep. 854; Sullivan Timber Co. *v.* Mobile, 110 Fed. Rep. 186.

California. — People *v.* Elk River Mill, etc., Co., 107 Cal. 221, 48 Am. St. Rep. 125.

however, entitled to compensation for rights lost by reason of improvements made for the purpose of aiding navigation.[1]

VI. How Rights Lost — 1. In General. — The right to flow and use may be lost by grant, license, condemnation, or prescription;[2] and the right to construct a wharf may be lost by prescription.[3]

2. Grant of Rights. — The *English* rule is that a riparian owner cannot, except as against himself, confer on one who is not a riparian owner any right to use the water of the stream; and any use by a nonriparian proprietor, even under a grant from a riparian owner, is wrongful;[4] but in the *United States* it has been held otherwise.[5] It has been held that the right or privilege of constructing a wharf is not personal to the shore owner so that it must be exercised by him alone or not at all, but is the subject of grant, and may be severed from the upland.[6] And it has also been decided that the right of the riparian proprietor upon navigable waters to improve, reclaim, and occupy the submerged lands out to the point of navigability may be separated from the shore land, and transferred to and enjoyed by persons having no interest in the original riparian estate; and this riparian right may be so disassociated from the shore land by act of the owner that a conveyance by him of the shore land will not include such riparian right.[7]

3. Nonuser. — The right of a riparian owner to put the water to legitimate uses is not lost by mere nonuser, but he may recover for an invasion of his right although he has not yet made any use of the water, or enough is left in the stream for the purpose of his business as then conducted. The right to the whole natural flow, subject to the right of other riparian owners, whether used or not, is a right guaranteed to him by law.[8]

Illinois. — Revell *v.* People, 177 Ill. 468, 69 Am. St. Rep. 257.

Kansas. — Emporia *v.* Soden, 25 Kan. 588, 37 Am. Rep. 265.

Minnesota. — Union Depot, etc., Transfer Co *v* Brunswick, 31 Minn. 297, 47 Am. Rep. 789; Bradshaw *v.* Duluth Imperial Mill Co., 52 Minn. 59.

Missouri. — Meyers *v.* St. Louis, 8 Mo. App. 266.

New York. — Smith *v.* Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Gilzinger *v.* Saugerties Water Co., 66 Hun (N. Y.) 173; Gallagher *v.* Kingston Water Co., 164 N. Y. 602, *affirming* 25 N. Y. App. Div. 82; Buffalo *v.* Delaware, etc., R. Co. (Supm. Ct. Spec. T.) 39 N. Y. Supp. 4.

North Dakota. — Bigelow *v.* Draper, 6 N. Dak. 152.

Oregon. — Hallock *v.* Suitor, 37 Oregon 9.

Washington. — Rigney *v.* Tacoma Light, etc., Co., 9 Wash. 576; New Whatcom *v.* Fair Haven Land Co., 24 Wash. 493.

Wisconsin. — Priewe *v.* Wisconsin State Land, etc., Co. 93 Wis. 534.

And see the titles Navigable Waters, vol. 21, p. 438; Waterworks and Water Companies.

Storing Storm and Flood Water and giving it out in dry times for the benefit of riparian owners is not a sufficient compensation for the diversion of such water. Sparks Mfg. Co. *v.* Newton, 57 N. J. Eq. 367.

1. Subject to Improvements for Navigation. — Paine Lumber Co. *v.* U. S., 55 Fed. Rep. 854; Richardson *v.* U. S., 100 Fed. Rep. 714; Sage *v.* New York, 154 N. Y. 61, 61 Am. St. Rep. 592. See also Priewe *v.* Wisconsin State Land, etc., Co., 93 Wis. 534. And see the title Navigable Waters, vol. 21, p. 438.

2. Methods of Losing Right of Flow. — Tyler *v.* Wilkinson, 4 Mason (U. S.) 397; Lux *v.* Haggin, 69 Cal. 255; Hargrave *v.* Cook, 108 Cal. 73; Gilzinger *v.* Saugerties Water Co., 66 Hun (N. Y.) 173; Bigelow *v.* Draper, 6 N. Dak. 152. See also Indianapolis Water Co. *v.* American Strawboard Co., 53 Fed. Rep. 970; Plattsmouth Water Co. *v.* Smith, 57 Neb. 579; New Whatcom *v.* Fairhaven Land Co., 24 Wash. 493. And see the titles Eminent Domain, vol. 10, p. 1088; Prescription, vol. 22, p. 1185.

3. Wharfage Rights Lost by Prescription. — Montgomery *v.* Shaver, 40 Oregon 244. See also Sargent *v.* Ballard, 9 Pick. (Mass.) 251.

4. English Rule Against Granting Right to Nonriparian Owner. — Ormerod *v.* Todmorden Joint Stock Mill Co., 11 Q. B. D. 155. See also Stockport Waterworks Co. *v.* Potter, 3 H. & C. 300; Nuttall *v.* Bracewell, L. R. 2 Exch. 1.

5. American Rule. — Gillis *v.* Chase, 67 N. H. 161, 68 Am. St. Rep. 645. See also Bigelow *v.* Draper, 6 N. Dak. 152; Rigney *v.* Tacoma Light, etc., Co., 9 Wash. 576.

6. Sale of Wharfage Right. — Montgomery *v.* Shaver, 40 Oregon 244.

7. Sale of Rights as to Submerged Land. — Hanford *v.* St. Paul, etc., R. Co., 43 Minn. 104 [*overruling* Lake Superior Land Co. *v.* Emerson, 38 Minn. 406, 8 Am. St. Rep. 679]; Bradshaw *v.* Duluth Imperial Mill Co., 52 Minn. 59.

8. Right Not Lost by Nonuser. — Sampson *v.* Hoddinott, 1 C. B. N. S. 590, 87 E. C. L. 590; Lux *v.* Haggin, 69 Cal. 255; Hargrave *v.* Cook, 108 Cal. 72; Whitney *v.* Wheeler Cotton Mills, 151 Mass. 396; Reeves *v.* Backus Brooks Co., 83 Minn. 339; Smith *v.* Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Gallagher *v.* Kingston Water Co., 164 N. Y. 602, *affirming* 25 N.

RIPE FOR JUDGMENT. — See note 1.

RIPRAP. — See note 2.

RISING. — See note 3.

RISK. (See generally the various insurance titles, such as ACCIDENT INSURANCE, vol. 1, p. 284; FIRE INSURANCE, vol. 13, p. 86; INSURANCE, vol. 16, p. 830; MARINE INSURANCE, vol. 19, p. 930; and the cross-references under those titles.) — A risk is a danger, hazard, or peril. In insurance law, "risk" expresses the obligation of the insurer; the probability of loss; the anticipated cause of loss; and the property, thing, or venture covered by the insurance.[4]

Y. App. Div. 82; Gilzinger *v.* Saugerties Water Co., 66 Hun (N. Y.) 173.

1. Ripe for Judgment. — A rule of court provided that "on the first Monday of every month judgment may be entered in all actions *ripe for judgment*, under a general order of the court." It was held that a case in which a suggestion of insolvency had been duly filed by the defendant with a motion for continuance, and a default had been entered for his nonappearance when the case was reached for trial, was not *ripe for judgment* if the motion for continuance had not in fact been considered and passed upon by the court. Hosmer *v.* Hoitt, 161 Mass. 173.

But in Dalton-Ingersoll Co. *v.* Fiske, 175 Mass. 19, the court said: "The defendant relies upon certain language in the case of Hosmer *v.* Hoitt, 161 Mass. 173. We have no doubt that that case was rightly decided; but we are of opinion that the reason given for the decision was wrong. The case came before the court on a motion to take off a default, no judgment having been entered. The case was a very simple one. By the Stat. of 1885, c. 384, § 10, the Superior Court had the power at any time before judgment to strike off the default. This power the Superior Court exercised; and this court overruled the plaintiff's exceptions. It was unnecessary for the decision to treat the case as if a judgment had been entered, and to say that the case was not *ripe for judgment* because a suggestion of insolvency and a motion for a continuance had not been acted upon before the case was defaulted." See also Norcross *v.* Crabtree, 161 Mass. 55; Bailey *v.* Edmundson, 168 Mass. 299

2. ***Riprap***, as used in a contract, has been held to mean a kind of wall; stone laid upon the slope of a dirt embankment, at such points as are likely to be washed by water. Wood *v.* Vermont Cent. R. Co., 24 Vt. 608.

3. Rising of Court. — A *Nebraska* statute provided that the party excepting must reduce his exceptions to writing within a time not exceeding forty days from the "*rising* of the court." It was held that the phrase "the *rising* of the court" must be deemed to be equivalent to "final adjournment" or "the last day of the term." State *v.* Weaver, 11 Neb. 165, *citing* Mechanics' Bank *v.* Withers, 6 Wheat. (U. S.) 106.

4. Risk — Insurance. — "The fallacy in the defendant's argument arises from the double meaning of the word *risk*. That means both the voyage commenced with necessary conditions to make the underwriters liable and also the chance of loss during its performance." Bradford *v.* Symondson, 7 Q. B. D. 464. See also Rodocanachi *v.* Elliott, L. R. 8 C. P. 649.

In Continental Ins. Co. *v.* Ætna Ins. Co., 138 N. Y. 21, it was said: "The word *risk*, in its ordinary and popular use, with reference to insurance, describes the liability assumed as specified on the face of the policy, and in that sense it is used in numerous statutes of this state regulating insurance companies, and in some adjudged cases."

In Friesmuth *v.* Agawam Mut. F. Ins. Co., 10 Cush. (Mass.) 587, an application for insurance in a mutual fire-insurance company stipulated that the statements therein were correct "so far as regards the *risk*." Another clause in the application, to which the policy was expressly made subject, provided that misrepresentation of material facts would destroy any claim for a loss. The application contained an untrue representation that the property was unencumbered. It was held that the policy was wholly void, and that the express covenant as to the *risk* did not limit the responsibility of the assured for other material misrepresentations.

Same — Risk Commencing. — In Cottam *v.* Mechanics, etc., Ins. Co., 40 La. Ann. 260, it was said: "The words 'beginning the adventure' are the equivalent of the expression '*risk* commencing.' And when does it so begin? In the language of the contract, 'from and immediately following the loading thereof on board of the said vessel.'"

Same — Increase of Risk. — See the title FIRE INSURANCE, vol. 13, pp. 266, 284 *et seq.*, and see Planters' Mut. Ins. Co. *v.* Rowland, 66 Md. 239.

Same — Policy and Risk Distinguished. — See POLICY, vol. 22, p. 941.

Same — Stock Subscriptions. — Stock subscriptions are not *risks*, and a statute prohibiting insurance companies from taking *risks*, except upon certain conditions, has been held not to invalidate stock subscriptions though such conditions have not been complied with. Bartlett *v.* Chouteau Ins. Co., 18 Kan. 369.

Same — Port Risk. — See the title MARINE INSURANCE, vol. 19, p. 965.

"**Risks of Navigation**" has been held to be a broader term than "perils of navigation" or "perils of the sea." Pitcher *v.* Hennessey, 48 N. Y. 419.

Own Risk — Carriers of Passengers. (See also the titles CARRIERS OF PASSENGERS, vol. 5, p. 621; TICKETS AND FARES.) — In McCawley *v.* Furness R. Co., L. R. 8 Q. B. 59, Blackburn, J., said: "The plea states that it was agreed that the plaintiff, being a drover traveling with cattle, should travel at his own *risk*; that is, he takes his chance, and, as far as having a

RISK OF EMPLOYMENT. — See the titles FELLOW-SERVANTS, vol. 12, p. 893; MASTER AND SERVANT, vol. 20, p. 3.

RIVAL. — See note 1.

RIVER. (See also the titles BOUNDARIES, vol. 4, p. 756; RIPARIAN RIGHTS, *ante;* WATERS AND WATERCOURSES; and see BANK OF A RIVER, vol. 3, p. 784.) — A river has been defined as a natural stream of water flowing betwixt banks or walls in a bed of considerable depth and width, being so called whether its current sets always one way or flows and reflows with the tide.[2]

right to recover damages, he shall not bring an action against the company for anything that may happen in the course of the carriage. It would of course be quite a different thing were an action brought for an independent wrong, such as an assault, or false imprisonment. Negligence in almost all instances would be the act of the company's servants, and 'at his own *risk*' would of course exclude that, and gross negligence would be within the terms of the agreement; as to wilful, I am at a loss to say what that means; but any negligence for which the company would be liable (confined, as I have said, to the journey, and it is so confined by the declaration) is excluded by the agreement."

Owner's Risk. — See generally the titles CARRIERS OF GOODS, vol. 5, p. 154; CARRIERS OF LIVE STOCK, vol. 5, p. 427; and see Irons *v.* Kentner, 51 Iowa 88; Keeney *v.* Grand Trunk R. Co., 59 Barb. (N. Y.) 140, *affirmed* 47 N. Y. 525; Baltimore, etc., R. Co. *v.* Rathbone, 1 W. Va. 107.

1. Rival. — In Hudson *v.* Tabor, 1 Q. B. D. 232, it was said: "The word in the report is *rival*, which according to Du Cange has two meanings, that of a river bank or shore, and that of a stream or watercourse; the context shows clearly that the word is used in the latter sense, for it goes on to state that the stream had become stopped, to the nuisance of the neighborhood, and the commissioners were to inquire by whom and through whose default the stoppage was occasioned."

2. River. — Berlin Mills Co. *v.* Wentworth's Location, 60 N. H. 156, *quoting* Bouv. L. Dict. See also The Garden City, 26 Fed. Rep. 772.

In State *v.* Gilmanton, 14 N. H. 477, it was said: "The word *river* is derived from the Latin word *rivus*, which again is derived from a Greek verb, signifying 'to flow.' In the classic authors it is used in a sense implying a current, a flowing of water from one point to another. '*Rivorum a fonte deductio*,' '*rivos deducere*,' '*tenuis fugiens per gramina rivus*,' are examples of the mode of its use by Cicero and Virgil. Webster defines a river to be 'a large stream' (which implies a current) 'of water flowing in a channel.' Johnson calls it 'a land current of water;' and in Rees's Encyclopædia it is defined to be 'a current of water.' Richardson, the most learned and satisfactory of modern English lexicographers, defines a *river* to be 'a flood or flowing course; a current; a stream of water;' and this definition expresses what we mean ordinarily when we speak of a *river*." See also Chamberlain *v.* Hemingway, 63 Conn. 5.

A *river* is defined as "water flowing in a channel between banks more or less defined." Rex *v.* Oxfordshire, 1 B. & Ad. 289, 20 E. C. L. 389; Berlin Mills Co. *v.* Wentworth's Location, 60 N. H. 156.

Distinguished from Brook or Sea. — A *river* is defined to be "a body of flowing water of no specific dimensions; larger than a brook or rivulet, less than a sea; a running stream, pent on each side by walls or banks." Alabama *v.* Georgia, 23 How. (U. S.) 513. See also Shelby County *v.* Castetter, 7 Ind. App. 312.

Same — High and Low Water. (See also the titles BOUNDARIES, vol. 4, p. 823 *et seq.;* STATES.) — In Com. *v.* Garner, 3 Gratt. (Va.) 669, Robinson, J., said: "A *river* is defined to be a stream of no precise dimensions, but larger than a brook; and it is that stream in all its conditions and stages; equally the *river* when reduced even far below ordinary low water, or when full to the top of its banks, or even when swelled by freshets beyond them. Nor does this notion of a *river*, on which the argument has been in part built up, that it is the stream within the low-water marks, find any color from the writers on national law. They tell us, a *river* is not to be considered as so much water merely, but as water flowing in a particular channel and enclosed in certain banks." But see Handly *v.* Anthony, 5 Wheat. (U. S.) 374, where it is said that *river* means a permanent *river*, that is the *river* within low-water marks. And see Com. *v.* Garner, 3 Gratt. (Va.) 692, 711.

Distinguished from Bay. — See BAY, vol. 3, p. 899.

Beginning and End of River. — "It is a *river* or watercourse from the point where the water comes to the surface and begins to flow in a channel until it mixes with the sea, the arms of the sea, lakes, etc. It may sometimes be dry, but * * * it must appear that the water usually flows in a particular direction and has a regular channel with bed, banks, or sides." Gould on Waters (2d ed.), § 41, *quoted* in Chamberlain *v.* Hemingway, 63 Conn. 6.

"A *river* or stream begins at its source where it comes to the surface." Chamberlain *v.* Hemingway, 63 Conn. 5, *quoting* Angell on Watercourses, § 46. See also Dudden *v.* Guardians of Poor, 1 H. & N. 627.

Bed — Bank. — In Eastman *v.* St. Anthony Falls Water-Power Co., 43 Minn. 64, it was said: "A *river* is composed of bed, banks, and water or stream. It is generally understood that the river-bed terminates where the banks begin, that is, at low-water mark." See also BANK OF A RIVER, vol. 3, p. 784; BED OF A RIVER, vol. 3, p. 905.

"Body of Water" Held to Include River. — See BODY, vol. 4, p. 612, note.

Current. — In State *v.* Gilmanton, 9 N. H. 461, it was intimated that a current would in-

ROAD. (See also the titles HIGHWAYS, vol. 15, p. 343; PRIVATE WAYS, vol. 23, p. 2; RAILROADS, vol. 23, p. 667; STREETS AND SIDEWALKS.) — 1. A road is defined as "a public way for passage or travel; a strip of ground appropriated for travel, forming a line of communication between different places; a highway; hence, any similar passage for travel, public or private."[1]

dicate that the water at that place was a *river*. See also State *v.* Gilmanton, 14 N. H. 473.

Dangers of Sea — Dangers of Lakes and Rivers. (See also the titles ACT OF GOD, vol. 1, p. 588; CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES, vol. 7, p. 221; MARINE INSURANCE, vol. 19, p. 1022.) — In an action against a carrier, the declaration stated the goods to have been delivered to the defendant on board a schooner to be safely carried from Michigan City to Buffalo, etc., "the dangers of the seas only excepted." The exception contained in the bill of lading offered in evidence by the plaintiff was "the dangers of the lakes and *rivers* excepted." It was held that the variance was immaterial. Harrison *v.* Hixson, 4 Blackf. (Ind.) 226.

River Fish. — In Woodhouse *v.* Etheridge, L. R. 6 C. P. 574, it was held that an eel which was bred in a *river* was a *river* fish.

River Front. — Upon the meaning of the term "*river* front," as used in a deed, the court said: "It evidently was not intended to refer to any part of the *river* bed, but is a description applicable to the shores above low-water mark, and, used in connection with 'land under water,' lends support to the construction placed upon the deed by the trial court, that it was intended to grant the submerged land above low-water mark, as defined and limited by the court." Eastman *v.* St. Anthony Falls Water-Power Co., 43 Minn. 64.

Judicial Notice. — Courts will take judicial notice of the *rivers* of the country. Shelby County *v.* Castetter, 7 Ind. App. 312. See also the title JUDICIAL NOTICE, vol. 17, p. 905.

River and Lake Distinguished. — See the title LAKES AND PONDS, vol. 18, p. 130.

Navigable Rivers. — See the title NAVIGABLE WATERS, vol. 21, p. 424.

Private Rivers. (See also the titles NAVIGABLE WATERS, vol. 21, p. 424; RIPARIAN RIGHTS, *ante;* WATERS AND WATERCOURSES.) — In People *v.* Platt, 17 Johns. (N. Y.) 211, it was said: "The distinguishing test between those *rivers* which are entirely private property and those which are private property subject to the public use and enjoyment, consists in the fact whether they are susceptible or not of use as a common passage for the public." See also Ellis *v.* Carey, 30 Ala. 727; Morrison *v.* Coleman, 87 Ala. 657; Chenango Bridge Co. *v.* Paige, 83 N. Y. 185.

Seacoast. — In Reg. *v.* Grey, L. R. 1 Q. B. 472, it was said: "*River* may also be used so as to include the neighboring seacoast."

Strait. — In The Garden City, 26 Fed. Rep. 772, it was said: "A *river* means a considerable stream of water that has a current of its own, flowing from a higher level, that constitutes its source, to its mouth, where it debouches. The 'East *river*,' so called, has none of these three essential elements. It has no source distinguishable from its mouth, nor has it any current of its own. It is a mere strait or gut, connecting the Atlantic ocean, through Long Island sound on the east, with the Atlantic ocean, through the upper and lower bays of New York on the south. It is swept by the tides, and has no current except such as the tides give it. Its whole length from Throg's neck to Governor's island is about seventeen miles."

"River" and "Stream" Used Synonymously. — See Rolle *v.* Whyte, L. R. 3 Q. B. 305; McHardy *v.* Ellice Tp., 1 Ont. App. 636. In this latter case it was held that the term *river* included a small stream.

Watercourses. — "The word 'watercourse' is a broader and more comprehensive word than *river*." Shelby County *v.* Castetter, 7 Ind. App. 312.

1. Road. — Northwestern Telephone Exch. Co. *v.* Minneapolis, 81 Minn. 154, *quoting* Cent. Dict.

"A passage through the country for the use of the people." Bouv. L. Dict., *quoted* in Horner *v.* State, 49 Md. 286; Chollar-Potosi Min. Co. *v.* Kennedy, 3 Nev. 373, and Newsom *v.* Newsom, (Tenn. Ch. 1900) 56 S. W. Rep. 31.

The term *road* "applies in its ordinary acceptation to a place set apart and appropriated, either *de jure* or *de facto*, to the purpose of passing with carriages, whether by public authority or by the general license and permission of the owners." Com. *v.* Gammons, 23 Pick. (Mass.) 203.

"The word *road* is defined to be 'a track for travel, forming a communication between one city, town, or place and another.'" Youngstown *v.* Pittsburgh, etc., R. Co., 2 Ohio Cir. Dec. 126, 3 Ohio Cir. Ct. 214.

Bridges. — The term includes bridges. Uhl *v.* Douglass Tp., 27 Kan. 81; Isaacs *v.* Wiley, 12 Vt. 679. *Compare* Simmons *v.* Ocean Causeway, 21 N. Y. App. Div. 40.

Same — Tax Sale. — An advertisement of a sale of land for taxes described the act granting the tax as an act assessing a tax "for the purpose of making and repairing and building bridges," when the act itself was "for the purpose of making and repairing *roads* and building bridges." It was held that this was such a material omission as to render invalid the sale under the advertisement. The court said: "The word 'bridges' is of lesser extent in signification than the word *roads*, and comprehends only particular portions of *roads* of a peculiar construction." Langdon *v.* Poor, 20 Vt. 16.

But in Isaacs *v.* Wiley, 12 Vt. 674, it was held that the omission of the word "bridges" in an advertisement under a similar act was not fatal, for the reason that the word *road* in an advertisement comprehended bridges, and consequently the purpose of the act was intelligently stated.

Bridges and Culverts. — A statute required that all contracts for the improvement of *roads* be let to the lowest competent bidder. It was held that the word *roads*, as thus used, in-

An open way or public passage; ground appropriated for travel. As a generic term it includes highway, street, and lane.[1] 2. "Road" is not infrequently

cluded permanent bridges and culverts. Follmer *v.* Nuckolls County, 6 Neb. 210. See also People *v.* Buffalo County, 4 Neb. 150.

By-road. — See BY-ROAD, vol. 5, p. 104.

County Road. — See COUNTY ROAD, vol. 7, p. 1010.

Easement. — That the term road primarily implies an easement, see State *v.* Dawson, 3 Hill L. (S. Car.) 100. And see the titles HIGHWAYS, vol. 15, p. 343; PRIVATE WAYS, vol. 23, p. 2.

Gates and Bars. — In Smith *v.* Worn, 93 Cal. 207, a deed granting a right of way over a *road* to be laid out was construed as entitling the grantee to a way without gates or bars, where there was nothing to indicate a different intention.

Gravel Road. — In Glass *v.* Tipton, etc., Turnpike Co., 32 Ind. 377, it was said: "It is insisted by the appellee that a 'turnpike' and a 'gravel *road*' are one and the same. This is only true in that a turnpike may include a gravel *road* or any other kind of *road* upon which a gate is placed for the collection of tolls to keep the *road* in repair."

Great Road. — See *Ex p.* Withers, 3 Brev. (S. Car.) 86.

Main Road. — See MAIN, vol. 19, p. 609.

Neighborhood Road. — See the title HIGHWAYS, vol. 15, p. 352. And see *Ex p.* Withers, 3 Brev. (S. Car.) 86; State *v.* Jefcoat, 11 Rich. L. (S. Car.) 529.

Path and Road. — See PATH, vol. 22, p. 506.

Pent Road. — See the title HIGHWAYS, vol. 15, p. 353.

Post Road. — See the title POSTAL LAWS, vol. 22, p. 1058.

Private Road. — See PRIVATE ROADS, vol. 23, p. 1, and see the next succeeding note.

Public Roads. — See PUBLIC ROADS, vol. 23, p. 458, and see the next succeeding note.

State Road. — See STATE ROADS.

Road Tax. (See also the titles HIGHWAYS, vol. 15, p. 343; TAXATION.) — A statute incorporating a fire company provided that its members should be exempt from military duty, *road* tax, and the performance of jury duty. In construing this provision the court said: "In our opinion, the word '*road* tax' was intended here to mean *road* duty. It is used in connection with the cognate subjects of military duty and jury duty. In its strict sense, there is no such assessment as a *road* tax under our laws" Lewin *v.* State 77 Ala. 46.

Same — For Road Purposes. — In People *v.* Wilson, 3 Ill. App. 373, it was said: "'A tax for the making and repairing of *roads* only' is a part of the tax collected for '*road* purposes,' and although the first expression, in an abstract sense, may be considered quite as comprehensive as the second, the legislature has seen proper to give it a more circumscribed meaning. The expression 'for *road* purposes,' however, we hold comprehends every step towards the making and improving roads and bridges, as provided for in section 81, and it seems clear that the most comprehensive terms are used in the present act for the purpose of avoiding the necessity of judicial construction."

Toll Road — Road in General Use by Traveling Public. (See also the title TURNPIKES.) — In State *v.* Lake, 8 Nev. 276, it was held that the phrase "*road* or highway now in general use by the traveling public," as employed in a toll-*road* act prohibiting interference with such a road, includes toll *roads*.

Turnpike Road. — See the title TURNPIKES.

Way and Road. — See WAY.

1. Webst. Dict.; And. L. Dict.; Manchester *v.* Hartford, 30 Conn. 120.

Highways. — The term *road* includes highways. Stokes *v.* Scott County, 10 Iowa 175; People *v.* Buffalo County, 4 Neb. 158; Follmer *v.* Nuckolls County, 6 Neb. 210.

And that the terms *road* and "highway" are used synonymously, see Smith *v.* Worn, 93 Cal. 214; Horner *v.* State, 49 Md. 286; Stedman *v.* Southbridge, 17 Pick. (Mass.) 164; Locke *v.* First Div. St. Paul, etc., R. Co., 15 Minn. 350; Fowler *v.* Lansing, 9 Johns. (N. Y.) 350; Brace *v.* New York Cent. R. Co., 27 N. Y. 271; Southwark R. Co. *v.* Philadelphia, 47 Pa. St. 314.

Public and Not Private Road. — The word *road*, used in a public act, means a public *road* — a *road* over which the public have rights. Curtis *v.* Embery, L. R. 7 Exch. 372.

In Morgan *v.* Palmer, 48 N. H. 336, it was held that a reservation in a grant of "the rangeway, if ever wanted for a *road*," was not a reservation of a private way, but of a public highway. See also Smith *v.* Worn, 93 Cal. 214. *Compare* Kister *v.* Reeser, 98 Pa. St. 1, 42 Am. Rep. 608.

A statute gave a right of action to any person injured in person or property through the want of repairs in a *road*, against the town or city in which the injury occurred. It was held that *road*, as here used, unquestionably meant a public highway. Bogie *v.* Waupun, 75 Wis. 4.

In Heiple *v.* East Portland, 13 Oregon 103, it was said that "the word *road* is uniformly taken as a public highway, and such is the common and legal acceptation of the word *road*. Respublica *v.* Arnold, 3 Yeates (Pa.) 422. It is, therefore, synonymous with highway."

But the term is sometimes used as meaning a private *road* and not a highway. See Hart *v.* Red Cedar, 63 Wis. 638, and see the general definitions given *supra*.

Same — Crossings. (See also the title CROSSINGS, vol. 8, p. 335.) — A requirement that a railroad company should erect suitable crossings where its line was crossed by *roads* was held not to require the company to erect a bridge at a farm crossing. But the statute had provided a specific remedy for such a case. Green *v.* Morris, etc., R. Co., 24 N. J. L. 490. See also Brooks *v.* New York, etc., R. Co., 13 Barb. (N. Y.) 594.

In Locke *v.* First Div. St. Paul, etc., R. Co., 15 Minn. 350, it was held that a provision in a railroad charter requiring locomotives to ring a bell or blow a whistle when approaching a *road* or street had no application to a private crossing.

Lane. — The term *road* includes a lane.

used in the sense of "railroad,"[1] and when thus used the term has been

Stokes *v.* Scott County, 10 Iowa 175; Follmer *v.* Nuckolls County, 6 Neb. 210; People *v.* Buffalo County, 4 Neb. 158.

Road Held to Include Street. — In *In re* Vacation of Osage St., 90 Pa. St. 117, it was said: "The word ***road***, in a proper connection, may be fitly used to designate a city or borough street." And that the term ***road*** includes a street, see Stokes *v.* Scott County, 10 Iowa 175; Northwestern Telephone Exch. Co. *v.* Minneapolis, 81 Minn. 154; People *v.* Buffalo County, 4 Neb. 150; Follmer *v.* Nuckolls County, 6 Neb. 210; Southern Kansas R. Co. *v.* Oklahoma City, (Okla. 1902) 69 Pac. Rep. 1054; Stormfeltz *v.* Manor Turnpike Co., 13 Pa. St. 560; Road from Fitzwater St. to Shippen St., 4 S. & R. (Pa.) 106; Sharett's Road, 8 Pa. St. 89.

Same — Cattle Guards. — A statute required railroad companies to maintain cattle guards at all ***road*** crossings. It was held that ***road***, as thus used, included a street in a village. Brace *v.* New York Cent. R. Co., 27 N. Y. 269.

Roads and Streets Distinguished. — In State *v.* Putnam County, 23 Fla. 639, it was said: "Though all public ***roads*** and all streets are public highways, yet neither all public highways nor all public ***roads*** are streets, or city or town highways. * * * Public ***roads*** are established by the county authorities with reference to the convenience of the people of the county or of neighborhoods therein; streets and other municipal highways are located in obedience to the dictation of the welfare and convenience of the town or city. The ***road*** may be so located in the town that no interest of the municipality would dictate its maintenance at municipal expense; it may touch no municipal highway of any kind." See also Duval County *v.* Jacksonville, 36 Fla. 196.

Same — Private or Local Bill. — In Matter of Woolsey, 95 N. Y. 135, it was held that the provision of Const. N. Y., art. 3, § 18, prohibiting the passage of a "private or local bill * * * laying out, opening, altering, * * * ***roads***, highways, or alleys" did not include and was not applicable to city streets and avenues. But in giving this construction to the clause the court was governed, perhaps, rather by the history of the amendment than by the force of the words used.

Same — Railroad Crossing Road. — A statute provided that a railroad company might, whenever it was necessary in the construction of its ***road*** to cross a ***road*** or stream of water, divert the same from its location or bed, but the company should without any unnecessary delay place such ***road*** or stream in such condition as not to impair its former usefulness. It was held that ***road*** did not include streets. The court said: "Undoubtedly, as a generic term, it includes street and highway, but in general, usage impresses an ordinary meaning upon words; 'street' denotes a main way in a city or town, and ***road*** a highway in the country; and it is in such sense that they are used in these sections. Indeed, the rule in the interpretation of statutes is to construe words according to their ordinary meaning." Youngstown *v.* Pittsburgh, etc., R. Co., 2 Ohio Cir. Dec. 126, 3 Ohio Cir. Ct. 214.

1. Road in Sense of or Including Railroad. (See also RAILROAD — RAILWAY, vol. 23, p. 645.) — Parker *v.* New Orleans, etc., R. Co., 33 Fed. Rep. 699; Bridge Proprietors *v.* Hoboken Co., 1 Wall. (U. S.) 147; Van Hostrup *v.* Madison, 1 Wall. (U. S.) 291; Aurora *v.* West, 9 Ind. 74; Evansville, etc., R. Co. *v.* Evansville, 15 Ind. 395; Washington County *v.* David, (Neb. 1902) 89 N. W. Rep. 737; Pierce *v.* Emery, 32 N. H. 484; Central R. Co. *v.* Hudson Terminal R. Co., 46 N. J. L. 292.

An ordinance granting a franchise to a street-railroad company contained the following condition: "This franchise is granted upon condition that the company faithfully fulfil the requirements herein expressed, and should the company fail therein or wilfully abandon such ***road***, and neglect or refuse to operate it, then this franchise to become null and void. Said company agree that they will forfeit said ***road*** to the city of Tower in one year after said company cease to operate said ***road***." In holding that the word ***road*** had the same import as "railroad," the court said: "By reference to our statutes upon the subject of railroads, it will be found that in numerous instances the word ***road*** is used in the same sense and with the same meaning as 'railroad.' Of course, whether the word ***road*** is used as synonymous with, or the equivalent of, 'railroad' depends upon its context." Tower *v.* Tower, etc., St. R. Co., 68 Minn. 504.

It has been held that where counties are authorized to aid in the construction of any ***road*** or bridge, the term ***road*** includes railroads. See the title MUNICIPAL AID, vol. 20, p. 1101.

Road Distinguished from Track. — In construing a statute prescribing the duty of a railroad company on the appearance of a person, animal, or other obstruction upon the ***road***, the court said: "In the first place, the statute does not say when any person, animal, or other obstruction appears upon the roadbed, or track, but when such shall appear 'upon the ***road***.' The ***road***, in contemplation of the statute, is not merely what is called strictly the roadbed or track, but it is the whole ***road***, and it is the duty of the lookout to sweep the whole ***road*** with his vision; and we know as matter of fact it is quite easy for him to do this." Nashville, etc., R. Co. *v.* Anthony, 1 Lea (Tenn.) 519. But this case was *overruled* in Louisville, etc., R. Co. *v.* Reidmond, 11 Lea (Tenn.) 205, 13 Am. & Eng. R. Cas. 517, where the court said: "His Honor was undoubtedly right in holding that an obstruction upon the ***road***, within the meaning of the statute, was something in a position to be struck or directly injured by the engine or train while moving on the rails, and that an animal not thus situated, but merely on some part of the company's right of way, would not be such an obstruction. Holder *v.* Chicago, etc., R. Co., 11 Lea (Tenn.) 176. If the language of the learned judge who delivers the opinion of the court in the case of the Nashville, etc., R. Co. *v.* Anthony, 1 Lea (Tenn.) 516, was intended to give a broader meaning to the word ***road***, as used in the statute, it was inadvertent, and

extended to include the appendages of a railroad.[1] But the term "road" will not always include a railroad.[2] 3. In maritime law, a "road" or "roadstead" is an open passage of the sea which, from the situation of the adjacent land and its own depth and width, affords a secure place for the common riding and anchoring of vessels.[3]

ROADBED — ROADWAY. (See also RIGHT OF WAY, *ante*; ROAD, *ante*; and see the title RAILROADS, vol. 23, p. 667). — The roadbed is the foundation on which the superstructure of a railroad rests; the term roadway has a more extended signification as applied to railroads. In addition to the part denominated roadbed, the roadway includes whatever space of ground is allowed by law to the company in which to construct its roadbed and lay its track, *i. e.*, the right of way.[4]

not required by the facts or essential to the point actually decided."

Right of Way. (See also RIGHT OF WAY, *ante*.) — A city lot was conveyed to a railroad company on condition that the company should construct and maintain its *road* through such lot. It was claimed that the word *road*, as thus used, meant simply the narrow strip of land on which the track was laid, but the court refused to sustain this contention. Union Pac. R. Co. *v.* Cook, (C. C. A.) 98 Fed Rep 283.

On Both Sides of Its Road. — A statute required a railroad to fence "on both sides of its *road*." In construing this statute in People *v.* Ohio, etc., R. Co, 21 Ill. App. 27, the court said: "We hold the meaning of these words, 'on both sides of its *road*,' to be the margin or border of the entire ground used as a roadway. This gives certainty and completeness to all the sections in reference to fencing."

Railroad and Line Distinguished. — See the title INTERSTATE COMMERCE, vol. 17, p. 158, note.

Connecting Road. — See the title CONNECTING CARRIERS (OF GOODS), vol. 6, p. 603.

Lateral Road. — See the title LATERAL OR BRANCH RAILROADS, vol. 18, p. 560.

1. Appendages.—In State Treasurer *v.* Somerville, etc., R. Co., 28 N. J. L. 21, it was held that the word *road*, in a charter requiring a railroad company to pay an annual tax of one-half of one per cent. upon the cost of its *road*, included the *road* and its appendages, in which were included bridges, viaducts, wharves, piers, depots, and depot grounds, machine shops, and other similar erections which were essential to its completion or to its advantageous or convenient operation; but that the term did not include the equipment, cars, engines, and other personal property of the company.

And in Toledo, etc., R. Co. *v.* Lafayette, 22 Ind 269, it was held that the word *road*, as used in a tax act, embraced not only the track, rolling stock, machinery, sidetracks, and switches, but all depots, machine shops, etc.

But in Atlanta St. R. Co. *v.* Atlanta, 66 Ga. 104, it was held that under a contract between a municipal corporation and a street-railroad company that "the *road*, rolling and live stock of said company" should be exempted from taxation, stables, shops, houses for storage of lumber, and other like conveniences, were not exempted.

And in Akers *v.* United New Jersey R., etc., Co., 43 N. J. L. 110, it was held that an act which authorized railroad corporations to condemn land "adjoining their *road* as constructed on their right of way, as located," did not apply to land which merely adjoined a sidetrack leading from the railway route to a freight house.

2. Road Held Not to Include Railroads. — In Stokes *v.* Scott County, 10 Iowa 176, *overruling* Dubuque County *v.* Dubuque, etc., R. Co., 4 Greene (Iowa) 1, it was said: "In this state it is not true that by the word *road* is understood 'railroad,' either in ordinary conversation or when used in the statute, for whatever purpose framed."

In State *v.* Wapello County, 13 Iowa 397, it was said: "That no improper or extended construction should be given to the word *road*, the legislature took the precaution, in section 26 of the Code, to define the sense in which it was to be used, limiting its meaning to that of an ordinary 'county *road*,' 'common *road*,' or 'state *road*.' Now we have an abundance of judicial authority for saying that a railroad is neither of these, for it has been held, both in *England* and in this country, upon principle as well as upon authority, that the construction of a railway over lands already taken for a public highway is an additional servitude upon the land, and entitles the owner to additional compensation for right of way; and that upon this ground the use of land for a railroad is vastly more onerous and detrimental to the owner of the fee. Springfield *v.* Connecticut River R. Co., 4 Cush. (Mass.) 63; Evansville, etc., R. Co. *v.* Dick, 9 Ind. 433; Protzman *v.* Indianapolis, etc., R. Co., 9 Ind. 467; Lexington, etc., R. Co. *v.* Applegate, 8 Dana (Ky.) 289."

3. Bouv. L. Dict., *citing* Hale, de Port. Mar., p. 2, c. 2. The word, however, does not appear to have a very definite meaning in maritime law.

"A *road* or 'roadstead' in the commercial sense and by the maritime definition is 'a place where ships may ride at anchor at some distance from the shore.' In the very name, therefore, of Hampton *Roads* is implied a place of anchorage at a distance from the shore." The Steamer J. W. Everman, 2 Hughes (U. S.) 28.

4. Roadbed and Roadway Distinguished. — Santa Clara County *v.* Southern Pac. R. Co., 118 U. S. 413; North Beach, etc., R. Co.'s Appeal, 32 Cal. 499; San Francisco, etc., R.

ROAD BRAND. — See the title BRANDS AND MARKS, vol. 4, p. 875.

ROADWORTHY. — See the titles CARRIERS OF PASSENGERS, vol. 5, p. 519 *et seq.*; LIVERY-STABLE KEEPERS, vol. 19, p. 434.

ROASTER. — See COFFEE ROASTER, vol. 6, p. 201.

ROBBERS. — See the titles MARINE INSURANCE, vol. 19, p. 1028; ROBBERY, *post*.

Co. *v.* State Board of Equalization, 60 Cal. 34; San Francisco *v.* Central Pac. R. Co., 63 Cal. 469. See also Standard L., etc., Ins. Co. *v.* Langston, 60 Ark. 381; Cass County *v.* Chicago, etc., R. Co., 25 Neb. 348.

Same — Common Road. — In San Francisco *v.* Central Pac. R. Co., 63 Cal. 469, 49 Am. Rep. 99, it was said: "These two words [***roadbed*** and ***roadway***] as applied to common roads, ordinarily mean the same thing, but as applied to railroads their meaning is not the same."

Right of Way and Roadway Synonymous. — Chicago, etc., R. Co. *v.* Cass County, 8 N. Dak. 20.

Bridge. — In Cass County *v.* Chicago, etc., R. Co., 25 Neb. 348, it was held that a railroad bridge across a navigable stream, owned, used, and operated by a railroad company as a part of its line of road, was not within the terms ***roadbed***, "right of way," and "superstructure," as used in a tax act. But this case was *overruled* in Chicago, etc., R. Co. *v.* Richardson County, 61 Neb. 519.

Fences. — In Santa Clara County *v.* Southern Pac. R. Co., 118 U. S. 413, it was held that fences erected upon the line between the right of way of a railroad and the land of adjacent proprietors were not part of the road.

Sidetracks, Etc. — In Chicago, etc., R. Co. *v.* Cass County, 8 N. Dak. 18, it was held that the term "right of way" included not only the strip of ground upon which the main line was located, but also ground necessary for the construction of sidetracks, turnouts, station houses, freight houses, etc. See also Standard L., etc., Ins. Co. *v.* Langston, 60 Ark. 381.

Steamers. — In San Francisco *v.* Central Pac. R. Co., 63 Cal. 467, 49 Am. Rep. 99, it was held that steamers used by a railroad company to transport freight cars across water were not a part of the ***roadway*** or ***roadbed***.

The Term "Railroad" has received a more extended signification than the mere track or ***roadway***. U. S. Trust Co. *v.* Atlantic, etc., R. Co., 8 N. Mex. 673.

Accident Insurance. (See also the title ACCIDENT INSURANCE, vol. 1, pp. 311, 312.) — In Piper *v.* Mercantile Mut. Acc. Assoc., 161 Mass. 589, where the space between the tracks was not fitted up as a way, the court said: "It was a part of the ***roadbed***, and nothing more."

Roadbed and Track. — See TRACK

ROBBERY.

By Edmund Burke.

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CROSS-REFERENCES.

For matters of Procedure, *see the* Encyclopædia of Pleading and Practice, vol. 18, p. 1217.

For other matters of Substantive Law and Evidence *related to this subject, see the following titles in this work:* ACCESSORY, vol. 1, p. 257; ATTEMPTS

TO COMMIT CRIME, vol. 3, p. 250; *BURGLARY*, vol. 5, p. 44; *CRIMINAL LAW*, vol. 8, p. 274; *EXTORTION*, vol. 12, p. 576; *FALSE PERSONATION*, vol. 12, p. 786; *FALSE PRETENSES AND CHEATS*, vol. 12, p. 792; *PIRACY*, vol. 22, p. 826; *POSTAL LAWS*, vol. 22, p. 1036; *RECEIVING STOLEN PROPERTY*, *ante*; *THREATS AND THREATENING LETTERS*. *And see BLACKMAIL*, vol. 4, p. 577.

I. Definitions — 1. At Common Law. — Robbery, at common law, is the felonious taking, without a *bona fide* claim of right, of a thing of value from the person or presence of another, against his will, by force or by putting him in fear.[1] The definitions in the reports of the several states of the Union are substantially in the language of the early writers.[2]

2. Under Statutes — *a.* In General. — While a few of the states refer to the common law for the definition of the offense and provide only for its punishment,[3] in *England* and in most of the *United States* the offense is regulated in detail by statute; these statutes, however, are not in general anything more than a codification of the common-law doctrine, the most striking departures

1. Other Definitions — Blackstone. — "Open and violent larceny from the person, or robbery, the *rapina* of the civilians, is the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him in fear." 4 Black. Com. 242, *approved* in Bonsall *v.* State, 35 Ind. 460; Com. *v.* Davis, (Ky. 1902) 66 S. W. Rep. 27; State *v.* Perley, 86 Me. 427, 41 Am. St. Rep. 564; Com. *v.* Humphries, 7 Mass. 242; Brown *v.* State, 33 Neb. 354; Com. *v.* White, 133 Pa. St. 182, 19 Am. St. Rep. 628; Com. *v.* Mills, 3 Pa. Super. Ct. 161; Houston *v.* Com., 87 Va. 257, and State *v.* Dengel, 24 Wash. 49.

East. — Robbery, at common law," is a felonious taking of money or goods to any value from the person of another, or in his presence, against his will, by violence or putting him in fear." 2 East P. C., c. 16, § 124, *approved* in State *v.* Lawler, 130 Mo. 366, 51 Am. St. Rep. 575; State *v.* Burke, 73 N. Car. 83; State *v.* Sowls, Phil. L. (61 N. Car.) 151; Hardy *v.* Com., 17 Gratt. (Va.) 592; and 2 Roscoe's Crim. Ev. (8th Am. ed.) 932.

East's definition is distinguishable from those of Hale and Hawkins by the use of the words "or in his presence" and "against his will." This distinction is also pointed out in State *v.* Lawler, 130 Mo. 366, 51 Am. St. Rep. 575, where it is further said that "the words 'in his presence' were added to the words 'from his person' by judicial construction, as substitutionary of and tantamount in meaning to 'from his person,' and this in order to prevent an evasion of the law."

Lord Mansfield defined robbery as the felonious taking of property from the person of another by force, in which three things are to be observed: 1. That it must be done feloniously, which goes to the intent of the taker. 2. That it must be taken from the person of another. 3. That it must be taken by force. Rex *v.* Donolly, 2 East P. C., c. 16, § 130, *approved* in Breckinridge *v.* Com., 97 Ky. 267; and State *v.* Brown, 113 N. Car. 645.

Coke. — "Robbery is a felony by the common law, committed by a violent assault upon the person of another, by putting him in fear and taking from his person his money or other goods of any value whatsoever. * * * It is derived *de la robe*, both because in ancient times (as sometimes yet is done) they bereave the true man of some of his robes or garments, and also for that his money or other goods are taken from his person, that is, from or out of some part of his garment or robe about his person." 3 Co. Inst. 68.

In Brooks *v.* People, 49 N. Y. 436, 10 Am. Rep. 398, it was said that Coke's definition is not careful, as it omits all idea of force or violence, or of putting in fear in the taking, but this refers to the definition as found in the earlier work (Co. Litt. 288*a*), where it is defined to be a "felonious taking away of a man's goods from his person."

2. American Definitions — *Alabama.* — Thomas *v.* State, 91 Ala. 34; James *v.* State, 53 Ala. 380; Allen *v.* State, 58 Ala. 98; Wesley *v.* State, 61 Ala. 282.

Arkansas. — Routt *v.* State, 61 Ark. 594.

Georgia. — Crawford *v.* State, 90 Ga. 701, 35 Am. St. Rep. 242.

Illinois. — Burke *v.* People, 148 Ill. 70.

Indiana. — Seymour *v.* State, 15 Ind. 288.

Iowa. — State *v.* Kegan, 62 Iowa 106.

Kentucky. — Blanton *v.* Com., (Ky. 1900) 58 S. W. Rep. 422.

Massachusetts. — Com. *v.* Humphries, 7 Mass. 242.

Missouri. — State *v.* Davidson, 38 Mo. 374; State *v.* Broderick, 59 Mo. 318; State *v.* Moore, 106 Mo. 480; State *v.* Adair, 160 Mo. 391.

Nebraska. — Stevens *v.* State, 19 Neb. 647; Brown *v.* State, 33 Neb. 354.

Pennsylvania. — Com. *v.* Snelling, 4 Binn. (Pa.) 379.

Tennessee. — Miller *v.* State, 12 Lea (Tenn.) 223; Hammond *v.* State, 3 Coldw. (Tenn.) 129; Crews *v.* State, 3 Coldw. (Tenn.) 350.

Utah. — People *v.* Hughes, 11 Utah 100.

Virginia. — Houston *v.* Com., 87 Va. 257.

3. The Common-law Definition of the word "rob" should be resorted to where the statute uses the word without defining it. U. S. *v.* Wilson, Baldw. (U. S.) 93.

The word "force" in a statutory definition is equivalent to the word "violence," in the common-law definition, and so also putting in fear is equivalent to intimidation. Clary *v.* State, 33 Ark. 561; Long *v.* State, 12 Ga. 293.

being in the classification of the offense into grades or degrees with corresponding penalties, and, in many jurisdictions, a more liberal definition of the requisite force or fear. The statutory qualifications of the common law will be hereinafter considered in their appropriate places.[1]

b. DEGREES OF CRIME. — In some jurisdictions the degree of guilt is made to depend upon the method of violence used in obtaining the property, as whether the accused was at the time armed with a dangerous weapon, or, being so armed, inflicted personal injury on the person assaulted;[2] whether the act was committed with the aid of accomplices actually present; whether the threatened violence was of immediate or future injury; or whether the robbery was upon or near a highway.[3] So in some jurisdictions train robbery is considered to be attended with aggravating circumstances.[4] Obtaining money by threats is sometimes called robbery in the third degree,[5] but usually it is made into a distinct offense.[6]

II. NATURE OF CRIME — 1. As Offense Against Person and Property. — The offense is against the person as well as against the goods of the owner.[7]

2. Distinguished from Larceny in General. — In a leading case[8] it was said that the distinction between larceny and robbery is that in larceny the property is taken privately and without the knowledge of the owner, and in robbery it is taken with his knowledge but against his will. But this evidently is not true where the violence is used to distract the attention of the owner from the act of taking.[9] Robbery, however, is a species of larceny involving the same elements of turpitude, aggravated by taking from the person, by open violence or putting in fear. The same design and malicious purpose and intent are in both offenses.[10]

1. 24 and 25 Vict., c. 96, § 40 *et seq.* This statute does not in general terms attempt to define the crime, but graduates the punishment to correspond with the degree of force used in the commission of the act, and makes it a distinct crime to extort money by threats. As to whether this statute has entirely superseded the common law, see *infra*, this title, *Essentials — Force or Fear — Fear of Injury to Reputation.* See statutes of the several states.

2. See the state statutes.

In Com. *v.* Martin, 17 Mass. 359, it was held that in order to make robbery a capital offense within the Statute of 1818, c. 124, § 1, it was sufficient for the party to be armed with a dangerous weapon, with intent to kill or maim the party assaulted by him in case such killing or maiming was necessary to his purpose of robbing, and that he should have the power of executing such intent.

It was not the intention of the legislature to create a new offense, but merely to prescribe a new punishment of acts which constitute robbery at common law. Com. *v.* Clifford, 8 Cush. (Mass.) 215. See 2 Rev. Laws (Mass.), 1902, p. 1744, § 17; p. 1745, § 19.

The common law is superseded by the statutes, under the provisions of one or the other of which it must be prosecuted. People *v.* Calvin, 60 Mich. 113. See 3 Comp. Laws of Mich. (1897), p. 3422, § 15; p. 3423, § 17.

3. See the various statutes.

No road in Virginia is a highway, within the statute taking away benefit of clergy, unless it is a public road laid out according to law, no evidence of which can be received but by the record, U. S. *v.* King, 1 Cranch (C. C.) 444, 26 Fed. Cas. No. 15,534; nor is a railroad a highway in such sense, State *v.* Johnson, Phil. L. (61 N. Car.) 140.

A building used as a place of business, situated on or near a highway, cannot be considered as included within the meaning of a statute punishing highway robbery. State *v.* Stewart, 1 Penn. (Del.) 433.

4. See for examples the statutes of *Alabama*, *Louisiana* and *Mississippi*.

5. 1 Rev. Stat. Mo., p. 557, § 1895.

6. See the titles EXTORTION, vol. 12, p. 576; THREATS AND THREATENING LETTERS.

7. 3 Co. Inst. 68; James *v.* State, 53 Ala. 380; Thomas *v.* State, 91 Ala. 34; Brown *v.* State, 120 Ala. 342; Com. *v.* Mills, 3 Pa. Super. Ct. 161.

8. Long *v.* State, 12 Ga. 293.

9. That the force used, or the putting in fear, is the gravamen of the offense, see *infra*, this title, *Essentials — Force or Fear.*

As to stealthily abstracting property while diverting attention, see *infra*, this title, *Essentials — Must Be Against Will.*

10. **Species of Larceny** — *England.* — Reg. *v.* McGrath, L. R. 1 C. C. 205.

United States. — U. S. *v.* Durkee, McAll. (U. S.) 196.

Arkansas. — Clary *v.* State, 33 Ark. 561; Haley *v.* State, 49 Ark. 147; Keeton *v.* State, (Ark. 1902) 66 S. W. Rep. 645.

California. — People *v.* Nelson, 56 Cal. 77; People *v.* Clary, 72 Cal. 59; People *v.* Jones, 53 Cal. 58; People *v.* Chuey Ying Git, 100 Cal. 437.

Illinois. — Burke *v.* People, 148 Ill. 70; Tobin *v.* People, 104 Ill. 565.

Indiana. — Hickey *v.* State, 23 Ind. 21; Duffy *v.* State, 154 Ind. 250; Bonsall *v.* State, 35 Ind. 460; Arnold *v.* State, 52 Ind. 281, 21 Am. Rep. 175.

Iowa. — State *v.* Reasby, 100 Iowa 231; State *v.* Graff, 66 Iowa 482.

3. Distinguished from Larceny from Person. — The charge of robbery under the *Nebraska* statutes includes the offense subsequently created of stealing from the person without force and violence, or putting in fear.[1]

4. Distinguished from Forcible Trespass. — The distinction between robbery and forcible trespass is that in the former a felonious intention exists, and in the latter it does not.[2]

5. Distinguished from Piracy. — Robbery committed on the high seas is piracy, under Act Cong. 1796, c. 36, § 8.[3]

III. Essentials — 1. Taking — *a.* In General. — By the "taking" necessary in this offense is implied first, that the person from whom the thing was taken must have been in peaceable possession thereof,[4] and second, that there was a manucaption and possession by the taker of the thing taken,[5] though the carrying away need be little if any more than formal, the slightest removal from a former position being sufficient.[6] The taker's possession, therefore, need be but momentary.[7]

b. Redelivery. — Where the offense of robbery is once actually completed by the felonious and violent taking of property from the person of another into the possession of the thief, it cannot be purged by any subse-

Kentucky. — Sullivan *v.* Com., (Ky. 1887) 5 S. W. Rep. 365.

Louisiana. — State *v.* Devine, 51 La. Ann. 1296.

Massachusetts. — Com. *v.* Humphries, 7 Mass. 244; Com. *v.* Clifford, 8 Cush. (Mass.) 216.

Missouri. — State *v.* Sommers, 12 Mo. App. 374; State *v.* Johnson, 111 Mo. 578.

Montana. — State *v.* Rodgers, 21 Mont. 143.

Nebraska. — Stevens *v.* State, 19 Neb. 647; Brown *v.* State, 33 Neb. 354.

New York. — Murphy *v.* People, 3 Hun (N. Y.) 114; People *v.* Langton, 32 Hun (N. Y.) 461.

North Carolina. — State *v.* John, 5 Jones L. (50 N. Car.) 163, 69 Am. Dec. 777.

Pennsylvania. — Com. *v.* Mills, 3 Pa. Super. Ct. 161.

Tennessee. — Hammond *v.* State, 3 Coldw. (Tenn.) 130; Crews *v.* State, 3 Coldw. (Tenn.) 350; Tucker *v.* State, 3 Heisk. (Tenn.) 484.

Texas. — Higgins *v.* State, (Tex. App. 1892) 19 S. W. Rep. 503.

Washington. — State *v.* Johnson, 19 Wash. 410.

United States Courts. — But although robbery includes larceny and the federal courts have jurisdiction of the latter offense in certain cases, this in itself, and in the absence of Congressional legislation on the subject, does not confer jurisdiction of cases of robbery. U. S. *v.* Terrel, Hempst. (U. S.) 411, and case on same point, reported in full on page 413. So also if the evidence establishes robbery the court may not entertain jurisdiction though it is expressly authorized to try cases of attempt to rob. See *infra*, this title, *Attempts.*

1. Brown *v.* State, 33 Neb. 354, *construing* Crim. Code Neb., § 13; Hill *v.* State, 42 Neb. 528; Granger *v.* State, 52 Neb. 354.

And in *New York* under an indictment for robbery the jury may convict the prisoner of larceny from the person. Murphy *v.* People, 3 Hun (N. Y.) 114.

But in *Georgia* it is held that robbery is not of the same character as the offense of larceny from the person, or cheating, or swindling; robbery involves force, the others do not. Doyle *v.* State, 77 Ga. 513.

2. State *v.* Sowls, Phil. L. (61 N. Car.) 151.

Simple Assault is included in the charge of robbery. Fox *v.* State, 50 Ark. 528.

3. See the title Piracy, vol. 22, p. 826.

4. **The Taking.** — Paper given to one under restraint upon which he is compelled to write an order for payment of money is not the subject of robbery even under 7 & 8 Geo. IV., c. 29, § 6, providing for the punishment of stealing choses in action. Rex *v.* Edwards, 6 C. & P. 521, 25 E. C. L. 522, *following* Rex *v.* Phipoe, 2 Leach C. C. 673, 2 East P. C., c. 16, § 73; 2 Russ. on Crimes (9th Am. ed.) 103.

As to ownership of property, see *infra*, this section, *Ownership.*

5. James *v.* State, 53 Ala. 380; Thomas *v.* State, 91 Ala. 34; Terry *v.* State, 13 Ind. 70; Com. *v.* Clifford, 8 Cush. (Mass.) 215; 2 Russ. on Crimes (9th Am. ed.) 103; 3 Co. Inst. 69; 3 Greenleaf on Evidence (14th ed.), § 225; 4 Black. Com. 242; 1 Wharton on Crim. Law (10th ed.), § 849.

Illustrations. — The snatching of an earring with such violence as to injure a person, the jewel being removed from the ear but caught in the hair, is robbery, Rex *v.* Lapier, 2 East P. C., c. 16, § 4, 1 Leach C. C. 320; but it is not a "taking" to compel one by threats of violence to lay down a bundle he is carrying, where the accused is apprehended before he can remove the property from where it lies, Farrell's Case, 1 Leach C. C. 322, note b; nor is it if a purse which is tied to a girdle falls to the ground in the struggle to secure it, and the purse is not taken up by the thief, though the girdle breaks, 1 Hale's P. C. 533; 2 Russ. on Crimes (9th Am. ed.) 103. And see Clary *v.* State, 33 Ark. 561; Kit *v.* State, 11 Humph. (Tenn.) 167; U. S. *v.* Jones, 3 Wash. (U. S.) 209, as to the necessity of actual severance of the property from the person.

The Giving of Money or other property through fear is a constructive taking. 2 Russ. on Crimes (9th Am. ed.) 104. And see *infra*, this section, *Must Be Against Will.*

6. Breckinridge *v.* Com., 97 Ky. 272.

7. State *v.* Burke, 73 N. Car. 83.

quent redelivery of the property to the owner. This is true although the thief may have retained possession but a short time,[1] and it is no defense that he intended only the temporary use of the property taken.[2]

c. THING TAKEN AND ITS VALUE. — It is essential, in order to constitute a robbery, that some property be feloniously taken by violence,[3] and though it must have at least some value, the kind or amount is not material, force and fear being the gravamen of the offense.[4] This principle of the common law has been incorporated in the statutes of several of the states.[5] If the things taken are not worthless, they are the subject of robbery though they are of insignificant or merely nominal pecuniary value, or even if their worth is incapable of estimation in money.[6]

2. Force or Fear — *a.* IN GENERAL. — While in robbery as in larceny there must be a taking[7] of another's property[8] with felonious intent to deprive the owner of the use thereof,[9] the element of robbery, distinguishing it from other forms of larceny, lies in the violence inflicted on the person of the one rightfully in possession of the property or the putting him in fear of injury.[10]

1. Redelivery. — Rex *v.* Peat, 1 Leach C. C. 228; McGinty *v.* State, 97 Ga. 368; 1 Hawk. P. C., c. 34, § 2; 2 Russ. on Crimes (9th Am. ed.) 104; 4 Black. Com. 442.

" The outrage offered to the rights of society doth not vary in its nature because ineffectual in its consequences." 1 Hawk. P. C., c. 34, § 2.

If a robber takes a purse of money from a person and restores it to him immediately, saying, " If you value your purse take it back again and give me the contents," but is apprehended before the money is delivered to him, yet the crime is completed. Rex *v.* Peat, 1 Leach C. C. 228, 2 East P. C., c. 16, § 5.

2. Hope *v.* People, 83 N. Y. 418, 38 Am. Rep. 460.

3. James *v.* State, 53 Ala. 380.

4. Value of Thing Taken — *Alabama.* — Wesley *v.* State, 61 Ala. 282.

Arkansas. — Clary *v.* State, 33 Ark. 561.

California. — People *v.* Chuey Ying Git, 100 Cal. 437.

Georgia. — Spencer *v.* State, 106 Ga. 692; McDow *v.* State, 110 Ga. 293.

Illinois. — Burke *v.* People, 148 Ill. 70.

Maine. — State *v.* Perley, 86 Me. 427, 41 Am. St. Rep. 564.

Missouri. — State *v.* Howerton, 58 Mo. 581; State *v.* Brown, 104 Mo. 365.

North Carolina. — State *v.* Burke, 73 N. Car. 83; State *v.* Brown, 113 N. Car. 645.

Texas. — Williams *v.* State, 10 Tex. App. 8.

A Memorandum respecting some money that a person owes to him from whose person it is taken is the subject of robbery, Rex *v.* Bingley, 5 C. & P. 602, 24 E. C. L. 474; but an extortion by violence of a promissory note is not robbery, for the note is void, Jackson *v.* State, 69 Ala. 249.

The Terms " personal property," Boose *v.* State, 10 Ohio St. 575; " treasury notes," Collins *v.* People, 39 Ill. 233, or " money," import value, State *v.* Hyde, 22 Wash. 551; Territory *v.* Bell, 5 Mont. 562, as money is the measure of values. McCarty *v.* State, 127 Ind. 223. But it is said that banknotes are not money, Turner *v.* State, 1 Ohio St. 422; but they and other choses in action are comprehended by the term " personal property." State *v.* Gorham, 55 N. H. 152; Turner *v.* State, 1 Ohio St. 422. So treasury notes are goods and chattels. Collins *v.* People, 39 Ill. 233.

5. See for instance, Comp. Laws Dak. (1887), § 6485; Rev. Codes N. Dak. (1895), § 7121; Annot. Stat. S. Dak. (1901), § 7744.

Many statutes also use the words " subject of larceny." See the various statutes.

6. Jackson *v.* State, 69 Ala. 249.

Where the property was a sack of flour and a jug of whiskey, which a witness testified that he " purchased," it was held that the jury was justified in finding that it was of some value without more specific proof on that point. James *v.* State, 53 Ala. 380.

As Affecting Intent. — The value of the property taken becomes of importance where its nature or its trifling cost bears on the element of intent, as where, on a trial for taking a pinch of tobacco from one by force, the defense was that the taking was a joke. Com. *v.* White, 133 Pa. St. 182, 19 Am. St. Rep. 628.

7. See *supra*, this section, *Taking*.

8. See *infra*, this section, *Ownership*.

9. See *infra*, this section, *Animus Furandi*.

10. General Rule as to Violence — *England.* — Rex *v.* Bingley, 5 C. & P. 602, 24 E. C. L. 474; Rex *v.* Smith, 2 East P. C. 784.

United States. — U. S. *v.* Negro Simms, 4 Cranch (C. C.) 618.

Arkansas. — Routt *v.* State, 61 Ark. 594; Clary *v.* State, 33 Ark. 561.

Illinois. — Burke *v.* People, 148 Ill. 70; Schroeder *v.* People, 196 Ill. 211.

Indiana. — Brennon *v.* State, 25 Ind. 403.

Iowa. — State *v.* Miller, 83 Iowa 291.

Kansas. — State *v.* Adams, 58 Kan. 365.

Kentucky. — Jones *v.* Com., (Ky. 1900) 57 S. W. Rep. 472; Com. *v.* Davis, (Ky. 1902) 66 S. W. Rep. 27.

Nebraska. — Stevens *v.* State, 19 Neb. 647.

New York. — Plato's Case, 2 City Hall Rec. (N. Y.) 31; Dayton's Case, 2 City Hall Rec. (N. Y.) 167, 6 City Hall Rec. (N. Y.) 86; Mahoney *v.* People, 3 Hun (N. Y.) 202, *affirmed* 59 N. Y. 659.

North Carolina. — State *v.* Burke, 73 N. Car. 83; State *v.* Brown, 113 N. Car. 645.

Ohio. — Ohio *v.* Carmans, Tappan (Ohio) 97.

Tennessee. — Kit *v.* State, 11 Humph. (Tenn.) 167; Crews *v.* State, 3 Coldw. (Tenn.) 351.

If the property is not taken with violence, or parted with through fear, it is not robbery, though there was sufficient legal and reasonable ground for fear, as upon a threat to charge one with an unnatural crime.[1] But under the statutes, as well as at common law, the offense may be committed either by the use of violence or by intimidation or putting in fear; both elements need not be present.[2] If the means used is by putting the party in fear of injury to his person or property, actual force is not an essential element of the crime;[3] and on the other hand it is not necessary that the complainant should have been put in fear if actual violence was used,[4] for, as it is sometimes said, from the use of violence the law, *in odium spoliatoris*, will presume fear;[5] and again, fear or intimidation may be constructive as distinguished from actual force or violence.[6]

b. OBJECT OF FORCE OR INTIMIDATION. — Though the violence is used for a different purpose than that of obtaining the property of the party assaulted, yet if the property is obtained by it the offense will, under some circumstances at least, amount to a robbery.[7]

Texas. — Wilson *v.* State, 3 Tex. App. 64; Gallagher *v.* State, 34 Tex. Crim. 306.

Virginia. — Hardy *v.* Com., 17 Gratt. (Va.) 592.

See also 1 Hale's P. C. 534; 3 Co. Inst. 68; 2 East P. C., c. 16, § 124 *et seq.*; 4 Black. Com. 242.

1. Rex *v.* Reane, 2 East P. C., c. 16, § 132, 2 Leach C. C. 616.

2. **Both Fear and Violence** — *England.* — Rex *v.* Gnosil, 1 C. & P. 304, 11 E. C. L. 400.

United States. — U. S. *v.* Negro Simms, 4 Cranch (C. C.) 618, 27 Fed. Cas. No. 16,290.

Alabama. — Chappell *v.* State, 52 Ala. 359.

Arkansas. — Young *v.* State, 50 Ark. 501.

Illinois. — Collins *v.* People, 39 Ill. 233.

Iowa. — State *v.* Brewer, 53 Iowa 735.

Kentucky. — Blanton *v.* Com., (Ky. 1900) 58 S. W. Rep. 422. See also Com. *v.* Brooks, 1 Duv. (Ky.) 150.

Louisiana. — State *v.* Patterson, 42 La. Ann. 934. And see State *v.* Durbin, 20 La. Ann. 408; State *v.* Cook, 20 La. Ann. 145.

Mississippi. — McDaniel *v.* State, 8 Smed. & M. (Miss.) 401, 47 Am. Dec. 93.

Missouri. — State *v.* Sommers, 12 Mo. App. 374; State *v.* McLain, 159 Mo. 340.

North Carolina. — State *v.* Burke, 73 N. Car. 83.

See also 2 Russ. on Crimes (9th Am. ed.) 108; 2 Roscoe's Crim. Ev. (8th Am. ed.) 936; 2 East P. C., c. 16, § 127; 1 Wharton on Crim. Law (10th ed.), § 850.

Actual or Constructive Taking. — "The taking must be felonious and forcible, from the person of the party robbed, either actual or constructive. It is actual when in fact the taking is immediately from the person, and constructive when in the possession of the party robbed; as, if the robber, having first assaulted the owner, takes away his horse standing near, or having put him in fear drives away his cattle, or takes up his pelisse or cloak, which the owner, to save it from the robber, had thrown into the bush." Crews *v.* State, 3 Coldw. (Tenn.) 350.

3. **When Actual Force Not Essential.** — Shinn *v.* State, 64 Ind. 13, 31 Am. Rep. 110; State *v.* O'Neil, 71 Minn. 399; Beall *v.* Territory, 1 N. Mex. 507.

4. **When Putting in Fear Not Essential** — *Arkansas.* — Clary *v.* State, 33 Ark. 561.

Massachusetts. — Com. *v.* Humphries, 7 Mass. 242.

Minnesota. — State *v.* O'Neil, 71 Minn. 399.

Mississippi. — McDaniel *v.* State, 8 Smed. & M. (Miss.) 401, 47 Am. Dec. 93, Cunningham *v.* State, (Miss. 1900) 28 So. Rep. 750.

Missouri. — State *v.* Broderick, 59 Mo. 318; State *v.* Stinson, 124 Mo. 447; State *v.* Lawler, 130 Mo. 366, 51 Am. St. Rep. 575; State *v.* Kennedy, 154 Mo. 268.

New Hampshire. — State *v.* Gorham, 55 N. H. 152.

New York. — People *v.* Glynn, 54 Hun (N. Y.) 332.

Pennsylvania. — Com. *v.* Snelling, 4 Binn. (Pa.) 379.

Texas. — Pendy *v.* State, 34 Tex. Crim. 643.

But if "putting him in fear" is alleged as the means whereby the money was obtained, that fact must be proved; proof of robbery by violence will not suffice. Glass *v.* Com., 6 Bush (Ky.) 436.

Under the Former Texas Statute it was held that robbery might be committed in either one of two modes — by assault and putting in fear of life or of bodily injury, or by violence and putting in fear of life or of bodily injury. Wilson *v.* State, 3 Tex. App. 63.

Rex v. Knewland, 2 Leach C. C. 721; 2 East P. C., c. 16, § 131, Is Criticised in 2 Roscoe's Crim. Ev. (8th Am. ed.) 942, where it is said that "the statement that terror, no less than force, is a component part of the complex idea annexed to the term 'robbery' is not in conformity with the various decisions already cited, from which it appears that either violence or putting in fear is sufficient to constitute a robbery."

5. Long *v.* State, 12 Ga. 293; Com. *v.* Humphries, 7 Mass. 242; State *v.* Crowell, 149 Mo. 391, 73 Am. St. Rep. 402; State *v.* Burke, 73 N. Car. 83. See also 2 Russ. on Crimes (9th Am. ed.) 113, 122.

6. *Arkansas.* — Clary *v.* State, 33 Ark. 561.

Georgia. — Long *v.* State, 12 Ga. 315.

Louisiana. — State *v.* Shonhausen, 26 La. Ann. 423; State *v.* Patterson, 42 La. Ann. 934.

Pennsylvania. — Com. *v.* Snelling, 4 Binn. (Pa.) 379.

Virginia. — Hardy *v.* Com., 17 Gratt. (Va.) 592.

See also 3 Greenleaf on Evidence (14th ed.), § 229; 2 Russ. on Crimes (9th Am. ed.) 108.

7. Reg. *v.* Edwards, 1 Cox C. C. 32; 2 Russ.

Statutes in Several States require that the force or fear must be employed either to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; if employed merely as a means of escape it does not constitute robbery.[1]

c. MUST PRECEDE OR BE CONCOMITANT WITH TAKING. — The violence or putting in fear which is an essential element of the crime of robbery must precede or, at least, be concomitant with the act by which the offender acquires possession of the property.[2] This is none the less true when the article thus taken is a weapon, or capable of being used as such, and the wrongdoer, after taking it, therewith intimidates the owner in order to effect an escape.[3] But the courts are not in accord as to when the taking and the act of violence or intimidation are contemporaneous.[4]

d. DEGREE — (1) *Force* — (a) **In General.** — While the particular degree of force requisite to effect the crime is not defined by the common law, nor, in many of the states, by statute,[5] if any injury is done to the person, or there is any struggle by the party to keep possession of the property before it is taken from him, there will be a sufficient actual violence.[6] If there is suffi-

on Crimes (9th Am. ed.) 112; 2 Roscoe's Crim. Ev. (8th Am. ed.) 934.

Taking Money Offered to Prevent Rape. — Taking money from a woman at the time of an attempt to commit a rape amounts to robbery, although there was no demand of money made by the prisoner, and it was clearly his original intention only to commit rape. Rex *v.* Blackham, 2 East P. C., c. 16, § 128; and on the same point see State *v.* Nathan, 5 Rich. L (S.Car.) 219.

Fraud — Use of Force as Secondary Means. — See State *v.* Levy, 126 Mo. 554.

As to the use of force to divert attention, see *infra*, this section, *Must Be Against Will.*

As to the degree of force essential to constitute robbery, see *infra*, this subsection, *Degree.*

1. Stat. Minn. (1894), § 6479; Pen. Code N. Y. (1901), § 225; Rev. Codes N. Dak. (1895), § 7118; Annot. Stat. S. Dak. (1901), § 7741.

2. **Question of Time** — *Alabama.* — James *v.* State, 53 Ala. 380; Thomas *v.* State, 91 Ala. 34.

Arkansas. — Clary *v.* State, 33 Ark. 561; Routt *v.* State, 61 Ark. 594.

Georgia. — Fanning *v.* State, 66 Ga. 167.

Indiana. — Shinn *v.* State, 64 Ind. 13, 31 Am. Rep. 110.

Kansas. — State *v.* Miller, 53 Kan. 324.

Missouri. — State *v.* Willis, 16 Mo. App. 553; State *v.* Davidson, 38 Mo. 374.

North Carolina. — State *v.* Deal, 64 N. Car. 270; State *v.* John, 5 Jones L. (50 N. Car.) 163, 69 Am. Dec. 777.

Ohio. — Hanson *v.* State, 43 Ohio St. 376.

See also 4 Black. Com. 242; 2 Roscoe's Crim. Ev. (8th Am. ed.) 949; 2 Russ. on Crimes (9th Am. ed.) 108.

In State *v.* Trexler, 2 Law Repos. (4 N. Car.) 90, it was said *obiter* that if a thief "should privately take money from one pocket and place it in another for the convenience of handing it at a suitable time to his comrade, and when he attempted to take it out again the owner should seize his hand, upon which a scuffle takes place, and the owner is overpowered or awed to desist, and the thief goes off with the money," this is robbery.

Fear is the distinguishing ingredient between robbery and other larceny (3 Co. Inst. 68); therefore, where a thief clandestinely stole a purse, and on its being discovered in his custody declared vengeance against the party if he spoke of it, this was held to be simple larceny only, and not robbery, because the fear excited by the menace of the thief was subsequent to the act of taking the purse. Harman's Case, 2 Rolle 154, 1 Hale's P. C. 535, 2 East P. C., c. 16, § 133.

3. Rex *v.* Fallows, 5 C. & P. 508, 24 E. C. L. 431; Jackson *v.* State, 114 Ga. 826.

4. **Violence Subsequent to Taking.** — The memorandum decision in State *v.* Clark, 12 Mo. App. 593, is that the taking and asportation of property without violence to, or putting in fear, the person from whom it is taken is not robbery, and it is not made so by subsequent violence and putting in fear to prevent a recapture and retention of the property so taken. But without noticing this it was afterwards held, in a similar brief decision, that if the violence was used to prevent an arrest after the taking it would be robbery. State *v.* Cunningham, 13 Mo. App. 576.

Although the acts of violence are not committed until after the property is taken, yet if it is removed afterwards in the presence of the owner, this is robbery. People *v.* Glynn, 54 Hun (N. Y.) 332, *affirmed without opinion* 123 N. Y. 631.

So is it where the accused is physically caught in the act of taking money from a drawer, and in the struggle to effect his escape uses violence. State *v.* Miller, 53 Kan. 324.

Also, where before the felonious taking of money by one person from another, the robber makes resistance, and the taking is not only without his consent but against it. Burke *v.* State, 74 Ga. 372.

In Sherman *v.* State, 2 Ohio Cir. Dec. 691, 4 Ohio Cir. Ct. 531, it was said, with doubt and hesitation, that where one without threats or putting in fear wrests from the possession of another anything of value, and immediately thereafter, for the purpose of retaining the possession of the property, on making his escape, violently strikes the other, such violence is concomitant with the taking and constitutes robbery.

5. Brennon *v.* State, 25 Ind. 403; Seymour *v.* State, 15 Ind. 288.

6. Seymour *v.* State, 15 Ind. 288; Com. *v.*

cient violence to effect and carry out the evil intent, its degree is not of much importance.[1] An accidental wounding, however, does not constitute the requisite force.[2] But in *England*, and in many of the *United States*, the degree of force used is material on the question of the severity of the punishment.[3]

(b) **Particular Acts of Violence** — *aa.* In General. — The force necessary to constitute robbery may consist in the violent seizure and detention of the person;[4] or in taking hold of goods attached to the person of another, followed immediately by a struggle to obtain possession of them;[5] or in taking money from one while jostling him to and fro in a crowd, with such violence as to tear off a button from his coat;[6] or in surrounding a person so as to render assistance hazardous or vain.[7] But it is not robbery stealthily to remove the property of another from his presence;[8] nor to obtain money by means of a trick, contrivance, or pretense;[9] nor stealthily to abstract property from the pocket of another,[10] even though after being discovered there was a struggle to prevent the escape of the thief[11] or though the pocket was torn in the attempt to withdraw the hand, and the thief's coat was left behind in the endeavor to escape.[12] So where money is given to one who demands it merely in a positive, rough

Davis, (Ky. 1902) 66 S. W. Rep. 27; State *v.* Gorham, 55 N. H. 152. See also 2 Russ. on Crimes (9th Am. ed.) 109; 4 Black. Com. 243.

"It is enough that so much force or threatening by word or gesture be used as might create an apprehension of danger, or induce a man to part with his property without or against his consent." Clary *v.* State, 33 Ark. 561.

In Highway Robbery the force used must be force with intent to overpower the party and prevent his resistance; and if the force used is not with that intent, but only to get possession of the property of the party attacked, it is not highway robbery. Rex *v.* Gnosil, 1 C. & P. 304, 11 E. C. L. 400.

1. State *v.* Broderick, 59 Mo. 318; Mahoney *v.* People, 3 Hun (N. Y.) 202; Houston *v.* Com., 87 Va. 257.

In *New York* it was formerly held that to constitute robbery by violence to the person the violence must be used to force the prosecutor to part with his property, not only against his will but in spite of his resistance. Not every assault and battery constituted the violence of the statute. People *v.* McGinty, 24 Hun (N. Y.) 62; McCloskey *v.* People, (Supm. Ct. Gen. T.) 5 Park. Crim. (N. Y.) 299; People *v.* Hall, (Supm. Ct. Gen. T.) 6 Park. Crim. (N. Y.) 642, *disapproving* Rex *v.* Lapier, 2 East P. C., c. 16, § 4; and Rex *v.* Mason, R. & R. C. C. 419.

But upon an indictment for robbery in the second degree for taking the property by force, the degree of force was held to be immaterial. People *v.* Foley, 27 N. Y. Wkly. Dig. 217.

At the present time in *New York*, and in several other states, it is expressly provided by statute that when the force or fear is employed either to obtain or retain possession of the property, or to prevent or overcome resistance to the taking, and not merely as a means of escape, the degree thereof is immaterial. Pen. Code N. Y. (1901), §§ 225, 226; Rev. Code N. Dak. (1895), § 7119; Stat. Minn. (1894), § 6480; Annot. Stat. S. Dak. (1901), § 7742.

The *Arkansas* statute (Sand. & H. Dig. Stat. Ark. 1894, § 1883) provides that "the manner of the force or the mode of intimidation is not material, further than it may show the intent of the offender." And see Boles *v.* State, 58 Ark. 35.

The degree of violence is important in those jurisdictions which graduate the offense by degrees depending upon whether there was immediate or threats of future injury. See *supra*, this title, *Definitions — Under Statutes — Degrees of Crime*.

2. Reg. *v.* Edwards, 1 Cox C. C. 32.

3. See *supra*, this title, *Definitions*.

In *Missouri* it is of the essence of robbery in the first degree that the violence or fear of injury should be present and immediate to the person, and that the property should be actually taken from the owner's person or in his presence, and against his will. State *v.* Jenkins, 36 Mo. 372.

4. **Particular Acts.** — Reg. *v.* McGrath, L. R. 1 C. C. 205; State *v.* Calhoun, 72 Iowa 432, 2 Am. St. Rep. 252; Blanton *v.* Com., (Ky. 1900) 58 S. W. Rep. 422; State *v.* Lawler, 130 Mo. 366, 51 Am. St. Rep. 575; People *v.* McElroy, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 203, 60 Hun (N. Y.) 577; Com. *v.* Snelling, 4 Binn. (Pa.) 379.

As to violence offered by one person and taking done by another, see *infra*, this title, *Criminal Liability*.

5. Long *v.* State, 12 Ga. 293; Rex *v.* Davies, 2 East P. C., c. 16, § 127.

6. Seymour *v.* State, 15 Ind. 288.

7. Hughes's Case, 1 Lewin C. C. 301.

8. State *v.* Miller, 83 Iowa 291.

9. James *v.* State, 53 Ala. 380; Thomas *v.* State, 91 Ala. 34; Routt *v.* State, 61 Ark. 597; Doyle *v.* State, 77 Ga. 513; Shinn *v.* State, 64 Ind. 13, 31 Am. Rep. 110; State *v.* Deal, 64 N. Car. 276. And see Huber *v.* State, 57 Ind. 341, 26 Am. Rep. 57 (larceny).

10. Territory *v.* McKern, 2 Idaho 759; McCloskey *v.* People, (Supm. Ct. Gen. T.) 5 Park. Crim. (N. Y.) 299; People *v.* Hall, (Supm. Ct. Gen. T.) 6 Park. Crim. (N. Y.) 642; Norris's Case, 6 City Hall Rec. (N. Y.) 86.

11. Shinn *v.* State, 64 Ind. 13, 31 Am. Rep. 110; State *v.* John, 5 Jones L. (50 N. Car.) 163, 69 Am. Dec. 777.

12. Fanning *v.* State, 66 Ga. 167.

tone of voice, in the absence of threats or menaces there is no robbery.[1] The nature of the act of knocking property from one's hand, followed by menaces or violence to prevent its recovery by the owner, has been considered by the courts of *England* and *New York*, the former holding it not to be robbery, as it did not affirmatively appear that the act of picking up the property was in the sight or presence of the owner, and the latter coming to the same conclusion on the ground that there was not a forcible taking.[2] Under a statute punishing robbery, being armed with a dangerous weapon, and wounding or striking the person robbed, it is not necessary, in order to constitute the offense, that the wounding or striking be done with the dangerous weapon,[3] but to constitute highway robbery the assault must be made with an offensive weapon.[4]

bb. SNATCHING. — Formerly there was a diversity of opinion as to the criminal nature of the act of suddenly snatching articles from the person or immediate presence of the owner, but it is now settled that this act in itself, unaccompanied by any offer of violence or demonstration intended to put the owner in fear, is not robbery [5] unless some injury is done to the person, or unless there is some previous struggle for the possession of the property, or some force is used to obtain it,[6] or unless the taking is resisted and the resistance is over-

1. Davis *v.* Com., (Ky. 1900) 54 S. W. Rep. 959.

2. Rex *v.* Francis, 2 Stra. 1015; Rex *v.* Grey, 2 East P. C., c. 16, § 126; People *v.* McGinty, 24 Hun (N. Y.) 62.

3. Com. *v.* Mowry, 11 Allen (Mass.) 20, *construing* Stat. Mass. (1860), c. 160, § 22 (Rev. Laws Mass. 1902, c. 207, § 17).

4. Rex *v.* Pelfryman, 2 Leach C. C. 563, 2 East P. C., c. 16, § 166.

5. **Snatching** — *England.* — Rex *v.* Baker, 2 East P. C., c. 16, § 14, 1 Leach C. C. 290; Rex *v.* Macauley, 1 Leach C. C. 287; Robins's Case, 1 Leach C. C. 290, note; Rex *v.* Steward, 2 East P. C., c. 16, § 121; Reg. *v.* Walls, 2 C. & K. 214, 61 E. C. L. 214. See Rex *v.* Danby, 2 East P. C., c. 16, § 121.

Alabama. — James *v.* State, 53 Ala. 380; Jackson *v.* State, 69 Ala. 249; Thomas *v.* State, 91 Ala. 34.

Arkansas. — Routt *v.* State, 61 Ark. 594.

Georgia. — Doyle *v.* State, 77 Ga. 513; Spencer *v.* State, 106 Ga. 692.

Idaho. — Territory *v.* McKern, 2 Idaho 759.

Indiana. — Brennon *v.* State, 25 Ind. 403; Bonsall *v.* State, 35 Ind. 460; Shinn *v.* State, 64 Ind. 13, 31 Am. Rep. 110.

Missouri. — State *v.* Sommers, 12 Mo. App. 374; State *v.* Willis, 16 Mo. App. 553; State *v.* Broderick, 59 Mo. 318.

New York. — Anderson's Case, 1 City Hall Rec. (N. Y.) 163; McCloskey *v.* People, (Supm. Ct. Gen. T.) 5 Park. Crim. (N. Y.) 299; People *v.* Hall, (Supm. Ct. Gen. T.) 6 Park. Crim. (N. Y.) 642; People *v.* McGinty, 24 Hun (N. Y.) 62.

North Carolina. — State *v.* Trexler, 2 Law Repos. (4 N. Car.) 90; State *v.* John, 5 Jones L. (50 N. Car.) 163, 69 Am. Dec. 777.

See also 2 Russ. on Crimes, (9th Am. ed.) 104; 2 Roscoe's Crim. Ev. 933; 2 East P. C., c. 16, § 127.

In the *District of Columbia* sudden and stealthy seizure or snatching is made robbery. Code D. C. (1902), § 810.

Snatching a bank bill from one, and thereby slightly and unintentionally touching his hand, is not an assault with force and violence. Com. *v.* Ordway, 12 Cush. (Mass.) 270. *Contra*, Burke *v.* State, 74 Ga. 372; State *v.* Carr, 43 Iowa 418 (decision based on *Iowa* statute, but that act does not materially differ from those of other states); Davis *v.* Com., (Ky. 1900) 54 S. W. Rep. 959; Jones *v.* Com., (Ky. 1902) 66 S. W. Rep. 633.

In Williams *v.* Com., (Ky. 1899) 50 S. W. Rep. 240, it was held that a person who seizes a purse in the hands of a woman who resists is guilty of robbery, and that it is not necessary that a blow should be struck, or the party be injured. All that is necessary to constitute the offense is that the robber should overcome resistance by force.

To snatch a basket of linen suddenly from the hand of another was held robbery. (O. B. 1782, No. 483.)

6. 2 East P. C., c. 16, § 127; 2 Russ. on Crimes (9th Am. ed.) 104; Routt *v.* State, 61 Ark. 594.

Illustrations. — It is sufficient violence to constitute robbery to snatch a diamond pin from the headdress of a lady with such force as to remove it with part of the hair from the place in which it is fixed, Rex *v.* Moore, 1 Leach C. C. 335, or to take, with such force as to bruise the arm, a handbag carried by a woman, Klein *v.* People, 113 Ill. 596, or to snatch a watch, with an expressed determination of doing so, from the person of another, the violent seizure causing the breaking of a silk guard passing around the owner's neck, though the act was committed with such suddenness that the owner felt no other fear than the loss of his watch, State *v.* McCune, 5 R. I. 60, 70 Am. Dec. 176 [*contra*, see U. S. *v.* Negro Simms, 4 Cranch (C. C.) 618]; or to snatch an article which is so attached to one's person or clothes as to afford resistance, however slight, Rex *v.* Mason, R. & R. C. C. 419; or to snatch a watchchain with such violence as to tear it away from the watch and from the buttonhole, the owner failing in his endeavor to recover the chain, and the defendant striking him and making his escape. State *v.* Broderick, 59 Mo. 318.

come by violence, or if resistance is prevented by threats of actual violence, creating a reasonable apprehension thereof.[1]

(2) *Fear* — (a) **In General.** — On the one hand the fear is not confined to an apprehension of bodily injury; and on the other hand it must be of such a nature as in reason and common experience is likely to induce a person to part with his property against his will, and to put him as it were under the temporary suspension of the power of exercising his will through the influence of the terror impressed; in which case, as well in sound reason as in legal construction, fear supplies the place of force, or of an actual taking by violence or assault upon the person.[2] The fear may be of injury to the person, to property, or to character.[3]

(b) **Duration of Fear.** — If the property is not taken by actual violence, but the owner delivers it in consequence of prior threats, such delivery must be enforced by terror actually felt at the time; otherwise there is neither actual nor constructive violence in the taking.[4] By statute in several of the states it is made robbery, usually in a low degree, to obtain money by threats of injury to be inflicted at a future time.[5]

(c) **Fear of Injury to Person** — *aa.* In General. — It is not necessary that actual violence be used to induce the fear.[6] It is robbery for one pretending to be a public officer to extort money from another by threatening to send the latter to jail, such threats being accompanied by forcible seizure[7] or the

But it was held otherwise where one caught hold of a watchribbon and key attached to the watch, snatched it from the owner, and made off with it. Reg. *v.* Walls, 2 C. & K. 214, 61 E. C. L. 214.

1. Jackson *v.* State, 69 Ala. 249; Evans *v.* State, 80 Ala. 4.

It is robbery, upon request and refusal of an article, forcibly to snatch it against the actual consent of the person in possession, accompanying the act with a declaration of intention to take it in any event. McDow *v.* State, 110 Ga. 293.

But snatching money from another and afterwards struggling with him in order to keep it, during which struggle the owner is thrown down and the thief runs away, is not robbery. Shinn *v.* State, 64 Ind. 13, 31 Am. Rep. 110.

2. **What Constitutes Fear.** — 2 East P. C., c. 16, § 129.

"The fear of injury to the person is that which is commonly excited on the commission of this offense, and where property is obtained by this means it will amount to robbery, though there be no great degree of terror or affright in the party robbed. * * * And it is not necessary that actual fear should be strictly and precisely proved, as the law, *in odium spoliatoris*, will presume fear where there appears to be a just ground for it." 2 Russ. on Crimes (9th Am. ed.) 113, *quoted* in Williams *v.* State, 51 Neb. 711. See also Long *v.* State, 12 Ga. 293.

Statutory Offenses. — One who enters a store in the daytime when the owner is absent, and it is in charge of a boy ten years of age, and, by falsehood, threats, and intimidation obtains money and goods from the store, may be convicted of a felony under Act Pa. March 31, 1860, § 102 (Bright. Purd. Dig. Laws Pa. 1894, p. 537, § 381), and Act Pa. April 22, 1863, § 2 (Bright. Purd. Dig. Laws Pa. 1894, p. 482, § 64). Com. *v.* Cruikshank, 138 Pa. St. 194.

In Order to Constitute the Statutory Offense of Demanding Property with Menaces, the menaces must cause such alarm as to unsettle the mind of the person on whom it operates and to take away from his acts that element of free, voluntary action which alone constitutes consent. Reg. *v.* Waldon, L. & C. 289.

3. Long *v.* State, 12 Ga. 293; Breckinridge *v.* Com., 97 Ky. 272.

4. **Duration of the Fear.** — Long *v.* State, 12 Ga. 293; State *v.* Howerton, 58 Mo. 581; 2 East P. C., c. 16, § 132.

"Thieves come to rob A, and finding little about him enforce him by menaces of death to swear to bring them a greater sum, which he does accordingly; this is robbery, * * * because the fear of that menace still continued upon him at the time he delivered the money." 2 East P. C., c. 16, § 129.

Where one heavily armed, accompanied by another, demands goods of a third person and the latter, still actuated by fear of a threatened assault, subsequently delivers the goods to companions of the person making the demand in the latter's absence, it is robbery. Ashworth *v.* State, 31 Tex. Crim. 419.

5. **Statutes — Threat of Future Injury.** — Gen. Stat. Kan. (1897), c. 100, § 77; Stat. Minn. (1894), § 6478; Annot. Code Miss. (1892), § 1285; Pen. Code N. Y. (1901), § 224; Rev. Codes N. Dak. (1895), § 7120; Annot. Stat. S. Dak. (1901), § 7743.

6. Brennon *v.* State, 25 Ind. 403.

The Means Used to Put in Fear need not be such as would put in fear one used to the ways of the world, State *v.* Carr, 43 Iowa 418, and the fear constituting an element of the crime is fear of present personal peril and from violence offered and impending, Britt *v.* State, 7 Humph. (Tenn.) 45, but besetting one's house with the intention of taking money therefrom does not involve the requisite violence. State *v.* Freels, 3 Humph. (Tenn.) 228.

7. **Public Officers — Extortion.** — Bussey *v.* State, 71 Ga. 100, 51 Am. Rep. 256; Williams *v.* State, 51 Neb. 711.

display of firearms.[1]

bb. To Whom Fear May Extend. — While, generally, the fear must be of injury to the person from whom the property is taken, it is enacted in several of the states that it may be either the fear of an unlawful injury to the person or property of the person robbed, or of any relative of his or member of his family, or, in several jurisdictions, of immediate and unlawful injury to the person or property of any one in the company of the person robbed at the time of the robbery.[2]

e. Fear of Injury to Property. — It is robbery to extort money by threats of destruction of the party's dwelling where there is an apparent present ability to execute the threat, as upon demand by one or more of a mob, and threat of mob violence if refused.[3]

f. Fear of Injury to Reputation — Threats to Accuse of Crime. — Threats of prosecution for crime do not amount to that constructive violence which is essential to robbery, except in one instance, namely, a threat to prosecute for an unnatural crime,[4] for the fear of being arraigned before those tribunals whose function it is to protect and vindicate innocence, as well as to ascertain and punish crime, should not shake a firm mind of conscious rectitude so far from its propriety as to induce the surrender of money or other valuable thing to the base accuser; and it is not the fear, except in the single instance indicated, which connects itself with the legal idea of robbery.[5] But if the threats or accusations are accompanied by force, and the property is given up in consequence, the transaction is robbery.[6] Except where statutes have made the act a distinct crime, it is robbery to put another in fear and to extort money by threatening to accuse him of an unnatural crime,[7]

1. Display of Fire Arms. — Williams *v.* State, (Tex. Crim. 1900) 55 S. W. Rep. 500. And see McCormick *v.* State, 26 Tex. App. 678.

Excessive Force by Officers. — If one connected in an unofficial capacity with a magistrate's office handcuffs a prisoner, under pretense of carrying him to prison with greater safety, and by means of this violence extorts money, he is guilty of robbery. Rex *v.* Gascoigne, 1 Leach C. C. 280, 2 East P. C., c. 16, § 127.

But Securing the Execution and Delivery of a Promissory Note while impersonating an officer, and by threatening to arrest and imprison the prosecutor on the charge of passing counterfeit money, is not robbery. Perkins *v.* State, 65 Ind. 317.

What Is Voluntary Delivery. — Arresting one on the pretense of believing him to be a fugitive from justice, and by exciting and operating on his fears and using not only threats of carrying him to prison unless he would let the captors have part of the sum of money then in his coat, in their possession, but intimating mob violence on the part of others, is robbery, though the portion of the money demanded is counted out in his presence and he is suffered to take the remainder. Sweat *v.* State, 90 Ga. 315.

2. See the various statutes.

3. Illustrations. — The obtaining of money by a mob upon advice given to the prosecutor by one of their number, if the advice was not *bona fide*, Rex *v.* Winkworth, 4 C. & P. 444, 19 E. C. L. 465, or by threatening to bring a mob and burn the prosecutor's house, Rex *v.* Astley, 2 East P. C., c. 16, § 131; Rex *v.* Brown, 2 East P. C., c. 16, § 131, or upon knocking by one of the mob at the prosecutor's door in a menacing manner, Rex *v.* Taplin, 2 East P. C., c. 16, § 128, may be the basis of an indictment for robbery.

So it was held in the case of a threat to tear down and level the house. Rex *v.* Simons, 2 East P. C., c. 16, § 131. And see Rex *v.* Brown, 2 East P. C., c. 16, § 131.

4. Threats of Criminal Prosecution. — Long *v.* State, 12 Ga. 319; Britt *v.* State, 7 Humph. (Tenn.) 45; Hammond *v.* State, 3 Coldw. (Tenn.)133; 2 Russ. on Crimes (9th Am. ed.)118.

Where persons, under pretense of an auction, got a woman into a house, and compelled her, by threats of carrying her before a magistrate and to prison for not paying for goods pretended to have been bid for by her, to pay them one shilling through fear of imprisonment, and for the purpose of obtaining her liberation, but without any fear of any other personal violence, this was held not to be robbery, but only duress. Rex *v.* Wood, 2 East P. C., c. 16, § 131; Rex *v.* Knewland, 2 Leach C. C. 721.

But in Reg. *v.* McGrath, L. R. 1 C. C. 205, it was held that it was robbery forcibly to detain one in a room upon the pretense of holding her for the payment of goods sold at auction, the payment being made while she was in fear.

Under the Texas Statute (Pen. Code 1895, art. 857), making it a robbery to obtain money by threatening to do "some illegal act injurious to the character," etc., of another, it is not robbery to obtain money by threatening to prosecute one for an offense of which he is guilty. Davis *v.* State, 37 Tex. Crim. 47, 66 Am. St. Rep. 791.

5. Britt *v.* State, 7 Humph. (Tenn.) 45.

6. Long *v.* State, 12 Ga. 293; Bussey *v.* State, 71 Ga. 100, 51 Am. Rep. 256.

7. Rex *v.* Cannon, R. & R. C. C. 146; Rex *v.* Fuller, R. & R. C. C. 408; Rex *v.* Jones, 1 Leach C. C. 139, 2 East P. C., c. 16, § 130;

whether he has or has not been guilty of such crime,[1] and though no actual or personal violence is used,[2] and although the party was under no apprehension of personal danger or imprisonment, and felt no other fear than that of losing his character;[3] but it is otherwise if the money was parted with for the purpose of prosecuting the taker,[4] or after the parties had separated and there was time for the prosecutor to deliberate and procure assistance.[5] It is not robbery to obtain money from a woman by threatening to accuse her husband of an indecent assault,[6] nor by threatening to procure witnesses to support a charge already made.[7] So much doubt was entertained as to the law on this subject that statutory provisions have been made in *England* and in many of the *United States* which make it a distinct offense to extort money by threats of accusation of felony.[8]

3. Must Be Against Will. — The taking must be against the will of the person robbed,[9] and his nonconsent is sufficient though the property taken

Rex *v.* Donolly, 2 East P. C., c. 16, § 130; Rex *v.* Harrold, 2 East P. C., c. 16, § 130; Rex *v.* Staple, 2 East P. C., c. 16, § 130; Rex *v.* Elmstead, 2 Russ. C. & M. 106; Reg. *v.* Cooper, 3 Cox C. C. 547; Bussey *v.* State, 71 Ga. 100, 51 Am. Rep. 256; Houston *v.* Com., 87 Va. 257.

"**The Reasoning** on which the single admitted exception is made to rest turns upon the overwhelming and withering character of the charge and its damning infamy, so well calculated to unman and subdue the will and alarm the fears of the falsely accused. It is evident that the courts of England felt that even this exception looked extremely anomalous, and they strive, while permitting it to stand, to place it on ground unapproachable by any other case of fear of prosecution, as if determined hereafter it should have no associate in the offense of robbery." Britt *v.* State, 7 Humph. (Tenn.) 45.

Terms of the Threat. — It is not necessary, in such a case, that the prisoner should have made the charge to the prosecutor in explicit terms, or in any particular form of language. It is enough that the language was intended to communicate such a charge, and was so understood by the prosecutor at the time. People *v.* McDaniels, (Oyer & T. Ct.) 1 Park. Crim. (N. Y.) 198.

1. Rex *v.* Gardner, 1 C. & P. 479, 11 E. C. L. 453; Reg. *v.* Cracknell, 10 Cox C. C. 408.

Guilt is material on the question whether the intention was to extort money or merely to compound a felony. Reg. *v.* Richards, 11 Cox C. C. 43.

2. Rex *v.* Donally, 1 Leach C. C. 193; 2 East P. C., c. 16, § 130.

3. Rex *v.* Hickman, 1 Leach C. C. 278, 2 Russ. on Crimes (9th ed.) 128; 2 East P. C., c. 16, § 130; Rex *v.* Egerton, R. & R. C. C. 375; Rex *v.* Elmstead, 2 Russ. C. & M. 106.

4. Rex *v.* Fuller, R. & R. C. C. 408.

5. Rex *v.* Jackson, 1 East P. C. Addenda XXI, 1 Leach C. C. 193, note; 2 Leach C. C. 618, note; Rex *v.* Reane, 2 East P. C., c. 16, § 132.

6. Rex *v.* Edwards, 5 C. & P. 518, 24 E. C. L. 435, 1 M. & Rob. 257.

7. 2 Russ. on Crimes (9th Am. ed.) 130.

8. See the titles in the table of cross-references at the head of this title. The statute now in force in England is 24 & 25 Vict., c. 96, §§ 46, 47.

Interpretation of English Statute. — "It was held, on a case reserved, that since the repealed statute 7 Wm. IV. & 1 Vict., c. 87, § 4, which is similar to the 24 & 25 Vict., c. 96, § 47, * * * an indictment in the ordinary form for robbery cannot be supported by proof of extorting money by threats of charging an infamous crime, and that a person present to aid A B to extort money by such charges cannot be convicted of robbery with A B, effected by him with actual violence, the prisoner being no party to such violence. Reg. *v.* Henry, 2 Moody 118, 9 C. & P. 309, 38 E. C. L. 128. But it has since been decided that assaulting and threatening to charge with an infamous crime (but in terms not within the above section), with intent thereby to extort money, was an assault with intent to rob. Reg. *v.* Stringer, 2 Moody 261, 1 C. & K. 188, 47 E. C. L. 188. In this latter case the judges doubted whether Reg. *v.* Henry was rightly decided on the ground on which it was decided, viz., that it was not robbery to obtain money by threat of a charge of sodomy." 2 Roscoe's Crim. Ev. (8th Am. ed.) 949.

"Under the 1 Vict., c. 87, § 4, where money was obtained by any of the threats to accuse specified in that section, the indictment, it seems, must be on that section and not for robbery; but where the money is obtained by threats to accuse, other than those specified in that section, the indictment may, it seems, be for robbery if the party was put in fear and parted with his property in consequence. It seems doubtful whether a count for demanding money with menaces is supported where it is proved that the money was actually obtained by menaces." 2 Russ. on Crimes (9th Am. ed.) 134. See also Reg. *v.* Norton, 8 C. & P. 671, 34 E. C. L. 577.

9. Taking Must Be Against the Will. — Long *v.* State, 12 Ga. 293; State *v.* Henry, 47 La. Ann. 1587; Trimble *v.* State, 61 Neb. 604; Acker *v.* Com., 94 Pa. St. 284; 2 Roscoe's Crim. Ev. (8th Am. ed.) 936.

Taking Property by Stealth from the presence of the prosecutor, without his knowledge, is not robbery. State *v.* Miller, 83 Iowa 291.

But Begging and Receiving Alms under circumstances indicating an intention to use violence if refused is robbery. Long *v.* State, 12 Ga. 293.

Money Delivered with Intent to Apprehend the taker may be the basis of an indictment for robbery. See McDaniel's Case, Foster 129.

belonged to another.[1] It is deemed to be against the owner's consent if violence is used to divert his attention while property is taken from his person, without his knowledge, even though there is no apprehension of injury or suspicion of the design of the taker.[2] While it is not robbery to abstract money from the person of one drunk and unconscious,[3] it is otherwise if, to accomplish the taking, the intoxicated person is beaten and bruised.[4]

4. Must Be from Person or Presence. — Although the taking must be "from the person," this does not mean that the property must be in actual physical contact with the person of him from whom it is taken, but it will be sufficient if it is taken from his presence or personal protection.[5] Even though the statutes use the words "from the person," it is enough if the property is in

Colorable Robbery. — If one assents to the taking pursuant to previous agreement to obtain a reward, it is not robbery. M'Daniel's Case, Foster 121. And to the same effect, but *obiter*, see People *v.* Clough, 59 Cal. 438.

Consent Is a Question of Fact. — Thompson *v.* State, (Tex. Crim. 1894) 26 S. W. Rep. 1081. As to burden of proof, see Williams *v.* State, 37 Tex. Crim. 147.

1. People *v.* Shuler, 28 Cal. 490; Stewart *v.* State, (Tex. Crim. 1895) 31 S. W. Rep. 407.

2. Violence Used to Divert Attention. — Anonymous, 1 Lewin C. C. 300; Seymour *v.* State, 15 Ind. 288; Snyder *v.* Com., (Ky. 1900) 55 S. W. Rep. 679; People *v.* Glynn, 54 Hun (N. Y.) 332; Mahoney *v.* People, 3 Hun (N. Y.) 202, *affirmed* 59 N. Y. 659; Com. *v.* Snelling, 4 Binn. (Pa.) 379. And see Brennon *v.* State, 25 Ind. 403.

This principle is incorporated in the statutes of *New York*. Penal Code N. Y., § 227.

3. Brennon *v.* State, 25 Ind. 403.

4. Bloomer *v.* People, 1 Abb. App. Dec. (N. Y.) 146.

But in *England* it has been held that where several men find another apparently intoxicated, and, swearing that he shall go home, drag him about, kicking him and clandestinely taking his money, it is not robbery; for no demand is made of money, nor is any fear excited for the purpose of obtaining it (O. B. 1784, p. 797). 1 Hawk. P. C., c. 34, § 5, note.

5. "From the Person" — *England*. — Rex *v.* Francis, 2 Stra. 1015; Rex *v.* Grey, 2 East P. C., c. 16, § 126.

United States. — U. S. *v.* Jones, 3 Wash. (U. S.) 209.

Alabama. — Croker *v.* State, 47 Ala. 53.

Arkansas. — Clary *v.* State, 33 Ark. 561.

Georgia. — Stegar *v.* State, 39 Ga. 583, 99 Am. Dec. 472; Clements *v.* State, 84 Ga. 660, 20 Am. St. Rep. 385; Crawford *v.* State, 90 Ga. 701, 35 Am. St. Rep. 242; Jackson *v.* State, 114 Ga. 826.

Louisiana. — State *v.* Cook, 20 La. Ann. 145.

Missouri. — State *v.* Jenkins, 36 Mo. 372; State *v.* Lawler, 130 Mo. 366, 51 Am. St. Rep. 575; State *v.* Kennedy, 154 Mo. 268.

Nebraska. — Brown *v.* State, 33 Neb. 354; Hill *v.* State, 42 Neb. 503.

Ohio. — Turner *v.* State, 1 Ohio St. 422.

Tennessee. — Hammond *v.* State, 3 Coldw. (Tenn.) 129; Crews *v.* State, 3 Coldw. (Tenn.) 350; Kit *v.* State, 11 Humph. (Tenn.) 167.

Virginia. — Houston *v.* Com., 87 Va. 257.

See also 2 Roscoe's Crim. Ev. (8th Am. ed.) 935; 2 Russ. on Crimes (9th Am. ed.) 106; 3 Co. Inst. 69.

Taking from "another person," People *v.* Beck, 21 Cal. 385, or taking and carrying away from one, State *v.* Leighton, 56 Iowa 595, is not necessarily a taking from his person or presence.

What Constitutes "Presence" and "Personal Possession" — Illustrations — *Driving Away Cattle*. — Where a robber by menaces and violence puts a man in fear, and drives away his sheep and cattle before his face, this is robbery. 1 Hale's P. C. 533; 4 Black. Com. 242; 1 Hawk. P. C., c. 34, § 5.

Taking in Absence of Owner. — Merriman *v.* Hundred of Chippenham, 2 East P. C., c. 16, § 127.

"If one cast away his goods to save them from a robber and the robber take them up and carry them away, this is a robbery done to his person." Wright's Case, Style 156.

Where one flees from his house when a pistol is pointed at him, and the person committing the assault, in his absence, compels an inmate to bring to him certain property which he carries away, there is no robbery. Crews *v.* State, 3 Coldw. (Tenn.) 350.

Presence in Another Building. — Clements *v.* State, 84 Ga. 660, 20 Am. St. Rep. 385.

Presence in Another Room. — State *v.* Calhoun, 72 Iowa 432, 2 Am. St. Rep. 252.

In *England* it was held, in Reg. *v.* Selway, 8 Cox C. C. 235, that whether the property in an adjoining room was under the protection of the prosecutor is for the jury.

Violently Entering a House and taking money therefrom, although the owner is in it, is not robbery. State *v.* Freels, 3 Humph. (Tenn.) 228.

Original Peaceable Possession of Taker. — James *v.* State, 53 Ala. 380.

Ejectment from Car. — State *v.* Kennedy, 154 Mo. 268.

From Another than Person Assaulted. — A and B were walking together, B carrying A's bundle, when C and D came up and assaulted A. B threw down the bundle and ran to the assistance of A, when C took it up and ran off with it. C and D were indicted for robbery, A being the prosecutor. It was held that they could not be convicted of the robbery, but only of simple larceny, as the thing stolen was not in the personal custody of the prosecutor. Rex *v.* Fallows, 5 C. & P. 508, 24 E. C. L. 431. The brief opinion of Vaughan, B., seems to indicate that the real reason for this defense is the absence of the *animus furandi*. He said: "If these prisoners intended to take the bundle why did they assault the prosecutor, and not the person who had it?"

the presence and under the immediate control of the person assaulted.[1]

5. Ownership. — To constitute the crime the property must be that of another than the taker,[2] but it is not material whether it properly belongs to the person assaulted or to a third person.[3] So if the master's property is taken from the possession of his servant, it is robbery and the servant may be deemed the owner of the goods.[4]

6. Animus Furandi — *a.* IN GENERAL. — Although the statute omits, in the definition of the offense, to include the element of intent,[5] the taking must be with the intent to deprive the owner of the thing taken and to convert it to a use other than that of the owner and against the consent of the latter,[6] though it is not essential that the taking be with intent to convert the property to the taker's own use.[7] A taking in jest or sport is not robbery,[8] but

1. **Statutes.** — State *v.* Calhoun, 72 Iowa 432, 2 Am. St. Rep. 252; Hill *v.* State, 42 Neb. 503; Turner *v.* State, 1 Ohio St. 422.

In Smith *v.* State, 37 Tex. Crim. 342, it was held that where the statutory definition uses the words " from the person," an allegation of taking " from the possession " will not import robbery.

2. **Ownership of Property.** — See *infra*, this section, *Animus Furandi — Claim of Right.* And see U. S. *v.* McNemara, 2 Cranch (C. C.) 45, 26 Fed. Cas. No. 15,701; Boles *v.* State, 58 Ark. 35; State *v.* Dengel, 24 Wash. 49.

On the trial of an information for robbery, unless the possession by the prosecuting witness of the money of which he claims to have been robbed is contested, the defense cannot as a matter of right question him to show contradictory statements as to where he obtained it. People *v.* Becker, 48 Mich. 43.

3. **Ownership of Person Assaulted or of Third Person** — *Alabama.* — Danzey *v.* State, 126 Ala. 15.

California. — People *v.* Vice, 21 Cal. 344; People *v.* Shuler, 28 Cal. 490; People *v.* Nelson, 56 Cal. 77; People *v.* Anderson, 80 Cal. 205; People *v* Clark, 106 Cal. 32.

Kansas. — State *v.* Adams, 58 Kan. 365.

Kentucky. — Ward *v.* Com., 14 Bush (Ky.) 233.

Massachusetts. — Com. *v.* Clifford, 8 Cush. (Mass.) 215.

Nevada. — State *v.* Ah Loi, 5 Nev. 99.

New York. — Brooks *v.* People, 49 N. Y. 436, 10 Am. Rep. 398.

4. Boles *v.* State, 58 Ark. 35; State *v.* Adams, 58 Kan. 365; State *v.* Nelson, 11 Nev. 334.

In Wright's Case, Style 156, it appeared that the robbery was in sight of the master.

A coach master may be deemed the owner of a coach glass of a gentleman's coach, standing in the former's yard. Rex *v.* Taylor, 1 Leach C. C. 356.

Before Delivery to Master. — Although the goods were never in the real owner's possession, they may be described either as his or those of the bailee in whose possession they were. State *v.* Gorham, 55 N. H. 152. But see Reg. *v.* Rudick, 8 C. & P. 237, 34 E. C. L. 368, holding that money received by a servant from his master's customers should, before its delivery to the master, be laid as the property of the servant.

5. Sledge *v.* State, 99 Ga. 684.

6. **Intent** — *United States.* — U. S. *v.* Jones, 3 Wash. (U. S.) 209.

Alabama. — Chappell *v.* State, 52 Ala. 359.

California. — People *v.* Keifer, 65 Cal. 233.

Georgia. — Sledge *v.* State, 99 Ga. 684.

Iowa. — State *v.* Hollyway, 41 Iowa 200, 20 Am. Rep. 586.

Kentucky.—Ward *v.* Com., 14 Bush (Ky.) 233.

Louisiana. — State *v.* Durbin, 20 La. Ann. 408; State *v.* Cook, 20 La. Ann. 145.

Mississippi. — Woods *v.* State, (Miss. 1889) 6 So. Rep. 207.

Missouri. — State *v.* Brown, 104 Mo. 365; State *v.* O'Connor, 105 Mo. 121; State *v.* Johnson, 111 Mo. 578; State *v.* Woodward, 131 Mo. 369; State *v.* McLain, 159 Mo. 340.

Montana. — State *v.* Oliver, 20 Mont. 318.

North Carolina. — State *v.* Curtis, 71 N. Car. 56; State *v.* Sowls, Phil. L. (61 N. Car.) 151.

Ohio. — Matthews *v.* State, 4 Ohio St. 539; Boose *v.* State, 10 Ohio St. 575.

Oklahoma. — Axhelm *v.* U. S., 9 Okla. 321.

Pennsylvania. — Com. *v.* White, 133 Pa. St. 182, 19 Am. St. Rep. 628.

Tennessee. — Hammond *v.* State, 3 Coldw. (Tenn.) 129.

Whether one of a mob or band of outlaws can plead in defense coercion by his companions, see Ashworth *v.* State, 31 Tex. Crim. 419.

It is not robbery if one, in a *bona fide* belief that he is acting under orders of the captain of the Home Guard, goes to another's dwelling house and forcibly possesses himself of a sword merely for the purpose of disarming the prosecutor. State *v.* Sowls, Phil. L. (61 N. Car.) 151. But compelling a janitor to surrender the key to a bank is robbery, whether the robbers formed the plan of taking the key before they entered the janitor's room, or whether it was an afterthought suggested by seeing it on the table. Hope *v.* People, 83 N. Y. 418, 38 Am. Rep. 460.

Liability of Belligerents. — Hammond *v.* State, 3 Coldw. (Tenn.) 129; Com. *v.* Holland, 1 Duv. (Ky.) 182; Witherspoon *v.* Farmers' Bank, 2 Duv. (Ky.) 496, 87 Am. Dec. 503.

Intoxication of the Accused is a fact proper for the jury to consider on the question of intent. Driscoll *v.* People, 47 Mich. 413; Latimer *v.* State, 55 Neb. 609, 70 Am. St. Rep. 408; Keeton *v.* Com., 92 Ky. 522.

Intent — Armed with Dangerous Weapon. — Com. *v.* Martin, 17 Mass. 359.

7. Jordan *v.* Com., 25 Gratt. (Va.) 943. And see Hope *v.* People, 83 N. Y. 418, 38 Am. Rep. 460.

8. **Taking in Jest.** — Chappell *v.* State, 52 Ala. 359; Com. *v.* White, 133 Pa. St. 183, 19 Am. St. Rep. 625, 25 W. N. C. (Pa.) 439.

a taking of goods accompanied by payment or an offer of payment of less than their value is robbery,[1] though it is doubtful in cases where the sum offered is equal to or in excess of their actual value.[2]

b. CLAIM OF RIGHT. — As it is essential, to constitute robbery, that the thing taken must belong to another than the taker,[3] it follows that though the property is taken from another forcibly or by putting in fear this is not robbery, whatever else it may be, if the taker at the time has a *bona fide* belief that the thing taken is his own.[4] Likewise, it is not robbery by violence or menaces to take money or other property in payment of a debt [5] unless more is taken than is due.[6] In *Georgia* and *Kentucky* it is held that it is not robbery to retake by force money lost at gambling,[7] while in *Texas* the contrary has been decided.[8] But, unquestionably, the crime is committed where more than the amount lost is taken.[9]

IV. CRIMINAL LIABILITY — 1. At Common Law. — To authorize a conviction for robbery it is not necessary that the taking and the acts of violence be done by the same person; if the force is exercised by one and the taking is done by another, it is equally robbery in both.[10] It is not even necessary that the accused participate in the robbery if, pursuant to previous agreement, he is ready and willing to assist;[11] nor, if there is such agreement, is it even requisite that he be actually present;[12] one who remains outside the building to aid while the others enter and commit the crime, or one who is in a distant city

1. Offer of Payment. — Rex *v.* Simons, 2 East P. C., c. 16, § 128; 2 Russ. on Crimes (9th Am. ed.) 106.

2. Rex *v.* Spencer, 2 East P. C., c. 16, § 128; Fisherman's Case, 2 East P. C., c. 16, § 98.

3. See *supra*, this section, *Ownership*.

4. Claim of Right — *England.* — Reg. *v.* Boden, 1 C. & K. 395, 47 E. C. L. 395; Rex *v.* Hall, 3 C. & P. 409, 14 E. C. L. 373.

Arkansas. — Brown *v.* State, 28 Ark. 126.

California. — People *v.* Vice, 21 Cal. 344.

Georgia. — Long *v.* State, 12 Ga. 293.

Iowa. — State *v.* Hollyway, 41 Iowa 200, 20 Am. Rep. 586.

Michigan. — Driscoll *v.* People, 47 Mich. 413.

Mississippi. — McDaniel *v.* State, 8 Smed. & M. (Miss.) 401, 47 Am. Dec. 93.

Missouri. — State *v.* Carroll, 160 Mo. 368.

New York. — People *v.* Hall, (Supm. Ct. Gen. T.) 6 Park. Crim. (N. Y.) 642.

Ohio. — State *v.* Carman, Tappan (Ohio) 97.

Texas. — Higgins *v.* State, (Tex. App. 1892) 19 S. W. Rep. 503; Barnes *v.* State, 9 Tex. App. 128; Smedly *v.* State, 30 Tex. 214.

Utah. — People *v.* Hughes, 11 Utah 100.

See also 2 Russ. on Crimes (9th Am. ed.) 105; 2 Roscoe's Crim. Ev. (8th Am. ed.) 934.

This doctrine accords with the principles of the Roman law. Just. Inst. L. IV., 2, § 1. *Compare* Black *v.* State, 3 Yerg. (Tenn.) 588, holding that it is not competent for a defendant indicted for forcibly taking property from the possession of another to show title to the property taken, upon the trial of the indictment, with McDaniel *v.* State, 8 Smed. & M. (Miss.) 401, 47 Am. Dec. 93, deciding that it is not larceny to take property from another under a *bona fide* claim of title.

Pretense. — "The claim of property in the thing taken away, without any color, is no manner of excuse." 1 Hawk. P. C., c. 34, § 8. See to the same effect State *v.* Hunt, 45 Iowa 673; 2 Russ. on Crimes (9th Am. ed.) 110.

5. Payment of Debt. — Reg. *v.* Coghlan, 4 F. & F. 316; Reg. *v.* Hemmings, 4 F. & F. 50; Crawford *v.* State, 90 Ga. 701, 35 Am. St. Rep. 242; State *v.* Hollyway, 41 Iowa 200, 20 Am. Rep. 586; State *v.* Brown, 104 Mo. 365.

6. State *v.* Carroll, 160 Mo. 368.

7. Retaking Money Lost at Gaming. — Gant *v.* State, 115 Ga. 205; Thompson *v.* Com., (Ky. 1892) 18 S. W. Rep. 1022; Sikes *v.* Com., (Ky. 1896) 34 S. W. Rep. 902.

8. Carroll *v.* State, (Tex. Crim. 1900) 57 S. W. Rep. 99; Blain *v.* State, 34 Tex. Crim. 448.

9. Gant *v.* State, 115 Ga. 205

10. Taking by One Person Violence by Another. — Rex *v.* Fallows, 5 C. & P. 508, 24 E. C. L. 431; State *v.* Lucas, 57 Iowa 501; State *v.* Stewart, 127 Mo. 290; State *v.* Lawler, 130 Mo. 366, 51 Am. St. Rep. 575; Wheeler *v.* Com., 86 Va. 658; 2 Russ. on Crimes (9th Am. ed.) 139. And see Reg. *v.* Barnett, 2 C. & K. 594, 61 E. C. L. 594, 3 Cox C. C. 432.

Where one crowds the complainant against the door of a crowded street car, while the other puts his arm around his neck and removes his wallet, this is robbery in the latter. Mahoney *v.* People, 3 Hun (N. Y.) 202, *affirmed* 59 N. Y. 659.

11. Prior Agreement. — Com. *v.* Ryan, 154 Mass. 422; Colter *v.* State, 37 Tex. Crim. 284; State *v.* O'Keefe, 23 Nev. 127, 62 Am. St. Rep. 768.

Felonious Intent to Render Assistance, Necessary. — Ward *v.* Com., 14 Bush (Ky.) 233. And see Golden *v.* State, 18 Tex. App. 637.

Where one party was present while the other committed the crime of robbery from the person, and, as soon as the latter declared that he had possession of the object of the crime, they both fled and hid together in a closet, this was held sufficient to constitute the first party a principal in the felony. People *v.* McElroy, (Supm. Ct. Gen. T.) 37 N. Y. St. Rep. 650.

As to the effect of 7 Wm. IV. and 1 Vict., c. 87, § 4, see Reg. *v.* Henry, 9 C. & P. 309, 38 E. C. L. 128, 2 Moody 118.

12. 1 Hawk. P. C., c. 34, § 4; Hale's P. C. 534.

doing acts preliminary to the execution of the joint purpose, is guilty.[1] The better rule seems to be that where the acts of several enable one or more to effect the taking all are not equally liable until it appears that all worked in concert to promote the robbery, pursuant to a previous agreement.[2] But if several have associated themselves for the purpose of committing robbery, all are guilty although one alone has perpetrated the act, as all are regarded as constructively present.[3] Participation in the fruits of the robbery is no test of liability,[4] and one who receives money obtained by robbery, with a knowledge of the manner in which it was obtained, cannot be convicted of robbery.[5] But if there is a conspiracy to rob one person and, by mistake, some of the conspirators rob another under the belief that he is the person intended, one of the conspirators who was not present, but who, on being subsequently advised of the facts, assents and participates in the result, becomes equally liable with the others.[6]

2. Under Statutes. — In several of the states it is provided that whenever two or more persons conjointly commit a robbery, or where the whole number of persons conjointly committing a robbery and persons present and aiding such robbery amount to two or more, either of such persons is punishable by imprisonment for life.[7] The *New Jersey* statute is directed against the person directly offending and "his or her aiders, procurers, and abettors."[8] If one is armed with a dangerous weapon all may be convicted of the statutory offense of robbery, being "armed with a dangerous weapon."[9]

V. EVIDENCE — Motive. — On the question of motive, it may be shown that there was an execution out against the defendant,[10] but not that the assaulted party had no money, unless it is shown that the defendant knew that fact.[11]

Intent. — The prosecutor may testify as to the fear and apprehension that he felt at the time of the robbery.[12] The felonious intent may be inferred from the taking.[13]

Res Gestæ. — Everything said and done by the prosecuting witness and the prisoner at the time of the assault is competent as part of the *res gestæ*.[14]

1. Stephens *v.* State, 42 Ohio St. 150.

Where several persons combined to rob an express company, and one, in pursuance of the combination, went to another city and telegraphed when a large amount of money would be on the express company's car, and the others did the robbery, the former was held to be equally guilty with the latter. State *v.* Chapman, 6 Nev. 320.

2. **Common Intent.** — Com. *v.* Ryan, 154 Mass. 422; People *v.* Foley, 59 Mich. 553.

Where a gang of poachers attacked a gamekeeper and left him senseless on the ground, and one of them returned and stole his money, it was held that only that one could be convicted of robbery, as the stealing was not in pursuance of any common intent. Rex *v.* Hawkins, 3 C. & P. 392, 14 E. C. L. 365; 1 Russ. on Crimes (9th Am. ed.) 745.

Where the defendant was jointly indicted with others for robbing the prosecuting witness, and the evidence showed that the defendant entered the house of the prosecuting witness and held him while one of the co-defendants opened a trunk and took certain coins therefrom, an instruction was held to be erroneous which authorized a verdict against the defendant without proof of a conspiracy or concerted action between himself and his co-defendant, who took the coins. State *v.* Johnson, 111 Mo. 578.

But where all act together, each in his own way, all may be deemed guilty under a joint and several indictment although they did not actually meet and agree to commit the robbery. Miller *v.* People, 39 Ill. 457.

3. State *v.* Heyward, 2 Nott & M. (S. Car.) 312, 10 Am. Dec. 604.

4. State *v.* Brown, 104 Mo. 365.

5. People *v.* Shepardson, 48 Cal. 189.

6. State *v.* Greenwade, 72 Mo. 298.

7. See for example, Annot. Stat. S. Dak. (1901), § 7749; Rev. Codes N. Dak. (1895), § 7126.

8. Gen. Stat. N. J. (1895), p. 1074, par. 134.

9. People *v.* Gallagher, 75 Mich. 512.

10. **Evidence — Motive.**—Armstrong *v.* State, 34 Tex. Crim. 248.

11. Angley *v.* State, 35 Tex. Crim. 427.

12. Long *v.* State, 12 Ga. 293; Dill *v.* State, 6 Tex. App. 113.

13. Jordan *v.* Com., 25 Gratt. (Va.) 948; Long *v.* State, 12 Ga. 293.

14. **Res Gestæ.** — Rex *v.* Rooney, 7 C. & P. 517, 32 E. C. L. 608; People *v.* Nelson, 85 Cal. 421; Lampkin *v.* State, 87 Ga. 516; Bow *v.* People, 160 Ill. 438; Pickerel *v.* Com., (Ky. 1895) 30 S. W. Rep. 617; State *v.* Horan, 32 Minn. 394, 50 Am. Rep. 583; Tracey *v.* State, 46 Neb. 361; State *v.* Ah Loi, 5 Nev. 99; Morgan *v.* State, 48 Ohio St. 371. And see as to similar acts in other places on the same day, Rex *v.* Winkworth, 4 C. & P. 444, 19 E. C. L. 465.

It is competent, upon the trial of an indictment for robbery, to show the effect of the

Dying Declarations. — Dying declarations are not admissible on a trial for robbery.[1]

Possession of Property. — The possession of stolen property shortly after the robbery, unless explained, is evidence of guilt.[2]

Ownership. — Proof of robbery from the person is sufficient *prima facie* evidence of the ownership of the money taken.[3]

Sufficiency to Convict. — As in prosecutions for other crimes, the guilt of the defendant must be established beyond a reasonable doubt.[4]

VI. ATTEMPTS. — The crime of assault with intent to rob may be committed by intimidation as well as by actual force, and as the intimidation may be as effectually accomplished by apparent as by actual ability to inflict the injury in the manner threatened, actual ability is not necessarily essential to constitute the crime.[5] Threats to accuse of crime or to do bodily injury are equivalent to attempts to rob in *Arkansas*, *Kansas*, and *Mississippi*.[6] An attempt to commit robbery involves an attempt to commit the larceny involved in the robbery,[7] but where the evidence shows an attempt to commit robbery rather than larceny, there can be no lawful conviction of the attempt to commit larceny.[8] In some jurisdictions assaults with intent to rob are distinguished by degrees, depending principally upon whether or not the accused was armed at the time.[9] The earlier cases interpreting 7 Geo. II., c. 21, § 1 (providing that "if any person or persons shall with any offensive weapon * * * assault, or shall by menaces, or in * * * violent manner

assault upon the person assaulted. Com. *v.* Flynn, 165 Mass. 153.

Defendant Acting with Another Person.— Farris *v.* State, 26 Tex. App. 105.

1. Rex *v.* Lloyd, 4 C. & P. 233, 19 E. C. L. 360. And see the title DYING DECLARATIONS, vol. 10, p. 370.

2. **Possession of Stolen Property.** — Bradley *v.* State, 103 Ala. 29; People *v.* Titherington, 59 Cal. 598; State *v.* Harris, 97 Iowa 407; State *v.* Sullivan, 9 Mont. 174; People *v.* Mackinder, 80 Hun (N. Y.) 40; Com. *v.* Devlin, 35 Pa. L. J. 432. And see People *v.* Etting, 99 Cal. 577; Com. *v.* Tolliver, 119 Mass. 312; People *v.* Whitson, 43 Mich. 419; State *v.* Sullivan, 9 Mont. 174.

3. Bow *v.* People, 160 Ill. 438. And see State *v.* Hobgood, 46 La. Ann. 855.

4. **For Cases Wherein the Evidence Was Held Sufficient** to convict or submit to the jury, see:
England. — Reg. *v.* Birch, 2 C. & K. 193, 61 E. C. L. 193, 1 Den. C. C. 185, 2 Cox C. C. 22; Reg. *v.* Britton, 1 F. & F. 354.
Arkansas. — James *v.* State, (Ark. 1902) 68 S. W. Rep. 247.
California. — People *v.* McDonald, (Cal. 1896) 45 Pac. Rep. 1005; People *v.* Barry, 90 Cal. 41; People *v.* Lum Yit, 83 Cal. 130.
Florida. — Williams *v.* State, 42 Fla. 205.
Georgia. — Scott *v.* State, 83 Ga. 793; Patton *v.* State, 92 Ga. 457; Usom *v.* State, 97 Ga. 194.
Illinois. — Ogden *v.* People, 134 Ill. 599; Garrity *v.* People, 70 Ill. 83.
Indiana. — McCarty *v.* State, 127 Ind. 223.
Iowa. — State *v.* Callahan, 96 Iowa 304; State *v.* Reasby, 100 Iowa 231; State *v.* Sipult, 81 Iowa 40.
Kentucky. — Hess *v.* Com., (Ky. 1887) 5 S. W. Rep. 751.
Minnesota. — State *v.* Minot, 79 Minn. 118.
Missouri. — State *v.* Moore, 106 Mo. 480.
Montana. — State *v.* Sullivan, 9 Mont. 174; State *v.* Roach, 11 Mont. 227.
New York. — People *v.* McElroy, 60 Hun (N. Y.) 577, 14 N. Y. Supp. 203; People *v.* Smith, (Supm. Ct. Gen. T.) 7 N. Y. Crim. 425. And see People *v.* Fox, 121 N. Y. 449; People *v.* Stack, 41 N. Y. App. Div. 548; People *v.* O'Neil, 51 Hun (N. Y.) 640, 4 N. Y. Supp. 410.
North Carolina. — State *v.* Leach, 119 N. Car. 828; State *v.* Bradburn, 104 N. Car. 881.
Tennessee. — Miller *v.* State, 12 Lea (Tenn.) 223.
Texas. — Odle *v.* State, 13 Tex. App. 612; Ring *v.* State, 42 Tex. 282; McCormick *v.* State, 26 Tex. App. 678.
Virginia. — Wheeler *v.* Com., 86 Va. 658.
In such a case, evidence that the prisoner had avowed an intention to rob D., that he had used violence towards D. on the night of the robbery, and that part of the stolen property was seen in his possession a few hours after the robbery, was held sufficient to submit the question of the prisoner's guilt to the jury. Bloomer *v.* People, 1 Abb. App. Dec. (N. Y.) 146.

5. **Attempts.** — McNamara *v.* People, 24 Colo. 66.
As to whether it is necessary that there should be a present actual ability, see the title ASSAULT AND BATTERY, vol. 2, p. 958.

6. Sand. & H. Dig. Stat. Ark. (1894), § 1886; Gen. Stat. Kan. (1897), c. 100, §§ 78, 80; Annot. Code Miss. (1892), § 1287.

7. State *v.* Sommers, 12 Mo. App. 374.

8. State *v.* Craft, 72 Mo. 456.

9. Rev. Laws Mass. (1902), c. 207, §§ 18, 20; Comp. Laws Mich. (1897), §§ 11486, 11487; Comp. Laws N. Mex. (1897), §§ 1086, 1088; Stat. Vt. (1895), §§ 4915, 4916; Stat. Wis. (1898), §§ 4376, 4379; Reg. *v.* Woodhall, 12 Cox C. C. 240.
Conviction of common assault cannot be had on an indictment for assault with intent to rob. Reg. *v.* Woodhall, 12 Cox C. C. 240.

demand any money * * * from any other person or persons with a felonious intent to rob or commit robbery upon such person or persons * * * shall be adjudged guilty," etc.), held that both a demand and an assault were necessary to constitute the offense, but it seems now to be settled that either a demand or the use of an offensive weapon is sufficient.[1] Though the Federal Statute defines and provides for the punishment of the offense of attempting to rob in the Indian country, and omits to provide for the punishment of the crime of robbery, this does not merge the lesser into the greater crime.[2]

ROCK. — "A rock may be defined as a mass of material matter composed of one or more, usually of several, kinds of minerals, having as a rule no definite external form, and liable to vary considerably in chemical composition."[3]

ROGATORY (LETTERS.) — See the title DEPOSITIONS, vol. 9, p. 298.

ROGUE. (See also VAGRANT.) — "Rogue" is a French word, which in that language signifies proud, arrogant. In some of the ancient *English* statutes it means an idle, sturdy beggar, which is its meaning in law. Rogues are usually punished as vagrants.[4]

ROISTERERS. — See note 5.

ROLL. (See also the title RECORDS, *ante*, p. 155.) — A "roll" is defined as 'a schedule of parchment which may be turned up with the hand in the form of a pipe or tube; sheet to sheet tacked together in such manner that the whole length might be wound up together in the form of spiral rolls."[6]

ROLLING STOCK. (See also the titles CHATTEL MORTGAGES, vol. 5, p. 975; RAILROADS, vol. 23, p. 667; RAILROAD SECURITIES, vol. 23, p. 807.) — Rolling stock embraces the movable property belonging to a railroad; more particularly, such property as in the ordinary operation of the road is taken from one part of the line to another, such as cars, locomotives, etc.[7]

ROLL MACHINE. — See note 8.

ROMAN CATHOLIC. — See CATHOLIC, vol. 5, p. 771, and the title RELIGIOUS SOCIETIES, *ante*.

RONDO. — See the titles GAMING, vol. 14, p. 683; GAMING HOUSES, vol. 14, pp. 707, 708.

1. Rex *v.* Parfait, 1 Leach C. C. 19; Rex *v.* Thomas, 1 Leach C. C. 330; Rex *v.* Jackson, 1 East P. C. 419; Rex *v.* Trusty, 1 East P. C. 418. And see 1 Hawk. P. C., c. 34.

The assault must be made on the person intended to be robbed. Rex *v.* Thomas, 1 Leach C. C. 330.

2. Axhelm *v.* U. S., 9 Okla. 321.

3. **Rock.** — Encyc. Brit., *quoted* in Okey *v.* Moyers, (Iowa 1902) 91 N. W. Rep. 771, in which case it was held that soapstone was ***rock***.

4. **Rogue.** — Bouv. L. Dict.

In Cockaine *v.* Hopkins, 2 Lev. 214, the term ***rogue*** was held not to be actionable *per se*. *Compare* Brunt *v.* Spencer, 2 Keb. 47. See also the title LIBEL AND SLANDER, vol. 18, pp. 888, 928, and see Morgan *v.* Livingston, 2 Rich. L. (S. Car.) 582; Davis *v.* Davis, 1 Nott & M (S. Car.) 290.

5. **Roisterers.** — In State *v.* Smith, 125 N. Car. 626, Douglass, J., in a concurring opinion, said: "There are no harmless ***roisterers***. That species of ***roisterer***, if it ever existed, became extinct before the dawn of history. Various definitions of the word are given in the dictionaries, all unfavorable. The Century Dictionary says it is derived from the old French word 'rusterer,' meaning ruffian."

6. **Roll.** — Colman *v.* Shattuck, 5 Thomp. & C. (N. Y.) 40, *affirmed* 62 N. Y. 348, *quoting* Bouv. L. Dict.

In McCahill *v.* Equitable L. Assur. Soc., 26 N. J. Eq. 536, it was said: "In 1 Inst. 260 Lord Coke says: 'The ***rolls***, being the records or memorials of the judges of the courts of record, import in them such incontrollable credit and verity as they admit of no averment, plea, or proof to the contrary. And if such a record be alleged, and it be pleaded that there is no such record, it shall be tried only by itself; and the reason hereof is apparent, there should never be any end of controversies.'"

Assessment Rolls. — See the title TAXATION.

Play or Roll. — See PLAY, vol. 22, p. 836.

7. **Rolling Stock.** — Ohio, etc., R. Co. *v.* Weber, 96 Ill. 448, 5 Am. & Eng. R. Cas. 101.

Personalty or Realty. — See the titles CHATTEL MORTGAGES, vol. 5, p. 975; RAILROAD SECURITIES, vol. 23, p. 807; and see State Treasurer *v.* Somerville, etc., R. Co., 28 N. J. L. 21.

8. **Roll Machine.** — See Elliott *v.* Secor, 60 Mo. 164.

ROOM. — See note 1.
ROOTS. — See note 2.
ROPE. — See note 3.
ROPEWALK. — See note 4.
ROSIN. — "Rosin is the residuum left from the process of distilling turpentine, and is poured into barrels while in a liquid or semi-liquid state. When it cools it hardens like plaster of paris and will stand alone as if it were of solid stone, even if taken out of the barrels." [5]
ROTTEN. — See note 6.
ROUND. — See note 7.

1. Room and Floor. — See FLOOR, vol. 13, p. 724.

Intoxicating Liquors. (See also the title INTOXICATING LIQUORS, vol. 17, p. 189.) — In State *v.* Barge, 82 Minn. 260, it was said: "The licensee must also give a bond not to sell at any place other than the *room* named in the license. Gen. Stat. (1894), §§ 2018, 2026. The word *room* is used in these sections of the statute in its ordinary sense, as meaning a single inclosure separated by partitions or other means from the other parts of a building. Now, if the *room* named in the license may be subdivided into inclosed drinking *rooms*, booths, or stalls, the declared policy and purposes of the law may be thereby wholly defeated."

Insurance Policy. — In his application for an insurance policy upon a manufactory, the assured affirmed that there were casks of water in each *room*. It was held that parol evidence was admissible to show that in the general use of language among manufacturers, the whole of a loft or story appropriated to a particular department was called "one *room*," although it was divided by partitions with doors. Daniels *v.* Hudson River F. Ins. Co., 12 Cush. (Mass.) 416, 59 Am. Dec. 192.

Whole Room. — An agreement for the lease of a storeroom, cellar, and warehouse to be used as a boot and shoe store was made while the building was in the course of erection, and contained the following agreement: "Said first party also to put up two partitions across store*room*; also one between said partitions; * * * and said partitions to be painted white by said first party. The whole *room* to be put in good order for use of said second party." It was held that the phrase "whole *room*" in the last sentence was to be construed as referring to the entire premises covered by the lease. The court said: "The definitions cited show that the word *room* has different meanings, such as, 'space in a building marked off or set apart by a partition;' 'Space which has been set apart or appropriated to any purpose.' Webster." Bentley *v.* Taylor, 81 Iowa 308.

Real Property. — Where a testator ordered that his wife should have one *room* in his dwelling house, this was held to be a devise of real property so as to bar the wife's right of dower, she neglecting to decline the devise within six months after probate, as provided by the *New Jersey* statute. White *v.* White, 16 N. J. L. 202.

2. Roots. — In Coit *v.* Commercial Ins. Co., 7 Johns. (N. Y.) 385, parol evidence was held to be admissible to show that the term *roots* in a policy of insurance was confined to such *roots* as were perishable in their nature.

Roots Prepared or Otherwise. — See PINKROOT, vol. 22, p. 824.

From the Grass Roots Down. — The vendor of a gold mine represented that it would yield a certain per cent. of gold from the grass *roots* down. In Martin *v.* Eagle Creek Development Co., 41 Oregon 456, the court said: "The expression 'from the grass *roots* down,' in its ordinary or literal sense, means to the centre of the earth, and that is as far as judicial notice can be expected to extend. If it has a peculiar signification, peculiar to a locality or to a particular industry, different from the ordinary one, of this the court will not take notice."

3. Rope Makers or Manufacturers. — See Wall *v.* Howard Ins. Co., 14 Barb. (N. Y.) 383.

Rope Reel — Spools. — In Felix *v.* Scharnweber, 19 Ill. App. 629, it was said: "The *rope* reel mentioned in the contract consisted of a combination of a frame or rack and a series of spools, each having adjustable flanges, said rack being held in an inclined position by means of a depending brace, hinged to the back of the frame at the upper end, and connected at the lower end by means of a tie brace."

4. Ropewalk. — Where a deed described the property conveyed as a *ropewalk*, it was held that such land of the grantor should pass as was exclusively devoted to the use of the *ropewalk*. Davis *v.* Handy, 37 N. H. 65.

5. London Assur. Corp. *v.* Thompson, 170 N. Y. 94, (fire policy). See the titles FIRE INSURANCE, vol. 13, p. 86; REINSURANCE, *ante*, p. 247.

6. Rotten — Unsound. — In Haworth *v.* Seevers Mfg. Co., 87 Iowa 775, it was held that an allegation that the defendants were negligent in using unsound and *rotten* material in a scaffold was supported by evidence that the board which broke and caused the injury was knotty, cross-grained, and dangerous. The court said: "There is, we may say, no evidence that the board was decayed so as to come within the ordinary acceptation of the term *rotten*, but it was unsound, and its strength likely weakened by time and exposure. One definition given by Webster for *rotten* is 'not firm or trusty; unsound; defective;' etc."

7. Round. — A grant of land was described in a patent as extending four English miles *round* five great plains, which were named. It was held that this did not necessarily imply that the boundaries of the grant were circular. The court, *per* Thompson, J., said: "This term *round* may, however, grammatically as

ROUNDSMAN. — See PATROLMAN, vol. 22, p. 506.

ROUT. (See also the titles AFFRAY, vol. 1, p. 915; RIOT, *ante;* UNLAWFUL ASSEMBLY.) — A rout is a disturbance of the peace by three or more persons who, having assembled unlawfully, with an intention to do that which, if done, would make them rioters, make, toward the execution of their purpose, an advance or motion which nevertheless falls short of execution.[1]

ROUTE. (See also the title RAILROADS, vol. 23, p. 667.) — A route is a way used for going from one place to another. And, corresponding with its defined meaning, its common acceptation excludes terminal points and makes it dependent on them.[2]

ROWBOAT. — See the title SHIPS AND SHIPPING, and see VESSEL.

ROYAL MINE. — See note 3.

ROYALTIES. — At common law royalties were the *regalitates*, prerogatives of the king, etc.[4] As the term is commonly understood, a royalty is a sum paid to the lessor of a mine or the grantor of a patent by the lessee or grantee, proportionate to the output of the mine or the number of patented articles manufactured;[5] also a certain sum for each volume sold stipulated for by the author of a copyrighted book in return for a grant of the copyright or of the right to publish.

RUBBISH. — See note 6.

RUBBLE STONES. — "Rubble stones are rough, irregular stones, such as are found in quarries that furnish small and inferior stone only, or are the

well as in common parlance, be satisfied by giving land on every side of the plains, let the exterior lines be either circular or straight." Jackson *v.* Reeves, 3 Cai. (N. Y.) 298. See generally the title BOUNDARIES, vol. 4, p. 756.

Measure of Damages. — In Golden *v.* Clinton, 54 Mo. App. 118, which was an action for damages for personal injuries, the court said: "The term ***round*** is no doubt the equivalent of that of 'large, great, or considerable,' and for that reason should not be employed in an instruction in a case like this; but in view of the fact that an instruction employing such a term has been passed by the Supreme Court without criticism (Loewer *v.* Sedalia, 77 Mo. 439), we do not feel at liberty to overturn a judgment for this reason alone."

Logs. — A bill of particulars described certain logs concerning which suit was brought as ***round***, while the written contract provided only for logs, without prescribing that they should be ***round***. It was held that the court would take judicial notice that all sawlogs are for all practical purposes considered ***round***. The court said: "The word ***round***, as applied to logs, has a well-known meaning, indicating that their shape is circular or cylindrical." Bucki *v.* McKinnon, 37 Fla. 391.

1. Rout. — 4 Black. Com. 146; 1 Hawk. P. C., c. 65, § 8. Unlawful assemblies, ***routs***, and riots are three allied disturbances of the public peace. If the unlawful assembly moves forward toward the execution of its design it is a ***rout;*** an actual execution of the design is a riot. See 1 Hawk. P. C., c. 65, § 1 *et seq.*

In State *v.* Sumner, 2 Spears L. (S. Car.) 599, where the indictment charged a riot and the evidence was that two of the defendants were about to engage in a prize fight, for which all preparations had been made, the third defendant being a second, it was held that the assembly with a common intent to commit a breach of the peace being shown, and nothing but blows being necessary to constitute the offense of riot, the case was one of ***rout***, and that a general verdict of guilty was sufficient.

2. Route. — Atty.-Gen. *v.* West Wisconsin R. Co., 36 Wis. 494.

Most Direct Route. — See MOST, vol. 20, p. 1076, note.

An agreement was for the conveyance of a right of way through the vendor's land "on the ***route*** lately surveyed." In construing this agreement the court said: "The term ***route*** is not necessarily so precise as to preclude variation sufficient to change an oblique angle into a curve, and the jury might well have found that the parties intended that this might be done." Wood *v.* Michigan Air Line R. Co., 90 Mich. 337.

Route Usually Traveled. — A statute allowed mileage for the ***route*** usually traveled by persons attending court. It was held that the allowance was proper where a longer but quicker ***route*** by rail was selected in preference to one by stage, shorter in actual distance but longer in time. Com. *v.* Heiges, 4 Pa. Dist. 184.

3. Royal Mine. — See Atty.-Gen. *v.* Morgan, (1891) 1 Ch. 444.

4. Royalties. — Atty.-Gen. *v.* Mercer, 8 App. Cas. 778.

Royalty in Sense of Rental. — Western Union Tel. Co. *v.* American Bell Telephone Co., 105 Fed. Rep. 687.

5. See the titles MINES AND MINING CLAIMS, vol. 20, p. 782; PATENTS, vol. 22, pp. 420, 438.

6. Rubbish. — As used in an *English* statute giving the ***rubbish*** removed by them to the public scavengers, ***rubbish*** was held to mean things which have become valueless to the owner and the property in which he has abandoned. Filbey *v.* Combe, 2 M. & W. 677.

remains in ledges from which dimension or other large stones have been taken; and when used for constructing walls they are not dressed, hewn, or cut, and so lose none of their measurement in laying." [1]

RUDE. (See also RIOT, *ante.*) — Rude means rough; insulting.[2]

RUDELY. — In a rude manner; coarsely; uncivilly; violently.[3]

RUG. — A rug is defined to be a coarse, nappy, woolen fabric, used for various purposes, as for the cover of a bed; for protecting the carpet before a fireplace; for protecting the legs against the cold in riding, as a railway rug.[4]

RULE. — 1. The verb "rule" has two significations: *a.* To command or require by a rule of court; as, to rule the sheriff to return the writ; to rule the defendant to plead. *b.* To settle or decide a point of law arising upon a trial at *nisi prius;* and when it is said of a judge presiding at such a trial that he "ruled" so and so, it is meant that he laid down, settled, or decided such and such to be the law.[5] 2. As a noun, a rule is: *a.* That which is prescribed or laid down as a guide to conduct; that which is settled by authority or custom; a regulation; a prescription; a minor law; a uniform course of things.[6] *b.* A regulation made by a court of justice or public office with reference to the conduct of business therein.[7] *c.* An order or direction of a court made in an action or other proceeding; usually made at the instance of one party to an action, and directed to the opposite party or to a ministerial officer commanding him to do some act, or to show cause why some act should not be done. Such rules are generally made incidentally in the trial of a cause, or upon interlocutory proceedings. In this sense the rule is either a rule *nisi* or a rule absolute. A rule *nisi*, or a rule to show cause, commands the party to show cause why he should not do the act required or why the object of the rule should not be enforced. It is in the form of an order that the relief desired shall be given, unless (*nisi*) sufficient cause is shown against it, and, if sufficient cause is not shown, the rule becomes absolute, final, and imperative. A rule absolute is opposed to a rule *nisi.* It commands the subject-matter of the rule to be at once enforced, and is not open to argument. *d.* "Rule" sometimes means a rule of law. Thus, we speak of the rule against perpetuities, the rule in Shelley's case, etc.[8]

RULE ABSOLUTE. — See RULE, *ante.*

RULE DAYS are days set apart periodically for making rules or orders in the clerk's office in causes pending.[9]

1. **Rubble Stones.** — Hawkins's Case, 12 Ct. Cl. 188. This case arose upon the construction of a contract providing for the delivery of a thousand cubic yards of ***rubble stones.***

2. **Rude.** — Holmes *v.* Carolina Cent. R. Co., 94 N. Car. 323.

Rude or Indecent Behavior. — See Reeves *v.* State, 96 Ala. 41, stated under INDECENT, vol. 16, p. 165.

3. **Rudely.** — State *v.* Lawrence, 19 Neb. 314.

Rudely Displaying Pistol. — Firing a pistol in the air has been held to constitute ***rudely*** displaying it. Gozy *v.* State, 34 Tex. Crim. 146.

4. **Rug.** — Webst. Dict., *quoted* in Ingersoll *v.* Magone, 14 U. S. App. 5, which was a case construing the term ***rug*** as used in a tariff act. See generally the title REVENUE LAWS, *ante.*

5. **Rule.** — Black's L. Dict.

6. Webst. Dict., *followed* in South Florida R. Co. *v.* Rhodes, 25 Fla. 46.

Rule of Evidence. — In Lapham *v.* Marshall, 51 Hun (N. Y.) 41, it was said: "The text writers say that the word 'evidence,' in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. 1 Greenl. Ev., § 1. A ***rule*** of evidence may, then, be defined to be the mode and manner of proving the competent facts and circumstances upon which a party relies to establish the fact in dispute in judicial procedure." See generally the title EVIDENCE, vol. 11, p. 484.

Legislative Body. — A ***rule*** is defined to be the regulation adopted by a deliberative body for the conducting of its proceedings. Armatage *v.* Fisher, 74 Hun (N. Y.) 172, in which case it was held that the term ***rule*** did not include an ordinance. *Compare* Taylor *v.* Lambertville, 43 N. J. Eq. 112. See generally the titles ORDINANCES, vol. 21, p. 943; STATUTES.

7. Sweet's L. Dict.

8. Sweet's L. Dict. See also ENCYC. OF PL. AND PR., titles ORDERS, vol. 15, p. 315; RULES OF COURT, vol. 18, p. 1235.

Judgment. — In Jacobs *v.* Moffatt, 3 Blackf. (Ind.) 398, it was said: "The ***rule*** entered was that the defendant should show cause, at the next term, why the award should not be made a ***rule*** of court. The word ***rule*** last used is evidently intended for the word 'judgment,' and must be so understood."

9. **Rule Days.** — 4 Min. Inst. 546.

RULE IN SHELLEY'S CASE. — See the title SHELLEY'S CASE (RULE IN).

RULE NISI. — See RULE, *ante*.

RULE OF COURSE. — A rule of course is a rule which the officers of a court are authorized to grant as a matter of course upon application, without the intervention of the court. Called also side-bar rule and office rule.

RULE OF PROPERTY. — A rule of property is a settled legal principle governing the devolution and ownership of property.[1]

RULES OF COURT. — See ENCYC. OF PL. AND PR., titles RULES OF COURT, vol. 18, p. 1235; UNITED STATES COURTS, vol. 22, p. 256.

RULE TO SHOW CAUSE. — See RULE, *ante*.

RUM. — See note 2.

RUMOR. (See also REPORT, *ante*.) — The word "rumor" signifies a flying or popular report; the common talk.[3]

RUN. — See note 4.

RUNAGATE. — See note 5.

RUNNING. — See note 6.

RUNNING ACCOUNTS. (See also the titles ACCOUNTS, vol. 1, p. 433; LIMITATION OF ACTIONS, vol. 19, p. 136; MUTUAL ACCOUNTS, vol. 21, p. 242.) — "Running account" means an open mutual account.[7]

RUNNING AT LARGE. — See LARGE — AT LARGE, vol. 18, p. 536, and see the titles ANIMALS, vol. 2, p. 378; FENCES, vol. 12, p. 1035; INJURIES TO ANIMALS, vol. 16, p. 478.

RUNNING DAYS. — See the title DEMURRAGE, vol. 9, p. 235.

1. Rule of Property. — See U. S. Savings, etc., Co. *v.* Harris, 113 Fed. Rep. 36.

2. Rum. — See the title INTOXICATING LIQUORS, vol. 17, p. 199, and see Grant *v.* State, 73 Ala. 14.

3. Rumor. — Smith *v.* Moore, (Vt. 1902) 52 Atl. Rep. 321, in which case it was also said that any *rumor* meant any current report, and not the remarks of a single person. See also the title LIBEL AND SLANDER, vol. 18, p. 851.

4. Run — Fire. — A statute provided for payment of damages by any person who should set a fire that should "*run* upon the land of another." It was held that it was not necessary that the fire should *run* along the ground in a traceable and continuous course, but that its spread in an ordinary mode, through natural causes, was within the statute. The court said: "We should do great violence to the statute were we to hold that it meant more by the word *run* than pass, spread, or communicate in ordinary modes." Ayer *v.* Starkey, 30 Conn. 307. See generally the title FIRES, vol. 13, p 404.

Run Out — Boundary. — A statute provided that when the boundary lines between two counties were indefinitely ascertained or described, the state engineer, upon application of the board of commissioners of either county, should "*run* out and establish such lines as nearly as may be in accordance with such defective description." It was held that the words "*run* out" did not require an actual survey of the line where such line had been drawn and unmistakably defined by nature. The court said: "The line is *run* out by adopting the one *run* out by nature. The summit of a mountain range is a natural line; no manual work upon it can define it any better than it is already defined. It is far more conspicuous than a line marked by artificial mounds can be." Hinsdale County *v.* Mineral County, 9 Colo. App. 376. See generally the title BOUNDARIES, vol. 4, p. 756.

Run-out — Metal. — In Kehoe *v.* Allen, 92 Mich. 466, it was said: "When the heated metal escapes through any imperfection in the mold it is called a '*run*-out,' and the testimony shows that these *run*-outs occur frequently, and in a large foundry like the one in question one occurs nearly every day."

Run and Remove. — Where an indictment charged that the defendant did *run* the property out of the state, instead of using the statutory word "remove," it was held that this did not render the indictment bad. Williams *v.* State, 27 Tex. App. 258.

Run Is Equivalent to Branch in the sense of a small watercourse. Webb *v.* Bedford, 2 Bibb (Ky.) 354.

Run of the Mine. — See Warren Glass Works Co. *v.* Keystone Coal Co., 65 Md. 551.

5. Runagate. — In Cockaine *v.* Hopkins, 2 Lev. 214, it was held that to charge a person with being a *runagate* was not actionable *per se*.

6. Running Along, On, and By. — See Hunt *v.* Brown, 75 Md. 481, and see the title BOUNDARIES, vol. 4, p. 756.

Running Fall. — A fall occasioned by a person attempting to gather or recover himself from starting to fall is sometimes termed a *running* fall. Mt. Carmel *v.* Guthridge, 52 Ill. App. 635.

Running Railroad. — In Neely *v.* Buchanan, (Tenn. 1899) 54 S. W. Rep. 997, it was said: "The railroad company, having nothing but a bare roadbed, with no railroad and no equipment, had not reached the plane of a common carrier. It was not '*running* and operating a railroad.'"

7. Running Account. — Brackenridge *v.* Baltzell, 1 Ind. 333, *cited* in Picker *v.* Fitzelle, 28 N. Y. App. Div. 521.

RUNNING DOWN. — See the title MARINE INSURANCE, vol. 19, p. 1026.

RUNNING POLICY. — See note 1.

RUNNING SWITCH. — See FLYING SWITCH, vol. 13, p. 725, and see the title CROSSINGS, vol. 8, p. 419.

RUNNING WATER. — See the title WATERS AND WATERCOURSES.

RUNNING WITH THE LAND. — See the title COVENANTS, vol. 8, p. 134; LEASES, vol. 18, p. 593.

RURAL. — See note 2.

RUST. — See the title CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES, vol. 7, p. 225.

S. (See also the title ABBREVIATIONS, vol. 1, p. 97.) — See note 3.

SABBATH. (See also LORD'S DAY, vol. 19, p. 549, and see the title SUNDAY AND HOLIDAYS.) — "Sabbath" and "Sunday" are used indiscriminately to denote the Christian Sabbath.[4]

SABBATH-BREAKING. (See also the title SUNDAY AND HOLIDAYS.) — See note 5.

1. Running Policy. (See also OPEN POLICY, vol. 21, p. 920, and see the titles FIRE INSURANCE, vol. 13, p. 102; MARINE INSURANCE, vol. 19, p. 1046.) — See Watson *v.* Swann, 11 C. B. N. S. 765 103 E. C. L. 765; Strohn *v.* Hartford F. Ins. Co., 37 Wis. 631.

2. Rural Population. — In State *v.* Eidson, 76 Tex. 305, it was said: "A town population is distinguished from a *rural* population, which is understood to signify a people scattered over the country and engaged in agricultural pursuits or some similar avocation requiring a considerable area of territory for its support. A section of country so inhabited cannot be called a town, nor treated as part of a town, without doing violence to the meaning ordinarily attached to that word."

Rural Property Distinguished from City Property. — In McKeesport *v.* Soles, 178 Pa. St. 367, it was said: "Generally speaking, the inquiry as to what is *rural* and what is urban property, within the meaning of the law, is one to which no hard and fast rule can be safely applied. It necessarily depends largely on the special circumstances of each case."

3. S. — Abbreviation of South. — See Sibley *v.* Smith, 2 Mich. 503.

Descriptions Held to Be Sufficient. — In a suit by a ditching association to enforce an assessment upon land described in the complaint as the "south half of the south-east quarter of section twenty-seven, in township twenty-one north, in range six, east, in the county of Madison," the assessment on which the suit was brought described the land thus: "*S.* ½ *S.* E. Sec. 27 T. 21, R. 6, E., twenty acres." It was held on demurrer that the description in the assessment was sufficient. Etchison Ditching Assoc. *v.* Jarrell, 33 Ind. 132.

The following description of land in an assessment: "*S.* ½ ex. W. 12 rods of E. 40 rods of N. ½ of N. ½, and N. 10 rods, *S.* 13 rods of E. 28 rods of N. ½ of N. W. ¼ of sec. 23, etc., 74 64-100 acres," was held to be sufficient, as the property could be located by a competent surveyor, without extrinsic aid. Law *v.* People, 80 Ill. 268.

Long S. — In Albright *v.* Lehigh Coal, etc., Co., 203 Pa. St. 69, it was said: "Generally his name is spelled by the officers writing as 'Burkhart Moser,' occasionally as 'Mosser,' and once in the Oswald suit the prothonotary has written it 'Mosser.' His signature to the waiver is written with the old-fashioned long *s*, now sometimes used in English to double the *s*, but at the date of the writing it signified but one *s*, and therefore the name spelled by the defendant is 'Moser,' as it appears in all the other papers in the suit now to be found in the office."

ss. — In Smith *v.* Richardson, 1 Utah 194, it was held that the omission of the letters *ss*, in the venue of an affidavit, was not fatal. The court said: "These letters form no material part of the venue. And although it is customary and more lawyer-like to use them after stating the venue, yet their use or omission, like the use or omission of the letters 'viz,' or the words 'to-wit,' for which the letters *ss* are a substitute, is more a matter of form than of real substance." To the same effect see McCord, etc., Mercantile Co. *v.* Glenn, 6 Utah 139.

4. Sabbath and Sunday. — Gunn *v.* State, 89 Ga. 342; State *v.* Drake, 64 N. Car. 591. See also Raines *v.* Watson, 2 W. Va. 387.

In State *v.* Drake, 64 N. Car. 591, the court said: "It was suggested upon the argument that the statute uses the word *Sabbath* instead of Sunday, which is the term usually employed in our previous legislation. The words are not strictly synonymous; the one signifying Saturday, the seventh day of the week, the Jewish *Sabbath;* the other, the first day of the week, commonly called the Lord's day. But by common usage, the terms are used indiscriminately to denote the Christian *Sabbath*, to wit, Sunday." See also State *v.* Williams, 4 Ired. L. (26 N. Car.) 400.

Sabbath-school Service Distinguished from Divine Service. — See Craig *v.* Pittsburgh First Presb. Church, 88 Pa. St. 48; Gass's Appeal, 73 Pa. St. 46.

Sabbath Night. — See NIGHT — NIGHTTIME, vol. 21, p. 540.

5. Sabbath-breaking. — In State *v.* Popp, 45 Md. 432, it was held that selling beer on Sunday was not *Sabbath-breaking.* The court said that by the legislation of the state a distinction had been made in terms between the offense of *Sabbath-breaking* and that of selling liquor on the Sabbath day. See also Seim *v.* State, 55 Md. 566.

SACCHARINE. — See note 1.

SACK. — See note 2.

SACRIFICE. — See note 3.

SADDLERY. — See note 4.

SÆVITIA. — In the civil and ecclesiastical law *sævitia* is defined to be personal violence actually inflicted or menaced, and affecting life or health.[5]

SAFE — SAFELY — SAFETY. — The word "safe" means free from danger of any kind; as, safe from enemies, safe from disease, safe from storms, safe from the malice of foes.[6]

1. Saccharine. — See U. S. *v.* Lehn, 113 Fed. Rep. 1005; Lutz *v.* Magone, 41 Fed. Rep. 129, 153 U. S. 108. And see generally the title REVENUE LAWS, *ante*.

2. Sack — Libel and Slander. (See generally the title LIBEL AND SLANDER, vol. 18, p. 851.) — In Edwards *v.* San Jose Printing, etc., Soc., 99 Cal. 431, it was held that a newspaper article which, in referring to a city election, stated that a large sum of money was to be put up by a corporation to corrupt voters, of whom a large number could be bought, and that it was "reported that Edwards is to have charge of the *sack*," was libelous *per se* and imported the use of the funds for purposes of corruption.

3. Sacrifice. (See also the title GENERAL AVERAGE, vol. 14, p. 952.) — In The Roanoke, 46 Fed. Rep. 298, it was said: "I take it, however, that the term *sacrifice*, as known to the maritime law, is used in the sense of giving up or suffering to be lost for the sake of something else, not in the sense of an immolation."

In Shepherd *v.* Kottgen, 2 C. P. D. 590, 21 Moak 485, Brett, L. J., said: "Where, whether the act relied upon as the act of *sacrifice* had been done or not, the thing in respect of which contribution is claimed would, by reason of its own state or condition, have been of no value whatever, or would have been certainly or absolutely lost to the owner, although the rest of the adventure had been saved, there is nothing lost to the owner by the act, and, therefore, there is nothing *sacrificed* — that is to say, there is no *sacrifice*." And see Heye *v.* North German Lloyd, 33 Fed. Rep. 63, where this opinion was commented upon approvingly.

4. Saddlery. (See also the title REVENUE LAWS, *ante*.) — In Veil *v.* U. S., 113 Fed. Rep. 856, it was held that the term *saddlery*, in a tariff law, did not include woolen bands used by veterinary surgeons to be applied to a horse's lame legs. The court said: "*Saddlery*, whatever else it may or may not mean, ought to be applied to the trappings of a well horse, a 'going' horse, and not a sick one."

Carriage Whips have been held not to be *saddlery* within a tariff law. See Davies *v.* U. S., 107 Fed. Rep. 266.

5. Sævitia. (See also the title DIVORCE, vol. 9, p. 783.) — Beebe *v.* Beebe, 10 Iowa 135; Hair *v.* Hair, 10 Rich. Eq. (S. Car.) 173; Briggs *v.* Briggs, 24 S. Car. 380, in which last case it was said: "And to this may be added as constituting *sævitia* of another kind: When the husband has not actually inflicted any bodily injury, yet practices such obscene and revolting indecencies in the family circle that a modest and pure-minded woman would find these grievances more intolerable to be borne than the most cruel afflictions upon her person."

6. Safe. — Louisville, etc., R. Co. *v.* Brownlee, 14 Bush (Ky.) 595, *quoting* Webst. Dict.

Personal Injuries. (See also the titles CARRIERS OF PASSENGERS, vol. 5, p. 474; MASTER AND SERVANT, vol. 20, p. 3.) — In St. Louis, etc., R. Co. *v.* Barnett, 65 Ark. 258, it was said: "In speaking of the duties of masters to servants or railroads to passengers, text writers and judges often use expressions like these, to wit: 'They are bound to furnish *safe* machinery, *safe* appliances, *safe* places to work, *safe* platforms,' etc. * * * But in none of the works or adjudicated cases does the word *safe*, when thus used, have an absolute or unqualified meaning; for that would make these classes of persons guarantors or insurers of the *safety* of their servants, employees, and passengers."

In Titus *v.* Bradford, etc., R. Co., 136 Pa. St. 626, it was said: "'Reasonably *safe*' means *safe* according to the usages, habits, and ordinary risks of the business. Absolute *safety* is unattainable, and employers are not insurers."

In Sankey *v.* Chicago, etc., R. Co., (Iowa 1902) 91 N. W. Rep. 821, it was said: "Reasonable *safety*, however, does not necessarily mean the absence of danger; for, paradoxical as it may seem, a place of great danger may be *safe*, within the terms of the law, if reasonable care has been used to guard against so much of the peril as ordinary prudence would anticipate and ordinary effort avoid."

Same — Special Machinery. — In an action by a servant against his master for personal injuries the trial court instructed the jury that it was the duty of the master to furnish *safe* machinery for the use of his employees. In holding this instruction to be erroneous, the court said: "The words '*safe* machinery,' in the connection used, would mean machinery so perfect that it could be used without danger resulting from any defect in it, and the law does not make it incumbent on railway companies or other employers to provide such machinery, but to use ordinary care to avoid such defects as may expose employees to danger while using it with ordinary care." Gulf, etc., R. Co. *v.* Wells, 81 Tex. 687. See also Texas Cent. R. Co. *v.* Lyons, (Tex. Civ. App. 1896) 34 S. W. Rep. 364.

Safe and Convenient — Highways. (See also the title HIGHWAYS, vol. 15, p. 420.) — In McCloskey *v.* Moies, 19 R. I. 299, it was said: "By the term '*safe* and convenient' is not meant, however, that they shall be absolutely *safe* or free from defects, but reasonably so. That is to say: When the traveled way is without obstruction or structural defects which en-

SAFE-CONDUCT. — See the title INTERNATIONAL LAW, vol. 16, p. 1159, and see PASSPORT, vol. 22, p. 258.

SAFE-DEPOSIT COMPANIES. — See the title LOAN, TRUST, AND SAFE-DEPOSIT COMPANIES, vol. 19, p. 477.

SAID. (See also AFORESAID, vol. 1, p. 918, and see SAME, *post*; SAY.) — "Said" is defined to mean before mentioned; aforesaid. In contracts, pleadings, and other legal documents, it is usual and proper, when it is desired to speak of a person or thing before mentioned, to designate it by the term "said" or "aforesaid," or by some similar term.[1] The word "said" is a word

danger the *safety* of travelers, and is sufficiently level and smooth to enable persons, by the exercise of ordinary care, to travel with *safety* and convenience, it is '*safe* and convenient.'" See also Church *v.* Cherryfield, 33 Me. 460.

Safe Custody. — See Reg. *v.* Newman, 8 Q. B. D. 706, stated under CUSTODY, vol. 8, p. 532, note.

Safe Distance. — A statute required persons engaged in blasting to give seasonable notice before each explosion so that all persons or teams should have time to retire to a *safe* distance. In construing this provision in Wadsworth *v.* Marshall, 88 Me. 271, the court said: "What would be a '*safe* distance' does not necessarily or probably mean absolutely beyond all sound of the explosion. The plaintiff might have driven to a point so far removed as to properly be considered a *safe* distance, and yet an unbroken or vicious horse might have been frightened by the noise of a distant explosion, which would not have had that effect upon a horse suitable to drive."

Safe Depository of Goods — Common Carrier. — See Louisville, etc., R. Co. *v.* Brownlee, 14 Bush (Ky.) 595.

Safe Keeping. (See also the title DEPOSIT, vol. 9, p. 279.) — In Wright *v.* Paine, 62 Ala. 340, 34 Am. Rep. 24, it was held that a deposit for *safe* keeping was a special deposit.

Same — Funds — Public Officers. — See the title PUBLIC OFFICERS, vol. 23, p. 374.

Safe Port. (See also the title CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES, vol. 7, pp. 179, 180, notes.) — A charter-party provided that a port to which the ship was ordered to go must be a *safe* port. It was held that a port which the vessel could not *safely* reach with a full cargo was not a *safe* port. Reynolds *v.* Tomlinson, (1896) 1 Q. B. 586. See also General Steam Nav. Co. *v.* Slipper, 11 C. B. N. S. 493, 103 E. C. L. 493; Capper *v.* Wallace, 5 Q. B. D. 163.

And in Ogden *v.* Graham, 1 B. & S. 773, 101 E. C. L. 773, it was held that a port which a vessel could not enter without risk of confiscation was not a *safe* port.

Safely and Securely. — Where a declaration stated that the defendant agreed to carry the plaintiff and his baggage "*safely* and securely," it was held that the words "safely and securely" meant "*safely* and securely, regard being had to the relative rights and duties of the parties;" that is to say, the words imported only an undertaking to use due care. Ross *v.* Hill, 2 C. B. 877, 52 E. C. L. 877.

Safely Delivered. — By the terms of a salvage contract no payments for services were due unless the vessel was delivered *safely* in port. In construing this provision, the court said: "'*Safely* delivered' meant delivered in a *safe* place, with no impending dangers, the same as '*safely* arrived,' '*safely* moored,' '*safely* anchored.' *Safely*, in such connection, does not mean that the ship is intact, without injury or damage resulting from her voyage." The Thornley, (C. C. A.) 98 Fed. Rep. 742.

In Safety. — In an action by a passenger against a carrier for injuries sustained while leaving a railroad train, the trial court instructed that the plaintiff was entitled to a reasonable time to leave the train in *safety*. This instruction was objected to. The Appellate Court said: "We are of opinion that the language was not improper in a charge, and did not hold defendant to too great a responsibility, and was, in effect, the same as if it had used the words 'without injury,' instead of 'in *safety*.'" Missouri, etc., R. Co. *v.* Miller, 15 Tex. Civ. App. 431.

1. Said. — Bouv. L. Dict., *followed* in Brown *v.* State, 28 Tex. App. 380. See also Lord *v.* Tyler, 14 Pick. (Mass.) 165.

The word *said* means something before mentioned. International, etc., R. Co. *v.* Anderson County, 59 Tex. 663.

"The word *said* is a word of limitation." Iowa College *v.* Fenno, 67 Iowa 247.

Said Forms No Part of Name Before Which It Is Placed. (See also the title NAME, vol. 21, p. 305.) — A declaration having given to a corporation its true name, to wit, "The Trustees of the Antipœda Baptist Church," etc., afterwards referred to it as "The *said* Trustees of the Antipœda Baptist Church," etc. This was claimed to be a misnomer, it being argued that the name was "the trustees," etc., and not "the *said* trustees." But the court held that the word "*said*" was not used as a part of the name of the corporation, but as a word of reference to an antecedent name; and that consequently there was no misnomer. Antipœda Baptist Church *v.* Mulford, 8 N. J. L. 190.

"Said Company." — See COMPANY, vol. 6, p. 359, note.

Said County. — See the title ACKNOWLEDGMENTS, vol. 1, p. 527, notes, and see Blythe *v.* Houston, 46 Tex. 67.

Said Parties. — See Lord *v.* Tyler, 14 Pick. (Mass.) 165.

Said Appeal. — Where it was ordered by the Court of Queen's Bench that an inferior court should hear "the *said* appeal," it was held that the appeal after being materially altered was not "the *said* appeal" and the court might refuse to hear it. Reg. *v.* Eyre, 7 El. & Bl. 619, 90 E. C. L. 619.

of reference to what has been already spoken of or specified, and if there is a question as to which of the antecedent things or propositions specified is referred to, it is generally held to refer to the last of such antecedent propositions or things.[1]

SAIL, SAILING, ETC. — To "sail" means to start on a voyage.[2]

SAILOR. — See the title SEAMEN.

SALABLE UNDERWOOD. — See UNDERWOOD.

SALABLE VALUE. — See ACTUAL — ACTUALLY, vol. 1, p. 607, note, and see VALUE.

SALARY. (See also the titles EXEMPTIONS (FROM EXECUTION), vol. 12, p. 134; INSOLVENCY AND BANKRUPTCY, vol. 16, p. 695; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 21, p. 833; PUBLIC OFFICERS, vol. 23, p. 314; and see COMPENSATION, vol. 6, p. 369; EMOLUMENTS, vol. 10, p. 1204; FEE, vol. 12, p. 889; WAGES.) — Salary is the periodical compensation of men in official and some other situations. The word "salary" is derived from *salarium*, which is from the word *sal*, salt, being an article in which the Roman soldiers were paid.[3] The word "salary" may be defined generally as

1. Last Antecedent. — Hinrichsen *v.* Hinrichsen, 172 Ill. 465.

In general, ***said*** has reference to the last antecedent, and will receive that construction, unless it would do violence to the context. For example, where a particular defendant is last named in a paragraph of a complaint, and in a succeeding paragraph the words "the ***said*** defendant" are used, without other designation, it will be held that the reference is to the defendant last named. Carver *v.* Carver, 97 Ind. 497. See also Esdaile *v.* Maclean, 15 M. & W. 277; Wigmore *v.* Wigmore, W. N. (72) 93; Ellis *v.* Horine, 1 A. K. Marsh. (Ky.) 417.

"Said" Does Not Necessarily Refer to Next Antecedent. — "The reference of the word ***said*** is to be determined in any given case by the sense. The relative 'same' refers to the next antecedent in the interpretation of a written instrument; the word ***said*** does so only when the plain meaning requires it. 2 Kent's Com. 555. In Wilkinson *v.* State, 10 Ind. 372, it was held that the word ***said***, in an indictment, will be referred to the next antecedent only when the plain meaning requires it. Mr. Bishop says: 'Chitty goes on: "The word 'aforesaid' in general refers to the last antecedent, but not so invariably as the word 'same,' which is more explicit." * * * This is a sort of criticism little indulged in by modern courts. It may be useful, in rare cases; but at this day, and perhaps always, the various words of reference of which the relatives and "there" and ***said*** are specimens will be referred to any antecedent plainly required by the sense, whether the writer in expressing it framed his sentences according to the rules of grammar or not.' 1 Bish. Crim. Pro. (3d ed.), § 512." Brown *v.* State, 28 Tex. App. 379. See also Southern Mut. Ins. Co. *v.* Pike, 34 La. Ann. 829.

There is no invariable rule of construction which refers the word ***said*** to the last antecedent, if it be at variance with the context of the will so to apply it. Healy *v.* Healy, Ir. R. 9 Eq. 418.

The word ***said***, even in an indictment, will not be referred to the last antecedent if the sense requires that it be referred to some prior antecedent. Lammers *v.* Meyer, 59 Ill. 215. See also Wilkinson *v.* State, 10 Ind. 372.

2. Sail. — Barker *v.* M'Andrew, 18 C. B. N. S. 774, 114 E. C. L. 774, in which case it was said that the term is almost a technical one.

Sailed. — "A vessel has ***sailed*** the moment she is unmoored and got under way, in complete preparation for the voyage, with the purpose of proceeding to sea, without further delay at the port of departure." 1 Phillips on Insurance (5th ed.), § 772, *quoted* in Sea Ins. Co. *v.* Blogg, (1898) 1 Q. B. 31.

In Sea Ins. Co. *v.* Blogg, (1898) 2 Q. B. 401, it was said: "If a ship being perfectly ready to start, having completed her loading and having all her crew on board, leaves the wharf where she has been loading, and proceeds ever so short a distance upon her voyage, and then some physical reason prevents her proceeding further, I think that the proper inference in such a case would generally be that she ***sailed***, within the meaning of the word ***sail*** as used in policies of marine insurance. But I agree that the ***sailing*** must be a ***sailing*** which is a commencement of the voyage; and therefore, if a ship, when she leaves the wharf, is not ready for the voyage by reason of not having all her crew on board, or some other reason, that may be evidence that she did not then commence her voyage."

Sailing Ships — Steamer under Sail. — See The Parthian, 5 U. S. App. 317.

3. Salary. — Cowdin *v.* Huff, 10 Ind. 85; Indianapolis *v.* Wasson, 74 Ind. 141.

In common acceptation, ***salary*** imports a certain annual stipend, payable to an officer for performing his duties. Fulgham *v.* Lightfoot, 1 Call (Va.) 255.

Salary means "compensation stipulated to be paid for services — annual or periodical wages or pay." Rowland *v.* New York, 83 N. Y. 375.

Salary is a "reward or recompense for services performed, and is usually applied to the reward paid to a public officer for the performance of his official duties." State *v.* Barnes, 24 Fla. 32, *quoting* Bouv. L. Dict. See also McNulta *v.* Corn Belt Bank, 164 Ill. 441.

"A ***salary*** is a compensation for services rendered; it is the periodical payment of a

a fixed annual or periodical payment for services, depending upon the time

certain value, in money, for work and labor done." Chancellor's Case, 1 Bland (Md.) 630.

In Henderson *v.* Koenig, 168 Mo. 367, it was said: "***Salary*** is defined to be 'a periodical allowance made as compensation to a person for his official or professional services or for his regular work.' Stand. Dict."

In Windmiller *v.* People, 78 Ill. App. 276, it was said: "The term ***salary*** means a reward or recompense paid for personal service. As applied to a public officer, it means the compensation paid him for his personal service in the discharge of the duties of his office."

Actor. — An actor entered into an agreement to act for the term of two years, at a ***salary*** of thirty pounds per week, payable weekly. The ***salary*** was to be subject to a proportionate reduction in respect of any night upon which the theatre should not be open. In construing this provision, Esher, M. R., said: "When there is a contract, the payment cannot be said to be precarious within the meaning of that decision. There is a right on the one side to the payment, and a right on the other to the services. It was urged that the bankrupt could not be compelled to act. Of course he could not. But he was under a legal obligation to act, and the manager was under a legal liability to pay him. Therefore, the payment was not precarious. The money was to be paid for services, and it was to be paid at ascertained periods. Therefore it comes, to my mind, under the term ***salary***." *In re* Shine, (1892) 1 Q. B. 527. *Compare Ex p.* Benwell, 14 Q. B. D. 301.

Allowance. (See also ALLOWANCE, vol. 2, p. 154, note.) — In Vance *v.* Lafferanderie, 4 Rob. (La.) 340, it was held that an allowance made by a court of probate for services of an auditor of the accounts of a succession could not be considered as the ***salary*** of an officer.

And a voluntary allowance has been held not to be ***salary*** or income, as the terms were used in an English bankruptcy act. *Ex p.* Wicks, 17 Ch. D. 70.

Annual or Periodical Payments — Percentage. — Thompson *v.* Phillips, 12 Ohio St. 617. See also Landis *v.* Lincoln Co., 51 Oregon 427.

Per Annum Compensation. — Henderson *v.* Koenig, 168 Mo. 367, *citing* Bouv. L. Dict.

Daily Compensation. — In Bigley *v.* Bellevue, 158 Pa. St. 495, it was held that where a borough employed a constable to light lamps and patrol the streets, at a fixed compensation per day, the wages received by the constable were not an official ***salary*** which could not be reduced without violating a constitutional provision which forbade the decrease of an officer's ***salary*** during his term of office.

But that a *per diem* compensation may be a ***salary***, see State *v.* Barnes, 24 Fla. 32.

So in Com. *v.* Butler, 99 Pa. St. 542, it was expressly held that a *per diem* compensation allowed to members of the legislature by statute was a ***salary***. The court, *per* Sharswood, C. J., said: "According to the most approved lexicographers the words 'wages' and ***salary*** are synonymous. They both mean one and the same thing: 'A sum of money periodically paid for services rendered.'"

Assignment of Salary. — See the title ASSIGNMENTS, vol. 2, p. 1031 *et seq.*

Balance Due on Contract. — In Morse *v.* Robertson, 9 Hawaii 197, it was held that a balance due by the government on a contract to build a bridge could not be garnished as ***salary***. The court said: "How is it possible to make a balance due on a contract to build a bridge mean a ***salary***?"

Bonus and Salary Distinguished. — In McNulta *v.* Corn Belt Bank, 164 Ill. 427, it was held that an amount fixed by bank directors to be paid to their president, in addition to a ***salary*** named, for his acceptance of the presidency and the performance by him of acts not embraced among his duties as president, was a bonus and not a ***salary***.

Clerk Hire — Deputy — Expenses. (See also the title PUBLIC OFFICERS, vol. 23, pp. 388, 389.) — Under an act fixing the ***salary*** of the county auditor at one thousand two hundred dollars, it was held that such sum, under the term ***salary***, must be deemed to include the expense of necessary clerk hire, in order to give effect to the manifest purpose of the legislature to fix a limit for the amount to be paid for the performance of the office, the act superseding an express provision for clerk hire. Bruce *v.* Dodge County, 20 Minn. 388. And to the same effect see Armstrong *v.* Ramsey County, 25 Minn. 344; Beaumont *v.* Ramsey County, 32 Minn. 108.

But in Marion County *v.* Lear, 108 Ill. 351, it was said: "We are aware of no instance in our law where the word ***salary*** is used merely to express the idea of a payment for expenses actually incurred, and since it is to the statute alone to which appellee must look for authority to demand the payment of these fees by the county, he must show a deficiency in the payment of his ***salary***, — *i. e.*, personal compensation — after applying to the payment thereof all the fees collected by him from other sources, before he can require the county to pay these fees in criminal cases, and then it can only be required to do so to the extent of such deficiency." See also Windmiller *v.* People, 78 Ill. App. 273; Crawford County *v.* Lindsay, 11 Ill. App. 263; Briscoe *v.* Clark County, 95 Ill. 309.

So in Sniffen *v.* New York, 4 Sandf. (N. Y.) 193, it was held that the term ***salary***, of itself, imported a compensation for personal services, and not the repayment of moneys expended in the discharge of the duties of an office.

Same — Traveling Expenses. — In Houser *v.* Orangeburg County, 59 S. Car. 266, it was said: "The word ***salary*** is defined in Webster's International Dictionary as 'Fixed regular wages, as by the year, quarter, or month.' When this word is used in connection with a public officer, it must be taken to embrace the fixed regular wages by the year, quarter, or month as established by public authority for such public officer as his compensation or wages earned by such officer by the discharge of the duties of his office. It does not include in its definition 'traveling expenses.'" See also Houser *v.* Umatilla County, 30 Oregon 486.

Collector. — A city charter provided that

and not upon the amount of services rendered.[1]

SALE, BILL OF. — See the title BILLS OF SALE, vol. 4, p. 555.

SALE NOTE. — See the title BOUGHT AND SOLD NOTES, vol. 4, p. 751.

SALE, SHORT. — See the titles GAMBLING CONTRACTS, vol. 14, p. 605; STOCK AND PRODUCE EXCHANGE; STOCKBROKERS.

there should be but one collector of the city, town, and certain school district taxes, and that he should be annually chosen at the town meeting and should receive "for collecting all said taxes," in lieu of all other compensation, a sum not exceeding two thousand dollars. In construing this charter the court said: "The collector is elected annually. His compensation is not a rate of commission, but a fixed sum — two thousand dollars. It is true the time or service for which he is to receive that sum is not expressly stated; but we think the fair import of the whole section is that he is to receive it for his services as collector during his term of office, which is one year, and that makes it a *salary*." Castle *v.* Lawlor, 47 Conn. 345.

Extra Compensation — Holding Special Court. — In Benedict *v.* U. S., 176 U. S. 360, it was held that extra compensation received by a district judge for holding court outside of his own district was no part of his official *salary*.

But in Buxton *v.* Rutherford County, 82 N. Car. 95, it was held, where the constitution provided that the *salaries* of the judges should not be diminished during their continuance in office, that an additional compensation of one hundred dollars, given to a Superior Court judge for services in holding a special term, was a part of his *salary*.

Salary and Fees Distinguished. — See FEE, vol. 12, p. 889, and see Henderson *v.* Koenig, 168 Mo. 356.

Fees and Commissions Included. — *Salary* is sometimes used in the sense of legal compensation for services, and when thus used includes the fees and commissions of a public officer due to him by law. San Juan County *v.* Oliver, 7 Colo. App. 515.

The term *salary* may mean an income arising from fees paid to an officer. Fulgham *v.* Lightfoot, 1 Call (Va.) 255.

Same — Commissions of Traveling Salesman. — See Hamberger *v.* Marcus, 157 Pa. St. 133, stated under the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 137, note. See also Hutchinson *v.* Gormley, 48 Pa. St. 270.

Purchase Price. — In Fidelity Ins., etc., Co. *v.* Shenandoah Valley R. Co., 86 Va. 8, it was said: "The price of a locomotive is not wages or *salary*."

Retrospective Act. — A statute amended the charter of a city by striking out words prohibiting compensation to the mayor and aldermen and giving a *salary* to them. It was held that the intent to give compensation for past services was not apparent, although the act used the word *salary*, which means a *per annum* compensation; "for that is apportionable, and the act means no more than at the rate of so much *per annum*." Montpelier *v.* Senter, 72 Vt. 114.

Service Terminable by Notice. — A was employed as a commercial traveler at a salary of one hundred pounds a year, terminable by a week's notice. A became bankrupt, and the County Court judge ordered him to pay twenty pounds every year out of such *salary* to his trustee in bankruptcy, according to the provisions of the Bankruptcy Act 1883, § 53, subsec. 2. It was held that A received a *salary*, within the meaning of the section, and that the order was right. *Ex p.* Brindle, 56 L. T. N. S. 498, 4 Mor. Bankr. Cas. 104.

Substitute Janitor. — In Davis *v.* Fall River, 155 Mass. 96, it appeared that the plaintiff had been appointed substitute janitor, there being some forty or forty-five regular janitors. The court said: "From * * * the fact that the plaintiff was the only substitute, and therefore liable to be called upon to act in place of either of the forty or forty-five, the jury might fairly infer that the city expected the plaintiff to abstain from other work, and to hold himself ready to act as janitor at any time, and that he should be paid whether he actually worked or not. The terms of the vote by which he was originally employed 'as substitute janitor at a *salary* of nine dollars per week, his term of service to begin March 2, 1889,' imply such a contract in their use of the word *salary*."

Term of Years. — In Palmer *v.* Marquette, etc., Rolling Mill Co., 32 Mich. 274, it was held that a telegram to "come on at once at *salary* of two thousand, conditional only upon satisfactory discharge of business," lacked one of the essential terms of the contract, in that it fixed no time for the continuance of the employment. It was also held that the use of the word *salary*, in a sense evidently implying a year s compensation, could not be said to indicate an intent to fix the time of employment at a single year rather than at a term of years.

1. **Time, Not Amount of Services Rendered.** — Benedict *v.* U. S., 176 U. S. 360.

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CROSS-REFERENCES.

For matters of PROCEDURE *see the* ENCYCLOPÆDIA OF PLEADING AND PRACTICE, vol. 19, p. 1.

For other matters of SUBSTANTIVE LAW *and* EVIDENCE *related to this subject, see in this work the following titles:* BILLS OF LADING, vol. 4, p. 507; BILLS OF SALE, vol. 4, p. 555; CHATTEL MORTGAGES, vol. 5, p. 945; CONDITIONAL SALES, vol. 6, p. 436; EXCHANGE OF PROPERTY, vol. 11, p. 569; FRAUD AND DECEIT, vol. 14, p. 12; FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 213; GIFTS, vol. 14, p. 1006; IMPLIED WARRANTIES, vol. 15, p. 1210; INTERPRETATION AND CONSTRUCTION, vol. 17, p. 1; OPTIONS, vol. 21, p. 924; PAYMENT, vol. 22, p. 513; PRIVATE INTERNATIONAL LAW, vol. 22, p. 1314; PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 472; RECORDING ACTS, *ante;* RESCISSION, CANCELLATION, AND REFORMATION, *ante;* STATUTE OF FRAUDS; STOPPAGE IN TRANSITU; VENDOR AND PURCHASER; WAIVER AND ABANDONMENT; WAREHOUSES AND WAREHOUSEMEN; WARRANTY.

I. DEFINITION AND NATURE — 1. Definition. — A sale may be defined as a contract, founded on a money consideration, by which the absolute or general property in the subject of sale is transferred from the seller to the buyer.[1]

The Essentials of a Sale are, first, a mutual agreement;[2] second, competent parties;[3] third, a money consideration;[4] fourth, a transfer of the absolute or general property in the subject of the sale from the seller to the buyer.[5]

2. Sales Distinguished from Other Transactions — *a.* IN GENERAL. — Transfers of the possession of property under circumstances which may or may not amount to a sale give rise in law to nice and important distinctions. If the transaction is a sale, the buyer has not only the right of possession, but all the rights and risks of ownership as well; any loss occurring must fall on him, and the property is liable to be taken in satisfaction of debts or other claims against him.[6] On the other hand, if no sale is effected the property in the

1. Sale Defined. — See Benj. on Sales (6th Am. ed.), § 1; 2 Bl. Com. 446; 2 Kent Com. (13th ed.) 468; Atkinson on Sales, p. 5; Story on Sales, § 1.

United States. — Williamson *v.* Berry, 8 How. (U. S.) 544.

Massachusetts. — Howard *v.* Harris, 8 Allen (Mass.) 298.

Missouri. — Nance *v.* Metcalf, 19 Mo. App. 189.

New York. — Madison Ave. Baptist Church *v.* Baptist Church, 46 N. Y. 131, 11 Abb. Pr. N. S. (N. Y.) 132; Schermerhorn *v.* Talman, 14 N. Y. 117.

North Carolina. — Wittkowsky *v.* Wasson, 71 N. Car. 451.

Pennsylvania. — Creveling *v.* Wood, 95 Pa. St. 158; Mackaness *v.* Long, 85 Pa. St. 158.

Texas. — Johnson *v.* State, (Tex. Crim. 1900) 55 S. W. Rep. 968.

See, for specific statutory definitions, Civ. Code Cal., § 1721; Rev. Civ. Code La., art. 2439; Sapp *v.* Brown County, 20 Kan. 243; Black's L. Dict.

A contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought or sold. Williamson *v.* Berry, 8 How. (U. S.) 544; Huthmacher *v.* Harris, 38 Pa. St. 491, 80 Am. Dec. 502.

"The ordinary definition of a sale, as a transmutation of property from one person to another for a price, does not fully express the essential elements which enter into and make up the contract. A more complete enumeration of these would be, competent parties to enter into a contract, an agreement to sell, and the mutual assent of the parties to the subject matter of the sale and to the price to be paid therefor. A learned author adds to this summary the brief and significant remark, 'If any of these ingredients be wanting, there is no sale.' Atkinson on Sales 5; Story on Sales, § 8; Blackb. on Sales 110." Gardner *v.* Lane. 12 Allen (Mass.) 43.

2. See *infra*, II. 1. *Mutual Assent.*

3. See *infra*, II. 2. *Parties.*

4. See *infra*, this section, *Sales Distinguished from Other Transactions — From Exchange or Barter;* and II. 3, *Consideration or Price.*

"A price is essential to the contract of sale. If there be none, it is either no contract, or if the consideration be other property, it is an exchange." W. T. Adams Mach. Co. *v.* Newman, 107 La. 702.

5. Wittkowsky *v.* Wasson, 71 N. Car. 451.

There Must Be a Transfer of Property. — Where, therefore, property is put up at auction by a master of a ship, as agent of his owners, and bid in by him to prevent a loss, it is, in contemplation of law, no sale of the property. Barker *v.* Marine Ins. Co., 2 Mason (U. S.) 369.

6. The Definition and Requisites of a Valid Sale, as already set forth, ought to furnish sufficient

goods does not pass, but remains in the original owner, whose agent or bailee the transferee becomes.[1] Whether on particular facts, or in particular circumstances, a contract is one of sale is largely a matter of intention,[2] to be determined by a proper construction of the contract in view of all the surrounding circumstances.[3] Business usages prevalent at the time and place of the contract may bear upon the question of intention.[4]

b. FROM BAILMENTS. — A sale is a transfer of the possession and ownership, while a bailment is a transfer of the possession only, the title or property remaining continuously in the original owner. The test generally recognized is that where the possession is transferred with an understanding that the identical article is to be returned either in the same or an altered form, the transaction is a bailment; but where there is no obligation to return the identical thing, and the transferee may discharge his obligation by delivering another thing as an equivalent, or by paying a sum of money, the transaction is a sale or exchange and the title passes.[5]

criteria for most of the cases which arise. Sometimes, however, the distinction is difficult to make, and the only solution is by a resort to the intention of the parties as shown by the facts and circumstances. See *supra*, this section, *Definition*. See also *infra*, this title, *When Title Passes*.

1. See in this connection the titles BAILMENTS, vol. 3, p 732; FACTORS OR COMMISSION MERCHANTS, vol. 12, p. 705; WAREHOUSEMEN.

2. **Intent.** — Heryford *v.* Davis, 102 U. S. 235; Gould *v.* Warne, 27 Ill. App. 651; Lyon *v.* Lenon, 106 Ind. 567; Reissner *v.* Oxley, 80 Ind. 584; Bates *v.* Dehaven, 10 Ind. 319; Seelig *v.* Dumas, 48 La. Ann. 1494; Wilcoxen *v.* Bowles, 1 La. Ann. 230; Slutz *v.* Desenberg, 28 Ohio St. 371; Williamson *v.* McClure, 37 Pa. St. 402; Williams *v.* Drummond Tobacco Co., 17 Tex. Civ. App. 635.

3. See the titles CONTRACTS, vol. 7, p. 88; INTERPRETATION AND CONSTRUCTION, vol. 17, p. 1.

Construction of Particular Transactions. — Krippendorf-Dittman Co. *v.* Trenoweth, 16 Colo. App. 178; Patrick *v.* Colorado Smelting Co., 20 Colo. 268; Horne *v.* Walton, 117 Ill. 130; Gray *v.* Millay, 61 Me. 327; De La Vergne Refrigerating Mach. Co. *v.* Hub Brewing Co., 175 Mass. 419; Houghton *v.* Todd, 58 Neb. 360; Wyllie *v.* Palmer, 137 N. Y. 248; Schwarzer *v.* Karsch Brewing Co., 74 N. Y. App. Div. 383; Garvin Mach. Co. *v.* Hutchinson, 1 N. Y. App. Div. 380; Cook *v.* Berrott, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 358, 66 Hun (N. Y.) 633; Black *v.* Webb, 20 Ohio 304, 55 Am. Dec. 456; Johnson *v.* Ensign, (Pa. 1886) 4 Atl. Rep. 37; Ruthrauff *v.* Hagenbuch, 58 Pa. St. 103.

In Ochs *v.* Price, 6 Heisk. (Tenn.) 483, there was a promise by a debtor to several of his creditors that if they would abstain from suing, he would, within a few days, send a specified stock of merchandise to a certain auctioneer, to be sold by him, the proceeds to be applied to the payment of their claims. This promise was not a sale to the creditors and no title passed to them by virtue of it.

A brewer sold a quantity of ale, in barrels bearing his brand, to a retailer, on an agreement that the barrels should be returned, and if not they should be paid for at two dollars per barrel. This was merely a liquidation of damages if they were not returned, not a sale of the barrels. Westcott *v.* Thompson, 18 N. Y. 363.

The Legal Intent Controls irrespective of what the parties may call the transaction. W. T. Adams Mach. Co. *v.* Newman, 107 La. 702; Williams *v.* Drummond Tobacco Co., 17 Tex. Civ. App. 635; Heryford *v.* Davis, 102 U. S. 235.

A planter agreed to sell his growing crop to his creditor for a certain sum of money, which, together with whatever else should be realized from the crop, should be placed to the credit of the planter's account. Although the parties called the transaction a sale, it was not one, but rather a contract of security, and the ownership of the crop was not transferred by it. Herold *v.* Stockwell, 32 La. Ann. 949. The essence of the contract is to be regarded rather than its form, or the name by which the contracting parties choose to designate it. See also Hutchings *v.* Field, 10 La. 237; Louisiana State Bank *v.* Orleans Nav. Co., 3 La. Ann. 294.

4. **Effect of Business Usage.** — Rahilly *v.* Wilson, 3 Dill. (U. S.) 420; Bailey *v.* Bensley, 87 Ill. 556; Lyon *v.* Culbertson, 83 Ill. 33, 25 Am. Rep. 349; Lonergan *v.* Stewart, 55 Ill. 44; Oldershaw *v.* Knoles, 4 Ill. App. 63; Morningstar *v.* Cunningham, 110 Ind. 328, 59 Am. Rep. 211; Lyon *v.* Lenon, 106 Ind. 567; Ledyard *v.* Hibbard, 48 Mich. 421, 42 Am. Rep. 474. See also the title USAGES AND CUSTOMS.

5. **Sale Distinguished from Bailment.** — See the title BAILMENTS, vol. 3, p. 734 *et seq.*, where this rule and its applications are fully considered. See also the following recent cases:

Colorado. — Patrick *v.* Colorado Smelting Co., 20 Colo. 268.

Illinois. — Fleet *v.* Hertz, 98 Ill. App. 564; Boehm *v* Griebenow, 78 Ill. App. 675.

Indiana. — Barrows *v.* Wampler, 24 Ind. App. 472; Beist *v.* Sipe, 16 Ind. App. 4.

Minnesota. — Jackson *v.* Sevatson, 79 Minn. 275; State *v.* Barry, 77 Minn. 128; Weiland *v.* Sunwall, 63 Minn. 320.

Missouri. — Brown *v.* Gilliam, 53 Mo. App. 376; O'Neal *v.* Stone, 79 Mo. App. 279, 2 Mo. App. Rep. 401.

Nebraska. — Baker *v.* Priebe, 59 Neb. 597.

New York. — Crosby *v.* Delaware, etc., Canal Co., 141 N. Y. 589; Sattler *v.* Hallock, 160 N. Y. 291, 73 Am. St. Rep. 686, 15 N. Y. App. Div. 500; Crosby *v.* Delaware, etc.,

c. FROM BAILMENT WITH RIGHT TO PURCHASE. — Where goods are delivered to one under a contract giving him the option of paying their value and keeping the goods, or of returning them if they prove unsuitable or unsatisfactory, the transferee holds as bailee and not as owner until the expiration of the stipulated time for exercising his option, or, in cases where no time is specified, until the expiration of a reasonable time.[1] But this rule does not apply where the privilege of purchase or return is not dependent on the suitableness of the property sold, but solely on the option of the purchaser. This latter class of contracts is known as " contracts of sale or return," and the title passes to the purchaser subject to his option to return the property within a time specified, or a reasonable time.[2] These rules are subject to any special agreement which the parties may make, and the transaction is a sale or a bailment according as the agreement is that the title shall or shall not pass on delivery.[3] In either class of cases, upon failure to exer-

Canal Co., (Supm. Ct. Gen. T.) 21 N. Y. Supp. 83, 66 Hun (N. Y.) 628.

Pennsylvania. — Stiles *v.* Seaton, 200 Pa. St. 114; Lippincott *v.* Holden, 11 Pa. Super. Ct. 15.

Utah. — Woodward *v.* Edmunds, 20 Utah 118.

1. Option to Return if Unsuitable — *England.* — Humphries *v.* Carvalho, 16 East 45; Ellis *v.* Mortimer, 1 B. & P. N. R. 257; Elphick *v.* Barnes, 5 C. P. D. 321, 30 Moak 810; Head *v.* Tattersall, L. R. 7 Exch. 7, 1 Moak 140; Moss *v.* Sweet, 16 Q. B. 495, 71 E. C. L. 495; Beverley *v.* Lincoln Gas Light, etc., Co., 6 Ad. & El. 829, 33 E. C. L. 222.

Georgia. — Wiggins *v.* Tumlin, 96 Ga. 753.

Illinois. — Colton *v.* Wise, 7 Ill. App. 395.

Indiana. — Johnson *v.* McLane, 7 Blackf. (Ind.) 501, 43 Am. Dec. 102.

Iowa. — Mowbray *v.* Cady, 40 Iowa 604.

Maine. — Wilson *v.* Stratton, 47 Me. 120.

Massachusetts. — Wartman *v.* Breed, 117 Mass. 18; Hunt *v.* Wyman, 100 Mass. 198.

Michigan. — Childs *v.* O'Donnell, 84 Mich. 533; Gurney *v.* Collins, 64 Mich. 458.

Missouri. — Quinn *v.* Stout, 31 Mo. 160.

New York. — Carter *v.* Wallace, 35 Hun (N. Y.) 189. See also Person *v.* Civer, (Supm. Ct. Spec. T.) 28 How. Pr. (N. Y.) 139.

North Carolina. — Moore *v.* Piercy, 1 Jones L. (46 N. Car.) 131; Glasscock *v.* Hazell, 109 N. Car. 145.

Pennsylvania. — Clark *v.* Jack, 7 Watts (Pa.) 375; Enlow *v.* Klein, 79 Pa. St. 488; Becker *v.* Smith, 59 Pa. St. 469; Chamberlain *v.* Smith, 44 Pa. St. 431; Rowe *v.* Sharp, 51 Pa. St. 26; Rose *v.* Story, 1 Pa. St. 190, 44 Am. Dec. 121.

Rhode Island. — See Schlesinger *v.* Stratton, 9 R. I. 578.

Tennessee. — Washington *v.* Johnson, 7 Humph. (Tenn.) 468.

Vermont. — See Fuller *v.* Buswell, 34 Vt. 108.

Wisconsin. — Bayley *v.* Anderson, 71 Wis. 417; Kahn *v.* Klabunde, 50 Wis. 238; Fairfield *v.* Madison Mfg. Co., 38 Wis. 346.

If, before the expiration of the time limited, the purchaser so misuses the property as to materially impair its value, the sale becomes absolute, the privilege of return being forfeited. Ray *v.* Thompson, 12 Cush. (Mass.) 281, 59 Am. Dec. 187.

2. Absolute Option to Return — *England.* — Neate *v.* Ball, 2 East 117.

Illinois. — Fleet *v.* Hertz, 98 Ill. App. 564; David Bradley Mfg. Co. *v.* Raynor, 70 Ill. App. 639.

Maine. — Crocker *v.* Gullifer, 44 Me. 491, 69 Am. Dec. 118; Walker *v.* Blake, 37 Me. 373; Southwick *v.* Smith, 29 Me. 228; Perkins *v.* Douglass, 20 Me. 317; Buswell *v.* Bicknell, 17 Me. 344, 35 Am. Dec. 262; Dearborn *v.* Turner, 16 Me. 17, 33 Am. Dec. 630. *Compare* Holbrook *v.* Armstrong, 10 Me. 31.

Massachusetts. — McKinney *v.* Bradlee, 117 Mass. 321; Martin *v.* Adams, 104 Mass. 262.

Missouri. — O'Neal *v.* Stone, 79 Mo. App. 279, 2 Mo. App. Rep. 401.

Nebraska. — Houck *v.* Linn, 48 Neb. 227; Omaha Nat. Bank *v.* Kraus, 62 Neb. 77.

New York. — Hurd *v.* West, 7 Cow. (N. Y.) 752; Oelbermann *v.* Jarman, 58 Hun (N. Y.) 609, 12 N. Y. Supp. 383; Wooster *v.* Sage, 6 Hun (N. Y.) 285; Baker *v.* Turner, 19 N. Y. App. Div. 223.

Ohio. — Gibb *v.* Townsend, 4 Ohio Cir. Dec. 96, 9 Ohio Cir. Ct. 409.

Pennsylvania. — Keohane *v.* Quinn, 18 Pa. Super. Ct. 443.

Rhode Island. — Schlesinger *v.* Stratton, 9 R. I. 578.

Story defines a contract "on sale and return" to be an " agreement by which goods are delivered by a wholesale dealer to a retail dealer, to be paid for at a certain rate, if sold again by the latter; and if not sold, to be returned." Story on Sales, § 249. And see Moss *v.* Sweet, 3 Eng. L. & Eq. 311, 16 Q. B. 493, 71 E. C. L. 493; Hotchkiss *v.* Higgins, 52 Conn. 205, 52 Am. Rep. 582; Jameson *v.* Gregory, 4 Met. (Ky.) 363; Meldrum *v.* Snow, 9 Pick. (Mass.) 441, 20 Am. Dec. 489; Marsh *v.* Wickham, 14 Johns. (N. Y.) 167.

3. Construction of Special Agreements. — Metropolitan Nat. Bank *v.* Benedict Co., (C. C. A.) 74 Fed. Rep. 182; Vermont Marble Co. *v.* Brow, 109 Cal. 236, 50 Am. St. Rep. 37; Standard Sewing-Mach. Co. *v.* Frame, 2 Penn. (Del.) 430; National Bank *v.* Goodyear, 90 Ga. 711; Crocker *v.* Gullifer, 44 Me. 491, 69 Am. Dec. 118; McClelland *v.* Scroggin, 35 Neb. 536; Morss *v.* Stone, 5 Barb. (N. Y.) 516; Lippincott *v.* Scott, 198 Pa. St. 283; Potter *v.* Stetson, 11 Pa. Super. Ct. 627; Rieker *v.* Koechling, 4 Pa. Super. Ct. 286; Braun *v.* Wisconsin Rendering Co., 92 Wis. 245.

Where the parties agree to a present transfer of the absolute title, with the privilege of

cise the option of returning the goods within the time limited, the transaction becomes an absolute sale.[1] So the sale becomes absolute at any time when the option to keep the thing delivered is definitely exercised, and it may be so exercised either expressly or by necessary implication.[2]

d. FROM PLEDGE. — A pledge is a mere bailment, and the general property in the thing pledged does not pass to the pledgee.[3]

e. FROM CHATTEL MORTGAGE. — This subject has been elsewhere considered.[4]

f. FROM LEASE OR HIRING. — A lease or hiring of personal property is simply a bailment, and as such has already been sufficiently distinguished from a sale.[5]

g. FROM ASSIGNMENTS. — The term "assignments" is generic, and indicates a transfer of property, and, broadly speaking, embraces the contract of sale.[6]

returning the thing sold if not satisfactory, it is a contract of sale and return, and the title passes immediately. McKinney *v.* Bradlee, 117 Mass. 321; Dearborn *v.* Turner, 16 Me. 17, 33 Am. Dec. 630; Person *v.* Civer, (Supm. Ct. Spec. T.) 28 How. Pr. (N. Y.) 139; Stevens *v.* Cunningham, 3 Allen (Mass.) 491.

A, in consideration of one hundred dollars, delivered to B certain options, with the agreement that if B should pay A a named sum within twenty days all A's right in the property should accrue to B, and B bound himself to pay A this sum or return the options, which had been duly indorsed to him, within thirty days. It was held that this was not a contract of sale and return so as to give A an absolute right to the purchase money on B's failure to pay it within twenty days or to return the options within thirty days. Wailes *v.* Howison, 93 Ala. 375.

Hiring or Leasing with Privilege of Purchase. — In Chamberlain *v.* Smith, 44 Pa. St. 431, the contract ran thus: "Received of J. B. one pair * * * stags to keep and work in a reasonable farmer-like manner for the term of one year, said cattle to be returned in one year; but the said McW. has the privilege, by paying forty dollars and legal interest, at the expiration of the year to keep the said cattle." The contract was held one of bailment and not a sale, "a bailment with a refusal of the cattle for a stipulated time."

1. Exercise of Option. — Stevens *v.* Hertzler, 109 Ala. 423; Griffin *v.* Keith, 1 Hilt. (N. Y.) 58; Haskins *v.* Dern, 19 Utah 89. *Compare* Marsh *v.* Wickham, 14 Johns. (N. Y.) 167.

Where an article was sold on trial, under an agreement fixing the time within which the trial was to be made, the buyer, in order to relieve himself from liability, must show that he gave notice of disapproval within the time fixed. Butler *v.* School Dist., 149 Pa. St. 351; Gentilli *v.* Starace, 59 N. Y. Super. Ct. 449; Spickler *v.* Marsh, 36 Md. 222; Childs *v.* O'Donnell, 84 Mich. 533. After giving notice, he is entitled to a reasonable time, after the expiration of such time, in which to return the goods. Newburger *v.* Hoyt, 86 Ga. 508. But there need be no return, or offer of return, even then, unless it be so agreed. Esterly *v.* Campbell, 44 Mo. App. 621, *distinguishing* Quinn *v.* Stout, 31 Mo. 160. And see Colles *v.* Swensberg, 90 Mich. 223.

2. Loan with Privilege of Purchase. — A loan with a continuous offer of sale at a certain price may be accepted as a sale at any time before the withdrawal of the offer. Windsor *v.* Cruise, 79 Ga. 635.

Right of Buyer to Sell. — It will be observed that although the buyer holds as bailee until he has exercised his option, he has the right at any time to make a valid sale of the property; such sale being an implied acceptance of the article sold and a waiver of his right, therefore, to return. Dearborn *v.* Turner, 16 Me. 17, 33 Am. Dec. 630.

3. Sale Distinguished from Pledge. — See the title PLEDGE AND COLLATERAL SECURITY, vol. 22, p. 839. See also the following recent cases: Ware *v.* Hooper, 98 Fed. Rep. 160; Upham *v.* Richey, 163 Ill. 530; Sedgwick City Bank *v.* Pollard, 8 Kan. App. 34; Morgenstern *v.* Davis, 158 N. Y. 733, 53 N. E. Rep. 1128; Standen *v.* Brown, 83 Hun (N. Y.) 610.

4. See the title CHATTEL MORTGAGES, vol. 5, p. 950.

Meaning of Sale as Used in Insurance Policy. — A policy of insurance upon merchandise provided that "in case of any transfer or termination of the interest of the insured in the property, by sale or otherwise, * * * the policy shall be void," and that "in case of any sale, alienation, transfer, or change of title in the property insured * * * such insurance shall be void." It was held that the giving of a chattel mortgage upon the goods without parting with the possession or the right of possession could not avoid the policy. The words sale, alienation, or transfer were construed to mean some act which divests the title absolutely. Van Deusen *v.* Charter Oak F. & M. Ins. Co., 1 Robt. (N. Y.) 55, 1 Abb. Pr. N. S. (N. Y.) 349.

5. Sale or Lease.—See *supra*, this section, *From Bailments*, and the title BAILMENTS, vol. 3, p. 732. See also Case *v.* L'Oeble, 84 Fed. Rep. 582; Parke, etc., Co. *v.* White River Lumber Co., 101 Cal. 37; North, etc., Rolling Stock Co. *v.* O'Hara, 73 Ill. App. 691; Seelig *v.* Dumas, 48 La. Ann. 1494; Wickes *v.* Hill, 115 Mich. 333; Ullman *v.* St. Louis Fair Assoc., 167 Mo. 273; Farmer *v.* Moore, 73 Mo. App. 527; Morgan-Gardner Electric Co. *v* Brown, 193 Pa. St. 351; Harper *v.* Hogue, 10 Pa. Super. Ct. 624.

6. Sale or Assignment. — See generally the titles ASSIGNMENTS, vol. 1, p. 1007; ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 2, p. 1. See also Potter *v.* Holland, 4 Blatchf. (U. S.)

h. FROM CONSIGNMENTS. — In the case of goods consigned to be sold for the consignor, who is to regulate the price and terms of sale, the factor is an agent and the contract one of bailment.[1] And this is so though the consignment is made on a *del credere* commission.[2] If, however, the consignee or factor is to sell upon terms fixed by himself, and is bound to pay to the consignor a fixed price, the contract is one of sale.[3] There are cases which fall within neither class, and where the intention of the parties and the particular incidents of the contracts fix their status.[4] In such cases the question is

210; Ball *v.* Chadwick, 46 Ill. 31; Johnson *v.* McGrew, 11 Iowa 151, 77 Am. Dec. 137; Cowles *v.* Rickets, 1 Iowa 582; Keiler *v.* Tutt, 31 Mo. 306; Bump *v.* Van Orsdale, 11 Barb. (N. Y.) 634; Hight *v.* Sackett, 34 N. Y. 451.

A debtor transferred his stock of goods, accounts, etc., to a creditor by an absolute bill of sale without any reservations or words of trust whatever. The creditor accepted the property in satisfaction of the debt, which was less than the value of the property, but he assumed to pay for the debtor certain other claims, the whole amount exceeding the value of the property. The transfer was held to be a sale — not an assignment for the benefit of the creditor. Powell *v.* Kelly, 82 Ga. 1.

1. Sale for Account of Consignor — *England.* — Gooderham *v.* Marlatt, 14 U. C. Q. B. 228; Dodds *v.* Durand, 5 U. C. Q. B. 623.

Arkansas. — Alexander *v.* Tomlinson, 40 Ark. 216.

Illinois. — Rosencranz, etc., Co. *v.* Hanchett, 30 Ill. App. 283.

Iowa. — Williams *v.* Davis, 47 Iowa 363.

Maine. — Boston, etc., R. Co. *v.* Warrior Mower Co., 76 Me. 251; Blood *v.* Palmer, 11 Me. 414, 26 Am. Dec. 547; Selden *v.* Beale, 3 Me. 178.

Massachusetts. — Audenried *v.* Betteley, 8 Allen (Mass.) 302; Brown *v.* Holbrook, 4 Gray (Mass.) 102; Ayres *v.* Sleeper, 7 Met. (Mass.) 45; Wadsworth *v.* Gay, 118 Mass. 44; Walker *v.* Butterick, 105 Mass. 237.

Montana. — Helena First Nat. Bank *v.* McAndrews, 5 Mont. 325, 51 Am. Rep. 51.

New York. — Morss *v.* Stone, 5 Barb. (N. Y.) 516; Converseville Co. *v.* Chambersburg Woolen Co., 14 Hun (N. Y.) 609.

Pennsylvania. — Keystone Watch Case Co. *v.* Fourth St. Nat. Bank, 194 Pa. St. 535.

Vermont. — Elliot *v.* Bradley, 23 Vt. 217.

See also the titles AGENCY, vol. 1, p. 930; FACTORS OR COMMISSION MERCHANTS, vol. 12, p. 625.

2. Del Credere Commission. — Atlas Glass Co. *v.* Ball Bros. Glass Mfg. Co., 87 Fed. Rep. 418; Johnson *v.* Allen, 70 Conn. 738; Holleman *v.* Bradley Fertilizer Co., 106 Ga. 156; Brown *v.* John Church Co., 55 Ill. App. 615; Weir Plow Co. *v.* Porter, 82 Mo. 23; Converseville Co. *v.* Chambersburg Woolen Co., 14 Hun (N. Y.) 609.

3. Sale for Account of Consignee — *England.* — Towle *v.* White, 21 W. R 465, 29 L. T. N. S. 78; *Ex p.* White, L. R. 6 Ch. 397.

United States. — Nutter *v.* Wheeler, 2 Lowell (U. S.) 346; *In re* Linforth, 4 Sawy. (U. S.) 372; Walter A. Wood Mowing, etc., Mach. Co. *v.* Brooke, 2 Sawy. (U. S.) 576; Halliday *v.* Hamilton, 11 Wall. (U. S.) 560.

Colorado. — Lemp *v.* Ryus, 7 Colo. App. 37.

Georgia. — Snelling *v.* Arbuckle, 104 Ga. 362.

Illinois. — Peoria Mfg. Co. *v.* Lyons, 153 Ill. 427; Fleet *v.* Hertz, 98 Ill. App. 573; People *v.* Midkiff, 71 Ill. App. 141; Upham *v.* Richey, 61 Ill. App. 654; Hadfield *v.* Berry, 28 Ill. App. 376; Jordan *v.* Easter, 2 Ill. App. 73.

Indiana. — Reissner *v.* Oxley, 80 Ind. 580.

Iowa. — Henney Buggy Co. *v.* Cathels, 110 Iowa 24; Alpha Checkrower Co. *v.* Bradley, 105 Iowa 537; Butterick Pub. Co. *v.* Bailey, 105 Iowa 326; Norwegian Plow Co. *v.* Clark, 102 Iowa 31.

Michigan. — Aspinwall Mfg. Co. *v.* Johnson, 97 Mich. 531.

Missouri. — Bicking *v.* Stevens, 69 Mo. App. 169.

Montana. — Helena First Nat. Bank *v.* McAndrews, 5 Mont. 325, 51 Am. Rep. 51.

Nebraska. — Yoder *v.* Haworth, 57 Neb. 150, 73 Am. St. Rep. 496; Mack *v.* Drummond Tobacco Co., 48 Neb. 397, 58 Am. St. Rep. 691.

New York. — Roosevelt *v.* Nusbaum, 75 N. Y. App. Div. 117; Vosbury *v.* Mallory, 70 N. Y. App. Div. 247; Vereinigte Pinsel-Fabriken *v.* Rogers, 52 N. Y. App. Div 529, 31 Civ. Pro. (N. Y.) 37; Weston *v.* Brown, 158 N. Y. 360; Baker *v.* Turner, 19 N. Y. App. Div. 223.

North Carolina. — Kellam *v.* Brown, 112 N. Car. 451.

Pennsylvania. — Briggs Carriage Co. *v.* Parry Mfg. Co., 30 Pittsb. Leg. J. N. S. (Pa.) 95.

Tennessee. — Atlanta Guano Co. *v.* Phipps, (Tenn. Ch. 1897) 41 S. W. Rep. 1087.

Texas. — Williams *v.* Drummond Tobacco Co., 17 Tex. Civ. App. 635; Texas Brewing Co. *v.* Templeman, 90 Tex. 277.

Virginia. — Arbuckle *v.* Gates, 95 Va. 802.

Where goods were billed by the seller to the buyer at factory prices in Chicago, less five per cent., the buyer paying freight at Pittsburg, the point of delivery, the buyer to receive for his services whatever price he could obtain above the invoice price and freight, this was held to be a contract of sale and not of bailment. Braunn *v.* Keally, 146 Pa. St. 519, 28 Am. St. Rep. 811.

The defendants were given the exclusive right to sell a certain patent roofing manufactured by the plaintiff in a certain territory, and ordered a car load of the roofing, the plaintiff's agent making the following indorsement on the agreement given to the defendants as to handling the roofing: "Sold C. & Co. [that being the defendants' firm name] one car load of roofing, to be paid for as sold." This language was held to be capable of but one construction, and the transaction to have been a sale upon credit, and the title to have passed absolutely to the defendants. Granite Roofing Co. *v.* Casler, 82 Mich. 466.

4. Sale or Consignment — Particular Contracts Construed — *United States.* — *In re* Linforth, 4 Sawy. (U. S.) 370.

generally one of fact for the jury.[1]

i. FROM GIFT. — A gift is a transfer of property without consideration,[2] while a sale is a transfer for a consideration or price in money.[3]

j. FROM EXCHANGE OR BARTER. — There is no substantial difference between a sale and an exchange or barter, and the term "sale" is frequently applied to the latter transaction. But a technical sale is a transfer for a consideration in money, while an exchange or barter is a transfer of property for other property.[4]

k. FROM AGENCY. — Whether a contract is one of sale or merely creates an agency depends upon the intention of the parties as legally ascertained.[5] One of the main tests applied is to inquire whether an option is given the

Connecticut. — Harris *v.* Coe, 71 Conn. 157.
Illinois. — W. O. Dean Co. *v.* Lombard, 61 Ill. App. 94.
Indiana. — Reissner *v.* Oxley, 80 Ind. 584.
Indian Territory. — Martin *v.* Stratton-White Co., 1 Indian Ter. 394.
Iowa. — Budlong *v.* Cottrell, 64 Iowa 234; Warder *v.* Hoover, 51 Iowa 491; Thompson *v.* Barnum, 49 Iowa 395; Bayliss *v.* Davis, 47 Iowa 340; Conable *v.* Lynch, 45 Iowa 84.
Kentucky. — Jameson *v.* Gregory, 4 Met. (Ky.) 369.
Michigan. — De Kruif *v.* Elieman, (Mich. 1902) 89 N. W. Rep. 558, 8 Detroit Leg. N. 1118.
Minnesota. — Head *v.* Miller, 45 Minn. 446.
Missouri. — Banister *v.* Weber Gas, etc., Engine Co., 82 Mo. App. 528.
New York. — Depew *v.* Keyser, 3 Duer (N. Y.) 336; Pam *v.* Vilmar, (Supm. Ct. Spec. T.) 54 How. Pr. (N. Y.) 235; Marsh *v.* Wickham, 14 Johns. (N. Y.) 167; Childs *v.* Waterloo Wagon Co., 37 N. Y. App. Div. 242.
North Carolina. — Simpson *v.* Pegram, 108 N. Car. 407.
South Dakota. — Rauber *v.* Sundback, 1 S. Dak. 268.
Texas. — Barnes *v.* Darby, 18 Tex. Civ. App. 468.

The fact that a value of merchandise is stated in an "invoice" accompanying does not, of itself, indicate absolutely that the property was sold and not consigned. Pam *v.* Vilmar, (Supm. Ct. Spec. T.) 54 How. Pr. (N. Y.) 235; Rosencranz, etc., Co. *v.* Hanchett, 30 Ill. App. 283. But a sale, and not a consignment, is presumed ordinarily from a shipment accompanied by bills in the usual form of merchants' bills of sale. Chapman *v.* Kerr, 80 Mo. 158.

The use of the word "consign" does not necessarily and conclusively determine that the transaction is a consignment, though it creates a presumption. Reissner *v.* Oxley, 80 Ind. 584; Schenck *v.* Saunders, 13 Gray (Mass.) 37; Dittmar *v.* Norman, 118 Mass. 324.

In Alexander *v.* Tomlinson, 40 Ark. 216, A shipped goods to B under a contract that B should sell for A and account to him for the billed price, B to have all above the named price that he could sell them for. The transaction was not a sale of the goods to B, and A might retake them from an officer holding them by virtue of an execution against B.

A provision that the vendee should have the "sole agency" for the article sold does not convert a contract of sale into one of agency, but amounts simply to a stipulation that the article should not be sold to other dealers. Roosevelt *v.* Nusbaum, 75 N. Y. App. Div. 117.

Where goods are consigned to a factor to be sold, any portion remaining unsold to be returned to the consignor, the transaction is a bailment and no title passes to the factor. Elgin First Nat. Bank *v.* Schween, 127 Ill. 573, 11 Am. St. Rep. 174; Blood *v.* Palmer, 11 Me. 414, 26 Am. Dec. 547; Eldridge *v.* Benson, 7 Cush. (Mass.) 483; Middleton *v.* Stone, 111 Pa. St. 589.

1. Question for Jury. — Reissner *v.* Oxley, 80 Ind. 580.

2. See the title GIFTS, vol. 14, p. 1008.

3. See *infra*, II. 3. *Consideration or Price.* See *supra*, this section, *Definition.*

4. See the title EXCHANGE OF PROPERTY, vol. 11, p. 570.

5. Sale or Agency. — See generally Columbus Constr. Co. *v.* Crane Co., 52 Fed. Rep. 635, 9 U. S. App. 46; Lenz *v.* Harrison, 148 Ill. 598, *distinguishing* Chickering *v.* Bastress, 130 Ill. 206, 17 Am. St. Rep. 309; Whitman Agricultural Co. *v.* Hornbrook, 24 Ind. App. 255; Richardson Drug Co. *v.* Oberfelder, 58 Neb. 822; Keswick *v.* Rafter, 165 N. Y. 653; Haarstick *v.* Fox, 9 Utah 110. See *supra*, this section, *Sales Distinguished from Other Transactions — From Consignments.* See generally the title AGENCY, vol. 1, p. 930.

It is competent for the parties thereto so to frame a contract that one of the parties may become an agent in respect to purchases therein proposed to be made, and may also become substantially the vendor of the goods in respect to their subsequent transfer and delivery. Columbus Constr. Co. *v.* Crane Co., 9 U. S. App. 46.

A gave to B a memorandum setting forth that A had received one hundred and seventy-five dollars as an advance to buy barley for B, A agreeing to deliver at a certain place and within a certain time and for a certain price one thousand bushels of merchantable barley. This was a contract of sale, not of agency, but the contract being executory the property in the barley remained in A until delivery by him to B. Black *v.* Webb, 20 Ohio 304, 55 Am. Dec. 456.

A raised tobacco on B's farm on shares; the whole crop was stored in B's sheds, and by a written agreement A "agrees to sell [to B] all his tobacco on the farm [of B], being the undivided half of all the tobacco," etc., "at fourteen cents per pound, the said tobacco being herein and hereby now delivered" to B, who "hereby agrees to sell the said tobacco for the

transferee to pay for the goods and keep them. In such a case the transaction is a sale, and title passes absolutely.[1]

l. FROM CONTRACT FOR LABOR AND MATERIALS. — It has been held that if the goods bargained for do not exist *in solido* at the time the contract is one for work and labor. but if they are in existence at the time then the contract is a contract of sale, notwithstanding the fact that work and labor are to be expended upon them before delivery.[2] Later cases have qualified the rule somewhat, and it has been held that if the article to be manufactured was one that was manufactured and supplied to the trade generally, the transaction is a sale, while if it was one specially manufactured to fill the order, it is a contract for work, labor, and materials.[3]

II. CONTRACT OF SALE — 1. Mutual Assent — *a.* IN GENERAL. — To constitute a valid contract of sale it is essential that the parties thereto mutually assent to the same thing at the same time.[4] Such assent or agreement may

best price he can obtain," whatever remaining — after payment of expenses — over fourteen cents a pound to be paid over to A. The whole crop was destroyed by a flood. It was contended, and the lower court so held, that the contract was one of trust or agency on B's part, and that the loss of the whole must fall equally on A and B. But, on appeal, it was held that there was an absolute sale to B, and that B must, therefore, bear the whole loss. Ruthrauff *v.* Hagenbuch, 58 Pa. St. 103.

1. Fleet *v.* Hertz, 98 Ill. App. 564; Upham *v.* Richey, 61 Ill. App. 654. See *supra*, this section, *From Bailment with Right to Purchase.*

2. **Sale or Contract for Work, Labor, and Materials.** — Sewall *v.* Fitch, 8 Cow. (N. Y.) 215; Crookshank *v.* Burrell, 18 Johns. (N. Y.) 58, 9 Am. Dec. 187; Robertson *v.* Vaughn, 5 Sandf. (N. Y.) 1; Donovan *v.* Willson, 26 Barb. (N. Y.) 138; Cooke *v.* Millard, 65 N. Y. 352, 22 Am. Rep. 619; Parsons *v.* Loucks, 48 N. Y. 17, 8 Am. Rep. 517.

3. Finney *v.* Apgar, 31 N. J. L. 266; Roubicek *v.* Haddad, 67 N. J. L. 522; Passaic Mfg. Co. *v.* Hoffman, 3 Daly (N. Y.) 495; Donnell *v.* Hearn, 12 Daly (N. Y.) 230; Hinds *v.* Kellogg, (C. Pl. Gen. T.) 13 N. Y. Supp. 922; Pelletreau *v.* U. S. Electric Light, etc., Co., (C. Pl. Gen. T.) 13 Misc. (N Y.) 237. See generally the title STATUTE OF FRAUDS.

4. **Mutual Assent Necessary.** — 1 Parsons on Contracts (7th ed.), p. 475; Pollock on Contracts (4th ed.) 2; Bishop on Contracts, § 313; 4 Minor's Insts. (2d ed.), p. 18.

England. — Dickinson *v.* Dodds, 2 Ch. D. 463, 16 Moak 854; Chinnock *v.* Ely, 4 De G. J. & S. 638; Huddleston *v.* Briscoe, 11 Ves. Jr. 583.

United States. — Carr *v.* Duval, 14 Pet. (U. S.) 83; Ketchum *v.* Duncan, 96 U. S. 659; Utley *v.* Donaldson, 94 U. S. 47.

Alabama. — Falls *v.* Gaither, 9 Port. (Ala.) 605; Montgomery *v.* Enslen, 126 Ala. 654; Sanford *v.* Howard, 29 Ala. 684, 68 Am. Dec. 101.

Arkansas. — Jones *v.* Pearce, 25 Ark. 545.

Colorado. — Hendrie, etc., Mfg. Co. *v.* Collins, 29 Colo. 102.

Connecticut. — Hartford, etc., R. Co. *v.* Jackson, 24 Conn. 514, 63 Am. Dec. 177.

Illinois. — Reid *v.* Shiffy, 99 Ill. App. 189; Corbin *v.* Speeter, 92 Ill. App. 652.

Louisiana. — Pittsburg, etc., Coal Co. *v.* Slack, 42 La. Ann. 107; Holtzman *v.* Millaudon, 18 La. Ann. 29.

Maine. — Stone *v.* Peacock, 35 Me. 388.

Massachusetts. — Lyman *v.* Robinson, 14 Allen (Mass.) 252; Gardner *v.* Lane, 12 Allen (Mass.) 43; Smith *v.* Gowdy, 8 Allen (Mass.) 566; Lincoln *v.* Erie Preserving Co., 132 Mass. 129; Oakman *v.* Rogers, 120 Mass. 214.

Michigan. — Griffin *v.* Gratwick, etc., Lumber Co., 97 Mich. 557.

Missouri. — Denton *v.* McInnis, 85 Mo. App. 542.

New Hampshire. — Abbott *v.* Shepard, 48 N. H. 14; Fuller *v.* Bean, 34 N. H. 303.

New York. — Schenectady Stove Co. *v.* Holbrook, 101 N. Y. 45; Camron *v.* Wright, 21 N. Y. App. Div. 395. See Tucker *v.* Woods, 12 Johns. (N. Y.) 190, 7 Am. Dec. 305; Livingston *v.* Rogers, 1 Cai. (N. Y.) 583.

Texas. — Whitaker *v.* Zeihme, (Tex. Civ. App. 1901) 61 S. W. Rep. 499.

Wyoming. — Sheridan First Nat. Bank *v.* C. D. Woodworth Co., 7 Wyo. 11.

Delivery of Bought and Sold Notes by a broker to the respective principals creates a binding contract of sale. Murray *v.* Doud, 63 Ill. App. 247, *affirmed* 167 Ill. 368, *citing* Memory *v.* Niepert, 131 Ill. 623. See also Numsen *v.* Levi, (Cal. 1894) 36 Pac. Rep. 657.

Where the bought and sold notes delivered by a broker to the respective parties to a contract of sale of produce differ in any material point, no contract is effected. Suydam *v.* Clark, 2 Sandf. (N. Y.) 133; Pettier *v.* Collins, 3 Wend. (N. Y.) 459, 20 Am. Dec. 711.

The Mutual Assent Must Be Real and Not Pretended. Therefore a mere colorable sale made with the intention that no title shall be transferred is void, and vests no rights whatever in the pretended purchaser that can affect creditors or subsequent *bona fide* purchasers. Lilienthal's Tobacco *v.* U. S., 97 U. S. 237; Cox *v.* Jackson, 6 Allen (Mass.) 108; Bradley *v.* Hale, 8 Allen (Mass.) 59; Dawson *v.* Wetherbee, 16 Gray (Mass.) 123; Billings *v.* Thomas, 114 Mass. 570. Though such sale may be valid as between the parties. Dyer *v.* Homer, 22 Pick. Mass.) 253; Harvey *v.* Varney, 98 Mass. 118; Clemens *v.* Clemens, 28 Wis. 637, 9 Am. Rep. 520; Nichols *v.* Patten, 18 Me. 231, 36 Am. Dec. 713; Andrews *v.* Marshall, 43 Me. 274, 48 Me. 26; Findley *v.* Cooley, 1 Blackf. (Ind.) 262; Moore *v.* Meek, 20 Ind. 484; Sprig-

be express, or may be implied from the language or conduct of the parties,[1] and consists properly of the acceptance of an offer.[2] These rules are not peculiar to the contract of sale, but apply to contracts generally.[3] Immediately upon acceptance of the offer, and not before, the contract of sale becomes complete and binding upon both parties,[4] and additional conditions cannot be thereafter added except by mutual assent.[5]

b. OFFER AND ACCEPTANCE. — The offer must be distinct as such, and not merely an invitation to enter into negotiations upon a certain basis.[6] If it contemplates the arrangement of other conditions it is a mere proposal to enter into an agreement, and does not become binding upon an acceptance.[7] Advertisements, quotations, price lists, etc., fall within this class, and are not technical offers.[8] The offer must specify the quantity to be furnished, as a

ner *v.* Drosch, 32 Ind. 486, 2 Am. Rep. 356; Lawton *v.* Gordon, 34 Cal. 36, 91 Am. Dec. 670; Hoeser *v.* Kraeka, 29 Tex. 450; Davis *v.* Ransom, 26 Ill. 105.

Contract Void for Uncertainty. — There will also be deemed to be no sale when the parties have expressed themselves in language so vague and unintelligible that the court finds it impossible to give any definite meaning to their agreement. So held in Guthing *v.* Lynn, 2 B. & Ad. 232, 22 E. C. L. 63, where by the terms of a contract of sale of a horse the price was to be sixty guineas, and " if the horse was lucky to the plaintiff he was to give five pounds more, or the buying of another horse."

1. Assent May Be Expressed or Implied. — 2 Bl. Com. 443.

England. — Joyce *v.* Swann, 17 C. B. N. S. 84, 112 E. C. L. 84, (" grumbling assent "); Taylor *v.* Jones, 1 C. P. D. 87, 16 Moak 437, (contract implied from acceptance of goods); Brogden *v.* Metropolitan R. Co., 2 App. Cas. 666, 20 Moak 171; Oxendale *v.* Wetherell, 9 B. & C. 386, 17 E. C. L. 401; Richardson *v.* Dunn, 2 Q. B. 222, 42 E. C. L. 647; Hart *v.* Mills, 15 M. & W. 85; Payne *v.* Cave, 3 T. R. 148.

Canada. — Bruce *v.* Tolton, 4 Ont. App. 144.

Alabama. — Kinney *v.* South, etc., R. Co., 82 Ala. 368.

Illinois. — Pickrel *v.* Rose, 87 Ill. 263; Western Union Tel. Co. *v.* Chicago, etc., R. Co., 86 Ill. 246, 29 Am. Rep. 28.

Indiana. — Street *v.* Chapman, 29 Ind. 142; Orme *v.* Cooper, 1 Ind. App. 449.

Massachusetts. — *Compare* Thruston *v.* Thornton, 1 Cush. (Mass.) 93.

New York. — Tilt *v.* La Salle Silk Mfg. Co., 5 Daly (N. Y.) 19.

North Carolina. — State *v.* Duckworth, 1 Winst. L. (60 N. Car.) 243.

West Virginia. — Bartholomae *v.* Paull, 18 W. Va. 771.

2. Acceptance of Offer Necessary. — See Minneapolis, etc., R. Co. *v.* Columbus Rolling Mill Co., 119 U. S. 149; Boston, etc., R. Co. *v.* Bartlett, 3 Cush. (Mass.) 224; Craig *v.* Harper, 3 Cush. (Mass.) 159; Thruston *v.* Thornton, 1 Cush. (Mass.) 91; McDonald *v.* Bewick, 51 Mich. 79; People *v.* Taylor, 2 Mich. 250; Johnson *v.* Jacobs, 42 Minn. 168; Lancaster *v.* Elliott, 28 Mo. App. 86; Tucker *v.* Woods, 12 Johns. (N. Y.) 190, 7 Am. Dec. 305; Slaymaker *v.* Irwin, 4 Whart. (Pa.) 369; Collins *v.* Baumgardner, 52 Pa. St. 461; Port Huron Engine, etc., Co. *v.* Clements, 113 Wis. 249.

An Offer Once Rejected or Revoked is of no effect unless renewed, and a subsequent acceptance creates no new contract. Minneapolis, etc., R. Co. *v.* Columbus Rolling Mill Co., 119 U. S. 149.

3. See generally the title CONTRACTS, vol. 7, p. 88.

4. Contract Becomes Binding on Acceptance — *California.* — Johnson-Locke Mercantile Co. *v.* Howard, 133 Cal. XIX.; Numsen *v.* Levi, (Cal. 1894) 36 Pac. Rep. 657.

Illinois.—Larson *v.* Johnson, 42 Ill. App. 198.

Kansas. — Julius Winkelmeyer Brewing Assoc. *v.* Nipp, 6 Kan. App. 730.

Kentucky. — Fairmount Glass Works *v.* Crunden-Martin Wooden Ware Co., 106 Ky. 659.

Massachusetts. — Mitchell *v.* Le Clair, 165 Mass. 308.

Missouri. — Parlin *v.* Boatman, 84 Mo. App. 67.

Tennessee. — College Mill Co. *v.* Fidler, (Tenn. Ch. 1899) 58 S. W. Rep. 382.

Texas. — Seley *v.* Williams, 20 Tex. Civ. App. 405; Sanger *v.* Thomasson, (Tex. Civ. App. 1898) 44 S. W. Rep. 408; Embree-McLean Carriage Co. *v.* Lusk, 11 Tex. Civ. App. 493.

Wisconsin. — Kingman *v.* Watson, 97 Wis. 596.

As to what constitutes an offer and acceptance, see *infra*, this section, *Offer and Acceptance.*

5. Andrews *v.* Schreiber, 93 Fed. Rep. 367; Murray *v.* Doud, 63 Ill. App. 247, *affirmed* 167 Ill. 368. See Fairmount Glass Works *v.* Crunden-Martin Wooden Ware Co., 106 Ky. 659.

6. What Constitutes an Offer. — Baston *v.* Toronto Fruit Vinegar Co., 4 Ont. L. Rep. 20; Lee Silver Min. Co. *v.* Omaha, etc., Smelting, etc., Co., 16 Colo. 118; Moody *v.* Standard Wheel Co., 20 Ind. App. 422; Patton *v.* Arney, 95 Iowa 664; Smith *v.* Gowdy, 8 Allen (Mass.) 566; Cheney Bigelow Wire Works *v.* Sorrell, 142 Mass. 442; Alexander *v.* Western Union Tel. Co., 67 Miss. 386; Slaymaker *v.* Irwin, 4 Whart. (Pa.) 369; Woldert *v.* Arledge, 4 Tex. Civ. App. 692; Moulton *v.* Kershaw, 59 Wis. 316, 48 Am. Rep. 516.

7. Coffin *v.* Portland, 43 Fed. Rep. 411; Wardell *v.* Williams, 62 Mich. 50, 4 Am. St. Rep. 814; Gates *v.* Nelles, 62 Mich. 444.

8. Advertisements, Price Lists, etc. — State *v.* Peters, 91 Me. 31; Beaupré *v.* Pacific, etc., Tel. Co., 21 Minn. 155; College Mill Co. *v.*

mere acceptance will not create a binding contract.[1] But there is a binding contract as to the amount actually delivered and accepted or as to the amount ordered, if such order is accepted.[2] Until an offer is accepted it is revocable at the will of the party making it;[3] and this is so, even though he has expressly promised that it shall be open until a specified time, provided such promise is founded on no consideration, in which case it constitutes a mere option and no rights are secured by it until its acceptance.[4] In case of an acceptance by letter, the contract is complete from the moment such letter is deposited in the post, and neither party can retract, though the letter may not reach his correspondent.[5] The same rule applies where the offer and its

Fidler, (Tenn. Ch. 1899) 58 S. W. Rep. 382; Moulton *v.* Kershaw, 59 Wis. 316, 48 Am. Rep. 516. *Contra*, Schenectady Stove Co. *v.* Holbrook, 30 Hun (N. Y.) 86, *affirmed* 101 N. Y. 45.

1. Specification of Quantity. — McCaw Mfg. Co. *v.* Felder, 115 Ga. 408; Fairmount Glass Works *v.* Crunden-Martin Wooden Ware Co., 106 Ky. 659; Ellis *v.* Miller, 22 N. Y. App. Div. 33; Allen *v.* Kirwan, 159 Pa. St. 612, 34 W. N. C. (Pa.) 29; Eckert *v.* Schoch, 155 Pa. St. 530; Moulton *v.* Kershaw, 59 Wis. 316, 48 Am. Rep. 516. But see Burgess Sulphite Fibre Co. *v.* Broomfield, 180 Mass. 283.

An offer and acceptance for a "carload" is a binding contract if by usage of the trade a "carload" is a definite quantity. Woldert *v.* Arledge, 4 Tex. Civ App. 692; Fairmount Glass Works *v.* Crunden-Martin Wooden Ware Co., 106 Ky. 659.

A party may be bound by an offer to sell such quantity as may be ordered or by an offer which, fairly construed, is to sell a reasonable quantity. In such case an order for a definite amount, if reasonable, constitutes a binding contract. College Mill Co. *v.* Fidler, (Tenn. Ch. 1899) 58 S. W. Rep. 382, *quoting* Lyman *v.* Robinson, 14 Allen (Mass.) 254, and *distinguishing* Moulton *v.* Kershaw, 59 Wis. 316, 48 Am. Rep. 516, and Beaupré *v.* Pacific, etc., Tel. Co., 21 Minn. 155.

2. McCaw Mfg. Co. *v.* Felder, 115 Ga. 408; Julius Winkelmeyer Brewing Assoc. *v.* Nipp, 6 Kan. App. 730; McColl *v.* Jackson Iron Co., 98 Mich. 482; Laclede Constr. Co. *v.* Tudor Iron Works, 169 Mo. 137; Eckert *v.* Shoch, 155 Pa. St. 530.

3. Revocation of Offer — *England.* — Head *v.* Diggon, 3 M. & R. 97; Great Northern R. Co. *v.* Witham, L. R. 9 C. P. 16.

Alabama. — Eskridge *v.* Glover, 5 Stew. & P. (Ala.) 264, 26 Am. Dec. 344.

California. — Harvey *v.* Duffey, 99 Cal. 401.

Colorado. — Sherwin *v.* National Cash-Register Co., 5 Colo. App. 162.

Illinois. — Martin *v.* Wilms, 61 Ill. App. 108; School Directors *v.* Trefethren, 10 Ill. App. 127.

Iowa. — Bradley *v.* Smith, (Iowa 1898) 77 N. W. Rep. 506; Thompson, etc., Mfg. Co. *v.* Perkins, 97 Iowa 607; McCormick Harvesting Mach. Co. *v.* Richardson, 89 Iowa 525.

Massachusetts. — Craig *v.* Harper, 3 Cush. (Mass.) 159.

Michigan. — Brown *v.* Snider, 126 Mich. 198; Challenge Wind, etc., Mill Co. *v.* Kerr, 93 Mich. 328; Weiden *v.* Woodruff, 38 Mich. 130; Aldine Press *v.* Estes, 75 Mich. 100.

Missouri. — Arnold *v.* Cason, (Mo. App. 1902) 69 S. W. Rep. 34.

New York. — Hochster *v.* Baruch, 5 Daly (N. Y.) 440; Dix *v.* Shaver, 14 Hun (N. Y.) 392; Quick *v.* Wheeler, 78 N. Y. 300; Howells *v.* Stroock, 50 N. Y. App. Div. 344; Klee *v.* Grant, (C. Pl. Gen. T.) 4 Misc (N. Y.) 88.

Pennsylvania. — Ames *v.* Pierson, 4 Pa. Dist. 392.

South Dakota. — National Refining Co. *v.* Miller, 1 S. Dak. 548.

Texas. — Whitaker *v.* Zeihme, (Tex. Civ. App. 1901) 61 S. W. Rep. 499; Summers *v.* Mills, 21 Tex. 77.

Wisconsin. — Baker *v.* Holt, 56 Wis. 100; Johnson *v.* Filkington, 39 Wis. 62.

4. Dickinson *v.* Dodds, 2 Ch. D. 463, 16 Moak 854; Routledge *v.* Grant, 4 Bing. 653, 15 E. C. L. 99; Head *v.* Diggon, 3 M. & R. 97; Smith *v.* Hudson, 6 B. & S. 431, 118 E. C. L. 431; Taylor *v.* Wakefield, 6 El. & Bl. 765, 88 E. C. L. 765; Great Northern R. Co. *v.* Witham, L. R. 9 C. P. 16; Payne *v.* Cave, 3 T. R. 148 (a case of a bidder at an auction withdrawing bid before the hammer was down); Cooke *v.* Oxley, 3 T. R. 653 (but see criticism of this case in Story on Sales, § 129; 2 Kent's Com., p. 477; Boston, etc., R. Co *v.* Bartlett, 3 Cush. (Mass.) 224); Falls *v.* Gaither, 9 Port. (Ala.) 605; Eskridge *v.* Glover, 5 Stew. & P. (Ala.) 264, 26 Am. Dec. 344; Larmon *v.* Jordan, 56 Ill. 204; School Directors *v.* Trefethren, 10 Ill. App. 127; Peck *v.* Freese, 101 Mich. 321; Beckwith *v.* Cheever, 21 N. H. 41; Paddock *v.* Davenport, 107 N. Car. 710; Faulkner *v.* Hebard, 26 Vt. 452. *Compare* Adams *v.* Lindsell, 1 B. & Ald. 681. See generally title OPTIONS, vol. 21, p. 924.

If, However, It Be under Seal, a consideration is conclusively presumed, and the party making it is bound by it until its proper withdrawal. Faulkner *v.* Hebard, 26 Vt. 457.

5. Contract by Letter through Mail — *England.* — Adams *v.* Lindsell, 1 B. & Ald. 681; Potter *v.* Sanders, 6 Hare 1; Dunlop *v.* Higgins, 1 H. L. Cas. 381; Household F., etc., Acc. Ins. Co. *v.* Grant, 4 Ex. D. 216; Duncan *v.* Topham, 8 C. B. 225, 65 E. C. L. 225.

United States. — Winterport Granite, etc., Co. *v.* Schooner Jasper, 1 Holmes (U. S.) 101.

Arkansas. — Kempner *v.* Cohn, 47 Ark. 519, 58 Am. Rep. 775.

Iowa. — Moore *v.* Pierson, 6 Iowa 279, 71 Am. Dec. 409.

Kentucky. — Chiles *v.* Nelson, 7 Dana (Ky.) 281; Hutcheson *v.* Blakeman, 3 Met. (Ky.) 80.

Maryland. — Stockham *v.* Stockham, 32 Md. 196; Wheat *v.* Cross, 31 Md. 99, 1 Am. Rep. 28.

New Hampshire. — Abbott *v.* Shepard, 48 N. H. 14.

New York. — Vassar *v.* Camp, 14 Barb. (N.

acceptance are by telegraph.[1] A revocation must be manifested by words or acts,[2] and must be communicated to the party to whom the offer is made before he has signified his acceptance.[3] Death before acceptance operates as a revocation.[4] An acceptance must be communicated to the party making the offer[5] within the stipulated or a reasonable time,[6] and before the order has been revoked.[7] What is a reasonable time may be a question of law for the court, but it is usually a mixed question of law and fact, to be determined by the jury under the instructions of the court with a view to all the circumstances of each case.[8] An acceptance, to bind the other party, must be

Y.) 341, *affirmed* 11 N. Y. 441; Mactier *v.* Frith, 6 Wend. (N. Y.) 103 21 Am. Dec. 262; Brisban *v.* Boyd, 4 Paige (N. Y.) 17; Clark *v.* Dales, 20 Barb. (N. Y.) 42.

Utah. — Haarstick *v.* Fox, 9 Utah 110.

See generally the title CONTRACTS, vol. 7, p. 88.

But see the Scottish case of Dunmore *v.* Alexander, 9 Shaw & Dunlop 190, where the letter of acceptance and the letter retracting the acceptance reached the proposed seller at the same time, and it was held that there was no contract.

1. Contracts by Telegraph. — Minnesota Linseed Oil Co. *v.* Collier White Lead Co., 4 Dill. (U. S.) 431; Gartner *v.* Hand, 86 Ga. 558; Haas *v.* Myers, 111 Ill. 421, 53 Am. Rep. 634; Trevor *v.* Wood, 36 N. Y. 307, 93 Am. Dec. 511; Perry *v.* Mt. Hope Iron Co., 15 R. I. 380, 2 Am. St. Rep. 902; College Mill Co. *v.* Fidler, (Tenn. Ch. 1899) 58 S. W. Rep. 382.

2. What Constitutes Revocation. — Omer *v.* Farlow, 46 Ill. App. 122; Rock Island Plow Co. *v.* Meredith, 107 Iowa 498; Peck *v.* Freeze, 101 Mich. 321.

3. Notice of Revocation of Offer. — Byrne *v.* Van Tienhoven, 5 C. P. D. 344; Stevenson *v.* McLean, 5 Q. B. D. 346, 29 Moak 341; The Palo Alto, 2 Ware (U. S.) 344; Sherwin *v.* National Cash Register Co., 5 Colo. App. 162; McCormick Harvesting Mach. Co. *v.* Markert, 107 Iowa 340; Fairmount Glass Works *v.* Crunden-Martin Wooden Ware Co., 106 Ky. 659. See Paddock *v.* Davenport, 107 N. Car. 710; Hawkinson *v.* Harmon, 69 Wis. 551. But see Dickinson *v.* Dodds, 2 Ch. D. 463.

4. Revocation by Death. — Riner *v.* Husted, 13 Colo. App. 523.

5. Acceptance Must Be Communicated — *England.* — Brogden *v.* Metropolitan R. Co., 2 App. Cas. 666.

California. — Harvey *v.* Duffey, 99 Cal. 401.

Illinois. — Martin *v.* Wilms, 61 Ill. App. 108.

Iowa. — Thompson, etc., Mfg. Co. *v.* Perkins, 97 Iowa 607. *Compare* McCormick Harvesting Mach. Co. *v.* Markert, 107 Iowa 340.

Kansas.—Trounstine *v.* Sellers, 35 Kan. 447.

Maine. — Jenness *v.* Mt. Hope Iron Co., 53 Me. 23.

Michigan. — McDonald *v.* Boeing, 43 Mich. 394, 38 Am. Rep. 199.

New Hampshire. — Beckwith *v.* Cheever, 21 N. H. 41.

New York. — White *v.* Corlies, 46 N. Y. 467. See Chase *v.* Evarts, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 987.

Pennsylvania. — Emerson *v.* Graff, 29 Pa. St. 358; Borland *v.* Guffey, 1 Grant Cas. (Pa.) 394.

Virginia. — *Compare* Insurance Co. of North America *v.* Gamble, 94 Va. 622.

See generally the title AGENCY, vol. 1, p. 930.

Acceptance by Agent. — Notice of acceptance to or by an authorized agent will be a sufficient communication. Trevor *v.* Wood, 36 N. Y. 307, 93 Am. Dec. 511; Mactier *v.* Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; Booth *v.* Bierce, 40 Barb. (N. Y.) 114. *Compare* Craig *v.* Harper, 3 Cush. (Mass.) 159, where there was an offer of sale of certain books, and a short time afterwards the agent of the party to whom the offer was made demanded a delivery of the books, which was refused. It was held that the proposer might revoke his offer by refusing acceptance, and it was also intimated that the demand by the agent was not an acceptance such as would constitute a contract.

6. Time of Acceptance — *England.* — Emmott *v.* Riddel, 2 F. & F. 142; Dickinson *v.* Dodds, 2 Ch. D. 463.

United States. — Minnesota Linseed Oil Co. *v.* Collier White Lead Co., 4 Dill. (U. S.) 431; Hargadine-McKittrick Dry Goods Co. *v.* Reynolds, 64 Fed. Rep. 560.

Alabama. — Falls *v.* Gaither, 9 Port. (Ala.) 605; Martin *v.* Black, 21 Ala. 721.

Arkansas. — Kempner *v.* Cohn, 47 Ark. 519, 58 Am. Rep. 775.

Connecticut. — Averill *v.* Hedge, 12 Conn. 424.

Iowa. — Judd *v.* Day, 50 Iowa 247.

Kansas. — Trounstine *v.* Sellers, 35 Kan. 447.

Maine. — Peru *v.* Turner, 10 Me. 185.

Massachusetts. — Craig *v.* Harper, 3 Cush. (Mass.) 160; Boston, etc., R. Co. *v.* Bartlett, 3 Cush. (Mass.) 224; Loring *v.* Boston, 7 Met. (Mass.) 409; Park *v.* Whitney, 148 Mass. 278.

Minnesota. — Stone *v.* Harmon, 31 Minn. 512.

Mississippi. — Curtis *v.* Blair, 26 Miss. 325, 59 Am. Dec. 257.

Missouri. — Cangas *v.* Rumsey Mfg. Co., 37 Mo. App. 297.

New Jersey. — Potts *v.* Whitehead, 20 N. J. Eq. 55.

New York — Chicago, etc., R. Co. *v.* Dane, 43 N. Y. 240; Trevor *v.* Wood, 36 N. Y. 307, 93 Am. Dec. 511; Currier *v.* Carnrick, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 176.

Ohio. — Longworth *v.* Mitchell, 26 Ohio St. 334.

Tennessee. — College Mill Co. *v.* Fidler, (Tenn. Ch. 1899) 58 S. W. Rep. 382; Paragon Refining Co. *v.* Lee, 98 Tenn. 643.

7. Harvey *v.* Duffey, 99 Cal. 401; Bradley *v.* Smith, (Iowa 1898) 77 N. W. Rep. 506; Craig *v.* Harper, 3 Cush. (Mass.) 159.

8. What Is Reasonable Time. — See generally the title QUESTIONS OF LAW AND FACT, vol. 23, p. 543. See also Craft *v.* Isham, 13 Conn. 41; Averill *v.* Hedge, 12 Conn. 424; Robeson *v.* Pels, 202 Pa. St. 399.

unconditional and unqualified,[1] and must correspond exactly to the terms of the offer.[2] Thus, where the offer is of or for a specified quantity, the acceptance must be of the precise quantity offered, neither more nor less.[3] An offer may impose any special terms or conditions which the party making it sees fit, and the acceptance must conform thereto or no contract will be concluded.[4] Immaterial variances between the offer and its acceptance may be

In the Case of a Proposition by Telegraph for the sale of certain goods, the market for which is subject to sudden and great fluctuations, it is presumed that an immediate answer is expected, and an acceptance not within twenty-four hours from the time of receipt is considered not to be within reasonable time, and does not operate to constitute a contract. Minnesota Linseed Oil Co. *v.* Collier White Lead Co., 4 Dill. (U. S.) 431. See Robeson *v.* Pels, 202 Pa. St. 399.

Parol Evidence of material facts and circumstances known to the parties at the time is admissible. 2 Story on Contr. (5th ed.), § 1325; Cocker *v.* Franklin Hemp, etc., Mfg. Co., 3 Sumn. (U. S.) 530; Coates *v.* Sangston, 5 Md. 121; Stone *v.* Harmon, 31 Minn. 512.

1. Acceptance Must Be Unconditional — *England.* — Bristol, etc., Aerated Bread Co. *v.* Maggs, 44 Ch. D. 616; Appleby *v.* Johnson, L. R. 9 C. P. 158; Crossley *v.* Maycock, L. R. 18 Eq. 180; Routledge *v.* Grant, 4 Bing. 653, 15 E. C. L. 99; Hyde *v.* Wrench, 3 Beav. 334; Wontner *v.* Shairp, 4 C. B. 404, 56 E. C. L. 404; Felthouse *v.* Bindley, 11 C. B. N. S. 869, 103 E. C. L. 869, 31 L. J. C. P. 204. See Andrews *v.* Garrett, 6 C. B. N. S. 262, 95 E. C. L. 262.

United States. — Snow *v.* Miles, 3 Cliff. (U. S.) 608; Carr *v.* Duval, 14 Pet. (U. S.) 77.

Colorado — Salomon *v.* Webster, 4 Colo. 353.

Illinois. — Corbin *v.* Speeter, 92 Ill. App. 652.

Indiana. — Cartmeal *v.* Newton, 79 Ind. 1.

Kansas. — Plant Seed Co. *v.* Hall, 14 Kan. 553; Seymour *v.* Armstrong, 10 Kan. App. 10.

Kentucky. — Hutcheson *v.* Blakeman, 3 Met. (Ky.) 80.

Maine. — Maynard *v.* Tabor, 53 Me. 511.

Massachusetts. — Gowing *v.* Knowles, 118 Mass. 232.

Michigan. — Eggleston *v.* Wagner, 46 Mich. 610; Johnson *v.* Stephenson, 26 Mich. 63.

Minnesota. — King *v.* Dahl, 82 Minn. 240; Hayden *v.* Byron, 78 Minn. 27.

Missouri. — Denton *v.* McInnis, 85 Mo. App. 542; Tufts *v.* Sams, 47 Mo. App. 487; Stotesburg *v.* Massengale, 13 Mo. App. 226.

New York. — Clark *v.* Dales, 20 Barb. (N. Y.) 42; Uhlman *v.* Day, 38 Hun (N. Y.) 298; Schenectady Stove Co. *v.* Holbrook, 101 N. Y. 45; Kirwan *v.* Byrne, (C. Pl. Gen. T.) 9 Misc. (N. Y.) 76 (N. Y. City Ct. Gen. T.) 6 Misc. (N. Y.) 528.

Ohio. — Warner Elevator Co. *v.* Guthrie, 5 Ohio Cir. Dec. 128, 12 Ohio Cir. Ct. 182.

Tennessee. — College Mill Co. *v.* Fidler, (Tenn. Ch. 1899) 58 S. W. Rep. 382.

Vermont. — Fenno *v.* Weston, 31 Vt. 345.

Wisconsin. — Northwestern Iron Co. *v.* Meade, 21 Wis. 474, 94 Am. Dec. 557.

An acceptance, in order to bind the parties, must be plain, unequivocal, and unambiguous. Where the plaintiff had certain negotiations with the defendant's agent relative to the sale of property, and finally wrote him a letter in which he did not accept the proposition but instructed him what to do and then added, "We will fix the writing all satisfactory," such letter was equivocal and ambiguous and there was no binding contract. Goodenow *v.* Barnes, 40 Iowa 561. See Batie *v.* Allison, 77 Iowa 314.

2. Conformity of Acceptance to Offer. — Story on Sales, § 136; 1 Parsons on Contr. 476, 477.

England. — Hutchison *v.* Bowker, 5 M. & W. 535; Jordan *v.* Norton, 4 M. & W. 155; Felthouse *v.* Bindley, 11 C. B. N. S. 869, 103 E. C. L. 869; Routledge *v.* Grant, 4 Bing. 653, 15 E. C. L. 99; Governor, etc., of Poor *v.* Petch, 10 Exch. 610.

Canada. — McIntosh *v.* Brill, 20 U. C. C. P. 426.

United States. — Carr *v.* Duval, 14 Pet. (U. S.) 77.

Iowa. — Sawyer *v.* Brossart, 67 Iowa 678, 56 Am. Rep. 371.

Louisiana. — Barrow *v.* Ker, 10 La. Ann. 120.

Michigan. — U. S. Heater Co. *v.* Applebaum, 126 Mich. 296, 8 Detroit Leg. N. 23; Eggleston *v.* Wagner, 46 Mich. 610; Michigan Bolt, etc., Works *v.* Steel, 111 Mich. 153.

Missouri. — Arnold *v.* Cason, (Mo. App. 1902) 69 S. W. Rep. 34; Strange *v.* Crowley, 91 Mo. 287.

New Jersey. — Potts *v.* Whitehead, 23 N. J. Eq. 512.

New York. — Myers *v.* Smith, 48 Barb. (N. Y.) 614; Myers *v.* Trescott, 59 Hun (N. Y.) 395; Tuttle *v.* Love, 7 Johns. (N. Y.) 470; Marschall *v.* Eisen Vineyard Co., (C. Pl. Gen. T.) 7 Misc. (N. Y.) 674; Cameron *v.* Wright, 21 N. Y. App. Div. 395.

Pennsylvania. — Clements *v.* Bolster, 6 Pa. Super. Ct. 411, 41 W. N. C. (Pa.) 512.

Texas. — Summers *v.* Mills, 21 Tex. 87.

Wisconsin. — Russell *v.* Falls Mfg. Co., 106 Wis. 329; Shores Lumber Co. *v.* Patterson, 98 Wis. 534.

Alternative Offers. — If a letter offering to buy goods contains alternative propositions, the seller has the right to elect which he will accept, and the buyer will be bound by it; and whether (in an action for the price of the goods) the seller elected the one or the other of the propositions may be put in issue by the defendant by his proof, and must be left to the jury. Woolbright *v.* Sneed, 5 Ga. 167.

3. Thomas *v.* Greenwood, 69 Mich. 215; Kein *v.* Tupper, 52 N. Y. 553, (N. Y. Super. Ct. Gen. T.) 42 How. Pr. (N. Y.) 437; M'Millan *v.* Vanderlip, 12 Johns. (N. Y.) 165, 7 Am. Dec. 299; Bruce *v.* Pearson, 3 Johns. (N. Y.) 534; Mead *v.* Degolyer, 16 Wend. (N. Y.) 632; Champlin *v.* Rowley, 13 Wend. (N. Y.) 258; Tipton *v.* Feitner, 20 N. Y. 423; Corning *v.* Colt, 5 Wend. (N. Y.) 253; Witherow *v.* Witherow, 16 Ohio 238; Barton *v.* Kane, 17 Wis. 37, 84 Am. Dec. 728.

4. Shady Hill Nursery Co. *v.* Waterer, 179

disregarded.[1] An offer must receive a reasonable construction, and the proposer is bound by its acceptance in that sense.[2] An acceptance with a variation, condition, or qualification annexed does not complete the contract, but constitutes a refusal of the offer,[3] and is equivalent to a new proposal, which, on acceptance, may become a valid contract.[4] What acts or words constitute an acceptance of a proposal is a question of law for the court where such words

Mass. 318; Lewis *v.* Browning, 130 Mass. 173; Taylor *v.* Rennie, 35 Barb. (N. Y.) 272; Fellows *v.* Prentiss, 3 Den. (N. Y.) 520, 45 Am. Dec. 484; Page *v.* Shainwald, 169 N. Y. 246; Howells *v.* Stroock, 50 N. Y. App. Div. 344; Union Nat. Bank *v.* Miller, 106 N. Car. 347, 19 Am. St. Rep. 538; College Mill Co. *v.* Fidler, (Tenn. Ch. 1899) 58 S. W. Rep. 382. See Maclay *v.* Harvey, 90 Ill. 525, 32 Am. Rep. 35.

"An acceptance, to be good, must, of course, be such as to conclude an agreement or contract between the parties. And to do this, it must in every respect meet and correspond with the offer, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand." Potts *v.* Whitehead, 23 N. J. Eq. 512; Eliason *v.* Henshaw, 4 Wheat. (U. S.) 225; Summers *v.* Mills, 21 Tex. 77; Fox *v.* Turner, 1 Ill. App. 153; Huddleston *v.* Briscoe, 11 Ves. Jr. 583.

An offer to sell which requires the payment of money as the condition of acceptance can only be met by the payment of money. Falls *v.* Gaither, 9 Port. (Ala.) 605.

When an offer is made to sell goods at a certain time and place, such offer is not unconditionally accepted by an answer which changes the place of delivery, even though all other terms of the offer are complied with. Johnson *v.* Stephenson, 26 Mich. 63.

It is even held that an acceptance communicated to a proposer at a place different from that indicated by him is of no effect, although it may be proven that he (the proposer) actually received it. Such an acceptance was a departure from the proposal. Eliason *v.* Henshaw, 4 Wheat. (U. S.) 225.

1. Immaterial Variance. — Branson *v.* Stammers, 28 W. R. 180, 41 L. T. N. S. 434; Clive *v.* Beaumont, 1 De G. & Sm. 403; Stevenson *v.* McLean, 5 Q. B. D. 346; Phillips *v.* Moor, 71 Me. 78; Brown *v.* Norton, 50 Hun (N. Y.) 248.

In Merriam *v.* Lapsley, 2 McCrary (U. S.) 606, it is held that an acceptance containing a condition, however immaterial, does not complete the contract.

2. Construction of Offer. — Fairmount Glass Works *v.* Crunden-Martin Wooden Ware Co., 106 Ky. 659; Brewington *v.* Mesker, 51 Mo. App. 348; Butler *v.* Moses, 43 Ohio St. 166. See also Western Union Tel. Co. *v.* Flint River Lumber Co., 114 Ga. 576.

If a proposal is susceptible of two constructions and the acceptor fairly and honestly adopts one of them and acts upon it, the proposer cannot waive his obligation by insisting that he intended his proposal to bear another construction. Ireland *v.* Livingston, L. R. 5 H. L. 395, 2 Moak 424.

3. Acceptance with Variations Constitutes Refusal — *England.* — Felthouse *v.* Bindley, 11 C. B. N. S. 869, 103 E. C. L. 869; Hyde *v.* Wrench, 3 Beav. 334.

Canada. — Fulton *v.* Upper Canada Furniture Co., 9 Ont. App. 211.

United States. — Merriam *v.* Lapsley, 2 McCrary (U. S.) 606; Minneapolis, etc., R. Co. *v.* Columbus Rolling Mill Co., 119 U. S. 149; National Bank *v.* Hall, 101 U. S. 49; Crabtree *v.* St. Paul Opera-House Co., 39 Fed. Rep. 746.

Georgia. — Decker *v.* Gwinn, 95 Ga. 518.

Illinois. — Fox *v.* Turner, 1 Ill. App. 153.

Indiana. — Cartmel *v.* Newton, 79 Ind. 1.

Iowa. — Baker *v.* Johnson County, 37 Iowa 186.

Maryland. — Hardwick *v.* Kirwan, 91 Md. 285.

Michigan. — Whiteford *v.* Hitchcock, 74 Mich. 208.

Missouri. — Tufts *v.* Sams, 47 Mo. App. 487; Brecheisen *v.* Coffey, 15 Mo. App. 84; Falls Wire Mfg. Co. *v.* Broderick, 12 Mo. App. 378.

New York. — McCotter *v.* New York, 37 N. Y. 325, *affirming* 35 Barb. (N. Y.) 609; Bruce *v.* Pearson, 3 Johns. (N. Y.) 534.

Wisconsin. — Baker *v.* Holt, 56 Wis. 100.

But where the defendant offered a lot of iron at a certain price, the offer to remain open for a certain time, and the plaintiff telegraphed to inquire whether he would accept a less price, it was held that this was not a rejection of the defendant's offer, and the plaintiff having subsequently accepted it before the expiration of the time, the defendant was held bound. Stevenson *v.* McLean, 5 Q. B. D. 346. See Clark *v.* Dales, 20 Barb. (N. Y.) 42. So when the seller expressed a mere hope that the buyer would pay more upon completion of the contract. Phillips *v.* Moor, 71 Me. 78.

4. Acceptance Constituting Counter Proposition — *England.* — Hart *v.* Mills, 15 M. & W. 85.

California. — Johnson-Locke Mercantile Co. *v.* Howard, 133 Cal. xix.

Colorado. — See Riner *v.* Husted, 13 Colo. App. 523.

Illinois. — Anglo-American Provision Co. *v.* Prentiss, 157 Ill. 506; Northwestern Iron, etc., Co. *v.* Hirsch, 94 Ill. App. 579; Smith *v.* Wetherell, 4 Ill. App. 659; Fox *v.* Turner, 1 Ill. App. 153.

Iowa. — Stennett *v.* Red Oak First Nat. Bank, 112 Iowa 273.

Kentucky. — Excelsior Coal Min. Co. *v.* Virginia Iron, etc., Co., 66 S. W. Rep. 373, 23 Ky. L. Rep. 1834.

Maine. — Jenness *v.* Mt. Hope Iron Co., 53 Me. 23.

Massachusetts. — Bowker *v.* Hoyt, 18 Pick. (Mass.) 558.

New York. — Avery *v.* Willson, 81 N. Y. 341, 37 Am. Rep. 503; Howells *v.* Stroock, (Supm. Ct. Tr. T.) 30 Misc. (N. Y.) 569.

Virginia. — Insurance Co. of North America *v.* Gamble, 94 Va. 622.

Wisconsin. — Russell *v.* Falls Mfg. Co., 106 Wis. 329.

or acts are unequivocal. Otherwise it is a mixed question of law and fact for the jury under proper instructions from the court.[1] Delivery within the stipulated time of the goods ordered is a sufficient acceptance.[2] An acceptance cannot be revoked except by consent of the other party, but if there is an attempt to revoke an acceptance, the other party may, at his option, regard the contract as terminated.[3]

c. MISTAKE. — As mutual assent is necessary to the formation of the contract, it follows that an error or mistake of fact in that which goes to the essence of the agreement, and therefore excludes such assent, prevents the formation of the contract, since each party is really assenting to something different, notwithstanding the apparent mutual assent.[4] But where the mistake is in relation to a matter wholly collateral, and does not affect the essence of the contract, it does not prevent a valid contract from being formed.[5] Sales have been held void for want of mutual assent where there was a mistake as to the subject-matter of the sale,[6] or as to the price or terms of sale,[7] or as to the quantity sold,[8] or as to identity of the party dealt with.[9]

1. What Constitutes Acceptance — Province of Court and Jury. — Lancaster *v.* Elliott, 28 Mo. App. 86. See generally the title QUESTIONS OF LAW AND FACT, vol. 23, p. 543.

What Constitutes Acceptance — Evidence — *United States.* — Hargadine-McKittrick Dry Goods Co. *v.* Reynolds, 64 Fed. Rep. 560.

Alabama. — Manier *v.* Appling, 112 Ala. 663.

California. — Buttner *v.* Smith, (Cal. 1894) 36 Pac. Rep. 652.

Georgia. — Pitcher *v.* Lowe, 95 Ga. 423.

Indiana. — Mummenhoff *v.* Randall, 19 Ind. App. 44.

Iowa. — Coad *v.* Rogers, 115 Iowa 478.

Minnesota. — King *v.* Dahl, 82 Minn. 240; Reid *v.* Northwestern Implement, etc., Co., 79 Minn. 369; Ames *v.* Smith, 65 Minn. 304.

Missouri. — Bicking *v.* Stevens, 69 Mo. App. 168.

New York. — Grant *v.* Griffith, 165 N. Y. 636, 39 N. Y. App. Div. 107; Crossett *v.* Carleton, 23 N. Y. App. Div. 366.

Pennsylvania. — Hall *v.* Wood, 187 Pa. St. 18, 67 Am. St. Rep. 563, 42 W. N. C. (Pa.) 563.

South Carolina. — Burwell *v.* Chapman, 59 S. Car. 581.

West Virginia. — Ford *v.* Friedman, 40 W. Va. 177.

Wisconsin. — Kingman *v.* Watson, 97 Wis. 596.

2. Delivery as an Acceptance. — Aultman *v.* Nilson, 112 Iowa 634; Rock Island Plow Co. *v.* Meredith, 107 Iowa 498, McCormick Harvesting Mach. Co. *v.* Markert, 107 Iowa 340.

3. Revocation of Acceptance. — Cameron *v.* Wright, 163 N. Y. 586, 21 N. Y. App. Div. 395.

4. Mistake. — 2 Kent Com. 477; Benj. on Sales (6th ed.), § 50; Story on Sales (4th ed.) 148; Davies *v.* Watson, 2 N. & M. 709, 28 E. C. L. 377; Raffles *v.* Wichelhaus 2 H. & C. 906; Oakman *v.* Rogers, 120 Mass. 214; Gowing *v.* Knowles, 118 Mass. 232; Conner *v.* Henderson, 15 Mass. 319, 8 Am. Dec. 103. See generally the title MISTAKE, vol. 20, p. 805. See also the title RESCISSION, CANCELLATION, AND REFORMATION, *ante*, p. 604.

5. Wheat *v.* Cross, 31 Md. 99, 1 Am. Rep. 28. Where the buyer supposes that the article bought will answer a certain purpose, but it fails to do so, he cannot pretend that he did not assent to the bargain. Chanter *v.* Hopkins, 4 M. & W. 399; Ollivant *v.* Bayley, 5 Q. B. 288, 48 E. C. L. 287; Prideaux *v.* Bunnett, 1 C. B. N. S. 613, 87 E. C. L. 613.

6. Mistake in Subject-matter — *England.* — Thornton *v.* Kempster, 5 Taunt. 786, 1 E. C. L. 265; Keele *v.* Wheeler, 7 M. & G. 665, 49 E. C. L. 663.

United States. — Utley *v.* Donaldson, 94 U. S. 29.

Connecticut — Hartford, etc., R. Co. *v.* Jackson, 24 Conn. 514, 63 Am. Dec. 177.

Maryland. — Wheat *v.* Cross, 31 Md. 99, 1 Am. Rep. 28.

Massachusetts. — Gardner *v.* Lane, 12 Allen (Mass.) 44, 9 Allen (Mass.) 492, 85 Am. Dec. 779; Harvey *v.* Harris, 112 Mass. 32; Hills *v.* Snell, 104 Mass. 173, 6 Am. Rep. 216; Kyle *v.* Kavanagh, 103 Mass. 356, 4 Am. Rep. 560; Winchester *v.* Howard, 97 Mass. 303, 93 Am. Dec. 93. See Chapman *v.* Cole, 12 Gray (Mass.) 141, 71 Am. Dec. 739.

Michigan. — Sherwood *v.* Walker, 66 Mich. 568, 11 Am. St. Rep. 531.

New York. — Calkins *v.* Griswold, 11 Hun (N. Y.) 208; Cutts *v.* Guild, 57 N. Y. 229.

Rhode Island. — Sheldon *v.* Capron, 3 R. I. 171.

Vermont. — Ketchum *v.* Catlin, 21 Vt. 191.

7. Mistake as to Price or Terms of Sale. — Phillips *v.* Bristolli, 2 B. & C. 511, 9 E. C. L. 162; Greene *v.* Bateman, 2 Woodb. & M. (U. S.) 359; National Bank *v.* Hall, 101 U. S. 49; Rovegno *v.* Defferari, 40 Cal. 459; Kirk *v.* L. Wolf Mfg. Co., 118 Ill. 567; Rupley *v.* Daggett, 74 Ill. 351; Parrish *v.* Thurston, 87 Ind. 437; Hogue *v.* Mackey, 44 Kan. 277; Postal Tel. Cable Co. *v.* Schaefer, 62 S. W. Rep. 1119, 23 Ky. L. Rep. 344.

8. Mistake as to Quantity. — But see Hamilton *v.* McAlister, 49 S. Car. 230. See also *infra*, V. 8. *Quantity to Be Delivered.*

An order in writing is, in the absence of fraud or mistake, conclusive upon both parties as to the amount ordered. Coates *v.* Buck, 93 Wis. 128.

The mere fact that the buyer by some mistake, for which the seller was not responsible, sent a written order for a larger quantity of goods than was wanted, is no defense to an action for the price. Coates *v.* Buck, 93 Wis. 128.

9. Mistake as to Identity of Party. — If there is a mistake as to the identity of a party to a

Mistake is a question of fact for the jury.[1]

d. FRAUD AND DECEIT. — This subject has been fully considered elsewhere in this work.[2]

2. Parties. — The law relating to the competency of parties to a sale as affected by coverture, infancy, insanity, etc., does not differ from that applicable to other contracts and calls for no special treatment here.[3]

3. Consideration or Price — *a.* IN GENERAL. — A money consideration is an essential element of a technical sale, and constitutes its distinguishing feature.[4] If there is no consideration, the transaction is a gift.[5] The necessity and sufficiency of the consideration are governed by the usual rules applicable to other contracts.[6] Mere inadequacy of consideration is not sufficient to invalidate a sale unless it be so gross as to amount to fraud or imposition.[7]

sale, it may or may not be void for want of mutual assent. In ordinary cash transactions it is generally immaterial whether a party buys from or sells to one person or another; but if identity is an important element of the sale, as, for instance, in case of sales on credit, and the seller is induced to assent by reason of the buyer's solvency, or where the buyer supposes his seller to be his debtor, and therefore has the right to set off the price, and in other cases where identity affects substantial rights of the parties, a mistake as to the person dealt with renders the contract void for want of mutual assent. Boulton *v.* Jones, 2 H. & N. 564; *In re* Reed, 3 Ch. D. 123; Mitchell *v.* Lapage, Holt N. P. 253, 3 E. C. L. 107; Mudge *v.* Oliver, 1 Allen (Mass.) 74; Boston Ice Co. *v.* Potter, 123 Mass. 28, 25 Am. Rep. 9; Consumers Ice Co. *v.* Webster, 32 N. Y. App. Div. 592; Roof *v.* Morrisson, 37 Ill. App. 37; Barker *v.* Dinsmore, 72 Pa. St. 427, 13 Am. Rep. 697; Decan *v.* Shipper, 35 Pa. St. 239, 78 Am. Dec. 334. See Edmunds *v.* Merchants' Despatch Transp. Co., 135 Mass. 283. But see Stoddard *v.* Ham, 129 Mass. 383, 37 Am. Rep. 369; Hand *v.* Gas Engine, etc., Co., 167 N. Y. 142, *reversing* 34 N. Y. App. Div. 354; Cowan *v.* Fairbrother, 118 N. Car. 406, 54 Am. St. Rep. 733.

"Where a person passes himself off for another, or falsely represents himself as agent for another, for whom he professes to buy, and thus obtains the vendor's assent to a sale and even a delivery of goods, the whole contract is void; it has never come into existence, for the vendor never assented to sell to the person thus deceiving him." The contracts in cases of this sort are generally "held void on the ground of fraud, but they are equally void for mistake, or the absence of the assent necessary to bring them into existence." Benj. on Sales (6th ed.), § 60. See Hardman *v.* Booth, 1 H. & C. 803; Cundy *v.* Lindsay, 3 App. Cas. 459; Higgons *v.* Burton, 26 L. J. Exch. 342; *In re* Reed, 3 Ch. D. 123; Rodlift *v.* Dallinger, 141 Mass. 1, 55 Am. Rep. 439.

Omission of Purchaser's Name in an Offer to Buy. — In case of an executory contract of sale where the name of the proposed purchaser is not disclosed in the offer to buy, the seller cannot be bound, since he may defend on the ground that he thought the purchaser was some other person whom he was willing to trust. Whedon *v.* Ames, 28 Mo. App. 243.

1. Question of Fact for Jury. — Phillips *v.* Bristolli, 2 B. & C. 511, 9 E. C. L. 162.

2. See the title FRAUD AND DECEIT, vol. 14, p. 208. See also the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 527.

3. See generally titles CONTRACTS, vol. 7, p. 88; HUSBAND AND WIFE, vol. 15, p. 785; INFANTS, vol. 16, p. 255; INSANITY, vol. 16, p. 558; INSOLVENCY AND BANKRUPTCY, vol. 16, p. 630; INTOXICATION, vol. 17, p. 398.

Seller as Agent of Purchaser. — In Woodburn Sarven Wheel Co. *v.* Philbrook, 76 Ind. 516, the buyer agreed to purchase timber on the representations of the seller as to quality and quantity. It was insisted in an action for the price of the timber that the court erred in admitting evidence tending to show that the seller occupied a duplex and inconsistent relation, that of seller and of agent. The objection, however, was not sustained.

4. A Money Consideration. — See *supra*, this title, I. 1, *Definition;* Williamson *v.* Berry, 8 How. (U. S.) 544; Eldridge *v.* Kuehl, 27 Iowa 173; Kleinpeter *v.* Harrigan, 21 La. Ann. 196; Wolf *v.* Wolf, 12 La Ann. 529; Slayton *v.* McDonald, 73 Me. 50; Schenck *v.* Saunders, 13 Gray (Mass.) 41 ("the distinguishing feature of a sale — a price for the goods or a stipulation by which the price can be fixed"); Massey *v.* State, 74 Ind. 368. See Madison Ave. Baptist Church *v.* Baptist Church, 46 N. Y. 131. See also Com. *v.* Smith, 102 Mass. 144. See *supra*, I. 2, *Sales Distinguished from Other Transactions — From Exchange or Barter.*

5. Gifts. — Bouv. L. Dict., Price; Pothier, Contrat de Vente, n. 18; Parkinson *v.* State, 14 Md. 184, 74 Am. Dec. 522; Gray *v.* Barton, 55 N. Y. 68, 14 Am. Rep. 181. See the title GIFTS, vol. 14, p. 1006.

In Keller *v.* State, 23 Tex. App. 259, it was held that proof of a gift of intoxicating liquor on Sunday does not support a conviction under a statute prohibiting the sale of such liquor. See generally the title INTOXICATING LIQUORS, vol. 17, p. 189.

6. Necessity and Sufficiency of Consideration. — See generally the title CONSIDERATION, vol. 6, p. 667. See also Rogers *v.* Fenimore, (Del. 1898) 41 Atl. Rep. 886; Weiboldt *v.* Standard Fashion Co., 80 Ill. App. 67; Aultman, etc., Co. *v.* Mead, 60 S. W. Rep. 294, 22 Ky. L. Rep. 1189; Lavert *v.* Hebert, 51 La. Ann. 222; Burgess Sulphite Fibre Co. *v.* Broomfield, 180 Mass. 283; Roosevelt *v.* Nusbaum, 75 N. Y. App. Div. 117; Smitherman Cotton Mills *v.* Randleman Mfg. Co., 125 N. Car. 329; Citizens Nat. Bank *v.* Wehrle, 9 Ohio Cir. Dec. 330; Patton *v.* Cardiner, 72 Vt. 47.

7. Inadequate Consideration. — Lloyd *v.* Scott, 4 Pet. (U. S.) 205; Follett *v.* Rose, 3 McLean

b. AGREEMENT AS TO CONSIDERATION OR PRICE. — The consideration or price must either be fixed or susceptible of being ascertained without further negotiations between the parties, as otherwise there is no mutual assent as to one essential element of the contract, and consequently no contract.[1] The maxim, *id certum est quod certum reddi potest* applies, so that if the price can be made certain without further negotiation between the parties, it is sufficient.[2] It frequently occurs that the parties agree that the price of goods shall be fixed by valuers appointed by them. In such cases, the price when so fixed is as much a part of the contract as if fixed by the parties themselves.[3] An agreement for a reasonable price is sufficiently certain to support the contract.[4] In the absence of express provision as to the price, the law will imply an agreement to pay a reasonable price.[5] And it

(U. S.) 332; Berry *v.* Lovi, 107 Ill. 612; Heberer *v.* Heberer, 67 Ill. 253; Duncan *v.* Sanders, 50 Ill. 475; Baldwin *v.* Dunton, 40 Ill. 188; Waller *v.* Cralle, 8 B. Mon. (Ky.) 14; Hind *v.* Holdship, 2 Watts (Pa.) 104, 26 Am. Dec. 107; Harrington *v.* Wells, 12 Vt. 505. See generally the titles CONSIDERATION, vol. 6, p. 667; RESCISSION, CANCELLATION, AND REFORMATION, *ante*, p. 604.

1. Price Must Be Fixed. — Hutton *v.* Moore, 26 Ark. 382; Fuller *v.* Bean, 34 N. H. 290; Hand *v.* Gas Engine, etc., Co., 167 N. Y. 142; Wittkowsky *v.* Wasson, 71 N. Car. 451; Bigley *v.* Risher, 63 Pa. St. 152; McCandlish *v.* Newman, 22 Pa. St. 460. See also *supra*, II. 1. *Mutual Assent.*

2. Broom's Leg. Max. (8th ed.), p. 624; Bouv. L. Dict., Price; Gordon *v.* Whitehouse, 18 C. B. 747, 86 E. C. L. 747; Bass *v.* Veltum, 28 Minn. 512; Cunningham *v.* Ashbrook, 20 Mo. 553; Fuller *v.* Bean, 34 N. H. 304; Phifer *v.* Erwin, 100 N. Car. 60; McConnell *v.* Hughes, 29 Wis. 537. See Keiler *v.* Tutt, 31 Mo. 301.

Thus in Cunningham *v.* Ashbrook, 20 Mo. 553, there was nothing remaining to be done except to weigh the hogs which had been sold. Since this could be done without further intervention of the parties, the contract was considered complete and the property passed to the buyer.

In McConnell *v.* Hughes, 29 Wis. 537, it appeared that A bargained and sold to B a certain quantity of wheat at a price ten cents per bushel less than the Milwaukee price should be on any day thereafter which A should name. The wheat was delivered in pursuance of this contract, and was destroyed by fire before A had named the day with reference to which the price should be determined. It was held that the property in the wheat had passed to B, and that A, having afterwards named such day, was entitled to the payment of the price fixed. See also Ames *v.* Quimby, 96 U. S. 324 (price to be regulated by price of gold); Lonergan *v.* Stewart, 55 Ill. 44; McBride *v.* Silverthorne, 11 U. C. Q. B. 545 (highest market price whenever seller may demand payment); Rourke *v.* Bullens, 8 Gray (Mass.) 549; Richardson *v.* Olmstead, 74 Ill. 213; Cunningham *v.* Brown, 44 Wis. 72 (price fixed as "the same as similar articles may bring afterward at auction"). See also Bradley *v.* Michael, 1 Ind. 552, where the price for certain cattle was "four hundred dollars, and as much more as they should come to at four cents a pound when weighed after being slaughtered."

3. Price to Be Fixed by Valuers. — Benj. on Sales (6th ed.), § 87; Tew *v.* Harris, 11 Q. B. 7, 63 E. C. L. 7, 11 Jur. 947; Thurnell *v.* Balbirnie, 2 M. & W. 786, 1 Jur. 847; Flagg *v.* Mann, 2 Sumn. (U. S.) 539; Easterlin *v.* Rylander, 59 Ga. 292; Norton *v.* Gale, 95 Ill. 533, 35 Am. Rep. 173; Newlan *v.* Dunham, 60 Ill. 233; Central Military Tract R. Co. *v.* Spurck, 24 Ill. 587; Brown *v.* Bellows, 4 Pick. (Mass.) 189. See also Nutting *v.* Dickinson, 8 Allen (Mass.) 540; Bass *v.* Veltum, 28 Minn. 512.

A power given to a third person to fix the price of goods sold, in discharge of a pre-existing debt, is irrevocable; its execution in such a case is necessary to effectuate an arrangement for the security of a creditor. Smyth *v.* Craig, 3 W. & S. (Pa.) 14.

In Thurnell *v.* Balbirnie, 2 M. & W. 786, 1 Jur. 847, the valuation was to be made by A and B. In the absence of evidence that A was prevented by the opposite party from making the valuation, it was held that a valuation by B alone was insufficient.

In Bos *v.* Helsham, L. R. 2 Exch. 72, it was held that an agreement that the price should be fixed by valuers was not equivalent to a submission to arbitration, and so where one party had appointed a valuer and the other had refused to do so, the one appointed could not act as sole arbitrator. See Turner *v.* Goulden, L. R. 9 C. P. 57. But valuers who accept the office for compensation may be held liable in damages for default in performing their duties. Jenkins *v.* Betham, 15 C. B. 168, 80 E. C. L. 168; Cooper *v.* Shuttleworth, 25 L. J. Exch. 114.

4. Agreement for Reasonable Price. — When a horse is sold and delivered to the purchaser "for a reasonable price to be afterwards agreed on," the title at once passes; and the fact that the parties cannot afterwards agree on a reasonable price makes no difference and does not enable the seller to recover the animal by action. Greene *v.* Lewis, 85 Ala. 221, 7 Am. St. Rep. 42.

The rule of the text does not apply in an action by the buyer for damages for refusal to deliver. In such case the measure of damages is the difference between the contract price and the market value. If the implied contract price, therefore, is the market value, evidently there can be no damages. Trunkey *v.* Hedstrom, 131 Ill. 208.

5. Implied Agreement for Reasonable Price. — Valpy *v.* Gibson, 4 C. B. 837, 56 E. C. L. 837; Acebal *v.* Levy, 10 Bing. 376, 25 E. C. L. 170; Joyce *v.* Swann, 17 C. B. N. S. 100, 112 E. C.

seems that this implied promise extends to executory as well as to executed contracts of sale.[1] This implied agreement for a reasonable price is a sufficient fixing of the price within the meaning of the rule under discussion.[2] What is a reasonable price is a question of fact for the jury,[3] to be determined as of the day of the sale.[4]

4. Formal Requisites — *a.* In General. — In the absence of statute, no particular formalities are necessary to the validity of a contract of sale, and it is governed by ordinary rules.[5] A very common statutory requirement is the recording of a bill of sale in cases where there is no actual change in possession, in order that the sale may be good as against creditors or subsequent *bona fide* purchasers.[6] In some states the sale of stock running loose on a range is regulated by statute, and a written transfer with specified formalities is required.[7]

b. Statute of Frauds. — Under certain circumstances the statute of frauds requires a contract of sale to be in writing. This statute is the subject of a special article in this work.[8]

c. Bills of Sale. — This subject is fully treated in a special article of this work.[9]

d. Execution and Delivery of Contract. — A formal written contract of sale does not become operative until execution and delivery in accordance with the usual rules governing contracts in general.[10]

5. Legality. — This subject is elsewhere fully treated.[11]

6. Construction of Contract — *a.* In General. — Contracts of sale frequently contain collateral or special stipulations not inherently essential in every contract of sale. Such stipulations must be construed in accordance with the general rules applicable to all contracts.[12] The particular provisions of contracts of

L. 100; Hoadly *v.* M'Laine, 10 Bing. 482, 25 E. C. L. 208; Fenton *v.* Braden, 2 Cranch (C. C.) 550; McEwen *v.* Morey, 60 Ill. 32 (reasonable price is market price at time and place of delivery); Lyles *v.* Lyles, 6 Har. & J. (Md.) 273; James *v.* Muir, 33 Mich. 223.

1. Executory Contract. — In Acebal *v.* Levy, 10 Bing. 376, 25 E. C. L. 170, Tindal, C. J., said: "Whether in all cases of an executory contract of purchase and sale, where the parties are altogether silent as to the price, the law will supply the want of any agreement as to price by inferring that the parties must have intended to sell and to buy at a reasonable price, may be a question of some difficulty. Undoubtedly the law makes that inference where the contract is executed by the acceptance of the goods by the defendants, in order to prevent the injustice of the defendant taking the goods without paying for them. But it may be questionable whether the same reason applies to a case where the contract is executory only, and where the goods are still in the possession or under the control of the seller." In a later case it is distinctly held that such a presumption arises in case of executory contracts of sale. Hoadly *v.* M'Laine, 10 Bing. 482, 25 E. C. L. 208; Valpy *v.* Gibson, 4 C. B. 837, 56 E. C. L. 837; James *v.* Muir, 33 Mich. 223. See Shealy *v.* Edwards, 73 Ala. 175, 49 Am. Rep. 43.

2. Hoadly *v.* M'Laine, 10 Bing. 482, 25 E. C. L. 208; Valpy *v.* Gibson, 4 C. B. 837, 56 E. C. L. 837; McEwen *v.* Morey, 60 Ill. 32; Cunningham *v.* Ashbrook, 20 Mo. 559; Hill *v.* Hill, 1 N. J. L. 302, 1 Am. Dec. 206.

3. What Is Reasonable Price. — Acebal *v.* Levy, 10 Bing. 383, 25 E. C. L. 174. See generally the title Questions of Law and Fact, vol. 23, p. 543. See also *infra*, X. *Remedies of Seller*.

4. Jenkins *v.* Richardson, 6 J. J. Marsh. (Ky.) 441, 22 Am. Dec. 82; Hill *v.* Hill, 1 N. J. L. 302, 1 Am. Dec. 206. See also Elmore *v.* Kingscote, 5 B. & C. 583, 12 E. C. L. 327.

5. See the title Contracts, vol. 7, p. 88.

6. Possession Remaining in Seller. — See generally the titles Bills of Sale, vol. 4, p. 555; Fraudulent Sales and Conveyances, vol. 14, p. 210. See also *infra*, XII. *Bona Fide Purchasers*. And see these recent cases: Washburne *v.* Burke, 84 Ill. App. 587; Whiting Mfg. Co. *v.* Gephart, 6 Wash. 615.

7. Sale of Stock on Range — Statutory Regulations. — Colorado First Nat. Bank *v.* Brown, 85 Tex. 80; Swan *v.* Larkin, 8 Tex. Civ. App. 421; Hickman *v.* Hickman, 5 Tex. Civ. App. 99; Scofield *v.* Douglass, (Tex. Civ. App. 1895) 30 S. W. Rep. 817; Rainwater-Boogher Hat Co. *v.* O'Neal, 7 Tex. Civ. App. 242; Nance *v.* Barber, 7 Tex. Civ. App. 111.

8. See the title Statute of Frauds.

9. See the title Bills of Sale, vol. 4, p. 555.

10. Execution and Delivery of Written Contract. — See generally the title Contracts, vol. 7, p. 88. See also Ward *v.* Spelts, 39 Neb. 809; Owen *v.* Long, 97 Wis. 78.

11. See the title Illegal Contracts, vol. 15, p. 927.

Illegal Sale of Fertilizers. — Merriman *v.* Knox, 99 Ala. 93; Spinks *v.* Rome Guano Co., 108 Ga. 614; H. A. Thierman Co. *v.* Laupheimer, (Ky. 1900) 55 S. W. Rep. 925; Harris *v.* Parker, 108 Tenn. 29.

12. Construction of Contract. — See generally the titles Contracts, vol. 7, p. 88, and In-

sale are almost infinitely varied, but for convenience of reference the cases have been here collated in classes according to the subject-matter of the stipulation, such as stipulations as to quantity,[1] stipulations as to quality,[2] stipulations as to the property and rights conveyed,[3] stipulations as to shipment

TERPRETATION AND CONSTRUCTION, vol. 17, p. 1. See also Harper *v.* Baird, 3 Penn. (Del.) 110; Landry *v.* Adeline Sugar-Factory Co., 52 La. Ann. 258.

1. Stipulations as to Quantity Construed — *United States.* — Wolff *v.* Wells, (C. C. A.) 115 Fed. Rep. 32; Manhattan Oil Co. *v.* Richardson Lubricating Co., (C. C. A.) 113 Fed. Rep. 923; Hull Coal, etc., Co. *v.* Empire Coal, etc., Co., (C. C. A.) 113 Fed. Rep. 256; Gage *v.* Carpenter, 107 Fed. Rep. 886, 47 C. C. A. 39; Staver Carriage Co. *v.* Park Steel Co., 104 Fed. Rep. 200, 43 C. C. A. 471; Budge *v.* United Smelting, etc., Co., 104 Fed. Rep. 498, 43 C. C. A. 665; U. S. *v.* Pine River Logging, etc., Co., (C. C. A.) 89 Fed. Rep. 907.

Georgia. — McCaw Mfg. Co. *v.* Felder, 115 Ga. 408; Bass Dry Goods Co. *v.* Granite City Mfg. Co., 113 Ga. 1142; Navassa Guano Co. *v.* Commercial Guano Co., 93 Ga. 92.

Illinois. — Morris *v.* Wibaux, 159 Ill. 627, 47 Ill. App. 630; Bloomington Canning Co. *v.* Union Can Co., 94 Ill. App. 62; Illinois Glass Co. *v.* Three States Lumber Co., 90 Ill. App. 599.

Indiana. — Beck, etc., Lithographing Co. *v.* Evansville Brewing Co., 25 Ind. App. 662; Everitt *v.* Indiana Paper Co., 25 Ind. App. 287; Gardner *v.* Caylor, 24 Ind. App. 521, 56 N. E. Rep. 134; Kirwan *v.* Van Camp Packing Co., 12 Ind. App. 1.

Kentucky. — Fairmount Glass Works *v.* Crunden-Martin Wooden Ware Co., 106 Ky. 659.

Maryland. — Moses *v.* Allen, 91 Md. 42.

Michigan. — Boyce *v.* Barker, 119 Mich. 157.

Missouri. — Del Bondio *v.* Jacob Dold Packing Co., 79 Mo. App. 465, 2 Mo. App. Rep. 475.

New Jersey. — Camden Iron Works *v.* Camden, 60 N. J. Eq. 211.

New York. — Boker *v.* Demorest Mfg. Co., (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 263; American Brass, etc., Co. *v.* Ingersoll, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 783; Crooks *v.* Rumball, 17 N. Y. App. Div. 622; Neff *v* Klepfer, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 49; Jackson *v.* Builders' Wood Working Co., 91 Hun (N. Y.) 435; Lamb *v.* Traitel, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 140; Heisel *v.* Volkmann, 55 N. Y. App. Div. 607.

Pennsylvania. — Hall *v.* Wood, 187 Pa. St. 18, 67 Am. St. Rep. 563, 42 W. N. C. (Pa.) 563.

South Carolina. — Coates *v.* Early, 46 S. Car. 220.

2. Stipulations as to Quality Construed — *United States.* — Ennis *v.* Borner, 100 Fed. Rep. 12, 40 C. C. A. 249; Long-Bell Lumber Co. *v.* Stump, (C. C. A.) 86 Fed. Rep. 574; Lilienthal *v.* McCormick, 86 Fed. Rep. 100.

Alabama. — Watson *v.* Kirby, 112 Ala. 436.

California. — Johnson-Locke Mercantile Co. *v.* Howard, 133 Cal. xix.

Delaware. — Darby *v.* Hall, 3 Penn. (Del.) 25.

Georgia. — Imperial Portrait Co. *v.* Bryan, 111 Ga. 99.

Illinois. — Elgin *v.* Shoenberger, 59 Ill. App. 384; Gregg *v.* Wooliscroft, 52 Ill. App. 214.

Iowa. — Samuels *v.* Shipley, 112 Iowa 580; Kimball *v.* Deere, 108 Iowa 676; Prior *v.* Schmeiser, 100 Iowa 299. But see Clement *v.* Drybread, 108 Iowa 701.

Kentucky. — Sanders *v.* Bond, 66 S. W. Rep. 635, 23 Ky. L. Rep. 2084.

Louisiana. — Strahorn-Hutton-Evans Commission Co. *v.* Red River Oil Co., 104 La. 664; Standard Cotton Seed Oil Co. *v.* Excelsior Refining Co., 47 La. Ann. 781, 49 Am. St. Rep. 386.

Maryland. — Columbian Iron Works, etc., Co. *v.* Douglas, 84 Md. 44, 57 Am. St. Rep. 362; City, etc., R. Co. *v.* Basshor, 82 Md. 397.

Massachusetts. — Cape Cod Cranberry Sales Co. *v.* Whitney, 177 Mass. 385; Weston *v.* Barnicoat, 175 Mass. 454.

Michigan. — American Hoist, etc., Co. *v.* Johnson, 114 Mich. 172.

Minnesota. — Vassau *v.* Campbell, 79 Minn. 167.

Missouri. — Roth *v.* Continental Wire Co., 94 Mo. App. 236; Gratiot St. Warehouse Co. *v.* Wilkinson, 94 Mo. App. 528.

New York. — Carleton *v.* Lombard, 149 N. Y. 137; Hecla Iron Works *v.* Milliken, 48 N. Y. App. Div. 574.

Washington. — Pacific Coast Elevator Co. *v.* Bravinder, 14 Wash. 315.

Wisconsin. — Ashland Lumber Co. *v.* Detroit Salt Co., 114 Wis. 66; Scott Lumber Co. *v.* Hafner-Lothman Mfg. Co., 91 Wis. 667.

3. Stipulations as to Property and Rights Conveyed — *United States.* — National Cordage Co. *v.* Pearson Cordage Co., (C. C. A.) 55 Fed. Rep. 812; Farmers' L. & T. Co. *v.* Oregon, etc., R. Co., 58 Fed. Rep. 639; Putnam *v.* Turney, etc., Co., 95 Fed. Rep. 56; Wheeler, etc., Mfg. Co. *v.* Lyon, 71 Fed. Rep. 374.

Alabama. — Keith *v.* Becker, (Ala. 1893) 13 So. Rep. 494; Jackson *v.* Millspaugh, 103 Ala. 175.

California. — Loose *v.* Stanford, (Cal. 1896) 44 Pac. Rep. 1058.

Georgia. — Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199.

Illinois. — Minneapolis Threshing Mach. Co. *v.* Higgins, 71 Ill. App. 506; Des Rivieres *v.* Lumber Dist. Milling Co., 69 Ill. App. 31.

Indiana. — Thomas *v.* Troxel, 26 Ind. App. 322.

Iowa. — Wood *v.* Allen, 111 Iowa 97.

Maryland. — Maryland Ice Co. *v.* Arctic Ice-Mach. Mfg. Co., 79 Md. 103.

Massachusetts. — Way *v.* Ryther, 165 Mass. 226; Lamson *v.* Martin, 159 Mass. 557.

Michigan. — T. Wilce Co. *v.* Kelley Shingle Co., (Mich. 1902) 89 N. W. Rep. 957; Gamble *v.* Gates, 97 Mich. 465.

Minnesota. — Citizens State Bank *v.* Bonnes, 76 Minn. 45.

Mississippi. — Starling *v.* Caldwell, (Miss. 1895) 18 So. Rep. 376.

Nebraska. — Denver First Nat. Bank *v.* Scott, 36 Neb. 607.

and delivery,[1] stipulations as to price and freight,[2] stipulations as to terms of payment,[3] stipulations as to remedies of parties in case of default in performance,[4] and other special and particular provisions.[5] Where the contract is unambiguous its proper construction is a question of law for the court, but where its provisions must be interpreted in the light of surrounding circumstances the intent of the parties is a question for the jury.[6] Parol evidence of surrounding circumstances or of the meaning of technical terms is admissible to aid in the construction of the contract.[7]

New York. — Genet *v.* Delaware, etc., Canal Co., 136 N. Y. 593; Towsand *v.* Ford, 76 N. Y. Supp. 501, 72 N. Y. App. Div. 621; Gullman *v.* Sharp, 81 Hun (N. Y.) 462; American Typefounders Co. *v.* Conner, (C. Pl. Gen. T.) 6 Misc. (N. Y.) 391; Corrigan *v.* Coney Island Jockey Club, 61 N. Y. Super. Ct. 393.

South Dakota. — Rosenbaum *v.* Foss, 4 S. Dak. 184.

Tennessee. — Royston *v.* McCulley, (Tenn. Ch. 1900) 59 S. W. Rep. 725; Nunnelly *v.* Goodwin, (Tenn. Ch. 1896) 39 S. W. Rep. 855; Hayes *v.* Lewisburg Bank, (Tenn. Ch. 1897) 39 S. W. Rep. 753; Carnegie Steel Co. *v.* Chattanooga Constr. Co., (Tenn. Ch. 1896) 38 S. W. Rep. 102.

Texas. — Coverdill *v.* Seymour, (Tex. Civ. App. 1900) 56 S. W. Rep. 221, *judgment reversed* 94 Tex. 1; Texas Standard Cotton-Oil Co. *v.* National Cotton Oil Co., (Tex. Civ. App. 1897) 40 S. W. Rep. 159.

Vermont. — McGowan *v.* Griffin, 69 Vt. 168.

Washington. — Keefe *v.* Chaffee, 11 Wash. 292.

Wisconsin. — Parish *v.* McPhee, 102 Wis. 241; Novelty Paper Box, etc., Co. *v.* Stone, 92 Wis. 523; Rogers *v.* Newton, 91 Wis. 523; Shadbolt, etc., Iron Co. *v.* Topliff, 85 Wis. 513.

1. Stipulations as to Shipment and Delivery Construed. — See *infra*, *Delivery of Goods*.

2. Stipulations as to Price and Freight. — See *infra*, *Payment or Tender of Price*.

3. Terms of Payment. — See *infra*, *Payment or Tender of Price*.

4. Stipulations as to Remedy. — Vickers *v.* Electrozone Commercial Co., 67 N. J. L. 665, holding that a stipulation that the contract shall become void upon default of the vendee does not deprive the vendor of his remedy by action on the contract.

5. Particular Contracts Construed — *United States.* — U. S. Sugar Refinery *v.* Edward P. Allis Co., 105 Fed. Rep. 881, 45 C. C. A. 108.

Alabama. — Gadsden, etc., Union R. Co. *v.* Gadsden Land, etc., Co., 128 Ala. 510; Austill *v.* Hieronymus, 124 Ala. 376.

California. — Peerless Glass Co. *v.* Pacific Crockery, etc., Co., 121 Cal. 641; Hewes *v.* Germain Fruit Co., 106 Cal. 441.

Connecticut. — Wells *v.* McNerney, (Conn. 1902) 51 Atl. Rep. 1064.

Georgia. — Rose *v.* Weinberger, 108 Ga. 533, 75 Am. St. Rep. 73.

Iowa. — McCormick Harvesting Mach. Co. *v.* Williams, 99 Iowa 601.

Kentucky. — O'Neal *v.* Rumley Co., (Ky. 1899) 53 S. W. Rep. 521; Brown *v.* Ellis, 103 Ky. 303; Meguier *v.* Walsh, (Ky. 1896) 36 S. W. Rep. 1124.

Maine. — Gilman *v.* Stock, 95 Me. 359.

Maryland. — City, etc., R. Co. *v.* Basshor, 82 Md. 397.

Massachusetts. — Maynard *v.* Weeks, 181 Mass. 368; Garst *v.* Hall, etc., Co., 179 Mass. 588; Davis *v.* Columbia Coal Min. Co., 170 Mass. 391.

Michigan. — Morse *v.* Johnson, 86 Mich. 9; Hangsterfer *v.* Shafer, (Mich. 1902) 89 N. W. Rep. 735; Blodgett *v.* Foster, 120 Mich. 392; Young Bros. Mach. Co. *v.* Young, 111 Mich. 118.

Missouri. — Berthold *v.* St. Louis Electric Constr. Co., 165 Mo. 280; Harrington *v.* Neville, 83 Mo. App. 589; Miles *v.* Withers, 76 Mo. App. 87; Springfield Seed Co. *v.* Walt, 94 Mo. App. 76.

New York. — Hubbard *v.* Chapman, 165 N. Y. 609, 34 N. Y. App. Div. 252; Browne *v.* Paterson, 165 N. Y. 460; Bladsworth *v.* Rosenblatt, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 357.

North Carolina. — Smitherman Cotton Mills *v.* Randleman Mfg. Co., 125 N. Car. 329.

Ohio. — Redfern *v.* Stacy, 5 Ohio Cir. Dec. 340, 12 Ohio Cir. Ct. 36.

Rhode Island. — Burke *v.* Rollinson, 23 R. I. 177; Lynd *v.* Apponaug Bleaching, etc., Co., 20 R. I. 344.

Texas. — Cullinan *v.* Standard Light, etc., Co., (Tex. Civ. App. 1901) 65 S. W. Rep. 689; American Well Works *v.* De Aguayo, (Tex. Civ. App. 1899) 53 S. W. Rep. 350.

Washington. — Moran Bros. Co. *v.* Snoqualmie Falls Power Co., (Wash. 1902) 69 Pac. Rep. 759.

Wisconsin. — Shadbolt, etc., Iron Co. *v.* Topliff, 85 Wis. 513.

Canada. — Durocher *v.* McLaren, 16 Quebec Super. Ct. 257.

Sales Subject to "Approval." — McCormick Harvesting Mach. Co. *v.* Okerstrom, 114 Iowa 260; Housding *v.* Solomon, 127 Mich. 654; Thurman *v.* Omaha, (Neb. 1902) 90 N. W. Rep. 253; Delahunty Dyeing Mach. Co. *v.* Pennsylvania Knitting Mills, 19 Pa. Super. Ct. 501; Allegheny Iron Co. *v.* Teaford, 96 Va. 372. See also the title SATISFY — SATISFACTION, ETC., *post*.

6. Province of Court and Jury. — Henderson *v.* McFadden, 112 Fed. Rep. 389, 50 C. C. A. 304; Johnson Forge Co. *v.* Leonard (Del. 1902) 51 Atl. Rep. 305; Excelsior Coal Min. Co. *v.* Virginia Iron, etc., Co., 66 S. W. Rep. 373, 23 Ky. L. Rep. 1834; Smith Woolen Mach. Co. *v.* Holden, 73 Vt. 396; Coates *v.* Early, 46 S. Car. 220; Ayers *v.* Herring, (Tex. Civ. App. 1895) 32 S. W. Rep. 1060.

7. Parol Evidence. — Thresher *v.* Gregory, (Cal. 1895) 42 Pac. Rep. 421; Neff *v.* Klepfer, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 49; Insurance Co. of North America *v.* Gamble, 94 Va. 622; Pacific Coast Elevator Co. *v.* Bravinder, 14 Wash. 315.

b. ENTIRE OR SEVERABLE CONTRACTS. — Whether a contract for the purchase and sale of several articles is an entire or a severable contract depends upon the intention of the parties as legally ascertained from the language of the parties and the surrounding circumstances.[1]

7. What Law Governs. — This subject has been elsewhere fully considered in this work.[2]

III. SUBJECTS OF SALE — 1. Title and Possession of Seller. — The general rule is that no one other than the owner or his lawful representative can make a valid sale or transfer of personal property.[3] The transfer of money and negotiable securities constitutes an exception to this rule.[4] In *England* a

1. Entire or Severable Contracts. — See the title CONTRACTS, vol. 7, p. 95, for a full treatment of this subject. See also the following recent cases:

United States. — L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 109 Fed. Rep. 411, 48 C. C. A. 455; Saunders *v.* Short, (C. C. A.) 86 Fed. Rep. 225.

California. — Herzog *v.* Purdy, 119 Cal. 99.

Connecticut. — Jordan *v.* Patterson, 67 Conn. 473.

Georgia. — Reid *v.* Caldwell, 110 Ga. 481; Harden *v.* Lang, 110 Ga. 392.

Illinois. — Morris *v.* Wibaux, 159 Ill. 627; Kingman *v.* Meeks, 56 Ill. App. 272.

Indiana. — Neal *v.* Shewalter, 5 Ind. App. 147.

Iowa. — Aultman, etc., Co. *v.* Lawson, 100 Iowa 569.

Maryland. — Morrison *v.* Baechtold, 93 Md. 319.

Michigan. — Williams *v.* Robb, 104 Mich. 242.

Minnesota. — Potsdamer *v.* Kruse, 57 Minn. 193.

Missouri. — Laclede Constr. Co. *v.* Tudor Iron Works, 169 Mo. 137; Morrison *v.* Leiser, 73 Mo. App. 95.

Nebraska. — McCormick Harvesting Mach. Co. *v.* Courtright, 54 Neb. 18.

North Dakota. — Nichols *v.* Charlebois, 10 N. Dak. 446.

New Jersey — Gerli *v.* Poidebard Silk Mfg. Co., 57 N. J. L. 432, 51 Am. St. Rep. 612.

New York. — Salomon *v.* Corbett, 38 N. Y. App. Div. 262; Bernstein *v.* Hilpolsteiner, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 376; Ming *v.* Corbin, 142 N. Y. 334, 68 Hun (N. Y.) 161.

Pennsylvania. — Sidney School Furniture Co. *v.* Warsaw Tp. School Dist., 158 Pa. St. 35.

Rhode Island. — Providence Coal Co. *v.* Coxe, 19 R. I. 380, 582.

Vermont. — Bowers Granite Co. *v.* Farrell, 66 Vt. 314.

Wisconsin. — Williams *v.* Thrall, 101 Wis. 337; Silvernail *v.* Rust, 88 Wis. 458.

2. See the title PRIVATE INTERNATIONAL LAW, vol. 22, p. 1338 *et seq.*

3. Property Not Owned by Seller. — See Broom's Leg. Max. (8th ed.) 470; Benj. on Sales (4th Am. ed.), § 6.

England. — Whistler *v.* Forster, 14 C. B. N. S. 257, 108 E. C. L. 257, 32 L. J. C. P. 161; Lee *v.* Bayes, 18 C. B. 599, 86 E. C. L. 599; Peer *v.* Humphrey, 2 Ad. & El. 495, 29 E. C. L. 158 (purchaser of stolen property liable to owner thereof).

United States. — Ventress *v.* Smith, 10 Pet. (U. S.) 176.

Illinois. — Simpson Brick Press Co. *v.* Wormley, 166 Ill. 383; Matson *v.* Ripley, 98 Ill. App. 479, *judgment affirmed* 196 Ill. 269.

Indiana. — Breckenridge *v.* McAfee, 54 Ind. 141.

Louisiana. — M'Grew *v.* Browder, 2 Mart. N. S. (La.) 17.

Massachusetts. — Riley *v.* Boston Water Power Co., 11 Cush. (Mass.) 11; Stanley *v.* Gaylord, 1 Cush. (Mass.) 536, 48 Am. Dec. 643 (sale of property by bailee); Bearce *v.* Bowker, 115 Mass. 132.

Montana. — *Compare* O'Sullivan *v.* Schultz, 22 Mont. 541.

New Hampshire. — Bryant *v.* Whitcher, 52 N. H. 158 (sheriff's sale of A's property upon an execution against B vests no title in purchaser).

New York. — Prescott *v.* De Forest, 16 Johns. (N. Y.) 159; Smith *v.* Clews, 114 N. Y. 190, 11 Am. St. Rep. 627.

Pennsylvania. — See Philadelphia, etc., R. Co. *v.* Woelpper, 64 Pa. St. 366, 3 Am. Rep. 596.

See also generally the titles AGENCY, vol. 1, p. 930; BROKERS, vol. 4, p. 959; FACTORS OR COMMISSION MERCHANTS, vol. 12, p. 625. See also *infra*, this title, *Bona Fide Purchasers.*

A thief traded a mare stolen by him for a gray horse, and then traded the gray horse to plaintiff for a black horse. It was held that the horse traded to the plaintiff not having been stolen, title to the horses in that trade passed, as the parties intended, and hence the defendant had title. Lightman *v.* Boyd, (Ala. 1902) 32 So. Rep. 714.

Property Belonging to United States. — Under the Federal Constitution, art. 4, § 3, no property belonging to the United States can be disposed of except by the authority of an act of Congress. U. S. *v.* Nicoll, 1 Paine (U. S.) 646.

4. Money and Negotiable Securities. — This principle prevails as to money and as to negotiable securities (which circulate as money) because of the incalculable injury to business which must follow an application of the general rule. So that the transfer of a negotiable security to a *bona fide* purchaser for value and without notice vests a perfect title in such purchaser, even though the transferrer had no title whatever. 3 Minor's Inst. 344; Smith's Mer. Law (3d ed.) 255; Benj. on Sales (6th Am. ed.), § 15.

England. — Crook *v.* Jadis, 5 B. & Ad. 909, 27 E. C. L. 234; Goodman *v.* Harvey, 4 Ad. & El. 870, 31 E. C. L. 212; Uther *v.* Rich, 10 Ad. & El. 784, 37 E. C. L. 232; Raphael *v.* Bank of England, 17 C. B. 161, 84 E. C. L. 161.

United States. — Swift *v.* Tyson, 16 Pet. (U.

sale in market overt is said to constitute an exception, but this doctrine does not obtain in the *United States.*[1] Outside of these exceptions the rule of *caveat emptor* applies, and the real owner of the property may recover it from one in possession of it under the sale of one not the owner.[2] In such a case the vendee may defend an action for the price upon the ground of failure of consideration.[3] It is not always essential to the validity of a sale that the property shall be in the possession of the seller at the time; he may transfer his right and interest though the property be in the adverse possession of a third person.[4] If there is an outstanding lien against the property, the buyer takes subject thereto, but the sale itself is good.[5] These rules are subject to variations growing out of the doctrine in favor of *bona fide* purchasers for value and without notice.[6] The parties may, of course, stipulate as to the

S.) 1; Vermilya *v.* Adams Express Co., 21 Wall. (U. S.) 138.

Connecticut. — Brush *v.* Scribner, 11 Conn. 388, 29 Am. Dec. 303.

Massachusetts. — Wheeler *v.* Guild, 20 Pick. (Mass.) 545, 32 Am. Dec. 231; Spooner *v.* Holmes, 102 Mass. 503, 3 Am. Rep. 491; Mason *v.* Waite, 17 Mass. 563.

Michigan. — Helms *v.* Douglass, 81 Mich. 442.

New Hampshire. — Crosby *v.* Grant, 36 N. H. 273.

New York. — Magee *v.* Badger, 30 Barb. (N. Y.) 246, *affirmed* 34 N. Y. 247; Wilson *v.* Metropolitan El. R. Co., 14 Daly (N. Y.) 171, *affirmed* 120 N. Y. 145; Seybel *v.* National Currency Bank, 54 N. Y. 288, 13 Am. Rep. 583.

Texas. — Greneaux *v.* Wheeler, 6 Tex. 515.

Vermont. — Roth *v.* Colvin, 32 Vt. 125.

See *infra*, this title, *Bona Fide Purchasers*. See also generally the titles BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 65; BANK-NOTES, vol. 3, p. 771.

In Chapman *v.* Cole, 12 Gray (Mass.) 141, 71 Am. Dec. 739, the owner of a gold coin, issued by a private individual, of the value of ten dollars, and current as such in some parts of the country, passed it to another by mistake for a half dollar, and the receiver transferred it to a third person for the same amount. It was held that the original owner might, after demand and a tender of a half dollar, have an action of trover against the holder.

1. Sale in Market Overt. — See Benj. on Sales (6th Am. ed.), § 8, note; Ventrees *v.* Smith, 10 Pet. (U. S.) 176; Jones *v.* Nellis, 41 Ill. 482, 89 Am. Dec. 389; Hinckley *v.* Merchants' Nat. Bank, 131 Mass. 149; Towne *v.* Collins, 14 Mass. 500. And see the title MARKETS, vol. 19, p. 1139.

2. Caveat Emptor. — See *infra*, this title, *Bona Fide Purchasers*.

3. Failure of Consideration. — Mock *v.* Stuckey, 96 Ga. 187; Johnson *v.* Rayner, 25 N. Y. App. Div. 598, 27 Civ. Pro. (N. Y.) 102; Miller *v.* Westerhoff, 14 Pa. Super. Ct. 604.

4. Sale of Property in Adverse Possession of Another. — 1 Parsons on Contr. (7th ed.), p. 523; 3 Minor's Inst. 243; Smith's Mer. Law 190; Benj. on Sales (6th Am. ed.), § 6; Newmark on Sales, § 172.

United States. — Tome *v.* Dubois, 6 Wall. (U. S.) 548.

California. — Howe *v.* Johnson, 117 Cal. 37.

Indiana. — Shipp *v.* Bowen, 25 Ind. 44.

Maine. — Webber *v.* Davis, 44 Me. 147, 69 Am. Dec. 87; Cartland *v.* Morrison, 32 Me. 190.

Massachusetts. — Hubbard *v.* Bliss, 12 Allen (Mass.) 590; Carpenter *v.* Hale, 8 Gray (Mass.) 157; Fettyplace *v.* Dutch, 13 Pick. (Mass.) 388, 23 Am. Dec. 688; Boston First Ward Nat. Bank *v.* Thomas, 125 Mass. 278.

Montana. — Reynolds *v.* Fitzpatrick, 23 Mont. 52.

New York. — Goodwin *v.* Kelly, 42 Barb. (N. Y.) 194; Van Hassell *v.* Borden, 1 Hilt. (N. Y.) 128; McIlvaine *v.* Egerton, 2 Robt. (N. Y.) 422; McKee *v.* Judd, 12 N. Y. 622, 64 Am. Dec. 515; Hall *v.* Robinson, 2 N. Y. 296.

Vermont. — Harding *v.* Janes, 4 Vt. 462.

Thus, in The Brig Sarah Ann, 2 Sumn. (U. S.) 211, the court, by Story, J., said: "I know of no principle of law that establishes that a sale of personal goods is invalid because they are not in the possession of the rightful owner, but are withheld by a wrongdoer. The sale is not, under such circumstances, the sale of a right of action; but it is the sale of the thing itself, and good to pass the title against every person not holding the same under a *bona fide* title for a valuable consideration without notice; and *a fortiori* against a wrongdoer." This language is quoted and approved in Tome *v.* Dubois, 6 Wall. (U. S.) 548.

There are cases, however, which contend that such a sale is but a transfer of a right of action, and in the absence of statutory provision is of no effect, since choses in action are not assignable at common law. O'Keefe *v.* Kellogg, 15 Ill. 347; M'Goon *v.* Ankeny, 11 Ill. 558; Stogdele *v.* Fugate, 2 A. K. Marsh. (Ky.) 136; Young *v.* Ferguson, 1 Litt. (Ky.) 298; Overton *v.* Williston, 31 Pa. St. 160; London *v.* Turner, 11 Leigh (Va.) 419. *Compare* Beach *v.* Derby, 19 Ill. 617.

5. Sale Subject to Lien. — 3 Minor's Inst. 234; Stafford *v.* Whitcomb, 8 Allen (Mass.) 518; Arnold *v.* Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296; Patrick *v.* Meserve, 18 N. H. 300. See also Wellington *v.* Sedgwick, 12 Cal. 469; Bliss *v.* Ball, 9 Johns. (N. Y.) 132.

See also Wilson *v.* Purcell, 11 Ired. L. (33 N. Car.) 502, where a horse was sold and delivered to A, after the vendor had agreed to sell the same horse to B, and had received a part of the purchase money in accordance with such agreement. It was held that a valid title passed to A.

6. See *infra*, **this title,** *Bona Fide Purchasers*.

nature of the title which is to be transferred, and such stipulation will be enforced.[1]

2. Existence of Thing Sold. — It has been seen that the transfer of the general or absolute property in the thing sold is an essential element of a valid sale.[2] If, then, at the time of the sale the subject has ceased to exist, there is no contract, and if a price has been paid it may be recovered.[3] If there is even a partial destruction of the subject of the sale, the same rule applies, though it seems the buyer has the option of taking the thing sold at a proportionally reduced valuation.[4]

Potential Existence. — Whether a valid sale can be made of property not yet in existence, or not yet acquired, must depend upon the character of such property. If it has a potential existence, for example, the natural product or expected increase of property already belonging to the seller, it may be the subject of a sale.[5] Instances of this may be seen where one sells the

1. Stipulations as to Title.—Deering Harvester Co. *v.* Kelly, 103 Fed. Rep. 261, 43 C. C. A. 225; Miller *v.* Westerhoff, 18 Lanc. L. Rev. 17, 14 Pa. Super. Ct. 604.

2. Pothier, Contrat de Vente, n. 4; Story on Sales, § 8; Gardner *v.* Lane, 12 Allen (Mass.) 43. See *supra*, this title, I. 1. *Definition.*

3. Subject-matter Not in Existence. — Pothier, Contrat de Vente 4; Benj. on Sales (6th Am. ed.), § 74; Story on Sales (4th ed.), § 184, note; Strickland *v.* Turner, 7 Exch. 208, 22 L. J. Exch. 115; Smith *v.* Myers, L. R. 7 Q. B. 139, 1 Moak 42, *affirming* L. R. 5 Q. B. 429; Hastie *v.* Couturier, 9 Exch. 102, 5 H. L. Cas. 673; Cochrane *v.* Willis, L. R. 1 Ch. 58, 35 L. J. Ch. 36; Barr *v.* Gibson, 3 M. & W. 390; Hitchcock *v.* Giddings, 4 Price 135; Young *v.* Bruces, 5 Litt. (Ky.) 324; Franklin *v.* Long, 7 Gill & J. (Md.) 407; Gibson *v.* Pelkie, 37 Mich. 380; Wolf *v.* Di Lorenzo, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 323; Dexter *v.* Norton, 47 N. Y. 62, 7 Am. Rep. 415; Harris *v.* Nicholas, 5 Munf. (Va.) 483; Kelly *v.* Bliss, 54 Wis. 187.

The Grounds upon Which This Principle Rests have been variously stated. In some cases it is said that it rests upon the ground that there is in every sale an implied warranty of the existence of the thing sold. See Lile *v.* Hopkins, 12 Smed & M. (Miss.) 299, 51 Am. Dec. 115. Other authorities have it that there is no sale because of a want of mutual assent. See Benj. on Sales (6th Am. ed.), § 77; 1 Fonbl. Eq. 114. The true ground, however, seems to be apparent, *i. e.*, that, one of the essential elements of a valid sale being wanting, there is no sale. So that if there be no proper subject of sale the transaction falls just as if there were no mutual assent or no competent parties. Gardner *v.* Lane, 12 Allen (Mass.) 43. See also the reasoning adopted in Rice *v.* Dwight Mfg. Co., 2 Cush. (Mass.) 86; Gardner *v.* Lane, 9 Allen (Mass.) 499, 85 Am. Dec. 779; Allen *v.* Hammond, 11 Pet. (U. S.) 72.

4. Partial Destruction of Subject-matter.—Story on Sales (4th ed.), § 184; 2 Kent Com. (13th ed.) 469, 470; Pothier, Contrat de Vente, n. 4; Curtis *v.* Hannay, 3 Esp. 82 (by Lord Eldon); Chambers *v.* Griffiths, 1 Esp. 150.

But it has been insisted that the contract will still bind the buyer and that his only remedy is for a breach of warranty. Morgan *v.* Richardson, 1 Campb. 40, note; Lile *v.* Hopkins, 12 Smed. & M. (Miss.) 301, 51 Am. Dec. 115; Tye *v.* Gwynne, 2 Campb. 346; Howell *v.* Wilson, 2 Blackf. (Ind.) 419; Barr *v.* Gibson, 3 M. & W. 390, where the sale of a ship not actually destroyed, but wrecked, was held valid. Hanks *v.* Palling, 6 El. & Bl. 659, 88 E. C. L. 659, where there was a sale of a fee farm rent which turned out not to exist; the sale was held valid on the ground that by the terms of the contract the buyer had assumed the chances.

In Howell *v.* Coupland, L. R. 9 Q. B. 462, 10 Moak 110, there was an agreement whereby A agreed to sell to B two hundred tons of potatoes, grown on land belonging to A in W, at a certain price per ton, to be delivered the following October and paid for as taken away. In March, A made ready sixty-eight acres which were planted and were amply sufficient to grow more than two hundred tons in an average year. But in August a blight appeared and the crop failed, so that A was able to deliver only eighty tons. B having brought an action for the nondelivery of one hundred and twenty tons, it was held that the contract must be taken to be subject to the implied condition that the party shall be excused if, before a breach, performance becomes impossible from the destruction of the thing sold without the fault of the seller. See also Taylor *v.* Caldwell, 3 B. & S. 833, 113 E. C. L. 833, 32 L. J. Q. B. 164; Appleby *v.* Myers, L. R. 2 C. P. 651; Rugg *v.* Minett, 11 East 210.

5. Potential Existence. — Benj. on Sales (4th Am. ed.), § 78; Story on Sales (4th ed.), § 185; 2 Kent's Com. (13th ed.) 468; Bacon's Abr., Grant (D) 3; Robinson *v.* Macdonnell, 5 M. & S. 228; Grantham *v.* Hawley, Hob. 132; Cottle *v.* Spitzer, 65 Cal. 460, 52 Am. Rep. 305; Arques *v.* Wasson, 51 Cal. 620, 21 Am. Rep. 718; Hull *v.* Hull, 48 Conn. 250, 40 Am. Rep. 165; Headrick *v.* Brattain, 63 Ind. 438; Wheeler *v.* Wheeler, 2 Met. (Ky.) 474, 74 Am. Dec. 421; Sawyer *v.* Gerrish, 70 Me. 254, 35 Am. Rep. 323; Lewis *v.* Lyman, 22 Pick. (Mass.) 437; Hodges *v.* Harris, 6 Pick. (Mass.) 360; Dickey *v.* Waldo, 97 Mich. 255; Conderman *v.* Smith, 41 Barb. (N. Y.) 406; Van Hoozer *v.* Cory, 34 Barb. (N. Y.) 10; Siemon *v.* Schurck, 29 N. Y. 598; Andrew *v.* Newcomb, 32 N. Y. 417; Fonville *v.* Casey, 1 Murph. (5 N. Car.) 389, 4 Am Dec. 559; M'Carty *v.* Blevins, 5 Yerg. (Tenn.) 195, 26 Am. Dec. 262.

The doctrine in this connection is apt to be confused with the subject of sales of unspecified chattels. Wherever there is a sale of

crops to be grown on his fields,[1] the wool to be cut from his sheep,[2] the earnings of an engagement of service already entered into,[3] or the future products of a mill for a specified period.[4]

3. After-acquired Property. — As a general rule any person may sell or offer for sale goods of which he is not at the time the owner or possessor, but which he hopes or expects to acquire.[5] But if the property has not a poten-

chattels not specific, the contract is executory merely until it becomes executed by the selection and separation of the exact quantity of goods sold. But there is nothing in this rule to prevent parties making an executed contract of sale of property not existing. Though the subject of sale does not exist, it is sufficiently specific, and the title vests immediately upon its coming into existence. Thus, a contract for the sale of cotton, the greater part of which is ungathered, to be delivered to the purchaser at a specified place as soon as it can be gathered and ginned, is executory, and does not vest a title to the cotton in the purchaser so as to enable him to maintain trover. Screws *v.* Roach, 22 Ala. 675. While, on the other hand, a sale of an entire crop of cotton to be grown on certain land is an executed one and vests the title immediately. Bellows *v.* Wells, 36 Vt. 599; Van Hoozer *v.* Cory, 34 Barb. (N. Y.) 10; Siemon *v.* Schurck, 29 N. Y. 598; Carter *v.* Jarvis, 9 Johns. (N. Y.) 143. See generally *infra*, this title, *When Title Passes*.

1. Crops to Be Grown. — Briggs *v.* U. S., 143 U. S. 346; Wilkinson *v.* Ketler, 69 Ala. 435; Jones *v.* Webster, 48 Ala. 109; Bell *v.* Real Estate Banking Co., 3 Ala. 77; Blackwood *v.* Cutting Packing Co., 76 Cal. 212, 9 Am. St. Rep. 199; Stephens *v.* Tucker, 55 Ga. 543; Gittings *v.* Nelson, 86 Ill. 591; Sanborn *v.* Benedict, 78 Ill. 309; Hansen *v.* Dennison, 7 Ill. App. 73; Heald *v.* Builders' Mut. F. Ins. Co., 111 Mass. 38; Moore *v.* Byrum, 10 S. Car. 452, 30 Am. Rep. 58; Wyatt *v.* Watkins, (Tenn. 1877) 16 Alb. L. J. 205, 30 Am. Rep. 63, note; Bellows *v.* Wells, 36 Vt. 599; Smith *v.* Atkins, 18 Vt. 461.

It is held in some cases that there may be a sale of crops to take effect at a future day, even if they are not yet planted or sown, particularly if the buyer takes possession before the intervention of third persons. Hurst *v.* Bell, 72 Ala. 336; Headrick *v.* Brattain, 63 Ind. 438; Everman *v.* Robb, 52 Miss. 653, 24 Am. Rep. 682; Van Hoozer *v.* Cory, 34 Barb. (N. Y.) 9; Siemon *v.* Schurck, 29 N. Y. 598; Rawlings *v.* Hunt, 90 N. Car. 270; Harris *v.* Jones, 83 N. Car. 317; Cotten *v.* Willoughby, 83 N. Car. 75, 35 Am. Rep. 564.

But the contrary view is sustained by some authorities. Thus, in Comstock *v.* Scales, 7 Wis. 159, a mortgage was executed upon a crop of oats, wheat and corn, about the time some of it was planted, but before it presented the appearance of growing corn, and it was there held that the mortgage could only operate upon property in existence at the time of its execution, and that the court below erred in instructing the jury that as soon as the grain was sown it was the subject of mortgage. See Hutchinson *v.* Ford, 9 Bush (Ky.) 318, 15 Am. Rep. 711. Again, where a lease was executed in March between the plaintiff and M. of a farm for one year from the first of the next April at a specified rent, and it was stipulated that the plaintiff should have a lien upon the crops as security for said rent, and that M. should market the same, it was held that a person who had purchased from M. corn raised upon the farm, with knowledge of the plaintiff's claim to a lien thereon, could hold the same as against the plaintiff. Milliman *v.* Neher, 20 Barb. (N. Y.) 37. See Redd *v.* Burrus, 58 Ga. 574; Shaw *v.* Gilmore, 81 Me. 396. *Compare* Cressey *v.* Sabre, 17 Hun (N. Y.) 120, where a mortgage of a certain amount of potatoes was held void; Chissom *v.* Hawkins, 11 Ind. 316.

2. Wool to Be Sheared. — 2 Kent's Com. (13th ed.) 468, note; Pothier, Contrat de Vente, n. 5, 6; Bacon's Abr., Grant (D) 3; Grantham *v.* Hawley, Hob. 132; Jones *v.* Richardson, 10 Met. (Mass.) 481; Low *v.* Pew, 108 Mass. 347, 11 Am. Rep. 359.

3. Sale of Prospective Earnings. — One may assign earnings arising out of a contract of service already entered into, but not those of a prospective service. In the one case the earnings have a potential existence, though there is a possibility that they may never materialize; in the other there is nothing more than a mere possibility of existence. See Hartley *v.* Tapley, 2 Gray (Mass.) 566; Emery *v.* Lawrence, 8 Cush. (Mass.) 151; Herbert *v.* Bronson, 125 Mass. 475; Hawley *v.* Bristol, 39 Conn. 26; Augur *v.* New York Belting, etc., Co., 39 Conn. 537; Mulhall *v.* Quinn, 1 Gray (Mass.) 105, 61 Am. Dec. 414; Farnsworth *v.* Jackson, 32 Me. 419.

4. Future Product of Mill. — Williams *v.* Chapman, 118 N. Car. 943; Brown *v.* Dail, 117 N. Car. 41.

5. Sale of After-acquired Property Valid. — Ajello *v.* Worsley, (1898) 1 Ch. 274, 67 L. J. Ch. 172, 77 L. T. N. S. 783; Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199; Fletcher *v.* Jacob Dold Packing Co., 41 N. Y. App. Div. 30; Wamsley *v.* Horton, 77 Hun (N. Y.) 317. See also the title GAMBLING CONTRACTS, vol. 14, p. 576.

It was held in Bryan *v.* Lewis, R. & M. 386, 21 E. C. L. 467, that a sale of goods to be delivered at a future day, where the seller has not the goods nor any contract for them, but expects to go into the market and buy them, is not a valid contract, but a mere wager on the price of the goods. But this has been overruled both in England and in the United States. Hibblewhite *v.* M'Morine, 5 M. & W. 462; Mortimer *v.* M'Callan, 6 M. & W. 58; Clarke *v.* Foss, 7 Biss. (U. S.) 540; Porter *v.* Viets, 1 Biss. (U. S.) 177; Phillips *v.* Ocmulgee Mills, 55 Ga. 633; Logan *v.* Musick, 81 Ill. 415; Rumsey *v.* Berry, 65 Me. 570; Appleman *v.* Fisher, 34 Md. 540; Gregory *v.* Wendell, 40 Mich. 432; Stanton *v.* Small, 3 Sandf. (N. Y.) 238.

There can be no valid sale made of a fund

tial existence, and is to be afterwards acquired, it can only be the subject of an executory contract of sale, and not of an actual sale.[1] This is the rule to be applied in all cases where the property, whether in existence or not, is yet to be acquired by the seller,[2] and any executory agreement to sell does not effect the transfer without some new act on the part of the seller indicating an intention to effectuate the contract.[3] An exception to this doctrine is seen in the case of the rule recognized in equity, that the sale of property to be after acquired, so described in the contract as to be capable of identification, vests in the buyer the beneficial interest in the property as soon as it is acquired by the seller.[4] Similar rules prevail in respect to chattel mortgages.[5] In the application of these principles, the distinction between an actual sale and a mere executory agreement to sell is constantly to be observed.[6]

4. Incorporeal Rights. — The property sold need not necessarily have a physical or corporeal existence such as to render it capable of manual delivery. It is enough if it has an actual value. Incorporeal rights and interests may be the subject of sale.[7]

in court as a fund. A party can only sell his interest when it may be adjusted. McCain *v.* Portis, 42 Ark. 402.

1. Contract Merely Executory. — Reed *v.* Blades, 5 Taunt. 212, 1 E. C. L. 81; Hope *v.* Hayley, 5 El. & Bl. 830, 85 E. C. L. 830; Allatt *v.* Carr, 27 L. J. Exch. 385; Reeve *v.* Whitmore, 4 De G. J. & S. 1, 9 Jur. N. S. 1214; Congreve *v.* Evetts, 10 Exch. 298; Gale *v.* Burnell, 7 Q. B. 850, 53 E. C. L. 850; Lunn *v.* Thornton, 1 C. B. 379, 50 E. C. L. 379; Brown *v.* Bateman, L. R. 2 C. P. 272; Reeves *v.* Barlow, 12 Q. B. D. 436; Blake *v.* Izard, 16 W. R. 108; Hutchinson *v.* Ford, 9 Bush (Ky.) 318, 15 Am. Rep. 711; Barnard *v.* Eaton, 2 Cush. (Mass.) 295; Jones *v.* Richardson, 10 Met. (Mass.) 481; Low *v.* Pew, 108 Mass. 347, 11 Am. Rep. 357; Brainard *v.* Burton, 5 Vt. 97.

The cases of Blackmore *v.* Shelby, 8 Humph. (Tenn.) 439, and Frazer *v.* Hilliard, 2 Strobh. L. (S. Car.) 309, holding that a sale of property not belonging to the seller, if not repudiated by the purchaser, is valid after the seller's acquisition of such property, are isolated ones and cannot be considered as stating the American doctrine. The intimation by Mr. Benjamin that their holding is the American doctrine is contradicted by an overwhelming weight of authority, as may be seen from the cases in next note. See Benj. on Sales (4th Am. ed.), § 83, and note.

2. Gale *v.* Burnell, 7 Q. B. 850, 53 E. C. L. 850; Brett *v.* Carter, 2 Lowell (U. S.) 458; Noyes *v.* Jenkins, 55 Ga 586; Gittings *v.* Nelson, 86 Ill. 591; Shaw *v.* Gilmore, 81 Me 396; Morrill *v.* Noyes, 56 Me. 458, 96 Am. Dec. 486; Head *v.* Goodwin, 37 Me. 187; Pierce *v.* Emery, 32 N. H. 484; McCaffrey *v.* Woodin, 65 N. Y. 459, 22 Am. Rep. 644; Farmers' L. & T. Co. *v.* Long Beach Imp. Co., 27 Hun (N. Y.) 89; Gardner *v.* McEwen, 19 N. Y. 123; Williams *v.* Briggs, 11 R. I. 476, 23 Am. Rep. 518; Parker *v.* Jacobs, 14 S. Car. 112, 37 Am. Rep. 724. See generally the title CHATTEL MORTGAGES, vol. 5, p. 945.

3. Brett *v.* Carter, 2 Lowell (U. S.) 458; Head *v.* Goodwin, 37 Me 181. But see Maskelinski *v.* Wazsinenski, (Buffalo Super. Ct. Gen. T.) 20 N. Y. Supp. 533. See also *infra*, *When Title Passes*.

4. Rule in Equity. — Holroyd *v.* Marshall, 10 H. L. Cas. 191; Belding *v.* Read, 3 H. & C. 955, 34 L. J. Exch. 212; Clements *v.* Matthews, 11 Q. B. D. 808; Tailby *v.* Official Receiver, 13 App. Cas. 523; Lazarus *v.* Andrade, 5 C. P. D. 318; *In re* Clarke, 36 Ch. D. 348; *In re* D'Epineuil, 20 Ch. D. 758; Brett *v.* Carter, 2 Lowell (U. S.) 461; Mitchell *v.* Winslow, 2 Story (U. S.) 638; Hurst *v.* Bell, 72 Ala. 336; Apperson *v.* Moore, 30 Ark. 56, 21 Am. Rep. 170; Muir *v.* Blake, 57 Iowa 665; Pennington *v.* Jones, 57 Iowa 37. See also Brown *v.* Dail, 117 N. Car. 43; Foster *v.* Hackett, 112 N. Car. 546; Wright *v.* Brown, 116 N. Car. 26; Taylor *v.* Smith, 116 N. Car. 551; McDonald *v.* McDonald, 5 Jones Eq. (58 N. Car.) 211, 75 Am. Dec. 434. See generally the titles MORTGAGES, vol. 20, p. 888; CHATTEL MORTGAGES, vol. 5, p. 945.

The doctrine was carried to an extreme in the case of Lazarus *v.* Andrade, 5 C. P. D. 318, 30 Moak 803, where it is said that "property to be after acquired, if described so as to be capable of being identified, may be, not only in equity but also at law, the subject-matter of a valid assignment for value." The use of the phrase "also at law" was probably in consequence of provisions of the judicature acts.

In Moody *v.* Wright, 13 Met. (Mass.) 17, 46 Am. Dec. 706, it was said that there is no difference between the rule at law and in equity; but it has been doubted whether this is the correct doctrine, and in Brett *v.* Carter, 2 Lowell (U. S.) 458, it was intimated that it is not good law.

5. See the title CHATTEL MORTGAGES, vol. 5, p. 945.

6. Benj. on Sales (6th Am. ed.), § 308; Chissom *v.* Hawkins, 11 Ind. 316; Whitehead *v.* Root, 2 Met. (Ky.) 584. See *infra*, this title, IV. 1. *Executed and Executory Contracts Distinguished.*

7. Incorporeal Rights — Instances. — The good-will of a partnership may be sold. Barber *v.* Connecticut Mut. L. Ins. Co., 15 Fed. Rep. 312. It has been held that a newspaper subscription list is not susceptible of separate ownership, but must pass on the sale of the types, presses, etc. McFarland *v.* Stewart, 2 Watts (Pa.) 111, 26 Am. Dec. 109; Holden *v.* M'Makin, 1 Pars. Eq. Cas. (Pa.) 270. An an-

5. Expectations and Possibilities. — The hope or expectation of means founded on a right in being may be the subject of a sale, since in such case there is a potential, though not an actual, existence.[1] But a mere possibility or contingency not founded upon a right or coupled with an interest can only be the subject of an executory contract of sale.[2]

IV. When Title Passes — 1. Executed and Executory Contracts Distinguished. — After the formation of a contract of sale, the question of its effect arises as to when the bargain amounts to an actual sale or when it is a mere executory agreement. The distinction between the two contracts consists in this: that in a bargain and sale the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded and without regard to the fact whether the goods be delivered to the buyer or remain in possession of the seller;[3] whereas, in an executory agreement, the

nuity may be sold. Lloyd *v.* Scott, 4 Pet. (U. S.) 205. The route of a newspaper carrier. Hathaway *v.* Bennett, 10 N. Y. 108, 61 Am. Dec. 739; Senter *v.* Davis, 38 Cal 450. A license to sell patented articles, or to print and sell copyright productions, etc. 2 Bl. Com. (Cooley's ed.) 405; Brooks *v.* Byam, 2 Story (U. S.) 525, Story on Sales (4th ed.), § 187; Pepper *v.* Labrot, 8 Fed. Rep. 29. A ferry franchise. Montgomery *v.* Multnomah R. Co., 11 Oregon 344. Knowledge of the existence and locality of an oil-well. Reed *v.* Golden, 28 Kan. 632, 42 Am. Rep. 180. A trade-mark. Warren *v.* Warren Thread Co., 134 Mass. 247; Burton *v.* Stratton, 12 Fed. Rep. 696; Pepper *v.* Labrot, 8 Fed. Rep. 29. A seat in a stock exchange. Clute *v.* Loveland. 68 Cal. 254. State land scrip. Yonley *v.* Thompson, 30 Ark. 399. The privilege of mining. Johnston *v.* Cowan, 59 Pa. St. 280.

1. Expectations with Potential Existence. — Dargin *v.* Hewlitt, 115 Ala. 510.

The future income to be derived from the use of a fair grounds already prepared for such use is subject to sale. Dargin *v.* Hawlitt, 115 Ala. 510.

In Bacon's Abridgment, Grant (D) 3, this example is given: "If there be a devise of a term to A for life, remainder to B, B cannot in the lifetime of A assign or grant over his interest, because he has but a bare possibility, for A may outgrow the number of years." *Citing* Dyer 116; 5 Co. 66; 10 Co. 47, 48 But this rule of policy, tending to deprive the owner of the reversion or vested remainder to the right to alien his property, is not favored in this country, and such sales are upheld, at least in equity, in all cases where it can be shown that there is no fraud or inadequate consideration. See 2 Minor's Inst. (3d ed.), p. (622) 699; Cribbins *v.* Markwood, 13 Gratt. (Va.) 507, 67 Am. Dec. 775; 1 Story's Eq., § 327.

2. Mere Possibilities. — Wheeler *v.* Wheeler, 2 Met. (Ky.) 474, 74 Am. Dec. 421. In this case a sale by a son of all his individual interest in the slaves and personal estate of his father, was held inoperative, and not to pass any title even though the sale was made with the father's assent. *Compare* Skipper *v.* Stokes, 42 Ala 255, 94 Am. Dec. 646; Fitch *v.* Fitch, 8 Pick. (Mass.) 480; Low *v.* Pew, 108 Mass. 347, 11 Am. Rep. 357; Boynton *v.* Hubbard, 7 Mass. 112; Needles *v.* Needles, 7 Ohio St. 432, 70 Am. Dec. 85; Fitzgerald *v.* Vestal, 4 Sneed (Tenn.) 258. See Grayson *v.* Sanford, 12 La. Ann. 646; Bates *v.* Smith, 83 Mich. 347; Sherwood *v.* Walker, 66 Mich. 568, 11 Am. St. Rep. 531; Varick *v.* Edwards, Hoffm. (N. Y.) 382; McDonald *v.* McDonald, 5 Jones Eq. (58 N. Car.) 211, 75 Am. Dec. 434; Mastin *v.* Marlow, 65 N. Car. 695; Power's Appeal, 63 Pa. St. 443; Steele *v.* Frierson, 85 Tenn. 430; Graham *v.* Henry, 17 Tex. 164; Nimmo *v.* Davis, 7 Tex. 26.

The question has been sometimes raised whether one can make a valid sale of an expectancy dependent upon chance — *e. g.*, where a fisherman offers to sell the catch of his net The civil law considered that such a sale might be valid, and this view is sustained by Mr. Story. Pothier, Contrat de Vente, No. 6; Story on Sales (4th ed.), § 185. But the doctrine is otherwise in the United States by an express decision. Low *v.* Pew, 108 Mass. 347, 11 Am. Rep. 357. It is considered by Benjamin that such a transaction is rather one for work and labor than one of sale; the case supposing that the fish before being caught were common property, being in public waters. Benj. on Sales (6th ed.), § 84. See also 4 Kent Com. (13th ed.), p. 468, note.

3. Delivery Not Essential as Between Parties. — That delivery is not necessary to pass the title as between the parties to the contract, unless required by the terms of the contract, is settled by many cases. As soon as a bargain and sale of specific property is struck, the contract becomes absolute, without actual payment or delivery; and the property and risk of accident are in the buyer. If the seller is prevented from delivering the property by the act of God, payment must nevertheless be made.

England. — Tarling *v.* Baxter, 6 B. & C. 360, 13 E. C. L. 199; Hinde *v.* Whitehouse, 7 East 558; Dixon *v.* Yates, 5 B. & Ad. 313, 27 E. C. L. 86.

United States. — Barrett *v.* Goddard, 3 Mason (U. S.) 107; Tome *v.* Dubois, 6 Wall. (U. S.) 548; Arkansas Valley Land, etc., Co. *v.* Mann, 130 U. S. 69; Sutherland *v.* Brace, 73 Fed. Rep. 624, 34 U. S. App. 638.

Alabama. — M'Coy *v.* Moss, 5 Port. (Ala.) 88; Darnell *v.* Griffin, 46 Ala. 520; McCrae *v.* Young, 43 Ala. 622.

Arkansas. — Lynch *v.* Daggett, 62 Ark. 592; Danley *v.* Rector, 10 Ark. 211, 50 Am. Dec. 242; Costar *v.* Davies, 8 Ark. 213, 46 Am. Dec. 311; Field *v.* Simco, 7 Ark. 269.

goods remain the property of the seller till the contract is executed.[1] This distinction is of importance in two connections: First, as between the parties to the contract, in order to determine upon whom the loss shall fall in case the property is destroyed, for it is plain that if the subject of the sale is lost or destroyed, the loss must fall upon the party who holds the title; thus, if before the transfer has taken place a loss occurs, it falls upon the seller, otherwise upon the buyer;[2] and second, in order to know what rights creditors or

California. — Crill *v.* Doyle, 53 Cal. 713; Visher *v.* Webster, 13 Cal. 58.

Illinois. — Webster *v.* Granger, 78 Ill. 230; Sidwell *v.* Lobly, 27 Ill. 437; Wade *v.* Moffett, 21 Ill. 110, 74 Am. Dec. 79; May *v.* Tallman, 20 Ill. 443.

Indiana. — Ramsey *v.* Kochenour, 8 Blackf. (Ind.) 325; Bertelson *v.* Bower, 81 Ind. 514; Lester *v.* East, 49 Ind. 588.

Kentucky. — Sweeney *v.* Owsley, 14 B. Mon. (Ky.) 332; Willis *v.* Willis, 6 Dana (Ky.) 48.

Louisiana. — Taylor *v.* Twenty-Five Bales Cotton, 26 La. Ann. 247.

Maine. — Cummings *v.* Gilman, 90 Me. 524; Webber *v.* Davis, 44 Me. 147, 69 Am. Dec. 87; Wing *v.* Clark, 24 Me. 366.

Maryland. — Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303; Gough *v.* Edelen, 5 Gill (Md.) 101.

Massachusetts. — Philbrook *v.* Eaton, 134 Mass. 398.

Michigan. — Byles *v.* Colier, 54 Mich. 1; Whitcomb *v.* Whitney, 24 Mich. 486; Davis *v.* Ransom, 4 Mich. 238.

Mississippi. — Ingersoll *v.* Kendall, 13 Smed. & M. (Miss.) 611; Cassell *v.* Backrack, 42 Miss. 56, 97 Am. Dec. 436, 2 Am. Rep. 590; Beauchamp *v.* Comfort, 42 Miss. 94.

Missouri. — Woodburn *v.* Cogdal, 39 Mo. 222.

Nebraska. — Uhl *v.* Robison, 8 Neb. 272; Robison *v.* Uhl, 6 Neb. 328.

New Hampshire. — Bailey *v.* Smith, 43 N. H. 143; Felton *v.* Fuller, 29 N. H. 121.

New Jersey. — Frazier *v.* Fredericks, 24 N. J. L. 162.

New York. — Dexter *v.* Norton, 55 Barb. (N. Y.) 272; Connor *v.* Williams, 2 Robt. (N. Y.) 46; Gray *v.* New York, 46 N. Y. Super. Ct. 494; Russell *v.* Carrington, 42 N. Y. 119, 1 Am. Rep. 502; Bissell *v.* Balcom, 39 N. Y. 275; Burt *v.* Dutcher, 34 N. Y. 493; Terry *v.* Wheeler, 25 N. Y. 520.

North Carolina. — Jenkins *v.* Jarrett, 70 N. Car. 255.

Ohio. — Hooben *v.* Bidwell, 16 Ohio 509, 47 Am. Dec. 386.

Pennsylvania. — Winslow *v.* Leonard, 24 Pa. St. 14, 62 Am. Dec. 354; McCandlish *v.* Newman, 22 Pa. St. 460.

Tennessee. — Potter *v.* Coward, Meigs (Tenn.) 26.

Texas. — Downey *v.* Taylor, (Tex. Civ. App. 1898) 48 S. W. Rep. 541.

"As a matter of law, a bill of sale is not necessary to pass the title to personal property." Gatzweiler *v.* Morgner, 51 Mo. 47.

1. Executory Contracts of Sale — *English.* — Young *v.* Matthews, L. R. 2 C. P. 127.

United States. — Elgee Cotton Cases, 22 Wall. (U. S.) 180; Cunningham Iron Co. *v.* Warren Mfg. Co., 80 Fed. Rep. 878; Hull *v.* Pitrat, 45 Fed. Rep. 94.

Alabama. — Leigh *v.* Mobile, etc., R. Co., 58 Ala. 165.

California. — Cardinell *v.* Bennett, 52 Cal. 476.

Georgia. — Central Georgia Land, etc., Co. *v.* Exchange Bank, 101 Ga. 345.

Illinois. — Olney *v.* Howe, 89 Ill. 556, 31 Am. Rep. 105.

Indiana. — Branigan *v.* Hendrickson, 17 Ind. App. 198; Lester *v.* East, 49 Ind. 592; Straus *v.* Ross, 25 Ind. 300.

Iowa. — Davis Gasoline Engine Works Co. *v.* McHugh, 115 Iowa 415.

Kansas. — Julius Winkelmeyer Brewing Assoc. *v.* Nipp, 6 Kan. App. 730.

Louisiana. — Knox *v.* Payne, 13 La. Ann. 361.

Massachusetts. — Mason *v.* Thompson, 18 Pick. (Mass.) 305.

Michigan. — Deyo *v.* Vaughn, 97 Mich. 1; Lingham *v.* Eggleston, 27 Mich. 324.

Minnesota. — Day *v.* Gravel, 72 Minn. 159; Welter *v.* Hill, 65 Minn. 273.

Missouri. — Cunningham *v.* Ashbrook, 20 Mo. 553.

Nebraska. — McClelland *v.* Scroggin, 35 Neb. 536.

New Jersey. — Hurff *v.* Hires, 40 N. J. L. 581, 29 Am. Rep. 282.

New York. — Gallup *v.* Sterling, (Supm. Ct. Tr. T.) 22 Misc. (N. Y.) 672; Hopkins *v.* Davis, 23 N. Y. App. Div. 235; Riendeau *v.* Bullock, (Supm. Ct. Gen. T.) 20 N. Y. Supp. 976.

North Dakota. — Nichols Shepard Co. *v.* Paulson, 6 N. Dak. 400.

Pennsylvania. — Potter *v.* Stetson, 11 Pa. Super. Ct. 627; Welsh *v.* Bell, 32 Pa. St. 17; Brown *v.* McCaffrey, 40 W. N. C. (Pa.) 69.

Vermont. — State *v.* O'Neil, 58 Vt. 140, 56 Am. Rep. 557.

The Distinction between a sale and an executory agreement to sell is this: In the one case A sells to B; in the other he only promises to sell. In the one case B becomes the owner of the goods themselves, as soon as the contract is completed by mutual consent; if they are lost or destroyed, he is the sufferer. In the other case, as he does not become the owner of the goods, he cannot claim them specifically; he is not the sufferer if the goods are lost; cannot maintain trover for them; and has not, at common law, any other remedy for breach of the contract than an action for damages. Zwisler *v.* Storts, 30 Mo. App. 163. See also Barrow *v.* Window, 71 Ill. 214.

2. Risk of Loss — *England.* — Simmons *v.* Swift, 5 B. & C. 857, 12 E. C. L. 388; Hanson *v.* Meyer, 6 East 614; Anglo-Egyptian Nav. Co. *v.* Rennie, L. R. 10 C. P. 271, 12 Moak 345; Anderson *v.* Morice, 1 App. Cas. 713, 18 Moak 1.

Alabama. — Browning *v.* Hamilton, 42 Ala. 484.

subsequent purchasers of one party may acquire as against the other.[1] An executory contract of sale becomes executed upon delivery and acceptance of the goods in accordance with the contract with intent to pass title.[2] The mere giving of earnest will not operate to pass the title where otherwise the contract is such that title would not have passed.[3]

2. Intention Governs. — In determining whether title has or has not passed by the contract, the primary consideration is one of intention. The agreement is what the parties intended to make it. If the intention is manifested clearly and unequivocally, it controls.[4] What was the intention of the par-

Indiana. — Bertelson *v.* Bower, 81 Ind. 512; Smith *v.* Dallas, 35 Ind. 255.

Massachusetts. — Thayer *v.* Lapham, 13 Allen (Mass.) 26.

Michigan. — Lingham *v.* Eggleston, 27 Mich. 324; Whitcomb *v.* Whitney, 24 Mich. 486.

Missouri. — Lovelace *v.* Stewart, 23 Mo. 384; Cunningham *v.* Ashbrook, 20 Mo. 553.

New York. — Dexter *v.* Norton, 55 Barb. (N. Y.) 272, 47 N. Y. 62, 7 Am. Rep. 415; Olyphant *v.* Baker, 5 Den. (N. Y.) 379; Lansing *v.* Turner, 2 Johns. (N. Y.) 13; Babcock *v.* Hutchinson, 4 Lans. (N. Y.) 276; Kein *v.* Tupper, 52 N. Y. 553; Terry *v.* Wheeler, 25 N. Y. 520; Joyce *v.* Adams, 8 N. Y. 291.

Pennsylvania. — Hutchinson *v.* Hunter, 7 Pa. St. 140.

Tennessee. — Goodrum *v.* Smith, 3 Humph. (Tenn.) 542; Broyles *v.* Lowrey, 2 Sneed (Tenn.) 22.

Virginia. — Pleasants *v.* Pendleton, 6 Rand. (Va.) 473, 18 Am. Dec. 726.

See also cases cited *supra*, this section.

A mere executory agreement to sell does not transfer the risk, since that attends upon the title. Garrett *v.* Crooks, 15 La. Ann. 483.

1. Rights of Third Persons. — Fosdick *v.* Schall, 99 U. S. 255; Ricker *v.* Cross, 5 N. H. 570, 22 Am. Dec. 480; Hurff *v.* Hires, 40 N. J. L. 581, 29 Am. Rep. 282; Golder *v.* Ogden, 15 Pa. St. 528, 53 Am. Dec. 618. See also *infra*, this title, *Bona Fide Purchasers*. See also the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 210.

2. When Contract Becomes Executed — *Georgia.* — Woodruff *v.* Graddy, 91 Ga. 333, 44 Am. St. Rep. 33.

Illinois. — Gilbert *v.* Forest City Furniture Co., 72 Ill. App. 186; Rothwell *v.* Alves, 60 Ill. App. 156.

Minnesota. — Carter *v.* Cream of Wheat Co., 73 Minn. 315; Rickey *v.* Stewart, 45 Minn. 437.

Missouri. — Scheirmerhorn Bros. Co. *v.* Herold, 81 Mo. App. 461; Ford *v.* Dyer, 148 Mo. 528.

Montana. — Herbert *v.* Winters, 15 Mont. 552.

New York. — Empire Mfg. Co. *v.* Moers, 27 N. Y. App. Div. 464.

Oklahoma. — Quinton *v.* Cutlip, 1 Okla. 302.

Texas. — Triplett *v.* Morris, 18 Tex. Civ. App. 50; Baker *v.* Guinn, (Tex. Civ. App. 1895) 32 S. W. Rep. 370; Brown *v.* Gupton, (Tex. Civ. App. 1894) 29 S. W. Rep. 88; Extence *v.* Stewart, (Tex. Civ. App. 1894) 26 S. W. Rep. 896; Baker *v.* Guinn, 4 Tex. Civ. App. 539.

Compare Dowagiac Mfg. Co. *v.* Higinbotham, 15 S. Dak. 547.

See generally *infra*, this title, *Delivery of Goods*.

No property passes to a vendee, as against attaching creditors of the vendor, where the contract of sale relates to and includes one kind of property, and a delivery is made to the vendee of a wholly different kind, without knowledge of the vendee or any assent on his part, either express or implied, to take and receive the substituted article in place of the one which he agreed to purchase. Under Gen. Stat., c. 49, §§ 36–39, providing for the preparation, division into different qualities, packing, inspecting and branding of mackerel, each different quality after being thus prepared for market is to be regarded as a different kind of merchandise, within the meaning of the above rule. Gardner *v.* Lane, 12 Allen (Mass.) 39.

Where goods were sold to C, and shipped to his address, but before delivery he notified the seller that he had abandoned business, and the seller ordered the goods held at the railroad warehouse until he could sell them, and they were there levied on as the property of C, the seller could replevy them. Hershiser *v.* Delone, 24 Neb. 380.

In Corrigan *v.* Sheffield, 10 Hun (N. Y.) 227, a contract for the sale of rags was made by which delivery was to be made at a certain date. Prior to that date the sellers delivered half the number of bales for their own convenience. These bales were afterwards destroyed. It was held that though the bales had been delivered, yet the title had not passed, because the contract was an entire one, and therefore the loss must fall upon the seller.

3. Effect of Giving Earnest. — Benjamin on Sales (4th Am. ed.), §§ 355–357, *citing* and *reviewing* Logan *v.* Le Mesurier, 6 Moo. P. C. 116; Acraman *v.* Morrice, 8 C. B. 449, 65 E. C. L. 449. See also Groat *v.* Gile, 51 N. Y. 431; Nesbit *v.* Burry, 25 Pa. St. 208; Jennings *v.* Flanagan, 5 Dana (Ky.) 217, 30 Am. Dec. 683; Restad *v.* Engemoen, 65 Minn. 148

4. Intention Governs — *England.* — Moakes *v.* Nicolson, 19 C. B. N. S. 290, 115 E. C. L. 290; Walker *v.* Clyde, 10 C. B. N. S. 381, 100 E. C. L. 381; Ogg *v.* Shuter, L. R. 10 C. P. 159, 11 Moak 316.

Canada. — Wilson *v.* Shaver, 3 Ont. L. Rep. 110; Leggatt *v.* Clarry, 13 Ont. 110; Ross *v.* Eby, 28 U. C. C. P. 316; Gleason *v.* Knapp, 26 U. C. C. P. 553.

United States. — Barrett *v.* Goddard, 3 Mason (U. S.) 113; Elgee Cotton Cases, 22 Wall. (U. S.) 187; Hatch *v.* Standard Oil Co., 100 U. S. 131.

Alabama. — Crawford *v.* Spraggins, 109 Ala. 353.

ties is a question for the jury to be determined under proper instructions from the court.[1] Whether a given contract is one of sale which passes the property

Arkansas. — White *v.* McCracken, 60 Ark. 613.

California. — Levy *v.* Scott, 115 Cal. 39; Eaton *v.* Richeri, 83 Cal. 185; Blackwood *v.* Cutting Packing Co., 76 Cal. 212, 9 Am. St. Rep. 199.

Colorado. — Hendrie, etc., Mfg. Co. *v.* Collins, 29 Colo. 102.

Connecticut. — Chapman *v.* Shepard, 39 Conn. 413.

Illinois. — Callaghan *v.* Myers, 89 Ill. 570; Sanborn *v.* Benedict, 78 Ill. 309.

Indiana. — Lester *v.* East, 49 Ind. 588; Chissom *v.* Hawkins, 11 Ind. 316.

Iowa. — Wind *v.* Iler, 93 Iowa 316; Ottumwa First Nat. Bank *v.* Reno, 73 Iowa 145.

Kansas. — O'Farrel *v.* McClure, 5 Kan. App. 880, 47 Pac. Rep. 160; Kneeland *v.* Renner, 2 Kan. App. 451.

Kentucky. — Paul *v.* Becker, (Ky. 1897) 39 S. W. Rep. 499.

Louisiana. — Baldwin *v.* Morey, 41 La. Ann. 1105.

Maine. — Dyer *v.* Libby, 61 Me. 45; Bethel Steam Mill Co. *v.* Brown, 57 Me. 18, 99 Am. Dec. 752; Stone *v.* Peacock, 35 Me. 388; Cleaves *v.* Washburn, (Me. 1888) 12 Atl. Rep. 734; Levasseur *v.* Cary, (Me. 1886) 3 Atl. Rep. 461.

Massachusetts. — Weed *v.* Boston, etc., Ice Co., 12 Allen (Mass.) 377; Denny *v.* Williams, 5 Allen (Mass.) 3; Pratt *v.* Parkman, 24 Pick. (Mass.) 42; Riddle *v.* Varnum, 20 Pick. (Mass.) 283; Macomber *v.* Parker, 13 Pick. (Mass.) 182; Sumner *v.* Hamlet, 12 Pick. (Mass.) 76; Barrett *v.* Pritchard, 2 Pick. (Mass.) 512, 13 Am. Dec. 449; Sherwin *v.* Mudge, 127 Mass. 547; Dugan *v.* Nichols, 125 Mass. 43; Morse *v.* Sherman, 106 Mass. 430.

Michigan. — Hauser *v.* Beaty, 93 Mich. 499; Sherwood *v.* Walker, 66 Mich. 575, 11 Am. St. Rep. 531; Brewer *v.* Michigan Salt Assoc., 47 Mich. 526; Wilkinson *v.* Holiday, 33 Mich. 386; Lingham *v.* Eggleston, 27 Mich. 324.

Minnesota. — Litchfield Bank *v.* Elliott, 83 Minn. 469; Welter *v.* Hill, 65 Minn. 273; Hart *v.* Kessler, 53 Minn. 546; Bangs *v.* Friezen, 36 Minn. 423; Thompson *v.* Libby, 35 Minn. 445; Martin *v.* Hurlbut, 9 Minn. 142.

Missouri. — Cunningham *v.* Ashbrook, 20 Mo. 554. *Compare* Esterly Harvesting Mach. Co. *v.* Criswell, 58 Mo. App. 471.

Nebraska. — Gray *v.* Peterson, (Neb. 1902) 90 N. W. Rep. 559; Neimeyer Lumber Co. *v.* Burlington, etc., R. Co., 54 Neb. 321.

New Hampshire. — Prescott *v.* Locke, 51 N. H. 101, 12 Am. Rep. 55; Ockington *v.* Richey, 41 N. H. 279; Kelsea *v.* Haines, 41 N. H. 246; Fuller *v.* Bean, 34 N. H. 290.

New Jersey. — Kerr *v.* Henderson, 62 N. J. L. 724.

New York. — Mahar *v.* Compton, 18 N. Y. App. Div. 536; Dennistown *v.* Barr, (Supm. Ct.) 31 Abb. N. Cas. (N. Y.) 21; Russell *v.* Nicoll, 3 Wend. (N. Y.) 112, 20 Am. Dec. 672; Hurd *v.* Cook, 75 N. Y. 454; Russell *v.* Carrington, 42 N. Y. 118, 1 Am. Rep. 498; Terry *v.* Wheeler, 25 N. Y. 525; Byam *v.* Hampton, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 372; Shields *v.* Pettie, 4 N. Y. 122.

North Dakota. — Nichols Shepard Co. *v.* Paulson, 6 N. Dak. 400.

Ohio. — Ormsbee *v.* Machir, 20 Ohio St. 301.

Oregon. — Pacific Lumber Co *v.* Prescott, 40 Oregon 374; Haines *v.* McKinnon, 35 Oregon 573; Wadhams *v.* Balfour, 32 Oregon 313.

Pennsylvania. — Gonser *v.* Smith, 115 Pa. St. 452; Winslow *v.* Leonard, 24 Pa. St. 14, 62 Am. Dec. 354.

Texas. — Gulf, etc., R. Co. *v.* Browne, (Tex. Civ. App. 1902) 66 S. W. Rep. 341; Hopkins *v.* Partridge, 71 Tex. 606.

Vermont. — James Smith Woolen Mach. Co. *v.* Holden, 73 Vt. 396; Fitch *v.* Burk, 38 Vt. 689; Bellows *v.* Wells, 36 Vt. 599.

Washington. — Pacific Lounge, etc., Co. *v.* Rudebeck, 15 Wash. 336; Anderson *v.* Land, 5 Wash. 493, 34 Am. St. Rep. 875; McCorvey *v.* Potvin, 4 Wash. 698; Meeker *v.* Johnson, 3 Wash. 247.

Wisconsin. — Upham Mfg. Co. *v.* Sanger, 80 Wis. 34; Cook *v.* Van Horne, 76 Wis. 520; Fletcher *v.* Ingram, 46 Wis. 201; Chamberlain *v.* Dickey, 31 Wis. 68; Sewell *v.* Eaton, 6 Wis. 490, 70 Am. Dec. 471.

But see Austin *v.* Hamilton, 96 Ga. 759.

In Ober *v.* Carson, 62 Mo. 214, the court, by Wagner, J., said: "The question of transfer to and vesting title in the purchaser always involves an inquiry into the intention of the contracting parties; and it is to be ascertained whether their negotiations and acts show an intention on the part of the seller to relinquish all further claims as owner, and on the part of the buyer to assume such control with all liabilities." See also Cunningham *v.* Ashbrook, 20 Mo. 553; England *v.* Mortland, 3 Mo. App. 490.

"If," says Parke, B., in Bryans *v.* Nix, 4 M. & W. 775, "the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels, is established, and they are in the hands of a depositary, no matter whether that depositary be a common carrier, or shipmaster, employed by the consignor or a third person, and the chattels are so placed on account of the person who is to have that property, and the depositary assents, it is enough; and it matters not by what documents this is effected." *Quoted* with approval by Shaw, C. J., in De Wolf *v.* Gardner, 12 Cush. (Mass.) 26, 59 Am. Dec. 165.

1. Province of Court and Jury — *England.* — Godts *v.* Rose, 17 C. B. 229, 84 E. C. L. 229; Tregelles *v.* Sewell, 7 H. & N. 574.

United States. — Hatch *v.* Standard Oil Co., 100 U. S. 131; Hathaway *v.* East Tennessee, etc., R. Co., 29 Fed. Rep. 489.

Illinois. — Graff *v.* Fitch, 58 Ill. 373, 11 Am. Rep. 85.

Iowa. — McClung *v.* Kelley, 21 Iowa 508.

Kansas. — Caywood *v.* Timmons, 31 Kan. 394.

Maine. — Dyer *v.* Libby, 61 Me. 45; George *v.* Stubbs, 26 Me. 250.

Massachusetts. — Stevens *v.* Boston, etc., R. Corp., 8 Gray (Mass.) 262; Riddle *v.* Varnum, 20 Pick. (Mass.) 280; Stanton *v.* Eager, 16 Pick. (Mass.) 473; Allen *v.* Williams, 12 Pick. (Mass.) 297; Wigton *v.* Bowley, 130 Mass. 254;

is one of construction to be determined by the court as a matter of law.[1] The burden of proof is upon the party affirming a sale [2] Evidence of custom and usage is admissible to show the intent of the parties.[3] Where, as is frequently the case, the parties fail to express their intention, or express it so imperfectly as to leave it in doubt, or where there is no definite intention, certain rules of construction are applied by the courts. In most instances these rules furnish tests which are adequate and conclusive.[4] These rules will be considered in the succeeding divisions of this section. It must be borne in mind, however, that, as between one of the parties to the contract and the creditors or *bona fide* purchasers of the other, the law requires some evidence of this intention to transfer title, such as delivery, registry, etc.[5] But formal delivery is not necessary to pass title where the buyer is already in possession or the goods are held by a bailee,[6] or where from the circumstances of the case delivery is impracticable and the buyer uses proper diligence to take possession within a reasonable time.[7]

3. Rules as to Presumed Intention — *a.* SOMETHING REMAINING TO BE DONE. — It is a presumption of law that if something remains to be done for the purpose of testing the property, or of fixing the amount to be paid by weighing, measuring, or the like, or of putting the property into condition for final delivery, title does not pass until such act is done.[8] But this pre-

Merchants' Nat. Bank *v.* Bangs, 102 Mass. 296

Michigan. — Slade *v.* Lee, 94 Mich. 127; Blodgett *v.* Hovey, 91 Mich. 571; Lobdell *v.* Horton, 71 Mich. 681; Wilkinson *v.* Holiday, 33 Mich. 386.

Missouri. — Glass *v.* Gelvin, 80 Mo. 297; Holly *v.* St. Louis, etc., R. Co., 34 Mo. App. 202

New Hampshire. — Kelsea *v.* Haines, 41 N. H. 253; Fuller *v.* Bean, 34 N. H. 290.

New York. — De Ridder *v.* M'Knight, 13 Johns. (N. Y.) 294; Terry *v.* Wheeler, 25 N. Y. 525

North Carolina. — Caldwell *v.* Smith, 4 Dev. & B. L. (20 N. Car.) 64.

North Dakota. — Roberts *v.* Fargo First Nat. Bank, 8 N. Dak. 474.

Pennsylvania. — Smyth *v.* Craig, 3 W. & S. (Pa.) 14; Kent Iron, etc., Co. *v.* Norbeck, 150 Pa. St. 559.

West Virginia. — Hood *v.* Bloch, 29 W. Va. 244.

1. Construction of Contract a Question for Court. —Wells *v.* McNerney, (Conn. 1902) 51 Atl. Rep. 1064; W. T. Adams Mach. Co. *v.* Newman, 107 La. 702; Irvin *v.* Edwards, 92 Tex. 258; Aultman *v.* Silha, 85 Wis. 359.

2. Burden of Proof. — Riddle *v.* Varnum, 20 Pick. (Mass.) 283.

3. Custom. — Putnam *v.* Tillotson, 13 Met. (Mass.) 517; Hobart *v.* Littlefield, 13 R. I. 341.

The Intention to Transfer Title may be either express or implied. Bonn *v.* Haire, 40 Mich. 404.

4 Benj. on Sales (6th ed.), § 309.

5. Intent as Affecting Third Persons —*England.* — Nicholson *v.* Harper, (1895) 2 Ch. 415, 13 Reports 567.

United States. — Meeker *v.* Wilson, 1 Gall. (U. S.) 419.

California. — Crocker *v.* Cunningham, 122 Cal. 547.

Kentucky. — H. A. Thierman Co. *v.* Laupheimer, (Ky. 1900) 55 S. W. Rep. 925.

Maine. — Vining *v.* Gilbreth, 39 Me. 496; Ludwig *v.* Fuller, 17 Me. 162, 35 Am. Dec. 245. See Cummings *v.* Gilman, 90 Me. 524.

Massachusetts. — Burge *v.* Cone, 6 Allen (Mass.) 412; Veazie *v.* Somerby, 5 Allen (Mass.) 280; Phelps *v.* Cutler, 4 Gray (Mass.) 138; Carter *v.* Willard, 19 Pick. (Mass.) 1; Hallgarten *v.* Oldham, 135 Mass. 8, 46 Am. Rep. 433; Harlow *v.* Hall, 132 Mass. 232.

New Hampshire. — Patrick *v.* Meserve, 18 N. H. 302; Ricker *v.* Cross, 5 N. H. 570, 22 Am. Dec. 480; Corning *v.* Records, 69 N. H. 390, 76 Am. St. Rep. 178.

New York. — Dodworth *v.* Jones, 4 Duer (N. Y.) 201.

See also *infra*, this title, *Delivery of Goods; Bona Fide Purchasers.* And see the title FRAUDULENT SALES, vol. 14, p. 210.

6. When Formal Delivery Unnecessary. — Lake *v.* Morris, 30 Conn. 201; Hall *v.* Morrison, 92 Ga. 311; Nichols *v.* Patten, 18 Me. 231, 36 Am. Dec. 713; Kittredge *v.* Sumner, 11 Pick. (Mass.) 50; Harding *v.* Manard, 55 Mo. App. 364. See also *infra*, this title, *Delivery.*

7. Wright *v.* Campbell, 4 Burr. 2051; Samuels *v.* Gorham, 5 Cal. 226; Jorda *v.* Lewis, 1 La. Ann. 59; Vining *v.* Gilbreth, 39 Me. 496; Pratt *v.* Parkman, 24 Pick. (Mass.) 47; Patrick *v.* Meserve, 18 N. H. 302; Ricker *v.* Cross, 5 N. H. 571, 22 Am. Dec. 480; Cadbury *v.* Nolen, 5 Pa. St. 320.

8. Presumption Against Passing of Title — *England.* — Simmons *v.* Swift, 5 B. & C. 862, 12 E. C. L. 390.

Alabama. — McFadden *v.* Henderson, 128 Ala. 221.

Georgia. — Clarke *v.* Wolfe, 115 Ga. 320; Jordan *v.* Jones, 110 Ga. 47.

Indiana. — Platter *v.* Acker, 13 Ind. App. 417.

Iowa. — McClung *v.* Kelley, 21 Iowa 508; Cook *v.* Logan, 7 Iowa 142.

Kansas. — Larkin *v.* Johnson, 8 Kan. App. 114.

Michigan. — H. M. Tyler Lumber Co. *v.* Charlton, 128 Mich. 299, 8 Detroit Leg. N. 651; Yockey *v.* Norn, 101 Mich. 193; Van

sumption may be overcome and title will pass if such appears by the contract to have been the intention of the parties.[1]

Goods to Be Shipped or Delivered. — If by the terms of the contract the seller is required to send or forward or deliver the goods to the buyer, the title and risk remain in the seller until the transportation is at an end or the goods are delivered in accordance with the contract, after which time the title is vested in the buyer.[2]

Wert *v.* Olney, etc., Grocer Co., 100 Mich. 328.

Nebraska. — Simpson *v.* State Bank, 55 Neb. 240.

New York. — Hopkins *v.* Davis, 23 N. Y. App. Div. 235; Reynolds *v.* Miller, 79 Hun (N. Y.) 113.

Oregon. — Wadhams *v.* Balfour, 32 Oregon 313.

Tennessee. — Parman *v.* Marshall, (Tenn. ch. 1899) 51 S. W. Rep. 116.

Texas. — Edwards *v.* Irvin, (Tex. Civ. App. 1898) 45 S. W. Rep. 1026.

Vermont. — Kitson Mach. Co. *v.* Holden, (Vt. 1902) 52 Atl. Rep. 271.

Wisconsin. — Smith *v.* Wisconsin Invest. Co., 114 Wis. 151.

Compare Whittle *v.* Phelps, 181 Mass. 317.

See also *infra*, this section, *Sale of Chattels Not Specific — General Rule.* And see the title CONDITIONAL SALES, vol. 6, p. 436.

1. Presumption May Be Rebutted — *England.* — Falk *v.* Fletcher, 18 C. B. N. S. 403, 114 E. C. L. 403; Turley *v.* Bates, 2 H. & C. 200; Alexander *v.* Gardner, 1 Bing. N. Cas. 671, 27 E. C. L. 538; Castle *v.* Playford, L. R. 7 Exch. 98; Martineau *v.* Kitching, L. R. 7 Q. B. 436; Young *v.* Matthews, L. R. 2 C. P. 127.

Alabama — Aderholt *v.* Embry, 78 Ala. 185.

Arkansas. — Chamblee *v.* McKenzie, 31 Ark. 155; Burr *v.* Williams, 23 Ark. 244.

California. — Ford *v.* Chambers, 28 Cal. 13.

Illinois. — Straus *v.* Minzesheimer, 78 Ill. 492; Graff *v.* Fitch, 58 Ill. 373, 11 Am. Rep. 85.

Kentucky. — Kenton *v.* Ratcliffe, 105 Ky. 376; Cummins *v.* Griggs, 2 Duv. (Ky.) 87, 87 Am. Dec. 482.

Maine. — Stone *v.* Peacock, 35 Me. 388; Cushman *v.* Holyoke, 34 Me. 289; Boynton *v.* Veazie, 24 Me. 286.

Massachusetts. — Denny *v.* Williams, 5 Allen (Mass.) 3; Beecher *v.* Mayall, 16 Gray (Mass.) 376; Riddle *v.* Varnum, 20 Pick. (Mass.) 283; Morse *v.* Sherman, 106 Mass. 430; Marble *v.* Moore, 102 Mass. 443; Merchants' Nat. Bank *v.* Bangs, 102 Mass. 295; Weld *v.* Came, 98 Mass. 152.

Michigan. — Byles *v.* Colier, 54 Mich. 1; Wilkinson *v.* Holiday, 33 Mich. 386.

New Hampshire. — Fuller *v.* Bean, 34 N. H. 300.

New York. — Chapin *v.* Potter, 1 Hilt. (N. Y.) 366; Burrows *v.* Whitaker, 71 N. Y. 291, 27 Am. Rep. 42; Terry *v.* Wheeler, 25 N. Y. 525; Filkins *v.* Whyland, 24 N. Y. 338; Kimberly *v.* Patchin, 19 N. Y. 330, 75 Am. Dec. 334; Russell *v.* Carrington, 42 N. Y. 118, 1 Am. Rep. 498.

Pennsylvania. — Gonser *v.* Smith, 115 Pa. St. 452.

Tennessee. — Bond *v.* Greenwald, 4 Heisk. (Tenn.) 453; Williams *v.* Adams, 3 Sneed (Tenn.) 359; Barker *v.* Freeland, 91 Tenn. 112.

Vermont. — Fitch *v.* Burk, 38 Vt. 683; Bemis *v.* Morrill, 38 Vt. 153.

Wisconsin. — Fletcher *v.* Ingram, 46 Wis. 191; Morrow *v.* Delaney, 41 Wis. 149; Sewell *v.* Eaton, 6 Wis. 490, 70 Am. Dec. 471.

In Callaghan *v.* Myers, 89 Ill. 566, it is said that the fact that the price has not been fixed does not necessarily prevent the title from passing, but is merely a fact to be considered by the jury in determining whether or not the title has passed.

2. Goods to Be Shipped or Delivered — *United States.* — Buckingham *v.* Dake, 112 Fed. Rep. 258, 50 C. C. A. 492; Cunningham Iron Co. *v.* Warren Mfg. Co., 80 Fed. Rep. 878; Peace River Phosphate Co. *v.* Grafflin 58 Fed. Rep. 550; Schreyer *v.* Kimball Lumber Co., (C. C. A.) 54 Fed. Rep. 653.

Alabama. — Capehart *v.* Furman Farm Imp. Co., 103 Ala. 671, 49 Am. St. Rep. 60.

Colorado. — A. Westman Mercantile Co. *v.* Park, 2 Colo. App. 545.

Connecticut. — Parker *v.* Selden, 69 Conn. 544.

Georgia. — Russell *v.* Abbott, 91 Ga. 178.

Indiana. — Branigan *v.* Hendrickson, 17 Ind. App. 198.

Iowa. — Gipps Brewing Co. *v.* De France, 91 Iowa 108, 51 Am. St. Rep. 329. *Compare* Welch *v.* Spies, 103 Iowa 389.

Kansas. — Julius Winkelmeyer Brewing Assoc. *v.* Nipp, 6 Kan. App. 736.

Kentucky. — Miller *v.* Somerset Cedar Post, etc., Co., (Ky. 1899) 51 S. W. Rep. 615. *Compare* Hagins *v.* Combs, 102 Ky. 165.

Louisiana. — Lozes *v.* Segura Sugar Co., 52 La. Ann. 1844; White *v.* White, 50 La. Ann. 104.

Massachusetts. — Taylor *v.* Cole, 111 Mass. 363; Odell *v.* Boston, etc., R. Co., 109 Mass. 50.

Mississippi. — Berry *v.* Waterman, 71 Miss. 497; Ouilette *v.* Davis, 69 Miss. 762.

Nebraska. — Neimeyer Lumber Co. *v.* Burlington, etc., R. Co., 54 Neb. 321; Havens *v.* Grand Island Light, etc., Co., 41 Neb. 153.

New York. — Riendeau *v.* Bullock, (Supm. Ct. Gen. T.) 20 N. Y. Supp. 976, 66 Hun (N. Y.) 628; Rogers *v.* Van Hoesen, 12 Johns. (N. Y.) 221.

Pennsylvania. — Fry *v.* Lucas, 29 Pa. St. 356; Doverspike *v.* Jewart, 2 Pa. Super. Ct. 313, 38 W. N. C. (Pa.) 491.

Tennessee. — Cole *v.* Rankin, (Tenn. 1896) 42 S. W. Rep. 72.

Washington. — North Pac. Lumbering, etc., Co. *v.* Kerron, 5 Wash. 214.

West Virginia. — Bloyd *v.* Pollock 27 W. Va. 75.

Wisconsin. — Smith *v.* Wisconsin Invest. Co., 114 Wis. 151.

Wyoming. — Kinney *v.* Rock Springs First Nat. Bank, (Wyo. 1902) 67 Pac. Rep. 471.

Goods to Be Weighed or Measured. — Where goods are to be weighed or measured, whether or not title passes before that is done depends altogether upon the intention of the parties, but nothing more appearing and nothing further remaining to be done, title is usually held to pass on delivery.[1]

b. SALE OF SPECIFIC CHATTELS UNCONDITIONALLY. — Where specific chattels are sold and delivered without any conditions or reservations, title passes to the buyer.[2] When there has been no manifestation of a contrary intention, the presumption of law is that the contract is an actual sale, and that the transfer of title takes place at once in advance of actual delivery, if the thing is agreed on, and it is ready for immediate delivery.[3] This is uni-

But see Kuhler *v.* Tobin, 1 Mo. App. Rep. 416.

Compare Lynch *v.* Daggett, 62 Ark. 592.

See generally *infra*, *Delivery of Goods*.

In Bloyd *v.* Pollock, 27 W. Va. 75, goods were sold to a buyer to be delivered at the depot in a certain city or to be delivered on the cars at the depot in that city. It was held that the title and risk remained in the seller until the goods arrived at the depot in such city, but upon their arrival there, without being unloaded and without any notice of their arrival at the depot, they at once became the property of the buyer, and from thenceforth were at his risk. Pacific Iron Works *v.* Long Island R. Co., 62 N. Y. 272.

If the seller has done all that is required of him, and the buyer, through neglect and carelessness, allows the goods to remain in the seller's hands, the seller is absolved from all liability for any injury resulting therefrom. Wood *v.* Tassell, 6 Q. B. 234, 51 E. C. L. 234. But where, by the announced terms of a public sale, the buyer has three days in which to remove the goods purchased, and the property is destroyed while in the possession of the seller before the expiration of that time, the loss falls on the seller. Gleason *v.* Sykes, 18 La. Ann. 627.

1. Goods to Be Weighed or Measured — *United States.* — H. B. Claflin Co. *v.* Kern, 55 Fed. Rep. 578.

Alabama. — Magee *v.* Billingsley, 3 Ala. 679.

Arkansas. — Chamblee *v.* McKenzie, 31 Ark. 155; Kaufman *v.* Stone, 25 Ark. 337.

California. — Lassing *v.* James, 107 Cal. 348.

Connecticut. — Upson *v.* Holmes, 51 Conn. 500.

Illinois. — Bell *v.* Farrar, 41 Ill. 400.

Kentucky. — Burke *v.* Shannon, (Ky. 1897) 43 S. W. Rep. 223.

Massachusetts. — Riddle *v.* Varnum, 20 Pick. (Mass.) 280.

Michigan. — Adams Min. Co. *v.* Senter, 26 Mich. 73.

Mississippi. — Crane *v.* Davis, (Miss. 1896) 21 So. Rep. 17.

Missouri. — Ober *v.* Carson, 62 Mo. 210; Southwestern Freight, etc., Press Co. *v.* Stanard, 44 Mo. 71, 100 Am. Dec. 255.

New York. — Bradley *v.* Wheeler, 44 N. Y. 495; Crofoot *v.* Bennett, 2 N. Y. 258.

Pennsylvania. — Scott *v.* Wells, 6 W. & S. (Pa.) 357, 40 Am. Dec. 568; Miller *v.* Seaman, 176 Pa. St. 291, 38 W. N. C. (Pa.) 459.

South Carolina. — Sahlman *v.* Mills, 3 Strobh. L. (S. Car.) 385, 51 Am. Dec. 630.

Washington. — Izett *v.* Stetson, etc., Mill Co., 22 Wash. 300.

Canada. — Wilson *v.* Shaver, 3 Ont. L. Rep. 110.

2. Unconditional Sale and Delivery Passes Title — *United States.* — Van Winkle *v.* Crowell, 146 U. S. 42; Schreiber *v.* Andrews, 101 Fed. Rep. 763, 41 C. C. A. 663; Mercantile Trust Co. *v.* Zanesville, etc , R. Co., 52 Fed. Rep. 342.

Alabama. — Francis-Chenoweth Hardware Co. *v.* Gray, 104 Ala. 236, 53 Am. St. Rep. 37.

Arkansas. — Nicklase *v.* Griffith, 59 Ark. 641, 26 S. W. Rep. 381.

California. — Lassing *v.* James, 107 Cal. 348.

Colorado. — A. Westman Mercantile Co. *v.* Park, 2 Colo. App. 545.

Delaware. — Freeman *v.* Topkis, 1 Marv. (Del.) 174.

Kentucky. — Shadoan *v.* Keeney, (Ky. 1900) 56 S. W. Rep. 506.

Louisiana. — Sloan *v.* Stevenson, 24 La. Ann. 278.

Maryland. — Dentzel *v.* City, etc., R. Co., 90 Md. 434.

Michigan. — Ferguson *v.* Arthur, 128 Mich. 297, 8 Detroit Leg. N. 658.

Minnesota. — Fredette *v.* Thomas, 57 Minn. 190.

Missouri. — Toney *v.* Goodley, 57 Mo. App. 235; Harding *v.* Manard, 55 Mo. App. 364; Harrigan *v.* Welch, 49 Mo. App. 496.

Nebraska. — Gray *v.* Peterson, (Neb. 1902) 90 N. W. Rep. 559.

New York. — Mayer *v.* Reggs, (N. Y. Super. Ct. Gen. T.) 9 Misc. (N. Y.) 352; Mackie *v.* Egan, (C. Pl. Gen. T.) 6 Misc. (N. Y.) 95.

Ohio. — Weitz *v.* Wenham, 3 Ohio Dec. 339.

Oklahoma. — Colcord *v.* Dryfus, 1 Okla. 228.

South Dakota. — Hull *v.* Caldwell, 3 S. Dak. 451.

Texas. — Embree-McLean Carriage Co. *v.* Lusk, 11 Tex. Civ. App. 493.

Washington. — Izett *v.* Stetson, etc., Mill Co., 22 Wash. 300; Seattle, etc., R. Co. *v.* Clausen-Sweeney Brewing Co., 5 Wash. 462.

West Virginia. — Huntington Bank *v.* Napier, 41 W. Va. 481.

3. Presumption that Title Passes in Advance of Delivery. — Benj. on Sales, §§ 313-317.

England. — Joyce *v.* Swann, 17 C. B. N. S. 84, 112 E. C. L. 84; Turley *v.* Bates, 2 H. & C. 200; Chambers *v.* Miller, 13 C. B. N. S. 125, 106 E. C. L. 125; Seath *v.* Moore, 11 App. Cas. 370; Sweeting *v.* Turner, L. R. 7 Q. B. 310; Chinery *v.* Viall, 5 H. & N. 288; Wood *v.* Bell, 6 El. & Bl. 355, 88 E. C. L. 355; Calcutta Co. *v.* De Mattos, 32 L. J. Q. B. 322; Gilmour *v.* Supple, 11 Moo. P. C. 551; Spartali *v.* Benecke, 10 C. B. 212, 70 E. C. L. 212; Martindale *v.* Smith, 1 Q. B. 389, 41 E. C. L. 592;

versally true where the price has been paid or the goods have been expressly sold on credit.[1] The retention of possession by the seller as security for the purchase money does not affect the presumption stated.[2] But where the sale is for cash, payment, it is said, must precede the transfer of title.[3] The

Tarling *v.* Baxter, 6 B. & C. 360, 13 E. C. L. 199; Hinde *v.* Whitehouse, 7 East 558.

United States. — Barrett *v.* Goddard, 3 Mason (U. S.) 107; Hatch *v.* Standard Oil Co, 100 U. S. 124; Sutherland *v.* Brace, (C. C. A.) 73 Fed. Rep. 624.

Alabama. — Lucas *v.* Pittman, 94 Ala. 616.

Connecticut. — Colegrove *v.* Snow, 45 Conn. 88; Chapman *v.* Shepard, 39 Conn. 413.

Illinois.—Straus *v.* Minzesheimer, 78 Ill. 492; Barrow *v.* Window, 71 Ill. 214; Shelton *v.* Franklin, 68 Ill. 333; Seckel *v.* Scott, 66 Ill. 196; Holliday *v.* Burgess, 34 Ill. 193; Peterson *v.* Bostrom, 99 Ill. App. 210.

Indiana. — Bertelson *v.* Bower, 81 Ind. 512; Henline *v.* Hall, 4 Ind. 189.

Kansas. — Moline Plow Co. *v.* Rodgers, 53 Kan. 743, 42 Am. St. Rep. 317; Shepard *v.* Lynch, 26 Kan. 377.

Kentucky. — Sweeney *v.* Owsley, 14 B. Mon. (Ky.) 332; Kenton *v.* Ratcliffe, 105 Ky. 376; Thompson *v.* Brannin, 94 Ky. 490.

Maine. — Penley *v.* Bessey, 87 Me. 530; Phillips *v.* Moore, 71 Me. 78; Webber *v.* Davis, 44 Me. 147, 69 Am. Dec 87; Chase *v.* Willard, 57 Me. 157; Merrill *v.* Parker, 24 Me. 89; Wing *v.* Clark, 24 Me. 366; Levasseur *v.* Cary, (Me. 1886) 3 Atl. Rep. 461.

Massachusetts. — Rice *v.* Codman, 1 Allen (Mass.) 377; Riddle *v.* Varnum, 20 Pick. (Mass.) 283; Dugan *v.* Nichols, 125 Mass. 43; Haskins *v.* Warren, 115 Mass. 533; Morse *v.* Sherman, 106 Mass. 430; Scudder *v.* Bradbury, 106 Mass. 427; McGlynn *v.* Mavnz, 104 Mass. 263.

Michigan. — Webster *v.* Anderson, 42 Mich. 554, 36 Am. Rep. 452.

Minnesota. — Rail *v.* Little Falls Lumber Co., 47 Minn. 422.

Missouri. — Collins *v.* Wayne Lumber Co., 128 Mo. 451; Bass *v.* Walsh, 39 Mo. 192; Hamilton *v.* Clark, 25 Mo. App. 428; Kuhler *v.* Tobin, 1 Mo. App. Rep. 416.

New Hampshire. — Felton *v.* Fuller, 29 N. H. 121.

New Jersey. — Bates *v.* Elmer Glass Mfg. Co., (N. J. 1888) 14 Atl. Rep. 273.

New York. — Dexter *v.* Norton, 55 Barb. (N. Y.) 272, 47 N. Y. 62, 7 Am. Rep. 415; Olyphant *v.* Baker, 5 Den. (N. Y.) 379; Hayden *v.* Demets, 53 N. Y. 426; Groat *v.* Gile, 51 N. Y. 431.

North Carolina. — Hurlburt *v.* Simpson, 3 Ired. L. (25 N. Car.) 233; Cohen *v.* Stewart, 98 N. Car. 97; Jenkins *v.* Jarrett, 70 N. Car. 255.

North Dakota. — Fletcher *v.* Nelson, 6 N. Dak. 94.

Ohio. — Parker *v.* Davis, 6 Ohio Cir. Dec. 684, 13 Ohio Cir. Ct. 631; Black *v.* Webb, 20 Ohio 304, 55 Am. Dec. 456.

Oregon. — Haines *v.* McKinnon, 35 Oregon 573; Wadhams *v.* Balfour, 32 Oregon 313.

Pennsylvania — Pittsburg Glass Co. *v.* Doubleday, 27 Pittsb. Leg. J. N. S. (Pa.) 94, 39 W. N. C. (Pa.) 14, 2 Pa. Super. Ct. 170.

South Carolina. — Frazer *v.* Hilliard, 2 Strobh. L. (S. Car.) 309.

Tennessee. — Miller *v.* Koger, 9 Humph. (Tenn.) 231.

Texas. — Sanger *v.* Thomasson, (Tex. Civ. App. 1898) 44 S. W. Rep. 408; Loeb *v.* Crow, 15 Tex. Civ. App. 537; Weathered *v.* Golden, (Tex. Civ. App. 1896) 34 S. W. Rep. 761; Maddox *v.* Dabney, (Tex. Civ. App. 1894) 27 S. W. Rep. 901; Hopkins *v.* Partridge, 71 Tex. 606.

Vermont. — Patton *v.* Cardiner, 72 Vt. 47; Barney *v.* Brown, 2 Vt. 374, 19 Am. Dec. 720.

Washington. — Pacific Lounge, etc., Co. *v.* Rudebeck, 15 Wash. 336.

Wisconsin. — Somers *v.* McLaughlin, 57 Wis. 358.

In Simmons *v.* Swift, 5 B. & C. 862, 12 E. C. L. 390, Bailey, J., said. "Generally, where a bargain is made for the purchase of goods and nothing is said about payment or delivery, the property passes immediately so as to cast upon the purchaser all future risk if nothing remains to be done to the goods, although he cannot take them away without paying the price." So in Dixon *v.* Yates, 5 B. & Ad. 313, 27 E. C. L. 86, Park, J., said: "I take it to be clear that by the law of *England* the sale of a specific chattel passes the property in it to the vendee without delivery. * * * Where there is a sale of goods generally no property in them passes till delivery, because until then the very goods sold are not ascertained. But where, by the contract itself, the vendor appropriates to the vendee a specific chattel and the latter thereby agrees to take that specific chattel and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the contract is equivalent to delivery by the vendor and the assent of the vendee to take this specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee."

A sold B a steer running at large, if in existence — a fact of which neither was certain, — and it was held that the property passed. Nance *v.* Metcalf, 19 Mo. App. 183.

1. Price Paid or Credit Extended. — Martindale *v.* Smith, 1 Q. B. 395, 41 E. C. L. 595; Tarling *v.* Baxter, 6 B. & C. 360, 13 E. C. L. 199; Crug *v.* Gorham, 74 Conn. 541; Syracuse Knitting Co. *v.* Blanchard, 69 N. H. 447; Upshur Guano Co. *v.* Mallory, 104 N. Car. 674; Brooks *v.* Friend Paper Co., 94 Tenn. 701. See also Scudder *v.* Bradbury, 106 Mass. 422.

2. Possession Retained as Security. — Beardsley *v.* Beardsley, 138 U. S. 262; Morse *v.* Sherman, 106 Mass. 430; Morey *v.* Medbury, 10 Hun (N. Y.) 540; Terry *v.* Wheeler, 25 N. Y. 520; Smith *v.* Lynes, 5 N. Y. 41.

3. Payment a Condition Precedent in Cash Sales. — Tiedman on Sales, § 85.

Georgia. — National Bank *v.* Augusta Cotton, etc., Co., 104 Ga. 403; Bergan *v.* Magnus, 98 Ga. 514.

better doctrine, however, appears to be that the transfer of title takes place immediately upon the conclusion of the contract, notwithstanding the fact that the transaction is for cash, the seller having a lien for the price which entitles him to retain the possession of the chattel until the price is paid, but in the meanwhile the goods are at the risk of the buyer.[1] And in those jurisdictions in which, when the sale is for cash, payment is held a condition precedent, it has been uniformly held that the seller waives the condition when he makes complete delivery without expressly reserving title to himself.[2] A conditional delivery for a special purpose does not operate as a waiver.[3] Whether this is such a delivery as to constitute a waiver is a mixed question of law and fact to be determined by the jury from the evidence and under the instructions of the court.[4] Evidence of usage or custom is admissible to

Indiana. — Rauh *v.* Waterman, (Ind. App. 1902) 63 N. E. Rep. 42.

Kansas. — Daugherty *v.* Fowler, 44 Kan. 628.

Maryland. — Powell *v.* Bradlee, 9 Gill & J. (Md.) 221; Kinnemon *v.* Miller, 2 Md. Ch. 407.

Massachusetts. — Whitney *v.* Eaton, 15 Gray (Mass.) 225. See also Reed *v.* Upton, 10 Pick. (Mass.) 522, 20 Am. Dec. 545; Ayer *v.* Bartlett, 9 Pick. (Mass.) 156; Barrett *v.* Pritchard, 2 Pick. (Mass.) 512, 13 Am. Dec. 449; Booraem *v.* Crane, 103 Mass. 522.

Minnesota. — Fishback *v.* Van Dusen, 33 Minn. 111.

Mississippi. — Hart *v.* Livermore Foundry, etc., Co., 72 Miss. 809.

Missouri. — Johnson-Brinkman Commission Co. *v.* Missouri Pac. R. Co., 72 Mo. App. 437; Strauss *v.* Hirsch, 63 Mo App. 95, 1 Mo. App. Rep. 603; Hall *v.* Missouri Pac. R. Co., 50 Mo. App. 179.

New York. — Scher *v.* Roher, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 792; Lange *v.* Pisch, (C. Pl. Gen. T.) 9 Misc. (N. Y.) 475; Hammett *v.* Linneman, 48 N. Y. 399.

Vermont. — Burditt *v.* Howe, 69 Vt. 563; Chalmers *v.* McAuley, 68 Vt. 44. See also Turner *v.* Moore, 58 Vt. 455.

Wisconsin. — McIver *v.* Williams, 83 Wis. 570.

See Joseph *v.* Cannon, 11 Tex. Civ. App. 295. See also Simpson *v.* Shackelford, 49 Ark. 63; Lentz *v.* Flint, etc., R. Co., 53 Mich. 444; Lang *v.* Rickmers, 70 Tex. 108. See also the title CONDITIONAL SALES, vol. 6, p 436.

1. Contrary View. — Joyce *v.* Swann, 17 C. B. N. S. 94, 112 E. C. L. 94; Spartali *v.* Benecke, 10 C. B. 223, 70 E. C. L. 223; Simmons *v.* Swift, 5 B. & C. 862, 12 E. C. L. 390; Rugg *v.* Minett, 11 East 210; Montgomery Furniture Co. *v.* Hardaway, 104 Ala. 100; Magee *v.* Billingsley, 3 Ala. 679; Harris *v.* Smith, 3 S. & R. (Pa.) 20; Mackaness *v.* Long, 85 Pa. St. 158; Bowen *v.* Burk, 13 Pa. St. 148.

See also Wilmshurst *v.* Bowker, 2 M. & G. 792, 40 E. C. L. 629; Farmers' Phosphate Co. *v.* Gill, 69 Md. 537, 9 Am. St. Rep. 443; Phillips *v.* Moor, 71 Me. 78; Morse *v.* Sherman, 106 Mass. 433; Brehen *v.* O'Donnell, 34 N. J. L. 408; Jenkins *v.* Jarrett, 70 N. Car. 255. *Compare* Bush *v.* Bender, 113 Pa. St. 94.

2. Waiver of Requirement of Cash Payment — *England.* — Spartali *v.* Benecke, 10 C. B. 223, 70 E C. L. 223.

Alabama. — Crawford *v.* Spraggins, 109 Ala. 353; Neal *v.* Boggan, 97 Ala. 611.

Delaware. — England *v.* Forbes, 7 Houst. (Del.) 301.

Iowa. — Briggs *v.* McEwen, 77 Iowa 303.

Maine. — Mixer *v.* Cook, 31 Me. 340.

Maryland. — Foley *v.* Mason, 6 Md. 37.

Massachusetts. — Smith *v.* Dennie, 6 Pick. (Mass.) 262, 17 Am. Dec. 368; Freeman *v.* Nichols, 116 Mass. 309; Upton *v.* Sturbridge Cotton Mills, 111 Mass. 446.

Minnesota. — Fishback *v.* Van Dusen, 33 Minn. 111. See Carter *v.* Cream of Wheat Co., 73 Minn. 315.

New York. — Pierson *v.* Hoag, 47 Barb. (N. Y.) 243; Wheeler, etc., Mfg. Co. *v.* Keeler, 65 Hun (N. Y.) 508.

Pennsylvania. — Welsh *v.* Bell, 32 Pa. St. 17; Bowen *v.* Burk, 13 Pa. St. 146.

West Virginia. — Freeport Stone Co. *v.* Carey, 42 W. Va 276.

Wisconsin. — Pitts *v.* Owen, 9 Wis. 152.

A purchaser from the buyer in such case acquires a valid title, provided he purchases *bona fide*. Michigan Cent. R. Co. *v.* Phillips, 60 Ill. 190. See generally *infra*, this title, *Bona Fide Purchasers*.

The rule of the text is not absolute, but may vary in particular cases. Thus, in a cash sale of merchandise in a city, the seller does not waive the condition precedent of payment where the goods are delivered too late on Saturday to send a bill, and payment is called for on Monday, when the purchaser has absconded. The seller in such case may reclaim the goods from a judgment creditor of the purchaser. Acker *v* Campbell, 23 Wend. (N. Y.) 372. So, where the buyer was bound to pay for each wagon load of goods as delivered, the seller does not waive his right to payment on delivery of subsequent loads by delivering several wagon loads without requiring payment for each. Gardner *v.* Clark, 21 N. Y. 399.

3. Conditional Delivery Not a Waiver. — Hudson Trust, etc., Inst. *v.* Carr-Curtan Paper Mills Co., 58 N. J. Eq. 59; Nichols Shepard Co. *v.* Paulson, 6 N. Dak. 400; McIver *v.* Williams, 83 Wis. 570.

4. Province of Court and Jury. — Wood *v.* Roach, 52 Ill App. 388; Goslen *v.* Campbell, 88 Me. 450; Rathowsky *v.* Dunn, (Supm. Ct. Tr. T.) 64 N. Y. Supp. 934.

In Smith *v.* Lynes, 5 N. Y. 41, *reversing* 2 Sandf. (N. Y.) 733, it is said that delivery in such cases without demand or receipt of payment creates a presumption of waiver or prepayment which may be rebutted by evidence

rebut the presumption of waiver.[1]

c. SALE OF SPECIFIC CHATTELS CONDITIONALLY. — The parties may insert their own conditions in the contract, such as a condition precedent, the performance of which must precede the vesting of the title, or a condition subsequent, a failure to perform which will divest the title. A common condition is that the seller shall put the property into a deliverable state, or that the buyer shall prepay the price. But even where the conditions are express it may remain a question of intention whether the title passes, and an implied waiver of the conditions may be inferred from the acts and conduct of the parties.[2]

d. SALE OF CHATTELS NOT SPECIFIC — (1) *General Rule.* — When the agreement of sale is for a thing not specified, as of an article to be manufactured or of a certain quantity of goods in general, without specific identification of them, or an "appropriation" of them to the contract, as it is technically termed, the contract is executory and the property does not pass.[3]

of the intent and conduct of the parties. And this is the view taken in Farlow *v.* Ellis, 15 Gray (Mass.) 229, (Shaw, C. J.); Parker *v.* Baxter, 86 N. Y. 586.

1. Evidence. — Farlow *v.* Ellis, 15 Gray (Mass.) 229; Scudder *v.* Bradbury, 106 Mass. 427.

But a usage of trade cannot be allowed to control the express intention of the parties, nor the interpretation and effect which result from an absolute rule of law applicable to the situation. And a usage that no title passes upon an ordinary sale and delivery without an actual payment of the price within a certain time is unreasonable and invalid. Haskins *v.* Warren, 115 Mass. 514; Foley *v.* Mason, 6 Md. 49; Stoever *v.* Whitman, 6 Binn. (Pa.) 416.

2. Conditional Sales in General — *Alabama.* — Bolling *v.* Kirby, 90 Ala. 215, 24 Am. St. Rep. 789.

Arkansas. — Edgewood Distilling Co. *v.* Shannon, 60 Ark. 133.

California. — Wise *v.* Collins, 121 Cal. 147

Colorado. — Gates Iron Works *v.* Cohen, 7 Colo. App. 341.

Illinois. — Osborne *v.* Rich, 53 Ill. App. 661.

Indiana. — Morgan *v.* East, 126 Ind. 43.

Iowa. — Davis Gasoline Engine Works Co. *v.* McHugh, 115 Iowa 415.

Kansas. — Cannon *v.* Griffith, 3 Kan. App. 506; McCormick Harvesting Mach. Co. *v.* Lewis, 52 Kan. 358.

Kentucky. — Thompson *v.* Brannin, 94 Ky. 490.

Minnesota. — Wilkinson *v.* H. C. Akeley Lumber Co., 56 Minn. 401.

Nebraska. — Charter Gas-Engine Co. *v.* Coleridge State Bank, 54 Neb. 743.

Nevada. — Yori *v.* Cohn, (Nev. 1902) 67 Pac. Rep. 212.

New York. — Shafarman *v.* Loman, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 726; Wolf *v.* Di Lorenzo, (N. Y. City Ct. Gen. T.) 21 Misc. (N. Y.) 521; Adams *v.* Roscoe Lumber Co., 2 N. Y. App. Div. 47; Shields *v.* Bush, 76 Hun (N. Y.) 220; Wheeler, etc., Mfg. Co. *v.* Keeler, 65 Hun (N. Y.) 508.

Ohio. — Bonham *v.* Hamilton, 66 Ohio St. 82.

Oklahoma. — Robinson *v.* Peru Plow, etc., Co., 1 Okla. 140.

See the title CONDITIONAL SALES, vol. 6, p. 436.

It is undoubted that the parties may stipulate that payment shall be a condition precedent to the transfer of title, and where such a stipulation exists no title vests in the buyer until he has performed the condition, although complete delivery may have been made. Whitney *v.* Eaton, 15 Gray (Mass.) 226; Tiedeman on Sales, § 85; Benj. on Sales (4th Am. ed.), §§ 388–391.

3. Appropriation Necessary to Pass Title — *England.* — Stock *v.* Inglis, 9 Q. B. D. 708; Mirabita *v.* Imperial Ottoman Bank, 3 Ex. D. 164, 31 Moak 200; Dixon *v.* Yates, 5 B. & Ad. 313, 27 E. C. L. 86; Campbell *v.* Mersey Docks, etc., Board, 14 C. B. N. S. 412, 108 E. C. L. 412; Austen *v.* Craven, 4 Taunt. 644; Shepley *v.* Davis, 5 Taunt. 617, 1 E. C. L. 211; White *v.* Wilks, 5 Taunt. 176, 1 E. C. L. 64; Gillett *v.* Hill, 2 Cromp. & M. 531; Busk *v.* Davis, 2 M. & S. 397; Gabarron *v.* Kreeft, L. R. 10 Exch. 274, 14 Moak 562; Wallace *v.* Breeds, 13 East 522.

Canada. — Lewis *v.* Barré, 14 Manitoba 32.

United States. — Guy *v.* U S., 25 Ct. Cl. 61.

Alabama. — Fry *v.* Mobile Sav. Bank, 75 Ala. 473; Mobile Sav. Bank *v.* Fry, 69 Ala. 350; Block *v.* Maas, 65 Ala. 211; Browning *v.* Hamilton, 42 Ala. 484; Screws *v.* Roach, 22 Ala. 675.

Arkansas. — Upham *v.* Dodd, 24 Ark. 545; Beller *v.* Block, 19 Ark. 566.

California. — Preston *v.* Knapp, 85 Cal. 559; Caruthers *v.* McGarvey, 41 Cal. 16; McLaughlin *v.* Piatti, 27 Cal. 451.

Georgia. — Huntington *v.* Chisholm, 61 Ga. 270; Lewis *v.* Lofley, 60 Ga. 559; Central R., etc., Co. *v.* Burr, 51 Ga. 553.

Illinois. — Dunlap *v.* Berry, 5 Ill. 327, 39 Am. Dec. 413.

Indiana. — Commercial Nat. Bank *v.* Gillette, 90 Ind. 268, 46 Am. Rep. 222; Indianapolis, etc., R. Co. *v.* Maguire, 62 Ind. 140; Murphy *v.* State, 1 Ind. 366.

Iowa. — Smyth *v.* Ward, 46 Iowa 339; Courtright *v.* Leonard, 11 Iowa 32; Rosenthal *v.* Risley, 11 Iowa 541; Cook *v.* Logan, 7 Iowa 142.

Kansas. — Howell *v.* Pugh, 27 Kan. 702; Bailey *v.* Long, 24 Kan. 90; Williams *v.* Feinman, 14 Kan. 288; Haug *v.* Gillett, 14 Kan. 140; Julius Winkelmeyer Brewing Assoc. *v.* Nipp, 6 Kan. App. 730.

Where the contract is for the sale of goods generally described and not referred to as forming part of a specified lot, there is no dispute that title does not pass until the goods have been separated or otherwise identified.[1] This is equally true when the sale is of an article to be manufactured.[2]

(2) *Part of Uniform Mass.* — Where, however, the sale is of a certain quantity of goods which constitutes a portion of a designated and uniform mass, it has been held by some authorities that no separation or appropriation is necessary in order to pass title.[3] But this view is supported neither by principle nor the weight of authority. The general rule governs this class of

Kentucky. — Ferguson *v.* Northern Bank, 14 Bush (Ky.) 555, 29 Am. Rep. 418.

Louisiana. — Warren *v.* Kirk, 24 La. Ann. 150.

Maine. — Morrison *v.* Dingley, 63 Me. 553; Stone *v.* Peacock, 35 Me. 385; Brewer *v.* Smith, 3 Me. 44, 14 Am. Dec. 213.

Maryland. — Reeder *v.* Machen, 57 Md. 56.

Massachusetts. — Ropes *v.* Lane, 9 Allen (Mass.) 510; Scudder *v.* Worster, 11 Cush. (Mass.) 573; Riddle *v.* Varnum, 20 Pick. (Mass.) 283; Merrill *v.* Hunnewell, 13 Pick. (Mass.) 213; Young *v.* Austin, 6 Pick. (Mass.) 280; New England Dressed Meat, etc., Co. *v.* Standard Worsted Co., 165 Mass. 328, 52 Am. St. Rep. 516; Foster *v.* Ropes, 111 Mass. 10; Abberger *v.* Marrin, 102 Mass. 70.

Michigan. — Joseph *v.* Braudy, 112 Mich. 579; Hahn *v.* Fredericks, 30 Mich. 223, 18 Am. Rep. 119.

Mississippi. — Williams *v.* Sayers, 79 Miss. 50; Baldwin *v.* McKay, 41 Miss. 358; Thomas *v.* State, 37 Miss. 353.

Missouri. — Ober *v.* Carson, 62 Mo. 213; Cunningham *v.* Ashbrook, 20 Mo. 553.

New Hampshire. — Hutchinson *v.* Grand Trunk R. Co., 59 N. H. 487; Jenness *v.* Wendell, 51 N. H. 63, 12 Am. Rep. 48; Ockington *v.* Richey, 41 N. H. 275; Fuller *v.* Bean, 34 N. H. 290; Davis *v.* Hill, 3 N. H. 382, 14 Am. Dec. 373; Messer *v.* Woodman, 22 N. H. 172, 53 Am. Dec. 241; Banchor *v.* Warren, 33 N. H. 183; Clough *v.* Ray, 20 N. H. 558.

New York. — Rodee *v.* Wade, 47 Barb. (N. Y.) 53; Stevens *v.* Eno, 10 Barb. (N. Y.) 95; Foot *v.* Marsh, 51 N. Y. 288, Field *v.* Moore, Hill & D. Supp. (N. Y.) 418; Outwater *v.* Dodge, 7 Cow. (N. Y.) 85; Downer *v.* Thompson, 2 Hill (N. Y.) 137; Joyce *v.* Adams, 8 N. Y. 291; Gardiner *v.* Suydam, 7 N. Y. 359; Crofoot *v.* Bennett, 2 N. Y. 258.

North Carolina. — Waldo *v.* Belcher, 11 Ired. L. (33 N. Car.) 609.

Ohio. — Ormsbee *v.* Machir, 20 Ohio St. 306; Woods *v.* McGee, 7 Ohio (pt. ii.) 127, 30 Am. Dec. 202.

Pennsylvania. — Haldeman *v.* Duncan, 51 Pa. St. 66; Hutchinson *v.* Hunter, 7 Pa. St. 140.

Tennessee. — Fitzpatrick *v.* Fain, 3 Coldw. (Tenn.) 15.

Texas. — Cleveland *v.* Williams, 29 Tex. 205, 94 Am. Dec. 274.

Washington. — Pacific Coast Elevator Co. *v.* Bravinder, 14 Wash. 315.

1. *Arkansas.* — Herron *v.* State, 51 Ark. 133.

Connecticut. — State *v.* Basserman, 54 Conn. 88.

Georgia. — Lewis *v.* Lofley, 60 Ga. 559.

Kentucky. — Stein Brewing Co. *v.* Eberhard, 62 S. W. Rep. 881, 23 Ky. L. Rep. 325; May *v.* Hoaglan, 9 Bush (Ky.) 171; Moss *v.* Meshew, 8 Bush (Ky.) 187.

Louisiana. — Warren *v.* Kirk, 24 La. Ann. 150.

Massachusetts. — Abberger *v.* Marrin, 102 Mass. 70.

Michigan. — Scotten *v.* Sutter, 37 Mich. 526.

New Hampshire. — Banchor *v.* Warren, 33 N. H. 183.

New Jersey. — Randolph Iron Co. *v.* Elliott, 34 N. J. L. 184.

New York. — Chambers *v.* Austin, 57 N. Y. App. Div. 359; Wilson *v.* Empire Dairy-Salt Co., 50 N. Y. App. Div. 114; Anderson *v.* Read, 106 N. Y. 333; Brady *v.* Cassidy, 104 N. Y. 147.

Ohio. — Ormsbee *v.* Machir, 20 Ohio St. 295; Black *v.* Webb, 20 Ohio 304, 55 Am. Dec. 456.

Oregon. — Hubler *v.* Gaston, 9 Oregon 66, 42 Am. Rep. 794.

Pennsylvania. — Eagle *v.* Eichelberger, 6 Watts (Pa.) 29, 31 Am. Dec. 449; Winslow *v.* Leonard, 24 Pa. St. 14, 62 Am. Dec. 354; McCandlish *v.* Newman, 22 Pa. St. 460.

Canada. — Pew *v.* Lawrence, 27 U. C. C. P. 402.

The plaintiff, a manufacturer of iron, contracted to sell to the defendants nine hundred tons of iron. It was held that notwithstanding the fact of payment, the contract remained executory until an appropriation of specific iron to the contract. Coplay Iron Co. *v.* Pope, 108 N. Y. 232.

Where the defendant bought from the plaintiff twenty barrels of a certain sugar, and there was at the time of making the purchase no selecting or setting apart of any specific barrels, it was held that the contract was executory. Doane *v.* Dunham, 65 Ill. 513.

2. See *infra*, this section, *Goods to Be Manufactured or Procured.*

3. **Separation or Appropriation Held Unnecessary** — *Connecticut.* — Chapman *v.* Shepard, 39 Conn. 413.

Florida. — Watts *v.* Hendry, 13 Fla. 523.

Iowa. — Welch *v.* Spies, 103 Iowa 389.

Kansas. — Kingman *v.* Holmquist, 36 Kan. 735, 59 Am. Rep. 604; Howell *v.* Pugh, 27 Kan. 702.

Minnesota. — Mackellar *v.* Pillsbury, 48 Minn. 396.

New Jersey. — Hurff *v.* Hires, 40 N. J. L. 581, 29 Am. Rep. 282.

New York. — Hoyt *v.* Hartford F. Ins. Co., 26 Hun (N. Y.) 416; Lobdell *v.* Stowell, 51 N. Y. 75; Russell *v.* Carrington, 42 N. Y. 118, 1 Am. Rep. 498; Kimberly *v.* Patchin, 19 N. Y. 330, 75 Am. Dec. 334; Crofoot *v.* Bennett, 2 N. Y. 258.

cases as well as the others, and an appropriation is necessary to cast the title

Texas. — Williams *v.* Leon, etc., Land Co., (Tex. Civ. App. 1900) 55 S. W. Rep. 374.

Virginia. — Pleasants *v.* Pendleton, 6 Rand. (Va.) 475, 18 Am. Dec. 726.

Wisconsin. — Young *v.* Miles, 23 Wis. 643; Sewell *v.* Eaton, 6 Wis. 490, 70 Am. Dec. 471.

Canada. — Coffey *v.* Quebec Bank, 20 U. C. C. P. 110.

See Jennison *v.* Thompson, 68 Minn. 333, wherein it was held to be a question for the jury to determine whether or not title had passed.

In Sanborn *v.* Benedict, 78 Ill. 309, there was a contract between a grain dealer and a farmer, made while the grain was growing in the field, whereby the farmer sold to the dealer a certain quantity of grain at an agreed price, to be delivered when called for, the purchaser to give ten days' notice of the time at which he would call. A part of the purchase money was paid at the time of the contract. It was held to be an executed and absolute sale of grain to be delivered in future, not an executory contract for a future sale.

Leading Cases. — In the leading case of Whitehouse *v.* Frost, 12 East 614, the sellers owned forty tons of oil in a cistern of which they sold ten tons, which was never measured or delivered from the larger mass. The purchaser sold his ten tons to another person and gave an order on the original sellers, which, on being presented, they accepted. It was held that the title had passed without separation, stress being laid upon the acceptance of the order by the sellers, which, it was said, placed them in the relation of bailees to the quantity sold. This case was *followed* in Jackson *v.* Anderson, 4 Taunt. 24.

In Pleasants *v.* Pendleton, 6 Rand (Va.) 473, 18 Am. Dec. 726, the defendant bought one hundred and nineteen barrels of flour out of one hundred and twenty-three, all of similar kind and marks, and in the same warehouse, and gave his check for the amount, taking a receipted bill and order on the warehouseman for their delivery. No separation or designation of any kind had been made, nor had the order on the bailee been presented, but on the next day the whole was destroyed by fire. The plaintiff recovered the price of the one hundred and nineteen barrels upon proof of a custom so to sell flour in store. The subject was elaborately examined in this leading case, and Jackson *v.* Anderson, 4 Taunt. 24, was much relied on.

A sold to B one hundred cattle of named age and part of a particular stock then running upon the range. B paid the price agreed upon, and A gave to him a delivery order upon his (A's) agent. C, with knowledge of these facts, subsequently purchased from A the balance of the particular stock. C took possession of the entire stock, admitting B's right of property in one hundred of the cattle. It was held, *citing* with approval Kimberly *v.* Patchin, 19 N. Y. 330, 75 Am. Dec. 334, and Pleasants *v.* Pendleton, 6 Rand. (Va.) 473, 18 Am. Dec. 726, that title passed without any separation or identification. Watts *v.* Hendry, 13 Fla. 523. But *compare* Stafford *v.* Anders, 8 Fla. 34.

In Kimberly *v.* Patchin, 19 N. Y. 330, 75 Am. Dec. 334, the leading American case on the subject, there was a sale of a small quantity of grain mingled with a larger mass. The court, after a long review of the authorities, held that the title might pass without the actual separation of the quantity sold from the mass with which it was mixed if the facts and declarations of the parties fairly evinced an intention to make an immediate transfer. But see Gardiner *v.* Suydam, 7 N. Y. 359, where it was held that the receipt of a warehouseman for a quantity of flour in store does not pass title to the flour unless the flour is actually separated from the mass by delivery, or is identified by some special mark or designation which would amount to a constructive delivery. See also Field *v.* Moore, Hill & D. Supp. (N. Y.) 418; Stevens *v.* Eno, 10 Barb. (N. Y.) 95.

In Merchants', etc., Bank *v.* Hibbard, 48 Mich. 118, 42 Am. Rep. 465, the court, by Cooley, J., after citing and reviewing a number of cases, said: "To the elaborate argument made for the defense to show that there can be neither a sale nor a pledge of property without in some manner specially distinguishing it, we fully assent, and we have no purpose to qualify or weaken the authority of Anderson *v.* Brenneman, 44 Mich. 198." This language was *quoted* with approval in Commercial Nat. Bank *v.* Gillette, 90 Ind. 269, 46 Am. Rep. 222, where the court remarked also that the civil-law rule is the same as that of the common law, and that our great American jurists have given to it unhesitating approval, *citing* 2 Kent's Com. (13th ed.) 639; Story on Sales (4th ed.), § 296. See also Pfistner *v.* Bird, 43 Mich. 14 (sale of all the trees on certain land that buyer may choose to cut); Hahn *v.* Fredericks, 30 Mich. 223, 18 Am. Rep. 119. But see Carpenter *v.* Graham, 42 Mich. 191. And in Wagar *v.* Detroit, etc., R. Co., 79 Mich. 648, the court, *citing* Carpenter *v.* Graham, 42 Mich. 191, with approval, distinctly held that no separation from a uniform mass is necessary to pass title.

In Kingman *v.* Holmquist, 36 Kan. 735, 59 Am. Rep. 604, it was held that where a certain number of articles is sold from an ascertained lot which are identical in kind and value, a selection is unnecessary and a separation is not essential to transfer title to the purchaser. *Compare* Bailey *v.* Long, 24 Kan. 90, where it was held that the sale of five hundred bushels of corn to be gathered from a field of sixty acres did not pass the title to the corn until there had been a separation. Williams *v.* Feiniman, 14 Kan. 288.

The Mass Must Be Uniform. — The courts hold, in those jurisdictions where the doctrine of the text prevails, that the subject of the sale must be of uniform quality and value with the mass of which it is a part before the rule applies. In Chapman *v.* Shepard, 39 Conn. 421, it was said: "If the articles differ from each other in quantity, or quality, or value, the necessity of a selection is clearly implied. In all such cases the subject-matter of the contract cannot be identified until severance, and the severance is necessary in order

upon the purchaser.[1] A seeming exception to the rule exists in cases where the grain of various parties is mixed together in a public warehouse. Here the parties are tenants in common of the whole mass, and each one may transfer his right and title to his portion without separating it from the com-

that the subject-matter of the contract may be made certain and definite. But where the subject-matter of the sale is part of an ascertained mass of uniform quality and value, no selection is required, and in this class of cases it is affirmed by authorities of the highest character that severance is not, as matter of law, necessary in order to vest the legal title in the vendee to the part sold."

In Kimberly *v.* Patchin, 19 N. Y. 330, 75 Am. Dec. 334, it was said: "It is a rule asserted in many legal authorities, but which may be quite as fitly called a rule of reason and logic as of law, that in order to an executed sale, so as to transfer a title from one party to another, the thing sold must be ascertained. This is a self-evident truth, when applied to those subjects of property which are distinguishable by their physical attributes from all other things, and, therefore, are capable of exact identification. * * * But property can be acquired and held in many things which are incapable of such an identification. Articles of this kind are sold, not by a description which refers to and distinguishes the particular thing, but in quantities, which are ascertained by weight, measure, or count, the constituent parts which make up the mass being undistinguishable from each other by any physical difference in size, shape, texture, or quality. Of this nature are wine, oil, wheat, and the other cereal grains and the flour manufactured from them." See also Galloway *v.* Week, 54 Wis. 604; Hoffman *v.* King, 58 Wis. 314; Newhall *v.* Langdon, 39 Ohio St. 87, 48 Am. Rep. 426; Kingman *v.* Holmquist, 36 Kan. 735, 59 Am. Rep. 604.

1. Separation or Appropriation Held Necessary — *England.* — Campbell *v.* Mersey Docks, etc., Board, 14 C. B. N. S. 412, 108 E. C. L. 412; Aldridge *v.* Johnson, 7 El. & Bl. 885, 90 E. C. L 885; Stock *v.* Inglis, 9 Q. B. D. 708; Gillett *v.* Hill, 2 Cromp. & M. 530.

Alabama. — Warten *v.* Strane, 82 Ala. 311; Fry *v.* Mobile Sav. Bank, 75 Ala. 473; Mobile Sav. Bank *v.* Fry, 69 Ala. 350; Block *v.* Maas, 65 Ala. 211; Browning *v.* Hamilton, 42 Ala. 484; Gresham *v.* Bryan, 103 Ala. 629.

Arkansas. — Upham *v.* Dodd, 24 Ark. 545; Beller *v.* Block, 19 Ark. 567.

California. — Blackwood *v.* Cutting Packing Co., 76 Cal. 212, 9 Am. St. Rep. 199; Callender *v.* McLeod, 74 Cal. 376; Caruthers *v.* McGarvey, 41 Cal. 15; McLaughlin *v.* Piatti, 27 Cal. 451. See also Greenbaum *v.* Martinez, 86 Cal. 459. *Compare* Ghirardelli *v.* McDermott, 22 Cal. 539; Horr *v.* Barker, 11 Cal. 403.

Georgia. — Love *v.* State, 78 Ga. 66, 6 Am. St. Rep. 234; Huntington *v.* Chisholm, 61 Ga. 270; Central R., etc., Co. *v.* Burr, 51 Ga. 553.

Illinois. — Morrison *v.* Woodley, 84 Ill. 192; Dunlap *v.* Berry, 5 Ill. 327, 39 Am. Dec. 413; Conboy *v.* Petty, 60 Ill. App. 117; Wood *v.* Roach, 52 Ill. App. 388.

Indiana. — Lester *v.* East, 49 Ind. 594; Bricker *v.* Hughes, 4 Ind. 146; Murphy *v.* State, 1 Ind. 366; Commercial Nat. Bank *v.* Gillette, 90 Ind. 268, 46 Am. Rep. 222.

Iowa. — Harwick *v.* Weddington, 73 Iowa 300; Davis *v.* Budd, 60 Iowa 144; Rosenthal *v.* Risley, 11 Iowa 541; Courtright *v.* Leonard, 11 Iowa 32; Cook *v.* Logan, 7 Iowa 142.

Kansas. — Bailey *v.* Long, 24 Kan. 90.

Kentucky. — Ferguson *v.* Northern Bank, 14 Bush (Ky.) 555, 29 Am. Rep. 418, May *v.* Hoaglan, 9 Bush (Ky.) 171.

Maine. — Morrison *v.* Dingley, 63 Me. 553; Brewer *v.* Smith, 3 Me. 44, 14 Am. Dec. 213. But see Waldron *v.* Chase, 37 Me. 415, 59 Am. Dec. 56.

Maryland. — Reeder *v.* Machen, 57 Md. 56.

Massachusetts. — Ropes *v.* Lane, 9 Allen (Mass.) 502; Scudder *v.* Worster, 11 Cush. (Mass.) 573; Merrill *v.* Hunnewell, 13 Pick. (Mass.) 213; Young *v.* Austin, 6 Pick. (Mass.) 280; New England Dressed Meat, etc., Co. *v.* Standard Worsted Co., 165 Mass. 328, 52 Am. St. Rep. 516; Keller *v.* Goodwin, 111 Mass. 490. *Compare* Damon *v.* Osborn, 1 Pick. (Mass.) 476, 11 Am. Dec. 229.

Mississippi. — Baldwin *v.* McKay, 41 Miss. 358; Thomas *v.* State, 37 Miss. 353.

Missouri. — Ober *v.* Carson, 62 Mo. 213; Adam Roth Grocer Co. *v.* Lewis, 69 Mo. App. 446; England *v.* Mortland, 3 Mo. App. 490. See Cunningham *v.* Ashbrook, 20 Mo. 553; England *v.* Cortland, 9 Mo. App. 578. But see Hamilton *v.* Clark, 25 Mo. App. 428.

New Hampshire. — Jeraulds *v.* Brown, 64 N. H. 606; Hutchinson *v.* Grand Trunk R. Co., 59 N. H. 487; Bailey *v.* Smith, 43 N. H. 141; Fuller *v.* Bean, 34 N. H. 290; Banchor *v.* Warren, 33 N. H. 183; Ockington *v.* Richey, 41 N. H. 275; Warren *v.* Buckminster, 24 N. H. 347.

New Jersey. — Randolph Iron Co. *v.* Elliott, 34 N. J. L. 184.

New York. — Lighthouse *v.* Buffalo Third Nat. Bank, 162 N. Y. 336; Cooke *v.* Millard, 65 N. Y. 352, 22 Am. Rep. 619, *affirming* 5 Lans. (N. Y.) 243.

North Carolina. — Waldo *v.* Belcher, 11 Ired. L. (33 N. Car.) 609; Dunkart *v.* Rinehart, 89 N. Car. 357; Austin *v.* Dawson, 75 N Car. 523; Blakely *v.* Patrick, 67 N. Car. 40, 12 Am. Rep. 600.

Ohio. — Woods *v.* McGee, 7 Ohio (pt. ii.) 127, 30 Am. Dec. 202. *Compare* Newhall *v.* Langdon, 39 Ohio St. 87, 48 Am. Rep. 426.

Oregon. — Benson *v.* Keller, 37 Oregon 120.

Pennsylvania. — Haldeman *v.* Duncan, 51 Pa. St. 66; Pennsylvania R. Co. *v.* Hughes, 39 Pa. St. 521; Winslow *v.* Leonard, 24 Pa. St. 14, 62 Am. Dec. 354; Golder *v.* Ogden, 15 Pa. St. 528, 53 Am. Dec. 618; Hutchinson *v.* Hunter, 7 Pa. St. 140.

Tennessee. — Fitzpatrick *v.* Fain, 3 Coldw. (Tenn.) 15.

Texas. — Goldberg *v.* Bussey, (Tex. Civ. App. 1898) 47 S. W. Rep. 49; Cleveland *v.* Williams, 29 Tex. 204, 94 Am. Dec. 274.

Washington. — Anderson *v.* Crisp, 5 Wash. 178.

mon mass by merely giving a delivery order.[1] Where the portion of the mass or lot which is the subject of the contract is designated in such a manner as to make it easily distinguishable from that with which it is mixed, no other separation or appropriation is necessary to render the contract complete and to pass the title.[2] The delivery of the whole to the purchaser, for the purpose of enabling him to separate the part sold, has been held to pass title to that part before such separation has been made.[3]

(3) *Subsequent Appropriation.* — After an executory contract has been made, it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or, in legal phrase, by the appropriation of specific goods to the contract. The sole element deficient in a perfect sale is thus supplied. The contract has been made in two successive stages instead of being completed at one time, but is none the less one contract, viz., a bargain and sale of goods. The selection of the goods by the one party and the adoption of that act by the other converts that which was before a mere agreement to sell into an actual sale, and the property thereby passes.[4] This doctrine presents no difficulty where both parties have subsequently assented to the appropriation of some specific goods to fulfil an agreement which in itself does not designate the goods. The effect is then the same as if the parties had, from the first, agreed upon a sale of those specific goods.[5] But the express or implied assent of both parties to the

1. Grain in Warehouse. — Broadwell *v.* Howard, 77 Ill. 305; Warren *v.* Milliken, 57 Me. 97; Cushing *v.* Breed, 14 Allen (Mass.) 380, 92 Am. Dec. 777. See also Farnum *v.* Pitcher, 151 Mass. 475; Russell *v.* Carrington, 42 N. Y. 118, 1 Am. Rep. 498. But see Ferguson *v.* Northern Bank, 14 Bush (Ky.) 555, 29 Am. Rep. 418; Ropes *v.* Lane, 9 Allen (Mass.) 502; Keeler *v.* Goodwin, 111 Mass. 490; Joyce *v.* Adams, 8 N. Y. 291; Gardiner *v.* Suydam, 7 N. Y. 359; Pacific Coast Elevator Co. *v.* Bravinder 14 Wash. 315.

In *Massachusetts* a statute provides that the warehouseman's receipt for any portion of grain or other property stored in a public warehouse in such a manner that different lots or parcels are mixed together so that the identity of the same cannot be preserved shall be deemed a valid title to so much thereof as is designated in said receipt, without regard to any separation or identification. Rev. Laws Mass. (1902), c. 69, § 6. And see upon this subject the title WAREHOUSES AND WAREHOUSEMEN.

Oil in Pipes. — Hutchison *v.* Com., 82 Pa. St. 472.

2. Sufficiency of Appropriation.— Tift *v.* Wight, etc., Co. 113 Ga. 681; Ropes *v.* Lane, 9 Allen (Mass.) 510; Scudder *v.* Worster, 11 Cush. (Mass.) 573; Webster *v.* Anderson, 42 Mich. 554, 36 Am. Rep. 452; Colwell *v.* Keystone Iron Co., 36 Mich. 51; Hamilton *v.* Clark, 25 Mo. App. 428; Sanger *v.* Waterbury, 116 N. Y. 371; Groat *v.* Gile, 51 N. Y. 431; Commercial Nat. Bank *v.* Davidson, 18 Oregon 57; Robertson *v.* Hunt, 77 Tex. 321; Griswold *v.* Scott, 66 Vt. 550; Barney *v.* Brown, 2 Vt. 374, 19 Am. Dec. 720. *Compare* Miller Grate Co. *v.* Hay, 54 Ill. App. 567; Binghamton First Nat. Bank *v.* Peck, 61 N. Y. App. Div. 258.

Thus in Newcomb *v.* Cabell, 10 Bush (Ky.) 460, where a distiller sold whiskey stored in his warehouse in barrels branded with numbers, and delivered to the purchaser a certificate signed by himself as proprietor of the warehouse, in which the barrels were designated by numbers, it was held that the whiskey was sufficiently identified.

3. Weld *v.* Cutler, 2 Gray (Mass.) 195; Iron Cliffs Co. *v.* Buhl, 42 Mich. 86; Lamprey *v.* Sargent, 58 N. H. 241; Page *v.* Carpenter, 10 N. H. 77. See also Brewer *v.* Salisbury, 9 Barb. (N. Y.) 511; Crofoot *v.* Bennett, 2 N. Y. 258.

4. Subsequent Appropriation Passes Title. — Benj. on Sales (6th ed.), § 358.

England. — Rhode *v.* Thwaites, 6 B. & C. 388, 13 E. C. L. 206.

Canada. — Wilson *v.* Shaver, 1 Ont. L. Rep. 107.

Colorado. — Colorado Springs Live Stock Co. *v.* Godding, 20 Colo. 249.

Massachusetts. — Claflin *v.* Boston, etc., R. Co., 7 Allen (Mass.) 341; Rice *v.* Codman, 1 Allen (Mass.) 377; Mitchell *v.* Le Clair, 165 Mass. 308; Merchants' Nat. Bank *v.* Bangs, 102 Mass. 295.

Michigan. — People *v.* Sheehan, 118 Mich. 539; Nash *v.* Rockford Veneer Co., 109 Mich. 269.

Minnesota. — Fishback *v.* Van Dusen, 33 Minn. 122.

New Jersey. — Thompson *v.* Conover, 32 N. J. L. 466

New York. — Hyde *v.* Lathrop, 2 Abb. App. Dec. (N. Y.) 436.

Texas. — International, etc., R. Co. *v.* Ogburn, (Tex. Civ. App. 1901) 63 S. W. Rep. 1072.

5. Agreement upon Appropriation. — Blackb. on Sales (Text-book Series) 129; Wilkins *v.* Bromhead, 6 M. & G. 963, 46 E. C. L. 963; Alexander *v.* Gardner, 1 Bing. N. Cas. 671, 27 E. C. L. 538; Rhode *v.* Thwaites, 6 B. & C. 388, 13 E. C. L. 206. Sparkes *v.* Marshall, 2 Bing. N. Cas. 761, 29 E. C. L. 480; Dowell *v.* Taylor, 2 Mo. App. 329; Wooster *v.* Sherwood, 25 N. Y. 278; Johnson *v.* Hays, 5 Ohio St. 102; Thayer *v.* Davis, 75 Wis. 205.

subsequent appropriation is essential.[1] The only difficulty that can arise on this question is in cases where the seller only, under the implied or express authority of the purchaser, has made the subsequent appropriation. When, from the nature of an agreement, an election is to be made, the party who is by the agreement to do the first act, which from its nature cannot be done till the election is determined, has authority to make the choice in order that he may be able to do that first act, and when once he has done that act the election has been irrevocably determined, but till then he may change his mind.[2] It follows from this that where, from the terms of an executory agreement to sell unspecified goods, the seller is to dispatch the goods or to do anything to them that cannot be done until the goods are appropriated, he has the right to choose what the goods shall be and the property is transferred the moment the dispatch or other act has commenced, for then an appropriation is made finally and conclusively by the authority conferred in the agreement.[3] Thus, where a seller delivers goods to a carrier by order of the purchaser, the appropriation is determined. The delivery to the carrier is a delivery to the purchaser and the property vests immediately.[4] To con-

1. Assent to Appropriation Necessary. — Bryans *v.* Nix, 4 M. & W. 775; Jenner *v.* Smith, L. R. 4 C. P. 270; Aldridge *v.* Johnson, 7 El. & Bl. 885, 90 E. C. L. 885; Atkinson *v.* Bell, 8 B. & C. 277, 15 E. C. L. 216; Gowans *v.* Consolidated Bank, 43 U. C. Q. B. 318; Moody *v.* Brown, 34 Me. 107, 56 Am. Dec. 640; Hague *v.* Porter, 3 Hill (N. Y.) 141; Rider *v.* Kelley, 32 Vt. 268, 76 Am. Dec. 176.

In Campbell *v.* Mersey Docks, etc., Board, 14 C. B. N. S. 414, 108 E. C. L. 414, Erle, C. J., said: "It has been established by a long series of cases, of which it will be enough to refer to Hanson *v.* Meyer, 6 East 614; Rugg *v.* Minett, 11 East 210; and Rhode *v.* Thwaites, 6 B & C. 388, 13 E. C. L. 206, that the purchaser of an unascertained portion of a larger bulk acquires no property in any part until there has been a separation and an appropriation assented to by both vendor and vendee. Nothing passes until there is an assent, express or implied, on the part of the vendee. The warehouseman may, in some cases, be the agent of the vendee for the purpose of such assent; but nothing passes until there has been a separation and an appropriation assented to."

But as will be seen from the succeeding paragraph of the text, a subsequent assent by the buyer to an appropriation made by the seller is not necessary. This assent is implied where by the terms of the contract the seller is vested with an implied authority to select the goods, and has determined an election by doing some act which the contract obliged him to do, and which he could not do until an appropriation was made. Benj. on Sales (6th ed.), § 371.

2. Appropriation by Seller Alone. — Benj. on Sales (6th ed.), § 359; Blackburn on Sales (Text-book Series), 130; Heyward's Case, 2 Coke 36; Comyns's Dig., tit. Election; Martz *v.* Putnam, 117 Ind. 392; Osborne *v.* Van Alten, 3 Wash. Ter. 53.

3. Benj. on Sales (6th ed.), § 359; Blackburn on Sales (Text-book Series), 130; Schouler's P. P. 265; Comyns's Dig., tit. Election.

England. — Heyward's Case, 2 Coke 36; Langton *v.* Higgins, 4 H. & N. 402; Fragano *v.* Long, 4 B. & C. 219, 10 E. C. L. 313; Bryans *v.* Nix, 4 M. & W. 775; Calcutta Co. *v.* De Mattos, 32 L. J. Q. B. 322, 33 L. J. Q. B. 214; Browne *v.* Hare, 3 H. & N. 484; Tregelles *v.* Sewell, 7 H. & N. 574; Aldridge *v.* Johnson, 7 El. & Bl. 885, 90 E. C. L. 885. See also Bryans *v.* Nix, 4 M. & W. 775.

Indiana. — Martz *v.* Putnam, 117 Ind. 400.

Kentucky. — Hagins *v.* Combs, 102 Ky. 165.

Massachusetts. — Wigton *v.* Bowley, 130 Mass. 252; Merchants' Nat. Bank *v.* Bangs, 102 Mass. 295; Fisher *v.* Tifft, 127 Mass. 313.

Michigan. — Brewer *v.* Michigan Salt Assoc., 47 Mich. 526.

New York. — Hyde *v.* Lathrop, 2 Abb. App. Dec. (N. Y.) 436.

Pennsylvania. — Sneathen *v.* Grubbs, 88 Pa. St. 147. See also Rochester, etc., Oil Co. *v.* Hugbey, 56 Pa. St. 322.

In Lynch *v.* O'Donnell, 127 Mass. 311, where the agreement was that the sale was to be at the seller's shop and the goods were to be delivered by the seller at the depot, it was held that upon the seller's putting up the goods, marking them with the purchaser's name, labelling them, placing them to one side with the bill of lading attached with intent to pass title, and delivering them to a teamster to take to the depot, the sale was complete and executed.

Where the contract was for the purchase of all the lumber of certain specified qualities which the seller should make at a certain place during the season, it was held that as fast as the different qualities were ascertained and set apart, they were identified as the lumber agreed to be sold and that title to them passed. Hart *v.* Summers, 38 Mich. 399; Whitcomb *v.* Whitney, 24 Mich. 486.

4. Delivery to Carrier — *England.* — Johnson *v.* Lancashire, etc., R. Co., 3 C. P. D. 499; London, etc., R. Co. *v.* Bartlett, 7 H. & N. 400; Dawes *v.* Peck, 8 T. R. 330; Wait *v.* Baker, 2 Exch. 1; Wise *v.* McMahon, Long. & T. 192; Cork Distilleries Co. *v.* Great Southern, etc., R. Co., L. R. 7 H. L. 269, 10 Moak 25; King *v.* Meredith, 2 Campb. 639; Dutton *v.* Solomonson, 3 B. & P. 582; Meredith *v.* Meigh, 2 El. & Bl. 364, 75 E. C. L. 364; Fragano *v.* Long, 4 B. & C. 219, 10 E. C. L. 313; Bull *v.* Robison, 10 Exch. 342; Brown *v.*

stitute a delivery to a common carrier in this connection the carrier must have accepted the goods in his capacity as carrier, and assumed exclusive custody and control over them, and the consignor must at the same time have parted with and entirely surrendered his possession and control over the goods.[1]

Hodgson, 2 Campb. 36. *Compare* Coates *v.* Chaplin, 2 Gale & D. 552, 6 Jur. 1123.

United States. — Pullman's Palace Car Co. *v.* Metropolitan St. R. Co., 157 U. S. 94.

Alabama. — Foley *v.* Felrath, 98 Ala. 176, 39 Am. St. Rep. 39; Robinson *v.* Pogue, 86 Ala. 261; Bradford *v.* Marbury, 12 Ala. 520, 46 Am. Dec. 264; Hill *v.* Gayle, 1 Ala. 275; Smith *v.* Barker, 102 Ala. 679.

Arkansas. — Hope Lumber Co. *v.* Foster, etc., Hardware Co., 53 Ark. 196; Burton *v.* Baird, 44 Ark. 556; State *v.* Carl, 43 Ark. 353, 51 Am. Rep. 565.

California. — Gates *v.* Carquinez Packing Co., 78 Cal. 439. *Compare* Perkins *v.* Eckert, 55 Cal. 405.

Colorado. — Hanauer *v.* Bartels, 2 Colo. 514.

Connecticut. — Hall *v.* Gaylor, 37 Conn. 550; Whiting *v.* Farrand, 1 Conn. 60. *Compare* Woodruff *v.* Noyes, 15 Conn. 335.

Georgia. — Dunn *v.* State, 82 Ga. 27; Mann *v.* Glauber, 96 Ga. 795. *Compare* Loyd *v.* Wight, 20 Ga. 574, 65 Am. Dec. 636.

Illinois. — Ellis *v.* Roche, 73 Ill. 280; Stafford *v.* Walter, 67 Ill. 83; Diversy *v.* Kellogg, 44 Ill. 114, 92 Am. Dec. 154; Bliss *v.* Geer, 7 Ill. App. 612.

Indiana. — Rechtin *v.* McGary, 117 Ind. 132; Keiwert *v.* Meyer, 62 Ind. 587, 30 Am. Rep. 206.

Iowa. — Wind *v.* Iler, 93 Iowa 316; Leggett etc., Tobacco Co. *v.* Collier, 89 Iowa 144. *Compare* Garretson *v.* Selby, 37 Iowa 529, 18 Am. Rep. 14.

Kansas. — Julius Winkelmeyer Brewing Assoc. *v.* Nipp, 6 Kan. App. 735.

Maine. — Torrey *v.* Corliss, 33 Me. 333; Wing *v.* Clark, 24 Me. 366; Barry *v.* Palmer, 19 Me. 303; State *v.* Peters, 91 Me. 31.

Maryland. — Magruder *v.* Gage, 33 Md. 344, 3 Am. Rep. 177; Campbell *v.* Ehlen, 76 Md. 93.

Massachusetts. — Hunter *v.* Wright, 12 Allen (Mass.) 548; Claflin *v.* Boston, etc., R. Co., 7 Allen (Mass.) 341; Putnam *v.* Tillotson, 13 Met. (Mass.) 517; Stanton *v.* Eager, 16 Pick. (Mass.) 467; Wigton *v.* Bowley, 130 Mass. 252; Odell *v.* Boston, etc., R. Co., 109 Mass. 50; Foster *v.* Rockwell, 104 Mass. 167; Kline *v.* Baker, 99 Mass. 253. *Compare* Finn *v.* Clark, 12 Allen (Mass.) 522.

Michigan. — Kuppenheimer *v.* Wertheimer, 107 Mich. 77, 61 Am. St. Rep. 317.

Mississippi. — Greenville First Nat. Bank *v.* Cook Carriage Co., 70 Miss. 587.

Missouri. — Meyer Bros. Drug Co. *v.* McMahon, 50 Mo. App. 18; Hening *v.* Powell, 33 Mo. 468; Scharff *v.* Meyer, 133 Mo. 428, 54 Am. St. Rep. 672; Armentrout *v.* St. Louis, etc., R. Co., 1 Mo. App. 158.

Nebraska. — Neimeyer Lumber Co. *v.* Burlington, etc., R. Co., 54 Neb. 321.

New Hampshire. — Arnold *v.* Prout, 51 N. H. 587; Garland *v.* Lane, 46 N. H. 248; Smith *v.* Smith, 27 N. H. 252; Woolsey *v.* Bailey, 27 N. H. 217.

New Jersey. — Kelsea *v.* Ramsey, etc., Mfg. Co., 55 N. J. L. 320.

New York. — Smith *v.* Edwards, 29 Hun (N. Y.) 493; Downer *v.* Thompson, 2 Hill (N. Y.) 137, 6 Hill (N. Y.) 378; Mee *v.* McNider, 109 N. Y. 500; Wilcox Silver Plate Co. *v.* Green, 72 N. Y. 17; Bailey *v.* Hudson River R. Co., 49 N. Y. 70; Krulder *v.* Ellison, 47 N. Y. 37, 7 Am. Rep. 402; Waldron *v.* Romanie, 22 N. Y. 368; Gutwillig *v.* Zuberbier, 41 Hun (N. Y.) 361. *Compare* Taplin *v.* Packard, 8 Barb. (N. Y.) 220.

North Carolina. — Ober *v.* Smith, 78 N. Car. 313.

Ohio. — Straus *v.* Wessel, 30 Ohio St. 211.

Oregon. — Allen *v.* Agee, 15 Oregon 551, 3 Am. St. Rep. 206.

Pennsylvania. — Summeril *v.* Elder, 1 Binn. (Pa.) 106; Griffith *v.* Ingledew, 6 S. & R. (Pa.) 429, 9 Am. Dec. 444; Bacharach *v.* Chester Freight Line, 133 Pa. St. 414; Garbracht *v.* Com., 96 Pa. St. 449, 42 Am. Rep. 550; Philadelphia, etc., R. Co. *v.* Wireman, 88 Pa. St. 264; Schmertz *v.* Dwyer, 53 Pa. St. 335.

Rhode Island. — Hobart *v.* Littlefield, 13 R. I. 341.

Texas. — Gulf, etc., R. Co. *v.* Browne, (Tex. Civ. App. 1902) 66 S. W. Rep. 341; De Stefano *v.* Todaro, (Tex. Civ. App. 1895) 33 S. W. Rep. 390.

Vermont. — Strong *v.* Dodds, 47 Vt. 348; Birge *v.* Edgerton, 28 Vt. 291.

Washington. — Whitman Agricultural Co. *v.* Strand, 8 Wash. 647.

West Virginia. — Bloyd *v.* Pollock, 27 W. Va. 129; State *v.* Hughes, 22 W. Va. 743.

Wisconsin. — Swanke *v.* McCarty, 81 Wis. 109; Sarbecker *v.* State, 65 Wis. 171, 56 Am. Rep. 624; Congar *v.* Galena, etc., R. Co., 17 Wis. 477; Ranney *v.* Higby, 5 Wis. 62 (manner of shipment chosen by vendee).

See also *infra*, this title, *Delivery of Goods*.

The delivery to the carrier must be by the express or implied order of the purchaser. Cobb *v.* Arundell, 26 Wis. 553; Everett *v.* Parks, 62 Barb. (N. Y.) 9; Hague *v.* Porter, 3 Hill (N. Y.) 141; Loyd *v.* Wight, 20 Ga. 574, 65 Am. Dec. 636; Hanauer *v.* Bartels, 2 Colo. 514. See also *infra*, *Delivery of Goods*.

But where the purchaser has not designated a special carrier, the delivery to a common carrier in the usual and ordinary course of business transfers the property to the purchaser. Dutton *v.* Solomonson, 3 B. & P. 582; Magruder *v.* Gage, 33 Md. 344, 3 Am. Rep. 177; Krulder *v.* Ellison, 47 N. Y. 36, 7 Am. Rep. 402; Watkins *v.* Paine, 57 Ga. 50.

It will be borne in mind that the buyer's title, however, does not become absolute until his receipt of the goods. During the course of transportation the title is so far his as to impose upon him all risk, and is valid as against all except the seller himself, who still retains the right of stoppage *in transitu*. See Lentz *v.* Flint, etc., R. Co., 53 Mich. 444; Armentrout *v.* St. Louis, etc., R. Co., 1 Mo. App. 158. See also the title STOPPAGE IN TRANSITU.

1. Sufficiency of Delivery to Carrier. — O'Ban-

The fact that the goods are to be paid for in cash or by note on arrival does not prevent the title from passing.[1] But where delivery is made conditional upon payment of price, title does not pass until that time.[2] The effect of any consignment is generally to vest the title in the consignee and impose the risk upon him;[3] though this is true only when the consignment is made in execution of a contract previously entered into between the parties.[4] The same rule applies where the delivery is made to a warehouseman with the express or implied agreement that he shall hold as bailee for the buyer.[5] These rules, however, may be varied by express provision of the contract or by the relation of the parties.[6] But however clearly the seller may have expressed an intention to choose particular goods, and however expensive may have been his preparations for performing the agreement with those particular goods, until the act of dispatch or other act is actually commenced the appropriation is not final, for it is not made by the authority of the other party nor binding on him.[7] The appropriation may be conditional, and the

non *v.* Southern Express Co., 51 Ala. 481; Reed *v.* Philadelphia, etc., R. Co., 3 Houst. (Del.) 176; Wenger *v.* Barnhart, 55 Pa. St. 300. See also generally the title CARRIERS OF GOODS, vol. 5, p. 154.

1. Payment to Be Made on Arrival. — Farmers' Phosphate Co. *v.* Gill, 69 Md. 545, 9 Am. St. Rep. 443. See also Alexander *v.* Gardner, 1 Bing. N. Cas. 671, 27 E. C. L. 538; Fragano *v.* Long, 4 B. & C. 219, 10 E. C. L. 313; Dutton *v.* Solomonson, 3 B. & P. 584; Appleman *v.* Michael, 43 Md. 281; Magruder *v.* Gage, 33 Md. 344, 3 Am. Rep. 177; Mee *v.* McNider, 109 N. Y. 500.

2. Delivery by Carrier to Purchaser Conditional upon Payment. — Merchants' Exch. Bank *v.* McGraw, 59 Fed. Rep. 972, 15 U. S. App. 332; Ramish *v.* Kirschbraun, 107 Cal. 659; Baker *v.* Chicago, etc., R. Co., 98 Iowa 438; Kentucky Refining Co. *v.* Globe Refining Co., 104 Ky. 559; Hopkins *v.* Cowen, 90 Md. 152; Willman Mercantile Co. *v.* Fussy, 15 Mont. 511, 48 Am. St. Rep. 698; Sims *v.* Norfolk, etc., R. Co., 130 N. Car. 556; Bellefontaine *v.* Vassaux, 55 Ohio St. 323.

3. Consignment Generally — *England.* — Fragano *v.* Long, 4 B. & C. 219, 10 E. C. L. 313; Dawes *v.* Peck, 8 T. R. 330.

United States.—Nesmith *v.* Dyeing, etc., Co., 1 Curt. (U. S.) 130; Lawrence *v.* Minturn, 17 How. (U. S.) 100; Grove *v.* Brien, 8 How. (U. S.) 429; The Mary and Susan, 1 Wheat. (U. S.) 25; Halliday *v.* Hamilton, 11 Wall. (U. S.) 560; Blum *v.* The Caddo, 1 Woods (U. S.) 64.

Alabama. — Jones *v.* Sims, 6 Port. (Ala.) 138.

Indiana. — Madison, etc., R. Co. *v.* Whitesel, 11 Ind. 55.

Massachusetts. — Claflin *v.* Boston, etc., R. Co., 7 Allen (Mass.) 341; Stanton *v.* Eager, 16 Pick. (Mass.) 467; Prince *v.* Boston, etc., R. Co., 101 Mass. 542, 100 Am. Dec. 129. *Compare* Merchants' Nat. Bank *v.* Bangs, 102 Mass. 291.

Minnesota. — Litchfield Bank *v.* Elliott, 83 Minn. 469.

New York. — Grosvenor *v.* Phillips, 2 Hill (N. Y.) 147.

Ohio. — Newhall *v.* Langdon, 39 Ohio St. 87, 48 Am. Rep. 426.

But see Prendergast *v.* Williamson, 6 Tex. Civ. App. 725.

4. Previous Contract Between Parties — *United States.* — The Frances, 8 Cranch (U. S.) 359, 2 Gall. (U. S.) 391 (shipment made without orders); The St. Joze Indiano, 1 Wheat. (U. S.) 208.

Colorado. — Hanauer *v.* Bartels, 2 Colo. 514.

Georgia. — Lloyd *v.* Wright, 25 Ga. 215.

Massachusetts. — Gardner *v.* Lane, 9 Allen (Mass.) 492, 85 Am. Dec. 779, 12 Allen (Mass.) 39.

Minnesota. — Hoover *v.* Maher, 51 Minn 269.

New York. — Hague *v.* Porter, 3 Hill (N. Y.) 141.

Wisconsin. — Barton *v.* Kane, 17 Wis. 37, 84 Am. Dec. 728.

See also Ezell *v.* English, 6 Port. (Ala.) 311. "But it would be different where the seller sends goods not ordered, in the hope of inducing a sale; for that delivery to a carrier which charges a purchaser, as delivery to him from the seller, must have been under some express or implied authority from the purchaser." 2 Schouler Pers. Prop., § 272. See also Cobb *v.* Arundell, 26 Wis. 553; Ruhl *v.* Corner, 63 Md. 185. Manifestly, in such a case an essential element of a valid sale, mutual assent, is lacking. See *supra*, *Mutual Assent.*

Negligence in Shipment. — The title does not pass where the consignor so negligently ships the goods that they are lost in transit, as where he fails to mark or direct them properly, etc. Woodruff *v.* Noyes, 15 Conn. 335; Finn *v.* Clark, 10 Allen (Mass.) 479; Garretson *v.* Selby, 37 Iowa 529, 18 Am. Rep. 14.

5. Delivery to Warehouseman. — Gibson *v.* Stevens, 8 How. (U. S.) 384; Bradford *v.* Marbury, 12 Ala. 520, 46 Am. Dec 264; Hunter *v.* Wright, 12 Allen (Mass.) 548; Gibson *v.* Chillicothe Branch of State Bank, 11 Ohio St. 311; Rice *v.* Cutler, 17 Wis. 351, 84 Am. Dec. 747.

6. Special Contract Provisions. — Thus, where the consignee is entitled to the proceeds only of the goods to be sold by him, the title remains in the consignor. Bonner *v.* Marsh, 10 Smed. & M. (Miss.) 376, 48 Am. Dec. 754; Waring *v.* Cox, 1 Campb. 369.

Or where delivery is ordered to a mere agent of the consignor. Waring *v.* Cox, 1 Campb. 369; Coxe *v.* Harden, 4 East 211. See also the title CARRIERS OF GOODS, vol. 5, p. 154.

As to reservation of title by express terms of the bill of lading, see *supra*, this section, *Sale of Specific Chattels Conditionally.*

7. When Appropriation Becomes Final.— Blackburn on Sales (Text-book Series) 130; Benj.

property will not pass until the condition has been performed.[1] The property does not pass even when the seller has the power to elect, unless he exercise it in conformity with the contract. He cannot send a larger quantity of goods, nor a smaller, nor goods of a different quality than those ordered, and throw the selection on the purchaser.[2] But an appropriation and tender of

on Sales (6th ed.), § 360; Aldridge *v.* Johnson, 7 El. & Bl. 885, 90 E. C. L. 885; Campbell *v.* Mersey Docks, etc., Board, 14 C. B. N. S. 412, 108 E. C. L. 412; Atkinson *v.* Bell, 8 B. & C. 277, 15 E. C. L. 216; Gunn *v.* Knoop, 73 Ga. 510; Andrews *v.* Cheney, 62 N. H. 404; Stanford *v.* McGill, 6 N. Dak. 536. See Miller *v.* Somerset Cedar Post, etc., Co., (Ky. 1899) 51 S. W. Rep. 615.

In Hays *v.* Pittsburgh, etc., Packet Co., 33 Fed. Rep. 552, the seller had contracted to sell a full boatload of coal slack, and had undertaken to fill the boat. It was held that the title did not pass until the boat was completely filled.

In Jenner *v.* Smith, L. R. 4 C. P. 270, where the sale was made by sample, and was of two pockets of hops out of three that were lying at a specified warehouse, the seller instructed the warehouseman to set apart two out of three pockets for the purchaser. And the warehouseman thereupon placed on two of them a "wait-order card," that is, a card on which was written "to wait orders" and the name of the purchaser, but no alteration was made on the warehouseman's books, and the seller remained liable for the storage. The seller then sent an invoice with the numbers and weights to the buyer of those two pockets with a note at the foot: "The two pockets are lying to your order." It was held that the property had not passed, because the buyer had not made the seller his agent for appropriating the goods to the contract, nor abandoned his right of comparing the bulk with the sample, or of verifying the weight. There was neither previous authority nor subsequent assent to the appropriation.

1. Conditional Appropriation. — Benj. on Sales (6th ed.), § 369; 2 Schouler's Pers. Prop., § 263; Godts *v.* Rose, 17 C. B. 229, 84 E. C. L. 229.

2. Conformity to Contract Necessary — *England.* — Levy *v.* Green, 1 El. & El. 969, 102 E. C. L. 969, 27 L. J. C. B. 111; Hart *v.* Mills, 15 M. & W. 85; Dixon *v.* Fletcher, 3 M. & W. 146; Gath *v.* Lees, 3 H. & C. 558; Cunliffe *v.* Harrison, 6 Exch. 903.

Connecticut. — Downs *v.* Marsh, 29 Conn. 409.

Georgia. — Lloyd *v.* Wright, 25 Ga. 215.

Massachusetts. — Gardner *v.* Lane, 9 Allen (Mass.) 492, 85 Am. Dec. 779, 12 Allen (Mass.) 39; Clark *v* Baker, 11 Met. (Mass.) 186, 45 Am. Dec. 199; Westfield *v.* Mayo, 122 Mass. 100, 23 Am. Rep. 292; Brewer *v.* Housatonic R. Co., 104 Mass. 593; Rommel *v.* Wingate, 103 Mass. 327; Marland *v.* Stanwood, 101 Mass. 470. *Compare* Rodman *v.* Guilford, 112 Mass. 405.

Michigan — Larkin *v.* Mitchell, etc., Lumber Co., 42 Mich. 296. *Compare* Iron Cliffs Co. *v.* Buhl, 42 Mich. 86.

New York. — Croninger *v.* Crocker, 62 N. Y. 151.

Pennsylvania. — Stevenson *v.* Burgin, 49 Pa. St. 44. *Compare* Brownfield *v.* Johnson, 128 Pa. St. 254; Lockhart *v.* Bonsall, 77 Pa. St. 53.

Compare The Julia, 8 Cranch (U. S.) 183; The Frances, 2 Gall. (U. S.) 391.

See also *infra*, this title, *Delivery of Goods.*

But in Downer *v.* Thompson, 6 Hill (N. Y.) 208, the plaintiff, having received an order from the defendant to forward two hundred and fifty barrels of cement, sent by a carrier two hundred and sixty barrels, which the defendant refused to receive, saying, among other things, that there was more than he had ordered, and that the quality was not good; whereupon the carrier took the cement away and stored it. Afterwards a letter was written to the plaintiff by the defendant, in which he placed his refusal to receive the cement on the sole ground that the quality was not good, but admitted that the order had been complied with as to the number of barrels. The plaintiff then brought an action for the value of the two hundred and fifty barrels of cement, declaring as for goods bargained and sold, and for goods sold and delivered; but he was nonsuited at the trial because the number of barrels ordered had been delivered to the carrier as part of a larger number, without being counted out or separated, and that therefore no sale had taken place. It was held that the nonsuit was erroneously granted, and that the case should have been submitted to the jury; for if the entire quantity of cement delivered to the carrier was intended as a mere compliance with the order, and was not sent for the purpose of charging the defendant with the excess, he was liable. This decision appears to rest entirely upon the ground that it did not appear that plaintiff intended to charge the defendant for the extra ten barrels; but upon the contrary, it seemed that they were merely thrown in "as good measure." This is the view which was taken of the case in Barton *v.* Kane, 17 Wis. 37, 84 Am. Dec. 728, where it was said: "To constitute a delivery to the carrier a delivery to the consignee, so as to pass the title and make the consignee liable for goods sold and delivered, the goods must correspond in quantity as well as quality with those named in the order. Bruce *v.* Pearson, 3 Johns. (N. Y.) 534, and Downer *v.* Thompson, 2 Hill (N. Y.) 137, are clear upon this question; and though the latter was reversed in the Court of Errors (6 Hill (N. Y.) 208), the main point of reversal cannot arise here. There can be no pretense that the six hundred and twenty-five extra cigars were sent out of an abundance of caution, and to insure a scriptural compliance with the order. They were sent to fill up the case, and the defendant was charged with their price. To entitle him to recover under the circumstances the plaintiff should have shown that the defendant actually received and accepted the cigars sent, upon the terms indicated in the plaintiff's letter notifying him of the consignment."

goods not in accordance with the contract, and for that reason rejected by the purchaser, does not prevent the seller from afterwards, within the time limited for so doing, appropriating and tendering other goods which are in accordance with the contract.[1] When there is an executory contract for the sale of a certain quantity of unspecified goods, and the seller in part performance thereof, sets aside, separates, and appropriates a smaller quantity of goods, which appropriation the buyer accepts, the property in the goods so appropriated passes to the purchaser, and it makes no difference as to the operation of this rule whether the executory contract was an entirety or not.[2] An unconditional delivery and acceptance of the goods in fulfilment of the contract passes the title.[3]

e. Goods to Be Manufactured or Procured. — Where the agreement is for the sale of goods to be manufactured, the same rule applies as in the case of the sale of unspecified chattels, the contract is executory, and the title does not pass until the manufacture is completed and goods selected, separated, and made ready for delivery.[4] This rule, however, is still one of presumption. And if it can clearly be shown that such was the intention of the parties, a sale may be made of an unfinished chattel as such, or of a chattel progressing towards completion, so as to transfer the property to the thing in its existing state;[5] or, though the contract was executory in the first place, the purchaser may elect to take the article in an unfinished state, and,

1. New Appropriation. — Borrowman *v.* Free, 4 Q. B. D. 500. See also Gath *v.* Lees, 3 H. & C. 558. See also *infra*, this title, *Delivery*.

2. Acceptance of Appropriation. — Thompson *v.* Conover, 32 N. J. L. 469; Hyde *v.* Lathrop, 2 Abb. App. Dec. (N. Y.) 436; Albemarle Lumber Co. *v.* Wilcox, 105 N. Car. 34; Birge *v.* Edgerton, 28 Vt. 291. See also Totten *v.* Cooke, 2 Met. (Ky.) 275.

3. Delivery and Acceptance. — Baker *v.* Heidinger, 17 Wash. 679. See also *supra*, this section, *Executed and Executory Contracts Distinguished—Sale of Specific Chattels Unconditionally*.

4. Completion Prima Facie Necessary — *England.* — Maberley *v.* Sheppard, 10 Bing. 99, 25 E. C. L. 43; Bishop *v.* Crawshay, 3 B. & C. 415, 10 E. C. L. 136; Atkinson *v.* Bell, 8 B. & C. 277, 15 E. C. L. 216; Mucklow *v.* Mangles, 1 Taunt. 318; Anglo-Egyptian Nav. Co. *v.* Rennie, L. R. 10 C. P. 271, 12 Moak 345; Bellamy *v.* Davey, (1891) 3 Ch. 544.

Canada. — Gowans *v.* Consolidated Bank, 43 U. C. Q. B. 318.

United States. — Winchester *v.* Davis Pyrites Co., 67 Fed. Rep. 45, 28 U. S. App. 353; Wheeler *v.* Walton, etc., Co., 64 Fed. Rep. 664.

Connecticut. — Shaw *v.* Smith, 48 Conn. 306, 40 Am. Rep. 170.

Illinois. — Wollensak *v.* Briggs, 119 Ill. 453; Schneider *v.* Westerman, 25 Ill. 514; Rothwell *v.* Luken, 60 Ill. App. 150.

Indiana. — Fordice *v.* Gibson, 129 Ind. 7. See also Pittsburgh, etc., R. Co. *v.* Heck, 50 Ind. 307, 19 Am. Rep. 713.

Iowa. — Moline Scale Co. *v.* Beed, 52 Iowa 309, 35 Am. Rep. 272.

Maine. — Fairfield Bridge Co. *v.* Nye, 60 Me. 372; Pettengill *v.* Merrill, 47 Me. 109; Moody *v.* Brown, 34 Me. 107, 56 Am. Dec. 640.

Massachusetts. — Briggs *v.* A Light Boat, 7 Allen (Mass.) 287; Mixer *v.* Howarth, 21 Pick. (Mass.) 205, 32 Am. Dec. 256; Goddard *v.* Binney, 115 Mass. 450, 15 Am. Rep. 112.

Michigan. — Marquette First Nat. Bank *v.* Crowley, 24 Mich. 492; Hosmer *v.* Wilson, 7 Mich. 293, 74 Am. Dec. 716.

New Jersey. — West Jersey R. Co. *v.* Trenton Car Works Co., 32 N. J. L. 517.

New York. — Halterline *v.* Rice, 62 Barb. (N. Y.) 593; Dunnigan *v.* Crummey, 44 Barb. (N. Y.) 528; Comfort *v.* Kiersted, 26 Barb. (N. Y.) 472; Smith *v.* Edwards, 29 Hun (N. Y.) 493; Higgins *v.* Murray, 4 Hun (N. Y.) 565, 73 N. Y. 252; Sutton *v.* Campbell, 2 Thomp. & C. (N. Y.) 595; McConihe *v.* New York, etc., R. Co., 20 N. Y. 495, 75 Am. Dec. 420; Andrews *v.* Durant, 11 N. Y. 35, 62 Am. Dec. 55; Matter of Non-Magnetic Watch Co., 89 Hun (N. Y.) 196.

North Carolina. — Heiser *v.* Mears, 120 N. Car. 443; Williams *v.* Chapman, 118 N. Car. 943.

Pennsylvania. — Frankenfield *v.* Freyman, 13 Pa. St. 56.

Wisconsin. — Galloway *v.* Week, 54 Wis. 604.

5. Intention Governs. — Woods *v.* Russell, 5 B. & Ald. 942, 7 E. C. L. 310; Young *v.* Matthews, L. R. 2 C. P. 127; Brown *v.* Bateman, L. R. 2 C. P. 272; Clarkson *v.* Stevens, 106 U. S. 505; Shaw *v.* Smith, 48 Conn. 306, 40 Am. Rep. 170; Cowgill *v.* Ford, 2 Houst. (Del.) 164; Green *v.* Hall, 1 Houst. (Del.) 506; Paine *v.* Young, 56 Md. 316; McConihe *v.* New York, etc., R. Co., 20 N. Y. 495, 75 Am. Dec. 420; Wright *v.* O'Brien, 5 Daly (N. Y.) 54. See also Beaumont *v.* Crane, 14 Mass. 400.

In Thorndike *v.* Bath, 114 Mass. 116, 19 Am. Rep. 318, a person offered to purchase an unfinished piano in the maker's shop if he would finish it. The offer was accepted then and there, a bill of sale made, and subsequently the price was paid. It was held that there was a sufficient delivery as against a subsequent purchaser.

It is competent for parties to make a special agreement as to when title shall pass, and this will control as between them, and also as to third parties, if proper evidence of the contract

if delivery is tendered and accepted, a new contract is created and title passes by virtue of it.[1] The rule is not altered by the fact that the contract provides for the payment of the price by instalments at various stages of the work. The title still remains in the seller or manufacturer until completion and appropriation, unless there is a plain and express understanding to the contrary between the parties.[2] Nor is the rule altered by the fact of prepayment of the entire price,[3] nor by the fact that the purchaser exercised a superintendence and control over the work.[4] Upon an appropriation of the finished article to the contract, the executory contract of sale becomes executed, as in the case of an appropriation of specific chattels, and title passes to the purchaser.[5] It is laid down by some of the authorities that where the appro-

is given. Wright *v.* O'Brien, 5 Daly (N. Y.) 54.

1. Substitution of Executed for Executory Contract. — Clemens *v.* Davis, 7 Pa St. 263. See also Thorndike *v.* Bath, 114 Mass. 116, 19 Am. Rep. 318.

2. Price Payable in Instalments — *United States.* — Scudder *v.* Calais Steamboat Co., 1 Cliff. (U. S.) 370. See Bacon *v.* The Poconoket, 67 Fed. Rep. 262.

California. — Yukon River Steamboat Co. *v.* Gratto, 136 Cal. 538.

Delaware. — Green *v.* Hall, 1 Houst. (Del.) 506.

Illinois. — Wollensak *v.* Briggs, 119 Ill. 453.

Massachusetts. — Briggs *v.* A Light Boat, 7 Allen (Mass.) 292; Williams *v.* Jackman, 16 Gray (Mass.) 514; Wright *v.* Tetlow, 99 Mass. 397. *Compare* Beaumont *v.* Crane, 14 Mass. 400.

New Jersey. — Elliott *v.* Edwards, 35 N. J. L. 265, *affirmed* 36 N. J. L. 449, 13 Am. Rep. 463.

New York. — Merritt *v.* Johnson, 7 Johns. (N. Y.) 473, 5 Am. Dec. 289; Andrews *v.* Durant, 11 N. Y. 35 62 Am. Dec. 55; Matter of Carter, 21 N. Y. App. Div. 118.

Pennsylvania. — Strong *v.* Dinniny, 175 Pa. St. 586; Derbyshire's Estate, 81 Pa. St. 18; Scull *v.* Shakespear, 75 Pa. St. 303.

In Scudder *v.* Calais Steamboat Co., 1 Cliff. (U. S.) 370, the general rule was recognized, but it was held that it did not prevail where the vessel was constructed under the superintendence of the party for whom it was built or his agent, and payments for it, based upon the progress of the work, were made by instalments as the work was done. Upper Canada Bank *v.* Killaly, 21 U. C. Q. B. 9.

In Woods *v.* Russell, 5 B. & Ald. 942, 7 E. C. L. 310, A, a shipbuilder, contracted with B to build a ship and to complete it in April. B was to pay for it by four instalments, the first, when the keel was laid; the second, when at the light plank; and the third and fourth when the ship was launched. Soon after the third instalment was paid, A went into bankruptcy. The court held that upon the payment of each instalment the title to so much of the ship as was then constructed passed to the buyer. And the English courts, following this case, have uniformly held that, in the absence of express understanding otherwise, the intention of the parties is that the title shall pass upon the payment of each instalment. Clarke *v.* Spence, 4 Ad. & El. 448, 31 E. C. L. 107; Wood *v.* Bell, 5 El. & Bl. 772, 85 E. C. L. 772, and cases *cited*; Laidler *v.* Burlinson, 2 M. & W. 602.

In Clarke *v.* Spence, 4 Ad. & El. 448, 31 E. C. L. 107, the court, while acknowledging and following the doctrine laid down in Woods *v.* Russell, 5 B. & Ald. 942, 7 E. C. L. 310, seriously questioned its correctness. The doctrine of the *English* case was followed in *Indiana*, Sandford *v.* Wiggins Ferry Co., 27 Ind. 522.

3. Prepayment of Price. — Bennett *v.* Platt, 9 Pick. (Mass.) 558; West Jersey R. Co. *v.* Trenton Car Works Co., 32 N. J. L. 517; Halterline *v.* Rice, 62 Barb. (N. Y.) 593.

In Shaw *v.* Smith, 48 Conn. 306, 40 Am. Rep. 170, a person with whom an agreement had been made to manufacture certain chattels fraudulently represented to the buyer that they were substantially completed and ready for delivery, and the buyer, trusting this representation, paid the balance of the contract price. Soon after the seller made an assignment in insolvency. In an action of replevin by the buyer against the trustee in insolvency, it was held that the title had not passed and that the buyer could not, therefore, recover the chattels.

4. Superintendence of Work by Buyer. — Williams *v.* Jackman, 16 Gray (Mass.) 514; Andrews *v.* Durant, 11 N. Y. 35, 62 Am. Dec. 55. *Compare*, however, Scudder *v.* Calais Steamboat Co., 1 Cliff. (U. S.) 370, *reversed* in 2 Black. (U. S.) 372, but not on the point here involved.

5. Title Passes upon Appropriation of Completed Article. — 2 Schouler's Pers. Prop., § 267; Mt. Hope Iron Co. *v.* Buffinton, 103 Mass. 62; McIntyre *v.* Kline, 30 Miss. 361, 64 Am. Dec. 163; Gordon *v.* Norris, 49 N. H. 376; Hubbard *v.* O'Brien, 8 Hun (N. Y.) 244; Higgins *v.* Murray, 4 Hun (N. Y.) 565, 73 N. Y. 252; Bement *v.* Smith, 15 Wend. (N. Y.) 493; Shawhan *v.* Van Nest, 25 Ohio St. 490, 18 Am. Rep. 313; Johnson *v.* Hibbard, 29 Oregon 184, 54 Am. St. Rep. 787; Ballentine *v.* Robinson, 46 Pa. St. 177; Spicers *v.* Harvey, 9 R. I. 582. See *supra*, this section, *Subsequent Appropriation.*

What Constitutes a Sufficient Appropriation. — Wilkins *v.* Bromhead, 6 M. & G. 963, 46 E. C. L. 963; Atkinson *v.* Bell, 8 B. & C. 277, 15 E. C. L. 216; Mucklow *v.* Mangles, 1 Taunt. 318; Leggo *v.* Welland Vale Mfg. Co., 2 Ont. L. Rep 45; Shepard *v.* King, 96 Ga. 81; Pratt *v.* Maynard, 116 Mass. 388; Weld *v.* Came, 98 Mass. 152; Brewer *v.* Michigan Salt Assoc., 47 Mich. 526; Kelsea *v.* Ramsey, etc., Mfg. Co., 55 N. J. L. 320; Lighthouse *v.* Buffalo

priation is made by the seller there must be a subsequent acceptance of the manufactured article by the purchaser before the title passes, and that until such acceptance the contract remains executory and the seller's remedy is an action for the refusal to accept, not for goods sold and delivered.[1] But this doctrine is not undisputed, some cases holding that the appropriation of the article, when completed, to the contract passes the title without the subsequent assent of the purchaser, and the weight of authority sustains the latter view.[2] Of course, if the contract is expressly made subject to acceptance or approval of the buyer, title does not pass until that time.[3] The title to materials furnished by the seller and designed for the article under construction does not pass, notwithstanding a constructive delivery of the article, until such materials have been so affixed to the manufactured article as to become a part of it.[4]

4. Reservation of Jus Disponendi. — The foregoing rules for determining whether the property in goods sold has passed from seller to buyer are rules of construction adopted for the purpose of ascertaining the intention of the parties. It follows necessarily that such general rules are not applicable where exceptional circumstances repel the presumptions or inferences upon which the rules rest. If, notwithstanding the appropriation of the goods, the seller's acts show clearly his purpose to retain the ownership, the property does not pass.[5] It is to be borne in mind, however, that this doctrine applies as between the parties to the sale, and not to the prejudice of the rights of third parties, such as creditors or *bona fide* purchasers, who, under the circumstances, may be entitled to insist that as to them a reservation should be treated as inoperative.[6] Where the seller delivers goods to a common carrier for delivery to the buyer, this is equivalent to a delivery to the buyer, whose agent the carrier is deemed to be.[7] If a bill of lading is taken, the carrier is bailee for the person indicated by the bill of lading.[8] If, as is frequently the

Third Nat. Bank, 25 N. Y. App. Div. 630; Benj. on Sales (6th ed.), § 379.

1. Acceptance by Buyer Held Necessary. — Atkinson *v.* Bell, 8 B. & C. 277, 15 E. C. L. 216; Gowans *v.* Consolidated Bank, 43 U. C. Q. B. 318; Moody *v.* Brown, 34 Me. 107, 56 Am. Dec. 640; McIntyre *v.* Kline, 30 Miss. 361, 64 Am. Dec. 163; Halterline *v.* Rice, 62 Barb. (N. Y.) 593; Gammage *v.* Alexander, 14 Tex. 414. See also Rider *v.* Kelley, 32 Vt. 268, 76 Am. Dec. 176.

In such cases the measure of damages for a refusal to accept is the contract price. The article having been manufactured expressly for the buyer and according to his directions, a larger measure of damages is allowed than in cases where the thing sold is an ordinary article of merchandise. Gordon *v.* Norris, 49 N. H. 376. See *infra*, this title, *Remedies of Seller — Action for Price*.

There is an admitted exception to the rule of the text where the work is done under the direction and superintendence of the buyer or his agent. Moody *v.* Brown, 34 Me. 107, 56 Am. Dec. 640.

2. Contrary View. — Bookwalter *v.* Clark, 11 Biss. (U. S.) 126; Smith *v.* Edwards 156 Mass. 221; Ballentine *v.* Robinson, 46 Pa. St. 177; Spicers *v.* Harvey, 9 R. I. 582. See also Rattary *v.* Cook, 50 Ala. 352; Goddard *v.* Binney, 115 Mass. 450, 15 Am. Rep. 112; Hyde *v.* Lathrop, 2 Abb. App. Dec. (N. Y.) 436; Donnell *v.* Hearn, 12 Daly (N. Y.) 230; Higgins *v.* Murray, 4 Hun (N. Y.) 565, 73 N. Y. 253; Bement *v.* Smith, 15 Wend. (N. Y.) 493; Shawhan *v.* Van Nest, 25 Ohio St. 490, 8 Am. Rep. 313; Hadly *v.* Pugh, Wright (Ohio) 554. And see Black River Lumber Co. *v.* Warner, 93 Mo. 374; Bates *v.* Conkling, 10 Wend. (N. Y.) 389; Pacific Iron Works *v.* Long Island R. Co., 62 N. Y. 272; Gordon *v.* Norris, 49 N. H. 376.

3. Contract Made Subject to Acceptance. — Levy *v.* Weir, (Sup. Ct. App. T.) 38 Misc. (N. Y.) 361; Matter of Non-Magnetic Watch Co., 89 Hun (N. Y.) 196. But see The Poconoket, 67 Fed. Rep. 262.

4. Materials Furnished by Seller. — The question arises where the manufactured article is attached by the buyer's creditors and the seller claims that some of the materials in the manufactured articles are not covered by the attachment. See Wood *v.* Bell, 5 El. & Bl. 772, 85 E. C. L. 772 (engines and boilers designed for a steamer); Anglo-Egyptian Nav. Co. *v.* Rennie, L. R. 10 C. P. 271, 12 Moak 345; Tripp *v.* Armitage, 4 M & W. 687; Johnson *v.* Hunt, 11 Wend. (N. Y.) 135; 2 Schouler on Pers. Prop. (2d ed.), § 268; Newmark on Sales, § 122.

5. Benj. on Sales, § 381.

6. See *infra*, this title, *Bona Fide Purchasers*. See also title CONDITIONAL SALES, vol. 6, p. 436.

7. See *supra*, this section, *Subsequent Appropriation*, and *infra*, *Delivery of Goods*.

8. Carrier Bailee for Person Named in Bill of Lading. — Shepherd *v.* Harrison, L. R. 4 Q. B. 196, L. R. 5 H. L. 116; Mirabita *v.* Imperial Ottoman Bank, 3 Ex. D. 164, 31 Moak 200; Brandt *v.* Bowlby, 2 B. & Ad. 932, 22 E. C. L. 214; Gabarron *v.* Kreeft, L. R. 10 Exch. 281;

case, the seller has the bill of lading so drawn that the goods are deliverable to his order, this, in the absence of evidence to the contrary, is almost decisive in showing his intention to reserve the *jus disponendi*, and to prevent the passing of title to the buyer.[1] The *prima facie* conclusion that the seller reserves the *jus disponendi* when the bill of lading is to his order may be rebutted by proof that in so doing he acted as agent for the purchaser and did not intend to retain control of the property; and it is for the jury to determine as a question of fact what the real intention was.[2] So, when the seller ships goods to a third person who is his agent for delivery to the purchaser, he equally manifests the intention to reserve the *jus disponendi* and to prevent the property from passing to the purchaser until such delivery has been made.[3] Where a bill of exchange for the price of goods is inclosed to the buyer for acceptance, attached to the bill of lading, which is to pass when the former is accepted or paid, the buyer cannot retain the bill of lading unless he accepts the bill of exchange, and if he refuses acceptance he acquires no right to the bill of lading or the goods of which it is a symbol.[4] This is true

Key *v.* Cotesworth, 7 Exch. 595; Moakes *v.* Nicolson, 19 C. B. N. S. 290, 115 E. C. L. 290; Wait *v.* Baker, 2 Exch. 1; Halliday *v.* Hamilton, 11 Wall. (U. S.) 560; Reynolds *v.* Scott, (Cal 1884) 4 Pac. Rep. 346; Ward *v.* Taylor, 56 Ill. 494; Blanchard *v.* Page, 8 Gray (Mass.) 281; Marine Bank *v.* Wright, 48 N. Y. 1; Griffith *v.* Ingledew, 6 S. & R. (Pa.) 429, 9 Am. Dec. 444.

1. Bill of Lading to Seller's Order — *England.* — Wait *v.* Baker, 2 Exch. 1; Wilmshurst *v.* Bowker, 2 M. & G. 792, 40 E. C. L. 629; Ellershaw *v.* Magniac, 6 Exch. 570, note; Van Casteel *v.* Booker, 2 Exch. 691; Jenkyns *v.* Brown, 14 Q. B. 496, 68 E. C. L. 496, 19 L. J. Q. B. 286; Shepherd *v.* Harrison, L. R. 5 H. L. 116; Gabarron *v.* Kreeft, L. R. 10 Exch. 274, 14 Moak 562; Ogg *v.* Shuter, 1 C. P. D. 47, 15 Moak 231; *Ex p.* Banner, 2 Ch. D. 278, 16 Moak 740.

United States. — The St. Joze Indiano, 1 Wheat. (U. S.) 208; The John K. Shaw, 32 Fed. Rep. 491.

Alabama.—McCormick *v.* Joseph, 77 Ala. 236.

Arkansas. — Berger *v.* State, 50 Ark. 20.

California. — Reynolds *v.* Scott, (Cal. 1884) 4 Pac. Rep. 346.

Massachusetts. — Merchants' Nat. Bank *v.* Bangs, 102 Mass. 291.

Missouri. — Bergeman *v.* Indianapolis, etc., R. Co., 104 Mo. 77.

New York. — Farmers', etc., Nat. Bank *v.* Logan, 74 N. Y. 568.

Wisconsin. — Doyle *v.* Roth Mfg. Co., 76 Wis. 48.

By such a bill of lading the seller does not reserve merely a lien, but the absolute right of disposal of the goods. Ogg *v.* Shuter, 1 C. P. D. 47, 15 Moak 231; Gabarron *v.* Kreeft, L. R. 10 Exch. 274, 14 Moak 562; Dows *v.* National Exch. Bank, 91 U. S. 618. And his assignee acquires the same rights, so that the carrier is bound to deliver to his order. Emery *v.* Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299; Rochester Bank *v.* Jones, 4 N. Y. 497, 55 Am. Dec. 290; Green Bay First Nat. Bank *v.* Dearborn, 115 Mass. 219, 15 Am. Rep. 92; Chicago Fifth Nat. Bank *v.* Bayley, 115 Mass. 230; Cairo First Nat. Bank *v.* Crocker, 111 Mass. 163; Shumacher *v.* Eby, 24 Pa. St. 521; St. Paul Roller-Mill Co. *v.* Great Western Despatch Co., 27 Fed. Rep. 434. See also Cincinnati First Nat. Bank *v.* Kelly, 57 N. Y. 34. The consignee in such cases becomes the mere agent or factor of the consignor or his assignee, Michigan Cent. R. Co. *v.* Phillips, 60 Ill. 190; and must therefore deliver to his order even though the consignor be indebted to him (the consignee) for advances, Marine Bank *v.* Wright, 48 N. Y. 1.

As to the negotiability of a bill of lading, its general character, etc., see the title BILLS OF LADING, vol. 4, p. 507.

2. Van Casteel *v.* Booker, 2 Exch. 691; Browne *v.* Hare, 4 H. & N. 822, 29 L. J. Exch. 6; Joyce *v.* Swann, 17 C. B. N. S. 84, 112 E. C. L. 84; Moakes *v.* Nicolson, 19 C. B. N. S. 290, 115 E. C. L. 290; Hobart *v.* Littlefield, 13 R. I. 341.

3. Shipment to Agent of Seller. — Berger *v.* State, 50 Ark. 20; Redd *v.* Burrus, 58 Ga. 574. *Compare* Sarbecker *v.* State, 65 Wis. 171, 56 Am. Rep. 624.

4. Draft Attached to Bill of Lading — *England.* — Shepherd *v.* Harrison, L. R. 4 Q. B. 196, L. R. 5 H. L. 116; Ogg *v.* Shuter, 1 C. P. D. 47, 15 Moak 231; Rew *v.* Payne, 53 L. T. N. S. 932; Brandt *v.* Bowlby, 2 B. & Ad. 932, 22 E. C. L. 214; Jenkyns *v.* Brown, 14 Q. B. 496, 68 E. C. L. 496; Barrow *v.* Coles, 3 Campb. 92.

United States.— National Bank of Commerce *v.* Merchants' Nat. Bank, 91 U. S. 92; Halliday *v.* Hamilton, 11 Wall. (U. S.) 560; Forty Sacks Wool, 14 Fed. Rep. 643; Seeligson *v.* Philbrick, 30 Fed. Rep. 601.

Alabama. — Alabama G. S. R. Co. *v.* Mt. Vernon Co., 84 Ala. 173.

Georgia. — Erwin *v.* Harris, 87 Ga. 333; Mathewson *v.* Belmont Flouring Mills Co., 76 Ga. 357.

Illinois. — Taylor *v.* Turner, 87 Ill. 296.

Louisiana. — Lanfear *v.* Blossman, 1 La. Ann. 148, 45 Am. Dec. 76.

Massachusetts. — Alderman *v.* Eastern R. Co., 115 Mass. 233; Cairo First Nat. Bank *v.* Crocker, 111 Mass. 163. But see Whitney *v.* Beckford, 105 Mass. 267.

Minnesota. — Security Bank *v.* Luttgen, 29 Minn. 363.

Missouri. — Bergeman *v.* Indianapolis, etc., R. Co., 104 Mo. 77.

New York. — Farmers', etc., Nat. Bank *v.* Logan, 74 N. Y. 568; Marine Bank *v.* Wright,

though the consignment is made expressly " at the risk of the buyer." [1] If the bill of exchange is payable at sight or on demand, there must be both acceptance and payment before the purchaser can claim the bill of lading.[2] Upon payment or acceptance of the bill by the purchaser and delivery of the bill of lading to him, the contract of bargain and sale is completed and the property of the goods is in the purchaser, although they are yet *in transitu.*[3] If the seller sends the bill of lading to the buyer without attaching to it the bill of exchange, the acceptance of the bill of exchange need not precede the vesting of the title in the purchaser. The title passes though he refuses to honor the bill.[4] These rules are not altered by the fact that the consignor is indebted to the consignee for advances, even though they may be beyond the value of the consignment.[5] Although, as a general rule, the delivery of goods by the seller on board the purchaser's own ship is a delivery to the purchaser and passes the property, [6] yet the seller may, by special terms, restrain the effect of such delivery and reserve the *jus disponendi,* even in cases where the bills of lading show that the goods are free of freight because owner's property.[7] If the carrier delivers goods to the purchaser notwithstanding the bill of lading provides otherwise, the purchaser acquires no title and the seller may maintain an action to recover the goods from any one in possession, even though he may be a *bona fide* purchaser for value.[8]

5. Place Where Title Passes. — It is sometimes important to determine at

48 N. Y. 1; Cayuga County Nat. Bank *v.* Daniels, 47 N. Y. 631; Rochester Bank *v.* Jones, 4 N. Y. 497, 55 Am. Dec. 290.

1. Consignment at Risk of Buyer. — Shepherd *v.* Harrison, L. R. 4 Q. B. 196, L. R. 5 H. L. 116.

2. Bill at Sight or on Demand. — Jenkyns *v.* Brown, 14 Q. B. 496, 68 E. C. L. 496; Dows *v.* National Exch. Bank, 91 U. S. 618; Alderman *v.* Eastern R. Co., 115 Mass. 233; Emery *v.* Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299; Hieskell *v.* Farmers', etc., Nat. Bank, 89 Pa. St. 155, 33 Am. Rep. 745. See also Treadwell *v.* Anglo-American Packing Co., 13 Fed. Rep. 22; Security Bank *v.* Luttgen, 29 Minn. 363; Farmers', etc., Nat. Bank *v.* Logan, 74 N. Y. 569.

3. Delivery of Bill of Lading. — Forcheimer *v.* Stewart, 65 Iowa 593, 54 Am. Rep. 30.

" If the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not, on payment or tender by the purchaser of the contract price, vest in him. When this occurs there is a performance of the condition subject to which the appropriation was made, and everything which, according to the intention of the parties, is necessary to transfer the property is done; and, in my opinion, under such circumstances, the property does, on payment or tender of the price, pass to the purchaser." Mirabita *v.* Imperial Ottoman Bank, 3 Ex. D. 173, 31 Moak 200.

But in Cobb *v.* Illinois Cent. R. Co., 88 Ill. 396, where the drafts were upon general account and not drawn upon a specific shipment of corn, it was held that property in a specific shipment did not pass.

4. Bill of Lading Not Attached to draft. — *Ex p.* Bannet, 2 Ch. D. 278, 16 Moak 740, *reversing* and *distinguishing* Shepherd *v.* Harrison, L. R. 4 Q. B. 196, L. R. 5 H. L. 116, and *Ex p.* Waring, 19 Ves. Jr. 345.

5. Consignor Indebted to Consignee. — Mitchel *v.* Ede, 11 Ad. & El. 888, 39 E. C. L. 260; Cairo First Nat. Bank *v.* Crocker, 111 Mass. 163; Marine Bank *v.* Wright, 48 N. Y. 1; Rochester Bank *v.* Jones, 4 N. Y. 497, 55 Am. Dec. 290; Emery *v.* Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299.

6. Delivery to Purchaser's Vessel. — Mirabita *v.* Imperial Ottoman Bank, L. R. 3 Ex. D. 172, 31 Moak 200. See also Campbell *v.* Ehlen, 76 Md. 93; Albemarle Lumber Co. *v.* Wilcox, 105 N. Car. 34; Gill *v.* Benjamin, 64 Wis. 364, 54 Am. Rep. 619.

7. Gumm *v.* Tyrie, 33 L. J. Q. B. 97, 34 L. J. Q. B. 124; Schotsmans *v.* Lancashire, etc., R. Co., L. R. 2 Ch. 332; Falk *v.* Fletcher, 18 C. B. N. S. 403, 114 E. C. L. 403; Moakes *v.* Nicholson, 19 C. B. N. S. 290, 115 E. C. L. 290; Van Casteel *v.* Booker, 2 Exch. 691; Brandt *v.* Bowlby, 2 B. & Ad. 932, 22 E. C. L. 214; Ellershaw *v.* Magniac, 6 Exch. 570, note; Turner *v.* Liverpool Docks, 6 Exch. 543.

8. Unauthorized Delivery by Carrier. — Brandt *v.* Bowlby, 2 B. & Ad. 932, 22 E. C. L. 214; Shepherd *v.* Harrison, L. R. 5 H. L. 116; Dows *v.* National Exch. Bank, 91 U. S. 618; Stollenwerck *v.* Thacher, 115 Mass. 224; Hieskell *v.* Farmers', etc., Nat. Bank, 89 Pa. St. 155, 33 Am. Rep. 745. *Compare,* as to *bona fide* purchasers, Michigan Cent. R. Co. *v.* Phillips, 60 Ill. 190.

In some cases the carrier is held liable for delivery in contradiction of the bill of lading. Thus, in Alderman *v.* Eastern R. Co., 115 Mass. 233, a second carrier received the consignsignment from the first carrier, and, ignorant of the terms of the bill of lading, though with knowledge of on whose account it was carried, delivered the goods to a purchaser from the consignee. In an action against the carrier, it was held liable to the holder of the bill of lading. Newcomb *v.* Boston, etc., R. Corp., 115 Mass. 230; Brandt *v.* Bowlby, 2 B. & Ad. 932, 22 E. C. L. 214. See generally the title CARRIERS OF GOODS, vol. 5, p. 154.

what place the transfer of title takes place in order to ascertain what law governs the contract. This subject has been elsewhere fully treated.[1]

V. Delivery of Goods — 1. Duty to Deliver. — After the completion of the contract of sale the chief and immediate duty of the seller, in the absence of contrary stipulations, is to deliver the goods to the buyer as soon as the latter has complied with the conditions precedent, if any, incumbent on him.[2] Until delivery the seller cannot maintain an action for the purchase price, unless under the circumstances he is entitled to retain possession,[3] but on the contrary may be liable to an action for nondelivery.[4] The buyer may waive objections which would entitle him to refuse to accept, and if he does so, the seller is bound to deliver.[5] The duty to deliver is, of course, controlled by any special stipulations in the contract.[6]

Meaning of "Delivery." — Confusion is apt to result from the fact that the term delivery is sometimes used to denote the transfer of title as well as the transfer of possession. And again, even where it is used to signify the transfer of possession it will be found that it is employed in two distinct classes of cases, one having reference to the formation of the contract, where the question arises as to the "actual receipt" or delivery necessary to give validity to a parol contract of sale under the statute of frauds; the other to delivery of possession of the bulk of the purchase to the buyer, so as to enable the seller to defend an action for nondelivery. This last, which is the proper meaning of the term, is the sense to which its use is confined in this section.[7]

2. What Constitutes Delivery. — Ordinarily, and in the absence of an agreement to the contrary, the seller is under no obligation to send or carry to the buyer the goods sold. His duty is fulfilled by so placing them at the disposal of the buyer that they can be removed by him.[8] Having done this, an action lies against the buyer for goods bargained and sold, even though the goods may never have left the seller's manual possession.[9] Where the goods are

1. See the title Private International Law, vol. 22, p. 1338 *et seq.*

2. **Duty to Deliver.** — Benj. on Sales (6th Am. ed.) 674.

3. See *infra*, *Remedies of Seller*. And see generally cases cited more specifically *infra*, as to delivery.

4. Swift's Iron, etc., Works *v.* Dewey, 37 Ohio St. 242. See *infra*, *Remedies of Buyer*.

5. Townsend *v.* Shepard, 64 Barb. (N. Y.) 41. See also *infra*, VI. 4. *Waiver of Objection*.

6. E. W. Bliss Co. *v.* U. S. Incandescent Gas Light Co., 149 N. Y. 300.

7. **Meaning of Delivery.** — See this misuse of terms adverted to in Benj. on Sales (6th Am. ed.), §§ 674–676, and American note; Tiedeman on Sales, §§ 84, 92; Story on Sales (4th ed.), § 295; Schouler on Pers. Prop. (2d ed.), § 383; Dixon *v.* Yates, 5 B. & Ad. 313, 27 E. C. L. 87; Marsh *v.* Hyde, 3 Gray (Mass.) 334.

8. **Placing Goods at Disposal of Buyer.** — Benj. on Sales (6th Am. ed.), § 679; Schouler on Pers. Prop. (2d ed.), §§ 383, 384; Story on Sales (4th ed.), § 301.

England. — Bloxam *v.* Sanders, 4 B. & C. 948, 10 E. C. L. 480.

Georgia. — Tift *v.* Wight, etc., Co., 113 Ga. 681.

Illinois. — Sanborn *v.* Benedict, 78 Ill. 309; Kohl *v.* Lindley, 39 Ill. 199, 89 Am. Dec. 294; Wade *v.* Moffett, 21 Ill. 110, 74 Am. Dec. 79.

Iowa. — Robinson *v.* Berkey, 111 Iowa 550.

Maine. — Means *v.* Williamson, 37 Me. 556.

Massachusetts. — Whittle *v.* Phelps, 181 Mass. 317; Middlesex Co. *v.* Osgood, 4 Gray (Mass.) 447; Burgess Sulphite Fibre Co *v.* Broomfield, 180 Mass. 283; Morse *v.* Sherman, 106 Mass. 432; Parry *v.* Libbey, 166 Mass. 112.

Missouri. — Roth *v.* Continental Wire Co., 94 Mo. App. 236.

New York. — Salomon *v.* Corbett, 38 N. Y. App. Div. 262.

Oregon. — Smith *v.* Wheeler, 7 Oregon 49, 33 Am. Rep. 698.

Texas. — Slaughter *v.* Moore, 17 Tex. Civ. App. 233.

See also *infra*, this section, *Mode of Delivery*.

The word "deliver" is apt to be misunderstood as having an active rather than a passive meaning. Delivery consists rather in the surrender of the possession and control of the goods than in the actual tradition of them by the seller to the buyer. Shurtleff *v.* Willard, 19 Pick. (Mass.) 202. In other words, goods are delivered when they are placed in the buyer's power so that he may immediately remove them and cannot rightfully be prevented from so doing. Smith's Merch. Law. (Pomeroy's ed.), § 599.

9. Hinde *v.* Whitehouse, 7 East 558; Wade *v.* Moffett, 21 Ill. 110, 74 Am. Dec. 79; Whittle *v.* Phelps, 181 Mass. 317; Frazier *v.* Simmons, 139 Mass. 531; Turner *v.* Langdon, 112 Mass. 265; Morse *v.* Sherman, 106 Mass. 432; Stearns *v.* Washburn, 7 Gray (Mass.) 187; Hayden *v.* Demets, 53 N. Y. 426; Dustan *v.* McAndrew, 44 N. Y. 72; Smith *v.* Wheeler, 7 Oregon 54, 33 Am. Rep. 698; Ballentine *v.* Robinson, 46 Pa. St. 177. See also Moody *v.* Brown, 34 Me. 107, 56 Am. Dec. 640; Kohl *v.* Lindley, 39 Ill. 195, 89 Am. Dec. 294. See also *infra*, X. 2. *Action for Price*.

already in possession of the buyer at the time of sale, no formal delivery is necessary.[1] The rule is the same where the property is in the possession of a third person.[2] An offer to deliver upon a condition not assented to or complied with by the buyer is not a sufficient delivery.[3] The question of delivery is one of the intent of the parties, and where the evidence is conflicting is a question of fact for the jury.[4] Usually the question is a mixed question of law and fact, to be determined by the jury under proper instructions from the court.[5]

3. Place of Delivery. — Where the place of delivery is fixed by the contract, that, of course, controls, and the seller need not make a tender at any other place, and if tendered at another place the buyer need not accept;[6] but where nothing is said upon the subject, it is taken for granted that the goods are to be delivered or placed at the buyer's disposal at the place where they are when sold,[7] unless some other place is required by the nature of the article, or by the usage of trade, or the previous course of dealing between the parties, or is to be inferred from the circumstances of the case.[8] In some states

1. Goods in Possession of Buyer. — Hayden *v.* Frederickson, 59 Neb. 141.

Delivery does not necessarily mean a transfer of the possession, since there are cases in which the property sold is in the buyer's possession at the time of the sale, so that delivery is effected merely by the seller's expression of assent to the transfer of title. See Lake *v.* Morris, 30 Conn. 201; Nichols *v.* Patten, 18 Me. 231, 36 Am. Dec. 713; Hobart *v.* Littlefield, 13 R. I. 343; Shurtleff *v.* Willard, 19 Pick. (Mass.) 202, in which latter case it was said that delivery consists rather in the surrender of possession and control of the goods than in the actual tradition of them. See also Upton *v.* Sturbridge Cotton Mills, 111 Mass. 453, where it was said: "Delivery, as applied to a change of possession in pursuance of sale, ordinarily includes both the act of the vendor in transferring the property, and that of the vendee in receiving it."

2. Goods in Possession of Third Person. — Jones *v.* Shaw, 43 W. N. C. (Pa.) 168. See also Brown *v.* McCaffrey, 40 W. N. C. (Pa.) 69.

3. Conditional Offer to Deliver. — Messer *v.* Woodman, 22 N. H. 172, 53 Am. Dec. 241. *Compare* Turner *v.* Langdon, 112 Mass. 265.

4. Province of Court and Jury. — Gibbons *v.* Robinson, 63 Mich. 146; Litchfield Bank *v.* Elliott, 83 Minn. 469.

5. Greenleaf *v.* Hamilton, 94 Me. 118; Goss Printing Press Co. *v.* Jordan, 171 Pa. St. 474, 37 W. N. C. (Pa.) 175.

What Constitutes Delivery — Illustrations. — Smith *v.* Jones, 63 Ark. 232; Dierson *v.* Petersmeyer, 109 Iowa 233; Aultman *v.* Nilson, 112 Iowa 634; Greenleaf *v.* Hamilton, 94 Me. 118; New England Dressed Meat, etc., Co. *v.* Standard Worsted Co., 165 Mass. 328, 52 Am. St. Rep. 516; Whittle *v.* Phelps, 181 Mass. 317; McCormick Harvesting Mach. Co. *v.* Cusack, 116 Mich. 647; McCormick Harvesting Mach. Co. *v.* Balfany, 78 Minn. 370; Butler *v.* Hirzel, (Supm. Ct. Tr. T.) 35 Misc. (N. Y.) 143; Woolsey *v.* Axton, 44 W. N. C. (Pa.) 299; Brown *v.* McCaffrey, 40 W. N. C. (Pa.) 69; Slaughter *v.* Moore, 17 Tex. Civ. App. 233; Knox *v.* Fuller, 23 Wash. 34.

The Taking Away of a Small Portion as a Sample is not a delivery of any part of the goods sold. Dierson *v.* Petersmeyer, 109 Iowa 233.

6. Place Fixed by Contract. — Story on Sales, § 308; Playford *v.* Mercer, 22 L. T. N. S. 41; Devine *v.* Edwards, 101 Ill. 138; Holtz *v.* Peterson, 98 Iowa 741; Melledge *v.* Boston Iron Co., 5 Cush. (Mass.) 158, 51 Am. Dec. 59; Lucas *v.* Nichols, 5 Gray (Mass.) 309; Washburn Iron Co. *v.* Russell, 130 Mass. 543; McKee *v.* Wild, 52 Neb. 9; Miles *v.* Roberts, 34 N. H. 245; Binghamton First Nat. Bank *v.* Peck, 61 N. Y. App. Div. 258; Hepke *v.* Schmalholz, (N. Y. City Ct. Gen. T.) 7 N. Y. Supp. 67; Buie *v.* Browne, 6 Ired. L. (28 N. Car.) 404; Dannemiller *v.* Kirkpatrick, 201 Pa. St. 218.

7. Presumption in Absence of Contract. — Benj. on Sales (6th Am. ed.), § 682; 2 Kent's Com. 505.

United States. — Hatch *v.* Standard Oil Co., 100 U. S. 134.

Illinois. — Smith *v.* Gillett, 50 Ill. 290.

Indiana. — Bailey *v.* Ricketts, 4 Ind. 488.

Kentucky. — Wilmouth *v.* Patton, 2 Bibb (Ky.) 280; Jacoby *v.* Schwartzwelder, 1 Bibb (Ky.) 430; Sousely *v.* Burns, 10 Bush (Ky.) 87; Buckley *v.* Frankfort, (Ky. 1898) 44 S. W. Rep 139.

Massachusetts. — Middlesex Co. *v.* Osgood, 4 Gray (Mass.) 447.

Minnesota. — Janney *v.* Sleeper, 30 Minn. 475.

Missouri. — Kraft *v.* Hurtz, 11 Mo. 109; Lewis *v.* Thomas, 14 Mo. App. 581.

New Hampshire. — Miles *v.* Roberts, 34 N. H. 253.

New Jersey. — Field *v.* Runk, 22 N. J. L. 525.

Pennsylvania. — Barr *v.* Myers, 3 W. & S. (Pa.) 299.

See Goodwin *v.* Holbrook, 4 Wend. (N. Y.) 377; also Rice *v.* Churchill, 2 Den. (N. Y.) 145, where there were notes "payable in lumber," and it was held that demand of payment must be made at the mill where the lumber was manufactured. Similar cases are seen in Kraft *v.* Hurtz, 11 Mo. 109; Mallory *v.* Grant, 4 Chand. (Wis.) 143.

8. Hatch *v.* Standard Oil Co., 100 U. S. 134; Bronson *v.* Gleason, 7 Barb. (N. Y.) 472; Loewenstein *v.* Bennett, 10 Ohio Cir. Dec. 530, 19 Ohio Cir. Ct. 616; Williams *v.* Adams, 3 Sneed (Tenn.) 359.

this rule is substantially declared by statute.[1] The agreement as to the place of delivery may be changed by a subsequent parol contract,[2] or it may be waived by the other party,[3] but it cannot be changed by a contemporaneous parol agreement.[4] It may be that the place remains to be designated by one of the parties, in which case he must designate it within the stipulated or a reasonable time, or the other party will be excused from performing his part of the contract.[5] In such a case notice of the time and place selected is necessary in order to hold the other party.[6] Failure to give such notice excuses the other party from making a formal tender or demand, and it is sufficient if he is ready to perform his part of the contract.[7] Such failure may constitute a breach of contract upon the part of the party required to give notice.[8] If the place is properly designated delivery must be made there, and the place cannot be changed except by consent of all parties.[9]

4. Buyer's License to Enter Seller's Premises. — As it is the duty of the buyer, in the absence of a stipulation to the contrary, to call for the goods, it follows that ordinarily he has by implication a license to enter upon the premises of the seller where the goods are deposited, for the purpose of removing them; and the license in such case, being coupled with an interest, may not be revoked.[10]

1. Rev. Stat. of *Idaho*, § 3250; Civ. Code of *California*, § 1754.

In California mining stock is personal property and its delivery is governed by the Civil Code, § 1754, providing that personal property shall be deliverable at the place where it is at the time of the sale, or agreement to sell, unless an option for its delivery is provided for or the seller has agreed to deliver it elsewhere. Mattingly *v.* Roach, 84 Cal. 207.

Under Iowa Code, § 2098, the residence of the buyer is the place of delivery in the absence of contrary stipulation. Holtz *v.* Peterson, 98 Iowa 741.

2. Subsequent Parol Agreement. — Miles *v.* Roberts, 34 N. H. 245; Hunt *v.* Thurman, 15 Vt. 336, 40 Am. Dec. 683; Seefeld *v.* Thacker, 93 Wis. 518. *Compare* Binghamton First Nat. Bank *v.* Peck, 61 N. Y. App. Div. 258.

3. Waiver. — M'Combs *v.* M'Kennan, 2 W. & S. (Pa.) 216, 37 Am. Dec. 505, holding that an agreement to accept delivery at another place does not constitute a new contract nor destroy the old.

4. Contemporaneous Parol Agreement. — La Farge *v.* Rickert, 5 Wend. (N. Y.) 187, 21 Am. Dec. 209; Clark *v.* Cuson, 3 Head (Tenn.) 55.

5. Place to Be Designated by One Party. — Benj. on Sales (6th Am. ed.), § 679; 2 Schouler on Pers. Prop. (2d ed.), § 385; Brunskill *v.* Mair, 15 U. C. Q. B. 213; Knox *v.* Mayne, Ir. R. 7 C. L. 557; London, etc., R. Co. *v.* Bartlett, 7 H. & N. 400, 31 L. J. Exch. 92; Mueller *v.* Pels, 94 Ill. App. 353; Bolton *v.* Riddle, 35 Mich. 13; Kaufman *v.* Canary, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 302; Slaughter *v.* Moore, 17 Tex. Civ. App. 233.

If the buyer is to designate the place, a designation by his assignee is sufficient. Mewherter *v.* Price, 11 Ind. 199.

6. Notice of Place Selected.—Davies *v.* McLean, 21 W. R. 264, 28 L. T. N. S. 113; Sutherland *v.* Allhusen, 14 L. T. N. S. 666; Armitage *v.* Insole, 14 Q. B. 728, 68 E. C. L. 728; Stanton *v.* Austin, L. R. 7 C. P. 651; Walton *v.* Black, 5 Houst. (Del.) 149; Canney *v.* Brown, 40 Minn. 461; Newcomb *v.* Cramer, 9 Barb. (N. Y.) 402; Rogers *v.* Van Hoesen, 12 Johns. (N. Y.) 221; Kunkle *v.* Mitchell, 56 Pa. St. 100; Weiseger *v.* Wheeler, 16 Wis. 492.

7. Failure to Give Notice. — Lucas *v.* Nichols, 5 Gray (Mass.) 309; Hunter *v.* Wetsell, 84 N. Y. 549, 38 Am. Rep. 544.

Where the seller is to deliver the goods on railroad cars to be furnished by the buyer at a specified time, and at such time he is ready and willing and offers to make delivery, but the buyer fails to furnish the cars and is not at the place of delivery to receive as required by the contract, it is not necessary for the seller to remove the goods in order to constitute a tender sufficient to support his right of action for the price. Smith *v.* Wheeler, 7 Oregon 49, 33 Am. Rep. 698; Bolton *v.* Riddle, 35 Mich. 13 (means of transportation must be furnished by buyer within reasonable time); Kunkle *v.* Mitchell, 56 Pa. St. 100, (buyer's duty to provide cars and to notify seller that they were ready); Chapman *v.* Dease, 34 Mich. 375.

8. Weiseger *v.* Wheeler, 16 Wis. 492.

9. Change After Designation. — Melledge *v.* Boston Iron Co., 5 Cush. (Mass.) 158, 51 Am. Dec. 59; Hunter *v.* Wetsell, 84 N. Y. 549, 38 Am. Rep. 544; Boyd *v.* Gunnison, 14 W. Va. 1.

10. Implied License to Enter Seller's Premises.— Wood *v.* Manley, 11 Ad. & El. 34, 39 E. C. L. 19; Salter *v.* Woollams, 2 M. & G. 650, 40 E. C. L. 559; McNeal *v.* Emerson, 15 Gray (Mass.) 384; Nettleton *v.* Sikes, 8 Met. (Mass.) 34; McLeod *v.* Jones, 105 Mass. 403, 7 Am. Rep. 539. And see Bentall *v.* Burn, 3 B. & C. 423, 10 E. C. L. 138; Folsom *v.* Moore, 19 Me. 252; Heath *v.* Randall, 4 Cush. (Mass.) 195; Doty *v.* Gorham, 5 Pick. (Mass.) 487, 16 Am. Dec. 417. See generally title LICENSE, vol. 18, p. 1126.

In Giles *v.* Simonds, 15 Gray (Mass.) 442, 77 Am. Dec. 373, it was held that the owner of land, who has made a verbal contract for the sale of standing wood to be cut and severed from the freehold by the purchaser, may at any time revoke the license which he thereby gives to the purchaser to enter on his land and carry away the wood, so far as it relates to any wood not cut at the time of the revocation.

5. Delivery to Carrier for Shipment. — Where the duty of the seller is to send the goods to the buyer, the general rule is that delivery to a common carrier is equivalent to a delivery to the buyer himself, and particularly is this so if the carrier to whom the delivery is made has been designated by the buyer; the carrier is deemed the agent of the buyer and not the agent of the seller.[1] Such delivery effects a transfer of title and is sufficient performance of the contract to enable the seller to maintain an action for goods sold and delivered,[2] even though the seller pays the freight,[3] though in controverted cases the payment of freight may have an important bearing in determining whose agent the carrier is.[4] But if the delivery or shipment is not made in accordance with the terms of the contract it is not considered that the delivery is made to the buyer's agent and the title and risk remain in the seller.[5]

1. Delivery to Carrier as Buyer's Agent. — Benj. on Sales (6th Am. ed.), § 693; 2 Schouler on Pers. Prop. (2d ed.), § 396.

Arkansas. — Burton *v.* Baird, 44 Ark. 556.

Georgia. — Falvey *v.* Richmond, 87 Ga. 99; Watkins *v.* Paine, 57 Ga. 50.

Illinois. — Jones *v.* People, 99 Ill. App. 305; Clancey *v.* People, 99 Ill. App. 303; Price *v.* Kohn, 99 Ill. App. 115; Schlesinger *v.* West Shore R. Co., 88 Ill. App. 273; Des Moines, etc., R. Co. *v.* Block-Pollak Iron Co., 88 Ill. App. 79.

Kansas. — Garfield Tp. *v.* Dodsworth Book Co., 9 Kan. App. 752; Julius Winkelmeyer Brewing Assoc. *v.* Nipp, 6 Kan. App. 730.

Maryland. — Magruder *v.* Gage, 33 Md. 344, 3 Am. Rep. 177.

Massachusetts. — Slivestri *v.* Missocchi, 165 Mass. 337; Frank *v.* Hoey, 128 Mass. 263; Abberger *v.* Marrin, 102 Mass. 70; Finch *v.* Mansfield, 97 Mass. 89.

Minnesota. — Mobile Fruit, etc., Co. *v.* McGuire, 81 Minn. 232; Kessler *v.* Smith, 42 Minn. 494.

Mississippi. — Planters' Oil Mill, etc., Co. *v.* Falls, (Miss. 1901) 29 So. Rep. 786.

Missouri. — Gill *v.* Johnson-Brinkman Commission Co., 84 Mo. App. 456; Comstock *v.* Affoelter, 50 Mo. 411.

Nebraska. — McKee *v.* Bainter, 52 Neb. 604.

New Hampshire. — Glauber Mfg. Co. *v.* Voter, 70 N. H. 332; Garland *v.* Lane, 46 N. H. 245.

New Mexico. — Orange County Fruit Exch. *v.* Hubbell, 10 N. Mex. 47.

New York. — Downer *v.* Thompson, 2 Hill (N. Y.) 137; Ludlow *v.* Bowne, 1 Johns. (N. Y.) 1, 3 Am. Dec. 277.

North Carolina. — Bowers *v.* Worth, 129 N. Car. 36.

North Dakota. — Witte *v.* Reilly, (N. Dak. 1902) 91 N. W. Rep. 42.

Pennsylvania. — Garbracht *v.* Com., 96 Pa. St. 449, 42 Am. Rep. 550; Rickey *v.* Tutelman, 19 Pa. Super. Ct. 403.

Rhode Island. — Hobart *v.* Littlefield, 13 R. I. 341.

Texas. — Specialty Furniture Co. *v.* Kingsbury, (Tex. Civ. App. 1901) 60 S. W. Rep. 1030.

Washington. — Roy *v.* Griffin, 26 Wash. 106.

Wisconsin. — Sarbecker *v.* State, 65 Wis. 171, 56 Am. Rep. 624; Ranney *v.* Higby, 4 Wis. 154.

See also generally the title PRIVATE INTERNATIONAL LAW, vol. 22, p. 1314.

2. *England.* — Smith *v.* Hudson, 6 B. & S. 431, 118 E. C. L. 431, 34 L. J. Q. B. 145; Hart *v.* Bush, El. Bl. & El. 494, 96 E. C. L. 494, 27 L. J. Q. B. 271; Cusack *v.* Robinson, 1 B. & S. 299, 101 E. C. L. 299, 30 L. J. Q. B. 261; Meredith *v.* Meigh, 2 El. & Bl. 364, 75 E. C. L. 364, 22 L. J. Q. B. 401; Norman *v.* Phillips, 14 M. & W. 277; Johnson *v.* Dodgson, 2 M. & W. 653; Dunlop *v.* Lambert, 6 Cl. & F. 600; Fragano *v.* Long, 4 B. & C. 219, 10 E. C. L. 313; Wait *v.* Baker, 2 Exch. 1; King *v.* Meredith, 2 Campb. 639; Bull *v.* Robison, 10 Exch. 342, 24 L. J. Exch. 165; Dawes *v.* Peck, 8 T. R. 330, 4 Rev. Rep. 675.

Alabama. — Hill *v.* Gayle, 1 Ala. 275.

Illinois. — Des Moines, etc., R. Co. *v.* Block-Pollak Iron Co., 88 Ill. App. 79.

Maryland. — Magruder *v.* Gage, 33 Md. 344, 3 Am. Rep. 177.

Massachusetts. — Dr. A. P. Sawyer Medicine Co. *v.* Johnson, 178 Mass. 374; Johnson *v.* Stoddard, 100 Mass. 306.

Minnesota. — Litchfield Bank *v.* Elliott, 83 Minn. 469.

Mississippi. — Strauss *v.* National Parlor Furniture Co., 76 Miss. 343.

New York. — Hague *v.* Porter, 3 Hill (N. Y.) 141; Potter *v.* Lansing, 1 Johns. (N. Y.) 215, 3 Am. Dec. 310.

North Carolina. — Hunter *v.* Randolph, 128 N. Car. 91.

See also *supra*, this title, *When Title Passes*.

3. Freight Paid by Seller. — Dawes *v.* Peck, 8 T. R. 330, 4 Rev. Rep. 675; Dannemiller *v.* Kirkpatrick, 201 Pa. St. 218. But see Julius Winkelmeyer Brewing Assoc. *v.* Nipp, 6 Kan. App. 730.

4. See Devine *v.* Edwards, 101 Ill. 138; Murray *v.* J. J. Nichols Mf. Co., (N. Y. City Ct. Gen. T.) 11 N. Y. Supp. 734; Taylor *v.* Cole, 111 Mass. 363.

5. Shipment Not in Accordance with Contract. — Nickoll *v.* Ashton, (1901) 2 K. B. 126, 70 L. J. K. B. 600, 84 L. T. N. S. 804; Finn *v.* Clark, 12 Allen (Mass.) 522; Wheelhouse *v.* Parr, 141 Mass. 593; Eppens, etc., Co. *v.* Littlejohn, 27 N. Y. App. Div. 22; Bowers *v.* Worth, 129 N. Car. 36; Barton *v.* Kane, 17 Wis. 44, 84 Am. Dec. 728. See also Bruce *v.* Pearson, 3 Johns. (N. Y.) 534; Downer *v.* Thompson, 2 Hill (N. Y.) 137.

But an order calling for the shipment of an engine is complied with by an offer to deliver one there in the town where the order was written. Aultman *v.* Henderson, 32 Ill. App. 331.

Where the buyer of goods, to be delivered f. o. b. at one of two foreign ports at his option, selected one and named the rates of freight to

There must, of course, be some proof of authority from the buyer for delivery to a carrier or the buyer will not be bound.[1] In the absence of specific directions by the buyer he will be bound if the goods are sent by the usual mode.[2] The mere fact that the goods are sent C. O. D. is not conclusive that the carrier is the seller's agent for the purpose of delivery.[3] Where the seller consigns the goods to himself, delivery to the carrier is not a delivery to the purchaser.[4] If the seller undertakes to make the delivery himself to the buyer at a distant place, thus assuming the risk of carriage, the carrier is the seller's agent.[5] It is the seller's duty to prepare the goods for shipment and to deliver them to the carrier in a merchantable condition,[6] and in delivering to a carrier he must take the usual precautions for insuring a safe delivery to the buyer and for holding the carrier liable in case of loss or damage.[7] Notice should be given to the buyer of the time and place of shipment, and of the carrier by whom the goods were forwarded,[8] unless the carrier is designated by the buyer.[9] The bill of lading should be delivered to the buyer within the stipulated or a reasonable time.[10] A stipulation for delivery "F. O. B." means that the seller at his own expense shall place the goods on the car or vessel which is to carry them on account of the buyer, at whose risk they are from that time.[11]

6. Delivery to Third Person. — Delivery to a warehouseman,[12] or other third person as bailee for the purchaser,[13] by consent or direction of the purchaser is a sufficient delivery to the purchaser.

be paid, it was held that the seller must ship at the rates named, or notify the buyer of his readiness to deliver at that place so that he might name the vessel to which delivery might be made. Dwight *v.* Eckert, 117 Pa. St. 490.

1. Authority from Buyer. — Everett *v.* Parks, 62 Barb. (N. Y.) 9; Hague *v.* Porter, 3 Hill (N. Y.) 141; Cobb *v.* Arundell, 26 Wis. 553.

2. Shipment in Usual Mode. — Garretson *v.* Selby, 37 Iowa 529, 18 Am. Rep. 14; Mobile Fruit, etc., Co. *v.* Boero, (Tex. Civ. App. 1900) 55 S. W. Rep. 361.

Quarantine Restrictions will justify shipping by an unusual route. Mobile Fruit, etc., Co. *v.* Boero, (Tex. Civ. App. 1900) 55 S. W. Rep. 361.

3. Goods Sent C. O. D. — Pilgreen *v.* State, 71 Ala. 368; State *v.* Carl 43 Ark. 359, 51 Am. Rep. 565. But see *contra*, State *v.* O'Neil, 58 Vt. 140, 56 Am. Rep. 557.

4. Consignment to Seller. — Sohn *v.* Jervis, 101 Ind. 578; Armstrong *v.* Coyne, 64 Kan. 75; Van Valkenburgh *v.* Gregg, 45 Neb. 654; Orange County Fruit Exch. *v.* Hubbell, 10 N. Mex. 47. *Compare* Cleveland *v.* Heidenheimer, (Tex. Civ. App. 1898) 44 S. W. Rep. 551.

5. Carrier as Seller's Agent. — Jenkyns *v.* Brown, 14 Q. B. 496, 68 E. C. L. 496; Dunlop *v.* Lambert, 6 Cl. & F. 600; Coombs *v.* Bristol, etc., R. Co., 3 H. & N. 1; Falvey *v.* Richmond, 87 Ga. 99; Devine *v.* Edwards, 101 Ill. 138; Missouri, etc., Coal Co. *v.* Pomeroy, 80 Ill. App. 144; Taylor *v.* Cole, 111 Mass. 363; Allis *v.* Voigt, 90 Mich. 125; Murray *v.* J. J. Nichols Mfg. Co., (N. Y. City Ct. Gen. T.) 11 N. Y. Supp. 734; See *v.* Bernheimer, 38 N. Y. Super. Ct. 40. See also Playford *v.* Mercer, 22 L. T. N. S. 41.

6. Seller's Duty as to Shipment. — Benj. on Sales (6th Am. ed.), § 693; Bull *v.* Robison, 10 Exch. 342, 24 L. J. Exch. 165.

7. Finn *v.* Clark, 12 Allen (Mass.) 522; Johnson *v.* Stoddard, 100 Mass. 306.

In Clarke *v.* Hutchins, 14 East 475, there was a regulation of the carrier by whom the goods were forwarded that he would not be liable for goods over five pounds in value unless notice of the value was given at the time of shipment. The seller failed to give this notice, and the goods being lost the loss was held to fall on him.

8. Notice of Shipment. — Davies *v.* McLean, 21 W. R. 264; Goom *v.* Jackson, 5 Esp. 112; Bradford *v.* Marbury, 12 Ala. 520, 46 Am. Dec. 268.

9. Bushell *v.* Wheeler, 15 Q. B. 442, 69 E. C. L. 442; Dawes *v.* Peck, 8 T. R. 330; Cooke *v.* Ludlow, 2 B. & P. N. R. 119; Bradford *v.* Marbury, 12 Ala. 520, 46 Am. Dec. 268; Burton *v.* Baird, 44 Ark. 556.

10. Delivery of Bill of Lading.—Smith's Mer. Law (Holcombe & Gholsom's ed.) 623; Sanders *v.* Maclean, 11 Q. B. D. 327; Barber *v.* Taylor, 5 M. & W. 527. *Compare* Hunter *v.* Randolph, 128 N. Car. 91, wherein title passed though the bill of lading had not been delivered. And see the title BILLS OF LADING, vol. 4, p. 501.

11. Delivery F. O. B. — Browne *v.* Hare, 3 H. & N. 484; *Ex p.* Rosevear China Clay Co., 11 Ch. D. 565; Ogg *v.* Shuter L. R. 10 C. P. 159; Stock *v.* Inglis, 12 Q. B. D. 573; McKee *v.* Bainter, 52 Neb. 604; Silberman *v.* Clark, 96 N. Y. 522.

12. Delivery to Warehouseman. — Knights *v.* Wiffen, L. R. 5 Q. B. 660; Gibson *v.* Stevens, 8 How. (U. S.) 384; Bradford *v.* Marbury, 12 Ala. 520, 46 Am. Dec. 264; Williams *v.* Lerch, 56 Cal. 330; Hunter *v.* Wright, 12 Allen (Mass.) 548; Gibson *v.* Chillicothe Branch of State Bank, 11 Ohio St. 311; Sheperdson *v.* Cary, 29 Wis. 34. See Scudder *v.* Worster, 11 Cush. (Mass.) 573.

13. Delivery to Bailee for Purchaser. — Alsop *v.* Swathel, 7 Conn. 500; Wright *v.* Maxwell, 9 Ind. 192; Stapp *v.* Anderson, 1 A. K. Marsh. (Ky.) 539; Wing *v.* Clark, 24 Me. 366; Hart *v.*

7. **Time of Delivery** — *a.* In General. — Where, under the contract, the obligation of sending the goods is on the seller, and nothing is said as to time, he must send them within a reasonable time, and delivery within a reasonable time is sufficient compliance with the contract.[1] After the expiration of a reasonable time without default upon his part, the seller is under no obligation to deliver.[2] What is reasonable time is a mixed question of law and fact depending upon the circumstances of each case, and is usually a question for the jury.[3] Parol evidence of the circumstances is admissible to show what is reasonable time.[4] If anything is to be done by the buyer before delivery, the seller is not in default until it has been done.[5] If, however, the contract fixes a time, this controls, and a failure by the seller to make a seasonable delivery releases the buyer from his obligation to accept and pay for the goods,[6] and a failure to accept them within the stipulated time

Tyler, 15 Pick. (Mass.) 171; Bement *v.* Smith, 15 Wend. (N. Y.) 493; Bickham *v.* Irwin, 3 Yeates (Pa.) 66.

1. Delivery Within Reasonable Time. — Benj. on Sales (6th Am. ed.), § 683.

England. — Benson *v.* Lamb, 9 Beav. 502.

United States. — Blydenburgh *v.* Welsh, Baldw. (U. S.) 331; Fish *v.* Hamilton, (C. C. A.) 112 Fed. Rep. 742.

Florida. — Whiting *v.* Gray, 27 Fla. 482.

Illinois. — Coyne *v.* Avery, 189 Ill. 378.

Iowa. — Loftus *v.* Riley, 83 Iowa 503.

New York. — Cragin *v.* O'Connell, 169 N. Y. 573, 50 N. Y. App. Div. 339; Browne *v.* Paterson, 165 N. Y. 460; Eppens *v.* Littlejohn, 164 N. Y. 187, 27 N. Y. App. Div. 22; Whitney *v.* Hop Bitters Mfg. Co., (Supm. Ct. Gen. T.) 2 N. Y. Supp. 438.

Pennsylvania. — Muskegon Curtain Roll Co. *v.* Keystone Mfg. Co., 135 Pa. St. 132.

Rhode Island. — Dawley *v.* Potter, 19 R. I. 372.

2. Hume *v.* Mullins, (Ky. 1896) 35 S. W. Rep. 551.

3. What Is Reasonable Time a Mixed Question of Law and Fact. — Smith's Mer. Law (Pomeroy's ed.), § 599; 2 Schouler on Pers. Prop. (2d ed.), § 386.

England. — Burton *v.* Griffiths, 11 M. & W. 817; Ellis *v.* Thompson, 3 M. & W. 445.

United States. — Robinson *v.* Brooks, 40 Fed. Rep. 525.

California. — Chaffin *v.* Doub, 14 Cal. 384.

Illinois. — Henkle *v.* Smith, 21 Ill. 238.

Louisiana. — Pratt *v.* Craft, 19 La. Ann. 130.

Maine. — Rhoades *v.* Cotton, 90 Me. 453.

Minnesota. — Roberts *v.* Mazeppa Mill Co., 30 Minn. 413; Cochran *v.* Toher, 14 Minn. 385.

Missouri. — Berthold *v.* St. Louis Electric Constr. Co., 165 Mo. 280; Joseph *v.* Andrews Co., 72 Mo. App. 551; State *v.* King, 44 Mo. 238.

New Jersey. — McCracken *v.* Harned, 66 N. J. L. 37; New Jersey School, etc., Furniture Co. *v.* Board of Education, 58 N. J. L. 646.

New York. — Jones *v.* Fowler, (N. Y. Super. Ct. Gen. T.) 37 How. Pr. (N. Y.) 104; Ideal Wrench Co. *v.* Garvin Mach. Co., 65 N. Y. App. Div. 235; Hirsch *v.* Annin, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 228; Eppens, etc., Co. *v.* Littlejohn, 27 N. Y. App. Div. 22.

Wisconsin. — Lippert *v.* Saginaw Milling Co., 108 Wis. 512.

See also the title Questions of Law and Fact, vol. 23, p. 543.

4. Parol Evidence. — Benj. on Sales (6th Am. ed.), § 683; Sansom *v.* Rhodes, 8 Scott 544; Jones *v.* Gibbons, 8 Exch. 920; Ellis *v.* Thompson, 3 M & W. 445; Cocker *v.* Franklin Hemp, etc., Mfg. Co., 3 Sumn. (U. S.) 530; Coates *v.* Sangston, 5 Md. 121; Lonergan *v.* Waldo, 179 Mass. 135; Stange *v.* Wilson, 17 Mich. 342; Roberts *v.* Mazeppa Mill Co., 30 Minn. 415. See also Consolidated Coal, etc., Co. *v.* Mercer, 16 Ind. App. 504.

5. Performance by Buyer. — Louisville, etc., R. Co. *v.* Diamond State Iron Co., 126 Ill. 294; Barker *v.* Davies, 47 Neb. 78.

Thus in a contract for clover seed the buyer was to furnish the sacks, and it was held that no obligation rested upon the seller unless the bags were furnished within the time specified for delivery of the seed, and that no demand for the bags was required. Russell *v.* Witt, 38 Ind. 9. But in Low *v.* Forbes, 14 Ill. 423, where F. sold corn to L. to be delivered at a place agreed on, L. to furnish sacks and F. to sack it, it was held that upon the failure of L. to furnish the sacks, F. was bound to deliver the corn in bulk.

6. Time Fixed by Contract. — Story on Sales (4th ed.), § 310.

England. — Wimshurst *v.* Deeley, 2 C. B. 253, 52 E. C. L. 253; Reuter *v.* Sala, 4 C. P. D. 239; Raffles *v.* Wichelhaus, 2 H. & C. 906; Ashmore *v.* Cox, (1899) 1 Q. B. 436, 68 L. J. Q. B. 72; Coddington *v.* Paleologo, L. R. 2 Exch. 193.

United States. — Cleveland Rolling Mill Co. *v.* Rhodes, 121 U. S. 255, *reversing* 17 Fed. Rep. 426; Henderson *v.* McFadden, 112 Fed. Rep. 389, 50 C. C. A. 304.

Illinois. — Phelps *v.* McGee, 18 Ill. 155.

Indiana. — Ellinger *v.* Comstock, 13 Ind. App. 696. And see Temple *v.* Aders, 38 Ind. 506.

Maine. — Soper *v.* Creighton, 93 Me. 564, 74 Am. St. Rep. 375; Dodge *v.* Barnes, 31 Me. 290; Pratt *v.* Lincoln, (Me. 1888) 13 Atl. Rep. 689.

Missouri. — Redlands Orange Growers Assoc. *v.* Gorman, 76 Mo App. 184.

New York. — Arthur *v.* Wright, 57 Hun (N. Y.) 22; Welsh *v.* Gossler, 89 N. Y. 540; Hill *v.* Blake, 97 N. Y. 216; Belknap Mach. Addressing, etc., Co. *v.* Racine, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 708.

Texas. — Berg *v.* San Antonio St. R. Co., 17 Tex. Civ. App. 291.

releases the seller from obligation to deliver,[1] unless such failure is excused by the conduct of the other party.[2] Where the time is to be designated by the buyer, the seller cannot be put in default until notified of the time chosen.[3] So where the time is to be designated by the seller he must notify the buyer in order to hold him to that date.[4] Whether or not there has been a seasonable delivery depends primarily upon the proper construction of the contract as to what is required.[5] Premature delivery is waived by acceptance,[6] but the buyer is not bound to accept delivery before the time specified.[7] Delay in delivery may, of course, be waived by acceptance or otherwise, but such acceptance does not necessarily waive the right to recover damages for the delay.[8] Although the contract provides for delivery " forthwith," "directly,"

1. Blossom *v.* Shotter, 128 N. Y. 679; Higgins *v.* Delaware, etc., R. Co., 60 N. Y. 553; Wilson *v.* Empire Dairy-Salt Co., 50 N. Y. App. Div. 114; Adams *v.* Ames, 19 Wash. 425. But see Halstead *v.* Jessup, 150 Ind. 85.

2. Gray *v.* Walton, 107 N. Y. 254. See also *infra*, this section, *Excuse for Nondelivery or Delay*.

3. **Time to Be Designated by Buyer.** — Colvin *v.* Weedman, 50 Ill. 311; Shaw *v.* Grandy, 5 Jones L. (50 N. Car.) 56.

Where goods are sold to be shipped " about " a certain time, shipping directions to be given by the buyer, the seller's right to recover is not affected by his failure to ship if no shipping directions are given. And though shipping directions have been given, the shipper may still recover where shipment has been indefinitely delayed at the subsequent request of the buyer and no other directions have been given. Louisville, etc., R. Co. *v.* Diamond State Iron Co., 126 Ill. 294.

4. **Time to Be Designated by Seller.** — Parker *v.* Selden, 69 Conn. 544; Stanford *v.* McGill, 6 N. Dak. 536. See generally *infra*, this title, *Acceptance of Goods*.

5. **Construction of Contract as to Time** — *United States.* — Fish *v.* Hamilton, 112 Fed. Rep. 742, 50 C. C. A. 509; Coca *v.* Morris, 107 Fed. Rep. 688, 46 C. C. A. 558; Grace *v.* Browne, 86 Fed. Rep. 155, 29 C. C. A. 621.

Connecticut. — Kugel *v.* Angel, (Conn. 1902) 51 Atl. Rep. 533; Parker *v.* Selden, 69 Conn. 544.

Indiana. — Consolidated Coal, etc., Co. *v.* Mercer, 16 Ind. App. 504.

Maine. — New Bedford Copper Co. *v.* Southard, 95 Me. 209.

Massachusetts. — Lefferts *v.* Weld, 167 Mass. 531; Snelling *v.* Hall, 107 Mass. 134.

Michigan. — T. Wilce Co. *v.* Kelley Shingle Co., (Mich. 1902) 89 N. W. Rep. 957, 9 Detroit Leg. N. 40; Bliss Furniture Co. *v.* Norris, (Mich. 1901) 87 N. W. Rep. 1041, 8 Detroit Leg. N. 855.

Montana. — Clark *v.* Lindsay, 19 Mont. 1, 61 Am. St. Rep. 479.

New York. — Browne *v.* Paterson, 165 N. Y. 460; Ledon *v.* Havemeyer, 121 N. Y. 179; Morel *v.* Stearns, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 486; Roth *v.* Haviland, (County Ct.) 19 Misc. (N. Y.) 317.

Oregon. — Stamper *v.* Raymond, 38 Oregon 16.

Rhode Island. — Dawley *v.* Potter, 19 R. I. 372.

Where the contract of sale of personalty provides that it is to be delivered at the option of the buyer on or before a certain date, the buyer has a right to demand the immediate delivery thereof at any time up to that date; but if no demand is made until after the time stipulated, the seller is entitled to a reasonable time after demand within which to deliver. Holt *v.* Brown, 63 Iowa 319.

When the seller agrees to deliver to the buyer as fast as a third person delivers to him, the buyer cannot set a time within which the seller must complete the delivery or be deemed guilty of a breach of contract. Smith *v.* Snyder, 82 Va. 614.

Where property sold is to be delivered between certain designated dates it is optional with the buyer to designate on which of the days he will receive it, and his failure to do so fixes the last day as that on which he may be required to perform the contract. Sousely *v.* Burns, 10 Bush (Ky.) 87; Richey *v.* Shinkle, 36 Kan. 516. And the seller must aver his readiness and willingness to deliver on that day. Chandler *v.* Robertson, 9 Dana (Ky.) 292.

Province of Court and Jury. — Where the contract expresses the time, the question is one of construction, and therefore one of law for the court, not of fact for the jury. Benj. on Sales (6th Am. ed.), § 684.

6. **Premature Delivery.** — Fairmount Glass Works *v.* Crunden-Martin Wooden Ware Co., 106 Ky. 659; Lee *v.* Bangs, 43 Minn. 23.

7. Maddox *v.* Wagner, 111 Ga. 146; Estill *v.* Weaver, 19 Tex. 543. See Davis *v.* Fowler, 20 N. Y. App. Div. 633.

8. **Waiver of Delay** — *Connecticut.* — Flannery *v.* Rohrmayer, 46 Conn. 558.

Delaware. — Fraser *v.* Ross, 1 Penn. (Del.) 348.

Illinois. — Waterman *v.* Clark, 76 Ill. 428; Haven *v.* Wakefield, 39 Ill. 509; Wheelock *v.* Berkley, 38 Ill. App. 518; Ramsey *v.* Tully, 12 Ill. App. 463.

Iowa. — Hansen *v.* Kirtley, 11 Iowa 565.

Kansas. — Arkansas City Canning Co. *v.* Dunston, 63 Kan. 880, 64 Pac. Rep. 1025.

Kentucky. — Belcher *v.* Sellards, (Ky. 1897) 43 S. W. Rep. 676.

Massachusetts. — Lefferts *v.* Weld, 167 Mass. 531.

Michigan. — Blodgett *v.* Foster, 120 Mich. 392; Industrial Works *v.* Mitchell, 114 Mich. 29.

Minnesota. — Minneapolis Threshing Mach. Co. *v.* Hutchins, 65 Minn. 89.

Missouri. — Roth *v.* Continental Wire Co., 94 Mo. App. 236.

New York. — Eppens *v.* Littlejohn, 164 N. Y. 187; Ruff *v.* Rinaldo, 55 N. Y. 664; Hirsch

"immediately," "as soon as possible," "on or before," etc., the better opinion seems to be that, aside from the interpretation given in particular cases,[1] the seller still has a reasonable time in which to make delivery, though the use of these terms indicates an intention to hasten delivery, and so less time can be claimed than where the law implies a reasonable time in the absence of any stipulation whatever.[2] Computation of time under contracts or statutes has been elsewhere separately considered in this work.[3] Where

v. Annin, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 228; Belknap Mach. Addressing, etc., Co. *v.* Racine, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 708. See Reynolds *v.* Spencer, 92 Hun (N. Y.) 275.

Pennsylvania. — McKay *v.* McKenna, 173 Pa. St. 581, 38 W. N. C. (Pa.) 10; Blakeslee Mfg. Co. *v.* Hilton, 18 Pa. Co. Ct. 553, 5 Pa. Super. Ct. 184; Germain Fruit Co. *v.* Roberts, 8 Pa. Super. Ct. 500

Rhode Island. — Hubley Mfg., etc., Co. *v.* Ives, 21 R. I. 191.

Texas. — McMechen *v.* Hubbard, (Tex. Civ. App. 1900) 59 S. W. Rep. 919.

And see *infra*, this title, VI. 5. *Effect of Acceptance.* See also the titles ESTOPPEL, vol. 11, p. 385; WAIVER.

1. "Immediately," "As Soon as Possible," etc. — Rommel *v.* Wingate, 103 Mass. 327; Neldon *v.* Smith, 36 N. J. L. 148. See IMMEDIATELY, vol. 15, p. 1020.

For various definitions of the term "forthwith," see FORTHWITH, vol. 13, p. 1157.

Particular Cases. — In Staunton *v.* Wood, 16 Q. B 638, 71 E. C. L. 638, the agreement was that delivery should be made "forthwith" and that the price should be paid fourteen days after the completion of the contract. It was held that "forthwith" meant at least sufficiently soon to make the delivery a condition precedent to payment. See also Roberts *v.* Brett, 11 H. L. Cas. 337.

In Duncan *v.* Topham, 8 C. B. 225, 65 E. C. L. 225, it was held that a contract to be performed "directly" was to be performed not merely "within a reasonable time" but "speedily," or, at the least, "as soon as practicable."

Where the goods are deliverable "on or before" a day named, a breach cannot occur before the day named unless there has been a previous demand by the buyer. Phelps *v.* McGee, 18 Ill. 155.

For the construction of these words in contracts of sale, see SOON, where all the authorities are collated. In Hydraulic Engineering Co. *v.* McHaffie, 4 Q. B. D. 673, 29 Moak 105, they were held to mean within a reasonable time, with an undertaking to do the work in the shortest practicable time. And see Tufts *v.* McClure, 40 Iowa 317.

Certain dealers in wheat in Duluth made a contract on May 25th to deliver wheat in Buffalo harbor "as soon as possible," and a delivery in Buffalo on June 18th, the wheat having been shipped on June 13th, was held insufficient and the buyers held justified in refusing it, the known difficulty in procuring transportation for wheat furnishing no excuse for the delay. Arthur *v.* Wright, 57 Hun (N. Y.) 22.

Parol evidence by parties familiar with the glass business is admissible to show that, in a contract of sale of glass bottles, the words "to be taken by" a certain time mean, in that business, as the buyer might from time to time specifically order, and that if all are not ordered within the time specified, it is customary to send the buyer a bill for the balance, and hold such balance subject to his order for a reasonable time. Atkinson *v.* Truesdell, 127 N. Y. 230.

2. Reasonable Time — *England.* — Staunton *v.* Wood, 16 Q. B. 638, 71 E. C. L. 638; Hydraulic Engineering Co. *v.* McHaffie, 4 Q. B. D. 670 De Oleaga *v.* West Cumberland Iron, etc., Co., 4 Q. B. D. 472; Thompson *v.* Gibson, 8 M & W. 281; Toms *v.* Wilson, 4 B. & S. 442, 116 E. C. L. 442; Pybus *v.* Mitford, 2 Lev. 75; Duncan *v.* Topham, 8 C. B. 225, 65 E. C. L. 225.

Canada. — Maxwell *v.* Scarfe, 18 Ont. 529.

United States. — Cashau *v.* Northwestern Nat. Ins. Co., 5 Biss. (U. S.) 476; U. S. *v.* Baldridge, 11 Fed. Rep. 558.

Connecticut. — Lockwood *v.* Middlesex Mut. Assur. Co., 47 Conn. 566.

Georgia. — Inman *v.* Barnum, 115 Ga. 117.

Illinois. — Chicago Sugar-Refining Co. *v.* Armington, 67 Ill. App. 538.

Indiana. — Railway Passenger Assur. Co. *v.* Burwell, 44 Ind. 460.

Maine. — Soper *v.* Creighton, 93 Me. 564, 74 Am. St. Rep. 375; Rhoades *v.* Cotton, 90 Me. 453.

New Jersey. — Gaddis *v.* Howell, 31 N. J. L. 313.

New York. — New York Cent. Ins. Co. *v.* National Protection Ins. Co., 20 Barb. (N. Y.) 468; Hirsch *v.* Annin, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 228. See Reynolds *v.* Spencer, 92 Hun (N. Y.) 275.

Pennsylvania. — Edwards *v.* Lycoming County Mut. Ins. Co., 75 Pa. St. 378; West Branch Ins. Co. *v.* Helfenstein, 40 Pa. St. 289, 80 Am. Dec. 573.

Wisconsin. — Richardson *v.* End, 43 Wis. 316.

3. Computation of Time. — See the title TIME, COMPUTATION OF. See also the following cases:

England. — Webb *v.* Fairmaner, 3 M. & W. 473, 6 Dowl. 549.

Colorado. — Stebbins *v.* Anthony, 5 Colo. 348.

Indiana. — Smith *v.* Smith, 8 Blackf. (Ind.) 208; Newby *v.* Rogers, 40 Ind. 16; Adams *v.* Dale, 29 Ind. 274.

Kentucky. — Sousely *v.* Burns, 10 Bush (Ky.) 87; Wall *v.* Simpson, 6 J. J. Marsh. (Ky.) 155, 22 Am. Dec. 72.

Maine. — Pease *v.* Norton, 6 Me. 233.

Massachusetts. — Farwell *v.* Rogers, 4 Cush. (Mass.) 460.

Montana. — Higley *v.* Gilmer, 3 Mont. 433.

New York. — Coonley *v.* Anderson, 1 Hill (N. Y.) 519.

the first delivery has, on account of some informality, been properly rejected by the buyer, the seller may tender a second delivery if within the time limited by the contract.[1]

b. HOUR OF THE DAY. — As to the hour of the day at which delivery must be made, this seems to be the rule: Where delivery may be made at any place, a tender at a convenient time before midnight is sufficient, but where the goods are to be delivered at a particular place and the buyer must be there to receive them, the law implies no obligation on his part to remain after sunset, so that delivery must be made at a convenient time before that hour, though, should the seller happen to find the buyer at the place of delivery after sunset and make a tender of the goods, it will be sufficient, if the goods are such as can be examined by candle-light and there is time before midnight in which to examine and accept them.[2]

c. WITH REFERENCE TO PAYMENT OF PRICE. — In the absence of anything said as to payment, the legal presumption is that the intention was that payment and delivery should be concurrent,[3] but this is merely a *prima facie* presumption and yields to any proof of actual intent.[4] Where goods are sold on credit, delivery precedes payment.[5]

Pennsylvania. — Rankin *v.* Woodworth, 3 P. & W. (Pa.) 48; Conawingo Petroleum Refining Co. *v.* Cunningham, 75 Pa. St. 138; Cleveland *v.* Sterrett, 70 Pa. St. 204.

See also generally MONTH, vol. 20, p. 869; DAY, vol. 8, p. 737; BEFORE, vol. 3, p. 908; BETWEEN, vol. 4, p. 8; ON, vol. 21, p. 916; TO; UNTIL. And see the title SUNDAYS AND HOLIDAYS.

1. Tender of Second Delivery. — Borrowman *v.* Free, 4 Q. B. D. 500, 29 Moak 40.

But where a contract provided that the seller should furnish a monument as soon as convenient, and the monument when delivered was rejected because of the omission of a material inscription, it was held that the contract was at an end when the buyer refused to accept it, and that he was not bound to accept another. American White Bronze Co. *v.* Gillette, 88 Mich. 231. 26 Am. St. Rep. 286.

2. Hour of the Day. — Startup *v.* Macdonald, 6 M. & G. 593, 46 E. C. L. 591. See Benj. on Sales (6th Am. ed.), § 685; Smith's Mer. Law (Pom. ed.), § 599. And see Berry *v.* Nall, 54 Ala. 446. See also McClartey *v.* Gokey, 31 Iowa 505, where payment after sundown of the last day was held sufficient. 2 Schouler on Pers. Prop. (2d ed.), § 387; Bass *v.* White, 7 Lans. (N. Y.) 171 (holding payment by check after bank hours not within reasonable time); *reversed* in 65 N. Y. 565.

In Avery *v.* Stewart, 2 Conn. 69, 7 Am. Dec. 240, the same rule was laid down that though the buyer is entitled to a delivery in such season as to enable him to examine and take an account of the articles before sunset, yet if the seller is present at the place of delivery, prepared to make delivery in proper season, and the buyer neglects to attend to receive them, a tender after sunset but by daylight is sufficient.

If the goods are such that a proper examination of them can only be made by daylight, a delivery at night is, of course, at an unreasonable time. Croninger *v.* Crocker, 62 N.Y. 151.

Plaintiff entered into an agreement to deliver certain live stock during "the first half of August," etc., at a specified place, and alleged delivery of said live stock at such place on the 16th day of August before noon. It was held, in an action for damages for failure to accept, that the fact that delivery had not been made before the 16th day of August was equivalent to notice that it should be made on that day; that such stock should have been kept at the place of delivery until noon, and that a delivery of live stock at such place on such day in the absence of the defendant, and the removal of the same by the plaintiff before noon, though to a place near at hand, was not a delivery binding the defendant. Kirkpatrick *v.* Alexander, 60 Ind. 95.

3. Payment and Delivery Concurrent — *England.* — Bloxam *v.* Sanders, 4 B. & C. 941, 10 E. C. L. 477.

Delaware. — Pusey, etc., Co. *v.* Dodge, 3 Penn. (Del.) 63.

Illinois. — Michigan Cent. R. Co. *v.* Phillips, 60 Ill. 190.

Indiana. — Terwilliger *v.* Murphy, 104 Ind. 32.

Massachusetts. — Barnes *v.* Bartlett, 15 Pick. (Mass.) 77; Haskins *v.* Warren, 115 Mass. 533; Scudder *v.* Bradbury, 106 Mass. 427.

Missouri. — Southwestern Freight, etc., Express Co. *v.* Plant, 45 Mo. 517.

New York. — Chapin *v.* Potter, 1 Hilt. (N. Y.) 366; Tipton *v.* Feitner, 20 N. Y. 423. And see Ackerman *v.* Astoria Veneer Mills, etc., Co., (Supm. Ct. Gen. T.) 11 N. Y. Supp. 528.

Oregon. — Lewis *v.* Craft, 39 Oregon 305.

Vermont. — Phelps *v.* Hubbard, 51 Vt. 489; Chalmers *v.* McAuley, 68 Vt. 44.

See Benj. on Sales (6th Am. ed.), § 677.

The offer of delivery cannot be conditioned upon the buyer's paying the seller an amount alleged to be due upon a different contract. Filley *v.* Walker, 28 Neb. 506.

4. Intent Controls. — King *v.* Reedman, 49 L. T. N. S. 473.

5. Sale on Credit. — In Doyle *v.* Roth Mfg. Co., 76 Wis. 48, the buyer ordered a car load of apple waste; "terms to be five days' sight after receipt of goods." The seller took the bill of lading in his own name and attached it to the draft with instructions to the bank not to deliver until draft had been paid. In an action for the nonacceptance of the draft it was held that there had been no sufficient delivery in performance of the contract.

d. POSTPONEMENT OF DELIVERY. — The postponement of delivery at the request of either party, unless amounting to a contract (in which case it must be reduced to writing to satisfy the statute of frauds), is a forbearance merely, and either may at any time insist upon his rights under the original contract.[1] But delay pursuant to such request is not a breach of contract, or at least it is excused,[2] and unless such forbearance is revoked, it operates to extend the time within which delivery may be made or demanded.[3] After the time of performance is past, an arrangement made between the parties for the performance of the contract at a different time is not binding unless supported by a new consideration.[4]

8. Quantity to Be Delivered. — The seller is bound to tender or deliver the exact quantity called for, neither more nor less, unless the contract is separable, in which case a tender or delivery of the exact quantity called for by some severable part of the contract is *pro tanto* sufficient and must be accepted.[5]

1. Postponement by Request. — Benj. on Sales (6th Am. ed.), § 688; Ogle *v.* Vane, L. R. 3 Q. B. 272, *affirming* L. R. 2 Q. B. 275; Hickman *v.* Haynes, L. R. 10 C. P. 598; Plevins *v.* Downing, 1 C. P. D. 220. And see Hill *v.* Blake, 48 N. Y. Super. Ct. 253, *affirmed* 97 N. Y. 216; Clark *v.* Fey, 121 N. Y. 470; Haldeman *v.* Berry, 74 Mich. 424. But see Wichert *v.* Stafford, 25 Ill. App. 218, where it was held that where, under a contract for the sale of goods to be delivered within a certain time, the buyer asks the seller to make no delivery until ordered, and the latter acts upon such direction, the time fixed is enlarged to a reasonable time in which to perform the contract, and the buyer cannot be put in default unless he refuses to receive the goods on tender of delivery within a reasonable time.

In Tyers *v.* Rosedale, etc., Iron Co., L. R. 10 Exch. 195, *reversing* L. R. 8 Exch. 305, the defendants were the sellers and the plaintiffs the buyers of iron, deliverable in monthly quantities from 1871. Defendants withheld delivery of various monthly quantities at the plaintiffs' request. Afterwards, in December, the last month fixed in the contract for delivery, the plaintiffs demanded immediate delivery of the whole of the residue of the iron deliverable under the contract. The defendants refused to deliver any more than the monthly quantity for December. In an action by the plaintiffs for nondelivery, it was held that, without deciding whether the defendants could be required to deliver in December at once the whole balance of the two thousand tons, they remained liable to deliver it at some reasonable time, and not having asked for such reasonable time, but having repudiated their liability, they had no defense to the action.

2. See *infra*, this section, *Excuse for Non-delivery or Delay*.

3. Pinckney *v.* Dambmann, 72 Md. 173; Davis *v.* Budd, 60 Iowa 144; Roth *v.* Continental Wire Co., 94 Mo. App. 236. See also *supra*, this section, *Time of Delivery — In General*, note 5, *Waiver of Delay*.

4. New Contract Requires New Consideration. — Hill *v.* Blake, 48 N. Y. Super. Ct. 253, *affirmed* 97 N. Y. 216. And see Phillips *v.* Taylor, 49 N. Y. Super. Ct. 322.

5. Quantity Fixed by Contract. — Benj. on Sales (6th Am. ed.), § 689; Schouler on Pers. Prop., § 388.

England. — Waddington *v.* Oliver, 2 B. & P. N. R. 61; Bragg *v.* Cole, 6 Moo. 114, 17 E. C. L. 19; Baldey *v.* Parker, 2 B. & C. 37, 9 E. C. L. 16; Reuter *v.* Sala, 4 C. P. D. 239.

Illinois. — Rockford, etc., R. Co. *v.* Lent, 63 Ill. 288.

Indiana. — Smith *v.* Lewis, 40 Ind. 102.

Iowa. — Cash *v.* Hinkle, 36 Iowa 623.

Massachusetts. — Collins *v.* Delaporte, 115 Mass. 159.

Missouri. — England *v.* Mortland, 3 Mo. App. 490.

New York. — Van Dam *v.* Tapscott, 40 N. Y. App. Div. 36.

North Carolina. — Dula *v.* Cowles, 7 Jones L. (52 N. Car.) 290, 75 Am. Dec. 463.

Pennsylvania. — Easton *v.* Jones, 193 Pa. St. 147. See also Rinehart *v.* Olwine, 5 W. & S. (Pa.) 157.

Texas. — See also Estill *v.* Weaver, 19 Tex. 543.

As to entire and severable contracts, see the title CONTRACTS, vol. 7, p. 88.

In an action brought against the seller for his failure to deliver a certain number of car loads of wheat, evidence is admissible of what is customarily considered a car-load. Price *v.* Vanstone, 40 Mo. App. 207. And where the contract is definite and certain in respect to quantity, evidence of a custom to change or vary it cannot be received. O'Donohue *v.* Leggett, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 426.

The Rule Is Less Rigid where goods are ordered from a correspondent who is an agent for buying them, the order being considered with reference to the circumstances and state of the market where the purchase is to be made. Thus, in Ireland *v.* Livingston, L. R. 2 Q. B. 99, L. R. 5 Q. B. 516, L. R. 5 H. L. 395; the defendant ordered five hundred tons of sugar, "fifty tons more or less of no moment, if it enables you to get a suitable vessel." So large a quantity of sugar as five hundred tons could not be purchased in one lot at the Mauritius, and it was the customary course of business there, in carrying out an order for a large quantity of sugar, to purchase it in smaller quantities from time to time of different persons. The plaintiffs had thus purchased four hundred tons when the defendant countermanded the order. It was held that the clause as to "fifty tons more or less" was not a limitation of a quantity to be pur-

He has not the right to send the goods sold mixed with other goods, and to call upon the buyer to accept more than he bargained for or to select the quantity bargained for out of a larger quantity delivered.[1] If the goods exceed, or fall short of, the quantity agreed upon, the buyer, as a general rule, may refuse the whole of them;[2] and though, if he receives and retains part of

chased, but was a discretion left to the plaintiffs that they might not be fettered in obtaining a vessel to carry the quantity ordered; that it was simply an order to purchase five hundred tons, but that the defendant must be taken to have been giving an order with reference to the circumstances of the Mauritius market; and therefore that each quantity, as it was purchased by the plaintiffs from the several sellers, was purchased on behalf of the defendant, and he was bound to accept and pay for the four hundred tons. And see Johnston *v.* Kershaw, L. R. 2 Exch. 82, 36 L. J. Exch. 44; Jefferson *v.* Querner, 30 L. T. N. S. 867; Marland *v.* Stanwood, 101 Mass. 470.

A Particular Case May Arise when the seller is not guilty of a breach of the contract in delivering a part only. Thus, in Havemeyer *v.* Cunningham, 35 Barb. (N. Y.) 515, a sale was made of an invoice of sugar to arrive by a certain ship on or before a day named. The vessel had sailed before the sale was made and arrived after the day named, with only a part of the cargo, the remainder having been destroyed by a storm. It was held that the buyer was entitled to all that arrived sound, and at the price named, if he was willing to waive the delay; that the seller was not guilty of a breach of the contract, the stipulated amount having been shipped.

Separable and Dependent Orders. — Where A sent B the following order, "Will you please ship me H. M. A. 100-1, 75-2, 50-3, 4, 5, 50-6, 8, 9, 10? And, if you please, you can send me at the same time 50-1, 2, 3, 4, 5, of Colonial," it was held that B might ship and recover for the goods mentioned in the first, without shipping those mentioned in the second, sentence of the order, but that he could not ship and recover for those mentioned in the second, without also shipping those mentioned in the first, sentence. Virtue *v.* Beacham, (N. Y. City Ct. Gen. T.) 17 N. Y. Supp. 450, *affirmed* (C. Pl. Gen. T.) 18 N. Y. Supp. 949. Generally as to separable contracts see the title CONTRACTS, vol. 7, p. 88.

1. Mixture With Other Goods — *England.* — Nicholson *v.* Bradfield Union, L. R. 1 Q. B. 620, 35 L. J. Q. B. 176; Cunliffe *v.* Harrison, 6 Exch. 903; Levy *v.* Green, 8 El. & Bl. 575, 92 E. C. L. 575; Reuter *v.* Sala, 4 C. P. D. 239. See also Dixon *v.* Fletcher, 3 M. & W. 146; Tarling *v.* O'Riorden, 2 L. R. Ir. 82.

Alabama. — See also Goodwin *v.* Wells, 49 Ala. 309.

Iowa. — Cash *v.* Hinkle, 36 Iowa 623.

Michigan. — McCormick Harvesting Mach. Co. *v.* Cusack, 116 Mich. 647.

Minnesota. — McCormick Harvesting Mach. Co. *v.* Balfany, 78 Minn. 370.

Mississippi. — Strauss *v.* National Parlor Furniture Co., 76 Miss. 343.

New York. — Flint *v.* Standard Rope, etc., Co., 52 N. Y. App. Div. 459.

North Carolina. — But *compare* Bowers *v.* Worth, 129 N. Car. 36.

Oregon. — See also Southwell *v.* Beezley, 5 Oregon 143.

In Iron Cliffs Co. *v.* Buhl, 42 Mich. 86, it was said that where ore is piled at the point of delivery in a mass larger than was contracted for, and nothing remains but to take the contract quantity from the pile, it seems that it is a sufficient delivery.

A contract for the sale of a cargo of from seven hundred to eight hundred tons of sugar, to be shipped from a certain port, is fulfilled by the delivery of only seven hundred tons, though shipped from said port as part of a cargo of eight hundred and forty-one tons. Standard Sugar Refinery *v.* Castano, 43 Fed. Rep. 279. And see Brownfield *v.* Johnson, 128 Pa. St. 254.

2. Exact Quantity Must Be Delivered — *England.* — Reuter *v.* Sala, 4 C. P. D. 239; Waddington *v.* Oliver, 2 B. & P. N. R. 61; Walker *v.* Dixon, 2 Stark. 281, 3 E. C. L. 410; Hart *v.* Mills, 15 M. & W. 85; Cunliffe *v.* Harrison, 6 Exch. 903; Oxendale *v.* Wetherell, 9 B. & C. 386, 17 E. C. L. 401.

Connecticut. — Wright *v.* Barnes, 14 Conn. 518.

Illinois. — Rockford, etc., R. Co. *v.* Lent, 63 Ill. 288.

Indiana. — Smith *v.* Lewis, 40 Ind. 98.

Massachusetts. — New England Dressed Meat, etc., Co. *v.* Standard Worsted Co., 165 Mass. 328, 52 Am. St. Rep. 516; Rommel *v.* Wingate, 103 Mass. 327.

Mississippi. — Strauss *v.* National Parlor Furniture Co., 76 Miss. 343.

Missouri. — Landesman *v.* Gumersell, 16 Mo. App. 459.

New York. — Flanagan *v.* Demarest, 3 Robt. (N. Y.) 173; O'Donohue *v.* Leggett, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 426; Reed *v.* Randall, 29 N. Y. 358, 86 Am. Dec. 305.

Oregon. — Sun Pub. Co. *v.* Minnesota Type Foundry Co., 22 Oregon 49.

But in Brandt *v.* Lawrence, 1 Q. B. D. 344, there were two contracts, each for the purchase of four thousand five hundred quarters of Russian oats, more or less, "shipment by steamer or steamers during February," etc. The seller shipped on board one steamer four thousand five hundred and eleven quarters to answer the first contract, and one thousand one hundred and thirty-nine quarters to answer in part the second contract. He also shipped on board another steamer a sufficient quantity to complete the second contract. The first shipment was made in time, but the second was too late. It was held that the buyer was bound to accept the one thousand one hundred and thirty-nine quarters shipped on time, because the contract provided that the shipment was to be "by steamer or steamers."

Delivery of an excessive quantity to a carrier is not a delivery to the buyer. Barton *v.* Kane, 17 Wis. 44, 84 Am. Dec. 728.

If, on the buyer attempting to return the

them he becomes liable for that part,[1] such acceptance and retention do not constitute a waiver of his right of action for the seller's breach of contract.[2] Where the contract is entire, the buyer cannot, without the seller's consent, retain a portion and return the balance, but if he receives and retains a part, he is liable for the whole.[3] The amount to be delivered frequently depends

goods, they are injured, he is liable only for negligence as a voluntary bailee. Landesman *v.* Gumersell, 16 Mo. App. 459.

He may accept what is delivered and reject the residue when unreasonably delivered. Wilson *v.* Wagar, 26 Mich. 452; Chandler *v.* De Graff, 27 Minn. 208.

A false statement as to the amount ready to be delivered will not excuse a wrongful repudiation of the contract by the buyer where the latter was not misled to his prejudice and his repudiation of the contract was in no way induced by such false statement. Edward Hines Lumber Co. *v.* Alley, (C. C. A.) 73 Fed. Rep. 603.

1. Buyer Liable for What He Receives and Retains. — Benj. on Sales (6th Am. ed.), § 690.

England. — Oxendale *v.* Wetherell, 9 B. & C. 386, 17 E. C. L. 401; Morgan *v.* Gath, 3 H. & C. 748; Couston *v.* Chapman, L. R. 2 H. L. Sc. 250.

California.— Ontario Deciduous Fruit-Growers' Assoc. *v.* Cutting Fruit-Packing Co., 134 Cal. 21; Williamette Steam Mills Lumbering, etc., Co. *v.* Union Lumber, etc., Co., 94 Cal. 156; Cole *v.* Swanston, 1 Cal. 51, 52 Am. Dec. 288.

Connecticut.— Downs *v.* Marsh, 29 Conn. 409.

Georgia. — Harden *v.* Lang, 110 Ga. 392.

Illinois.— Defenbaugh *v.* Weaver, 87 Ill. 132; Richards *v.* Shaw, 67 Ill. 222.

Indiana. — Keen *v.* Preston, 24 Ind. 395.

Massachusetts. — Marland *v.* Stanwood, 101 Mass. 470.

Michigan. — Chapman *v.* Dease, 34 Mich. 375; Wilson *v.* Wagar, 26 Mich. 457.

New York. — Silberman *v.* Fretz, 12 N. Y. App. Div. 328.

Wisconsin. — Barton *v.* Kane, 18 Wis. 262.

But in New York the rule is somewhat different, and where the contract is entire it is held that a party may retain, without compensation, the benefits of a partial performance where, from the nature of the contract, he must receive such benefits in advance of a full performance, and by its terms or just construction is under no obligation to pay until the performance is complete. Smith *v.* Brady, 17 N. Y. 173, 72 Am. Dec. 442; Crane *v.* Knubel, (Super. Ct. Gen. T.) 43 How. Pr. (N. Y.) 389; Nightingale *v.* Eiseman, 50 Hun (N. Y.) 189, Catlin *v.* Tobias, 26 N. Y. 217, 84 Am. Dec. 183; Champlin *v.* Rowley, 13 Wend. (N. Y.) 258; Levene *v.* Rabitte, (N. Y. City Ct. Tr. T.) 2 N. Y. Supp. 389; Paige *v.* Ott, 5 Den. (N. Y.) 406. And see Pratt *v.* Gulick, 13 Barb. (N. Y.) 297; M'Millan *v.* Vanderlip, 12 Johns. (N. Y.) 165, 7 Am. Dec. 299; Mead *v.* Degolyer, 16 Wend. (N. Y.) 632. The principle established by Smith *v.* Brady, 17 N. Y. 173, 72 Am. Dec. 442, "has been followed as an authoritative exposition of the law," Crane *v.* Knubel, (Super. Ct. Gen. T.) 43 How. Pr. (N. Y.) 393; and "has never been overruled," Preusser *v.* Florence, (C. Pl. Gen. T.) 4 Abb. N. Cas. (N. Y.) 136. But the buyer may waive his right to insist upon entire performance, and thus become liable for the price of any portion received and used, and where the delivery is not to be in parcels at different times, but there is to be only one and a single delivery, the acceptance of a portion by the buyer and the appropriation of the same to his own use, will be considered acts evincing an intention to waive this right, and he will become liable to pay for what is actually delivered. Avery *v.* Willson, 81 N. Y. 344, 37 Am. Rep. 503; Flanagan *v.* Demarest, 3 Robt. (N. Y.) 173. And see Corning *v.* Colt, 5 Wend. (N. Y.) 253, and Tipton *v.* Feitner, 20 N. Y. 423. The question of waiver is frequently one of fact, to be determined by the circumstances and evidence. Avery *v.* Willson, 81 N. Y. 344, 37 Am. Rep. 503; Vanderbilt *v.* Eagle Iron Works, 25 Wend. (N. Y.) 665.

Where the goods were to be delivered in quantities to be called for by the buyer during the course of one year, payment to be made at a specified time after each shipment, the seller is entitled to recover, having delivered all that were called for, though the last shipment, made at the end of the year, does not complete the quantity specified in the contract. Whitney *v.* Hop Bitters Mfg. Co., (Supm. Ct. Gen. T.) 2 N. Y. Supp. 438.

In Wilson *v.* Wagar, 26 Mich. 457, it is said that this action by the seller, being an innovation upon the common law (which permitted no recovery for a partial performance of an entire contract), and being based upon equity principles, can only be maintained where he has honestly attempted to fully perform his contract, and where a refusal of it would work injustice and oppression.

2. Tyers *v.* Rosedale, etc., Iron Co., L. R. 10 Exch. 195, 12 Moak 631, *reversing* L. R. 8 Exch. 305, 7 Moak 273.

The buyer's liability in the case of the acceptance of the part performance of an entire contract arises not upon the old contract but upon a new contract, implied in law, to pay a reasonable price for what he has received and accepted. Wilson *v.* Wagar, 26 Mich. 457; Chapman *v.* Dease, 34 Mich. 380.

Therefore his right to an action for a breach of the original contract remains as if he had not accepted at all, though the damages are necessarily materially lessened. Wilson *v.* Wagar, 26 Mich. 457; Howell *v.* Medler, 41 Mich. 643; McKnight *v.* Dunlop, 5 N. Y. 537, 55 Am. Dec. 370.

3. Entire Contract — Acceptance of Part. — Morse *v.* Brackett, 98 Mass. 205; Ormond *v.* Henderson, 77 Miss. 34.

In the case of Goodwin *v.* Wells, 49 Ala. 309, the buyer received goods in excess of those ordered, and on remitting the price for those ordered, wrote: "Balance of goods shipped me were not ordered. You will please have patience until they are sold, or they are sub-

upon the proper construction of the contract.[1] The quantity to be delivered is sometimes stated in the contract with the addition of such words as "about," "more or less," "say about," etc. These are considered words of estimate and expectation only, and indicate a purpose on the part of the seller not to bind himself to any precise quantity, but merely to keep reasonably close to the amount named.[2] For where the terms of the contract do

ject to your order if you prefer it so." It was held that neither this communication nor the retention of the excess of goods for several years without proof that he sold them, constituted in law any promise to pay for them, and that his liability was a question for the jury.

1. Particular Contracts Construed. — Laclede Constr. Co. *v.* Tudor Iron Works, 169 Mo. 137; Roth *v.* Haviland, (County Ct.) 19 Misc. (N. Y.) 317.

In Welch *v.* Moffat, 1 Thomp. & C. (N. Y.) 575, the contract was as follows: "Bought of S. M. Welch, three hundred and forty bales of broom corn, eighty-one thousand seven hundred and sixty-two pounds at ten cents, eight thousand one hundred and seventy-six dollars and twenty cents ($8,176.20). The above constitutes my entire stock of corn now held by me, and all upon the fourth floor of my store and sold to them as it is entire." After purchase the corn was weighed and the quantity fell short three thousand five hundred and fourteen pounds. It was held, in an action on a note given for the purchase price, that the buyer was not relieved from his obligation to pay, on the ground that the seller had not delivered the quantity called for.

In Wheeler *v.* Britton, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 749, A proposed to deliver to B "not less than three thousand five hundred tons of ice, and four thousand if it holds out." B wrote accepting A's offer "to deliver three thousand five hundred to four thousand tons of good ice if the houses hold that amount." One of A's ice houses was burned and part of its contents destroyed, and it was held that the contract did not restrict A to the use of the ice contained in the houses mentioned in B's letter, and that he had the right to furnish the minimum amount called for, at all hazards, from other sources.

2. "About," "More or Less," etc. — *England.* — Ireland *v.* Livingston, L. R. 2 Q. B. 99; McConnel *v.* Murphy, L. R. 5 P. C. 203, 8 Moak 164; Bourne *v.* Seymour, 16 C. B. 337, 81 E. C. L. 337; Kreuger *v.* Blanck, L. R. 5 Exch. 179; Cross *v.* Eglin, 2 B. & Ad. 106, 22 E. C. L. 36. And see Hayward *v.* Scougall, 2 Campb. 56; Barker *v.* Windle, 6 El. & Bl. 675, 88 E. C. L. 675.

United States. — Norrington *v.* Wright, 115 U. S. 204; Brawley *v.* U. S., 96 U. S. 171.

Illinois. — Tilden *v* Rosenthal, 41 Ill. 385, 89 Am. Dec. 388.

Kansas. — Shepard *v.* Lynch, 26 Kan. 377.

Massachusetts. — Pembroke Iron Co. *v.* Parsons, 5 Gray (Mass.) 589; Clapp *v.* Thayer, 112 Mass. 296.

Michigan. — Holland *v.* Rea, 48 Mich. 218.

New York. — Flanagan *v.* Demarest, 3 Robt. (N. Y.) 173.

Ohio. — Creighton *v.* Comstock, 27 Ohio St. 548.

Texas. — Day *v.* Cross, 59 Tex. 595.

See generally the titles ABOUT, vol. 1, p. 196; MORE OR LESS, vol. 20, p. 873.

See, as to bills of lading, Tamvaco *v.* Lucas, 1 El. & El. 581, 102 E. C. L. 581; as to "average weight," Cash *v.* Hinkle, 36 Iowa 623.

In Gwillim *v.* Daniell, 2 C. M. & R. 61, 4 L. J. Exch. 174, the agreement was that the plaintiff should accept all the naphtha that defendant should happen to manufacture, "say from one thousand to twelve hundred gallons per month." In the absence of fraud or bad faith the contract is fulfilled by a delivery of all the naphtha manufactured, though it may be far less than the amount mentioned. See Brawley *v.* U. S. 96 U. S. 172.

But in Tamvaco *v.* Lucas, 1 El. & El. 581, 102 E. C. L. 581, a contract for "about two thousand quarters, say from one thousand eight hundred to two thousand two hundred quarters," was, in view of its other stipulations, construed as fixing a minimum and a maximum limit.

"Say Not Less Than." — In Leeming *v.* Snaith, 16 Q. B. 275, 71 E. C. L. 275, 20 L. J. Q. B. 164, there was a contract for the sale of wool, "say not less than one hundred packs." These words were held to be not mere words of expectation, but to amount to a contract to deliver at least the quantity named.

"Say About." — In McConnel *v.* Murphy, L. R. 5 P. C. 203, there was a sale of all the spars manufactured by A, "say about six hundred." It was held that the words "say about six hundred," were words of expectation and estimate only, not amounting to an understanding that the quantity should be exactly six hundred. The effect of the word "say," when prefixed to the word "about," was considered as emphatically marking the seller's purpose to guard himself against being supposed to have made an absolute promise as to quantity.

But in a charter-party, a contract to deliver "a full and complete cargo, say about" a specific quantity, the words "say about" would bear a different meaning from what they would in an ordinary contract, and would not be mere words of explanation, but words of limitation, and, therefore, of contract. Morris *v.* Levison, 1 C. P. D. 155, 45 L. J. C. P. 409, 16 Moak 496.

Rules of Construction. — For a statement of rules for construing the words "more or less" or "about," see Brawley *v.* U. S., 96 U. S. 171, set out at length under the title ABOUT, vol. 1, p. 197. See also as supporting the rules and classification laid down in this case, Robinson *v.* Noble, 8 Pet. (U. S.) 197; Merriam *v.* U. S., 107 U. S. 437; Norrington *v.* Wright, 115 U. S. 200; Gwillim *v.* Daniell, 2 C. M. & R. 61.

The above-mentioned rules were *quoted* and *approved* in Day *v.* Cross, 59 Tex. 604. In

not mention the exact quantity, and admit of some latitude of construction, the courts are inclined to adopt a liberal construction in favor of the seller and hold a substantial compliance on his part to be sufficient.[1] Whether or not the quantity conforms to such description is generally a question for the jury.[2]

9. Quality to Be Delivered. — Questions relating to quality fall ordinarily within the subject of warranty, express or implied, and are dealt with elsewhere.[3] The proper construction of the contract as to what is called for is the primary and controlling consideration. The seller is not bound to deliver anything different from what he has sold, and the buyer is not bound to receive anything different from what he has bought.[4] In the absence of contrary stipulation the quality is to be determined as of the place of delivery.[5]

10. Inspection by Buyer. — The seller is under obligation to afford to the buyer opportunity for examination of the goods, so that he may satisfy himself that they are in accordance with the contract. The buyer has the right of inspection,[6] and a tender under circumstances not permitting of an inspection is not sufficient to constitute or excuse delivery or to put the buyer in

Brawley *v.* U. S., 96 U. S. 171, there was an agreement to deliver eight hundred and eighty cords of wood, "more or less, as shall be determined to be necessary by the post commander," etc., and it was held that the post commander having determined that only forty cords were needed, the United States was not liable for any number of cords delivered beyond the forty required.

1. 2 Schouler on Pers. Prop., § 389.

2. **Question for Jury.** — Coates *v.* Huffine, 13 Ind. App. 182; Clapp *v.* Thayer, 112 Mass. 296.

It is said that under a contract to sell and deliver goods in a warehouse in Liverpool the giving of a delivery order of about the quantity is a sufficient delivery, evidence being given of a well-known usage of warehouse keepers not to accept delivery orders in any other form. Moore *v.* Campbell, 10 Exch. 323.

3. See the titles IMPLIED WARRANTIES, vol. 15, p. 1210; WARRANTY.

4. **Particular Contracts Construed** — *California.* — Ontario Deciduous Fruit-Growers' Assoc. *v.* Cutting Fruit-Packing Co., 134 Cal. 21.

Kentucky. — Munford *v.* Kevil, 58 S. W. Rep. 703, 22 Ky. L. Rep. 730.

Louisiana. — Strahorn-Hutton-Evans Commission Co. *v.* Red River Oil Co., 104 La. 664.

Missouri. — Bush *v.* Fisher, 85 Mo. App. 1.

New York. — Bloomingdale *v.* Hewitt, 170 N. Y. 568, 40 N. Y. App. Div 208; Thompson *v.* Chatham Water Works Co., 51 N. Y. App. Div. 621; Shipway *v.* Rofrano, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 230; Mussina *v.* New York Steam Co., 42 N. Y. App. Div. 625.

Ohio. — Bellaire Stove Co. *v.* Midland Steel Co., 66 Ohio St. 1.

Pennsylvania. — Delahunty Dyeing Mach. Co. *v.* Pennsylvania Knitting Mills, 19 Pa. Super. Ct. 501.

South Carolina. — Daniel Pratt Gin Co. *v.* Timmerman, 62 S. Car. 437.

Tennessee. — Stamps *v.* Tennessee Producers' Marble Co., (Tenn. Ch. 1900) 59 S. W. Rep. 769.

Texas. — Myers *v.* Menefee, (Tex. Civ. App. 1902) 68 S. W. Rep. 540.

On the sale of a reaping machine, the delivery will not be complete until the different parts, which none but an expert can put together, have been set up so as to form the machine. Walter A. Wood Mowing, etc., Mach. Co. *v.* Gaertner, 63 Mich. 520.

5. Baker *v.* McKinney, 87 Mo. App. 361.

6. **Seller Must Allow Buyer to Inspect.** — Benj. on Sales (6th Am. ed.), § 695.

England. — Street *v.* Blay, 2 B. & Ad. 456, 22 E. C. L. 122; Toulmin *v.* Hedley, 2 C. & K. 157, 61 E. C. L. 157; Lorymer *v.* Smith, 1 B. & C. 1, 8 E. C. L. 1.

Delaware. — Love *v.* Barnesville Mfg. Co., 3 Penn. (Del.) 152.

Illinois. — Doane *v.* Dunham, 65 Ill. 512, 79 Ill. 131; Shields *v.* Reibe, 9 Ill. App. 598.

Michigan. — Henkel *v.* Welsh, 41 Mich. 664.

Minnesota. — Knoblauch *v.* Kronschnabel, 18 Minn. 302.

Mississippi. — Strauss *v.* National Parlor Furniture Co., 76 Miss. 343.

New Hampshire. — Holmes *v.* Gregg, 66 N. H. 621.

New Jersey. — Salomon *v.* King, 63 N. J. L. 39.

New York. — Pierson *v.* Crooks, 115 N. Y. 539, 12 Am. St. Rep. 831.

South Carolina. — Ancrum *v.* Wehmann, 15 S. Car. 118.

Texas. — Pontiac Shoe Mfg. Co. *v.* Hamilton, 18 Tex. Civ. App. 283.

Vermont. — Boughton *v.* Standish, 48 Vt. 594; Gilson *v.* Bingham, 43 Vt. 410, 5 Am. Rep. 289.

West Virginia. — Bartholomae *v.* Paull, 18 W. Va. 771.

Wisconsin. — Woodle *v.* Whitney, 23 Wis. 55, 99 Am. Dec. 102; Fisk *v.* Tank, 12 Wis. 303.

"It is only where the buyer, by some artifice of the seller, or under other circumstances imputing to himself no negligence, is really deprived of his proper opportunity to examine, that his right of acceptance, after the seller has tendered delivery, may long remain in abeyance." 2 Schouler on Pers. Prop. (2d ed.), § 408; Dutchess Co. *v.* Harding, 49 N. Y. 321.

In Toulmin *v.* Hedley, 2 C. & K. 157, 61 E. C. L. 157, the rule is laid down that when one has bought goods, to arrive on a particular ship, he has the right, on the arrival of the ship, to make an inspection in order to see

default.[1] But a refusal to inspect where a reasonable opportunity has been afforded constitutes a breach of contract upon the part of the purchaser.[2] Nothing unusual or unreasonable can be required of the seller under pretense of a right to inspect.[3] Only a reasonable time is allowed for inspection.[4] The contract itself may regulate the right of inspection and the rights and obligations of the parties in regard thereto.[5] Delivery is not complete until inspection and acceptance in accordance with the contract,[6] unless such inspection is waived.[7] The place of inspection is the place of delivery, in the absence of a contrary agreement.[8] Taking such possession of the goods as is necessary to make an inspection does not constitute an acceptance of them by the buyer.[9] The buyer must notify the seller of the result of inspection.[10]

11. Mode of Delivery — *a.* IN GENERAL. — Provisions in the contract as to the manner of delivery are, of course, to be followed,[11] and in some cases a

whether the goods are of the character ordered. But if he allows the cargo to be landed and delivered he is estopped to refuse acceptance.

In some instances, owing to the peculiar circumstances of the case, this right may not exist, as, for example, in auction sales, or where the contract itself or a usage of trade forbids it. Pettit *v.* Mitchell, 4 M. & G. 819, 43 E. C. L. 423.

1. Isherwood *v.* Whitmore, 11 M. & W. 347; Harper *v.* Baird, 3 Penn. (Del.) 110; Erwin *v.* Harris, 87 Ga. 333; Charles *v.* Carter, 96 Tenn. 607. And see Startup *v.* Macdonald, 6 M. & G. 593, 46 E. C. L. 591. But see Sawyer *v.* Dean, 114 N. Y. 469.

2. Refusal to Inspect. — Trent Valley Woollen Mfg. Co. *v.* Oelrichs, 23 Can. Sup. Ct. 682. See also Barker *v.* Turnbull, 51 Ill. App. 226. *Compare* Lyon *v.* Motley, (C. Pl. Gen. T.) 9 Misc. (N. Y.) 500.

3. The Usual and Customary Mode of Inspection is the one to be adopted in the absence of contrary stipulation. Tasker *v.* Crane Co., 55 Fed. Rep. 449.

In the case of a vessel sold to be delivered at a certain port, while the buyer is entitled to an opportunity to examine the vessel before acceptance, he cannot insist upon putting the seller to such an unusual expense as would be involved in putting the vessel into a dry-dock and making the delivery there. Lincoln *v.* Gallagher, 79 Me. 189.

4. Reasonable Time. — Tasker *v.* Crane Co., 55 Fed. Rep. 449; Morrell *v.* Koerner-Parker Lumber Co., 51 Mo. App. 592; Charles *v.* Carter, 96 Tenn. 607.

5. Stipulations as to Inspection. — Tasker *v.* Crane Co., 55 Fed. Rep. 449; Bullock *v.* Consumers' Lumber Co., (Cal. 1892) 31 Pac. Rep. 367; Fraser *v.* Ross, 1 Penn. (Del.) 348; Hyde *v.* Love, 63 Ill. App. 43; Williams Mfg. Co. *v.* Standard Brass Co., 173 Mass. 356; Gorman *v.* Kennedy, 126 Mich. 182; Gratiot St. Warehouse Co. *v.* Wilkinson, 94 Mo. App. 528; Missouri, etc., R. Co. *v.* Jones, (Tex. Civ. App. 1896) 35 S. W. Rep. 199.

6. Delivery Incomplete until Inspection and Acceptance. — Cole *v.* Bryant, 73 Miss. 297. *Compare* Pullman's Palace Car Co. *v.* Metropolitan St. R. Co., 157 U. S. 94. See generally *infra*, this title, *Acceptance of Goods.*

Sending goods to a person against his will and after he has countermanded his order is not such a delivery as will support an action for goods sold and delivered. Thorn *v.* Danzinger, 50 Ill. App. 306.

7. Waiver of Inspection. — Smith *v.* Barber, 153 Ind. 322; Midland Elevator Co. *v.* Cleary, 77 Mo. App. 298; McClure *v.* Jefferson, 85 Wis. 208. See Fraser *v.* Ross, 1 Penn. (Del.) 348. See also Van Winkle *v.* Crowell, 146 U. S. 42.

8. Place of Inspection. — Perkins *v.* Bell, (1893) 1 Q. B. 193; Peace River Phosphate Co. *v.* Grafflin, 58 Fed. Rep. 550; Trent Valley Woollen Mfg. Co. *v.* Oelrichs, 23 Can. Sup. Ct. 382. See also Stewart *v.* Atkinson, 22 Can. Sup. Ct. 315.

A stipulation for inspection at a certain place is waived by consent to inspection at some other place. Midland Elevator Co. *v.* Cleary, 77 Mo. App. 298.

It is not necessary that the buyer of goods under an executory contract should examine them at the place agreed upon for delivery to the carrier. It is sufficient that he make the inspection at the place of consignment. Fogel *v.* Brubaker, 122 Pa. St. 7.

It is said in one case to be the buyer's duty, when the article purchased is open and susceptible of ready inspection, and delivery is to be made at a specified place, to provide for its inspection before it has left the place of delivery in pursuance of his directions. Pease *v.* Copp, 67 Barb. (N. Y.) 132; Stafford *v.* Pooler, 67 Barb. (N. Y.) 143; Dyment *v.* Thomson, 12 Ont. App. 659. *Compare* Pierson *v.* Crooks, 42 Hun (N. Y.) 576; Brownlee *v.* Bolton, 44 Mich. 219. But this is not the correct rule in all cases. Circumstances may forbid proper examination at any place other than the buyer's factory or place of business, etc., and in such cases inspection may properly be made after the goods have been forwarded from their place of delivery. Trotter *v.* Heckscher, 40 N. J. Eq. 612.

9. Possession for Purpose of Inspection. — Love *v.* Barnesville Mfg. Co., (Del. 1901) 50 Atl. Rep. 536; Strauss *v.* National Parlor Furniture Co., 76 Miss. 343; Holmes *v.* Gregg, 66 N. H. 621.

10. Notice of Result of Inspection.—Fraser *v.* Ross, 1 Penn. (Del.) 348.

11. Delivery in Accordance with Contract.—Robinson *v.* U. S., 13 Wall. (U. S.) 363; Harrison *v.* Fortlage, 161 U. S. 57; Blumenthal *v.* Greenberg, 130 Cal. 384. See *infra*, this section, *Delivery by Instalments* and *Symbolical or Constructive Delivery.*

Where there was a sale of rice in "double bags" the buyer was not bound to accept a tender of the rice in single bags, there being

well-established usage may be permitted to control the construction of doubtful requirements.[1]

b. DELIVERY BY INSTALMENTS. — There has been some conflict of authority where the delivery is by instalments, but the rule now seems to be settled in the *United States* that where the contract of sale is entire, delivery to be made by instalments, the failure of the seller to deliver, or of the buyer to accept, one instalment constitutes such a breach of contract as will give the other party the right to rescind the contract and sue for damages,[2] without

proof that this mode of packing rice made a difference in the sale. Makin *v.* London Rice Mill Co., 20 F. T. N. S. 705, 17 W. R. 768.

Where wool lying in bulk on the seller's premises was sold, payable on delivery by weight, the seller was not allowed, in the absence of an express agreement, to recover the cost of labor, etc., in putting the wool into sacks furnished by the buyer, the wool not having been weighed until after being put into the sacks. Cole *v.* Kerr, 20 Vt. 21.

1. Usage and Custom. — Iasigi *v.* Rosenstein, 3 N. Y. App. Div. 500.

In Robinson *v.* U. S., 13 Wall. (U. S.) 363, the contract was to deliver one million bushels of barley, but there was no specification as to whether it should be " in bulk," loose, or in sacks. A portion was delivered, but was refused by the buyer because it was not in sacks. In an action for nondelivery it was held that evidence of the usage of trade with reference to the delivery of barley might be introduced to show the seller's duty as to delivery. See also Cole *v.* Kerr, 20 Vt. 21. *Compare* Groat *v.* Gile, 51 N. Y. 431.

2. Breach as to One Instalment — *England.* — Mersey Steel, etc., Co. *v.* Naylor, 9 App. Cas. 439; Hoare *v.* Rennie, 5 H. & N. 19; Coddington *v.* Paleologo, L. R. 2 Exch. 193; Behn *v.* Burness, 3 B. & S. 751, 113 E. C. L. 751; Bowes *v.* Shand, 2 App. Cas. 455.

United States. — Lowber *v.* Bangs, 2 Wall. (U. S.) 728; Cleveland Rolling Mill Co. *v.* Rhodes, 121 U. S. 255; Norrington *v.* Wright, 115 U. S. 188; Davison *v.* Von Lingen, 113 U. S. 40; Brawley *v.* U. S., 96 U. S. 169; Yellow Poplar Lumber Co. *v.* Chapman, (C. C. A.) 74 Fed. Rep. 444; Hughes's Case, 4 Ct. Cl. 64.

Illinois. — Delaware, etc., Canal Co. *v.* Mitchell, 92 Ill. App. 577.

Maryland. — Bollman *v* Burt, 61 Md. 415, (*distinguishing* Maryland Fertilizing, etc., Co. *v.* Lorentz, 44 Md. 218, on the ground that in that case the failure to deliver had been condoned).

Massachusetts. — *Compare* Winchester *v.* Newton, 2 Allen (Mass.) 492.

Michigan. — T. Wilce Co. *v.* Kelley Shingle Co., (Mich. 1902) 89 N. W. Rep. 957.

New Hampshire. — Haines *v.* Tucker, 50 N. H. 307.

New York. — Elting Woolen Co. *v.* Martin, 5 Daly (N. Y.) 417; Van Sickle *v.* Nester, 34 Hun (N. Y.) 64; Pope *v.* Porter, 102 N. Y. 366; Hill *v.* Blake, 97 N. Y. 216; Catlin *v.* Tobias, 26 N. Y. 217, 84 Am. Dec. 183; Nichols *v.* Scranton Steel Co., (Supm. Ct. Gen. T.) 18 N. Y. Supp. 623; Azema *v.* Levy, (N. Y. City Ct. Gen. T.) 5 N. Y. Supp. 418.

Pennsylvania. — *Compare* Shinn *v.* Bodine, 60 Pa. St. 182, 100 Am. Dec. 560; Morgan *v.* McKee, 77 Pa. St. 228; Scott *v.* Kittanning Coal Co., 89 Pa. St. 231, 33 Am. Rep. 753.

Wisconsin. — Hill *v.* Chipman, 59 Wis. 218.

Generally as to entire and severable contracts, see title CONTRACTS, vol. 7, p. 88.

In Gardner *v.* Clark, 21 N. Y. 399, *reversing* (Supm. Ct. Gen. T.) 6 How. Pr. (N. Y.) 449, the contract was that the buyer should pay upon the delivery of each instalment. It was held that by failure to pay upon demand as agreed upon the whole contract was broken; also that the seller did not waive his right to demand payment by failing to exercise it at the first and second deliveries. And see Bright *v.* Dean, (N. Y. City Ct. Gen. T.) 2 N. Y. Supp. 658.

But see Blackburn *v.* Reilly, 47 N. J. L. 290, 54 Am. Rep. 159, where the court, in adopting the rule laid down in Mersey Steel, etc., Co. *v.* Naylor, 9 App. Cas. 434, said by Dixon, J.: " Defaults by one party in making particular payments or deliveries will not release the other party from his duty to make the other deliveries or payments stipulated in the contract, unless the conduct of the party in default be such as to evince an intention to abandon the contract, or a design no longer to be bound by its terms." But there was reason to suppose there had been a waiver in this case. And see Trotter *v.* Heckscher, 40 N. J. Eq. 612; Lucesco Oil Co. *v.* Brewer, 66 Pa. St. 351; Lee *v.* J. B. Sickles Saddlery Co., 38 Mo. App. 201; Bigelow *v.* Bemis, 2 Allen (Mass.) 496; Miller *v.* Moore, 83 Ga. 685, 20 Am. St. Rep. 329. See also a note by Mr. Landreth in 21 Am. Law Reg. N. S. 398, maintaining that the weight of American authority is opposed to the rule as laid down in Norrington *v.* Wright, 115 U. S. 188.

There Has Been Much Conflict in the English Cases. Hoare *v.* Rennie, 5 H. & N. 19, 29 L. J. Exch. 73, and Honck *v.* Muller, 7 Q. B. D. 92, holding that the failure to make or accept delivery of one instalment enables the other party to rescind the contract, while Simpson *v.* Crippin, L. R. 8 Q. B. 14, holds that such failure does not enable the other party to rescind. It is impossible to reconcile these conflicting decisions, and it is, in fact, unnecessary, since Lord Selbourne, in Mersey Steel, etc., Co. *v.* Naylor, 9 App. Cas. 434, *affirming* 9 Q. B. D. 648, laid down an intelligible principle by which the courts may be guided in the future. He said: " You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other. You must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind,

waiting until the time for delivery of the last instalment has passed.[1] Of course, defaults in respect to particular instalments may be waived by the other party. One's own default does not entitle him to terminate the contract.[2] If, however, the contract is not entire, but one made up of several independent agreements, a breach of one part does not affect the remainder.[3] Time and quantity are of the essence in contracts of this nature.[4]

c. SYMBOLICAL OR CONSTRUCTIVE DELIVERY. — The law requires only such a delivery as is consistent with the nature and situation of the thing sold, and so where the goods are ponderous or bulky, or cannot conveniently be delivered manually, or where they are not in the personal custody of the seller, actual delivery is dispensed with and symbolical or constructive delivery will suffice.[5] Thus, sufficient delivery in the performance of the contract may be made by delivering the key of the warehouse in which the goods are stored,[6] or by a transfer of the warehouse receipt,[7] or by a delivery of a part

and whether the other party may accept it as a reason for not performing his part." And see Freeth *v.* Burr, L. R. 9 C. P. 208; Withers *v.* Reynolds, 2 B. & Ad. 882, 22 E. C. L. 203, *cited* in Mersey Steel, etc., Co. *v.* Naylor, 9 App. Cas. 435, and Pordage *v.* Cole, 1 Saund. 319*d*. And *examine* and *compare* Jonassohn *v.* Young, 4 B. & S. 296, 116 E. C. L. 296, 32 L. J. Q. B. 385; Bradford *v.* Williams, L. R. 7 Exch. 259; Brandt *v.* Lawrence, 1 Q. B. D. 344; and Reuter *v.* Sala, 4 C. P. D 239.

1. Hill *v.* Chipman, 59 Wis. 218.

2. **Waiver of Default.** — Johnson *v.* Allen, 78 Ala. 387, 56 Am. Rep. 34; O'Neill *v.* James, 43 N. Y. 84.

3. **Severable Contracts.** — Johnson *v.* Allen, 78 Ala. 387, 56 Am. Rep. 34; Deming *v.* Kemp, 4 Sandf. (N. Y.) 147; Bletsch *v.* Robinson, 4 Ohio Dec. (Reprint) 504, 2 Clev. L. Rep. 282. See Veerkamp *v.* Hulburd Canning, etc., Co., 58 Cal. 229, 41 Am. Rep. 265.

4. **Time and Quantity of the Essence.** — Hoare *v.* Rennie, 5 H. & N. 19; Shand *v.* Bowes, 1 Q. B. D. 470, 2 Q. B. D. 112, 2 App. Cas. 455; Norrington *v.* Wright, 115 U. S. 188; Brawley *v.* U. S., 96 U. S. 168; Lehigh Zinc, etc., Co. *v.* Trotter, 42 N. J. Eq. 678; Louis Werner Sawmill Co. *v.* Ferree, 201 Pa. St. 405; King Philip Mills *v.* Slater, 12 R. I. 82, 34 Am. Rep. 603. But see Mersey Steel, etc., Co. *v.* Naylor, 9 App. Cas. 439, *affirming* 9 Q. B. D. 648; Freith *v.* Burr, L. R. 9 C. P. 208; Simpson *v.* Crippin, L. R. 8 Q. B. 14; Brandt *v.* Lawrence, 1 Q. B. D. 344.

5. **Symbolical or Constructive Delivery Sufficient.** — Story on Sales (4th ed.), §§ 311, 311*b*; Benj. on Sales (6th Am. ed.), § 696.

England. — Ellis *v.* Hunt, 3 T. R. 464; Chaplin *v.* Rogers, 1 East 192; Hinde *v.* Whitehouse, 7 East 558.

United States. — Ruffee's Case, 15 Ct. Cl. 291.

Arizona. — Gant *v.* Broadway, (Ariz. 1887) 15 Pac. Rep. 862.

Arkansas. — Beller *v.* Block, 19 Ark. 566; Cocke *v.* Chapman, 7 Ark. 197, 44 Am. Dec. 536.

Louisiana. — Lambeth *v.* Wells, 12 Rob. (La.) 51.

Maine. — McKee *v.* Garcelon, 60 Me. 167, 11 Am. Rep. 200; Bethel Steam Mill Co. *v.* Brown, 57 Me. 9, 99 Am. Dec. 752; Wheeler *v.* Nichols, 32 Me. 233; Boynton *v.* Veazie, 24 Me. 286.

Maryland. — Van Brunt *v.* Pike, 4 Gill (Md.) 270, 45 Am. Dec. 126; Thompson *v.* Baltimore, etc., R. Co., 28 Md. 396; Atwell *v.* Miller, 6 Md. 10, 61 Am. Dec. 294.

Massachusetts. — Whipple *v.* Thayer, 16 Pick. (Mass.) 25, 26 Am. Dec. 626; Fettyplace *v.* Dutch, 13 Pick. (Mass.) 388, 23 Am. Dec. 688; Jewett *v.* Warren, 12 Mass. 300, 7 Am. Dec. 74.

Missouri. — Glasgow *v.* Nicholson, 25 Mo. 29.

New York. — Wilkes *v.* Ferris, 5 Johns. (N. Y.) 335, 4 Am. Dec. 364; Hayden *v.* Demets 53 N. Y. 426. See also Noble *v.* Smith, 2 Johns. (N. Y.) 52, 3 Am. Dec. 399.

Pennsylvania. — Bolin *v.* Huffnagle, 1 Rawle (Pa.) 20.

Vermont. — Kingsley *v.* White, 57 Vt. 565.

See also as to constructive or symbolical delivery, the titles FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 210; STATUTE OF FRAUDS.

There should be some act indicating a purpose to pass the property absolutely to another. Barrett *v.* Turner, 2 Neb. 172. See also Brock *v.* McCaffrey, 3 Pa. Super. Ct. 431.

6. **Delivery of Key of Warehouse.** — Vining *v.* Gilbreth, 39 Me. 496; Packard *v.* Dunsmore, 11 Cush. (Mass.) 282; Parker *v.* Jervis, (Ct. App.) 34 How. Pr. (N. Y.) 257, 3 Abb. App. Dec. (N. Y.) 449; Wilkes *v.* Ferris, 5 Johns. (N. Y.) 335, 4 Am. Dec. 364; Gray *v.* Davis, 10 N. Y. 285; Benford *v.* Schell, 55 Pa. St. 393; Chappel *v.* Marvin, 2 Aik. (Vt.) 79, 16 Am. Dec. 684; Knox *v.* Fuller, 23 Wash. 34.

7. **Transfer of Warehouse Receipt.** — Zwinger *v.* Samuda, 7 Taunt. 265, 2 E. C. L. 265; Gibson *v.* Stevens, 8 How. (U. S.) 384; Davis *v.* Russell, 52 Cal. 611, 28 Am. Rep. 647; Horr *v.* Barker, 8 Cal. 609; Adams *v.* Foley, 4 Iowa 44; Tuxworth *v.* Moore, 9 Pick. (Mass.) 347, 20 Am. Dec. 479; Farnum *v.* Pitcher, 131 Mass. 470; Wilkes *v.* Ferris, 5 Johns. (N. Y.) 335, 4 Am. Dec. 364; Hayden *v.* Demets, 53 N. Y. 427, *affirming* 34 N. Y. Super. Ct. 344. But see Gragard's Succession, 106 La. 298.

It has been held in *Oregon* that where the warehouse receipt is not in negotiable form, but restricts the warehouseman's undertaking to a delivery to the bailor personally, an assignment of the receipt does not pass the possession of the property without the warehouseman's consent. Gill *v.* Frank, 12 Oregon 507, 53 Am. Rep. 378. And see Mitchell *v.* McLean, 7 Fla. 329; Hallgarten *v.* Oldham, 135 Mass. 1, 46 Am. Rep. 433. But it passes the property and is a sufficient delivery as between

with intent thereby to deliver the whole.[1] So, also, delivery may be effected by the transfer of a bill of sale, particularly in the case of a vessel and cargo at sea,[2] or of a bill of lading for goods in course of transportation.[3] Delivery of the foregoing character is usually known as symbolical delivery, as distinguished from other forms of constructive delivery, and is generally to be preferred as affording more positive evidence of the transfer of title.[4] Con-

the buyer and the seller. Salter *v.* Woollams, 2 M. & G. 650, 40 E. C. L. 559.

Delivery Order. — In Edwards *v.* Meadows, 71 Ala. 42, one party agreed to sell to another a threshing machine, which had been loaned to, and was at the time in the possession of, a third party, and gave to the purchaser an order on the party in possession for the machine, the purchaser giving his note for the purchase money. It was held that, in the absence of proof that the parties so intended, this did not constitute a delivery of the machine, or vest the title thereto in the purchaser; that to constitute a delivery in such a case, the party in possession must deliver the machine, or consent to attorn to the purchaser so as to become his bailee. *Compare* Sahlman *v.* Mills, 3 Strobh. L. (S. Car.) 384, 51 Am. Dec. 630.

But a seller's order on the captain of a vessel to deliver to the buyer's agent at the destined port goods already on board and consigned to seller's agent there, was held to constitute a good constructive delivery, although vessel and goods were lost before reaching port. Jones *v.* Davis, 3 Houst. (Del.) 68.

Where flour was deliverable upon a day certain, and the seller sent the buyer a delivery order upon a barge, in the hold of which the flour was deposited, but the captain of the barge declined to deliver the flour when demanded, and said that he would do so when he could get his boat up to the dock, which was not until after the time limited for delivery, it was held that the giving of the delivery order was not a compliance with the contract, there being no actual delivery on the day specified. Suydam *v.* Clark, 2 Sandf. (N. Y.) 133.

1. Delivery of Part. — Dixon *v.* Yates, 5 B. & Ad. 313, 27 E. C. L. 86; Hammond *v.* Anderson, 1 B. & P. N. R. 69; Kohl *v.* Lindley, 39 Ill. 195, 89 Am. Dec. 294; Pratt *v.* Chase, 40 Me. 269; Boynton *v.* Veazie, 24 Me. 286; Shurtleff *v.* Willard, 19 Pick. (Mass.) 202.

Where It Is the Custom to detain until certain disbursements are paid, a delivery of a part is not constructive delivery of the whole. Holderness *v.* Shackels, 8 B. & C. 618, 15 E. C. L. 317.

2. Bill of Sale —*England.* — Manton *v.* Moore, 7 T. R. 67; Stovell *v.* Hughes, 14 East 308; Atkinson *v.* Maling, 2 T. R. 462, 1 Rev. Rep. 524. See also Mair *v.* Glennie, 4 M. & S. 240.

United States. — Gibson *v.* Stevens, 8 How. (U. S.) 397; Meeker *v.* Wilson, 1 Gall. (U. S.) 421; Harper *v.* Dougherty, 2 Cranch (C. C.) 284; D'Wolf *v.* Harris, 4 Mason (U. S.) 515.

Arkansas. — Trieber *v.* Andrews, 31 Ark. 163.

Maine. — Smith *v.* Davenport, 34 Me. 520; Brinley *v.* Spring, 7 Me. 241. See also McKee *v.* Garcelon, 60 Me. 165, 11 Am. Rep. 200.

Massachusetts. — Hardy *v.* Potter, 10 Gray (Mass.) 89; Turner *v.* Coolidge, 2 Met. (Mass.) 350; Whipple *v.* Thayer, 16 Pick. (Mass.) 25, 26 Am. Dec. 626; Joy *v.* Sears, 9 Pick. (Mass.) 4; Dugan *v.* Nichols, 125 Mass. 43; Thorndike *v.* Bath, 114 Mass. 116, 19 Am. Rep. 318; Ingalls *v.* Herrick, 108 Mass. 351, 11 Am. Rep. 360. See also Packard *v.* Wood, 4 Gray (Mass.) 307; Gardner *v.* Howland, 2 Pick. (Mass.) 599; Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202, Dempsey *v.* Gardner, 127 Mass. 381, 34 Am. Rep. 389.

Montana. — State *v.* Conrow, 19 Mont. 104.

Pennsylvania. — Dawes *v.* Cope, 4 Binn. (Pa.) 258.

South Carolina. — Southworth *v.* Sebring, 2 Hill L. (S. Car.) 587.

If Goods in the Possession of a Third Party Are Sold, and a bill of sale is given to the buyer and notice of the sale given to the third party with a request that he hold the goods as bailee for the buyer, it will constitute a valid constructive delivery, although the third party does not consent to hold them. Carter *v.* Willard, 19 Pick. (Mass.) 1. But if no notice is given to the person in possession, and there is nothing to prevent actual delivery, a bill of sale will not suffice. Burge *v.* Cone, 6 Allen (Mass.) 412; Solomons *v.* Chesley, 58 N. H. 238.

3. Bill of Lading. — Benj. on Sales (6th Am. ed.), § 813; Lickbarrow *v.* Mason, 2 T. R. 63, 1 H. Bl. 360, 5 T. R. 683, 1 Smith Lead. Cas. 753; Conard *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 386; Andrews *v.* Schreiber, 93 Fed. Rep. 367. See also Allen *v.* Jones, 24 Fed. Rep. 11; Adams *v.* Steamer Trent, 19 La. Ann. 262; Pratt *v.* Parkman, 24 Pick. (Mass.) 42; Peters *v.* Ballistier, 3 Pick. (Mass.) 495; Helena First Nat. Bank *v.* McAndrews, 5 Mont. 325, 51 Am. Rep. 51; Peoria First Nat. Bank *v.* Northern R. Co., 58 N. H. 204. And see the title BILLS OF LADING, vol. 4, p. 507.

But the mere indorsement of the bill of lading, without a delivery of it, does not transfer the property in the goods. Buffington *v.* Curtis, 15 Mass. 528, 8 Am. Dec. 115.

4. Symbolical as Distinguished from Constructive Delivery. — See And. L. Dict., Delivery; Abb. L. Dict., Delivery; Bolin *v.* Huffnagle, 1 Rawle (Pa.) 9.

For other instances of symbolical delivery, see Cooke *v.* Hallett, 119 Mass. 148 (delivery of stock by transfer of certificate); Winslow *v.* Fletcher, 53 Conn. 398, 55 Am. Rep. 122.

The symbol employed must have been delivered with the intention of transferring the title to the property sold, and must be of such a character as to indicate such transfer. Therefore, where there was a sale of oxen, a delivery merely of the brass knobs which had been worn on their horns was not sufficient to act as a symbolical delivery of the oxen, unless the parties had so specially agreed. Clark *v.* Draper, 19 N. H. 419.

structive delivery may also be made by an arrangement that the seller, or some third party in possession of the goods, shall hold them as bailee of the buyer,[1] or by mere agreement between the parties; as where a large lot of floating lumber was sold and the seller verbally assured the buyer that he thereby transferred his possession.[2] Where the goods are in the possession of the buyer at the time of the sale no formal delivery is necessary.[3]

12. Excuse for Nondelivery or Delay. — Nondelivery or delay in delivery may or may not constitute a breach of contract upon the part of the seller. This will depend upon the terms of the contract and the cause of such delay or nondelivery.

The Act of God is a sufficient excuse for nondelivery or delay,[4] unless the contract properly construed calls for delivery at all events.[5]

Destruction by Accident of the goods, before delivery and without fault of the seller, excuses a delivery, and the seller is not liable for nondelivery.[6]

Repudiation of the Contract by the buyer,[7] as where he wrongfully refuses to

1. Constructive Delivery — *England.* — Lucas *v.* Dorrien, 7 Taunt. 278, 2 E. C. L. 278; Searle *v.* Keeves, 2 Esp. 598; Bentall *v.* Burn, 3 B. & C. 423, 10 E. C. L. 138.

United States. — Barrett *v.* Goddard, 3 Mason (U. S.) 107.

California. — Walden *v.* Murdock, 23 Cal. 541, 83 Am. Dec. 135; Cartwright *v.* Phœnix, 7 Cal. 281; Montgomery *v.* Hunt, 5 Cal. 366.

Illinois. — Hodges *v.* Hurd, 47 Ill. 363.

Maine. — Robinson *v.* Safford, 57 Me. 163; Means *v.* Williamson, 37 Me. 558.

Massachusetts. — Cushing *v.* Breed, 14 Allen (Mass.) 376, 92 Am. Dec. 777; Hatch *v.* Lincoln, 12 Cush. (Mass.) 31; Hatch *v.* Bayley, 12 Cush. (Mass.) 27; Bullard *v.* Wait, 16 Gray (Mass.) 55; Hardy *v.* Potter, 10 Gray (Mass.) 89; Shumway *v.* Rutter, 8 Pick. (Mass.) 443, 19 Am. Dec. 340; Gardner *v.* Howland, 2 Pick. (Mass.) 599; Ingalls *v.* Herrick, 108 Mass. 351, 11 Am. Rep. 360.

Michigan. — Webster *v.* Anderson, 42 Mich. 554, 36 Am. Rep. 452; Carpenter *v.* Graham, 42 Mich. 191; Buhl Iron Works *v.* Teuton, 67 Mich. 630.

New Hampshire. — Stowe *v.* Taft, 58 N. H. 445; Lane *v.* Sleeper, 18 N. H. 214.

New York. — Dixon *v.* Buck, 42 Barb. (N. Y.) 70; Bates *v.* Conkling, 10 Wend. (N. Y.) 390.

Pennsylvania. — Keil *v.* Harris, (Pa. 1886) 6 Atl. Rep. 750. *Compare* Brock *v.* McCaffrey, 3 Pa. Super. Ct. 431.

Vermont. — Potter *v.* Washburn, 13 Vt. 558, 37 Am. Dec. 615; Barney *v.* Brown, 2 Vt. 374, 19 Am. Dec. 720.

See also the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 210.

Constructive possession accompanies the title to cattle running on a range which is common pasturage to everybody, for they are in the actual possession of no one. Budd *v.* Power, 9 Mont. 99.

2. Delivery by Mere Agreement. — Story on Sales (4th ed.), § 311*b*; 2 Kent's Com. (4th ed.) 591; Cartwright *v.* Phœnix, 7 Cal. 281; Jewett *v.* Warren, 12 Mass. 300, 7 Am. Dec. 74; Hutchins *v.* Gilchrist, 23 Vt. 88.

3. Goods in Possession of Buyer. — Manton *v.* Moore, 7 T. R. 67, 4 Rev. Rep. 376; Lake *v.* Morris, 30 Conn. 201; Nichols *v.* Patten, 18 Me. 231, 36 Am. Dec. 713; Shurtleff *v.* Willard, 19 Pick. (Mass.) 202; Macomber *v.* Parker, 13 Pick. (Mass.) 175; Chapman *v.* Searle, 3 Pick. (Mass.) 45; Warden *v.* Marshall, 99 Mass. 305; Pressel *v.* Bice, 142 Pa. St. 263.

Undivided Interests. — The same rule applies to sales of undivided interests by one tenant in common to another. Kittredge *v.* Sumner, 11 Pick. (Mass.) 50. And where one advanced money to the constructor of certain machines, to enable him to manufacture them, under an agreement that he should have a share in the machines equal to the advances so made, he became thereby a tenant in common with the constructor without any manual delivery. Beaumont *v.* Crane, 14 Mass. 400.

4. Act of God. — Love *v.* Barnesville Mfg. Co., 3 Penn. (Del.) 152; New Haven, etc., Co. *v.* Quintard, (N. Y. Super. Ct. Gen. T.) 6 Abb. Pr. N. S. (N. Y.) 128.

5. Love *v.* Barnesville Mfg. Co., 3 Penn. (Del.) 152.

6. Destruction by Accident.— Dexter *v.* Norton, 47 N. Y. 62, 7 Am. Rep. 415; Wunderlich *v.* Palatine F. Ins. Co., 104 Wis. 395.

A party who contracted to sell all the pine blocks cut by a certain mill during the sawing season, is excused from delivering any for three months, where the failure is caused by the mill shutting down during that time. McFadden *v.* Wetherbee, 63 Mich. 390.

7. Repudiation of Contract by Buyer. — Scully Steel, etc., Co. *v.* Old Meadow Rolling-Mill Co., 108 Fed. Rep. 732, 47 C. C. A. 646; American Tin-Plate Co. *v.* Trotter, 105 Fed. Rep. 478; Herzog *v.* Purdy, 119 Cal. 99; McCormick Harvesting Mach. Co. *v.* Markert, 107 Iowa 340; Langlois *v.* Ennis, 16 Quebec Super. Ct. 64.

" If the conduct or assertions before time of performance of one of the parties to an executory contract is relied upon as a repudiation of the contract, and as justifying an action as for a breach of the contract, there must be shown a distinct and unequivocal refusal to perform, treated and relied upon as an absolute repudiation by the other party to the contract. The rule in respect of such an anticipatory breach is that: 'A mere assertion that the party will be unable or will refuse to perform his contract is not sufficient. It must be a distinct and unequivocal, absolute refusal to perform the promise, and must be treated

accept the goods[1] or to pay the agreed price,[2] or any other repudiation of the contract will excuse a formal tender and delivery.[3] Where the contract is severable a repudiation of one part will not excuse the seller from tendering performance of the other severable parts.[4]

Waiver or Consent upon the part of the buyer is an excuse.[5] The existence of such waiver or consent is usually a question of fact for the jury.[6]

Delay or Nondelivery Caused by the Buyer does not constitute a breach upon the part of the seller.[7]

Mere Inability to Perform the contract, arising from causes not contemplated by the contract, and not involving any inherent impossibility, will not excuse delay or nondelivery in accordance with the contract.[8]

Mere Difficulty or Inconvenience of performance is not a sufficient excuse.[9]

The Contract Itself May Limit Liability, as where it excepts delay or nondelivery arising from certain causes.[10]

and acted upon as such by the party to whom the promise was made, for if he afterwards continue to urge or demand compliance with the contract, it is plain he does not understand it to be at an end.' Benj. Sales, § 860; Smoot's Case, 15 Wall. (U. S.) 36; Dingley *v.* Oler, 117 U. S. 490." Edward Hines Lumber Co. *v.* Alley, (C. C. A.) 73 Fed. Rep. 606.

1. Refusal to Accept Goods — *United States.* — Edward Hines Lumber Co. *v.* Alley, 73 Fed. Rep. 603, 43 U. S. App. 169.

California. — Scribner *v.* Schenkel, 128 Cal. 250.

Delaware. — Love *v.* Barnesville Mfg. Co., 3 Penn. (Del.) 152.

Illinois. — Franklin *v.* Krum, 70 Ill. App. 649. See Thorn *v.* Danzinger, 50 Ill. App. 306.

Kansas. — Grant *v.* Pendery, 15 Kan. 236.

Kentucky. — Morris *v.* Globe Refining Co., 59 S. W. Rep. 12, 22 Ky. L. Rep. 911.

New York. — Lackawanna Mills *v.* Weil, 162 N. Y. 642, 21 N. Y. App. Div. 492; Duryea *v.* Bonnell, 18 N. Y. App. Div. 151; Hayden *v.* De Mets, 34 N. Y. Super. Ct. 344; Kaufman *v.* Canary, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 302.

Pennsylvania. — Bascom *v.* Danville Stove, etc., Co., 182 Pa. St. 427, 41 W. N. C. (Pa.) 131.

Canada. — Tufts *v.* Poness, 32 Ont. 51.

2. Refusal to Pay Price. — Union Pressed Brick Co. *v.* Fultonham Brick, etc., Tile Co., 112 Fed. Rep. 920, 50 C. C. A. 615; Scully Steel, etc., Co. *v.* Old Meadow Rolling Mill Co., (C. C. A.) 108 Fed. Rep. 732; Scribner *v.* Schenkel, 128 Cal. 250; Leonard *v.* Johnson Forge Co., 3 Penn. (Del.) 104; Love *v.* Barnesville Mfg. Co., 3 Penn. (Del.) 152; Armstrong *v.* St. Paul, etc., Coal, etc., Co., 48 Minn. 118, *affirming* 48 Minn. 115; Easton *v.* Jones, 193 Pa. St. 147, 44 W. N. C. (Pa.) 490. *Compare* Lewis *v.* Craft, 39 Oregon 305.

3. Delay in Requesting Delivery. — In Jones *v.* Gibbons, 8 Exch. 920, it was held no defense to an action by the buyer for nondelivery "as required," that he had not requested delivery within a reasonable time. If the seller wanted to get rid of his obligation because of unreasonable delay in taking the goods, or in requiring delivery, it was for him to offer delivery, or to inquire of the buyer whether he would take the goods, and he had no right to treat the contract as rescinded by mere delay.

4. Severable Contract. — Herzog *v.* Purdy, 119 Cal. 99.

5. Waiver or Consent. — Forrestt *v.* Aramayo, 83 L. T. N. S. 335, 9 Asp. M. Cas. 134, New Bedford Copper Co. *v.* Southard, 95 Me. 209; Long *v.* Hunter, 58 S. Car. 152; Comora *v.* Mariano, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 755; Hill *v.* Blake, 48 N. Y. Super. Ct. 253; Phillips *v.* Taylor, 49 N. Y. Super. Ct. 318; Easton *v.* Jones, 193 Pa. St. 147, 44 W. N. C. (Pa.) 490; Cameron *v.* Wells, 30 Vt. 633; Barnes *v.* Stacy, 79 Wis. 55.

6. Question for Jury. — Eppens *v.* Littlejohn, 164 N. Y. 187.

In order to establish a waiver of the obligation to deliver at the time specified, there must be shown either such acts of defendant before the expiration of the time as amount to an estoppel, or after the expiration of the time, an agreement founded on a new consideration. Phillips *v.* Taylor, 49 N. Y. Super. Ct. 319.

7. Prevention by Buyer. — Chicago Lumber Co. *v.* Comstock, 71 Fed. Rep. 477, 34 U. S. App. 414; Lozes *v.* Segura Sugar Co., 52 La. Ann. 1844; Barker *v.* Davies, 47 Neb. 78; Duryea *v.* Bonnell, 18 N. Y. App. Div. 151; Whitney *v.* Hop Bitters Mfg. Co., (Supm. Ct. Gen. T.) 2 N. Y. Supp. 438; La Follett *v.* Mitchell, (Oregon 1902) 69 Pac. Rep. 916; Ault *v.* Dustin, 100 Tenn. 366. *Compare* Palestine Cotton-Seed Oil Co. *v.* Corsicana Cotton Oil Co., (Tex. Civ. App. 1901) 61 S. W. Rep. 433.

8. Inability to Perform. — Adams *v.* Royal Mail Steam-Packet Co., 5 C. B. N. S. 492, 94 E. C. L. 492; Ellis *v.* Thompson, 3 M. & W. 445; Arthur *v.* Wright, 57 Hun (N. Y.) 22; New Haven, etc., Co. *v.* Quintard, (N. Y. Super. Ct. Gen. T.) 6 Abb. Pr. N. S. (N. Y.) 128; Beebe *v.* Johnson, 19 Wend. (N. Y.) 500, 32 Am. Dec. 518; Phillips *v.* Taylor, 49 N. Y. Super. Ct. 318, *affirmed* 101 N. Y. 639; Eppens *v.* Littlejohn, 164 N. Y. 187; Bradley *v.* McHale, 19 Pa. Super. Ct. 300.

Inability caused by the seller's default is no excuse. Richmond Ice Co. *v.* Crystal Ice Co., 99 Va. 285.

9. Difficulty or Inconvenience. — Tradewater Coal Co. *v.* Lee, 68 S. W. Rep. 400, 24 Ky. L. Rep. 215; Arthur *v.* Wright, 57 Hun (N. Y.) 22; Shores Lumber Co. *v.* Claney, 102 Wis. 235.

10. Contract Stipulations. —Davis *v.* Columbia Coal Min. Co., 170 Mass. 391; Thomas Iron Co. *v.* Jackson Iron Co., (Mich. 1902) 91 N. W. Rep. 137, 9 Detroit Leg. N. 276; Consolidated Coal Co. *v.* Mexico Fire Brick Co., 66 Mo.

Or It May Extend Liability, as where it amounts to an absolute undertaking or guaranty to deliver at a certain time in any event.[1]

VI. ACCEPTANCE OF GOODS — 1. Duty to Accept. — Acceptance, at common law, is the correlative of delivery. Upon delivery by the seller in accordance with the contract,[2] the duty of acceptance by the buyer follows.[3] As has been said elsewhere, the obligation to accept may require a buyer to send for the goods,[4] and for an unreasonable delay in doing this he may render himself liable in damages.[5]

2. What Constitutes Acceptance — *a.* IN GENERAL. — Acceptance includes more than the mere receipt of that which is tendered; it comprehends a receipt of the goods in pursuance of a previous agreement and with the intention of retaining what is received.[6] What constitutes an acceptance is a mixed question of law and fact, and is usually a question for the jury,[7] to be determined in view of the particular circumstances arising in each case.[8]

App. 296; New York, etc., Gas Coal Co. *v.* Pittsburgh, 6 Pa. Dist. 122.

1. Bradley *v.* McHale, 19 Pa. Super. Ct. 300; Hesser-Milton-Renahan Coal Co. *v.* La Crosse Fuel Co., 114 Wis. 654.

2. Duty to Accept in General. — The buyer's duty to accept depends altogether on the sufficiency or insufficiency of the delivery offered by the seller. Benj. on Sales (6th Am. ed.), § 701. It has been seen, *supra*, this title, *Delivery of Goods*, that delivery must be made of the quantity and quality of goods called for by the contract, at the proper time and place. See also the titles IMPLIED WARRANTIES, vol. 15, p. 1210; WARRANTY; and see *infra*, this section, *Excuse for Nonacceptance*.

3. *England.* — *In re* Salomon, 81 L. T. N. S. 325.

United States. — Harrison *v.* Fortlage, 161 U. S. 57.

Alabama. — McFadden *v.* Henderson, 128 Ala. 221.

Connecticut. — Parker *v.* Selden, 69 Conn. 544.

Illinois. — Garden City Wire, etc., Co. *v.* Kause, 67 Ill. App. 108.

Iowa. — Sedgwick *v.* Cottingham, 54 Iowa 512; Loftus *v.* Riley, 83 Iowa 503.

Massachusetts. — Rodman *v.* Guilford, 112 Mass. 405; Nichols *v.* Morse, 100 Mass. 523.

Missouri. — Gratiot St. Warehouse Co. *v.* Wilkinson, 94 Mo. App. 528; Coates *v.* Hurst, 65 Mo. App. 256, 2 Mo. App. Rep. 1215; Stresovich *v.* Kesting, 63 Mo. App. 57, 1 Mo. App. Rep. 614.

New Jersey. — Barton *v.* McKelway, 22 N. J. L. 165.

New York. — Pacific Iron Works *v.* Long Island R. Co., 62 N. Y. 274; Owen *v.* Matthews, (N. Y. City Ct. Gen. T.) 19 N. Y. Supp. 813.

Oregon. — Brigham *v.* Hibbard, 28 Oregon 386.

Texas. — Cumberland Nursery Co. *v.* Sudberry, (Tex. Civ. App. 1899) 54 S. W. Rep. 27.

4. See *supra*, this title, *Delivery of Goods*.

But where the goods are sent by carrier, and the seller has them consigned to himself, it is no delivery to the buyer, and he is not obliged to take them from the carrier or to make inquiry of the carrier for goods not consigned to him. Sohn *v.* Jervis, 101 Ind. 578.

5. Delay in Acceptance. — Benj. on Sales (6th Am. ed.), § 700; Bloxam *v* Sanders, 4 B. & C. 941, 10 E. C. L. 477; Greaves *v.* Ashlin, 3 Campb. 426. And see Maclean *v.* Dunn, 4 Bing. 722, 15 E. C. L. 129; Middlesex Co. *v.* Osgood, 4 Gray (Mass.) 447; Sanborn *v.* Benedict, 78 Ill. 309; Nicholson *v.* Paston, (Buffalo Super. Ct. Gen. T.) 11 N. Y. Supp. 567; Dibble *v.* Corbett 5 Bosw. (N. Y.) 202.

6. Acceptance Distinguished from Receipt. — Armsby *v.* Shewmake, 113 Ga. 1086. This distinction is recognized in the provision of the statute of frauds requiring an actual acceptance and receipt, etc. See the title STATUTE OF FRAUDS.

There may be a receipt without any acceptance, and an acceptance without any receipt. Blackb. on Sales (2d ed.), p. 22; Simpson *v.* Krumdick, 28 Minn. 355; Demens *v.* Le Moyne, 26 Fla. 323.

Where goods are sent by carrier, we have seen, *supra*, this title, V. 5. *Delivery to Carrier for Shipment*, that the carrier is the agent of the buyer to receive the goods and transport them, but he is not the buyer's agent to accept them. Pierson *v.* Crooks, 115 N. Y. 539, 12 Am. St. Rep. 831.

7. Province of Court and Jury. — Garfield *v.* Paris, 96 U. S. 563; Coates *v.* Huffine, 13 Ind. App. 182; Greenleaf *v.* Hamilton, 94 Me. 118; Strauss *v.* National Parlor Furniture Co., 76 Miss. 343; Norton *v.* Dreyfuss, 106 N. Y. 90; Jones *v.* Reynolds, 120 N. Y. 213; N. Y. Van Pub. Co. *v.* Westinghouse, 72 N. Y. App. Div. 121; Empire Mfg. Co. *v.* Moers, 27 N. Y. App. Div. 464; Stockton *v.* Rogers, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 138; Kahn *v.* Klabunde, 50 Wis 235. See Lauer *v.* Richmond Co-operative Mercantile Inst., 8 Utah 305.

8. Sufficiency of Evidence to Show Acceptance — *Delaware.* — Grier *v.* Simpson, 8 Houst. (Del.) 7.

Iowa. — Aultman *v.* Nilson, 112 Iowa 634; Dierson *v.* Petersmeyer, 109 Iowa 233.

Maine. — White *v.* Harvey, 85 Me. 212; Houdlette *v.* Tallman, 14 Me. 400.

Massachusetts. — Gowing *v.* Knowles, 118 Mass. 232.

New Jersey. — Salomon *v.* King, 63 N. J. L. 39.

New York. — Norton *v.* Dreyfuss, 106 N. Y. 90; Birch *v.* Kavanaugh Knitting Co., 34 N. Y. App. Div. 614; Kraus *v.* J. H. Mohlman Co., (Supm. Ct. App. T.) 18 Misc. (N. Y.) 430; Bensler *v.* Locke, (Buffalo Super. Ct. Gen. T.) 4 Misc. (N. Y.) 486.

There may, of course, be an acceptance by express language,[1] or it may be inferred from conduct of the buyer inconsistent with an intent not to accept.[2] In all cases, however, there must be some definite act of the parties which amounts to a transfer of possession, and an actual receipt by the buyer depriving the seller of his lien for the price in order to constitute an acceptance.[3]

b. DELAY IN REJECTION. — The receipt of the goods may become an acceptance if the right of rejection is not exercised within a reasonable time.[4]

Pennsylvania. — Clark *v.* Wright, 5 Phila. (Pa.) 439, 21 Leg. Int. (Pa.) 212.

South Dakota. — J. I. Case Threshing Mach. Co. *v.* Eichinger, 15 S. Dak. 530.

Wisconsin. — Valley Iron-Works Mfg. Co. *v.* Grand Rapids Flouring-Mill Co., 85 Wis. 274.

Delivery in accordance with the contract is *prima facie* evidence of acceptance. White *v.* Harvey, 85 Me. 212.

1. Express Acceptance. — 2 Schouler Pers. Prop. (2d ed.), §§ 406, 407; Greenleaf *v.* Hamilton, 94 Me. 118. See Hayner *v.* Sherrer, 2 Ill. App. 536; Bozzoni *v.* Woodward, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 644.

2. Implied Acceptance. — Greenleaf *v.* Hamilton, 94 Me. 118; Mussinan *v.* New York Steam Co., 42 N. Y. App. Div. 625; Stewart *v.* Gilruth, 8 S. Dak. 181. See generally specific instances, *infra*, this section.

3. Transfer of Possession Necessary. — Edwards *v.* Grand Trunk R. Co., 54 Me. 105. And see generally Wilds *v.* Smith, 2 Ont. App. 8; Hamilton *v.* Myles, 24 U. C. C. P. 309; Cox *v.* Jones, 24 U. C. Q. B. 81.

Acceptance of goods sold may precede as well as follow the delivery of the goods. Stockton *v.* Rogers, (N. Y. City Ct. Gen. T.) 15 Misc. (N. Y.) 468; Stockton *v.* Rogers, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 138; Cross *v.* O'Donnell, 44 N. Y. 661, 4 Am. Rep. 721; U. S. Reflector Co. *v.* Rushton, 7 Daly (N. Y.) 410.

4. Unreasonable Delay in Rejection — *England.* — Moss *v.* Sweet, 16 Q. B. 493, 71 E. C. L. 493; Beverley *v.* Lincoln Gas Light, etc., Co., 6 Ad. & El. 829, 33 E. C. L. 222; Cash *v.* Giles, 3 C. & P. 407, 14 E. C. L. 372; Percival *v.* Blake, 2 C. & P. 514, 12 E. C. L. 241; Milner *v.* Tucker, 1 C. & P. 15, 11 E. C. L. 300; Harrison *v.* Allen, 2 Bing. 4, 9 E. C. L. 291, 9 Moo. 28; Okell *v.* Smith, 1 Stark. 107, 2 E. C. L. 50; Bianchi *v.* Nash, 1 M. & W. 545; Couston *v.* Chapman, L. R. 2 H. L. 250, 3 Moak 187. *Compare* Yates *v.* Pym, 2 Marsh. 141, 6 Taunt. 446, 1 E. C. L. 446.

Canada. — See Creighton *v.* Pacific Coast Lumber Co., 12 Manitoba 546.

United States. — Foss-Schneider Brewing Co. *v.* Bullock, 59 Fed. Rep. 83, 16 U. S. App. 311.

California. — Merehin *v.* Ball, 68 Cal. 205.

Connecticut. — C. & C. Electric Motor Co. *v.* Frisbie, 66 Conn. 67; Treadwell *v.* Reynolds, 39 Conn. 31; Downs *v.* Marsh, 29 Conn. 409.

Florida. — Heinberg *v.* Cannon, 36 Fla. 601.

Georgia. — Armsby Co. *v.* Shewmake, 113 Ga. 1086.

Illinois. — Pennell *v.* McAfferty, 84 Ill. 364; McBride *v.* McClure, 49 Ill. App. 612; Mayes *v.* Rogers, 47 Ill. App. 372.

Iowa. — Winelander *v.* Jones, 77 Iowa 401; Mackey *v.* Swartz, 60 Iowa 711; Hirshhorn *v.* Stewart, 49 Iowa 418.

Maine. — Goodhue *v.* Butman, 8 Me. 116.

Maryland. — Delamater *v.* Chappell, 48 Md. 244.

Massachusetts. — Hobbs *v.* Massasoit Whip Co., 158 Mass. 194; Wheeler *v.* Klaholt, 176 Mass. 141.

Michigan. — Comstock *v.* Sanger, 51 Mich. 497. *Compare* Shipman *v.* Graves, 41 Mich. 675.

Minnesota. — Rosenfield *v.* Swenson, 45 Minn. 190; Lee *v.* Bangs, 43 Minn. 23; Haase *v.* Nonnemacher, 21 Minn. 486; Knoblauch *v.* Kronschnabel, 18 Minn. 302.

Missouri. — Graff *v.* Foster, 67 Mo. 512; Ozark Lumber Co. *v.* Chicago Lumber Co., 51 Mo. App. 555.

Nebraska. — McCormick Harvesting Mach. Co. *v.* Martin, 32 Neb. 723.

New York. — Fitch *v.* Carpenter, 43 Barb. (N. Y.) 40; Reimers *v.* Ridner, (N. Y. Super. Ct. Gen. T.) 17 Abb. Pr. (N. Y.) 292; U. S. Reflector Co. *v.* Rushton, 7 Daly (N. Y.) 410; Greenthal *v.* Schneider, (C. Pl. Gen. T.) 52 How. Pr. (N. Y.) 133; Empire Steam Pump Co. *v.* Inman, 59 Hun (N. Y.) 230; Coplay Iron Co. *v.* Pope, 108 N. Y. 232; Golden Gate Concentrator Co. *v.* Caplice, 55 N. Y. Super. Ct. 439; Reed *v.* Randall, 29 N. Y. 358, 86 Am. Dec. 305; Duford *v.* Patrick, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 285; Van Pub. Co. *v.* Westinghouse, 72 N. Y. App. Div. 121; O'Sullivan *v.* New York Lumber Corp., (N. Y. City Ct. Gen. T.) 29 Misc. (N. Y.) 604; Turl *v.* Knabe, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 770; Logan *v.* Berkshire Apartment House, (C. Pl. Gen. T.) 3 Misc. (N. Y.) 296; Chambers *v.* Lancaster, 160 N. Y. 342; Smith *v.* Coe, 57 N. Y. App. Div. 631.

Pennsylvania. — Baltimore Brick Co. *v.* Coyle, 18 Pa. Super. Ct. 186; American Watch Tool Co. *v.* Reed Mfg. Co., 18 Pa. Super. Ct. 24; Clark *v.* Wright, 5 Phila. (Pa.) 439, 21 Leg. Int. (Pa.) 212.

Texas. — Pontiac Shoe Mfg. Co. *v.* Hamilton, 18 Tex. Civ. App. 283.

Vermont. — Waters Heater Co. *v.* Mansfield, 48 Vt. 378; Spencer *v.* Hale, 30 Vt. 314, 73 Am. Dec. 309.

West Virginia. — Bartholomae *v.* Paull, 18 W. Va. 779.

Wisconsin. — Thompson Mfg. Co. *v.* Gunderson, 106 Wis. 449; Gammon *v.* Abrams, 53 Wis. 323.

See *supra*, this title, V. 10. *Inspection by Buyer.*

The retention by the buyer of the goods sold for an unreasonable length of time is conclusive upon himself, but it seems that others are not estopped from showing that the title had not then passed to him. Thus, in Shipman *v.* Graves, 41 Mich. 675, the goods were forwarded for acceptance, if satisfactory, but acceptance and payment were delayed for an unreasonable length of time, and meanwhile

What is reasonable time is usually a mixed question of law and fact dependent upon the circumstances of each case.[1] But as a general rule the right of rejection must be exercised promptly and with due diligence.[2] Usage and custom in the trade may be considered in determining whether rejection was within a reasonable time.[3] Delay attributable to the seller does not constitute acceptance.[4] The contract itself may fix the time or place for acceptance or rejection, in which case a subsequent rejection comes too late,[5] unless the provisions as to time and place have been waived by the conduct of the parties.[6] A conditional rejection followed by continual retention of the goods amounts to an acceptance. A rejection to be effectual must be unconditional.[7] Mere notice of rejection and that the goods are held at the seller's risk is sufficient to constitute a rejection. The buyer is not bound to send them back to the seller or to make any other disposition of them.[8] But he must do one or the other — either give notice of rejection or return the goods.[9]

c. ACTS OF OWNERSHIP. — Any act done by the buyer which he would have no right to do, unless as owner of the goods, amounts to an acceptance.[10]

the consignee became insolvent and made an assignment. In an action of replevin by the seller it was held that notwithstanding this unreasonable detention, the title had not passed to the buyer and was, therefore, not included in his assignment. See also Lentz *v.* Flint, etc., R. Co., 53 Mich. 444.

1. Province of Court and Jury. — Young *v.* Argo, 1 Marv. (Del.) 156; Hirshhorn *v.* Stewart, 49 Iowa 418; Bostain *v.* De Laval Separator Co., 92 Md. 483; Morrell *v.* Koerner-Parker Lumber Co., 51 Mo. App. 592; Dowdle *v.* Bayer, 9 N. Y. App. Div. 308; Lauer *v.* Richmond Co-Operative Mercantile Inst., 8 Utah 305; Bartholomae *v.* Paull, 18 W. Va. 771. See also cases cited in preceding note. And see the title QUESTIONS OF LAW AND FACT, vol. 23, p. 543.

2. Promptness and Diligence Required. — Couston *v.* Chapman, L. R. 2 H. L. Sc. 250, 3 Moak 187; Sanders *v.* Jameson, 2 C. & K. 557, 61 E. C. L. 557; Stafford *v.* Pooler, 67 Barb. (N. Y.) 143; Empire Mfg. Co. *v.* Moers, 27 N. Y. App. Div. 464; Johnson *v.* Hibbard, 29 Oregon 184, 54 Am. St. Rep. 787; Baltimore Brick Co. *v.* Coyle, 18 Pa. Super. Ct. 186; Louis Werner Saw Mill Co. *v.* Ferree, 201 Pa. St. 405; Boughton *v.* Standish, 48 Vt. 594; Spencer *v.* Hale, 30 Vt. 314, 73 Am. Dec. 309.

Where the buyer of wood saw a portion of it as it was delivered from day to day at the place designated in the contract, and examined it there and made no objection, he was held to have accepted the wood examined, though it had not been measured. Small *v.* Stevens, 65 N. H. 209.

Where the seller sold for clover seed a mixture of clover and plantain, it was held that though the buyer was unable to look at the seed at the time of purchase, he was bound to examine it before sowing. Fox *v.* Everson, 27 Hun (N. Y.) 355.

3. Usage and Custom. — Sanders *v.* Jameson, 2 C. & K. 557, 61 E. C. L. 557.

Evidence is admissible that under mercantile usage the proper storage of herring (or any other article of commerce) on receiving it without immediate examination, does not waive objections to its quality or variance from the order given. Henkel *v.* Welsh, 41 Mich. 665.

4. Delay Caused by Seller. — Gibson *v.* Vail, 53 Vt. 476; Suit *v.* Bonnell, 33 Wis. 180.

5. Special Contract Provisions. — Fraser *v.* Ross, 1 Penn. (Del.) 348; Stafford *v.* Pooler, 67 Barb. (N. Y.) 143 Birch *v.* Kavanaugh Knitting Co., 165 N. Y. 617; Suit *v.* Bonnell, 33 Wis. 180. See Stillwell *v.* Biloxi Canning Co., 78 Miss. 779. See also Kahn *v.* Klabunde, 50 Wis. 235; Fairfield *v.* Madison Mfg. Co., 38 Wis. 346. And see Cole *v.* Common Council, 53 Mich. 438; Mansfield Mach. Works *v.* Common Council, 62 Mich. 554.

6. Waiver of Contract Provisions. — Long-Bell Lumber Co. *v.* Stump, (C. C. A.) 86 Fed. Rep. 574; Leffel *v.* Piatt, 126 Mich. 443, 8 Detroit Leg. N. 92; Cefalu *v.* Fitzsimmons-Derrig Co., 65 Minn. 480; Gaar *v.* Stark, (Tenn. Ch. 1895) 36 S. W. Rep. 149.

7. Conditional Rejection. — Duckwall *v.* Brooke, 65 S. W. Rep. 357, 23 Ky. L. Rep. 1459; Howard *v.* Hayes, 47 N. Y. Super. Ct. 89.

8. Notice of Rejection Sufficient. — Grimoldby *v.* Wells, L. R. 10 C. P. 391, 12 Moak 451 (expressly *overruling* a *dictum* to the contrary in Couston *v.* Chapman, L. R. 2 H. L. 250); Lucy *v.* Mouflet, 5 H. & N. 233; Heilbutt *v.* Hickson, L. R. 7 C. P. 438, 3 Moak 329; Love *v.* Barnesville Mfg. Co., 3 Penn. (Del.) 152; Wartman *v.* Breed, 117 Mass. 18; American White Bronze Co. *v.* Gillette, 88 Mich. 231, 26 Am. St. Rep. 286; Suit *v.* Bonnell, 33 Wis. 180. See also Wright *v.* St. Louis Hoop, etc., Co., 73 Ill. App. 264.

9. American Watch Tool Co. *v.* Reed Mfg. Co., 18 Pa. Super. Ct. 24.

10. Acts of Ownership Constitute Acceptance — *England.* — Chapman *v.* Morton, 11 M. & W. 534; Parker *v.* Palmer, 4 B. & Ald. 387, 6 E. C. L. 529; Perkins *v.* Bell, 4 Reports 212, (1893) 1 Q. B. 193.

United States. — Van Winkle *v.* Crowell, 146 U. S. 42.

Illinois. — Telford *v.* Albro, 60 Ill. App. 359; Underwood *v.* Wolf, 31 Ill. App. 637, *affirmed* 131 Ill. 425, 19 Am. St. Rep. 40.

Indiana. — Hunter *v.* Leavitt, 36 Ind. 141.

Iowa. — Aultman *v.* Nilson, 112 Iowa 634; Hensen *v.* Beebe, 111 Iowa 534; Rock Island Plow Co. *v.* Meredith, 107 Iowa 498; Frey-Sheckler Co. *v.* Iowa Brick Co., 104 Iowa 494;

Even where goods are not ordered, but are voluntarily sent to one, his receipt of them and exercise of ownership over them may constitute an acceptance and preclude him from denying his liability for the price.[1] The retention and use of an article after the time when it should have been rejected is such an act of ownership as amounts to an acceptance.[2] A subsequent sale by the buyer is an acceptance.[3]

d. CONDITIONAL ACCEPTANCE. — Acceptance may be conditioned upon some further performance by the seller, in which case the acceptance does not become absolute until the condition is performed.[4]

e. ACCEPTANCE OF INSTALMENTS. — Where delivery is to be made by instalments, an acceptance of one instalment does not affect the buyer's right to refuse any subsequent instalment, when such subsequent instalment is not of the proper quality or quantity, or is not delivered within the time specified in the contract.[5] Where the contract is entire the buyer must accept or reject the whole,[6] and he is not called upon to act until the entire amount is

Leggett, etc., Tobacco Co. *v.* Collier, 89 Iowa 144.

Kentucky. — Helfrich Saw, etc., Mill Co. *v.* Everly, (Ky. 1895) 32 S. W. Rep. 750.

Massachusetts. — Hedden *v.* Roberts, 134 Mass. 38, 45 Am. Rep. 276.

New York. — Pease *v.* Copp, 67 Barb. (N. Y.) 132; Brown *v.* Foster, 108 N. Y. 387; Allen *v.* Grove Springs Hotel, etc., Co., 85 Hun (N. Y.) 537; Bozzoni *v.* Woodward, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 644; Schuchman *v.* Winterbottom, 58 N. Y. Super. Ct. 105. But *compare* Cooke *v.* Underhill Mfg. Co., 57 Hun (N. Y.) 107.

Pennsylvania. — Freedman *v.* Morrow Shoe Mfg. Co., 122 Pa. St. 25.

Vermont. — Brown *v.* Nelson, 66 Vt. 660; Dennis *v.* Stoughton, 55 Vt. 371.

West Virginia. — Manss-Bruning Shoe Co. *v.* Prince, 51 W. Va. 510.

Wisconsin. — White *v.* Hanchett, 21 Wis. 415; McClure *v.* Jefferson, 85 Wis. 208.

After a purchaser has retained goods for nearly two months without giving notice of his rejection of them, his appropriation of a part by a sale thereof will be an appropriation of the whole. Watkins *v.* Paine, 57 Ga. 50.

1. Schouler on Pers. Prop. (2d ed.), § 407; Hobbs *v.* Massasoit Whip Co., 158 Mass. 194, Reed *v.* Randall, 29 N. Y. 358, 86 Am. Dec. 305; Bartholomae *v.* Paull, 18 W. Va. 771; Wellauer *v.* Fellows, 48 Wis. 105.

2. Retention and Use — *United States.* — Louisiana Electric Light, etc., Co. *v.* Bass Foundry, etc., Works, 69 Fed. Rep. 65, 30 U. S. App. 433.

Illinois. — Smith *v.* Ainsworth, 64 Ill. App. 157; De Kalb Implement Works *v.* White, 59 Ill. App. 171.

Kansas. — Tufts *v.* Mabie, 7 Kan. App. 129.

Minnesota. — *Compare* Schwartz *v.* Church of Holy Cross, 60 Minn. 183.

Mississippi. — Stillwell *v.* Biloxi Canning Co., 78 Miss. 779.

New Jersey. — Woodward *v.* Emmons, 61 N. J. L. 281.

New York. — Turl *v.* Knabe, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 770; Ellison *v.* Creed, 34 N. Y. App. Div. 15; Wiles *v.* Provost, 6 N. Y. App. Div. 1; Chambers *v.* Lancaster, 3 N. Y. App. Div. 215; Logan *v.* Berkshire Apartment House, (C. Pl. Gen. T.) 3 Misc. (N. Y.) 296; Empire Mfg. Co. *v.* Moers, 27 N. Y. App. Div. 464. *Compare* Bensler *v.* Locke, (Buffalo Super. Ct. Gen. T.) 4 Misc. (N. Y.) 486.

North Carolina. — Huyett, etc., Mfg. Co. *v.* Gray, 124 N. Car. 322.

Pennsylvania. — Louis Werner Saw Mill Co. *v.* Ferree, 201 Pa. St. 405.

Tennessee. — *Compare* Gaar *v.* Stark, (Tenn. Ch. 1895) 36 S. W. Rep. 149.

Washington. — Childs Lumber, etc., Co. *v.* Page, 28 Wash. 128.

Wisconsin. — Palmer *v.* Banfield, 86 Wis. 441.

3. Subsequent Sale. — Houston *v.* Clark, 62 Ill. App. 174; Pottlitzer *v.* Wesson, 8 Ind. App. 472; Walcott *v.* Richman, 94 Me. 364; Kienle *v.* Klingman, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 708; Levison *v.* Seybold Mach. Co., (Supm. Ct. App. T.) 22 Misc. (N. Y.) 327; Stewart *v.* Gilruth, 8 S. Dak. 181; Brown *v.* Nelson, 66 Vt. 660. *Compare* Little Rock Grain Co. *v.* Brubaker, 89 Mo. App. 1.

4. Conditional Acceptance. — Duplanty *v.* Stokes, 103 Mich. 630; Belt *v.* Stetson, 26 Minn. 411. See also Uhlman *v.* Day, 38 Hun (N. Y.) 298; Smith *v.* Brady, 17 N. Y. 173, 72 Am. Dec. 442.

5. Acceptance of Instalments. — Hubbard *v.* George, 49 Ill. 275; American Paper Pail, etc., Co. *v.* Oakes, 64 Mo. App. 235, 2 Mo. App. Rep. 1102; Holmes *v.* Gregg, 66 N. H. 621; Pacific Coast Elevator Co. *v.* Bravinder, 14 Wash. 315; Lewis *v.* Barré, 14 Manitoba 32. And see Plant Seed Co. *v.* Hall, 14 Kan. 553; Kipp *v.* Meyer, 5 Hun (N. Y.) 111; Pierson *v.* Crooks, 115 N. Y. 539, 12 Am. St. Rep. 831; Cahen *v.* Platt, 69 N. Y. 348, 25 Am. Rep. 203. *Compare* Maynard *v.* Render, 95 Ga. 652. And see *supra*, this title, V. 11. *b. Delivery by Instalments.*

But if a party accepts and pays for part of a quantity of goods delivered, without reserving the right to object subsequently, and does not offer to return such goods but retains them, he waives any defect in their quality and cannot make such defect a ground of objection to subsequent deliveries which are in accordance with the contract. Guernsey *v.* West Coast Lumber Co., 87 Cal. 249. And see Mason *v.* Smith, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 301; Cahen *v.* Platt, 69 N. Y. 348, 25 Am. Rep. 203.

6. Entire Contracts. — Williams *v.* Leslie, 66 Ill. App. 246; Simon *v.* Wood, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 607; Blum *v.* Daly,

tendered.[1] Where the contract is severable an acceptance of a part does not bind the purchaser to accept the balance.[2]

3. Excuse for Nonacceptance. — The buyer is justified in refusing to accept goods which are not tendered in accordance with the provisions of the contract of sale.[3] Thus, if the goods are not of the designated quality,[4] or quantity,[5] or if delivery is not tendered at the time[6] and place[7] agreed upon, the buyer may reject the goods tendered, and is not liable upon the contract for the agreed price, nor in damages for nonacceptance.[8] The contract itself may provide for the rejection or return of the goods in certain contingencies, in which case it, of course, controls the rights of the parties.[9]

4. Waiver of Objections. — Objections sufficient to justify a rejection of the goods tendered may be waived by the buyer.[10] Any act amounting to an acceptance operates as such a waiver.[11] A rejection placed upon one ground may operate as a waiver of objections based upon other grounds.[12]

5. Effect of Acceptance. — When there has once been an acceptance by the

(Supm. Ct. App. T.) 22 Misc. (N. Y.) 342; Manss-Bruning Shoe Co. *v.* Prince, 51 W. Va. 510. But *compare* Holmes *v.* Gregg, 66 N. H. 621. See also *supra*, this title, V. 11. *b. Delivery by Instalments.*

1. Harper *v.* Baird, 3 Penn. (Del.) 110.

2. **Severable Contracts.** — U. S. Printing Co. *v.* H. O. Wilbur Co., 98 Ill. App. 20.

3. **Tender Not According to Contract.** — Vigers *v.* Sanderson, 70 L. J. K. B. 383, (1901) 1 K. B. 608; Fenton *v.* Braden, 2 Cranch (C. C.) 550; Armsby Co. *v.* Shewmake, 113 Ga. 1086, Murphy *v.* Toner, 19 Ind. 228; Richardson *v.* Great Western Mfg. Co., 3 Kan. App. 445; Price *v.* Marthen, 124 Mich. 690; King *v.* Rochester, 67 N. H. 310; Downer *v.* Thompson, 6 Hill (N. Y.) 208; Morse *v.* Arnfield, 15 Pa. Super. Ct. 140.

Where a contract of sale of a piano provides for the delivery of a written warranty with the instrument, the mere failure, without more, to have it present when the piano is delivered will not authorize a refusal to accept, there being no refusal or disclaimer of the warranty. Jesse French Piano, etc., Co. *v.* Wallace, 84 Mo. App. 378.

4. **Goods Not of Designated Quality** — *England.* — Drummond *v.* Van Ingen, 12 App. Cas. 284, 56 L. J. Q. B. 563; Heilbutt *v.* Hickson, L. R. 7 C. P. 438; Mody *v.* Gregson, L. R. 4 Exch. 49.

Canada. — Stewart *v.* Atkinson, 22 Can. Sup. Ct. 315.

Alabama. — Penn *v.* Smith, 104 Ala. 445.

Delaware. — Love *v.* Barnesville Mfg. Co., 3 Penn. (Del.) 152.

Georgia. — Armsby Co. *v.* Shewmake, 113 Ga. 1086.

Illinois. — Houston *v.* Clark, 62 Ill. App. 174.

Missouri. — Little Rock Grain Co. *v.* Brubaker, 89 Mo. App. 1.

Nebraska. — Bryant *v.* Thesing, 46 Neb. 244.

New Jersey. — Meader *v.* Cornell, 58 N. J. L. 375.

New York. — Blum *v.* Daly, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 342.

Tennessee. — Gregson *v.* New Soddy Coal Co., (Tenn. Ch. 1899) 54 S. W. Rep. 113.

The buyer cannot refuse to accept because the goods were not packed in the usual wrappers with which he was familiar, it not appearing that he was injured by the seeming variance from his order. Forke *v.* E. C. Meacham Arms Co., (Tex. 1892) 19 S. W. Rep. 550.

The purchaser of coffee bearing the name of a district in Java in which it is grown cannot be compelled to accept coffee bearing the name of a plantation in an adjoining district, which is not so well known and which does not command so high a price. O'Donohue *v.* Leggett, 134 N. Y. 40.

In Loftus *v.* Riley, 83 Iowa 503, where the buyer rejected ten car-loads of paving blocks after inspecting only two, and there was evidence that the remaining loads were superior to those rejected, he was held liable to pay for the latter unless they did not substantially conform to the specifications of the contract.

5. See *supra*, V. 8. *Quantity to Be Delivered.*

6. See *supra*, V. 7. *Time of Delivery.*

7. See *supra*, V. 3. *Place of Delivery.*

8. See generally *infra*, this title, *Remedies of Seller.*

9. **Contract Stipulations.** — Colles *v.* Lake Cities Electric R. Co., 22 Ind. App. 86; Hawley Down-Draft Furnace Co. *v.* Southern Chemical, etc., Co., 51 La. Ann. 914; Lyon *v.* Motley, (C. Pl. Gen. T.) 9 Misc. (N. Y.) 500.

10. **Buyer May Waive Objections.**—Hayner *v.* Sherrer, 2 Ill. App. 536; Redlands Orange Growers Assoc. *v.* Gorman, 76 Mo. App. 184; Hollfield *v.* Black, 20 Mo. App. 328; Stamps *v.* Tennessee Producers' Marble Co., (Tenn. Ch. 1900) 59 S. W. Rep. 769.

In Dowell *v.* Williams, 33 Kan. 319, *affirmed* 40 Kan. 753, there was a sale of hogs. Some time previous to delivery the seller expressed doubts to the buyer as to whether they were of the quality stipulated; the buyer did not then object, but when delivery was made he declined to receive them because they were not of proper quality. It was held that he had not waived his right to reject them by not objecting previous to the delivery.

11. See *supra*, this section, *What Constitutes Acceptance.* See also *infra*, this section, *Effect of Acceptance.*

12. Sutton *v.* Risser, 104 Iowa 631; Littlejohn *v.* Shaw, 159 N. Y. 188; Smith *v.* Pettee, 70 N. Y. 17; Johnson *v.* Oppenheim, 55 N. Y. 291; Knox *v.* Schoenthal, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 7; Kelly *v.* Berry, 39 Wis. 669.

buyer it is absolutely binding and conclusive upon him. It renders him liable for the price agreed on, precludes him from alleging that the goods are not of the character and quality called for by the contract, or from insisting that a proper quantity was not delivered.[1] He is not estopped, however, from alleging that such acceptance was procured by fraud or mistake.[2] Nor is his right of action for breach of warranty affected, unless the defect was obvious at the time of acceptance.[3] Where time is of the essence, acceptance

1. Acceptance as Waiver of Objections. — Story on Sales (4th ed.), § 405.

England. — Harnor *v.* Groves, 15 C. B. 667, 80 E. C. L. 667; Street *v.* Blay, 2 B. & Ad. 456, 22 E. C. L. 122; Parker *v.* Palmer, 4 B. & Ald. 387, 6 E. C. L. 529.

United States. — Van Winkle *v.* Crowell, 146 U. S. 42; Dodge *v.* Dickson Mfg. Co., (C. C. A.) 113 Fed. Rep. 218; Carleton *v.* Jenks, (C. C. A.) 80 Fed. Rep. 937.

Alabama. — Moore *v.* Barber Asphalt Paving Co., 118 Ala. 563; Watson *v.* Kirby, 112 Ala. 436.

Delaware. — Harper *v.* Baird, 3 Penn. (Del.) 110; Darby Hall, 3 Penn. (Del.) 25.

Georgia. — Maynard *v.* Render, 95 Ga. 652; Woodruff *v.* Graddy, 91 Ga. 333, 44 Am. St. Rep. 33.

Illinois. — Defenbaugh *v.* Weaver, 87 Ill. 132; Carondelet Iron Works *v.* Moore, 78 Ill. 69; Hummer *v.* Brenneman, 89 Ill. App. 460; Houston *v.* Clark, 62 Ill. App. 174; Telford *v.* Albro, 60 Ill. App. 359; De Kalb Implement Works *v.* White, 59 Ill. App. 171; Barker *v.* Turnbull, 51 Ill. App. 226; Davidson *v.* Clark, 36 Ill. App. 313.

Iowa. — Mackey *v.* Swartz, 60 Iowa 710; Schopp *v.* Taft, 106 Iowa 612; Aultman-Taylor Machinery Co. *v.* Ridenour, 96 Iowa 638.

Kansas. — *Compare* Tufts *v.* Mabie, 7 Kan. App. 129.

Kentucky. — Dana *v.* Boyd, 2 J. J. Marsh. (Ky.) 587; Albin Co. *v.* Kentucky Table Co., (Ky. 1902) 67 S. W. Rep. 13; Stein Brewing Co. *v.* Eberhard, 62 S. W. Rep. 881, 23 Ky. L. Rep. 325; Jones *v.* McEwan, 91 Ky. 373.

Louisiana. — See Strahorn-Hutton-Evans Commission Co. *v.* Red River Oil Co., 104 La. 664.

Maine. — Baldwin *v.* Farnsworth, 10 Me. 414, 25 Am. Dec. 252; Goodhue *v.* Butman, 8 Me. 116.

Michigan. — Gilbert *v.* Lichtenberg, 98 Mich. 417.

Minnesota. — Mobile Fruit, etc., Co. *v.* McGuire, 81 Minn. 232; Haase *v.* Nonnemacher, 21 Minn. 486.

Missouri. — Adams *v.* Helm, 55 Mo. 468; Tufts *v.* Morris, 87 Mo. App. 98.

New Jersey. — Higbie *v.* Rogers, 63 N. J. Eq. 368; Woodward *v.* Emmons, 61 N. J. L. 281.

New York. — Pease *v.* Copp, 67 Barb. (N. Y.) 132; U. S. Trust Co. *v.* Harris, 2 Bosw. (N. Y.) 75; Bock *v.* Healy, 8 Daly (N. Y.) 156; Consequa *v.* Fanning, 3 Johns. Ch. (N. Y.) 587; Sprague *v.* Blake, 20 Wend. (N. Y.) 61; Smith *v.* Coe, 170 N. Y. 162, 57 N. Y. App. Div. 631, 55 N. Y. App. Div. 585; Larrowe *v.* Lewis, 128 N. Y. 593, *affirming* 58 Hun (N. Y.) 601; Studer *v.* Bleistein, 115 N. Y. 316; Gaylord Mfg. Co. *v.* Allen, 53 N. Y. 519; McCormick *v.* Sarson, 45 N. Y. 265, 6 Am. Rep. 80, *affirming* (N. Y. Super. Ct. Gen. T.) 38 How. Pr. (N. Y.) 190; Reed *v.* Randall, 29 N. Y. 358, 86 Am. Dec. 305; Stuart *v.* Manhattan Bath Tub Co., (Supm. Ct. App. T.) 68 N. Y. Supp. 816, 34 Misc. (N. Y.) 165; Allen *v.* Grove Springs Hotel, etc., Co., 85 Hun (N. Y.) 537; Carleton *v.* Lombard, 72 Hun (N. Y.) 254; Duford *v.* Patrick, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 285; Wallace *v.* Valentine, (C. Pl. Spec. T.) 10 Misc. (N. Y.) 645.

Pennsylvania. — Louis Werner Saw Mill Co. *v.* Ferree, 201 Pa. St. 405; Albree *v.* Philadelphia Co., 201 Pa. St. 165; Baltimore Brick Co. *v.* Coyle, 18 Pa. Super. Ct. 186.

South Carolina. — Vanderhorst *v.* M'Taggart, 2 Bay (S. Car.) 498; Mitchell *v.* McBee, 1 McMull. L. (S. Car.) 267, 36 Am. Dec. 264.

South Dakota. — Stewart *v.* Gilruth, 8 S. Dak. 181.

Tennessee. — Stamps *v.* Tennessee Producer's Marble Co., (Tenn. Ch. 1900) 59 S. W. Rep. 769.

Texas. — Maud *v.* Coppinger, 23 Tex. Civ. App. 128; Florida Athletic Club *v.* Hope Lumber Co., 18 Tex. Civ. App. 161; Breneman *v.* Kilgore, (Tex. Civ. App. 1896) 35 S. W. Rep. 202; Seay *v.* Diller, (Tex. 1891) 16 S. W. Rep. 642.

Vermont. — Gilson *v.* Bingham, 43 Vt. 415, 5 Am. Rep. 289; Cram *v.* Watson, 28 Vt. 22; Cole *v.* Champlain Transp. Co., 26 Vt. 87.

Virginia. — Proctor *v.* Spratley, 78 Va. 254.

Washington. — Childs Lumber, etc., Co. *v.* Page, 28 Wash. 128.

Wisconsin. — Thompson Mfg. Co. *v.* Gunderson, 106 Wis. 449; Olson *v.* Mayer, 56 Wis. 551; Locke *v.* Williamson, 40 Wis. 377.

See also the title IMPLIED WARRANTIES, vol. 15, p 1210.

In Giles Lith., etc., Co. *v.* Chase, 149 Mass. 459, 14 Am. St. Rep. 439, defendant ordered certain cards subject to his acceptance of a finished proof. The proof was sent and returned by him marked "O. K." After the cards were printed it was discovered that a material misprint had been made and overlooked by both parties, and it was held that defendant could not refuse to accept them.

2. Fraud or Mistake Not Waived. — Excelsior Coal Min. Co. *v.* Virginia Iron, etc., Co., 66 S. W. Rep. 373, 23 Ky. L. Rep. 1834. See Barker *v.* Turnbull, 51 Ill. App. 226; Maud *v.* Coppinger, 23 Tex. Civ. App. 128. But see Carondelet Iron Works *v.* Moore, 78 Ill. 65; Becker *v.* Brawner, 18 Ill. App. 39; Thompson *v.* Libby, 35 Minn. 443, 36 Minn. 287. See generally the titles FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 210; IMPLIED WARRANTIES, vol. 15, p. 1210.

3. Breach of Warranty Not Waived — *United States.* — Bagley *v.* Cleveland Rolling Mill Co., 21 Fed. Rep. 164.

after the time stipulated does not waive the right to recover damages for the delay,[1] especially where there are circumstances showing an intention not to waive the right to damages.[2] There are cases, however, where an acceptance has been held to operate as a waiver of a claim for damages for delay.[3] The question is really one of fact to be determined with a view to all the circumstances. The intention of the parties is the controlling factor.[4]

VII. Payment or Tender of Price — 1. In General. — After delivery and acceptance of the goods it is the duty of the buyer to pay the price in the manner agreed upon.[5] Where the contract prescribes the time, place, and mode of payment the seller is not bound to accept, and the buyer is not bound to tender, payment at any other time or place or in any other mode.[6] The contract itself determines the rights of the parties as to payments as in other respects, and their rights and duties may be varied almost indefinitely by special provisions.[7] Where no special provisions exist as to payment or

California. — Polhemus *v.* Heiman, 45 Cal. 573.

Delaware. — Leonard *v.* Johnson Forge Co., 3 Penn. (Del.) 104.

Iowa. — Schopp *v.* Taft, 106 Iowa 612.

Maryland. — Clements *v.* Smith, 9 Gill (Md.) 156.

Minnesota. — Cosgrove *v.* Bennett, 32 Minn. 371; Scott *v.* Raymond, 31 Minn. 437.

Missouri. — Redlands Orange Growers' Assoc. *v.* Gorman, 161 Mo. 203.

New Jersey. — Woodward *v.* Emmons, 61 N. J. L. 281.

New York. — Willard *v.* Merritt, 45 Barb. (N. Y.) 295; Lawrence *v.* Dale, 3 Johns. Ch. (N. Y.) 42; Smith *v.* Coe, 55 N. Y. App. Div. 585.

Texas. — Florida Athletic Club *v.* Hope Lumber Co., 18 Tex. Civ. App. 161. See Maud *v.* Coppinger, 23 Tex. Civ. App. 128.

Vermont. — Gilson *v.* Bingham, 43 Vt. 410, 5 Am. Rep. 289.

1. Damages for Delay — *United States.* — Phillips, etc., Constr. Co. *v.* Seymour, 91 U. S. 646; Jeffrey Mfg. Co. *v.* Central Coal, etc., Co., 93 Fed. Rep. 408.

Georgia. — Van Winkle *v.* Wilkins, 81 Ga. 104.

Illinois. — Ramsey *v.* Tully, 12 Ill. App. 463.

Iowa. — Hansen *v.* Kirtley, 11 Iowa 565.

Kansas. — Halstead Lumber Co. *v.* Sutton, 46 Kan. 192.

Kentucky. — Belcher *v.* Sellards, (Ky. 1897) 43 S. W. Rep. 676.

Maryland. — Bagby *v.* Walker, 78 Md. 239.

Michigan. — Industrial Works *v.* Mitchell, 114 Mich. 29.

Minnesota. — Whalon *v.* Aldrich, 8 Minn. 349

Missouri. — Redlands Orange Growers' Assoc. *v.* Gorman, 161 Mo. 203.

New York. — McMaster *v.* State, 108 N. Y. 553; Ruff *v.* Rinaldo, 55 N. Y. 664; Gaylord *v.* Karst, (C. Pl. Gen. T.) 17 N. Y. Supp. 720.

Pennsylvania. — Rockwell Mfg. Co. *v.* Cambridge Springs Co., 191 Pa. St. 386.

Washington. — Dignan *v.* Spurr, 3 Wash. 315.

Wisconsin. — Schweickhart *v.* Stuewe, 71 Wis. 1, 5 Am. St. Rep. 190; Fisk *v.* Tank, 12 Wis. 306.

2. *In re* Kelly, 51 Fed. Rep. 194; Havens *v.* Grand Island Light, etc., Co., 41 Neb. 153; Jones *v.* National Printing Co., 13 Daly (N. Y.) 92; Bock *v.* Healy, 8 Daly (N. Y.) 156; Perry Tie, etc., Co. *v.* Rennolds, 4 Va. Sup. Ct. 198. *Compare* Wallace *v.* Valentine, (C. Pl. Spec. T.) 10 Misc. (N. Y.) 645.

3. Fraser *v.* Ross, 1 Penn. (Del.) 348; Baldwin *v.* Farnsworth, 10 Me. 414, 25 Am. Dec. 252; Minneapolis Threshing Mach. Co. *v.* Hutchins, 65 Minn. 89; Adams *v.* Helm, 55 Mo. 468; Bock *v.* Healy, 8 Daly (N. Y.) 156; Pomeroy *v.* Shaw, 2 Daly (N. Y.) 267; Roby *v.* Reynolds, 65 Hun (N. Y.) 486; Toplitz *v.* King Bridge Co., (Supm. Ct. App. T.) 20 Misc. (N. Y.) 576; Blakeslee Mfg. Co. *v.* Hilton, 5 Pa. Super. Ct. 184; Reid *v.* Field, 83 Va. 26; Manss-Brunning Shoe Co. *v.* Prince, 51 W. Va. 510; Baker *v.* Henderson, 24 Wis. 509. *Compare* Rockwell Mfg. Co. *v.* Cambridge Springs Co., 191 Pa. St. 386.

4. Intention of Parties Controlling. — Strain *v.* Pauley Jail Bldg., etc., Co., 80 Tex. 622. See also Ramsey *v.* Tully, 12 Ill. App. 463; Davis *v.* Fish, 1 Greene (Iowa) 406, 48 Am. Dec. 387; Merrimack Mfg. Co. *v.* Quintard, 107 Mass. 127; Industrial Works *v.* Mitchell, 114 Mich. 29.

5. Payment in General. — Benj. on Sales (6th Am. ed.), § 706.

The general subject of payment — what is sufficient to constitute it, when, where, and by and to whom it is to be made, the medium to be employed, etc. — is treated in the title Payment, vol. 22, p. 513. See also the titles Set-off, Recoupment, and Counterclaim; Tender. As to part payment to satisfy the statute of frauds, see the title Statute of Frauds.

As to Defenses in an action for the price, see *infra*, this title, X. 2. *e. Defenses.*

6. Contract Provisions. — Wilmshurst *v.* Bowker, 2 M. & G. 792, 40 E. C. L. 629; Straus *v.* J. M. Russell Co., 85 Fed. Rep. 589; Morgan *v.* East, 126 Ind. 42; Crowl *v.* Goodenberger, 112 Mich. 683; Southern Lumber Co. *v.* Mercantile Lumber, etc., Co., 89 Mo. App. 141; Galway *v.* Shields, 66 Mo. 313, 27 Am. Rep. 351; Evans *v.* Cox, 3 Rich. L. (S. Car.) 106; Owens *v.* Jackson, (Tex. Civ. App. 1902), 65 S. W. Rep. 1125. But see Benedict *v.* Field, 4 Duer (N. Y.) 154.

7. Construction of Special Contracts — *United States.* — Tinsman *v.* F. R. Patch Mfg. Co., 101 Fed. Rep. 373, 41 C. C. A. 388.

Colorado. — Lindsey *v.* Flebbe, 5 Colo. App. 218.

delivery, they are concurrent acts, and neither party can complain of a failure by the other until he himself has tendered performance of his own duty.[1] But full performance may be waived or excused by the conduct of the other party.[2] For example, an absolute refusal to deliver will excuse a formal tender of the price.[3] Payment or tender must be made in money in the absence of contrary provision.[4] Payment may or may not be a condition precedent to the passing of title. This will depend upon the intention of the parties and the terms of the contract.[5]

2. Cash or Credit Sales. — By the terms of the sale absolute payment in cash may be required, or a conditional payment in promissory notes or acceptances, in both of which cases the payment is a condition precedent to the buyer's right of possession,[6] though the seller may waive his right to retain possession, as where he makes delivery without insisting upon prior payment.[7] Whether or not there was a waiver is usually a question of fact for the jury,[8] to be determined on the evidence in each particular case.[9] In the absence of a special provision or understanding to the contrary a cash sale is generally presumed to have been contemplated.[10] But credit will be implied where the

Illinois. — Anglo-American Provision Co. *v.* Prentiss, 157 Ill. 506.

Kansas. — Cannon *v.* Griffith, 3 Kan. App. 506.

Kentucky. — Muir *v.* Samuels, 62 S. W. Rep. 481, 23 Ky. L. Rep. 14.

Massachusetts. — Sercombe-Bolte Mfg. Co. *v.* Lovell Arms Co., 171 Mass. 175.

Michigan. — Perkins *v.* Grobben, 116 Mich. 172, 72 Am. St. Rep. 512; W. H. H. Peck Co. *v.* Gordon, 112 Mich. 487.

Minnesota. — Potter *v.* Holmes, 65 Minn. 377.

Mississippi. — Noles *v.* Moreland, (Miss. 1900) 27 So. Rep. 598.

New York. — Fulton Grain, etc., Co. *v.* Anglim, 34 N. Y. App. Div. 164; Lackawanna Mills *v.* Weil, 21 N. Y. App. Div. 492; Equitable General Providing Co. *v.* Stein, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 582; Whitney *v.* McLean, 4 N. Y. App. Div. 449.

Texas. — Godfrey *v.* Anderson, 12 Tex. Civ. App. 64; Joseph *v.* Cannon, 11 Tex. Civ. App. 295.

Virginia. — Richmond Ice Co. *v.* Crystal Ice Co., 99 Va. 285, 3 Va. Sup. Ct. 172.

Wisconsin. — Frederickson *v.* Ayer, 93 Wis. 217.

1. Payment and Delivery Concurrent. — Cole *v.* Swanston, 1 Cal. 51, 52 Am. Dec. 288; Pusey, etc., Co. *v.* Dodge, 3 Penn. (Del.) 63; Rice *v.* Appel, 111 Iowa 454; Merrill Furniture Co. *v.* Hill, 87 Me. 17; Morton *v.* Clark, 181 Mass. 134; W. A. McArthur Co. *v.* Bay City Old Second Nat. Bank, 122 Mich. 223; Minear *v.* Phelps, 112 Mich. 84; Lamont *v.* Le Fevre, 96 Mich. 175; Fishback *v.* Van Dusen, 33 Minn. 111; Stresovich *v.* Kesting, 63 Mo. App. 57; Behrends *v.* Beyschlag, 50 Neb. 304; Howard *v.* Emerson, (Tex. Civ. App. 1901) 65 S. W. Rep. 382.

2. Waiver of Nonperformance by Other Party. — Straus *v.* J. M. Russell Co., 85 Fed. Rep. 589; Love *v.* Barnesville Mfg. Co., 3 Penn. (Del.) 152; Wells *v.* Merle, etc., Mfg. Co., 66 Ill. App. 292; Hartlove *v.* Durham, 86 Md. 689; Rothschild Sons' Co. *v.* McLaughlin, 6 Pa. Super. Ct. 347. See Guilford *v.* Mason, 22 R. I. 422. See also *supra*, this title, V. 12. *Excuse for Nondelivery or Delay.*

3. Sloan *v.* Thornhill, 68 Ill. App. 331.

4. Medium of Payment. — Triplett *v.* Mansur, etc., Implement Co., 68 Ark. 230; Johnson-Locke Mercantile Co. *v.* Howard, 133 Cal. xix; Behrends *v.* Beyschlag, 50 Neb. 304. See generally the titles PAYMENT, vol. 22, p. 513; TENDER.

Payment by Check is not sufficient when the seller is entitled to payment in money. Behrends *v* Beyschlag, 50 Neb. 304. But *compare* Johnson-Locke Mercantile Co. *v.* Howard, 133 Cal. xix.

5. Payment as Condition Precedent. — See *supra*, this title, *When Title Passes*. See also Wilmshurst *v.* Bowker, 2 M. & G. 792, 40 E. C. L. 629; Daugherty *v.* Fowler, 44 Kan. 628. And see the title CONDITIONAL SALES, vol. 6, p. 436.

6. Payment as Condition Precedent to Delivery. — Wilmshurst *v.* Bowker, 2 M. & G. 792, 40 E. C. L. 629; Barr *v.* Logan, 5 Harr. (Del.) 52; Metz *v.* Albrecht, 52 Ill. 491; Kirby *v.* Studebaker, 15 Ind. 45; Bradley *v.* Michael, 1 Ind. 551; Jennings *v.* West, 40 Kan. 372; Whitney *v.* Eaton, 15 Gray (Mass.) 225; Minear *v.* Phelps, 112 Mich. 84; Clarkson *v.* Carter, 3 Cow. (N. Y.) 84; Cook *v.* Ferral, 13 Wend. (N. Y.) 285. See also *infra*, this title, X. 6. *Lien.*

For a particular case where, though the sale was "terms cash," payment was held not a condition precedent to delivery, see Nelson *v.* Patrick, 2 C. & K. 641, 61 E. C. L. 641.

7. Waiver of Payment as Condition Precedent. — Payne *v.* Shadbolt, 1 Campb. 427; Warder *v.* Hoover, 51 Iowa 491; Robbins *v.* Harrison, 31 Ala. 160; Crawford *v.* Spraggins, 109 Ala. 353; Kirby *v.* Studebaker, 15 Ind. 45; Scharff *v.* Meyer, 133 Mo. 428, 54 Am. St. Rep. 672; Witte *v.* Reilly, (N. Dak. 1902) 91 N. W. Rep. 42; Clark *v.* Bache, 186 Pa. St. 343. See also Minear *v.* Phelps, 112 Mich. 84. But see Merrill Furniture Co. *v.* Hill, 87 Me. 17.

8. Waiver a Question of Fact. — Wells *v.* Merle, etc., Mfg. Co., 66 Ill. App. 292; Merrill Furniture Co. *v.* Hill, 87 Me. 17.

9. Evidence on Question of Waiver. — Thomas *v.* First Nat. Bank, 66 Ill. App. 56; Witte *v.* Reilly, (N. Dak. 1902) 91 N. W. Rep. 42; Clark *v.* Bache, 186 Pa. St. 343, 42 W. N. C. (Pa.) 265.

10. Cash Sale Presumed Prima Facie. — Comyns's Dig., title Agreement, B. 3.

seller makes delivery without insisting upon payment, and in such a case the buyer has a reasonable time after demand is made in which to tender payment.[1]

Where the Sale Is Made on Credit, the buyer is entitled to immediate possession without payment either absolute or conditional,[2] and delivery is a condition precedent to the right to demand payment.[3] The time of credit is to be computed by the usual rules,[4] and, of course, depends upon the terms of the contract.[5]

3. Payment on Demand. — Where provision is made for payment on demand, a reasonable time must be allowed the buyer in which to procure and tender the money.[6]

4. Payment by Instalments. — Where goods are to be delivered in instalments and payment therefor is to be made as delivered, the seller is not bound to deliver subsequent instalments until prior instalments have been paid for.[7] *Prima facie*, payment is to be made for each instalment as delivered.[8]

5. Amount. — The amount of the price or payments to be made depends upon the terms of the contract and often turns upon the construction of particular provisions.[9] In the absence of any express provision a reasonable

Alabama. — Robbins *v.* Harrison, 31 Ala. 160.

Delaware. — Barr *v.* Logan, 5 Harr. (Del.) 52.

Indiana. — Robinson *v.* Marney, 5 Blackf. (Ind.) 329.

Massachusetts. — Dixon *v.* Williamson, 173 Mass. 50.

Michigan. — W. A. McArthur Co. *v.* Bay City Old Second Nat. Bank, 122 Mich. 223.

Mississippi. — Hundley *v.* Buckner, 6 Smed. & M. (Miss.) 70.

Missouri. — Stresovich *v.* Kesting, 63 Mo. App. 57, 1 Mo. App. Rep. 614.

New York. — Clark *v.* Dales, 20 Barb. (N. Y.) 61; Genin *v.* Tompkins, 12 Barb. (N. Y.) 265; New York Firemen Ins. Co. *v.* De Wolf, 2 Cow. (N. Y.) 56.

Ohio. — Coil *v.* Willis, 18 Ohio 28.

Pennsylvania. — M'Combs *v.* M'Kennan, 2 W. & S. (Pa.) 216, 37 Am. Dec. 505.

Vermont. — Kitson Mach. Co. *v.* Holden, (Vt. 1902) 52 Atl. Rep. 271.

Wisconsin.—Goldsmith *v.* Bryant, 26 Wis. 34.

1. Credit Implied from Delivery. — Anstedt *v.* Sutter, 30 Ill. 164; Powell *v.* Bradlee, 9 Gill & J. (Md.) 221. But see Childs *v.* Waterloo Wagon Co., 167 N. Y. 576.

2. Sales on Credit. — Bell *v.* Farrar, 41 Ill. 400; Harlow *v.* Sass, 38 Mo. 34.

3. Right of Possession. — Staunton *v.* Wood, 16 Q. B. 638, 71 E. C. L. 638; Spartali *v.* Benecke, 10 C. B. 212, 70 E. C. L. 212; Ferguson *v.* Carrington, 3 C. & P. 457, 14 E. C. L. 387, 9 B. & C. 59, 17 E. C. L. 330; Price *v.* Nixon, 5 Taunt. 338, 1 E. C. L. 126; Heritage *v.* Lawrence, 2 F. & F. 532; Broomfield *v.* Smith, 1 M. & W. 542.

4. Computation of Time of Credit. — See the title TIME, COMPUTATION OF. See also Webb *v.* Fairmaner, 3 M. & W. 473, 6 Dowl. 549; Smiley *v.* Barker, 83 Fed. Rep. 684, 55 U. S. App. 125; Sturz *v.* Fisher, 38 N. Y. App. Div. 457.

5. Contract Provisions as to Credit. — Campbell *v.* Heney, 128 Cal. 109; Goulds Mfg. Co. *v.* Munckenbeck, 20 N. Y. App. Div. 612; French Wax-Figure Co. *v.* Jupp Baxter Co., 12 Ohio Cir. Dec. 76, 21 Ohio Cir. Ct. 764; Victoria Harbour Lumber Co. *v.* Irwin, 24 Can. Sup. Ct. 607.

6. Payment "On Demand." — Thus, in Toms *v.* Wilson, 4 B. & S. 442, 116 E. C. L. 442, it was held that a promise to pay immediately on demand could not be construed so as to deprive the debtor of an opportunity to get the money which he may have in bank or near at hand. See Massey *v.* Sladen, L. R. 4 Exch. 13; Brightly *v.* Norton, 3 B. & S. 305, 113 E. C. L. 305.

7. Payment by Instalments. — Ebbw Vale Steel, etc., Co. *v.* Blaina Iron Co., 6 Com. Cas. 33; Leibel *v.* Light, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 732; Pacific Export Lumber Co. *v.* Prescott, 40 Oregon 374, *judgment modified* on rehearing Pacific Export Lumber Co. *v.* Prescott, 40 Oregon 388.

8. Morton *v.* Clark, 181 Mass. 134.

9. Amount of Price or Payments — Construction of Contract — *United States.* — Choctaw, etc., R. Co. *v.* Colorado Fuel, etc., Co., (C. C. A.) 93 Fed. Rep. 742; Spang *v.* Rainey, 79 Fed. Rep. 250, 45 U. S. App. 655; Pottsville Iron, etc., Co. *v.* Ascherson, 58 Fed. Rep. 319, 17 U. S. App. 181; Earnshaw *v.* McHose, 56 Fed. Rep. 606, 17 U. S. App. 119.

Alabama. — Sheffield Furnace Co. *v.* Hull Coal, etc., Co., 101 Ala. 446.

Colorado. — Warren *v.* Hall, 20 Colo. 508.

Illinois. — Minneapolis Threshing Mach. Co. *v.* Higgins, 71 Ill. App. 506; Strubhar *v.* Misch, 68 Ill. App. 241; Rice *v.* Western Fuse, etc., Co., 64 Ill. App. 603; Farmer *v.* Emminga, 53 Ill. App. 220.

Iowa. — Ubbinga *v.* Farmers' Sav. Bank, 108 Iowa 221; Farmer *v.* Thrift, 94 Iowa 374; McCoy *v.* Hastings, etc., Co., 92 Iowa 585; Fawkner *v.* Lew Smith Wall Paper Co., 88 Iowa 169, 45 Am. St. Rep. 230.

Kentucky. — Boaz *v.* Owens, (Ky. 1898) 45 S. W. Rep. 876; Loughridge *v.* Allen, (Ky. 1897) 38 S. W. Rep. 698.

Maine. — Rogers *v.* Hayden, 91 Me. 24.

Minnesota. — Blew *v.* Collins, 61 Minn. 418.

Missouri. — Faulconer *v.* Samples, 57 Mo. App. 302.

New Jersey. — Camden Iron Works *v.* Camden, 60 N. J. Eq. 211.

New York. — Stern *v.* Ladew, 47 N. Y. App. Div. 331, 30 Civ. Pro. (N. Y.) 135; Keswick *v.* Rafter, 35 N. Y. App. Div. 508; Hand *v.* Gas

price will be implied.[1]

6. Sufficiency of Payment or Tender. — It may be said generally that the buyer is discharged if the payment is made as directed by the seller.[2] If the seller directs that payment be made by mail, or if such direction is to be inferred from a well-established usage, the money, while thus in transit, is at the risk of the buyer.[3]

A Tender of the Price in accordance with the terms of the contract is as much a performance of the seller's duty as an actual payment,[4] if such tender be made unconditionally.[5]

VIII. Warranties and False Representations. — This subject has received separate consideration in this work.[6]

IX. Rescission or Modification of Contract — 1. By Mutual Consent — Rescission. — A contract of sale, like any other contract, may be rescinded or discharged by mutual consent or agreement of parties founded upon sufficient consideration.[7] Consent to rescission may be either express or implied from

Engine, etc., Co., 34 N. Y. App. Div. 354, *reversing* 167 N. Y. 142; Ashner *v.* Abenheim, (Supm. Ct. Tr. T.) 19 Misc. (N. Y.) 282; Nixon *v.* Zuricalday, 12 N. Y. App. Div. 287; Ashner *v.* Abenheim, 83 Hun (N. Y.) 34; Lefurgy *v.* Stewart, (Supm. Ct. Gen. T.) 22 N. Y. Supp. 537, 69 Hun (N. Y.) 614.

Pennsylvania. — Plymouth Cordage Co. *v.* Pennsylvania Wood Co., 203 Pa. St. 206; Ascherson *v.* Bethlehem Iron Co., 161 Pa. St. 63.

Washington. — Moran Bros. Co. *v.* Snoqualmie Falls Power Co., (Wash. 1902) 69 Pac. Rep. 759; Morford *v.* Frye, 13 Wash. 244.

Wisconsin. — Ashland Lumber Co. *v.* Detroit Salt Co., 114 Wis. 66; Wing *v.* Wadhams Oil, etc., Co., 99 Wis. 248.

1. Reasonable Price Implied. — Arnold *v.* Cason, (Mo. App. 1902) 69 S. W. Rep. 34; Moran Bros. Co. *v.* Snoqualmie Falls Power Co., (Wash. 1902) 69 Pac. Rep. 759.

2. Sufficiency of Payment. — Benj. on Sales (6th Am. ed.), § 710. See the title Payment, vol. 22, p. 513.

3. Money Sent by Mail. — Benj. on Sales (6th Am. ed.), § 710; Tiedeman on Sales, § 154; Kington *v.* Kington, 11 M. & W. 233; Warwick *v.* Noakes, Peake N. P. (ed. 1795) 68; Morgan *v.* Richardson, 13 Allen (Mass.) 410; True *v* Collins, 3 Allen (Mass.) 438; Gurney *v.* Howe, 9 Gray (Mass.) 404, 69 Am. Dec. 299; Buell *v.* Chapin, 99 Mass. 594, 97 Am. Dec. 58; Wakefield *v.* Lithgow, 3 Mass. 249; Palmer *v.* Phœnix Mut. L. Ins. Co., 84 N. Y. 63; Townsend *v.* Henry, 9 Rich. L. (S. Car.) 323. See Dodge *v.* Smith, 34 Vt. 178. But see Williams *v.* Carpenter, 36 Ala. 9, 76 Am. Dec. 316.

The burden of proving that this mode of remittance was authorized by the creditor, or that such was the well-established usage of the parties, is upon the debtor. Yon *v.* Blanchard, 75 Ga. 519; Crane *v.* Pratt, 12 Gray (Mass.) 348; Gurney *v.* Howe, 9 Gray (Mass.) 404, 69 Am. Dec. 299.

4. Tender. — Benj. on Sales (6th Am. ed.), § 712. As to tender generally, its requirements, effect, etc., see the title Tender. See also Morgan *v.* East, 126 Ind. 42.

5. Tender Must Be Unconditional. — See the title Tender. Thus, in Tompkins *v.* Batie, 11 Neb. 147, 38 Am. Rep. 361, it appeared that the defendant "showed" the plaintiff five hundred dollars "and told him he could have it for his claim." It was held that this offer meant that if the plaintiff would surrender his entire demand defendant would give him five hundred dollars, and that such was a conditional offer, by accepting which the plaintiff would be barred from all further claim, and it was therefore unavailing as a tender. See Greenwood *v.* Sutcliffe, (1892) 1 Ch. 1.

6. See the titles Fraud and Deceit, vol. 14, p. 12; Fraudulent Sales and Conveyances, vol. 14, p. 210; Implied Warranties, vol. 15, p. 1210; Warranties.

7. Rescission by Mutual Consent — *England.* — Smith *v.* Field, 5 T. R. 402.

Alabama. — Robinson *v.* Pogue, 86 Ala. 257.

Colorado. — Falke *v.* Brule, (Colo. App. 1902) 68 Pac. Rep. 1054.

Connecticut. — Tomlinson *v.* Roberts, 25 Conn. 477, 68 Am. Dec. 367.

Delaware. — Darby *v.* Hall, 3 Penn. (Del.) 25.

Georgia. — Steen *v.* Harris, 81 Ga. 681. See Steele Lumber Co. *v.* Laurens Lumber Co., 98 Ga. 329.

Illinois. — Forster *v.* New Albany Second Nat. Bank, 61 Ill. App. 272.

Indiana. — Nash *v.* Caywood, 39 Ind. 457; Fruits *v.* Pearson, 25 Ind. App. 235.

Kansas. — Manhattan Mills, etc., Mfg. Co. *v.* Edward P. Allis Mfg. Co., 59 Kan. 779.

Massachusetts. — Folsom *v.* Cornell, 150 Mass. 115; Alden *v.* Thurber, 149 Mass. 271.

Mississippi. — Mount *v.* Harris, 1 Smed. & M. (Miss.) 185, 40 Am. Dec. 89.

Missouri. — McGregor-Noe Hardware Co. *v.* Livesay, 85 Mo. App. 271; Benedict, etc., Mfg. Co. *v.* Jones, 64 Mo. App. 218, 2 Mo. App. Rep. 1105.

Nebraska. — Bryant *v.* Thesing, 46 Neb. 244.

New York. — Wolff *v.* Zeller, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 255.

Pennsylvania. — Cannon *v.* Young, 19 Pa. Co. Ct. 239, 5 Pa. Dist. 772.

See also the titles Accord and Satisfaction, vol. 1, p. 408; Consideration, vol. 6, p. 667; Release and Discharge, *ante*, p. 282; Rescission, Cancellation, and Reformation, *ante*, p. 604.

An Executed Contract of Sale cannot be rescinded by mutual consent so as to revest the

the language and conduct of the parties.[1] The mutual consent may be given in advance, as by a provision in the contract that upon a certain contingency the contract may be rescinded or the goods returned, in whole or in part.[2] Thus, it is a common provision that the buyer may return the goods and receive back the purchase price if the goods are not satisfactory.[3] A reserved right to rescind must, of course, be exercised in conformity to the contract, and all conditions precedent must be performed, unless waived;[4] and may be waived or lost by failure to do so, as by an express election to keep the goods.[5] Unreasonable delay operates as a waiver.[6] Rescission by mutual

property in the seller. A resale is necessary to effect this result. Hornberger *v.* Feder, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 121, *following* Blanchard *v.* Trim, 38 N. Y. 225. See also Quincy *v.* Tilton, 5 Me. 277; Gleason *v.* Drew, 9 Me. 79; State *v.* Intoxicating Liquors, 61 Me. 520; Beecher *v.* Mayall, 16 Gray (Mass.) 376, where the delivery was held sufficient in such a case, though the original buyer retained possession in order to make repairs for the seller. *Compare* Shaul *v.* Harrington, 54 Ark. 305 (redelivery held unnecessary as against buyer's purchaser).

1. Consent Express or Implied — *United States.* — Pepper *v.* Taylor, (C. C. A.) 54 Fed. Rep. 32.

England. — Gomery *v.* Bond, 3 M. & S. 378; Page *v.* Cowasjee Eduljee, L. R. 1 P. C. 127; Stephens *v.* Wilkinson, 2 B. & Ad. 320, 22 E. C. L. 86.

Colorado. — A. Westman Mercantile Co. *v.* Park, 2 Colo. App. 545.

District of Columbia. — Cumberland Hydraulic Cement, etc., Co. *v.* Wheatley, 9 App. Cas. (D. C.) 334.

Massachusetts. — Alden *v.* Thurber, 149 Mass. 271.

Michigan. — Doty *v* Nixon, 109 Mich. 266.

Minnesota. — Avery Planter Co. *v.* Peck, 86 Minn. 40; Avery Planter Co. *v.* Peck, 80 Minn. 519, *judgment reversed* on rehearing, 80 Minn. 522.

New York. — Loader *v.* Brooklyn Chair Co., 64 N. Y. App. Div. 615; Flint, etc., Co. *v.* Standard Rope, etc., Co., 52 N. Y. App. Div. 459; Maurer *v.* Wolf, 66 Hun (N. Y.) 632, 21 N. Y. Supp. 202; Sloane *v.* Van Wyck, 4 Abb. App. Dec. (N. Y.) 250; Russell *v.* Wolfl, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 536; Grouse *v.* Wolf, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 535.

Pennsylvania. — Central Nat. Bank *v.* Gallagher, 163 Pa. St. 456.

Rhode Island. — Fleming *v.* Hanley, 21 R. I. 141.

Wisconsin. — Aultman Co. *v.* McDonough, 110 Wis. 263.

Where there was a contract to deliver goods in ten days' notice by buyer, such contract was not rescinded by the sale of the goods by the purchaser through brokers to the first seller at a price less than that of the original contract, the goods not having passed out of the actual possession of such seller. Warden *v.* Marshall, 99 Mass. 305.

2. Consent in Advance. — Malsby *v.* Young, 104 Ga. 205; Latham *v.* Hartford, 27 Kan. 249; Morris *v.* Brightman, 143 Mass. 149; Gallup *v.* Sterling, (Supm. Ct. Tr. T.) 22 Misc. (N. Y.) 672; P. J. Sorg Co. *v.* Crouse, 88 Hun (N. Y.) 246; Backus Mfg. Co. *v.* Feldman, (Buffalo Super. Ct. Gen. T.) 9 Misc. (N. Y.) 387.

3. Option to Return Goods if Unsatisfactory. — Ellinger *v.* Hogan, 53 Ill. App. 527; Housding *v.* Solomon, 127 Mich. 654, 8 Detroit Leg. N. 485; O'Rourke *v.* Schultz, 23 Mont. 285; P. J. Sorg Co. *v.* Crouse, 88 Hun (N. Y.) 246; De Bavier *v.* Funke, 66 Hun (N. Y.) 633, 21 N. Y. Supp. 410; Adams Radiator, etc., Works *v.* Schnader, 155 Pa. St. 394, 35 Am. St. Rep. 893; Lyons *v.* Stills, 97 Tenn. 514; Osborne *v.* Francis, 38 W. Va. 312, 45 Am. St. Rep. 859.

See generally the title SATISFY — SATISFACTION, *post.* See also *supra*, this title, I. 2. *c. From Bailment with Right to Purchase.*

4. Conformity to Contract — Conditions of Rescission — *United States.* — Lilienthal *v.* McCormick, 86 Fed. Rep. 100.

Georgia. — Langston *v.* Bitting, 96 Ga. 410; Malsby *v.* Young, 104 Ga. 205.

Illinois. — Orvis *v.* Waite, 58 Ill. App. 504; Kingman *v.* Meeks, 56 Ill. App. 272.

Indiana. — Campbell *v.* Wray, 5 Ind. App. 155.

Iowa. — Pitts Sons Mfg. Co. *v.* Spitznogle, 54 Iowa 36; McCormick Harvesting Mach. Co. *v.* Russell, 86 Iowa 556.

Michigan. — Housding *v.* Solomon, 127 Mich. 654, 8 Detroit Leg. N. 485; Westinghouse Co. *v.* Gainor, (Mich. 1902) 90 N. W. Rep. 52, 9 Detroit Leg. N. 53.

Minnesota. — Avery Planter Co. *v.* Peck, 80 Minn. 519, *judgment reversed* on rehearing, 80 Minn. 522; *In re* Ward, 57 Minn. 377.

Montana. — Schultz *v.* O'Rourke, 18 Mont. 418.

New Jersey. — Vickers *v.* Electrozone Commercial Co., 67 N. J. L. 665.

New York. — P. J. Sorg Co. *v.* Crouse, 88 Hun (N. Y.) 246; Backus Mfg. Co. *v.* Feldman, (Buffalo Super. Ct. Gen. T.) 9 Misc. (N. Y.) 387.

Tennessee. — Lyons *v.* Stills, 97 Tenn. 514; Gaar *v.* Stark, (Tenn. Ch. 1895) 36 S. W. Rep. 149; Knoxville Traction Co. *v.* Manchester Mfg. Co., (Tenn. Ch. 1900) 59 S. W. Rep. 173.

In Davis *v.* Butrick, 68 Iowa 94, it was held, where the buyer of a machine reserved the right to return it, and the seller, to repay the money or give a new machine, that, upon the return of the machine by the purchaser and his demand of repayment, the seller had the right to insist upon his taking a new machine.

5. Waiver or Loss of Right. — *In re* Ward, 57 Minn. 377; Columbia Rolling Mill Co. *v.* Beckett Foundry, etc., Co., 55 N. J. L. 391; McGill *v.* Hall, (Tex. Civ. App. 1894) 26 S. W. Rep. 132.

6. Delay in Rescission. — Patent Title Co. *v.*

consent is usually a mixed question of law and fact.[1]

Modification of Contract. — The contract of sale may be modified, or a new contract substituted therefor, by mutual agreement of the parties.[2]

2. By Seller — *a.* RIGHT TO RESCIND — (1) *Grounds for Rescission* — (a) **In General.** — The seller may rescind the contract of sale upon any of the grounds upon which contracts generally may be rescinded, and subject to the same rules.[3] The rights of third persons in this connection have been elsewhere considered.[4]

(b) **Fraud and Deceit.** — Fraud and deceit upon the part of the buyer operating to induce the sale to him is sufficient to authorize the seller to rescind the sale.[5] Such fraud most frequently consists of misrepresentations or conceal-

Stratton, 89 Fed. Rep. 174; Columbia Rolling Mill Co. *v.* Beckett Foundry, etc., Co., 55 N. J. L. 391; P. J. Sorg Co. *v.* Crouse, 88 Hun (N. Y.) 246. *Compare* Goldberg *v.* Einstein, 44 Ill. App. 272.

1. Mixed Question of Law and Fact. — Gomery *v.* Bond, 3 M. & S. 378; Hobbs *v.* Columbia Falls Brick Co., 157 Mass. 109; Astoria Veneer Mills *v.* Looschen, 91 Hun (N. Y.) 545.

After the consummation by delivery of a verbal contract of sale of chattels, the subsequent change in the mode of payment or the acceptance of a bill of sale will not operate as a rescission of the contract. Sanders *v.* Stokes, 30 Ala. 432; McClure *v.* Williams, 5 Sneed (Tenn.) 718. See also Sparks *v.* Leavy, (N. Y. Super. Ct. Gen. T.) 19 Abb. Pr. (N. Y.) 364.

2. Modification of Contract — *United States.* — Hull Coal, etc., Co. *v.* Empire Coal, etc., Co., (C. C. A.) 113 Fed. Rep. 256.

Connecticut. — C., etc., Electric Motor Co. *v.* Frisbie, 66 Conn. 67.

Delaware. — Fraser *v.* Ross, 1 Penn. (Del.) 348.

District of Columbia. — Cumberland Hydraulic Cement, etc., Co. *v.* Wheatley, 9 App. Cas. (D. C.) 334.

Illinois. — Minnesota Lumber Co. *v.* Whitebreast Coal Co., 160 Ill. 85.

Kansas. — Manhattan Mills, etc., Mfg. Co. *v.* Edward P. Allis Mfg. Co., 59 Kan. 779.

Michigan. — T. Wilce Co. *v.* Kelley Shingle Co., (Mich. 1902) 89 N. W. Rep. 957; 9 Detroit Leg. N. 40; Leffel *v.* Piatt, 126 Mich. 443, 8 Detroit Leg. N. 92.

Minnesota. — Hansen *v.* Gaar, 63 Minn. 94.

Missouri. — Schweppe Grocer Co. *v.* Nolin, 83 Mo. App. 73.

Montana. — John S. Brittain Dry Goods Co. *v.* Birkenfeld, 20 Mont. 347.

New York. — Eppens, etc., Co. *v.* Littlejohn, 164 N. Y. 187; Riendeau *v.* Bullock, 147 N. Y. 269; Lilienthal *v.* Betz, 61 N. Y. App. Div. 601; Lawlor *v.* Magnolia Metal Co., 33 N. Y. App. Div. 356; Eppens, etc., Co. *v.* Littlejohn, 27 N. Y. App. Div. 22.

Pennsylvania. — Stiles *v.* Seaton, 200 Pa. St. 114. *Compare* Cannon *v.* Young, 19 Pa. Co. Ct. 239.

Texas. — Heierman *v.* Robinson, (Tex. Civ. App. 1901) 63 S. W. Rep. 657.

3. See generally the titles DURESS, vol. 10, p. 320; FRAUD AND DECEIT, vol. 14, p. 12; INFANTS, vol. 16, p. 255; INSANITY, vol. 16, p. 558; INTOXICATION, vol. 17, p. 398; MISTAKE, vol. 20, p. 805; RESCISSION, CANCELLATION, AND REFORMATION, *ante*, p. 604. See also the titles STOPPAGE IN TRANSITU; UNDUE INFLUENCE.

4. See *infra*, this title, *Bona Fide Purchasers*, and *infra*, *Remedies of Seller — Recovery of Goods, etc. — As Against Third Persons.*

5. Fraud and Deceit in General — *United States.* — Slaughter *v.* Gerson, 13 Wall (U. S.) 379; Stevenson *v.* Marble, 84 Fed. Rep. 23; Jaffrey *v.* Brown, 29 Fed. Rep. 476.

Alabama. — Darby *v.* Kroell, 92 Ala. 607.

Arkansas. — Triplett *v.* Rugby Distilling Co., 66 Ark. 219.

California. — Amer *v.* Hightower, 70 Cal. 440.

Georgia. — Newman *v.* Claflin Co., 107 Ga. 89; Exchange Bank *v.* H. B. Claflin Co., 100 Ga. 640; Barnett *v.* Speir, 93 Ga. 762; Landauer *v.* Cochran, 54 Ga. 533.

Illinois. — Sheridan *v.* Pease, 93 Ill. App. 219; Hacker *v.* Munroe, 176 Ill. 384, *affirming* 61 Ill. App. 420; Staver, etc., Mfg. Co. *v.* Coe, 49 Ill. App. 426; Reed *v.* Pinney, 35 Ill. App. 610.

Indiana. — Gregory *v.* Schoenell, 55 Ind. 101; Bischof *v.* Coffelt, 6 Ind. 23; Connersville *v.* Wadleigh, 7 Blackf. (Ind.) 102, 41 Am. Dec. 214.

Iowa. — Frum *v.* Keeney, 109 Iowa 393; Starr *v.* Stevenson, 91 Iowa 684.

Kansas. — Slatten *v.* Konrath, 1 Kan. App. 636; Daugherty *v.* Fowler, 44 Kan. 628.

Kentucky. — Brice *v.* Boyd, (Ky. 1897) 39 S. W. Rep. 821.

Maine. — Cross *v.* Peters, 1 Me. 376, 10 Am. Dec. 78.

Massachusetts. — Thaxter *v.* Foster, 153 Mass. 151; Brown *v.* Pierce, 97 Mass. 46, 93 Am. Dec. 57.

Michigan. — Ross *v.* Miner, 101 Mich. 1; Pratt *v.* Burhans, 84 Mich. 487, 22 Am. St. Rep. 703; Ross *v.* Miner, 64 Mich. 204.

Missouri. — Carson *v.* Smith, 133 Mo. 606; Moore *v.* Hinsdale, 77 Mo. App. 217; Kirkendall *v.* Hartsock, 58 Mo. App. 234; Herboth *v.* Gaal, 47 Mo. App. 255; Swafford Bros. Dry Goods Co. *v.* Jacobs, 66 Mo. App. 362, 2 Mo. App. Rep. 1334.

Nebraska. — Henry *v.* Vliet, 36 Neb. 138.

New Jersey. — Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311; Hicks *v.* Campbell, 19 N. J. Eq. 183.

New York. — Bliss *v.* Sickles, 124 N. Y. 647, 36 N. E. Rep. 1064; Brinkerhoff *v.* Sartwell, 85 Hun (N. Y.) 557; Bliss *v.* Sickles, 66 Hun (N. Y.) 633, 21 N. Y. Supp. 273; Wheeler, etc., Mfg. Co. *v.* Keeler, 65 Hun (N. Y.) 508; Whittin *v.* Fitzwater, 58 Hun (N. Y.) 601, 11 N. Y.

ment as to the buyer's financial condition whereby the seller is induced to part with his goods on credit.[1] So it may consist of a purchase of goods with a preconceived intent not to pay for them or no reasonable expectation

Supp. 297; Hotchkin *v.* Martin, 58 Hun (N. Y.) 606, 11 N. Y. Supp. 806; Hotchkin *v.* Malone Third Nat. Bank, 57 Hun (N. Y.) 594, 11 N. Y. Supp. 220; Hitchcock *v.* Covill, 20 Wend. (N. Y.) 167.

Oregon. — Crossen *v.* Murphy, 31 Oregon 114; Craig *v.* California Vineyard Co., 30 Oregon 43.

Pennsylvania. — Labe *v.* Bremer, 167 Pa. St. 15; Smith, etc., Co. *v.* Smith, 166 Pa. St. 563; Schofield *v.* Shiffer, 156 Pa. St. 65; Krumbhaar *v.* Griffiths, 151 Pa. St. 223; Harding *v.* Lloyd, 3 Pa. Super. Ct. 293, 40 W. N. C. (Pa.) 66.

South Dakota. — Tootle *v.* Petrie, 8 S. Dak. 19.

Texas. — Downs *v.* Self, (Tex. Civ. App. 1902) 67 S. W. Rep. 897; Cabaness *v.* Holland, 19 Tex. Civ. App. 383; Parlin, etc., Co. *v.* Harrell, 8 Tex. Civ. App. 368; Morrison *v.* Adoue, 76 Tex. 255.

Vermont. — Chamberlin *v.* Fuller, 59 Vt. 247.

Wisconsin. — Hart *v.* Moulton, 104 Wis. 349, 76 Am. St. Rep. 881; Singer *v.* Schilling, 74 Wis. 369; Weed *v.* Page, 7 Wis. 503.

Right of Seller's Creditors. — The right of a seller to rescind a sale for fraud cannot be exercised by his creditors who have not obtained a specific lien. Kingsley *v.* McGrew, 48 Neb. 812.

1. Misrepresentations of Financial Condition — *United States.*— Turner *v.* Ward, 154 U. S. 618; Johnson *v.* Peck, 1 Woodb. & M. (U. S.) 334.

Alabama. — Union Mfg., etc., Co. *v.* East Alabama Nat. Bank, 129 Ala. 292; Hudson *v.* Baur Grocery Co., 105 Ala. 200; Cohn *v.* Stringfellow, 100 Ala. 242; Traywick *v.* Keeble, 93 Ala. 498; Johnston *v.* Bent, 93 Ala. 160.

Arkansas. — Stephenson *v.* Weathersby, 65 Ark. 631, 45 S. W. Rep. 987.

Georgia. — Hughes *v.* Winship Mach. Co., 78 Ga. 793.

Illinois. — Huthmacher *v.* Lowman, 66 Ill. App. 448; Luthy *v.* Kline, 56 Ill. App. 314; Schweizer *v.* Tracy, 76 Ill. 345.

Iowa. — Franklin Sugar Refining Co. *v.* Collier, 89 Iowa 69; Reid *v.* Cowduroy, 79 Iowa 169, 18 Am. St. Rep. 359.

Kansas. — Flohr *v.* Schwartzberg, 9 Kan. App. 215.

Kentucky. — Dietz *v.* Sutcliffe, 80 Ky. 650; Bradberry *v.* Keas, 5 J. J. Marsh. (Ky.) 446.

Maryland. — Standard Horseshoe Co. *v.* O'Brien, 91 Md. 751.

Massachusetts. — Perkins *v.* Bailey, 99 Mass. 61, 96 Am. Dec. 689; Thurston *v.* Blanchard, 22 Pick. (Mass.) 18, 33 Am. Dec. 700; Rowley *v.* Bigelow, 12 Pick. (Mass.) 307; 23 Am. Dec. 607; Hoffman *v.* Noble, 6 Met. (Mass.) 68, 39 Am. Dec. 711.

Michigan. — Skinner *v.* Michigan Hoop Co., 119 Mich. 467, 75 Am. St. Rep. 413; Whitaker Iron Co. *v.* Preston Nat. Bank, 101 Mich. 146.

Missouri. — Kirkendall *v.* Hartsock, 58 Mo. App. 234; Wertheimer-Swarts Shoe Co. *v.* Exchange Bank, 56 Mo. App. 662; Voorhis *v.* Smith, etc., Co.'s Mfg. Works, 11 Mo. App. 108.

Montana. — Richardson-Roberts-Byrne Dry Goods Co. *v.* Goodkind, 22 Mont. 462.

Nebraska. — McKinney *v.* Chadron First Nat. Bank, 36 Neb. 629; Work *v.* Jacobs, 35 Neb. 772.

New Jersey. — Collins *v.* Cooley, (N. J. 1888) 14 Atl. Rep. 574.

New York. — Sheffield *v.* Mitchell, 31 N. Y. App. Div. 266; Wakefield Rattan Co. *v.* Tappan, 70 Hun (N. Y.) 405; Bliss *v.* Sickles, 66 Hun (N. Y.) 633, 21 N. Y. Supp. 273; Wise *v.* Grant, 66 Hun (N. Y.) 626, 20 N. Y. Supp. 828; Scott *v.* Simmons, (C. Pl. Spec. T.) 34 How. Pr. (N. Y.) 66.

North Carolina. — Wilson *v.* White, 80 N. Car. 280.

Pennsylvania. — Cincinnati Cooperage Co. *v.* Gaul, 170 Pa. St. 545; Talcott *v.* Brenniser, 167 Pa. St. 391; Wessels *v.* Weiss, 156 Pa. St. 591; Boyd *v.* Shiffer, 156 Pa. St. 100; Knowles *v.* Lord, 4 Whart. (Pa.) 500, 34 Am. Dec. 525; Whiting Mfg. Co. *v.* Fourth St. Nat. Bank, 15 Pa. Super. Ct. 419; Harding *v.* Lloyd, 3 Pa. Super. Ct. 293.

Rhode Island. — Burgess *v.* Chapin, 5 R. I. 225.

South Dakota. — Tootle *v.* Petrie, 8 S. Dak. 19.

Texas. — Meyers *v.* Bloon, 20 Tex. Civ. App. 554; Fargo *v.* Rider, (Tex. Civ. App. 1896) 36 S. W. Rep. 340; Abilene Mill, etc., Co. *v.* Finley, (Tex. Civ. App. 1896) 34 S. W. Rep. 311.

Washington. — Woonsocket Rubber Co. *v.* Loewenberg, 17 Wash. 29, 61 Am. St. Rep. 902.

Representations Through Mercantile Agencies — *Arkansas.* — Triplett *v.* Rugby Distilling Co., 66 Ark. 219.

Colorado. — Burchinell *v.* Hirsh, 5 Colo. App. 500.

Illinois. — Moyer *v.* Lederer, 50 Ill. App. 94; Staver, etc., Mfg. Co. *v.* Coe, 49 Ill. App. 426.

Indiana. — Vermont Marble Co. *v.* Smith, 13 Ind. App. 457.

Louisiana. — Jaffray *v.* Moss, 41 La. Ann. 548.

Michigan. — Silberman *v.* Munroe, 104 Mich. 352; Mooney *v.* Davis, 75 Mich. 188, 13 Am. St. Rep. 425.

Mississippi. — Hiller *v.* Ellis, 72 Miss. 701.

Montana. — Richardson-Roberts-Byrne Dry Goods Co. *v.* Goodkind, 22 Mont. 462; John V. Farwell Co. *v.* Boyce, 17 Mont. 83.

Nebraska. — Berkson *v.* Heldman, 58 Neb. 595.

New York. — Humphrey *v* Smith, 7 N. Y. App. Div. 442.

Ohio. — Wilmot *v.* Lyon, 7 Ohio Cir. Dec. 394, 11 Ohio Cir. Ct. 238.

Pennsylvania. — Manhattan Brass Co. *v.* Reger, 168 Pa. St. 644; Sharpless *v.* Gummey, 166 Pa. St. 199; Ralph *v.* Fon Dersmith, 3 Pa. Super. Ct 618, 40 W. N. C. (Pa.) 116.

Texas. — Meyers *v.* Bloon, 20 Tex. Civ. App. 554; Williams *v.* Kohn, (Tex. Civ. App. 1894) 28 S. W. Rep. 920; Lowden *v.* Fisk, (Tex. Civ. App. 1894) 27 S. W. Rep. 180; Wolf *v.* Lachman, (Tex. Civ. App. 1892) 20 S. W. Rep. 867; Gainesville Nat. Bank *v.* Bamberger, 77 Tex. 48, 19 Am. St. Rep. 738.

of paying for them.[1] Mere insolvency of the buyer and failure to disclose it are not sufficient ground for rescission,[2] unless coupled with an intention not to pay for the goods or the absence of any reasonable expectation of doing so.[3] What constitutes fraud and misrepresentation sufficient to authorize

1. Intent Not to Pay for Goods — *United States.* — Jaffrey *v.* Brown, 29 Fed. Rep. 476; Davis *v.* Stewart, 8 Fed. Rep. 803.

Alabama. — Union Mfg., etc., Co. *v.* East Alabama Nat. Bank, 129 Ala. 292; McKensie *v.* Rothschild, 119 Ala. 419; Hudson *v.* Bauer Grocery Co., 105 Ala. 200; Spira *v.* Hornthall, 77 Ala. 137.

Arkansas. — Triplett *v.* Rugby Distilling Co., 66 Ark. 219; Gavin *v.* Armistead, 57 Ark. 574, 38 Am. St. Rep. 262; Taylor *v.* Mississippi Mills, 47 Ark. 247.

Colorado. — *Contra*, Burchinell *v.* Hirsh, 5 Colo. App. 500.

Connecticut. — Thompson *v.* Rose, 16 Conn. 71, 41 Am. Dec. 121.

Illinois. — Farwell *v.* Hanchett, 120 Ill. 573; Hacker *v.* Munroe, 176 Ill. 384, *affirmed* 61 Ill. App. 420; John V. Farwell Co. *v.* Linn, 59 Ill. App. 245; King *v.* Brown, 24 Ill. App. 579; Hanchett *v.* Mansfield, 16 Ill. App. 407; Catlin *v.* Warren, 16 Ill. App. 418.

Indiana. — Peninsular Stove Co. *v.* Ellis, 20 Ind. App. 491.

Iowa. — Deere *v.* Morgan, 114 Iowa 287; Starr *v.* Stevenson, 91 Iowa 684; Oswego Starch Factory *v.* Lendrum, 57 Iowa 573, 42 Am. Rep. 53.

Kentucky. — Carstairs *v.* Charles A. Kelley Co., (Ky. 1895) 29 S. W. Rep. 622; Lane *v.* Robinson, 18 B. Mon. (Ky.) 623.

Massachusetts. — Kline *v.* Baker, 106 Mass. 61.

Michigan — Skinner *v.* Michigan Hoop Co., 119 Mich. 467, 75 Am. St. Rep. 413; Whitaker Iron Co. *v.* Preston Nat. Bank, 101 Mich. 146; Ross *v.* Miner, 67 Mich. 410; Cortland Mfg. Co. *v.* Platt, 83 Mich. 419; Edson *v.* Hudson, 83 Mich. 450.

Minnesota. — Slagle *v.* Goodnow, 45 Minn. 531.

Missouri. — Gratton, etc.. Mfg. Co. *v.* Troll, 77 Mo. App. 339; Reid *v.* Lloyd, 52 Mo. App. 278; Fox *v.* Webster, 46 Mo. 181; Elsass *v.* Harrington, 28 Mo. App. 300; Bidault *v.* Wales, 20 Mo. 546, 64 Am. Dec. 205; Thomas *v.* Freligh, 9 Mo. App. 151. *Compare* Moore *v.* Hinsdale, 77 Mo. App. 217.

Montana. — *Compare* Richardson-Roberts-Byrne Dry Goods Co. *v.* Goodkind, 22 Mont. 462.

New York. — Hennequin *v.* Naylor, 24 N. Y. 139; Sparks *v.* Leavy, (N. Y. Super. Ct. Gen. T.) 19 Abb. Pr. (N. Y.) 364; Dobson *v.* Warner, 58 Hun (N. Y.) 602, 11 N. Y. Supp. 760.

Ohio. — Wilmot *v.* Lyon, 49 Ohio St. 296.

Pennsylvania. — Mackinley *v.* McGregor, 3 Whart. (Pa.) 369, 31 Am. Dec. 522. *Compare* Diller *v.* Nelson, 10 Pa. Super. Ct. 449.

Tennessee. — Wertheimer-Swartz Shoe Co. *v.* Faris, (Tenn. Ch. 1898) 46 S. W. Rep. 336. *Compare* Dorman *v.* Weakley, (Tenn. Ch. 1896) 39 S. W. Rep. 890.

Texas. — Willis *v.* Strickland, (Tex. Civ. App. 1899) 50 S. W. Rep. 159. See Williams *v.* Kohn, (Tex. Civ. App. 1894) 28 S. W. Rep. 920.

Wisconsin. — *Compare* Hart *v.* Moulton, 104 Wis. 349, 76 Am. St. Rep. 881.

2. Mere Insolvency — *England.* — But see Hodgson *v.* Davies, 2 Campb. 530.

United States. — See Florence Min. Co. *v.* Brown, 124 U. S. 385.

Alabama. — Johnston *v.* Bent, 93 Ala. 160.

Arkansas. — Gavin *v.* Armistead, 57 Ark. 574, 38 Am. St. Rep. 262.

Delaware. — Freeman *v.* Topkis, 1 Marv. (Del.) 174.

Illinois. — Hacker *v.* Munroe, 56 Ill. App. 532.

Indiana. — Sweet *v.* Campbell, 14 Ind. App. 570.

Iowa. — *Compare* Starr *v.* Stevenson, 91 Iowa 684.

Kentucky. — See Holland *v.* Cincinnati Desiccating Co., 97 Ky. 454.

Louisiana. — Yeager Milling Co. *v.* Lawler, 39 La. Ann. 572.

Michigan. — Illinois Leather Co. *v.* Flynn, 108 Mich. 91; Reeder Bros. Shoe Co. *v.* Prylinski, 102 Mich. 468; Ross *v.* Miner, 101 Mich. 1.

New York. — Pinckney *v.* Darling, 158 N. Y. 728, 53 N. E. Rep. 1130.

Ohio. — Pike *v.* Equitable Nat. Bank, 2 Ohio Dec. 283, 1 Ohio N. P. 323.

Pennsylvania. — Cincinnati Cooperage Co. *v.* Gaul, 170 Pa. St. 545; Rodman *v.* Thalheimer, 75 Pa. St. 232; Backentoss *v.* Speicher, 31 Pa. St. 326; Bunn *v.* Ahl, 29 Pa. St. 387, 72 Am. Dec. 639; Smith *v.* Smith, 21 Pa. St. 367, 60 Am. Dec. 51; Hartwell *v.* Carlisle Mfg. Co., 17 Pa. Co. Ct. 565; Ralph *v.* Fon Dersmith, 3 Pa. Super. Ct. 618; Paul *v.* Eurich, 3 Pa. Super. Ct. 299. But see Bughman *v.* Central Bank, 159 Pa. St. 94.

Tennessee. — Brooks *v.* Geo. H. Friend Paper Co., 94 Tenn. 701.

Wisconsin. — Consolidated Milling Co. *v.* Fogo, 104 Wis. 92; Adler, etc., Clothing Co. *v.* Thorp, 102 Wis. 70.

3. Insolvency Coupled with Intent Not to Pay — *England.* — *Ex p.* Whittaker, L. R. 10 Ch. 446.

Alabama. — McKensie *v.* Rothschild, 119 Ala. 419; Hudson *v.* Bauer Grocery Co., 105 Ala. 200; Le Grand *v.* Eufaula Nat. Bank, 81 Ala. 123, 60 Am. Rep. 140; Robinson *v.* Levi, 81 Ala. 134; Kyle *v.* Ward, 81 Ala. 120; Loeb *v.* Flash, 65 Ala. 526. See also Wollner *v.* Lehman, 85 Ala. 274.

Colorado. — See Burchinell *v.* Hirsh, 5 Colo. App. 500.

Delaware. — Mears *v.* Waples, 3 Houst. (Del.) 581.

Illinois. — Morris *v.* Reticker, 27 Ill. App. 601; Reticker *v.* Katzenstein, 26 Ill. App. 33.

Indiana. — Waterbury *v.* Miller, 13 Ind. App. 197.

Iowa. — Kearney Milling, etc., Co. *v.* Union Pac. R. Co., 97 Iowa 719, 59 Am. St. Rep. 434; Houghtaling *v.* Hills, 59 Iowa 287.

rescission of a contract has been elsewhere fully considered.[1]

(c) **Mistake.** — A mutual mistake in regard to a material matter connected with the subject-matter of the contract is ground for rescission by either party,[2] as, for example, where the purchaser had reference to one article and the seller to another,[3] or where the article was not in existence, contrary to the supposition of the parties.[4] Or it may be a mutual mistake as to the price or terms, in which case neither party is bound.[5] Again, the mistake may be on the part of the seller as to the purchaser's ability to pay, which will furnish ground for rescission,[6] or it may be in regard to the identity of the party dealt with.[7]

(d) **Inadequacy of Consideration.** — Inadequacy of consideration is ground for

Louisiana. — Yeager Milling Co. *v.* Lawler, 39 La. Ann. 572.

Maine. — Cross *v.* Peters, 1 Me. 376, 10 Am. Dec. 78.

Michigan. — Silberman *v.* Munroe, 104 Mich. 352; Doyle *v.* Mizner, 40 Mich. 160.

Mississippi. — See also Frank *v.* Robinson, 65 Miss. 162.

Missouri. — Manheimer *v.* Harrington, 20 Mo. App. 297.

New York. — Anderson *v.* Read, 106 N. Y. 333; Swarthout *v.* Merchant, 47 Hun (N. Y.) 106; Cooper Mfg. Co. *v.* De Forest, 5 N. Y. App. Div. 43; Bach *v.* Tuck, 57 Hun (N. Y.) 588, 10 N. Y. Supp. 884. See also Morris *v.* Wells, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 61.

North Carolina. — See also Wilson *v.* White 80 N. Car. 280.

Ohio. — Pike *v.* Equitable Nat. Bank, 2 Ohio Dec. 283. *Contra*, Kraft *v.* Dulles, 2 Cinc. Super. Ct. 116.

Oregon. — Craig *v.* California Vineyard Co., 30 Oregon 43.

Pennsylvania. — Perlman *v.* Sartorius, 162 Pa. St. 320, 42 Am. St. Rep. 834; Mann *v.* Salsberg, 17 Pa. Super. Ct. 280; Davis *v.* Cosel, 4 Pa. Super. Ct. 519; Lowrey *v.* Ulmer, 1 Pa. Super. Ct. 425.

Rhode Island. — Dalton *v.* Thurston, 15 R. I. 418, 2 Am. St. Rep. 905.

Wisconsin. — Consolidated Milling Co. *v.* Fogo, 104 Wis. 92; Adler, etc., Clothing Co. *v.* Thorp, 102 Wis. 70.

See also the cases cited in the next preceding note.

1. See the title FRAUD AND DECEIT, vol. 14, p. 12. See also the cases cited *supra*, in the first note to this subsection.

2. Mistake as Ground for Rescission. — Benj. on Sales, § 415.

England. — Webster *v.* Cecil, 30 Beav. 62; Tamplin *v.* James, 15 Ch. D. 215; Scott *v.* Littledale, 8 El. & Bl. 815, 92 E. C. L. 815; Kennedy *v.* Panama, etc., Royal Mail Co., L. R., 2 Q. B. 580. But see Smith *v.* Hughes, L. R., 6 Q. B. 597, 19 W. R. 1059.

Maryland. — Wheat *v.* Cross, 31 Md. 99, 1 Am. Rep. 28.

Massachusetts. — Stoddard *v.* Ham, 129 Mass. 383, 37 Am. Rep. 369.

Michigan. — Sherwood *v.* Walker, 66 Mich. 568, 11 Am. St. Rep. 531.

Mississippi. — Lowenstein *v.* Goodbar, 69 Miss. 808.

Vermont. — Montgomery *v.* Ricker, 43 Vt. 169; Ketchum *v.* Catlin, 21 Vt. 191.

Wisconsin. — Harran *v.* Foley, 62 Wis. 584. See Wiswall *v.* Harriman, 62 N. H. 671; Mowatt *v.* Wright, 1 Wend. (N. Y.) 355, 19 Am. Dec. 508. But see Scott *v.* Hall, 60 N. J. Eq. 451. See generally the titles MISTAKE, vol. 20, p. 805; RESCISSION, CANCELLATION, AND REFORMATION, *ante*, p. 604.

3. Mistake as to Identity of Thing Sold. — Thornton *v.* Kempster, 5 Taunt. 786, 1 E. C. L. 265; Calverley *v.* Williams, 1 Ves. Jr. 213; Bowen *v.* Sullivan, 62 Ind. 281, 30 Am. Rep. 172; Gardner *v.* Lane, 9 Allen (Mass.) 499; Rice *v.* Dwight Mfg. Co., 2 Cush. (Mass.) 86; Chapman *v.* Cole, 12 Gray (Mass.) 141, 71 Am. Dec. 739; Harvey *v.* Harris, 112 Mass. 32; Kyle *v.* Kavanagh, 103 Mass. 356, 4 Am. Rep. 560; Fullerton *v.* Dalton, 58 Barb. (N. Y.) 236; Webb *v.* Odell, 49 N. Y. 583; Sheldon *v.* Capron, 3 R. I. 171. See Hills *v.* Snell, 104 Mass. 173, 6 Am. Rep. 216; Walker *v.* Davis, 65 N. H. 170.

4. Existence of Thing Sold. — Allen *v.* Hammond, 11 Pet. (U. S.) 63; Thomas *v.* Knowles, 128 Mass. 22; Ketchum *v.* Stevens, 19 N. Y. 502; Kelly *v.* Bliss, 54 Wis. 187.

5. Mistake as to Price or Terms. — Phillips *v.* Bristolli, 2 B. & C. 511, 9 E. C. L. 162; Wilkinson *v.* Williamson, 76 Ala. 163; Rovegno *v.* Defferari, 40 Cal. 459; Rupley *v.* Daggett, 74 Ill. 351; Ayer *v.* Western Union Tel. Co., 79 Me. 493, 1 Am. St. Rep. 353; Scott *v.* Hall, 58 N. J. Eq. 42; Fullerton *v.* Dalton, 58 Barb. (N. Y.) 237; Calkins *v.* Griswold, 11 Hun (N. Y.) 208; Everson *v.* International Granite Co., 65 Vt. 658.

A Mutual Mistake as to Quantity is ground for rescission if the exact quantity is a material matter. Cox *v.* Prentice, 3 M. & S. 344; Schurtz *v.* Romer, 82 Cal. 474. See Montgomery County *v.* American Emigrant Co., 47 Iowa 91; Scott *v.* Warner, 2 Lans. (N. Y.) 49; Laurence *v.* Staigg, 8 R. I. 256.

6. Ability to Pay. — Lupin *v.* Marie, 6 Wend. (N. Y.) 77, 21 Am. Dec. 256.

7. Identity of Party Dealt With. — La Salle Pressed-Brick Co. *v.* Coe, 53 Ill. App. 506. As where an order for goods given to one party is filled by his successor in the business. Boston Ice Co. *v.* Potter, 123 Mass. 28, 25 Am. Rep. 9. This is especially so, where privity has existed between the purchaser and the person with whom he first contracted. Boulton *v.* Jones, 2 H. & N. 564. *Compare* Mitchell *v.* Lapage, Holt N. P. 253; Mudge *v.* Oliver 1 Allen (Mass.) 74; Orcutt *v.* Nelson, 1 Gray (Mass.) 536; Winchester *v.* Howard, 97 Mass. 303, 93 Am. Dec. 93.

rescission only when it is so gross as to tend to show fraud.[1]

(e) **Failure of Consideration.** — If a person has advanced money or goods on a contract of sale and the consideration of such contract fails, he may rescind and recover in a proper action the money or other thing advanced.[2] In case of a partial failure of consideration, a party may rescind if the contract is entire,[3] but if it is severable, and he has enjoyed any part of the consideration for which the advancement was made, he thereby loses his right.[4]

(f) **Illegality.** — If the seller discovers that the buyer intends to use the property for an illegal purpose, he is entitled to rescind,[5] unless there has been an actual transfer of possession before discovering the unlawful intent.[6]

(g) **Breach or Nonperformance by Buyer** — *aa.* General Rule. — Where the contract is executory, any breach or nonperformance by the buyer is sufficient to authorize the seller to rescind.[7] Where the contract is executed, a mere breach by the buyer will not authorize the seller to rescind,[8] unless performance in that regard is made a condition of the sale.[9]

1. Inadequacy of Consideration — *England.* — Davies *v.* Cooper, 5 Myl. & C. 270.

United States. — Holmes *v.* Holmes, 1 Sawy. (U. S.) 99.

Illinois. — Baldwin *v.* Dunton, 40 Ill. 188.

Iowa. — Tootle *v.* Taylor, 64 Iowa 629.

New Jersey. — Wintermute *v.* Snyder, 3 N. J. Eq. 489.

New York. — Osgood *v.* Franklin, 2 Johns. Ch. (N. Y.) 1.

North Carolina. — Green *v.* Thompson, 2 Ired. Eq. (37 N. Car.) 365.

South Carolina.—Butler *v.* Haskell, 4 Desaus. (S. Car.) 651.

Tennessee. — Merriman *v.* Lacefield, 4 Heisk. (Tenn.) 209; Hardeman *v.* Burge, 10 Yerg. (Tenn.) 202.

Vermont. — Holden *v.* Crawford, 1 Aik. (Vt.) 390, 15 Am. Dec. 700; Howard *v.* Edgell, 17 Vt. 9.

Virginia. — M'Kinney *v.* Pinckard, 2 Leigh. (Va.) 149, 21 Am. Dec. 601; Forde *v.* Herron, 4 Munf. (Va.) 316.

But see Newman *v.* Meek, Freem. (Miss.) 441. See generally the titles Catching Bargain, vol. 5, p. 764; Consideration, vol. 6, p. 667.

2. Failure of Consideration. — Giles *v.* Edwards, 7 T. R. 177; Kempson *v.* Saunders, 4 Bing. 5, 13 E. C. L. 321; Burchfield *v.* Moore, 3 El. & Bl. 683, 77 E. C. L. 683; Howe Mach. Co. *v.* Willie, 85 Ill. 333; Harlow *v.* Putnam, 124 Mass. 553; Bruce *v.* Burr, 5 Daly (N. Y.) 510; Arnold *v.* Carpenter, 16 R. I. 560; Peckham *v.* Kiernan, 13 R. I. 354. See Devine *v.* Edwards, 101 Ill. 138. *Compare* Rappleye *v.* Racine Seeder Co., 79 Iowa 220.

3. Partial Failure of Consideration. — Hill *v.* Buckley, 17 Ves. Jr. 394; Graham *v.* Oliver, 3 Beav. 129; Wright *v.* Barnes, 14 Conn. 518; Smith *v.* Lewis, 40 Ind. 98; Kuhlman *v.* Wood, 81 Iowa 128; Miner *v.* Bradley, 22 Pick. (Mass.) 457; Jenness *v.* Wendell, 51 N. H. 63. 12 Am. Rep. 48; Bruce *v.* Pearson, 3 Johns. (N. Y.) 534; Dula *v.* Cowles, 2 Jones L. (47 N. Car.) 454; Roberts *v.* Beatty, 2 P. & W. (Pa.) 63. 21 Am. Dec. 410. But see Harnor *v.* Groves, 15 C. B. 667, 80 E. C. L. 667, 24 L. J. C. Pl. 53; Morse *v.* Brackett, 98 Mass. 205; Carpentier *v.* Minturn, 65 Barb. (N. Y.) 297.

4. Lawes *v.* Purser, 6 El. & Bl. 930, 88 E. C. L. 930; Taylor *v.* Hare, 1 B. & P. N. R. 260. See Bowker *v.* Hoyt, 18 Pick. (Mass.) 555; Morse *v.* Brackett, 98 Mass. 205.

But in Chanter *v.* Leese, 5 M. & W. 698, it was held, in the case of the sale of six patents for one consideration, five of which were valid and one void, that there had been an entire failure of consideration, since the money payable had not been apportioned by the contract to the different parts of the consideration, and the patents had not been enjoyed in part by the buyer.

5. Illegality. — Cowan *v.* Milbourn, L. R., 2 Exch. 230.

6. Feret *v.* Hill, 15 C. B. 207, 80 E. C. L. 207; Myers *v.* Meinrath, 101 Mass. 366, 3 Am. Rep. 368; McWilliams *v.* Phillips, 51 Miss. 196. See the title Illegal Contracts, vol. 15, p. 927.

7. Breach of Executory Contract — *England.* — Basten *v.* Butter, 7 East 479.

United States. — H. D. Williams Cooperage Co. *v.* Scofield, (C. C. A.) 115 Fed. Rep. 119.

Alabama. — Peckham *v.* Davis, 93 Ala. 474; McFadden *v.* Henderson, 128 Ala. 221.

Illinois. — Harrison Mach. Works *v.* Miller, 36 Ill. App. 86.

Maine. — Dodge *v.* Greeley, 31 Me. 343.

Massachusetts. — Allen *v.* Ford, 19 Pick. (Mass.) 217; Goodrich *v.* Lafflin, 1 Pick. (Mass.) 57.

New Hampshire. — Sumner *v.* Parker, 36 N. H. 449; Webb *v.* Stone, 24 N. H. 282; Kimball *v.* Grover, 11 N. H. 375.

New York. — Philips *v.* Bruce, Anth. N. P. (N. Y.) 89.

Pennsylvania. — Shaw *v.* Lewistown, etc., Turnpike Road Co., 3 P. & W. (Pa.) 445.

Vermont. — Hill *v.* Hovey, 26 Vt. 109; Fletcher *v.* Cole, 23 Vt. 114.

See *supra*, V. 1. *Duty to Deliver;* 12. *Excuse for Nondelivery.* See generally the title Rescission, Cancellation, and Reformation, *ante*, p. 604.

Mere Delay in Performance by the vendee will not authorize a rescission where time is not of the essence, unless the seller makes demand for performance within a reasonable time under penalty of rescission. Monroe *v.* Reynolds, 47 Barb. (N. Y.) 574; McFadden *v.* Henderson, 128 Ala. 221.

8. Breach of Executed Contract. — See *infra*, this subsection, *Nonpayment.*

9. Breach of Conditions of Sale. — Newell *v.*

bb. NONPAYMENT. — Failure and refusal to pay the price of goods at the time fixed for such payment, where a purchase is made of goods to be subsequently or concurrently delivered, authorizes the seller to rescind;[1] but default in payment after the goods have become the property of the vendee does not give such right to the vendor, unless it be expressly reserved in the contract,[2] as where it is stipulated that title shall not pass until payment.[3] Where by the terms of the contract the delivery of goods is to be by instalments, payment to be made upon each delivery, the refusal of the vendee to make such payment entitles the vendor to rescind.[4]

cc. NONACCEPTANCE. — A wrongful refusal to accept the goods in accordance with the contract authorizes the seller to rescind the contract.[5]

dd. REPUDIATION OF CONTRACT BY BUYER. — Any act amounting to a repudiation of the contract upon the part of the buyer authorizes the seller to rescind.[6]

Grant Locomotive Works, 50 Ill. App. 611; Lawlor *v.* Magnolia Metal Co., 33 N. Y. App. Div. 356. See generally the title CONDITIONAL SALES, vol. 6, p. 436.

But see *contra*, on the ground that the breach did not extend to the whole consideration, Osgood *v.* Bauder, 75 Iowa 550.

1. Nonpayment under Executory Contract — *United States.* — The Schooner Treasurer, 1 Sprague (U. S.) 473.

Alabama. — Harmon *v.* Goetter, 87 Ala. 325; Shines *v.* Steiner, 76 Ala. 458.

California. — Beauchamp *v.* Archer, 58 Cal. 431, 41 Am. Rep. 266.

Georgia. — Steen *v.* Harris, 81 Ga. 681.

Illinois. — Evans *v.* Chicago, etc., R. Co., 26 Ill. 189; Cheatle *v.* MacVeagh, 83 Ill. App. 336.

Iowa. — Hayden *v.* Reynolds, 54 Iowa 157.

Maine. — Dwinel *v.* Howard, 30 Me. 258.

Minnesota. — Globe Milling Co. *v.* Minneapolis Elevator Co., 44 Minn. 153.

Missouri. — Johnson-Brinkman Commission Co. *v.* Missouri Pac. R. Co., 52 Mo. App. 407; Hall *v.* Missouri Pac. R. Co., 50 Mo. App. 179.

New York. — American Broom, etc., Co. *v.* Addickes, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 36.

South Carolina. — Neil *v.* Cheves, 1 Bailey L. (S. Car.) 539; Pickett *v.* Cloud, 1 Bailey L. (S. Car.) 362.

Texas. — Lang *v.* Richmers, 70 Tex. 108.

Vermont. — Preble *v.* Bottom, 27 Vt. 249.

Washington. — Meeker *v.* Johnson, 5 Wash. 718.

Canada. — Clement *v.* Durocher, 16 Quebec Super. Ct. 479.

See also *infra*, this subsection, *Repudiation of Contract by Buyer*.

2. Nonpayment After Title Has Passed — *England.* — Martindale *v.* Smith, 1 Q. B. 395, 41 E. C. L. 595.

California. — Rayfield *v.* Van Meter, 120 Cal. 416.

Connecticut. — Buckingham *v.* Osborne, 44 Conn. 133.

Illinois. — Young *v.* Paris, 69 Ill. App. 449. But see Genessee Fruit Co. *v.* Barrett, 67 Ill. App. 673.

Iowa. — Morse *v.* Chicago, etc., R. Co., 73 Iowa 226; Kramer *v.* Messner, 101 Iowa 88.

Kansas. — Slatten *v.* Konrath, 1 Kan. App. 636.

Kentucky. — Holland *v.* Cincinnati Desiccating Co., 97 Ky. 454.

Michigan. — Skinner *v.* Michigan Hoop Co., 119 Mich. 467, 75 Am. St. Rep. 413.

Missouri. — Roberts *v.* Boulton, 56 Mo. App. 405.

New York. — Keller *v.* Strasburger, 23 Hun (N. Y.) 625.

Pennsylvania. — Dicken *v.* Winters, 169 Pa. St. 126.

3. Preston *v.* Whitney, 23 Mich. 260; Ketchum *v.* Brennan, 53 Miss. 596; O'Rourke *v.* Hadcock, 114 N. Y. 541; Buffkins *v.* Eason, 112 N. Car. 162.

4. Delivery and Payment by Instalments. — Withers *v.* Reynolds, 2 B. & Ad. 882, 22 E. C. L. 203; Bloomer *v.* Bernstein, L. R. 9 C. P. 588; Hull Coal, etc., Co. *v.* Empire Coal, etc., Co., (C. C. A.) 113 Fed. Rep. 256; Rayfield *v.* Van Meter, 120 Cal. 416; Johnson Forge Co. *v.* Leonard, (Del. 1902) 51 Atl. Rep. 305; George H. Hess Co. *v.* Dawson, 149 Ill. 138; Rugg *v.* Moore, 110 Pa. St. 236; Granite Mills *v.* Keystone Oil Cloth Co., 15 Montg. Co. Rep. (Pa.) 36. See Stockdale *v.* Schuyler, 55 Hun (N. Y.) 610, 8 N. Y. Supp. 813. But see Mersey Steel, etc., Co. *v.* Naylor, 9 Q. B. D. 648; *Ex p.* Chalmers, L. R. 8 Ch. 289; Monarch Cycle Mfg. Co. *v.* Royer Wheel Co., 105 Fed. Rep. 324, 44 C. C. A. 523; West *v.* Bechtel, 125 Mich. 144, 7 Detroit Leg. N. 452. *Compare* Morgan *v.* Bain, L. R. 10 C. P. 15; *In re* Phœnix Bessemer Steel Co., 4 Ch. D. 108; Norrington *v.* Wright, 5 Fed. Rep. 768; *Re* Wheeler, 2 Lowell (U. S.) 252.

5. Nonacceptance of Goods. — Bartholomew *v.* Markwick, 15 C. B. N. S. 711, 109 E. C. L. 711; The Schooner Treasurer, 1 Sprague (U. S.) 473; Hughes's *v.* Case, 4 Ct. Cl. 64; Middle Div. Elevator Co. *v.* Vandeventer, 80 Ill. App. 669; Bigelow *v.* Chapman, 43 Ill. App. 561; Redmond *v.* Smock, 28 Ind. 365; Smith *v.* Keith, etc., Coal Co., 36 Mo. App. 567; Coon *v.* Reed, 1 Hilt. (N. Y.) 511; Flynn *v.* Ledger, 48 Hun (N. Y.) 465. See Clement, etc., Mfg. Co. *v.* Meserole, 107 Mass. 362. But see Simpson *v.* Crippin, L. R. 8 Q. B. 14; Honck *v.* Muller, 7 Q. B. D. 92; Hoare *v.* Rennie, 5 H. & N. 19. See also *infra*, this subsection, *Repudiation of Contract by Buyer*.

6. Repudiation of Contract by Buyer — *United States.* — The Schooner Treasurer, 1 Sprague (U. S.) 473; Monarch Cycle Mfg. Co. *v.* Royer Wheel Co., 105 Fed. Rep. 324, 44 C. C. A. 523.

California. — Rayfield *v.* Van Meter, 120 Cal. 416.

(2) *Conditions of Rescission* — (a) **Return of Consideration.** — Upon rescission by the seller, he must return or offer to return the consideration received by him. He cannot both rescind and keep the consideration.[1] In many cases a tender or deposit in court in an action to enforce rescission has been held sufficient.[2] Under particular circumstances, a return or tender of the consideration may be excused.[3] The seller need not return or tender money expended in perpetrating a fraud upon him.[4]

(b) **Demand for Rescission.** — A demand for the return of the property should usually be made before bringing suit, but a demand is unnecessary where it would have been useless.[5]

b. WAIVER OR LOSS OF RIGHT TO RESCIND. — The right to rescind must be exercised promptly upon the discovery of the facts authorizing rescission. Any unreasonable delay in rescission,[6] or any further dealing or action in

Delaware. — Johnson Forge Co. *v.* Leonard, (Del. 1902) 51 Atl. Rep. 305.

Illinois. — Genesee Fruit Co. *v.* Barrett, 67 Ill. App. 673.

Massachusetts. — King *v.* Faist, 161 Mass. 449.

Michigan. — West *v.* Bechtel, 125 Mich. 144.

Missouri. — Smith *v.* Keith, etc., Coal Co., 36 Mo. App. 567.

North Carolina. — Heiser *v.* Mears, 120 N. Car. 443.

Tennessee. — Ault *v.* Dustin, 100 Tenn. 366.

Texas. — Steinlein *v.* S. Blaisdell, Jr. Co., (Tex. Civ. App. 1898) 44 S. W. Rep. 200.

Canada. — McCowan *v.* McKay, 13 Manitoba 590.

See also *supra*, this title, *Delivery of Goods — Excuse for Nondelivery or Delay.*

If the act of one party be such as necessarily to prevent the other from performing his part according to the terms of his agreement, the contract may be considered as rescinded. Dubois *v.* Delaware, etc., Canal Co., 4 Wend. (N. Y.) 285. This is properly a case of wrongful rescission by one party which gives the other party a right to treat the property as though no bargain had ever been made, and without any liability to the party in default. See Monroe *v.* Reynolds, 47 Barb. (N. Y.) 574; Raymond *v.* Bearnard, 12 Johns. (N. Y.) 274, 7 Am. Dec. 317; Fancher *v.* Goodman, 29 Barb. (N. Y.) 315.

1. Necessity of Return or Tender of Consideration — *Alabama.* — Wilcox *v.* San Jose Fruit-Packing Co., 113 Ala. 519, 59 Am. St. Rep. 135.

Illinois. — Leon *v.* Goldsmith, 69 Ill. App. 22.

Indiana. — Adam, etc., Co. *v.* Stewart, 157 Ind. 678.

Kansas. — Rock Island Implement Co. *v.* Horton First Nat. Bank, 9 Kan. App. 96.

Massachusetts. — Coolidge *v.* Brigham, 1 Met. (Mass.) 547; Thurston *v.* Blanchard, 22 Pick. (Mass.) 18, 33 Am. Dec. 700; Kimball *v.* Cunningham, 4 Mass. 502, 3 Am. Dec. 230.

Michigan. — Havey *v.* Petrie, 100 Mich. 190.

Mississippi. — Ketchum *v.* Brennan, 53 Miss. 596.

Missouri. — J. I. Case Plow Works *v.* Ross, 74 Mo. App. 437; Wm. S. Merrill Chemical Co. *v.* Nickells, 66 Mo. App. 678; Wertheimer, etc., Shoe Co. *v.* Exchange Bank, 56 Mo. App. 662. *Compare* Wurmser *v.* Sivey, 52 Mo. App. 424.

New York. — Washburn *v.* Cordis, (Brooklyn City Ct. Gen. T.) 1 Misc. (N. Y.) 427.

Ohio. — Caldwell *v.* Singer Mfg. Co., 4 Ohio Cir. Dec. 680, 7 Ohio Cir. Ct. 460.

Oregon. — Crossen *v.* Murphy, 31 Oregon 114.

Pennsylvania. — Arbuthnot *v.* Smith, 18 Pa. Super. Ct. 22; Schwartz *v.* McCloskey, 156 Pa. St. 258; Hineman *v.* Matthews, 138 Pa. St. 204.

Rhode Island. — Fleming *v.* Hanley, 22 R. I. 251.

Texas. — Gibson *v.* Lancaster, 90 Tex. 540.

Wisconsin. — Friend Bros. Clothing Co. *v.* Hulbert, 98 Wis. 183.

2. Cowen *v.* Bloomberg, 66 N. J. L. 385; Atlas Nat. Bank *v.* Rheinstrom, 6 Ohio Dec. 215, 4 Ohio N. P. 15; Crossen *v.* Murphy, 31 Oregon 114; Schofield *v.* Shiffer, 156 Pa. St. 65; Sisson *v.* Hill, 18 R. I. 212; Blalock *v.* Joseph Bowling Co., (Tex. Civ. App. 1898) 44 S. W. Rep. 305.

3. When Return or Tender Excused — *Arkansas.* — Triplett *v.* Rugby Distilling Co., 66 Ark. 219.

Massachusetts. — Coolidge *v.* Brigham, 1 Met. (Mass.) 547; Thurston *v.* Blanchard, 22 Pick. (Mass.) 18, 33 Am. Dec. 700.

Michigan. — Sheldon Axle Co. *v.* Scofield, 85 Mich. 177; Skinner *v.* Michigan Hoop Co., 119 Mich. 467, 75 Am. St. Rep. 413.

Mississippi. — Volking *v.* Huckabay, 67 Miss. 206.

Nebraska. — Phenix Iron Works Co. *v.* McEvony, 47 Neb. 228, 53 Am. St. Rep. 527.

New York. — Johnson *v.* Frew, 33 Hun (N. Y.) 193; Gould *v.* Cayuga County Nat. Bank, 86 N. Y. 81; Nichols *v.* Michael, 23 N. Y. 264, 80 Am. Dec. 259; Gibb *v.* Redway Mfg. Co., (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 43.

Ohio. — Frost *v.* Lowry, 15 Ohio 200.

Pennsylvania. — Sloane *v.* Shiffer, 156 Pa. St. 59.

Wisconsin. — Gates *v.* Raymond, 106 Wis. 657; Friend Bros. Clothing Co. *v.* Hulbert, 98 Wis. 183.

4. Expense of Perpetrating Fraud. — Soper Lumber Co. *v.* Halsted, etc., Co., 73 Conn. 547; J. I. Case Plow Works *v.* Ross, 74 Mo. App. 437. *Compare* Parks *v.* Lancaster, (Tex. Civ. App. 1896) 38 S. W. Rep. 262; Gibson *v.* Lancaster, 90 Tex. 540.

5. Demand. — Triplett *v.* Rugby Distilling Co., 66 Ark. 219. And see generally the title DEMAND, vol. 9, p. 197.

6. Delay in Rescission — *England.* — Central R. Co. *v.* Kisch, L. R. 2 H. L. 99.

Alabama. — Young *v.* Arntze, 86 Ala. 510; Jones *v.* Anderson, 82 Ala. 302.

respect to the contract as though it were still in force, amounts to a ratification or election to abide by the contract and is a bar to a subsequent rescission.[1] Action taken in ignorance of the facts authorizing a rescission does not have this effect.[2]

c. WHAT CONSTITUTES RESCISSION. — Where the seller is entitled to rescind, any act done by him in distinct disaffirmance of the contract constitutes a rescission.[3]

3. By Buyer — *a.* RIGHT TO RESCIND — (1) *Grounds for Rescission* — (a) **In General.** — The buyer may rescind the contract and recover the consideration paid upon any of the usual grounds for the rescission of contracts generally.[4]

California. — Gamble *v.* Tripp, 99 Cal. 223; Bailey *v.* Fox, 78 Cal. 389.

Connecticut. — Cohen *v.* Pemberton, 53 Conn. 221, 55 Am. Rep. 101; Bulkley *v.* Morgan, 46 Conn. 393.

Illinois. — Hall *v.* Fullerton, 69 Ill. 448; Osborn *v.* Stanley, 35 Ill. 102, 85 Am. Dec. 347; Nichols *v.* Guibor, 20 Ill. 285; Musick *v.* Gatzmeyer, 47 Ill. App. 329; Prickett *v.* McFadden, 8 Ill. App. 197; Frederick *v.* Case, 28 Ill. App. 215

Iowa. — Upton Mfg. Co. *v.* Huiske, 69 Iowa 557.

Kansas. — Cookingham *v.* Dusa, 41 Kan. 229.

Michigan. — DeArmand *v.* Phillips, Walk. (Mich.) 186; Childs *v.* O'Donnell, 84 Mich. 533; Gridley *v.* Globe Tobacco Co., 71 Mich. 528; Wilbur *v.* Flood, 16 Mich. 40, 93 Am. Dec. 203.

Mississippi. — Jagers *v.* Griffin, 43 Miss. 134.

Missouri. — World Pub. Co. *v.* Hull, 81 Mo. App. 277; Johnson-Brinkman Commission Co. *v.* Missouri Pac. R. Co., 52 Mo. App. 407; Brockhaus *v.* Schilling, 52 Mo. App. 73; Lapp *v.* Ryan, 23 Mo. App. 436.

Montana. — McDonald *v.* Goodkind, 22 Mont. 491.

Nebraska. — Smith *v.* Chadron First Nat. Bank, 45 Neb. 444.

New York. — Heilbronn *v.* Herzog, 33 N. Y. App. Div. 311; Hallahan *v.* Webber, 7 N. Y. App. 122, *reversing* 15 Misc. (N. Y.) 327, 2 N. Y. Annot. Cas. 333; Gould *v.* Cayuga County Nat. Bank, 86 N. Y. 82.

Oregon. — Crossen *v.* Murphy, 31 Oregon 114.

Pennsylvania. — Mann *v.* Salsberg, 17 Pa. Super. Ct. 280; Morgan *v.* McKee, 77 Pa. St. 228.

South Carolina. — Fowler *v.* Williams, 2 Brev. L. (S. Car.) 304, 4 Am. Dec. 579.

Tennessee. — Wertheimer-Swartz Shoe Co. *v.* Faris (Tenn. Ch. 1898) 46 S. W. Rep. 336.

Texas. — Brantley *v.* Thomas, 22 Tex. 270, 73 Am. Dec. 264.

But see Williamson *v.* New Jersey Southern R. Co., 28 N. J. Eq. 277. See generally the title RESCISSION, CANCELLATION, AND REFORMATION, *ante*, p. 604.

The election to rescind may be made at any time, unless there has been a previous election to affirm the contract. Clough *v.* London, etc., R. Co., L. R. 7 Exch. 26. See Kirby *v.* Harrison, 2 Ohio St. 326, 59 Am. Dec. 677.

1. Ratification of Contract — *England.* — Smith *v.* Field, 5 T. R. 402.

United States. — Van Winkle *v.* Crowell, 146 U. S. 42. But see Browning *v.* De Ford, 178 U. S. 196.

Arkansas. — Little Rock Bank *v.* Frank, 63 Ark. 16, 58 Am. St. Rep. 65.

Connecticut. — Gallup *v.* Fox, 64 Conn. 491.

Massachusetts. — Wilkinson *v.* Blount Mfg. Co., 169 Mass. 374.

Missouri. — Mapes *v.* Burns, 72 Mo. App. 411. But see Johnson-Brinkman Commission Co. *v.* Central Bank, 116 Mo. 558.

Nebraska. — Chadron First Nat. Bank *v.* Tootle, 59 Neb. 44.

New York. — Droege *v.* Ahrens, etc., Mfg. Co., 163 N. Y. 466; Maskelinski *v.* Wazsinenski, (Buffalo Super. Ct. Gen. T.) 20 N. Y. Supp. 533. But see Wolf *v.* Lachman, (Tex. Civ. App. 1892) 20 S. W. Rep. 867.

2. Ignorance of Facts Authorizing Rescission. — Deere *v.* Morgan, 114 Iowa 287; Gallipolis Furniture Co. *v.* Symmes, 10 Ohio Cir. Dec. 514, 19 Ohio Cir. Ct. 659; Crossen *v.* Murphy, 31 Oregon 114; Neill *v.* Hitchman, 201 Pa. St. 207. See McDonald *v.* Goodkind, 22 Mont. 491.

3. What Constitutes Rescission — *United States.* — Florence Min. Co. *v.* Brown, 124 U. S. 385; Schreyer *v.* Kimball Lumber Co. (C. C. A.) 54 Fed. Rep. 653.

California. — Willard *v.* Tatum, (Cal. 1893) 31 Pac. Rep. 912.

Connecticut — Soper Lumber Co. *v.* Halsted, etc., Co., 73 Conn. 547.

Delaware. — Fait, etc., Co. *v.* Truxton, 1 Penn. (Del.) 24.

Illinois. — Weill *v.* American Metal Co., 182 Ill. 128.

Iowa. — Kearney Milling, etc., Co. *v.* Union Pac. R. Co., 97 Iowa 719, 59 Am. St. Rep. 434.

Massachusetts. — King *v.* Faist, 161 Mass. 449.

Missouri. — Porter *v.* Leyhe, 67 Mo. App. 540.

Nebraska. — Hamilton Brown Shoe Co. *v.* Milliken, 62 Neb. 116.

New Jersey. — Skillman Hardware Co. *v.* Davis, 53 N. J. L. 144.

New York. — Sloane *v.* Van Wyck, 4 Abb. App. Dec. (N. Y.) 250; Borgfeldt *v.* Wood, 92 Hun (N. Y.) 260, 3 N. Y. Annot. Cas. 46; Baumann *v.* Moseley, 73 Hun (N. Y.) 40.

North Carolina. — Grist *v.* Williams, 111 N. Car. 53, 32 Am. St. Rep. 782.

Pennsylvania. — Mann *v.* Salsberg, 17 Pa. Super. Ct. 280; Patten's Appeal, 45 Pa. St. 151, 84 Am. Dec. 479.

Texas. — Raby *v.* Frank, 12 Tex. Civ. App. 125.

Wisconsin. — Shores Lumber Co. *v.* Claney, 102 Wis. 235.

4. See generally the title RESCISSION, CAN-

(b) **Fraud and Deceit.** — Fraud and deceit upon the part of the seller operating to induce the purchase is sufficient to authorize the buyer to rescind.[1] Such fraud usually consists of misrepresentations in respect to the thing sold, whereby the other party is induced to buy,[2] or the fraudulent concealment of some defect which it is his duty to make known to the purchaser, and which, if it had been known, would have influenced him not to buy.[3] What consti-

CELLATION, AND REFORMATION, *ante*, p. 604. See also *supra*, this section, *Rescission — By Seller — Grounds for Rescission.*

1. Fraud and Deceit in General. — Barker *v.* Keown, 67 Ill. App. 433; Aultman *v.* Nilson, 112 Iowa 634; Shrimpton *v.* Netzorg, 104 Mich. 225; Garrison *v.* Technic Electrical Works, 59 N. J. Eq. 440; Witt *v.* Cuenod, 9 N. Mex. 143; Shrimpton *v.* Eschwege, 10 N. Y. App. Div. 56; Griffith *v.* Strand, 19 Wash. 686. See Curran *v.* Hauser, 9 Ohio Dec. 468, 6 Ohio N. P. 281. But see Cudd *v.* Williams, 39 S. Car. 452. See generally the title FRAUD AND DECEIT, vol. 14, p. 12.

Evidence and Burden of Proof. — Greene *v.* Societe Anonyme, etc., 81 Fed. Rep. 64; Hoyle *v.* Southern Saw Works, 105 Ga. 123; Hicks *v.* Stevens, 121 Ill. 186; McCorkell *v.* Karhoff, 90 Iowa 545; Garrison *v.* Technic Electrical Works, 59 N. J. Eq. 440; Gans *v.* Wormser, 73 N. Y. App. Div. 623; Cole *v.* Carter, 22 Tex. Civ. App. 457; Cabaness *v.* Holland, 19 Tex. Civ. App. 383.

Province of Court and Jury. — Cole *v.* Carter, 22 Tex. Civ. App. 457.

2. Misrepresentations as to Thing Sold — *United States.* — Montgomery *v.* Bucyrus Mach. Works, 92 U. S. 257; Merrill *v.* Florida Lands, etc., Co., 60 Fed. Rep. 17, 13 U. S. App. 649; Boggs *v.* Wann, 58 Fed. Rep. 681; Curtiss *v.* Hurd, 30 Fed. Rep. 729.

Alabama. — Alexander *v.* Dennis, 9 Port. (Ala.) 174, 33 Am. Dec. 309; Whitworth *v.* Thomas, 83 Ala. 308, 3 Am St. Rep. 725.

Arkansas. — Gaty *v.* Holcomb, 44 Ark. 216.

Colorado. — Beard *v.* Bliley, 3 Colo App. 479.

Georgia. — Clayton *v.* O'Conner, 29 Ga. 687; Hoyle *v.* Southern Saw Works, 105 Ga. 123.

Illinois. — Hicks *v.* Stevens, 121 Ill. 186.

Indiana. — Higham *v.* Harris, 108 Ind. 246; Gatling *v.* Newell, 12 Ind. 118; Miller *v.* Buchanan, 10 Ind. App. 474.

Kansas. — Burns *v.* Mahannah, 39 Kan. 87; Graffenstein *v.* Epstein, 23 Kan. 443, 33 Am. Rep. 171.

Kentucky. — Phelps *v.* Quinn, 1 Bush (Ky.) 375; American Harrow Co. *v.* Martin, (Ky. 1896) 36 S. W. Rep. 178.

Maine. — Hoxie *v.* Small, 86 Me. 23; Farris *v.* Ware, 60 Me. 482.

Massachusetts. — Stroud *v.* Pierce, 6 Allen (Mass.) 413; Way *v.* Ryther, 165 Mass. 226; Holbrook *v.* Burt, 22 Pick. (Mass.) 546; Waters' Patent Heater Co. *v.* Smith, 120 Mass. 444; Boles *v.* Merrill, 173 Mass. 491, 73 Am. St. Rep. 308.

Michigan. — Johnson *v.* Seymour, 79 Mich. 156; Peck *v.* Jenison, 99 Mich. 326; H. W. Williams Transp. Line *v.* Darius Cole Transp. Co., (Mich. 1901) 88 N. W. Rep. 473.

Minnesota. — MacLaren *v.* Cochran, 44 Minn. 255; Johnson *v.* Hillstrom, 37 Minn. 122.

Missouri. — Clark *v.* Edgar, 84 Mo. 106, 54 Am. Rep. 84; Brockhaus *v.* Schilling, 52 Mo. App. 73.

New York. — Harding *v.* Taylor, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 684; Holmes *v.* Bloomingdale, 72 N. Y. App. Div. 627; Jackson *v.* Foley, 53 N. Y. App. Div. 97; Bridge *v.* Penniman, 105 N. Y. 642; Elwell *v.* Chamberlain, 4 Bosw. (N. Y.) 320; Ketletas *v.* Fleet, 7 Johns. (N. Y.) 324; Harlow *v.* La Brum, 82 Hun (N. Y.) 292; American Writing Mach. Co. *v.* Bushnell, (C. Pl. Gen. T.) 9 Misc. (N. Y.) 462; Yeomans *v.* Bell, 79 Hun (N. Y.) 215; Arnold *v.* Norfolk, etc., Hosiery Co., 76 Hun (N. Y.) 15, 148 N. Y. 392; Mason *v.* Wheeler, (N. Y. Super. Ct. Eq. T.) 2 Misc. (N. Y.) 523; Miller *v.* Barber, 66 N. Y. 558.

Pennsylvania. — Thompson *v.* Chambers, 13 Pa. Super. Ct. 213; Goodwin *v.* Schott, 159 Pa. St. 552; Taylor *v.* Saurman, 110 Pa. St. 3; Nelson *v.* Martin, 105 Pa. St. 229.

Tennessee. — Pearcy *v.* Huddleston, 3 Yerg. (Tenn.) 36.

Texas. — Cole *v.* Carter, 22 Tex. Civ. App. 457; Carter *v.* Cole, (Tex. Civ. App. 1897) 42 S. W. Rep. 369; Ford *v.* Oliphant, (Tex. Civ. App. 1895) 32 S. W. Rep. 437; Riley *v.* Treanor, (Tex. Civ. App. 1894) 25 S. W. Rep. 1054; Halsell *v.* Musgrave, 5 Tex. Civ. App. 476; Wintz *v.* Morrison, 17 Tex. 372, 67 Am. Dec. 658.

Vermont. — Stone *v.* Robie, 66 Vt. 245; Badger *v.* Whitcomb, 66 Vt. 125. See also Somers *v.* Richards, 46 Vt 170.

Washington. — English *v.* Grinstead, 12 Wash. 670.

Wisconsin. — Potter *v.* Taggart, 54 Wis. 395; Mamlock *v.* Fairbanks, 46 Wis. 415, 32 Am. Rep. 716; Page *v.* Dickerson, 28 Wis. 694, 9 Am. Rep. 532. See also Paetz *v.* Stoppleman, 75 Wis. 510.

But see *infra*, *ee. Breach of Warranty.*

3. Fraudulent Concealment of Defects — *Alabama.* — Perry *v.* Johnston, 59 Ala. 648.

Kentucky. — Brooks *v.* Cannon, 2 A. K. Marsh. (Ky.) 525.

Massachusetts. — Sibley *v.* Hulbert, 15 Gray (Mass.) 509; Matthews *v.* Bliss, 22 Pick. (Mass.) 53.

Missouri. — Cecil *v.* Spurger, 32 Mo. 462, 82 Am. Dec. 140.

New Hampshire. — Hanson *v.* Edgerly, 29 N. H. 343.

New York. — Rothmiller *v.* Stein, 143 N. Y. 581; Smith *v.* Countryman, 30 N. Y. 681.

Pennsylvania. — Croyle *v.* Moses, 90 Pa. St. 250, 35 Am. Rep. 654; Harris *v.* Tyson, 24 Pa. St. 347, 64 Am. Dec. 661.

South Carolina. — Carter *v.* Walker, 2 Rich. L. (S. Car.) 45.

Vermont. — Graham *v.* Stiles, 38 Vt. 578; Paddock *v.* Strobridge, 29 Vt. 470; Fitzsimmons *v.* Joslin, 21 Vt. 129, 52 Am. Dec. 46.

See also generally the title IMPLIED WARRANTIES, vol. 15, p. 1210.

tutes fraud such as to entitle the buyer to rescind is elsewhere considered.[1]

(c) **Mistake.** — Mistake is ground for rescission subject to the usual rules.[2]

(d) **Failure of Consideration.** — The buyer may rescind for failure of consideration.[3] For example, the vendor in an executory contract may wholly fail to make a title to the vendee, in which case there is such failure of consideration as will entitle him to rescind.[4]

(e) **Breach of Contract by Seller** — *aa.* In General. — Breach of an executory contract of sale by the seller authorizes the buyer to rescind.[5] But the buyer cannot rescind an executed contract for a mere breach of contract, unless the breach is in regard to a matter forming an express or implied condition of the sale.[6]

bb. Express or Implied Conditions. — The buyer may rescind for breach by the seller of any express or implied condition of the contract of sale.[7] But mere breach of collateral stipulations not made conditions of the sale is not ground for rescission.[8]

cc. Breach as to Kind or Quality of Goods. — The buyer may rescind and claim a return of the price where the goods delivered are not of the kind or quality called for by the contract.[9] Thus, where the goods are sold to be used for a specific purpose, but are not fit for such purpose, the buyer may rescind.[10]

1. See the title Fraud and Deceit, vol. 14, p. 12. See also cases cited *supra*, this section.

2. Mistake. — Hamilton *v.* McAlister, 49 S. Car. 230. See also the title Mistake, vol. 20, p. 805; Rescission, Cancellation, and Reformation, *ante* And see *supra*, this section, *By Seller — Mistake.*

3. Failure of Consideration. — Kauffman Milling Co. *v.* Stuckey, 37 S. Car. 7; Carter *v.* Walker, 2 Rich L. (S. Car.) 40. But see Case *v.* Hall, 24 Wend. (N. Y.) 103, 35 Am. Dec. 605. See generally the title Consideration, vol. 6, p. 667. See also *supra*, this section, *By Seller — Failure of Consideration.*

4. Failure to Make Title. — Eichholtz *v.* Bannister, 17 C. B. N. S. 708, 112 E. C. L. 708; Souter *v.* Drake, 5 B. & Ad. 992, 27 E. C. L. 250; Purvis *v.* Rayer, 9 Price 488; Siegel *v.* Brooke, 25 Ill. App. 207; Kitchen *v.* Wilcox, (Ky. 1900) 56 S. W. Rep. 514; Judson *v.* Wass, 11 Johns. (N. Y.) 528, 6 Am. Dec. 392; Talmadge *v.* Wallis, 25 Wend. (N. Y.) 117; Shores Lumber Co. *v.* Claney, 102 Wis. 235.

5. Executory Contracts. — Rubin *v.* Sturtevant, (C. C. A.) 80 Fed. Rep. 930; McCormick Harvesting Mach. Co. *v.* Knoll, 57 Neb. 790; Smith *v.* York Mfg. Co., 58 N. J. L. 242. See Whitla *v.* Moore, 164 Pa. St. 451. *Compare* Worth *v.* Herbert, 59 Mo. App. 560.

6. Executed Contracts. — Gattorno *v.* Adams, 12 C. B. N. S. 560, 104 E. C. L. 560; Stelwagon *v.* Wilmington Coal Gas Co., 2 Marv. (Del.) 184; H. W. Williams Transp. Line *v.* Darius Cole Transp. Co., (Mich. 1901) 88 N. W. Rep. 473. See also *infra*, *ee. Breach of Warranty.*

7. Breach of Express or Implied Conditions. — Coates *v.* Mernin, 48 Ill. App. 466; Smith *v.* York Mfg. Co., 58 N. J. L. 242; Truman *v.* Lombard, 10 N. Y. App. Div. 430; Koerner *v.* Henn, 8 N. Y. App. Div. 602; Browne *v.* Paterson, 36 N. Y. App. Div. 167; Jackson *v.* Butler, 21 Tex. Civ. App. 379. See Aultman *v.* Nilson, 112 Iowa 634. But see Embree-McLean Carriage Co. *v.* Lusk, 11 Tex. Civ. App. 493. *Compare* Weber *v.* Owens, 91 Ill. App. 418.

8. Collateral Stipulations. — Kendall *v.* Young, 27 Ill. App. 174; Witt *v.* Cuenod, 9 N. Mex. 143; Lamson Consol. Store-Service Co. *v.* Conyngham, (C. Pl. Gen. T.) 11 Misc. (N. Y.) 428; Tufts *v.* Weinfeld, 88 Wis. 647; Hoffman *v.* King, 70 Wis. 372. See Fairbanks *v.* Owens, 46 Ill. App. 80. *Compare* Koerner *v.* Henn, 8 N. Y. App. Div. 602.

9. Breach as to Kind or Quality of Goods — *United States.* — St. Louis Paper-Box Co. *v.* J. C. Hubinger Bros. Co., (C. C. A.) 100 Fed. Rep. 595; Rubin *v.* Sturtevant, (C. C. A.) 80 Fed. Rep. 930.

Delaware. — But see Stelwagon *v.* Wilmington Coal Gas Co., 2 Marv. (Del.) 184.

Georgia. — Barnett *v.* Terry, 42 Ga. 283.

Louisiana. — C. S. Burt Co. *v.* Laplace, 46 La. Ann. 722.

Massachusetts. — Hallwood Cash Register Co. *v.* Lufkin, 179 Mass. 143.

Mississippi. — *Compare* Shrimpton *v.* Warmack, 72 Miss. 208.

New Hampshire. — Walker *v.* Davis, 65 N. H. 170.

New Jersey. — Smith *v.* York Mfg. Co., 58 N. J. L. 242.

New York. — Cahen *v.* Platt, 69 N. Y. 348, 25 Am. Rep. 203; Howard *v.* Hoey 23 Wend. (N. Y.) 350, 35 Am. Dec. 572; Peck *v.* Armstrong, 38 Barb. (N. Y.) 215. But see Rouse *v.* Printers' Exch. Co., (C. Pl. Gen. T.) 12 Misc. (N. Y.) 114. *Compare* Miller *v.* Benjamin, 142 N. Y. 613.

Virginia. — Virginia-Carolina Chemical Co. *v.* Carpenter, 99 Va. 292.

Texas. — Hunt County Oil Co. *v.* Scott, (Tex. Civ. App. 1902) 67 S. W. Rep. 451; Cole *v.* Carter, 22 Tex. Civ. App. 457

See *infra*, this section, *Breach of Warranty* and see the title Warranty.

See *supra*, this title, *Delivery — Quality to Be Delivered;* and *supra*, *Acceptance.* See also the title Implied Warranties, vol. 15. p. 1210.

But in Hoadley *v.* House, 32 Vt. 179, 76 Am. Dec. 167, it was held that rescission cannot be effected after delivery and use of a part of the goods for mere difference in quality, but the difference must be in kind or class.

10. Goods Sold for Specific Purpose. — Penn *v.* Smith, 93 Ala. 476; Wolf *v.* Dietzsch, 75 Ill.

Of course, the right to reject the goods delivered or to rescind the contract may be waived or lost by acceptance.[1] Obvious defects furnish no ground for rescission.[2]

dd. Repudiation of Contract. — Any act by the seller which amounts to a repudiation of the contract authorizes the buyer to rescind.[3]

ee. Breach of Warranty. — While breach of warranty, as a general rule, does not entitle the vendee to rescind, unless there be fraud or an election to rescind reserved,[4] yet in some states the rule is different, and the vendee has the right to rescind and return the goods in all cases where there is such breach, whether the warranty be express or implied.[5] Of course, if the contract is still executory, a breach of warranty is ground for rescission.[6] So if

205; Craver *v.* Hornburg, 26 Kan. 94; Hudson *v.* Roos, 72 Mich. 363; Branson *v.* Turner, 77 Mo. 489; Compton *v.* Parsons, 76 Mo. 455; Barr *v.* Baker, 9 Mo. 850; Morrow *v.* Rees, 69 Pa. St. 368; Chester Steel Castings Co. *v.* Brownscombe, 7 Kulp (Pa.) 136. *Compare* Evans *v.* Western Brass Mfg. Co., 118 Mo. 548.

But an action for rescission cannot be maintained on account of a defect existing at the time of the sale which was so apparent that it might have been discovered by simple inspection. Bloom *v.* Beebe, 15 La. Ann. 65; Bell *v.* Lacy, 16 La. Ann. 51.

1. Effect of Acceptance. — Bullock *v.* Consumers' Lumber Co., (Cal. 1892) 31 Pac. Rep. 367; Dounce *v.* Dow, 6 Thomp. & C. (N. Y.) 653. See *infra*, this title, *Waiver or Loss of Right to Rescind.*

2. Obvious Defects. — Hansen *v.* Baltimore Packing, etc., Co., 86 Fed. Rep. 832. See Gray *v.* Long, (Cal. 1894) 37 Pac. Rep. 380. See also the title Implied Warranties, vol. 15, p. 1210.

3. Repudiation of Contract by Seller. — Mess *v.* Duffus, 6 Com'l Cas. 165; Smiley *v.* Barker, (C. C. A.) 83 Fed. Rep. 684; Leahy *v.* Lobdell, (C. C. A.) 80 Fed. Rep. 665; Behrman *v.* Newton, 103 Ala. 525; White *v.* Wolf, 185 Pa. St. 369.

4. Breach of Warranty Not Ground for Rescission — *England.* — Street *v.* Blay, 2 B. & Ad. 456, 22 E. C. L. 122.

United States. — Thornton *v.* Wynn, 12 Wheat. (U. S.) 183; Reeves *v.* Corning, 51 Fed. Rep. 774.

Connecticut. — Worcester Mfg. Co. *v.* Waterbury Brass Co., 73 Conn. 554; Trumbull *v.* O'Hara, 71 Conn. 172.

Georgia. — Dawson *v.* Pennaman, 65 Ga. 698.

Illinois. — Skinner *v.* Mulligan, 56 Ill. App. 47.

Indiana. — Hoover *v.* Sidener, 98 Ind. 290.

Maine. — Prentiss *v.* Russ, 16 Me. 30.

Michigan. — H. W. Williams Transp. Line *v.* Darius Cole Transp. Co., (Mich. 1901) 88 N. W. Rep. 473; 8 Detroit Leg. N. (Mich.) 927; Kimball, etc , Mfg. Co. *v.* Vroman, 35 Mich. 310, 24 Am. Rep. 558. See also Murphy *v.* McGraw, 74 Mich. 318.

Minnesota. — Lynch *v.* Curfman, 65 Minn. 170.

Missouri. — Bunce *v.* Beck, 43 Mo. 279.

Nebraska. — See McCormick Harvesting Mach. Co. *v.* Knoll, 57 Neb. 790.

New York. — Day *v.* Pool, 52 N. Y. 416, 11 Am. Rep. 719; Muller *v.* Eno, 14 N. Y. 597; Kiernan *v.* Rocheleau, 6 Bosw. (N. Y.) 148; Voorhees *v.* Earl, 2 Hill (N. Y.) 288, 38 Am. Dec. 588.

Pennsylvania. — Kase *v.* John, 10 Watts (Pa.) 107, 36 Am. Dec. 148.

South Carolina. — Kauffman Milling Co. *v.* Stuckey, 37 S. Car. 7; Kauffman Milling Co. *v.* Stuckey, 40 S. Car. 110.

Tennessee. — Garr *v.* Young, (Tenn. Ch. 1901) 62 S. W. Rep. 631.

Texas. — Aultman *v.* McKinney (Tex. Civ. App. 1894) 26 S. W. Rep. 267; Blythe *v.* Speake, 23 Tex. 429; Miller-Stone Mach. Co. *v.* Balfour, (Tex. Civ. App. 1901) 61 S. W. Rep. 972.

See the title Warranty, where the subject is fully treated.

5. Contrary View — *Illinois.* — Howe Mach. Co. *v.* Rosine, 87 Ill. 105; Matthews *v.* Fuller, 8 Ill. App. 529.

Indiana. — Dill *v.* O'Ferrell, 45 Ind. 268.

Iowa. — Jack *v.* Des Moines, etc., R. Co., 53 Iowa 399.

Kansas. — Kansas Refrigerator Co. *v.* Pert, 3 Kan. App. 364; Gale Sulky Harrow Mfg. Co. *v.* Stark, 45 Kan. 606, 23 Am. St. Rep. 739.

Kentucky. — Stansifer *v.* Moser, (Ky. 1897) 42 S. W. Rep. 843.

Maine. — Milliken *v.* Skillings, 89 Me. 180; Marshall *v.* Perry, 67 Me. 78.

Maryland. — Horn *v.* Buck, 48 Md. 358.

Massachusetts. — Morse *v.* Brackett, 98 Mass. 209; Perley *v.* Balch, 23 Pick. (Mass.) 283, 34 Am. Dec. 56; Bryant *v.* Isburgh, 13 Gray (Mass.) 607, 74 Am. Dec. 655; Dorr *v.* Fisher, 1 Cush. (Mass.) 271.

Mississippi. — Jagers *v.* Griffin, 43 Miss. 134; Millsaps *v.* Merchants, etc., Bank, 71 Miss. 361.

Missouri. — See Tower *v.* Pauly, 51 Mo. App. 75.

Nebraska. — Davis *v.* Hartlerode, 37 Neb. 864. See Jones *v.* Wessel, 40 Neb. 116.

New Hampshire. — See Chase *v.* Willard, 67 N. H. 369.

Pennsylvania. — Selig *v.* Rehfuss, 195 Pa. St. 200; Youghiogheny Iron, etc., Co. *v.* Smith, 66 Pa. St. 340.

Vermont. — Pennock *v.* Stygles, 54 Vt. 226.

Wisconsin. — Merrill *v.* Nightingale, 39 Wis. 247.

6. Executory Contracts. — Rubin *v.* Sturtevant, 80 Fed. Rep. 930; McCormick Harvesting Mach. Co. *v.* Knoll. 57 Neb. 790; Smith *v.* York Mfg. Co., 58 N. J. L. 242.

See *supra*, this subsection, *Breach of Contract by Seller — In General.* See also 2 Mechem on Sales 816; Story on the Law of Sales (4th ed.), § 451.

the breach of warranty amounts to a failure of consideration, the contract may be rescinded upon that ground.[1]

ff. Nondelivery. — A failure to deliver goods sold in accordance with the contract is ground for rescission by the buyer.[2] Where the delivery is to be made in instalments, if the vendor fails to deliver any one of the instalments, the buyer may rescind.[3] An entire contract for the sale of several articles may be rescinded for nondelivery of any one of the articles.[4]

gg. Delay in Delivery. — Delay in delivery, where time is of the essence, or unreasonable delay in any case, is ground for rescission.[5] The delay may, of course, be waived.[6]

(2) *Conditions of Rescission* — (a) **Return of Goods.** — As a general rule, when the buyer rescinds he must return or offer to return to the seller the goods received under the contract.[7] Under particular circumstances this rule is

1. Breach Amounting to Failure of Consideration. — H. W. Williams Transp. Line *v.* Darius Cole Transp. Co., (Mich. 1901) 88 N. W. Rep. 473, 8 Detroit Leg. N. 927. See *supra*, this subsection, *Failure of Consideration.*

2. Nondelivery. — Johnson *v.* Latimer, 71 Ga. 470; Malone *v.* Minnesota Stone Co., 36 Minn. 325; Dawson *v.* Chisholm, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 171. But see Hansen *v.* Baltimore Packing, etc., Co. 86 Fed. Rep. 832.

3. Delivery by Instalments. — Pope *v.* Porter, 102 N. Y. 366; Elting Woolen Co. *v.* Martin, 5 Daly (N. Y.) 417. *Contra*, Blackburn *v.* Reilly, 47 N. J. L. 290, 54 Am. Rep. 159; Gerli *v.* Poidebard Silk Mfg. Co., 57 N. J. L. 432, 51 Am. St. Rep. 612.

4. Entire Contracts. — Behrman *v.* Newton, 103 Ala. 525; Campbell Printing-Press, etc., Co. *v.* Marsh. 20 Colo. 22.

5. Delay in Delivery. — Benson *v.* Lamb, 9 Beav. 502; Coddington *v.* Paleologo, L. R. 2 Exch. 193; Robinson *v.* Brooks, 40 Fed. Rep. 525; Inman *v.* Barnum, 115 Ga. 117; Fisher *v.* Boynton, 87 Me. 395; Hallwood Cash Register Co. *v.* Lufkin, 179 Mass. 143; White *v.* Wolf, 185 Pa. St. 369; Heller's Estate, 19 Pa. Co. Ct. 301, 6 Pa. Dist. 193.

6. Jeffrey Mfg. Co. *v.* Central Coal, etc., Co., 93 Fed. Rep. 408; Gausler *v.* Bridges, 13 Pa. Super. Ct. 646.

7. Necessity and Sufficiency of Return or Offer — *United States.* — Henckley *v.* Hendrickson, 5 McLean (U. S.) 170; Christy *v.* Cummins, 3 McLean (U. S.) 386; Simpson *v.* Wiggin 3 Woodb. & M. (U. S.) 413; Miller *v.* Smith, 1 Mason (U. S.) 437.

Alabama. — Young *v.* Arntze, 86 Ala. 116; Jones *v.* Anderson, 82 Ala. 302; Dill *v.* Camp, 22 Ala. 249; Rice *v.* Gilbreath, 119 Ala. 424; Burnett *v.* Stanton, 2 Ala 181.

Arkansas. — Righter *v.* Roller, 31 Ark. 170.

California. — Rohrbacher *v.* Kleebauer, 119 Cal. 260; Miller *v.* Steen, 30 Cal. 402, 89 Am. Dec. 124; Coghill *v.* Boring, 15 Cal. 213.

Colorado. — Tilley *v.* Montelius Piano Co., 15 Colo. App. 204.

Florida. — Hancock *v.* Tucker, 8 Fla. 435.

Illinois. — Hemphill *v* Miller, 75 Ill. App. 488; Fairbanks *v.* Owens, 46 Ill. App. 80; Dawson *v.* Vickery, 150 Ill. 398.

Indiana. — Sandage *v.* Studabaker Bros. Mfg. Co., 142 Ind. 148, 51 Am. St. Rep. 165; Vogel *v.* Demorest, 97 Ind. 440; Cates *v.* Bales, 78 Ind. 285; Love *v.* Oldham, 22 Ind. 51.

Indian Territory. — Cherry *v.* Cox, 1 Ind. Ter. 578.

Iowa. — Bradley *v.* Palen, 78 Iowa 126.

Kansas. — Cookingham *v.* Dusa, 41 Kan. 229; Bigger *v.* Bovard, 20 Kan. 204; Field *v.* Kinnear, 4 Kan. 476.

Kentucky. — Buford *v.* Brown, 6 B. Mon. (Ky.) 553; Minor *v.* Kelly, 5 T. B. Mon. (Ky.) 272; Stewart *v.* Dougherty, 3 Dana (Ky.) 479.

Louisiana. — Vancleave *v.* Nelson, 49 La. Ann. 621.

Maine. — Milliken *v.* Skillings, 89 Me. 180; Sharp *v.* Ponce, 76 Me. 350; Tisdale *v.* Buckmore, 33 Me. 461; Quincy *v.* Tilton, 5 Me. 277; Norton *v.* Young, 3 Me. 30.

Maryland. — Hoops *v.* Strasburger, 37 Md. 390, 11 Am. Rep. 538; Rutter *v.* Blake, 2 Har. & J. (Md.) 353, 3 Am. Dec. 550.

Massachusetts. — Bassett *v.* Brown, 105 Mass. 551; Morse *v.* Brackett, 98 Mass. 205; Thurston *v.* Blanchard, 22 Pick. (Mass.) 18, 33 Am. Dec. 700; Beecher *v.* Mayall, 16 Gray (Mass.) 376; Clark *v.* Baker, 11 Met. (Mass.) 186, 45 Am. Dec. 199; Thayer *v.* Turner, 8 Met. (Mass.) 550.

Mississippi. — Ware *v.* Houghton, 41 Miss. 370, 93 Am. Dec. 258; Ferguson *v.* Oliver, 8 Smed. & M. (Miss.) 332.

Missouri. — Wahlert *v.* Weisberg, 70 Mo. App. 368; Enterprise Soap Works *v.* Sayers, 55 Mo. App. 15; Walls *v.* Gates, 6 Mo. App. 242; Robinson *v.* Siple, 129 Mo. 208; Branson *v.* Turner, 77 Mo. 489.

Montana. — Schultz *v.* O'Rourke, 18 Mont. 418.

Nebraska. — McCormick Harvesting Mach. Co. *v.* Knoll, 57 Neb. 790.

New Hampshire. — Rogers *v.* Miller, 62 N. H. 131; Cook *v.* Gilman, 34 N. H. 556; Sanborn *v.* Osgood, 16 N. H. 112; Shepherd *v.* Temple, 3 N. H. 455.

New Jersey. — Smalley *v.* Hendrickson, 29 N. J. L. 371.

New York. — Taylor *v.* Thompson, 62 N. Y. App. Div. 159; Woodruff *v.* Peterson, 51 Barb. (N. Y.) 252; Moyer *v.* Shoemaker, 5 Barb. (N. Y.) 319; Pierson *v.* McCurdy, 33 Hun (N. Y.) 520; Burton *v.* Stewart, 3 Wend. (N. Y.) 236, 20 Am. Dec. 692.

Ohio. — Crooks *v.* Eldridge, etc., Co., 64 Ohio St. 195

Oregon. — *Compare* Russell *v.* Lilienthal, 36 Oregon 105.

Pennsylvania. — Babcock *v.* Case, 61 Pa. St.

subject to exceptions and qualifications.[1] Thus, where the goods received are wholly worthless, they need not be returned.[2] So, a distinct refusal by the seller to receive back the goods will excuse their actual return or tender.[3] A tender or offer to return made in a suit to enforce rescission is usually held sufficient.[4]

(b) **Total or Partial Rescission.** — If the contract is entire, the vendee must rescind the contract as a whole, or not at all. He cannot rescind as to part and affirm as to the remainder.[5] But where the contract is not entire, the purchaser may rescind as to any severable part, and affirm as to the other parts.[6]

b. WAIVER OR LOSS OF RIGHT TO RESCIND. — The right to rescind must be exercised promptly upon the discovery of the facts giving rise to the right of rescission. Any unreasonable delay,[7] or any action taken in continued

427, 100 Am. Dec. 654; Thompson *v.* Chambers, 13 Pa. Super. Ct. 213.

South Carolina. — Kauffman Milling Co. *v.* Stuckey, 37 S. Car. 7; Carter *v.* Walker, 2 Rich. L. (S. Car.) 40; Benson *v.* Littlefield, 2 Mill. (S. Car.) 180.

Tennessee. — Kentucky Saw Works *v.* Little River Land, etc., Co., (Tenn. Ch. 1897) 42 S. W. Rep. 527; Williams *v.* Hurt, 2 Humph. (Tenn.) 68.

Texas. — Caldwell *v.* Dutton, 20 Tex. Civ. App. 369; Ford *v.* Oliphant. (Tex. Civ. App. 1895) 32 S. W. Rep. 437; Brantley *v.* Thomas, 22 Tex. 270, 73 Am. Dec. 264.

Vermont. — Smith *v.* Smith, 30 Vt. 139; Poor *v.* Woodburn, 25 Vt. 234.

Wisconsin. — Becker *v.* Trickel, 80 Wis. 484; Paige *v.* McMillan, 41 Wis. 337.

1. Exceptions and Qualifications to Rule. — In an action to recover the price of an article sold for a particular use, the plaintiff cannot recover if the article was not genuine, and the rule that the buyer, in order to rescind, must return the property, cannot be enforced where it has been destroyed necessarily in discovering the falsity. Smith *v.* Love, 64 N. Car. 439.

So, the vendee of stock, wishing to rescind his contract on the ground of fraud, is not bound to accept the certificate of stock left on deposit for him by the vendor, and tender it before bringing his action. Pence *v.* Langdon, 99 U. S. 578.

Upon the rescission of a contract or sale on the ground that the goods were not such as the purchaser had ordered, such purchaser has a right to demand reimbursement for freight and other expenses paid by him, and upon refusal, to sell so much as would cover such expenses. Barnett *v.* Terry, 42 Ga. 283. *Compare* Taylor *v.* Saxe, 57 Hun (N. Y.) 411. If, however, the goods were procured by fraud of the purchaser, the seller is not bound to make such reimbursement. Chamberlin *v.* Fuller, 59 Vt. 247.

2. Goods Worthless. — Pacific Guano Co. *v.* Mullen, 66 Ala. 582; Conner *v.* Henderson, 15 Mass. 319, 8 Am. Dec. 103; Crooks *v.* Eldridge, etc., Co., 64 Ohio St. 195. But see Stelwagon *v.* Wilmington Coal Gas Co., 2 Marv. (Del.) 184. *Compare* Morse *v.* Brackett, 98 Mass. 205; Thayer *v.* Turner, 8 Met. (Mass.) 550.

3. Refusal of Seller to Accept Return. — Padden *v.* Marsh, 34 Iowa 522; Tibbs *v.* Timberlake, 4 Litt. (Ky.) 12; Milliken *v.* Skillings, 89 Me. 180; Sycamore Marsh Harvester Co. *v.* Grundrad, 16 Neb. 529; Ruben *v.* Lewis, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 583. See Rubin *v.* Sturtevant, (C. C. A.) 80 Fed. Rep. 930.

4. Tender in Suit for Rescission. — Chisholm *v.* Eisenhuth, 69 N. Y. App. Div. 134; Delano *v.* Rice, 23 N. Y. App. Div. 327; Delano *v.* Rice, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 714; Fleming *v.* Hanley, 21 R. I. 141.

5. Entire Contracts — *United States.* — Lyon *v.* Bertram, 20 How. (U. S.) 149; Crane Co. *v.* Columbus Constr. Co. (C. C. A.) 73 Fed. Rep. 984. *Compare* Aultman *v.* McFallon, 11 Fed. Rep. 836.

Alabama. — Telford *v.* Albro, 60 Ill. App. 359; Jennings *v.* Gage, 13 Ill. 610, 56 Am. Dec. 476; Buchenau *v.* Horney, 12 Ill. 336.

Indiana. — Johnson *v.* McLane, 7 Blackf. (Ind.) 501, 43 Am. Dec. 102; Thompson *v.* Peck, 115 Ind. 512; National Bank, etc., Co. *v.* Dunn, 106 Ind. 110. See John A. Roeblings' Sons' Co. *v.* Lock Stitch Fence Co., 130 Ill. 660.

Louisiana. — De La Vergne Refrigerating Mach. Co. *v.* New Orleans, etc., R. Co., 51 La. Ann. 1733.

Maine. — Cushman *v.* Marshall, 21 Me. 122; Junkins *v.* Simpson, 14 Me. 364; Norton *v.* Young, 3 Me. 30.

Massachusetts. — Coolidge *v.* Brigham, 1 Met. (Mass.) 550; Perley *v.* Balch, 23 Pick. (Mass.) 286, 34 Am. Dec. 56; Miner *v.* Bradley, 22 Pick. (Mass.) 457; A. K. Young, etc., Mfg. Co. *v.* Wakefield, 121 Mass. 91; Morse *v.* Brackett, 98 Mass. 205.

Missouri. — Lapp *v.* Ryan, 23 Mo. App. 436.

New Hampshire. — Preston *v.* Travellers' Ins. Co., 58 N. H. 76; Willoughby *v.* Moulton, 47 N. H. 205; Weeks *v.* Robie, 42 N. H. 316; Sumner *v.* Parker, 36 N. H. 449.

New York. — Voorhees *v.* Earl, 2 Hill (N. Y.) 292, 38 Am. Dec. 588; Fullager *v.* Reville, 3 Hun (N. Y.) 600. *Compare* Weston *v.* Chamberlain, 56 Barb. (N. Y.) 415.

West Virginia. — Manss-Bruning Shoe Mfg. Co. *v.* Prince, 51 W. Va. 510. See generally the title RESCISSION, CANCELLATION, AND REFORMATION, *ante*, p. 604.

6. Severable Contracts. — A. K. Young, etc., Mfg. Co. *v.* Wakefield, 121 Mass. 91; Peoria Mfg. Co. *v.* Bain Mfg. Co., 76 Mo. App. 76. See also Morgan *v.* McKee, 77 Pa. St. 228; Costigan *v.* Hawkins, 22 Wis. 74, 94 Am. Dec 583.

7. Delay in Rescission — *United States.* — Pat-

recognition of the contract as a binding obligation, amounts to a ratification or election to abide by the contract and bars a subsequent rescission.[1] But delay or action taken in ignorance of the facts giving a right to rescind will

ent Title Co. *v.* Stratton, 89 Fed. Rep. 174; Hansen *v.* Baltimore Packing, etc., Co., 86 Fed. Rep. 832; Dodsworth *v.* Hercules Iron Works, 66 Fed. Rep. 483, 31 U. S. App. 292. *Compare* Aultman *v.* McFallon, 11 Fed. Rep. 836.

Alabama. — State *v.* Fields, 131 Ala. 201; Hodge *v.* Tufts, 115 Ala. 366.

California. — Wilder *v.* Beede, 119 Cal. 646.

Colorado. — Tilley *v.* Montelius Piano Co., 15 Colo. App. 204.

Delaware. — Young *v.* Argo, 1 Marv. (Del.) 156.

Georgia. — Inman *v.* Barnum, 115 Ga. 117; Pearce *v.* Borg Chewing-Gum Co., 111. Ga. 847; Hoyle *v.* Southern Saw Works, 105 Ga. 123; Smith *v.* Estey Organ Co., 100 Ga. 628; Newburger *v.* Hoyt, 86 Ga. 508.

Idaho. — Wamego First Nat Bank *v.* Skinner, (Idaho 1896) 43 Pac. Rep. 679.

Illinois. — McMillan *v.* De Tamble, 93 Ill. App. 65; Sandwich Mfg. Co. *v.* Kelly, 26 Ill. App. 394; Matthews *v.* Fuller, 8 Ill. App. 529; Morgan *v.* Thetford, 3 Ill. App. 323.

Indiana. — Heintz *v.* Mueller, 27 Ind. App. 42.

Iowa. — Eagle Iron Works *v.* Des Moines Suburban R. Co., 101 Iowa 289; Humbert *v.* Larson, 99 Iowa 275; McCormick Harvesting Mach. Co. *v.* Russell, 86 Iowa 556; Winelander *v.* Jones, 77 Iowa 401; Leacox *v.* Griffith, 76 Iowa 89.

Kentucky. — Aultman *v.* Mead, 60 S. W. Rep. 294, 22 Ky. L. Rep. 1189; Snyder *v.* Hegan, (Ky. 1897) 40 S. W. Rep. 693; Nelson *v.* Overman, (Ky. 1897) 38 S. W. Rep. 882; Bernard Leas Mfg. Co. *v.* Waller, (Ky. 1896) 36 S. W. Rep. 531.

Maine. — Libby *v.* Haley, 91 Me. 331.

Michigan. — Schofield *v.* Conley, 126 Mich. 712, 8 Detroit Leg. N. 192; S. C. Forsaith Mach. Co. *v.* Mengel, 99 Mich. 280; Farrington *v.* Smith, 77 Mich. 550; Gridley *v.* Globe Tobacco Co., 71 Mich. 528.

Minnesota. — Auerbach *v.* Wunderlich, 76 Minn. 42; Rosenfield *v.* Swenson, 45 Minn. 190.

Missouri. — Metropolitan Rubber Co. *v.* Monarch Rubber Co., 74 Mo. App. 266; Tower *v.* Pauly, 51 Mo. App. 75; Pierce Steam-Heating Co. *v.* A. Siegel Gas-Fixture Co., 60 Mo. App. 148, 1 Mo. App. Rep. 108.

New York. — Taylor *v.* Thompson, 62 N. Y. App. Div. 159; Jackson *v.* Foley, 53 N. Y. App. Div. 97; Schnitzler *v.* Kelly, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 327; National Keg, etc., Co. *v.* Baker, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 35; Mason *v.* Wheeler, (N. Y. Super. Ct. Eq. T.) 2 Misc. (N. Y.) 523. *Compare* Hart *v.* Haight, 57 Hun (N. Y.) 591, 10 N. Y. Supp. 798.

Oklahoma. — Luger Furniture Co. *v.* Street, 6 Okla. 312.

Rhode Island. — Fleming *v.* Hanley, 21 R. I. 141.

Texas. — Fay Fruit Co. *v.* Talerico, (Tex. Civ. App. 1901) 63 S. W. Rep. 656; Boehringer *v.* Richards Medicine Co., 9 Tex. Civ. App. 284.

Utah. — Detroit Heating, etc., Co. *v.* Stevens, 16 Utah 177.

Vermont. — Matteson *v.* Holt, 45 Vt. 336.

Washington. — Kleeb *v.* Long-Bell Lumber Co., 27 Wash. 648.

Wisconsin. — Boothby *v.* Scales, 27 Wis. 626. *Compare* Woodle *v.* Whitney, 23 Wis. 55, 99 Am. Dec. 102.

Canada. — Brown *v.* Wiseman, 20 Quebec Super. Ct. 304.

Compare Couston *v.* Ghapman, L. R. 2 H. L. Sc. 250; Clark *v.* Deering, 29 Neb. 293.

If the purchaser do not affirm the contract after his discovery of the fraud, delay in order to deliberate will not deprive him of the right to rescind. Whitcomb *v.* Denio, 52 Vt. 382.

Reasonable Time — Province of Court and Jury. — See the title QUESTIONS OF LAW AND FACT, vol. 23, p. 543. See also cases cited *supra*, this note.

1. Ratification — *England.* — Head *v.* Tattersall, L. R. 7 Exch. 7.

Canada. — Creighton *v.* Pacific Coast Lumber Co., 12 Manitoba 546.

United States. — Pullman's Palace Car Co. *v.* Metropolitan St. R. Co., 157 U. S. 94; Buckstaff *v.* Russell, 79 Fed. Rep. 611, 49 U. S. App. 253.

Alabama. — Hodge *v.* Tufts, 115 Ala. 366.

Georgia. — Page *v.* Dodson Printers' Supply Co., 106 Ga. 77.

Illinois. — Anderson *v.* Chicago Trust, etc., Bank, 195 Ill. 341; O'Donnell, etc., Brewing Co. *v.* Farrar, 163 Ill. 471.

Iowa. — Gross *v.* Feehan, 110 Iowa 163.

Maine. — Libby *v.* Haley, 91 Me. 331.

Michigan. — Foster *v.* Rowley, 110 Mich. 63.

Minnesota. — Tufts *v.* Hunter, 63 Minn. 464.

Missouri. — Kansas Moline Plow Co. *v.* Wayland, 81 Mo. App. 305; Triplett *v.* Montgomery, 81 Mo. App. 141.

Nebraska. — McKee *v.* Wild, 52 Neb. 9; Babcock *v.* Purcupile, 36 Neb. 417.

New Jersey. — Krueger *v.* Armitage, 58 N. J. Eq. 357.

New York. — Bates *v.* Fish Bros. Wagon Co., 169 N. Y. 587, 50 N. Y. App. Div. 38; Guarantee Sav. Loan, etc., Co. *v.* Moore, 35 N. Y. App. Div. 421; Zimmele *v.* American Plaster Board Co., 1 N. Y. App. Div. 327; Logan *v.* Berkshire Apartment House, (C. Pl. Gen. T.) 3 Misc. (N. Y.) 296. *Compare* Wegenaar *v.* Dechow, 33 N. Y. App. Div. 12.

Pennsylvania. — Gausler *v.* Bridges, 13 Pa. Super. Ct. 646; Jessop *v.* Ivory, 158 Pa. St. 71, 33 W. N. C. (Pa.) 285; Houston *v.* Cook, 153 Pa. St. 43.

Tennessee. — Garr *v.* Young, (Tenn. Ch. 1901) 62 S. W. Rep. 631.

Texas. — Cabaness *v.* Holland, 19 Tex. Civ. App. 383.

Wisconsin. — Fintel *v.* Cook, 88 Wis. 485; Cream City Glass Co. *v.* Friedlander, 84 Wis. 53, 36 Am. St. Rep. 895.

Compare Boles *v.* Merrill, 173 Mass. 491, 73 Am. St. Rep. 308.

not bar a rescission made promptly upon a discovery of the facts.[1] Delay in rescission is waived when the seller accepts a return of the goods.[2]

c. WHAT CONSTITUTES RESCISSION. — Notice to the seller, together with a return or offer to return the goods, or conduct equivalent thereto, constitutes a rescission.[3]

X. REMEDIES OF SELLER — 1. Action for Damages — *a.* IN GENERAL. — **Where the Contract of Sale Is Still Executory,** that is to say, where the property in the goods has not been transferred from the vendor to the vendee, the remedy of the vendor for a failure or refusal to accept or pay for the goods is a personal action for breach of contract.[4]

Delay in Acceptance gives rise to a cause of action for the damages thereby caused, even where the buyer afterwards accepts the goods.[5]

Where the Contract Is Executed, and title has passed, but the goods have not been delivered, the seller has a remedy by resale of the goods, and an action for damages to recover the difference between the contract price and the price at which the goods were resold.[6]

1. Ignorance of Facts Authorizing Rescission.— Hoyle *v.* Southern Saw Works, 105 Ga. 123; Welch *v.* Burdick, 101 Iowa 70; National Bank *v.* Taylor, 5 S. Dak. 99.

2. Waiver of Delay. — Aultman *v.* Miller, 52 Kan. 60.

3. What Constitutes Rescission — *Georgia.* — Smith *v.* Columbia Jewelry Co., 114 Ga. 698; Hollis *v.* Friedman, 112 Ga. 699.

Illinois. — Follansbee *v.* Adams, 86 Ill. 13; Holbrook *v.* Electric Appliance Co., 90 Ill. App. 86; Hoover *v.* Doetsch, 54 Ill. App. 65.

Massachusetts. —Alden *v.* Hart, 161 Mass. 576.

Michigan. — Westinghouse Co. *v.* Gainor, (Mich. 1902) 90 N. W. Rep. 52, 9 Detroit Leg. N. 53.

Missouri. — Creasy *v.* Gray, 88 Mo. App. 454; Beal *v.* Minneapolis Threshing Mach. Co., 84 Mo. App. 539.

Nebraska. — McCormick Harvesting Mach. Co. *v.* Knoll, 57 Neb. 790; Jones *v.* Wessel, 40 Neb. 116.

New Hampshire. — Spaulding *v.* Hancom, 67 N. H. 401.

New Jersey. — Smith *v.* York Mfg. Co., 58 N. J. L. 242.

New York. — Cushman *v.* De Mallie, 46 N. Y. App. Div. 379; Hornberger *v.* Feder, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 121; Norton *v.* Dreyfuss 51 N. Y. Super. Ct. 491.

South Carolina. — Coates *v.* Early, 46 S. Car. 220.

4. Executory Contract — Action for Damages — *England.* — Atkinson *v.* Bell, 8 B. & C. 277, 15 E. C. L. 216; Laird *v.* Pim, 7 M. & W. 478; Elliott *v.* Heginbotham, 2 C. & K. 545, 61 E. C. L. 545.

United States. — Chicago *v.* Greer, 9 Wall. (U. S.) 726; Gibbons *v.* U. S., 8 Wall. (U. S.) 269.

Alabama. — West *v.* Cunningham, 9 Port. (Ala.) 104, 33 Am. Dec. 300; Schleicher *v.* Montgomery Light Co., 114 Ala. 228.

Arkansas. — Morris *v.* Cohn, 55 Ark. 401.

Connecticut. — Allen *v.* Jarvis, 20 Conn. 38.

Illinois. — Thorn *v.* Danzinger, 50 Ill. App. 306.

Indiana. — Fell *v.* Muller, 78 Ind. 507.

Iowa. — Harris Mfg. Co. *v.* Marsh, 49 Iowa 11.

Maine. — Greenleaf *v.* Gallagher, 93 Me. 549, 74 Am. St. Rep. 371; Atwood *v.* Lucas, 53 Me. 508, 89 Am. Dec. 713.

Massachusetts. — Stearns *v.* Washburn, 7 Gray (Mass.) 187; White *v.* Solomon, 164 Mass. 519.

Michigan. — Peters *v.* Cooper, 95 Mich. 191; Brownlee *v.* Bolton, 44 Mich. 218; Hosmer *v.* Wilson, 7 Mich. 294, 74 Am. Dec. 716.

Mississippi.—Crawford *v.* Avery, 35 Miss. 205.

Missouri. — Northrup *v.* Cook, 39 Mo. 208.

New Hampshire. — Hurd *v.* Dunsmore, 63 N. H. 173; Gordon *v.* Norris, 49 N. H. 376; Messer *v.* Woodman, 22 N. H. 172, 53 Am. Dec. 241.

New Jersey. — Perdicaris *v.* Trenton City Bridge Co., 29 N. J. L. 367.

New York. — Marvin Safe Co. *v.* Emanuel, (C. Pl. Gen. T.) 21 Abb. N. Cas. (N. Y.) 187; Outwater *v.* Dodge, 7 Cow. (N. Y.) 87; Canda *v.* Wick, 100 N. Y. 127; Whelan *v.* Lynch, 60 N. Y. 469, 19 Am. Rep. 202; Hayden *v.* Demets, 53 N. Y. 426; Lawlor *v.* Magnolia Metal Co., 33 N. Y. App. Div. 356.

North Carolina. — Hurlburt *v.* Simpson, 3 Ired. L. (25 N. Car.) 233.

Ohio. — Nixon *v.* Nixon, 21 Ohio St. 114.

Pennsylvania. — Girard *v.* Taggart, 5 S. & R. (Pa.) 19, 9 Am. Dec. 333; Laubach *v.* Laubach, 73 Pa. St. 392.

Texas. — Tufts *v.* Lawrence, 77 Tex. 526; Gammage *v.* Alexander, 14 Tex. 414; Sonka *v.* Chatham, 2 Tex. Civ. App. 312.

Vermont. — Danforth *v.* Walker, 37 Vt. 239; Rider *v.* Kelley, 32 Vt. 268, 76 Am. Dec. 176.

Wisconsin. — Tufts *v.* Weinfeld, 88 Wis. 647; Chapman *v.* Ingram, 30 Wis. 294; Pickering *v.* Bardwell, 21 Wis. 562; Ganson *v.* Madigan, 13 Wis. 67.

See also *infra*, this section, *Action for Price — a. Where Contract Is Executory.*

5. Damages for Delay in Acceptance. — Dibble *v.* Corbett, 5 Bosw. (N. Y.) 202; Alleghany Iron Co. *v.* Teaford, 96 Va. 372.

Thus where by custom of the trade a buyer of goods on shipboard is bound to unload within a definite time, if by reason of his failure to take goods within that time the owner is obliged to pay lighterage and storage fees, the buyer is liable for such payments. Dayton *v.* Rowland, 1 Daly (N. Y.) 446.

6. See *infra*, this section, *Resale and Action for Damages.*

b. ACCRUAL OF CAUSE OF ACTION. — The cause of action accrues as soon as the purchaser is put in default according to the terms or legal construction of the contract.[1] The purchaser is, of course, not in default until the seller has performed all conditions precedent upon his part.[2] A tender or offer to perform by the seller is sometimes necessary in order to put the buyer in default, though tender or performance or offer to perform may be excused by the conduct of the buyer, as where he in effect repudiates the contract.[3] But the seller must have been able and willing to perform his part of the contract.[4] A demand for performance is not necessary.[5] The action may be brought immediately upon the buyer's refusal to accept or his repudiation of the contract, even though the sale was upon credit, or the contract was to extend over a considerable period of time and that period had not expired.[6]

c. MEASURE OF DAMAGES. — The measure of damages is not the full value of the goods, but the loss that the seller has actually sustained by reason of

1. Accrues on Default of Purchaser. — In Hurlburt *v.* Simpson, 3 Ired. L. (25 N. Car.) 233, it was said that a party may recover damages for a noncompliance with a parol contract for the purchase of an article, though no earnest was paid nor any actual delivery made nor any special time appointed for the delivery of the article or the payment of the purchase money. It is sufficient if the seller tender the article, or is ready to deliver it when the buyer refuses it; and if no particular time is fixed for the delivery or for the payment of the price, it must be done immediately or within a reasonable time.

2. Performance by Vendor. — Southern Lumber Co. *v.* Mercantile Lumber, etc., Co., 89 Mo. App. 141.

3. Tender or Offer to Perform by Seller — *England.* — Cort *v.* Ambergate, etc., Junction R. Co., 17 Q. B. 127, 79 E. C. L. 127; Bowdell *v.* Parsons, 10 East 359; Ripley *v.* M'Clure, 4 Exch. 345.

United States. — Cherry Valley Iron Works *v.* Florence Iron River Co., 64 Fed. Rep. 569, 22 U. S. App. 655.

Arkansas. — Morris *v.* Cohn, 55 Ark. 401.

Illinois — Weill *v.* American Metal Co., 182 Ill. 128; McPherson *v.* Hall, 44 Ill. 264; Lassen *v.* Mitchell, 41 Ill. 101; Christy *v.* Stafford, 22 Ill. App. 430; Kingman *v.* Hanna Wagon Co., 176 Ill. 545, *affirming* 74 Ill. App. 22.

Indiana. — Gardner *v.* Caylor, 24 Ind. App. 521.

Iowa. — McCormick *v.* Basal, 46 Iowa 235.

Kentucky. — Jones *v.* Strode, (Ky. 1897) 41 S. W. Rep. 562.

Massachusetts. — Middlesex Co. *v.* Osgood, 4 Gray (Mass.) 447.

Michigan. — Hosmer *v.* Wilson, 7 Mich. 294, 74 Am. Dec. 716.

Missouri. — Berthold *v.* St. Louis Electric Constr. Co., 165 Mo. 280; Chapman *v.* Kansas City, etc., R. Co., 146 Mo. 493; Black River Lumber Co. *v.* Warner, 93 Mo. 374; Bean *v.* Miller, 69 Mo. 384; Gabriel *v.* Akinsville Pressed Brick Co., 57 Mo. App. 520.

New York. — Catlin *v.* Tobias, 26 N. Y. 217, 84 Am. Dec. 183; Todd *v.* Gamble, 67 Hun (N. Y.) 38; Nichols *v.* Scranton Steel Co., (Supm. Ct. Gen. T.) 18 N. Y. Supp. 623, *affirmed* 137 N. Y. 471; Richards *v.* Haebler, 36 N. Y. App. Div. 94; Eppens, etc., Co. *v.* Littlejohn, 27 N. Y. App. Div. 22.

Pennsylvania. — Rinehart *v.* Olwine, 5 W. & S. (Pa.) 157; Girard *v.* Taggart, 5 S. & R. (Pa.) 19, 9 Am. Dec. 327.

Texas. — Lindsey *v.* Singletary, (Tex. Civ. App. 1897) 43 S. W. Rep. 273; Weathered *v.* Golden, (Tex. Civ. App. 1896) 34 S. W. Rep. 761; Diamond State Iron Co. *v.* San Antonio, etc., R. Co., 11 Tex. Civ. App. 587; Shepard *v.* Weiss, (Tex. Civ. App. 1894) 28 S. W. Rep. 355.

West Virginia. — James *v.* Adams, 16 W. Va. 267; Pancake *v.* George Campbell Co., 44 W. Va. 82.

In Newberry *v.* Furnival, (Supm. Ct. Gen. T.) 46 How. Pr. (N. Y.) 139, it was said that in order to entitle the plaintiffs to recover in an action for alleged breach of contract by the defendants in refusing to receive and pay for certain goods which the plaintiffs contracted to sell them, subsequently to arrive in a designated vessel, the latter must show a delivery or a readiness and offer to deliver the whole quantity of goods; but when a part arrives, if the defendants, knowing this, accept it, this probably will be a waiver; or if they make no objections to a delivery of the whole at that time, but affirmatively refuse to receive it on some other ground, this probably will be a waiver of delivery of the whole.

4. Ability and Willingness to Perform. — Cort *v.* Ambergate, etc., Junction R. Co., 17 Q. B. 127, 79 E. C. L. 127; Cole *v.* Swanston, 1 Cal. 54; Sweetser *v.* Mellick, (Idaho 1894) 38 Pac. Rep. 403; Lassen *v.* Mitchell, 41 Ill. 101; Hungate *v.* Rankin, 20 Ill. 642; Greenup *v.* Stoker, 8 Ill. 213; Franklin *v.* Krum, 70 Ill. App. 649; Johnson *v.* Powell, 9 Ind. 566; Walter *v.* Victor G. Bloede Co., 94 Md. 80; Pope *v.* Terre Haute Car, etc., Co., 107 N. Y. 61; Gallup *v.* Sterling, (Supm. Ct. Tr. T.) 22 Misc. (N. Y.) 672; Davis *v.* Gilliam, 14 Wash. 206.

5. Demand for Performance. — Marks *v.* Englund, 37 N. Y. App. Div. 539.

6. Anticipatory Breach. — Horst *v.* Roehm, 84 Fed. Rep. 565; Tahoe Ice Co. *v.* Union Ice Co., 109 Cal. 242; Miller *v.* Burch, (Ky. 1897) 41 S. W. Rep. 307; Crawford *v.* Avery, 35 Miss. 205; Hocking *v.* Hamilton, 158 Pa. St. 107; James *v.* Adams, 16 W. Va. 267; Pancake *v.* George Campbell Co., 44 W. Va. 82; Ontario Lantern Co. *v.* Hamilton Brass Mfg. Co., 27 Ont. App. 346. See Roehm *v.* Horst, (C. C. A.) 91 Fed. Rep. 345, *affirming* 84 Fed. Rep. 565.

the breach, and this generally is the difference between the price fixed by the contract and the market value of the goods at the time and place of delivery.[1]

1. **Rule as to Measure of Damages** — *England.* — Barrow *v.* Arnaud, 8 Q. B. 604, 55 E. C. L. 604; Laird *v.* Pim, 7 M. & W. 478; Phillpotts *v.* Evans, 5 M. & W. 475; Boorman *v.* Nash, 9 B. & C. 145, 17 E. C. L. 344; Gainsford *v.* Carroll, 2 B. & C. 624, 9 E. C. L. 204; Hickman *v.* Haynes, L. R. 10 C. P. 598.

United States. — Barnard *v.* Conger, 6 McLean (U. S.) 497; Pope *v.* Filley, 3 McCrary (U. S.) 190, 9 Fed. Rep. 65; McNaughter *v.* Cassally, 4 McLean (U. S.) 530; Gibbons *v.* U. S., 8 Wall. (U. S.) 269; Hopkins *v.* Lee, 6 Wheat. (U. S.) 109; Clews *v.* Jamieson, 182 U. S. 461; Salem Iron Co. *v.* Lake Superior Consol. Iron Mines, 112 Fed. Rep. 239, 50 C. C. A. 213; Southern Cotton-Oil Co. *v.* Heflin, (C. C. A.) 99 Fed. Rep. 339; Newark City Ice Co. *v.* Fisher, 76 Fed. Rep. 427, 39 U. S. App. 335; Yellow Poplar Lumber Co. *v.* Chapman, (C. C. A.) 74 Fed. Rep. 444; Knowlton *v.* Oliver, 28 Fed. Rep. 516; Hughes's Case, 4 Ct. Cl. 64. See Roehm *v.* Horst, (C. C. A.) 91 Fed. Rep. 345.

Arkansas.—Nelson *v.* Hirschberg, 70 Ark. 39.

California. — Scribner *v.* Schenkel, 128 Cal. 250; Tahoe Ice Co. *v.* Union Ice Co., 109 Cal. 242; Hewes *v.* Germain Fruit Co., 106 Cal. 441; Haskell *v.* McHenry, 4 Cal. 411; Tustin Fruit Assoc. *v.* Earl Fruit Co., (Cal. 1898) 53 Pac. Rep. 693.

Colorado. — Colorado Springs Live Stock Co. *v.* Godding, 2 Colo. App. 1.

Connecticut. — Allen *v.* Jarvis, 20 Conn. 38.

Illinois. — Murray *v.* Doud, 167 Ill. 368, 59 Am. St. Rep. 297; Foos *v.* Sabin, 84 Ill. 564; Sanborn *v.* Benedict, 78 Ill. 309; McNaught *v.* Dodson, 49 Ill. 446; Phelps *v.* McGee, 18 Ill. 158; Smith *v.* Dunlap, 12 Ill. 184; James H. Rice Co. *v.* Penn Plate Glass Co., 88 Ill. App. 407; Neuberger *v.* Rountree, 18 Ill. App. 610; Thurman *v.* Wilson, 7 Ill. App. 312.

Indiana. — McComas *v.* Haas, 107 Ind. 512; Fell *v.* Muller, 78 Ind. 507; Pittsburgh, etc., R. Co. *v.* Heck, 50 Ind. 303, 19 Am. Rep. 713; Beard *v.* Sloan, 38 Ind. 128; Gatling *v.* Newell, 12 Ind. 125; Van Vleet *v.* Adair, 1 Blackf. (Ind.) 346; Gardner *v.* Caylor, 24 Ind. App. 521; Dill *v.* Mumford, 19 Ind. App. 609; Browning *v.* Simons, 17 Ind. App. 45; Ridgley *v.* Mooney, 16 Ind. App. 362; Neal *v.* Shewalter, 5 Ind. App. 147.

Iowa. — Harris Mfg. Co. *v.* Marsh, 49 Iowa 11; Cannon *v.* Folsom, 2 Iowa 101, 63 Am. Dec. 474.

Kansas. — Lawrence Canning Co. *v.* H. D. Lee Mercantile Co., 5 Kan. App. 77.

Kentucky. — Williams *v.* Jones, 1 Bush (Ky.) 621; Sanders *v.* Bond, (Ky. 1902) 66 S. W. Rep. 635; Singer Mfg. Co. *v.* Cheney, (Ky. 1899) 51 S. W. Rep. 813; Miller *v.* Burch, (Ky. 1897) 41 S. W. Rep. 307.

Massachusetts. — Thompson *v.* Alger, 12 Met. (Mass.) 428; Whitney *v.* Thacher, 117 Mass. 523; Collins *v.* Delaporte, 115 Mass. 159.

Michigan. — Brownlee *v.* Bolton, 44 Mich. 218; Clark *v.* Moore, 3 Mich. 55.

Minnesota. — Converse *v.* Burrows, 2 Minn. 229.

Missouri. — Black River Lumber Co. *v.* Warner, 93 Mo. 374; Northrup *v.* Cook, 39 Mo. 208; Whitmore *v.* Coates, 14 Mo. 9; Parlin, etc., Co. *v.* Boatman, 89 Mo. App. 43, 84 Mo. App. 67; Halliday *v.* Lesh, 85 Mo. App. 285.

Nebraska. — Schaaf *v.* Hamilton, (Neb. 1902) 89 N. W. Rep. 614; Funke *v.* Allen, 54 Neb. 407, 69 Am. St. Rep. 716; Lincoln Shoe Mfg. Co. *v.* Sheldon, 44 Neb. 279.

New Hampshire. — Haines *v.* Tucker, 50 N. H. 307; Gordon *v.* Norris, 49 N. H. 376; Rand *v.* White Mountains R. Co., 40 N. H. 79; Hanover *v.* Weare, 2 N. H. 131.

New York. — Hewitt *v.* Miller, 61 Barb. (N. Y.) 567; Billings *v.* Vanderbeck, 23 Barb. (N. Y.) 546; Wemple *v.* Stewart, 22 Barb. (N. Y.) 154; Smith *v.* Griffith, 3 Hill (N. Y.) 333, 38 Am. Dec. 639; Gregory *v.* McDowell, 8 Wend. (N. Y.) 435; Fletcher *v.* Jacob Dold Packing Co., 169 N. Y. 571; Moore *v.* Potter, 155 N. Y. 481, 63 Am. St. Rep. 692; Windmuller *v.* Pope, 107 N. Y. 676; Canda *v.* Wick, 100 N. Y. 127; Cahen *v.* Platt, 69 N. Y. 348, 25 Am. Rep. 203; Hayden *v.* Demets, 53 N. Y. 426; Durst *v.* Burton, 47 N. Y. 175, 7 Am. Rep. 428; Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; Schwartzenbach *v.* Hass, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 806; Todd *v.* Gamble, 148 N. Y. 384; National Cash Register Co. *v.* Schmidt, 48 N. Y. App. Div. 472; Kelso *v.* Marshall, 24 N. Y. App. Div. 128; House *v.* Babcock, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 640; Stengel *v.* Hewit, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 671; Deery *v.* Williams, 27 N. Y. App. Div. 131. *Compare* Orr *v.* Bigelow, 14 N. Y. 556.

North Dakota. — Minneapolis Threshing Mach. Co. *v.* McDonald, 10 N. Dak. 408.

Ohio. — Cullen *v.* Bimm, 37 Ohio St. 236; Nixon *v.* Nixon, 21 Ohio St. 114.

Oklahoma. — Mansur-Tebbetts Implement Co. *v.* Willet, 10 Okla. 383.

Pennsylvania. — Schnebly *v.* Shirtcliff, 7 Phila. (Pa.) 236; Girard *v.* Taggart, 5 S. & R. (Pa.) 19, 9 Am. Dec. 327; Jones *v.* Jennings, 168 Pa. St. 493; Unexcelled Fire-Works Co. *v.* Polites, 130 Pa. St. 536, 17 Am. St. Rep. 788; Laubach *v.* Laubach, 73 Pa. St. 392; Ballentine *v.* Robinson, 46 Pa. St. 179; Newport, etc., R. Co. *v.* Seager, 19 Pa. Co. Ct. 465; Hooper *v.* Bromley Bros. Carpet Co., 11 Pa. Super. Ct. 634; E. Keeler Co. *v.* Schott, 1 Pa. Super. Ct. 458, 38 W. N. C. (Pa.) 316.

Texas. — Randon *v.* Barton, 4 Tex. 289; Breneman *v.* Kilgore, (Tex. Civ. App. 1896) 35 S. W. Rep. 202.

Vermont. — Danforth *v.* Walker, 37 Vt. 239.

Virginia. — Smith *v.* Snyder, 77 Va. 432.

West Virginia.— Hall *v.* Pierce, 4 W. Va. 107.

Wisconsin. — Gehl *v.* Milwaukee Produce Co., 105 Wis. 573; T. B. Scott Lumber Co. *v.* Hafner-Lothman Mfg. Co., 91 Wis. 667; Chapman *v.* Ingram, 30 Wis. 290; Ganson *v.* Madigan, 13 Wis. 75.

See also *infra*, this section, *Resale and Action for Damages.*

See Collins *v.* Delaporte, 115 Mass. 159, where, in an action for damages for nonacceptance of lumber tendered, evidence was admitted to prove that the tender was not of the quality contracted for, in reduction of damages.

The destruction of the goods after the defendant's wrongful refusal to accept does not alter the rule nor increase the damages.[1] The fact that before delivery the buyer gives notice to the seller that he will not receive the goods does not alter the rule. The damages are still to be estimated as of the date of delivery.[2] If the market value of the goods is the same as or higher than the contract price, only nominal damages may be recovered.[3] Where there is no market value, or where under the terms of the special contract the market value is not an appropriate or adequate criterion of damages, the measure of damages is compensation for the actual loss suffered.[4] Freight charges paid by the plaintiff may be recovered as an item of damages in proper cases.[5] In the case of contracts for the sale of articles to be manufactured the actual damages suffered are the measure of recovery,[6] and is

The Reason of the Rule is well stated by Tindal, C. J., in Barrow *v.* Arnaud, 8 Q. B. 609, 55 E. C. L. 609: "Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser having the money in his hands may go into the market and buy. So if a contract to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them."

A Leading Case on this subject in regard to contracts generally is Masterton *v.* Brooklyn, 7 Hill (N. Y.) 61, 42 Am. Dec. 38, where it was held that the measure of damages for breach of executory contract includes loss of profits growing immediately out of the contract, which would have been realized from its full performance, but not loss of profits or other damages arising out of collateral undertakings entered into on the faith of the contract; and in this case, which arose out of a contract to procure and prepare certain building materials, the measure was held to be the difference between the contract price and the cost of procuring and preparing the materials, such cost to be estimated according to the state of the market at the date of the breach, and not at the time of full performance or at any intermediate time, though the action was brought after the full time had elapsed.

The Market Value is to be determined with reference to the time and place of delivery; if the market is subject to undue fluctuations, due to artificial causes, these must be taken into account by the jury in determining what is the actual market value. Kountz *v.* Kirkpatrick, 72 Pa. St. 376, 13 Am. Rep. 687. See the titles DAMAGES, vol. 8, p. 537; MARKET VALUE, vol. 19, p. 1153.

1. Destruction of Goods. — Neal *v.* Shewalter, 5 Ind. App. 147. *Compare* American Oak Extract Co. *v.* Ryan, 104 Ala. 267.

2. Damages Estimated at Time of Delivery — *England.*—Cort *v.* Ambergate, etc , Junction R. Co., 17 Q. B. 127, 79 E. C. L. 127; Hochster *v.* De La Tour, 2 El. & Bl. 678, 75 E. C. L. 678; Leigh *v.* Paterson, 8 Taunt. 540, 4 E. C. L. 204; Phillpotts *v.* Evans, 5 M. & W. 475; Frost *v.* Knight, L. R. 5 Exch. 322. See Bartholomew *v.* Markwick, 15 C. B. N. S. 711, 109 E. C. L. 711. But see Roth *v.* Taysen, 8 Asp. M. Cas. 120, 73 L.T. N. S. 628.

United States. — Southern Cotton-Oil Co. *v.* Heflin, 99 Fed. Rep. 339, 39 C. C. A. 546; Smoot's Case, 15 Wall. (U. S.) 48; Dingley *v.* Oler, 117 U. S. 490; Marks *v.* Van Eeghen, 57 U. S. App. 149, 85 Fed. Rep. 855. But see Horst *v.* Roehm, 84 Fed. Rep. 565.

Georgia. — Cooper *v.* Young, 22 Ga. 269, 68 Am. Dec. 502.

Illinois. — Lake Shore, etc., R. Co. *v.* Richards, 152 Ill. 100; Kadish *v.* Young, 108 Ill. 178, 48 Am. Rep. 548; Cummings *v.* Tilton, 44 Ill. 173; McPherson *v.* Walker, 40 Ill. 371; Fox *v.* Kitton, 19 Ill. 519. But see James H. Rice Co. *v.* Penn Plate Glass Co., 88 Ill. App. 407.

New York. — Crist *v.* Armour, 34 Barb. (N. Y.) 378. See Schwarzer *v.* Karsch Brewing Co., 74 N. Y. App. Div. 383. *Compare* Masterton *v.* Brooklyn, 7 Hill (N. Y.) 61, 42 Am. Dec. 38.

Pennsylvania. — Zuck *v.* McClure, 98 Pa. St. 541; Baney *v.* Killmer, 1 Pa. St. 30, 44 Am. Dec. 109.

Vermont. — Danforth *v.* Walker, 37 Vt. 239. But see Heiser *v.* Mears, 120 N. Car. 443; W. T. Adams Mach. Co. *v.* Looney, (Tex. Civ. App. 1898) 47 S. W. Rep. 671. *Compare* Tufts *v.* Weinfeld, 88 Wis. 647.

3. Nominal Damages. — Foos *v.* Sabin, 84 Ill. 564; National Cash Register Co. *v.* Schmidt, 48 N. Y. App. Div. 472; Gehl *v.* Milwaukee Produce Co., 105 Wis. 573.

4. Compensation for Actual Loss. — International Contracting Co. *v.* McNichol, 105 Fed. Rep. 553; Taylor *v.* Newcastle County, 1 Pen. (Del.) 555; Indiana Canning Co. *v.* Priest, 16 Ind. App. 445; Berthold *v.* St. Louis Electric Constr. Co., 165 Mo. 280; Lloyd Lumber Co. *v.* Solon, 9 Ohio Cir. Dec. 656, 17 Ohio Cir. Ct. 194; Alleghany Iron Co. *v.* Teaford, 96 Va. 372.

5. Freight Charges. — Minneapolis Threshing Mach. Co. *v.* McDonald, 10 N. Dak. 408.

6. Articles to Be Manufactured. — Cort *v.* Ambergate, etc., Junction R. Co., 17 Q. B. 127, 79 E. C. L. 127; Knowlton *v.* Oliver, 28 Fed. Rep. 516; Allen *v.* Jarvis, 20 Conn. 38; Geiss *v.* Wyeth Hardware, etc., Co., 37 Kan. 130; Tufts *v.* Grewer, 83 Me. 407; Eckenrode *v.* Chemical Co., 55 Md. 51; Hosmer *v.* Wilson, 7 Mich. 294, 74 Am. Dec. 716; Muskegon Curtain-Roll Co. *v.* Keystone Mfg. Co., 135 Pa. St. 132; Rider *v.* Kelley, 32 Vt. 268, 76 Am. Dec. 176; Tufts *v.* Weinfeld, 88 Wis. 647.

Destruction of Property Before Completion. — Since the title does not pass until the completion and delivery of the manufactured

frequently the difference between the cost of manufacturing and delivering the goods and the contract price, that is, the profit which the plaintiff would have made if the contract had been fully performed.[1] Anything realized by the seller from the goods left in his hands must be credited upon the contract price.[2] Where the defendant had an option to designate the particular kind of goods to be delivered damages should be estimated upon the theory that he would have selected the kind upon which the plaintiff would have realized the least profit.[3] Nominal damages only may be recovered in the absence of proof of market value or of facts justifying the application of another standard of damages, or in the absence of any proof of any damage.[4]

d. DEFENSES. — Any prior breach of contract or nonperformance upon the part of the seller sufficient to justify the buyer in refusing to accept the goods,[5] is available as a defense to an action for noncompliance.[6] The defendant, of course, cannot insist upon anything contrary to the terms of the agreement.[7] A set-off or counterclaim may be set up in accordance with usual rules.[8]

e. EVIDENCE AND BURDEN OF PROOF. — Subject to the usual rules of evidence, any fact is admissible in evidence tending to prove or disprove the existence and terms of the contract,[9] performance by the plaintiff in accordance with the terms of the contract of all conditions precedent or concurrent,[10]

article, any loss occurring from the destruction of the material must fall on the seller. And this is true even where the default of the buyer prevented the completion of the contract. McConihe *v.* New York, etc., R. Co., 20 N. Y. 495, 75 Am. Dec. 420; Atkinson *v.* Bell, 8 B. & C. 277, 15 E. C. L. 216. In such case the seller's remedy, it seems, is an action for damages. As is said in Butler *v.* Butler, 77 N. Y. 475, 33 Am. Rep. 650: "Doubtless the plaintiff may in this, as in other cases where the performance of a contract has been prevented by the act or omission of the other party, recover what he has lost thereby, if anything, or the damages sustained, if any." *Citing* Hosmer *v.* Wilson, 7 Mich. 294, 74 Am. Dec. 716.

1. Difference Between Cost of Manufacture and Contract Price — *Illinois.* — James H. Rice Co. *v.* Penn Plate Glass Co., 88 Ill. App. 407; Kingman *v.* Hanna Wagon Co., 74 Ill. App. 22; Beardsley *v.* Smith, 61 Ill. App. 340.

Indiana. — See also Indiana Canning Co. *v.* Priest, 16 Ind. App. 445.

Iowa. — Kimball *v.* Deere, 108 Iowa 676.

Kentucky. — Hauser, etc., Co. *v.* Tate, 105 Ky. 701.

Missouri. — Berthold *v.* St. Louis Electric Constr. Co., 165 Mo. 280; Chapman *v.* Kansas City, etc., R. Co., 146 Mo. 481.

New York. — Masterton *v.* Brooklyn, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; Todd *v.* Gamble, 148 N. Y. 382; Dryfoos *v.* Uhl, 69 N. Y. App. Div. 118; Kelso *v.* Marshall, 24 N. Y. App. Div. 128.

North Carolina. — Williams *v.* Crosby Lumber Co., 118 N. Car. 928. But see Heiser *v.* Mears, 120 N. Car. 443.

Oregon. — American Bridge, etc., Co. *v.* Bullen Bridge Co., 29 Oregon 549.

Texas. — Sabine Tram Co. *v.* Jones, (Tex. Civ. App. 1898) 43 S. W. Rep. 905.

Wisconsin. — McCall Co. *v.* Icks, 107 Wis. 232.

Compare Yellow Poplar Lumber Co. *v.* Chapman, (C. C. A.) 74 Fed. Rep. 444; Southern Cotton-Oil Co. *v.* Heflin, (C. C. A.) 99 Fed. Rep. 339.

2. Credits on Contract Price. — Diamond State Iron Co. *v.* San Antonio, etc., R. Co., 11 Tex. Civ. App. 587. See also *infra*, this section, *Resale and Action for Damages.*

3. Alternative Contracts. — Kimball *v.* Deere, 108 Iowa 676.

4. Nominal Damages in Absence of Proof. — Turney *v.* Peoria Grape-Sugar Co., 65 Ill. App. 656; Miller *v.* Burch, (Ky. 1897) 41 S. W. Rep. 307; Halliday *v.* Lesh, 85 Mo. App. 285; Petigor *v.* Ward, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 816.

5. See *supra*, this title, *Delivery of Goods; Acceptance of Goods.*

6. Nonperformance by Vendor. — Schleicher *v.* Montgomery Light Co., 114 Ala. 228; Hauser, etc., Co. *v.* Tate, 105 Ky. 701; Southern Lumber Co. *v.* Mercantile Lumber, etc., Co., 89 Mo. App. 141; Schaaf *v.* Hamilton, (Neb. 1902) 89 N. W. Rep. 614; Richard *v.* Haebler, 36 N. Y. App. Div. 94; Crossman *v.* Lurman, 33 N. Y. App. Div. 422; Shores Lumber Co. *v.* Claney, 102 Wis. 235.

7. Minneapolis Threshing Mach. Co. *v.* McDonald, 10 N. Dak. 408.

8. Set-off or Counterclaim. — Berthold *v.* St. Louis Electric Constr. Co., 165 Mo. 280. See generally the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM.

9. Existence and Terms of Contract. — See the title CONTRACTS, vol. 7, p. 88, and *supra*, this title, *Contract of Sale.*

10. Performance by Plaintiff — *In General.* — Kimball *v.* Deere, 108 Iowa 676.

Evidence of Quality. — St. Louis Paper-Box Co. *v.* J. C. Hubinger Bros. Co., (C. C. A.) 100 Fed. Rep. 595; Penn *v.* Smith, 104 Ala. 445; Kingman *v.* Hanna Wagon Co., 176 Ill. 545, *affirming* 74 Ill. App. 22; Schofield *v.* Conley, 126 Mich. 712, 8 Detroit Leg. N. 192; Carrel *v.* Cold-Storage Co., 112 Mich. 34; Fletcher *v.* Jacob Dold Packing Co., 169 N. Y. 571, 41 N. Y. App. Div. 30; Crossman *v.* Lurman, 46 N. Y. App. Div. 62.

or an excuse for nonperformance,[1] coupled with an ability and a willingness to perform,[2] and the amount of damages suffered,[3] involving usually proof of the real market value of the goods,[4] and the contract price for the amount to be delivered.[5]

The Burden of Proof is upon the plaintiff to show performance upon his part in accordance with the terms of the contract,[6] or that he was able and willing to perform.[7]

f. QUESTIONS FOR COURT AND JURY. — The general rule, as in other cases,[8] is that questions of law are for the court, and questions of fact for the jury.[9] Acceptance or nonacceptance is usually a mixed question of law and fact for the jury.[10] The value of the goods is a question of fact for the jury,[11] as is also the amount of damages.[12]

2. Action for Price — *a.* WHERE CONTRACT IS EXECUTORY. — Where title has not passed, and the contract is still executory, it is usually held that the remedy by an action for damages is exclusive, and that an action for the agreed price cannot be maintained.[13] There is authority, however, for the

Evidence as to Reasonableness of Time of Delivery. — Eppens, etc., Co. *v.* Littlejohn, 164 N. Y. 187.

1. See *supra*, this section, *Accrual of Cause of Action*.

2. **Evidence of Ability and Willingness to Perform.** — Walter *v.* Victor G. Bloede Co., 94 Md. 80; Fletcher *v.* Jacob Dold Packing Co., 169 N. Y. 571, 41 N. Y. App. Div. 30; Diamond State Iron Co. *v.* San Antonio, etc., R. Co., 11 Tex. Civ. App. 587; Shores Lumber Co. *v.* Claney, 102 Wis. 235.

A mere notice that the seller is ready to deliver is not of itself sufficient; it may prove that he is willing, but not that he has the goods on hand so that he is able to deliver. Lassen *v.* Mitchell, 41 Ill. 101.

3. **Evidence of Damages.** — Clews *v.* Jamieson, 182 U. S. 461; Salem Iron Co. *v.* Lake Superior Consol. Iron Mines, (C. C. A.) 112 Fed. Rep. 239; Slaughter *v.* Marlow, (Ariz. 1892) 31 Pac. Rep. 547; Tahoe Ice Co. *v.* Union Ice Co., 109 Cal. 242; Kingman *v.* Hanna Wagon Co., 74 Ill. App. 22; Dowagiac Mfg. Co. *v.* Corbit, 127 Mich. 473, 8 Detroit Leg. N. 425; Parlin, etc., Co. *v.* Boatman, 84 Mo. App. 67; Minneapolis Threshing Mach. Co. *v.* McDonald, 10 N. Dak. 408; Fletcher *v.* Jacob Dold Packing Co., 169 N. Y. 571; Petigor *v.* Ward, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 816; McCall Co. *v.* Icks, 107 Wis. 232. See also *supra*, this section, *Measure of Damages*.

4. **Evidence of Value or Market Value** — *United States.* — Yellow Poplar Lumber Co. *v.* Chapman, (C. C. A.) 74 Fed. Rep. 444.

Kansas. — Lawrence Canning Co. *v.* H. D. Lee Mercantile Co., 5 Kan. App. 77.

Kentucky. — Sanders *v.* Bond, (Ky. 1902) 66 S. W. Rep. 635.

Missouri. — Parlin, etc., Co. *v.* Boatman, 89 Mo. App. 43; Halliday *v.* Lesh, 85 Mo. App. 285.

New York. — Fletcher *v.* Jacob Dold Packing Co., 41 N. Y. App. Div. 30; Deery *v.* Williams, 27 N. Y. App. Div. 131; Kelso *v.* Marshall, 24 N. Y. App. Div. 128; Stengel *v.* Hewit, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 670.

Pennsylvania. — Jones *v.* Jennings, 168 Pa. St. 493.

Texas. — Breneman *v.* Kilgore, (Tex. Civ. App. 1896) 35 S. W. Rep. 202.

Wisconsin. — T. B. Scott Lumber Co. *v.* Hafner-Lothman Mfg. Co., 91 Wis. 667.

5. **Evidence of Contract Price.** — Nash *v.* Classen, 163 Ill. 409; Collins *v.* Shaw, 124 Mich. 474; Fletcher *v.* Jacob Dold Packing Co., 41 N. Y. App. Div. 30, *affirmed* 169 N. Y. 571.

6. **Burden of Showing Performance.** — Milliken *v* Randall, 89 Me. 200; Richard *v.* Haebler, 36 N. Y. App. Div. 94; Eppens, etc., Co. *v.* Littlejohn, 164 N. Y. 187, 27 N. Y. App. Div. 22; Duryea *v.* Rayner, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 544; Wright *v.* Ramp, 41 Oregon 285; Pacific Coast Elevator Co. *v.* Bravinder 14 Wash. 315.

7. Sweetser *v.* Mellick, (Idaho 1894) 38 Pac. Rep. 403.

8. See the title QUESTIONS OF LAW AND FACT, vol. 23, p. 543.

9. **Questions of Fact for Jury.** — St. Louis Paper-Box Co. *v.* J. C. Hubinger Bros. Co., 100 Fed. Rep. 595, 40 C. C. A. 577; Crossman *v.* Lurman, 57 N. Y. App. Div. 393.

10. **Acceptance.**—Western Mfg. Co. *v.* Kingman, 112 Fed. Rep. 246, 50 C. C. A. 221.

11. **Value.**—Salem Iron Co. *v.* Lake Superior Consol. Iron Mines, (C. C. A.) 112 Fed. Rep. 239.

12. **Damages.**—Dryfoos *v.* Uhl, 69 N. Y. App. Div. 118.

13. **Action for Damages the Exclusive Remedy**— *England.* — Cort *v.* Ambergate, etc., Junction R. Co., 17 Q. B. 127, 79 E. C. L. 127; Elliott *v.* Pybus, 10 Bing. 512, 25 E. C. L. 222; Rhode *v.* Thwaites, 6 B. & C. 388, 13 E. C. L. 207, 3 Phil. Ev. 410; Simmons *v.* Swift, 5 B. & C. 857, 12 E. C. L. 388; Laird *v.* Pim, 7 M. & W. 478; Hanson *v.* Meyer, 6 East 614. See Atkinson *v.* Bell, 8 B. & C. 277, 15 E. C. L. 216.

Arkansas. — Morris *v.* Cohn, 55 Ark. 401.

Connecticut. — Allen *v.* Jarvis, 20 Conn. 38.

Delaware. — Pusey, etc., Co. *v.* Dodge, 3 Penn. (Del.) 63.

Illinois. — Brand *v.* Henderson, 107 Ill. 141; Burnham *v.* Roberts, 70 Ill. 24; Seckel *v.* Scott, 66 Ill. 106; Thorn *v.* Danzinger, 50 Ill. App. 306.

Indiana. — Indianapolis, etc., R. Co. *v.* Maguire, 62 Ind. 140; Pittsburgh, etc., R. Co. *v.* Heck, 50 Ind. 303, 19 Am. Rep. 713.

Kansas. — John Deere Plow Co. *v.* Gorman, 9 Kan. App. 675.

view that the vendor may elect either to sue for damages or to treat the goods as the property of the vendee, notwithstanding a distinct refusal to accept them, and sue upon the contract for the whole contract price,[1] and in

Kentucky. — Williams *v.* Jones, 1 Bush (Ky.) 621; Singer Mfg. Co. *v.* Cheney, (Ky. 1899) 51 S. W. Rep. 813.

Maine. — Atwood *v.* Lucas, 53 Me. 508, 89 Am. Dec. 713; Moody *v.* Brown, 34 Me. 107, 56 Am. Dec. 640.

Massachusetts. — Hallwood Cash Register Co. *v.* Lufkin, 179 Mass. 143; Thompson *v.* Alger, 12 Met. (Mass.) 428; White *v.* Solomon, 164 Mass. 519; Frazier *v.* Simmons, 139 Mass. 531; Collins *v.* Delaporte, 115 Mass. 162; Penniman *v.* Hartshorn, 13 Mass. 87.

Michigan. — Scotten *v.* Sutter, 37 Mich. 526.

Minnesota. — McCormick Harvesting Mach. Co. *v.* Balfany, 78 Minn. 370.

Mississippi. — Scott *v.* Wood, 41 Miss. 661.

New Hampshire. — Clay *v.* Bohonon, 54 N. H. 474; Gordon *v.* Norris, 49 N. H. 382; Bailey *v.* Smith, 43 N. H. 143; Ockington *v.* Richey, 41 N. H. 279; Fuller *v.* Bean, 34 N. H. 290; Shepherd *v.* Pressey, 32 N. H. 49; Messer *v.* Woodman, 22 N. H. 172, 53 Am. Dec. 241.

New Jersey. — Perdicaris *v.* Trenton City Bridge Co., 29 N. J. L. 367; Doremus *v.* Howard, 23 N. J. L. 390.

New York. — Mallory *v.* Lord, 29 Barb. (N. Y.) 454; Outwater *v.* Dodge, 7 Cow. (N. Y.) 85; Stanton *v.* Small, 3 Sandf. (N. Y.) 230; Bement *v.* Smith, 15 Wend. (N. Y.) 493; Davis *v.* Shields, 24 Wend. (N. Y.) 322; Dey *v.* Dox, 9 Wend. (N. Y.) 129, 24 Am. Dec. 137; National Cash Register Co. *v.* Schmidt, 48 N. Y. App. Div. 472; Orr *v.* Bigelow, 14 N. Y. 556; Dana *v.* Fiedler, 12 N. Y. 41, 62 Am. Dec. 130.

Pennsylvania. — Girard *v.* Taggart, 5 S. & R. (Pa.) 33, 9 Am. Dec. 327; Guillon *v.* Earnshaw, 169 Pa. St. 463; Unexcelled Fire Works Co. *v.* Polites, 130 Pa. St. 536, 17 Am. St. Rep. 788; Brown *v.* McCaffrey, 40 W. N. C. (Pa.) 69; Newport, etc., R. Co. *v.* Seager, 19 Pa. Co. Ct. 465.

Texas. — Sonka *v.* Chatham, 2 Tex. Civ. App. 312.

Vermont. — Danforth *v.* Walker, 37 Vt. 239.

Wisconsin. — Tufts *v.* Weinfeld, 88 Wis. 647; Ganson *v.* Madigan, 13 Wis. 67.

1. **Contrary View** — *Illinois.* — Bagley *v.* Findlay, 82 Ill. 524. See also Wade *v.* Moffett, 21 Ill. 110, 74 Am. Dec. 79.

Iowa. — Sedgwick *v.* Cottingham, 54 Iowa 512. See also Harris Mfg. Co. *v.* Marsh, 49 Iowa 11.

Kentucky. — Bell *v.* Offutt, 10 Bush (Ky.) 639.

Massachusetts. — White *v.* Solomon, 164 Mass. 516; Pearson *v.* Mason, 120 Mass. 53; Rodman *v.* Guilford, 112 Mass. 406; Turner *v.* Langdon, 112 Mass. 265; Nichols *v.* Morse, 100 Mass. 523; Thorndike *v.* Locke, 98 Mass. 340. See Mitchell *v.* Le Clair, 165 Mass. 308. See also Frazier *v.* Simmons, 139 Mass. 531. *Compare* Brewer *v.* Housatonic R. Co., 104 Mass. 594.

Minnesota. — Wood *v.* Michaud, 63 Minn. 478.

Mississippi. — Crawford *v.* Avery, 35 Miss. 208.

Missouri. — Walker *v.* Nixon, 65 Mo. App. 326; Crown Vinegar, etc., Co. *v.* Wehrs, 59 Mo. App. 493.

Nebraska. — Lincoln Shoe Mfg. Co. *v.* Sheldon, 44 Neb. 279.

New Jersey. — Barton *v.* McKelway, 22 N. J. L. 165.

New York. — Schwarzer *v.* Karsch Brewing Co., 74 N. Y. App. Div. 383; Lewis *v.* Greider, 49 Barb. (N. Y.) 606; Hunter *v.* Wetsell, 84 N. Y. 549, 38 Am. Rep. 544; Quick *v.* Wheeler, 78 N. Y. 305; Mason *v.* Decker, 72 N. Y. 596, 28 Am. Rep. 190; Pacific Iron Works *v.* Long Island R. Co., 62 N. Y. 274; Bridgford *v.* Crocker, 60 N. Y. 627; American Grocery Co. *v.* Pirkl, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 727; Hayden *v.* Demets, 53 N. Y. 426; Kaufman *v.* Canary, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 302; Dustan *v.* McAndrew, 44 N. Y. 78; Pollen *v.* Le Roy, 30 N. Y. 549; Owen *v.* Matthews, (N. Y. City Ct. Gen. T.) 19 N. Y. Supp. 813. See also Donnell *v.* Hearn, 12 Daly, (N. Y.) 230; Higgins *v.* Murray, 73 N. Y. 254.

Ohio. — Hadly *v.* Pugh, Wright (Ohio) 554; Shawhan *v.* Van Nest, 25 Ohio St. 490, 18 Am. Rep. 313.

Pennsylvania. — Ballentine *v.* Robinson, 46 Pa. St. 177.

See also Chicago *v.* Greer, 9 Wall. (U. S.) 726; Morris *v.* Cohn, 55 Ark. 401.

"When * * * all the conditions have been complied with, the performance of which by the terms of the contract entitles the vendors to the whole sum, if the vendors afterwards have not either broken the contract or done any act diminishing the rights given them in express words, the buyer cannot by any act of his own repudiating the title gain a right of recoupment, or otherwise diminish his obligation to pay the whole sum which he has promised." White *v.* Solomon, 164 Mass. 518, *citing* Smith *v.* Bergengren, 153 Mass. 236.

"If the vendee in such a case afterwards refuses to take the goods and pay for them, the vendor may recover the price if he keeps them in readiness for delivery to the purchaser. Under a contract of sale, when the goods have been so appropriated and set apart, the vendor has done that which by the terms of the agreement makes the whole consideration payable; and so long as he remains ready to do whatever else is to be done to give the vendee the benefit of his purchase, he is entitled to receive the agreed price without deduction on account of his retention of his lien upon the property." Mitchell *v.* Le Clair, 165 Mass. 310 (*citing* Morse *v.* Sherman, 106 Mass. 430; Putnam *v.* Glidden, 159 Mass. 47, 38 Am. St. Rep. 394; White *v.* Solomon, 164 Mass. 516). But in this case it was held that title had passed.

"The rule has long been established that where a vendee unlawfully refuses to accept personal property under an executory contract of sale, the vendor may avail himself of one of three remedies, viz.: He may retain the property for the vendee and recover the entire purchase price; or, he may keep it as his own and sue for the difference between the market

some states this rule is established by statute,[1] but this rule is frequently confined to cases where the contract calls for goods to be manufactured especially for the vendee.[2] There is much confusion upon this subject, however, even among the cases from the same jurisdiction, and the facts in some of the cases do not support or require the application of the broad rule laid down.[3]

Price to Be Paid on Day Certain. — It has also been held that where it is agreed that the price shall be paid on a day certain, irrespective of the delivery of the goods, the vendor may recover the whole agreed price and is not confined to an action for damages.[4]

Title Reserved until Payment. — Where goods are sold and delivered under an agreement that title shall not pass until the price is paid, if the price is not paid within the stipulated time the seller may maintain an action to recover the price,[5] and is not confined to his remedy against the goods.[6] Where such conditional sales are considered in effect mortgages the vendor may elect to sue for the debt instead of enforcing the mortgage,[7] or the contract may be enforced by a decree of foreclosure.[8]

b. WHERE CONTRACT IS EXECUTED. — Where the contract of sale is executed and title has passed to the vendee, the vendor may maintain a personal action for the agreed price.[9] The action may be maintained even though the

value and the contract price; or, he may sell the property for the highest price he can get and recover the balance of the purchase price." Stengel *v.* Hewit, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 671.

1. Statutory Rule. — Dowagiac Mfg. Co. *v.* Higinbotham, 15 S. Dak. 547.

2. Goods Specially Manufactured — *United States.* — Bookwalter *v.* Clark, 11 Biss. (U. S.) 126.

Connecticut. — Allen *v.* Jarvis, 20 Conn. 38.

Iowa. — McCormick Harvesting Mach. Co. *v.* Markert, 107 Iowa 340.

Missouri. — Black River Lumber Co. *v.* Warner, 93 Mo. 374; Walker *v.* Nixon, 65 Mo. App. 326.

New Hampshire. — Gordon *v.* Norris, 49 N. H. 376.

New York. — Donnell *v.* Hearn, 12 Daly (N. Y.) 230; Crookshank *v.* Burrell, 18 Johns. (N. Y.) 58, 9 Am. Dec. 187; Bement *v.* Smith, 15 Wend. (N. Y.) 493; Hass *v.* Pettingill, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 318. See Schwarzer *v.* Karsch Brewing Co., 74 N. Y. App. Div. 383; Higgins *v.* Murray, 73 N. Y. 252.

Oregon. — Smith *v.* Wheeler, 7 Oregon 49, 33 Am. Rep. 698.

Pennsylvania. — Ballentine *v.* Robinson, 46 Pa. St. 177.

Washington. — Fox *v.* Utter, 6 Wash. 299.

Wisconsin. — Ganson *v.* Madigan, 13 Wis. 75. See Shawhan *v.* Van Nest, 25 Ohio St. 490, 18 Am. Rep. 313. *Compare* Thorn *v.* Danzinger, 50 Ill. App. 306; Shipps *v.* Atkinson, 8 Ind. App. 505.

3. See cases cited in preceding notes. See 18 Am. L. Reg. (N. S.) 164; Sedgwick, Dam. (7 ed.) vol. 1, p. 596, note.

4. Price Payable on Day Certain. — Benj. on Sales (6th Am. ed.), § 762; Martineau *v.* Kitching, L. R. 7 Q. B. 436; Dunlop *v.* Grote, 2 C. & K. 153, 61 E. C. L. 153; Higgins *v.* Murray, 73 N. Y. 252. See White *v.* Solomon, 164 Mass. 516. See also Marvin Safe Co. *v.* Emanuel, (C. Pl. Gen. T.) 21 Abb. N. Cas. (N. Y.) 181, 14 N. Y. St. Rep. 681.

5. Title Reserved until Payment. — Appleton *v.* Norwalk Library Corp., 53 Conn. 4; Aspinwall Mfg. Co. *v.* Johnson, 97 Mich. 531; Clay *v.* Bohonon, 54 N. H. 474; Brewer *v.* Ford, 54 Hun (N. Y.) 116, 126 N. Y. 643; Root *v.* Lord, 23 Vt. 568; Wheeler, etc., Mfg. Co. *v.* Teetzlaff, 53 Wis. 220. See also White *v.* Solomon, 164 Mass 516; Marvin Safe Co. *v.* Emanuel, (C. Pl. Gen. T.) 21 Abb. N. Cas. (N. Y.) 181.

But *compare* Hine *v.* Roberts, 48 Conn. 267, 40 Am. Rep. 170; Hallwood Cash Register Co. *v.* Lufkin, 179 Mass. 143; Minneapolis Harvester Works *v.* Hally, 27 Minn. 495; National Cash Register Co. *v.* Schmidt, 48 N. Y. App. Div. 472.

6. See *infra*, this section, 4. *Recovery of Goods, Value, or Proceeds.* See also *infra*, this section, 5. *Resale and Action for Damages;* 6. *Lien.*

7. Conditional Sale as a Mortgage. — Munroe *v.* Williams, 35 S. Car. 572.

8. Campbell Printing Press, etc., Co. *v.* Powell, 78 Tex. 53.

9. Action for Price — *England.* — Elliott *v.* Heginbotham, 2 C. & K. 545, 61 E. C. L. 545; Atkinson *v.* Bell, 8 B. & C. 277, 15 E. C. L. 216; Simmons *v.* Swift, 5 B. & C. 857, 12 E. C. L. 388; Rhode *v.* Thwaites, 6 B. & C. 388, 13 E. C. L. 206; Boswell *v* Kilborn, 15 Moo. P. C. 309· Alexander *v.* Gardner, 1 Scott 630; Martindale *v.* Smith, 1 Q. B. 395, 41 E. C. L. 595; Payne *v.* Shadbolt, 1 Campb. 427.

United States. — Atlantic Phosphate Co. *v.* Grafflin, 114 U. S. 492; Brown *v.* Slee, 103 U. S. 828.

Alabama. — Winter *v.* Mobile Sav. Bank, 54 Ala. 174; Robbins *v.* Harrison, 31 Ala. 160; American Oak Extract Co. *v.* Ryan, 104 Ala. 267.

Arkansas. — Sumner *v.* Gray, 4 Ark. 469.

California. — Lassing *v.* James, 107 Cal. 348.

Colorado. — Ford *v.* Rockwell, 2 Colo. 376.

Delaware. — Pusey, etc., Co. *v.* Dodge, 3 Penn. (Del.) 53; Phœnix Lock Works *v.* Capelle Hardware Co., 9 Houst. (Del.) 232.

Illinois. — Brand *v.* Henderson, 107 Ill. 141; Burnham *v.* Roberts, 70 Ill. 19; Seckel *v.* Scott, 66 Ill. 106; Wade *v.* Moffett, 21 Ill. 110,

goods have not been delivered.[1] The only effect of delivery, where title has passed, is upon the form of action. Before delivery the action must be for goods bargained and sold, and neither delivery nor acceptance is necessary to support the action.[2] After delivery the action is for goods sold and delivered, and an actual delivery and acceptance are essential to support a recovery.[3]

74 Am. Dec. 79; Thorn *v.* Danzinger, 50 Ill. App. 306.

Indiana. — Kirby *v.* Studebaker, 15 Ind. 45.

Iowa. — Austin Mfg. Co. *v.* Decker, 109 Iowa 277; Warder *v.* Hoover, 51 Iowa 491.

Maine. — Pool *v.* Tuttle, 11 Me. 468, 26 Am. Dec. 552.

Maryland. — Armstrong *v.* Turner, 49 Md. 589.

Massachusetts. — Knight *v.* New England Worsted Co., 2 Cush. (Mass.) 271; Haskell *v.* Rice, 11 Gray (Mass.) 240; Stearns *v.* Washburn, 7 Gray (Mass.) 187; Hart *v.* Tyler, 15 Pick. (Mass.) 171; Gilmore *v.* Wilbur, 12 Pick. (Mass.) 120, 22 Am. Dec. 410; Thompson *v.* Alger, 12 Met. (Mass.) 428; Obery *v.* Lander, 179 Mass. 125; Williamson *v.* Hill, 154 Mass. 117; Pearson *v.* Mason, 120 Mass. 53; Thorndike *v.* Locke, 98 Mass. 340.

Michigan. — Richards *v.* Burroughs, 62 Mich. 117; McGraw *v.* Sturgeon, 29 Mich. 426; Begole *v.* McKenzie, 26 Mich. 470.

Minnesota. — Pineville Lumber Co. *v.* Thompson, 46 Minn. 502.

Mississippi. — New Orleans, etc., R. Co. *v.* Pressley, 45 Miss. 66.

Missouri. — Kevill *v.* Soldani, 34 Mo. 149.

New Hampshire. — Gordon *v.* Norris, 49 N. H. 376; Bailey *v.* Smith, 43 N. H. 141; Newmarket Iron Foundry *v.* Harvey, 23 N. H. 395; Messer *v.* Woodman, 22 N. H. 172, 53 Am. Dec. 241.

New York. — Reynolds *v.* Cleveland, 4 Cow. (N. Y.) 282, 15 Am. Dec. 369; Weston *v.* Brown, (Supm. Ct. Gen. T.) 36 N. Y. Supp. 675, 91 Hun (N. Y.) 639; Butler *v.* Haight, 8 Wend. (N. Y.) 535; Hunter *v.* Wetsell, 84 N. Y. 554, 38 Am. Rep. 544; Pollen *v.* Le Roy, 30 N. Y. 556.

North Carolina. — Fobes *v.* Branson, 81 N. Car. 256.

Oregon. — Brigham *v.* Hibbard, 28 Oregon 386.

Pennsylvania. — Trenton Rubber Co. *v.* Small, 3 Pa. Super. Ct. 8, 39 W. N. C. (Pa.) 281.

Washington. — Moore *v.* Perrott, 2 Wash. 1.

Wisconsin. — Ganson *v.* Madigan, 13 Wis. 67. See Sewell *v.* Eaton, 6 Wis. 490, 70 Am. Dec. 471.

Conflict of Laws. — Smith *v.* Godfrey, 28 N. H 379, 61 Am. Dec. 617.

1. Goods Not Delivered. — Story on Sales (4th ed.), § 436; Maclean *v.* Dunn, 4 Bing 722, 15 E. C. L. 129; Pusey, etc., Co. *v.* Dodge, 3 Penn. (Del.) 63; Mitchell *v.* Le Clair, 105 Mass. 308; Clark *v.* Greeley, 62 N. H. 394; Doremus *v.* Howard, 23 N. J. L. 390; Sands *v.* Taylor, 5 Johns. (N. Y.) 395, 4 Am. Dec. 374; Nicholson *v.* Paston, (Buffalo Super. Ct. Gen. T.) 11 N. Y. Supp. 567. See Bullock *v.* Finley, 28 Fed. Rep. 514.

2. When Delivery and Acceptance Unnecessary —*England.* — Alexander *v.* Gardner, 1 Scott 281, 630. 1 Bing. N. Cas. 671, 27 E. C. L. 538, 3 Dowl. 146, 1 Hodges 147, 4 L. J. C. Pl. 223; Scott *v.* England, 2 Dowl. & L. 520; Atkinson *v.* Bell, 8 B. & C. 277, 15 E. C. L. 216; Rhode *v.* Thwaites, 6 B. & C. 388, 13 E. C. L. 206; Simmons *v.* Swift, 5 B. & C. 857, 12 E. C. L. 388; Turley *v.* Bates, 2 H. & C. 200; Boulter *v.* Arnott, 1 Cromp. & M. 333; Hankey *v.* Smith, Peake 42, note; Kymer *v.* Suwercropp, 1 Campb. 109, 10 Rev. Rep. 646.

Delaware. — Pusey, etc., Co. *v.* Dodge, 3 Penn. (Del.) 63.

Illinois. — Kerfoot *v.* Cromwell Mound Co., 115 Ill. 502; Brand *v.* Henderson, 107 Ill. 141; Seckel *v.* Scott, 66 Ill. 106; Dole *v.* Olmstead, 36 Ill. 150. 85 Am. Dec. 397, 41 Ill. 344, 89 Am. Dec. 386.

Maine. — Atwood *v.* Lucas, 53 Me. 508, 89 Am. Dec. 713.

Massachusetts. —Cushing *v.* Breed, 14 Allen (Mass.) 380, 92 Am. Dec. 777; Stearns *v.* Washburn, 7 Gray (Mass.) 187; Middlesex Co. *v.* Osgood, 4 Gray (Mass.) 447; Frazier *v.* Simmons, 139 Mass. 531; Turner *v.* Langdon, 112 Mass. 265; Morse *v.* Sherman, 106 Mass. 430.

Missouri. — Ozark Lumber Co. *v.* Chicago Lumber Co., 51 Mo. App. 555; Brewington *v.* Mesker, 51 Mo. App. 348.

New Hampshire. — Bailey *v.* Smith, 43 N. H. 141; Warren *v.* Buckminster, 24 N. H. 336; Newmarket Iron Foundry *v.* Harvey, 23 N. H. 395.

New Jersey. — Doremus *v.* Howard, 23 N. J. L. 390.

New York. — Outwater *v.* Dodge, 7 Cow. (N. Y.) 85; Hague *v.* Porter, 3 Hill (N. Y.) 141; Bradley *v.* Wheeler, 44 N. Y. 495; Russell *v.* Carrington, 42 N. Y. 118, 1 Am. Rep. 498; Kimberley *v.* Patchin, 19 N. Y. 330, 75 Am. Dec. 334.

Tennessee. — McClure *v.* Williams, 5 Sneed (Tenn.) 718.

3. When Delivery and Acceptance Necessary. — Blackburn on Sales, 238; Benj. on Sales (6th Am. ed.), §§ 677, 869.

England. —Cort *v.* Ambergate, etc., Junction R. Co., 17 Q. B. 127, 79 E. C. L. 126; 20 L. J. Q. B. 460; Staunton *v.* Wood, 16 Q. B. 638, 71 E. C. L. 638, 15 Jur. 1123; Elliott *v.* Heginbotham, 2 C. & K. 545, 61 E. C. L. 545; Salter *v.* Woollams, 2 M. & G. 650, 40 E. C. L. 559; Dodsley *v.* Varley, 12 Ad. & El. 632, 40 E. C. L. 141; Simmons *v.* Swift, 5 B. & C. 857, 12 E. C. L. 388; Thompson *v.* Maceroni, 3 B. & C. 17 10 E. C. L. 3; Goodall *v.* Skelton, 2 H. Bl. 316; Boulter *v.* Arnott, 1 Cromp. & M. 333; Smith *v.* Chance, 2 B. & Ald. 755; Storr *v.* Scott, 6 C. & P. 241, 25 E. C. L. 378; Anderson *v.* Hodgson, 5 Price 630; Forbes *v.* Smith, 11 W. R. 574; Hazard *v.* Hodges, 7 W. R. 204; Bianchi *v.* Nash 1 M. & W. 545, Tyrw. & G. 916, 5 L. J. Exch. 252.

Arkansas. — Gilliam *v.* Towles, 15 Ark. 64.

Delaware. — Grier *v.* Simpson, 8 Houst. (Del.) 7.

Illinois. — Dwyer *v.* Duquid, 70 Ill. 307; Burnham *v.* Roberts. 70 Ill. 19; McEwen *v.* Morey, 60 Ill. 32; Graff *v.* Fitch, 58 Ill. 373,

But the recovery is the same in either case, and is the contract price.[1] If the goods have not been delivered, they must be tendered at the trial.[2]

c. WHERE RIGHT OF ACTION ACCRUES. — The right of action for the price is complete upon the sale and tender or delivery of the goods.[3]

Sales on Credit. — Where the sale was on credit, the action cannot be maintained until the expiration of the time for which the credit was extended,[4] unless the credit was obtained by fraud, in which case an action will lie

11 Am. Rep. 85; Ward *v.* Taylor, 56 Ill. 494; Consolidated Coal Co. *v.* Block, etc., Smelting Co., 36 Ill. App. 38.

Kentucky. — Snodgrass *v.* Broadwell, 2 Litt. (Ky.) 355.

Maine. — Greenleaf *v.* Hamilton, 94 Me. 118; Greenleaf *v.* Gallagher, 93 Me. 549, 74 Am. St. Rep. 371; Atwood *v.* Lucas, 53 Me. 508, 89 Am. Dec. 713; Moody *v.* Brown, 34 Me. 107, 56 Am. Dec. 640; Edmunds *v.* Wiggin, 24 Me. 505.

Maryland. — Hewes *v.* Jordan, 39 Md. 472, 17 Am. Rep. 578.

Massachusetts. — Stern *v.* Filene, 14 Allen (Mass.) 9; Stearns *v.* Washburn, 7 Gray (Mass.) 187; Hart *v.* Tyler, 15 Pick. (Mass.) 171; Benjamin *v.* Dockham, 134 Mass. 418; Wadsworth *v.* Gay, 118 Mass. 44; Goddard *v.* Binney, 115 Mass. 450, 15 Am. Rep. 112; Nichols *v.* Morse, 100 Mass. 523.

Michigan. — Richards *v.* Burroughs, 62 Mich. 117; Gage *v.* Meyers, 59 Mich. 300; Hart *v.* Summers, 38 Mich. 399; Begole *v.* McKenzie, 26 Mich. 470; Weston *v.* McDowell, 20 Mich. 353; Butterfield *v.* Seligman, 17 Mich. 98.

New Hampshire. — Davis *v.* Dyer, 60 N. H. 400; Young *v.* Woodward, 44 N. H. 250; Messer *v.* Woodman, 22 N. H. 172, 53 Am. Dec. 241.

New Jersey. — Perdicaris *v.* Trenton City Bridge Co., 29 N. J. L. 367; Boswell *v.* Green, 25 N. J. L. 390; Clark *v.* Imlay, 12 N. J. L. 119.

New York. — Dexter *v.* Bevins, 42 Barb. (N. Y.) 573; Outwater *v.* Dodge, 7 Cow. (N. Y.) 85; Hague *v.* Porter, 3 Hill (N. Y.) 141; Bement *v.* Smith, 15 Wend. (N. Y.) 493; Porter *v.* M'Clure, 15 Wend. (N. Y.) 189; Gray *v.* Walton, 107 N. Y. 254, Groat *v.* Gile, 51 N. Y. 431.

Pennsylvania. — Yohe *v.* Robertson, 2 Whart. (Pa.) 155.

Texas. — Hamilton *v.* James A. Cushman Mfg. Co., 15 Tex. Civ. App. 338.

Vermont. — Allen *v.* Thrall, 36 Vt. 711; Rider *v.* Kelley, 32 Vt. 268, 76 Am. Dec. 176; Latham *v.* Lewis, *cited* in Carpenter *v.* Brainerd, 37 Vt. 147, and in Hodges *v.* Fox, 36 Vt. 81 (*overruling* Mattison *v.* Wescott, 13 Vt. 258).

Wisconsin. — Ganson *v.* Madigan, 13 Wis. 67.

Compare Fox *v.* Utter, 6 Wash. 299.

"There may be such a delivery as will satisfy the statute of frauds, and yet not such a delivery as will authorize the maintenance of a suit for goods sold and delivered. Delivery to and acceptance by the purchaser of any portion of the goods bargained for will satisfy the statute of frauds, but to authorize the maintenance of a suit for goods sold and delivered there must be a delivery and acceptance of all the goods sued for." Atwood *v.* Lucas, 53 Me. 510, 89 Am. Dec. 713. See also Outwater *v.* Dodge, 7 Cow. (N. Y.) 85; Timmons *v.* Nelson, 66 Barb. (N. Y.) 594; Ketchum *v.* Evertson, 13 Johns. (N. Y.) 359; 7 Am. Dec. 384; Champlin *v.* Rowley, 13 Wend. (N. Y.) 258.

In an action for goods sold and delivered, the plaintiff may recover the price upon proof of a delivery in accordance with the contract without proving acceptance. Nichols *v.* Morse, 100 Mass. 523. See also Brigham *v.* Hibbard, 28 Oregon 386.

The vendor may recover for goods sold and delivered, as well as for goods bargained and sold, without proving any actual acceptance. Ozark Lumber Co. *v.* Chicago Lumber Co., 51 Mo. App. 555.

Partial Delivery. — The count for goods sold and delivered lies for the value of such articles, delivered in part performance of an entire contract of sale, as have been accepted by the vendee. Watson *v.* Kirby, 112 Ala. 436; Shimp *v.* Siedel, 6 Houst. (Del.) 421; Sentell *v.* Mitchell, 28 Ga. 196; Boynton *v.* Wicker, 45 Ill. 137; Bowker *v.* Hoyt, 18 Pick. (Mass.) 555; Gage *v.* Meyers, 59 Mich. 300; Begole *v.* McKenzie, 26 Mich. 470; Clark *v.* Moore, 3 Mich. 55.

Contract of "Sale or Return." — Where goods have been sold upon a contract of sale or return within a reasonable time, and the goods are detained an unreasonable time, the plaintiff may maintain an action upon the common count for goods sold and delivered, the title having passed. Perkins *v.* Douglass, 20 Me. 317; Dearborn *v.* Turner, 16 Me. 17, 33 Am. Dec. 630; Meldrum *v.* Snow, 9 Pick. (Mass.) 441, 20 Am. Dec. 489; Schlesinger *v.* Stratton, 9 R. I. 578; Moss *v.* Sweet, 16 Q. B. 493, 71 E. C. L. 493; Beverley *v.* Lincoln Gas Light, etc., Co., 2 N. & P. 283, 6 Ad. & El. 829, 33 E. C. L. 222, 7 L. J. Q. B. 113; Bailey *v.* Gouldsmith, Peake, 78; Harrison *v.* Allen, 9 Moo. 28 1 C. & P. 235, 2 Bing. 4, 9 E. C. L. 291, 2 L. J. C. Pl. 97.

1. See *infra*, this section, 2. *d. Amount of Recovery.*

2. Tender of Goods at Trial. — Stokes *v.* Mackay, 82 Hun (N. Y.) 449.

3. Action Accrues on Sale and Tender of Goods. — Ozark Lumber Co. *v.* Chicago Lumber Co., 51 Mo. App. 555; Brewington *v.* Mesker, 51 Mo. App. 348; Hobkirk *v.* Green, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 18; Keppert *v.* Aultman, (Tex. Civ. App. 1901) 61 S. W. Rep. 410. See Shipps *v.* Atkinson, 8 Ind. App. 505. See also *supra*, this section, 2. *Action for Price — a. Where Contract Is Executory.*

4. Expiration of Credit — *England.* — Mussen *v.* Price, 4 East 147; Dutton *v.* Solomonson, 3 B. & P. 582.

Canada. — Auger *v.* Thompson, 3 Ont. App. 19. See Sheriff *v.* McCoy, 27 U. C. Q. B. 597.

Colorado. — Lindsey *v.* Flebbe, 5 Colo. App. 218.

immediately for the price,[1] or unless the credit has been waived.[2] If the credit is conditional, or is extended for a consideration, and the condition is not performed or the consideration fails, suit may be brought for the price as though no credit had been given.[3] If a note has been given for the price, the action cannot be brought until after maturity of the note.[4] Whether or not the sale was upon credit depends upon the terms of the contract.[5]

If a Note or Other Security Is to Be Given at once, payable at a future day, the vendor may maintain an action for a default in giving the note or security, in which action he may recover the contract price as the measure of damages, without waiting for the expiration of the agreed credit,[6] unless it appears

Delaware. — Pusey, etc., Co. *v.* Dodge, 3 Penn. (Del.) 63.

Illinois. — Manton *v.* Gammon, 7 Ill. App. 201.

Indiana. — Hays *v.* Weatherman, 14 Ind. 341.

Iowa. — McCormick *v.* Basal, 46 Iowa 235.

Maryland. — Dellone *v.* Hull, 47 Md. 112; Appleman *v.* Michael, 43 Md. 269.

Massachusetts. — Wilder *v.* Colby, 134 Mass. 377.

Michigan. — Galloway *v.* Holmes, 1 Dougl. (Mich.) 330.

Mississippi. — Crawford *v.* Avery, 35 Miss. 205.

Missouri. — Campbell *v.* Buller, 32 Mo. App. 646.

New Hampshire. — Dodge *v.* Waterman, 36 N. H. 186.

New York. —Keller *v.* Strasburger, 23 Hun (N. Y.) 625; *affirmed* 90 N. Y. 379; Yale *v.* Coddington, 21 Wend. (N. Y.) 175; Hanna *v.* Mills, 21 Wend. (N. Y.) 90; Sturz *v.* Fisher, 38 N. Y. App. Div. 457; Zimmern *v.* Heinecke, (N. Y. City Ct. Gen. T.) 17 N. Y. Supp. 728.

Ohio. — Stephenson *v.* Repp, 47 Ohio St. 551; French Wax Figure Co. *v.* Jupp Baxter Co., 12 Ohio Cir. Dec. 76, 21 Ohio Cir. Ct. 764.

Oregon. — Wheeler *v.* Harrah, 14 Oregon 325.

Pennsylvania. — Rinehart *v.* Olwine, 5 W. & S. (Pa.) 157; Girard *v.* Taggart, 5 S. & R. (Pa.) 19, 9 Am. Dec. 327.

Tennessee. — Brady *v.* Isler, 9 Lea (Tenn.) 356.

Texas. — Young *v.* Dalton, 83 Tex. 497.

Vermont. — Scott *v.* Montague, 16 Vt. 164.

Wisconsin. — Frederickson *v.* Ayer, 93 Wis. 217.

In Girard *v.* Taggart, 5 S. & R. (Pa.) 19, 9 Am. Dec. 327, there was an auction sale. On tender the buyer refused to accept the goods, and the owner was allowed to maintain an action for damages immediately, but it was admitted that he could not sue for the price until the time of credit had expired.

An action commenced upon the day upon which the term of credit expires cannot be maintained. Sturz *v.* Fisher, 38 N. Y. App. Div. 457.

1. Credit Obtained by Fraud — *United States.* — Barrett *v.* Koella, 5 Biss. (U. S.) 40.

Kentucky. — Dietz *v.* Sutcliffe, 80 Ky. 650.

Maine. — Hervey *v.* Harvey, 15 Me. 357.

Massachusetts. — Manufacturers', etc., Bank *v.* Gore, 15 Mass. 79, 8 Am. Dec. 83. See Montgomery *v.* Forbes, 148 Mass. 249.

New York. — Kayser *v.* Sichel, 34 Barb. (N. Y.) 84; Roth *v.* Palmer, 27 Barb. (N. Y.) 654; Keller *v.* Strasburger, 23 Hun (N. Y.) 625, *affirmed* 90 N. Y. 379; Claflin *v.* Taussig, 7 Hun (N. Y.) 223; Willson *v.* Foree, 6 Johns. (N. Y.) 110, 5 Am. Dec. 195; Heilbronn *v.* Herzog, 165 N. Y. 98, *reversing* 33 N. Y. App. Div. 311; Eppens *v.* McGrath, (N. Y. City Ct. Gen. T.) 3 N. Y. Supp. 213. *Compare* Heilbronn *v.* Herzog, 73 N. Y. App. Div. 188.

Oklahoma. — Jaffray *v.* Wolf, 4 Okla. 303.

Oregon. — Crown Cycle Co. *v.* Brown, 39 Oregon 285.

See also Pope *v.* Nance, 1 Stew. (Ala.) 354, 18 Am. Dec. 60. *Compare* Jones *v.* Brown, 167 Pa. St. 395.

2. Credit Waived. — Keller *v.* Strasburger, 23 Hun (N. Y.) 625, *affirmed* 90 N. Y. 379.

Where the sale of hotel furniture, partly on credit, was part of an arrangement by which the purchaser was bound to rent the hotel, and he failed to perform the agreement to pay rent and abandoned the premises, it was held that he could not object that the credit allowed him on the furniture protected him from immediate suit for the unpaid purchase money. Wineman *v.* Walters, 53 Mich. 470.

3. Conditional Credit. — Wineman *v.* Walters, 53 Mich. 470; Baldwin *v.* Threlkeld, 8 Ind. App. 312; Morgan *v.* Turner, 4 Tex. Civ. App. 192. But see Allen *v.* Ford, 19 Pick. (Mass.) 217. See also Allen *v.* D. H. Ranck Pub. Co., 98 Ill. App. 44.

4. Note Given for Price. — Lee *v.* Tinges, 7 Md. 215; Sturz *v.* Fischer, 19 N. Y. App. Div. 198; Guilford *v.* Mulkin, 85 Hun (N. Y.) 489; Jones *v.* Brown, 167 Pa. St. 395. See also Claflin *v.* Taussig, 7 Hun (N. Y.) 223.

The seller may recover the residue if, after part payment of the note given, the buyer, by means of fraudulent representations, induces him to surrender the note. Blodgett *v.* Webster, 24 N. H. 91.

Where the Note Is Forged, an action may be maintained for the price without regard to the note. Baldwin *v.* Threlkeld, 8 Ind. App. 312.

5. Cash or Credit Sale. — Moss *v.* Katz, 69 Tex. 411. See also *supra*, VII. 2. *Cash or Credit Sales.*

6. Failure to Give Agreed Security for Price. — *England.* — Mussen *v.* Price, 4 East 147; Dutton *v.* Solomonson, 3 B. & P. 582.

Illinois. — Manton *v.* Gammon, 7 Ill. App. 201.

Indiana. — Carnahan *v.* Hughes, 108 Ind. 225; Bicknell *v.* Buck, 58 Ind. 354; Hays *v.* Weatherman, 14 Ind. 341; Burke *v.* Keystone Mfg. Co., 19 Ind. App. 556.

Iowa. — McCormick *v.* Basal, 46 Iowa 235; Hoover *v.* Cary, 86 Iowa 494.

Minnesota.—Barron *v.* Mullin, 21 Minn. 374.

Mississippi. — Crawford *v.* Avery, 35 Miss. 205.

that he has waived the stipulation for a note.[1] If the bill or note is not given as agreed, the vendor must either declare specially for breach of the contract to give the paper,[2] or he must wait until the period for which the bill or note was to run has expired, whereupon he may recover upon the common count for goods sold and delivered,[3] though it has been held that a failure to give the agreed security operates as a waiver of the credit, and entitles the vendor to sue immediately upon the common counts for goods sold and delivered.[4]

Instalment Contracts. — Where deliveries or payments are to be made by instalments from time to time, upon a breach of the buyer upon any instalment, the seller may treat the contract as wholly broken and recover the contract price for goods already delivered, together with damages for the breach as to the future instalments.[5] Upon breach by the seller, the purchaser is under no obligation to pay for goods already delivered under the contract until the

Missouri. — Aultman *v.* Daggs, 50 Mo. App. 280; Campbell *v.* Buller, 32 Mo. App. 646.

New York. — Smith *v.* Milliken, 7 Lans. (N. Y.) 336; Hanna *v.* Mills, 21 Wend. (N. Y.) 90, 34 Am. Dec. 216; Yale *v.* Coddington, 21 Wend. (N. Y.) 175; Matthews *v.* McGrath, (N. Y. City Ct. Gen. T.) 19 N. Y. St. Rep. 45.

Ohio. — Stephenson *v.* Repp, 47 Ohio St. 551.

Oregon. — Wheeler *v.* Harrah, 14 Oregon 325.

Pennsylvania. — Girard *v.* Taggart, 5 S. & R. (Pa.) 19, 9 Am. Dec. 333; Rinehart *v.* Olwine, 5 W. & S. (Pa.) 157.

Vermont. — Foster *v.* Adams, 60 Vt. 392, 6 Am. St. Rep. 120; Hale *v.* Jones, 48 Vt. 227; Rice *v.* Andrews, 32 Vt. 691.

See Morgan *v.* Turner, 4 Tex. Civ. App. 192; Caldwell *v.* Dutton, 20 Tex. Civ. App. 369.

In Carnahan *v.* Hughes, 108 Ind. 225, the agreement was that both buyers should execute the notes for the price. The seller received and retained notes executed by one buyer alone. In an action by the seller against the other for damages for refusing to sign the notes, it was held that he could not maintain the action without offering to return the notes already received.

Note Given for Price. — An action may be maintained to recover the purchase price, where the goods were sold without credit, although notes have been subsequently given, when there is no agreement to extend the time, and the notes are produced and offered to be surrendered. Fuller *v.* Negus, (Supm. Ct. Gen. T.) 29 N. Y. St. Rep. 192, *following* Graham *v.* Negus, 55 Hun (N. Y.) 440.

Price Payable in Instalments. — Where a contract of sale stipulates for payment by instalments, to be secured by promissory notes, which notes the buyer, after delivery of the goods, refuses to give, the seller may either treat the contract as broken and sue for damages, or regard it as subsisting and sue for each instalment as it falls due. Clarke *v.* Dill, (Pa. 1887) 11 Atl. Rep. 82.

1. Waiver of Stipulation for Note. — Dodge *v.* Waterman, 36 N. H. 186; Scott *v.* Montague, 16 Vt. 164.

2. Action for Failure to Give Security or for Price. — Mussen *v.* Price, 4 East 147; Dutton *v.* Solomonson, 3 B. & P. 582; Manton *v.* Gammon, 7 Ill. App. 201; Hnnneman *v.* Grafton, 10 Met. (Mass.) 454; Gibbs *v.* Blanchard, 15 Mich. 305; Crawford *v.* Avery, 35 Miss. 205; Yale *v.* Coddington, 21 Wend. (N. Y.) 175.

In Clarke *v.* Dill, (Pa. 1887) 11 Atl. Rep. 82, it was held that where a contract of sale stipulated for payment by instalments which were to be secured by promissory notes, and the buyer, after delivery of the property, refuses to give the notes, the seller may consider the contract either as broken and sue for damages, or as still subsisting, and sue for each instalment upon its becoming due.

3. Marshall *v.* Poole, 13 East 97; Hoskins *v.* Duperoy, 9 East 498; Mussen *v.* Price, 4 East 147; Lee *v.* Risdon, 7 Taunt. 188, 2 E. C. L. 188; Heron *v.* Granger, 5 Esp. 269; Dutton *v.* Solomonson, 3 B. & P. 582; Manton *v.* Gammon, 7 Ill. App. 201; Gibbs *v.* Blanchard, 15 Mich. 292; Barron *v.* Mullin, 21 Minn. 374; Crawford *v.* Avery, 35 Miss. 209; Yale *v.* Coddington, 21 Wend. (N. Y.) 175.

Where a machine was sold for which the notes of two parties were taken in payment, a demand must be made upon both for the note before suit can be brought for the price of the machine. Osborne *v.* Bell, 62 Mich. 214.

4. Rice *v.* McLarren, 42 Me. 165; Loring *v.* Gurney, 5 Pick. (Mass.) 15; Patterson *v.* Stettauer, 40 N. Y. Super. Ct. 54; Rice *v.* Andrews, 32 Vt. 691. See also Wineman *v.* Walters, 53 Mich. 470.

The purchaser of goods was given an option to pay in thirty days, or give a four months' note. He did neither and it was held that at the expiration of thirty days an action could be brought for the price. Matthews *v.* McGrath, (N. Y. City Ct. Gen. T.) 2 N. Y. Supp. 659.

5. Instalment Contracts.— Hale *v.* Trout, 35 Cal. 229; Roebling's Sons' Co. *v.* Lock Stitch Fence Co., 130 Ill. 660; Glenn *v.* Miller, (Ky. 1897) 38 S. W. Rep. 1086; Nichols *v.* Scranton Steel Co., 137 N. Y. 471; Kokomo Straw-Board Co. *v.* Inman, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 329, *affirmed* 134 N. Y. 92; Hocking *v.* Hamilton, 158 Pa. St. 107, 33 W. N. C. (Pa.) 221. *Compare* Hunt *v.* Markle, 12 Ind. App. 335.

In Nightingale *v.* Eiseman, 50 Hun (N. Y.) 189, it appeared that goods had been ordered from the plaintiffs to be delivered at different times in certain quantities, and to be paid for ten days after the delivery. It was held that there could be no recovery of price until one complete delivery had been made. *Affirmed* 121 N. Y. 288.

time for all the deliveries under the contract has expired and the amount of the damages suffered by him can be determined.[1]

Partial Delivery. — If partial delivery only has been made, the seller may recover the price of the part actually delivered subject to an offset of the damages caused to the buyer by his failure to deliver,[2] unless by the terms of the contract complete performance is made a condition precedent to the right to demand payment.[3]

Conditions Precedent imposed by the contract must be performed or waived before an action will lie to recover the price.[4]

d. AMOUNT OF RECOVERY. — The contract price fixes the amount of recovery and is the measure of damages.[5] Evidence that the goods were not

1. Anglo-American Provision Co. *v.* Prentiss, 157 Ill. 506.

2. **Partial Delivery** — *Alabama.* — Watson *v.* Kirby, 112 Ala. 436; Raisin Fertilizer Co. *v.* J. J. Barrow, Jr. Co., 97 Ala. 694.

Indiana. — Hoagland *v.* Moore, 2 Blackf. (Ind.) 167.

Massachusetts. — Moulton *v.* Trask, 9 Met. (Mass.) 577.

Michigan. — Gage *v.* Meyers, 59 Mich. 300; Mitchell *v.* Scott, 41 Mich. 108; Moon *v.* Harder, 38 Mich. 566; McQueen *v.* Gamble, 33 Mich. 344; Begole *v.* McKenzie, 26 Mich. 470.

New Hampshire. — Flanders *v.* Putney, 58 N. H. 358; Horn *v.* Batchelder, 41 N. H. 86.

Wisconsin. — Goodwin *v.* Merrill, 13 Wis. 658.

See Smith *v.* Keith, etc., Coal Co., 36 Mo. App. 567; Brady *v* Cassidy, 145 N. Y. 171; Partridge *v.* Gildermeister, 3 Abb. App. Dec. (N. Y.) 461. See also Clarke *v.* Johnson Foundry, etc., Co., (Ky. 1897) 42 S. W. Rep. 844.

See also cases cited *infra* as to performance or waiver of conditions precedent.

The seller cannot sue for the part actually delivered and accepted, until after the expiration of the time in which the residue is to be delivered. Waddington *v.* Oliver, 2 B. & P. N. R. 61; Oxendale *v.* Wetherell, 9 B. & C. 386, 17 E. C. L. 401, 1 Comyns's Dig., Actions, F. 2.

3. **Performance a Condition Precedent.** — Pratt *v.* Gulick, 13 Barb. (N. Y.) 300; McKnight *v.* Dunlop, 4 Barb. (N. Y.) 36; Jennings *v.* Camp, 13 Johns. (N. Y.) 94, 7 Am. Dec. 367; M'Millan *v.* Vanderlip, 12 Johns. (N. Y.) 165, 7 Am. Dec. 299; Champlin *v.* Rowley, 13 Wend. (N. Y.) 258.

4. **Performance or Waiver of Conditions Precedent** — *United States.* — Springfield Milling Co. *v.* Barnard, etc., Mfg. Co., (C. C. A.) 81 Fed. Rep. 261.

Alabama. — Wikle *v.* Johnson Laboratories, 132 Ala. 268; Southern R. Co. *v.* Spragins, 131 Ala. 319.

Arizona. — Bashford-Burmister Co. *v.* Agua Fria Copper Co., (Ariz. 1894) 35 Pac. Rep. 983.

California. — Russ Lumber, etc., Co. *v.* Muscupiabe Land, etc., Co., 120 Cal. 521, 65 Am. St. Rep. 186.

Delaware. — Pusey, etc., Co. *v.* Dodge, 3 Penn. (Del.) 63.

Georgia. — Blount *v.* Edison Gen. Electric Co., 106 Ga. 197.

Illinois. — Morris *v.* Wibaux, 159 Ill. 627; Dearborn Foundry Co. *v.* Rielly, 79 Ill. App. 281.

Indiana. — Marion Mfg. Co. *v.* Harding, 155 Ind. 648; Shipps *v.* Atkinson, 8 Ind. App. 505; Neal *v.* Shewalter, 5 Ind. App. 147.

Iowa. — Becker *v.* Calderwood, 102 Iowa 529.

Maryland. — Hartlove *v.* Durham, 86 Md. 689.

Massachusetts. — Knight *v.* New England Worsted Co., 2 Cush. (Mass.) 271.

Michigan. — Gordon *v.* Cleveland Sawmill, etc., Co., 123 Mich. 430.

Minnesota. — Potter *v.* Holmes, 65 Minn. 377.

Nebraska. — Silurian Mineral Spring Co. *v.* Kuhn, (Neb. 1902) 91 N. W. Rep. 508; Hayden *v.* Frederickson, 59 Neb. 141; Barker *v.* Davies, 47 Neb. 78; Bryant *v.* Thesing, 46 Neb. 244.

New York. — Nash *v.* Weidenfeld, 166 N. Y. 612; Hubbard *v.* Chapman, 165 N. Y. 609; E. W. Bliss Co. *v.* U. S. Incandescent Gas Light Co., 149 N. Y. 300; Brady *v.* Cassidy, 145 N. Y. 171; Hubbard *v* Chapman, 34 N. Y. App. Div. 252; Kaufman *v.* Canary, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 302; Logan *v.* Berkshire Apartment House, (C. Pl. Gen. T.) 3 Misc. (N. Y.) 296; Maguire *v.* Durant, (N. Y. City Ct. Gen. T.) 1 Misc. (N. Y.) 509; *distinguishing* Bunn *v.* Lett, 65 Hun (N. Y.) 43; Rochester Printing Co. *v.* Kellogg, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 279.

Ohio. — Simmons Hardware Co. *v.* Bucket Pump Co., 10 Ohio Cir. Dec. 285, 18 Ohio Cir. Ct. 878.

Pennsylvania. — Rockwell Mfg. Co. *v.* Cambridge Springs Co., 21 Pa. Co. Ct. 248; Christner, *v.* John, 2 Pa. Super. Ct. 78, 21 Pittsb. Leg. J. N. S. (Pa.) 117, 39 W. N. C. (Pa.) 44; Sidney School Furniture Co. *v.* Warsaw Tp. School, 158 Pa. St. 35, 33 W. N. C. (Pa.) 287; Manbeck *v.* Shaffer, 16 Lanc. L. Rev. 321.

Rhode Island. — Hargraves *v.* A. B. Pitkin Mach. Co., 19 R. I. 426.

Vermont. — New England Granite Works *v.* Bailey, 69 Vt. 257.

Wisconsin. — Nichols, etc., Co. *v.* Chase, 103 Wis. 570.

See Cowan *v.* Fisher, 31 Ont. 426; Vanausdeln *v.* Crenshaw, 16 Kan. 234; C. S. Burt Co. *v.* Laplace, 46 La Ann. 722.

5. **Contract Price** — *Arkansas.* — Beaty *v.* Johnston, 66 Ark. 529.

Colorado. — Morrison *v.* Bartholomew, 9 Colo. App. 27.

Delaware. — Darby *v.* Hall, 3 Penn. (Del.) 25.

Georgia. — Underwood *v.* Caldwell, 102 Ga. 16.

worth the contract price is inadmissible in the absence of warranty or fraud.[1] But in an action upon an implied assumpsit the plaintiff is entitled to recover only the reasonable value of the goods delivered, and not the contract price.[2] Where no price is fixed by the contract the market price at the time and place of sale is the amount of recovery,[3] irrespective of the real or actual value of the goods.[4] Where there is no market price, and no price is fixed by the contract, the reasonable value of the goods may be recovered.[5] If part of the price has been paid, the recovery is limited to the amount unpaid.[6] A recovery can be had only for the amount of goods delivered to the defendant.[7] A breach of warranty may be shown in reduction of the stipulated price.[8] The defendant may show in mitigation of damages that the goods were of a quality inferior to what they were represented to be at the sale or called for by the contract.[9] But in the absence of warranty or fraud, the buyer is not entitled to a deduction from the price upon the ground of defects in goods which have been delivered and accepted.[10] Damages for delay in delivery

Michigan. — Leffel *v.* Piatt, 126 Mich. 443, 8 Detroit Leg. N. 92; Deyo *v.* Hammond, 102 Mich. 122.

Missouri. — Drumm-Flato Commission Co. *v.* Zeb F. Crider Commission Co., 165 Mo. 84.

Nebraska. — Boston Tea Co. *v.* Brubaker, 26 Neb. 409.

New Hampshire. — Gordon *v.* Norris, 49 N. H. 376.

New York. — Kingman *v.* Hotaling, 25 Wend. (N. Y.) 423; Stuart *v.* Manhattan Bath Tub Co., (Supm. Ct. App. T.) 34 Misc. (N. Y.) 165; Butcher *v.* Consolidated Trust Co., 44 N. Y. App. Div. 370; Shapiro *v.* Jacoves, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 473; Kokomo Straw Board Co. *v.* Inman, (Supm. Ct. Gen, T.) 11 N. Y. Supp. 329.

Texas. — Corbett *v.* Sayers, (Tex. Civ. App. 1902) 69 S. W. Rep. 108; Henry *v.* McCardell, 15 Tex. Civ. App. 497; Godfrey *v.* Anderson, 12 Tex. Civ. App. 64.

Washington. — Tilden *v.* Gordon, 25 Wash. 593.

There is no implied contract that the buyer shall pay the seller for any services in relation to the property rendered previous to the completion of the sale by delivery. Cole *v.* Kerr, 20 Vt. 21.

Exemplary Damages. — In *South Carolina*, the seller is by statute entitled to recover exemplary damages against a purchaser who fails to pay. See McDaniel *v.* Monroe, 63 S. Car. 307.

1. Value or Market Price Immaterial. — Philip Schneider Brewing Co. *v.* American Ice-Mach. Co., 77 Fed. Rep. 138, 40 U. S. App. 382; Blumenthal *v.* Greenberg, 130 Cal. 384; Morrison *v.* Bartholomew, 9 Colo. App. 27; Stocks *v.* Scott, 89 Ill. App. 615; Bicknell *v.* Buck, 58 Ind. 354; Obery *v.* Lander, 179 Mass. 125; Shirley *v.* Keagy, 126 Pa. St. 282. See Dickson *v.* Jordan, 12 Ired. L. (34 N. Car.) 79. See also Vedder *v.* Leamon, 70 N. Y. App. Div. 252.

It is no defense that the price as agreed on was above the market price. Miller *v.* Tiffany, 1 Wall. (U. S.) 308.

2. Implied Assumpsit. — Redman *v.* Adams, 165 Mo. 60; Rude *v.* Mitchell, 97 Mo. 371; Mansur *v.* Botts, 80 Mo. 651; Ibers *v.* O'Donnell, 25 Mo. App. 120.

3. Market Price. — B. S. Green Co. *v.* Smith, 52 Ill. App. 158; Dickson *v.* Jordan, 12 Ired. L. (34 N. Car.) 79.

4. Dickson *v.* Jordan, 12 Ired. L. (34 N. Car.) 79.

5. Reasonable Value. — Lovejoy *v.* Michels, 88 Mich. 15; Livingston *v.* Wagner, 23 Nev. 53; Welling *v.* Ivoroyd Mfg. Co., 162 N. Y. 599, *affirming* 15 N. Y. App. Div. 116; Pelletreau *v.* United Electric Light, etc., Co., (C. Pl. Gen. T.) 10 Misc. (N. Y.) 769. See generally *supra*, this section.

In Greene *v.* Bateman, 2 Woodb. & M. (U. S.) 359, there was a misunderstanding as to price, after delivery of the shingles sold. The buyer offered to return them or to pay the price offered. The seller refused and insisted on being paid his own price. The buyer then kept the shingles and sold them. It was held that the seller might recover, as a reasonable price, the proceeds of the sale after deducting a fair compensation to the buyer.

6. Partial Payment. — See Rose *v.* Story, 1 Pa. St. 190, 44 Am. Dec. 121.

7. Recovery Limited to Amount of Goods Delivered. — Edison Electric Light Co. *v.* McCorkell, 161 Pa. St. 227; Shaw *v.* Gilmer, (Tex. Civ. App. 1902) 66 S. W. Rep. 679. See Shaw *v.* Lady Ensley Coal, etc., R. Co., 147 Ill. 526, *reversing* 46 Ill. App. 603, and *distinguishing* 118 Ill. 524. But see Higbie *v.* Rogers, (N. J. 1901) 48 Atl. Rep. 554, decree *reversed* 63 N. J. Eq. 368.

8. Breach of Warranty in Reduction of Price. — Hodge *v.* Tufts, 115 Ala. 366; McCormick Harvesting Mach. Co. *v.* Robinson, 60 Ill. App. 253; Green *v.* Witte, 5 Ind. App. 343; Danforth *v.* Crookshanks, 68 Mo. App. 311; Hall *v.* Clark, 21 Mo. 415; Kester *v.* Miller, 119 N. Car. 475; Allen *v.* Hooker, 25 Vt. 137. See generally the title WARRANTY.

9. Inferior Quality of Goods in Mitigation. — Miller *v.* Smith, 1 Mason (U. S.) 437; Culver *v.* Blake, 6 B. Mon. (Ky.) 528; Wescott *v.* Nims, 4 Cush. (Mass.) 215; Hunter *v.* Lake Mills, (Miss. 1901) 29 So. Rep. 519; Renaud *v.* Peck, 2 Hilt. (N. Y.) 137; Howie *v.* Rea, 70 N. Car. 559; Falconer *v.* Smith, 18 Pa. St. 130, 55 Am. Dec. 611; Dailey *v.* Green, 15 Pa. St. 118. See also *infra*, this section. *Defenses* — Note 8, p. 1127, *Set-off, Recoupment, and Counterclaim.*

10. Waiver of Defects by Acceptance — *United States.* — Peck Colorado Co. *v.* Stratton, 95 Fed. Rep. 741.

Georgia. — Page *v.* Dodson Printers' Supply Co., 106 Ga. 77.

may be shown in reduction of the recovery.[1]

e. DEFENSES. — In defense to the action the buyer may set up breach of warranty or fraud,[2] or any defect in the goods, or default on the part of the seller which may have been ground for a rescission of the contract.[3] Mistake as a defense has been elsewhere separately considered.[4] Payment is, of course, a defense.[5] Ownership by a third person at the time of sale is not available as a defense, while the purchaser still retains possession,[6] and, of course, delivery to a third person claiming title is no defense unless such third person in fact had a superior title.[7] Set-off, recoupment, or counterclaim is a defense *pro tanto*, subject to the usual rules.[8] Illegality of the contract is

Kansas. — Minnesota Thresher Mfg. Co. *v.* Gruben, 6 Kan. App. 665.

Louisiana. — Cazelar *v.* Walker, 17 La. Ann. 236.

North Carolina. — Max *v.* Harris, 125 N. Car. 345. See Sapona Iron Co. *v.* Holt, 64 N. Car. 335.

North Dakota. — International Soc. *v.* Hildreth, (N. Dak. 1902) 91 N. W. Rep. 70; Plano Mfg. Co. *v.* Root, 3 N. Dak. 165.

New York. — U. S. Trust Co. *v.* Harris, 2 Bosw. (N. Y.) 75; Gihon *v.* Levy, 2 Duer (N. Y.) 176; Welling *v.* Ivoroyd Mfg. Co., 15 N. Y. App. Div. 116, 4 N. Y. Annot. Cas. 145; Smadback *v.* Wolffe, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 82; Wiles *v.* Provost, 6 N. Y. App. Div. 1; Hospital Supply Co. *v.* O'Neill, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 655. See Lascelles *v.* Miller, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 447.

Washington. — Williams *v.* Miller, 1 Wash. Ter. 88.

See Preston *v.* Dunham, 52 Ala. 217; Thomas *v.* Grise, 1 Penn. (Del.) 381; Ziegler *v.* Studebaker Brothers Mfg. Co., 28 Ill. App. 226; McFadden *v.* Wetherbee, 63 Mich. 390; Black River Lumber Co. *v.* Warner, 93 Mo. 374; Blakeslee Mfg. Co. *v.* Hilton, 18 Pa. Co. Ct. 553. But see Iroquois Furnace Co. *v.* Wilkin Mfg. Co., 181 Ill. 582, *reversing* 77 Ill. App. 59; Tillyer *v.* Van Cleve Glass Co., 7 Ohio Cir. Dec. 209, 13 Ohio Cir. Ct. 99.

In an action on a promissory note for goods sold, etc., the defendant may reduce the agreed price of the articles sold by proving what the difference was at the time of delivery between the articles as they actually were and what they ought to have been according to the contract; but the damages which may have arisen from the defect of the articles must be recovered, if recoverable at all, by a separate suit. Kelly *v.* Case, 2 Ind. 231.

1. Damages for Delay in Delivery. — Jones *v.* Maxton, 197 Ill. 248; Nash *v.* Weidenfeld, 41 N. Y. App. Div. 511. See Vanausdeln *v.* Crenshaw, 16 Kan. 234. But see Blakeslee Mfg. Co. *v.* Hilton, 18 Pa. Co. Ct. 553. See also Rockwell Mfg. Co. *v.* Cambridge Springs Co., 21 Pa. Co. Ct. 248. *Compare* Logan *v.* Berkshire Apartment House, (C. Pl. Gen. T.) 3 Misc. (N. Y.) 296.

2. See the title WARRANTY. See also the title FRAUD AND DECEIT, vol. 14, p. 12.

3. See *supra*, this title, *Rescission or Modification of Contract*. See also the titles, FRAUD AND DECEIT, vol. 14, p. 12; FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 211; MISTAKE, vol. 20, p. 805. And see *supra*, this section, *Where Right of Action Accrues*.

4. See the title MISTAKE, vol. 20, p. 805. See also Shrimpton *v.* Brice, 102 Ala. 655.

5. Payment. — See generally the title PAYMENT, vol. 22, p. 513. See also Ketelman *v.* Chicago Brush Co., (Neb. 1902) 91 N. W. Rep. 282.

6. Ownership by Third Person. — Ogburn *v.* Ogburn, 3 Port. (Ala.) 126; Rundle *v.* Gordon, 27 N. Y. App. Div. 452. See McKenzie *v.* Wimberly, 86 Ala. 195; Johnson *v.* Oehmig, 95 Ala. 189, 36 Am. St. Rep. 204; Morrison *v.* Bartholomew, 9 Colo. App. 27; Rice *v.* Walker, 9 Detroit Leg. N. 327; Ware *v.* Houghton, 41 Miss. 370, 93 Am. Dec. 258; Budd *v.* Power, 9 Mont. 99; Case *v.* Hall, 24 Wend. (N. Y.) 102, 55 Am. Dec. 605; Sheridan First Nat. Bank *v.* C. D. Woodworth Co., 7 Wyo. 11. See also National Cotton Oil Co. *v.* Taylor, (Tex. Civ. App. 1898) 45 S. W. Rep. 478.

Where there has been no fraud, a buyer cannot set up a defect of title in the seller and a notice of claim by a third person as defense to an action for the purchase money, unless the property has been returned, or his possession has been interfered with, or the claimant has had a recovery against him, or the claimant has been paid for the property. McGiffin *v.* Baird, 62 N. Y. 329.

Where a purchaser of goods voluntarily pays the price of them to a third person, who claims them, he cannot afterwards, in a suit against him by the seller for the price, set up as a defense the want of title in the seller, and that he has paid the price to the true owner. Vibbard *v.* Johnson, 19 Johns. (N. Y.) 77.

7. Cargill *v.* Walker, 1 Stew. & P. (Ala.) 223.

8. Set-off, Recoupment, and Counterclaim — *Colorado.* — Dolan *v.* John Douglas Co., 4 Colo. App. 280.

Georgia. — McCaw Mfg. Co. *v.* Felder, 115 Ga. 408; Gore *v.* Malsby, 110 Ga. 893; Johnson *v.* Winship Mach. Co., 108 Ga. 554; Electric R. Co. *v.* Tennessee Coal, etc., Co., 98 Ga. 189; Day *v.* Jeffords, 102 Ga. 714.

Illinois. — Iroquois Furnace Co. *v.* Wilkin Mfg. Co., 181 Ill. 582; Krause *v.* Scott, 86 Ill. App. 238.

Indiana. — Zimmerman *v.* Druecker, 15 Ind. App. 512.

Kansas. — Graff *v.* Osborne, 56 Kan. 162.

Kentucky. — Aultman *v.* Mead, 60 S. W. Rep. 294, 22 Ky. L. Rep. 1189; Albin Co. *v.* Demorest Mfg. Co., (Ky. 1900) 56 S. W. Rep. 982.

available as a defense.[1] Failure of consideration as a defense has been elsewhere considered.[2] Accidental destruction of goods after title has passed is, of course, no defense.[3] Injury caused by the purchaser's default is no defense.[4] Rescission of the contract is a good defense.[5]

f. PERSONS LIABLE FOR PRICE. — Only the person or persons to whom the goods were sold and with whom the contract was made are liable for the agreed price.[6] A subpurchaser is not liable in the absence of fraud or an assumption of the debt.[7]

g. EVIDENCE AND BURDEN OF PROOF. — The usual rules of evidence are, of course, applicable in actions for the price of goods sold.[8] The burden of

Louisiana. — Blymer Ice Mach. Co. *v.* McDonald, 48 La. Ann. 439.

Massachusetts. — Hilliard *v.* Weeks, 173 Mass, 304.

Michigan. — Industrial Works *v.* Mitchell, 114 Mich. 29; Liggett Spring, etc., Co. *v.* Michigan Buggy Co., 106 Mich. 445.

Missouri. — Roman *v.* Boston Trading Co., 87 Mo. App. 186.

Nebraska. — Warder *v.* Myers, (Neb. 1902) 89 N. W. Rep. 387; McCormick Harvesting Mach. Co. *v.* Gustafson, 54 Neb. 276.

New York. — Blauner *v.* Williams Co., (Supm. Ct. App. T.) 36 Misc. (N. Y.) 173; Ellis *v.* Miller, 164 N. Y. 434; Chambers *v.* Lancaster, 3 N. Y. App. Div. 215; Weaver *v.* Bonnell, (N. Y. City Ct. Gen. T.) 15 Misc. (N. Y.) 456.

North Dakota. — International Soc. *v.* Hildreth, (N. Dak. 1902) 91 N. W. Rep. 70; Nichols *v.* Charlebois, 10 N. Dak. 446.

Oregon. — Parlin, etc., Co. *v.* Barnett, 35 Oregon 568.

Pennsylvania. — Kinports *v.* Breon, 193 Pa. St. 309; Keystone Drilling Co. *v.* Stahl, 17 Pa. Co. Ct. 498, 26 Pittsb. Leg. J. N. S. (Pa.) 419; New Jersey Steel Tube Co. *v.* Riehl, 9 Pa. Super. Ct. 220.

Texas. — Saunders *v.* Weekes, (Tex. Civ. App. 1900) 55 S. W. Rep. 33; Voorheis *v.* Fry, (Tex. Civ. App. 1899) 52 S. W. Rep. 580; Tyler Car, etc., Co. *v.* Wettermark, 12 Tex. Civ. App. 399; Boehringer *v.* A. B. Richards Medicine Co., 9 Tex. Civ. App. 284.

Washington. — Hofius *v.* Stimson Mill Co., 21 Wash. 113; Griffith *v.* Strand, 19 Wash. 686.

Wisconsin. — Morgan *v.* Hayes, 98 Wis. 313; Wilbur Lumber Co. *v.* Oberbeck Brothers Mfg. Co., 96 Wis. 383.

See generally the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM.

Conversion by the seller after delivery must be set up as a counterclaim, or it will not be available as a defense. Salomon *v.* Corbett, 38 N. Y. App. Div. 262.

1. See the title ILLEGAL CONTRACTS, vol. 15, p. 927. See also Houck *v.* Wright, 77 Miss. 476.

2. Failure of Consideration. — See the title CONSIDERATION, vol. 6, p. 667. See also the following cases:

United States. — Peck Colorado Co. *v.* Stratton, 95 Fed. Rep. 741.

California. — Field *v.* Austin, 131 Cal. 379; Russ Lumber, etc., Co. *v.* Muscupiabe Land, etc., Co., 120 Cal. 521, 65 Am. St. Rep. 186; Kriess *v.* Faron, 118 Cal. 142.

Georgia. — Coates *v.* Cook, 101 Ga. 586; American Car Co. *v.* Atlanta St. R. Co., 100 Ga. 254; Harder *v.* Carter, 97 Ga. 273; Spinks *v.* Washington, 96 Ga. 756; Jones *v.* Cordele Guano Co., 94 Ga. 14; Hardee *v.* Carter, 94 Ga. 482.

Iowa. — McCormick Harvesting Mach. Co. *v.* Brower, 94 Iowa 144.

Kentucky. — Helfrich Saw, etc., Mill Co. *v.* Everly, (Ky. 1895) 32 S. W. Rep. 750.

Minnesota. — Deering Harvester Co. *v.* Melheim, 83 Minn. 359.

Missouri. — Danforth *v.* Crookshanks, 68 Mo. App. 311.

Nebraska. — Hanna *v.* Buckley, 48 Neb. 127.

New York. — Herzog *v.* Heyman, 151 N. Y. 587, 56 Am. St. Rep. 646.

Oklahoma. — Frick *v.* Reynolds, 6 Okla. 638.

Texas. — Thomas Mfg. Co. *v.* Griffin, 16 Tex. Civ. App. 188.

Washington. — Bay View Brewing Co. *v.* Tecklenberg, 19 Wash. 469.

3. Destruction of Goods. — American Oak Extract Co. *v.* Ryan, 104 Ala. 267; Butterick Pub. Co. *v.* Bailey, 105 Iowa 326; Hayes *v.* Gross, 162 N. Y. 610, 9 N. Y. App. Div. 12. *Compare* Goldie *v.* Harper, 31 Ont. 284.

4. Injury Caused by Purchaser's Default. — Mountain City Mill Co. *v.* Butler, 109 Ga. 469; Delahoussaye *v.* Adeline Sugar Factory Co., 50 La. Auro. 544.

5. Rescission. — See *supra*, this title, *Rescission or Modification of Contract.* See also Rohrbacher *v.* Kleibauer, 119 Cal. 260; Fenske *v.* Nelson, 74 Minn. 1; Grouse *v.* Wolf, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 535; Warder, etc., Co. *v.* Pischer, 110 Wis. 363.

6. Person with Whom Contract Made. — Tanner *v.* Townsend, 4 Colo. App. 543; Hartshorn *v* Byrne, 147 Ill. 418; Cobb *v.* James H. Rice Co., 60 Ill. App. 523; Foreman *v.* Barrie, 24 Minn. 349; Culver *v.* Scott, etc., Lumber Co., 53 Minn. 360; Deranlieu *v.* Jandt, 37 Neb. 532; Meurer *v.* Von Kramer, 69 Hun (N. Y.) 125. See Austin Mfg. Co. *v.* Decker, 109 Iowa 277.

7. Subpurchasers. — Houston Ice, etc., Co. *v.* Edgewood Distilling Co., (Tex. Civ. App. 1901) 63 S. W. Rep. 1075; Shepich *v.* Kent Lumber Co., 19 Wash. 296.

8. Evidence — Admissibility and Sufficiency — *In General.* — See generally the title EVIDENCE, vol. 11, p. 484, and cross-references there given. See also Wikle *v.* Johnson Laboratories, 132 Ala. 268; Malter *v.* Cutting Fruit Packing Co., 134 Cal. xix; Alpert *v.* Bright, (Conn. 1902) 51 Atl. Rep. 521; Thompson *v.* Brannin, 94 Ky. 490; Hubbard *v.* Seitz, 58 Neb. 351; Kumberger *v.* Congress Spring Co., 158 N. Y. 339.

Existence and Terms of Contract — Alabama. — Shrimpton *v.* Brice, 102 Ala. 655.

California. — Rauer *v.* Merani, 130 Cal. 616.
Colorado. — Young *v.* Minkler, 14 Colo. App. 204; Mt. Lincoln Coal Co. *v.* Lane, 23 Colo. 121.
Illinois. — Story *v.* Carter, 27 Ill. App. 287.
Indiana. — Colman *v.* Price, 1 Blackf. (Ind.) 303; Lindley *v.* Downing, 2 Ind. 418.
Iowa. — Gross *v.* Feehan, 110 Iowa 163; Bonnot Co. *v.* Newman, 109 Iowa 580; Austin Mfg. Co. *v.* Decker, 109 Iowa 277.
Kentucky. — Nancy *v.* Snell, 6 Dana (Ky.) 148.
Massachusetts. — Brownville Maine Slate Co. *v.* Hill, 175 Mass. 532; Stern *v.* Filene, 14 Allen (Mass.) 9; Ayres *v.* Sleeper, 7 Met. (Mass.) 45; Thompson *v.* Alger, 12 Met. (Mass.) 428.
Michigan. — Ortmann *v.* Fletcher, 117 Mich. 501; People *v.* Cotteral, 115 Mich. 43; Cullen *v.* Detroit Tug, etc., Co., 99 Mich. 23; American Cushman Telephone Co. *v.* Noble, 98 Mich 67. See Warner *v.* Feige, 65 Mich. 92.
Minnesota. — A. Hirschman Co. *v.* Kiewel, 79 Minn. 239; Walter A. Wood Harvester Co. *v.* Ramberg, 60 Minn. 219.
New York. — Kumberger *v.* Congress Spring Co., 158 N. Y. 339; Meade *v.* Bell, 35 N. Y. App. Div. 627; Tuchfabriken *v.* Meyer, 31 N. Y. App. Div. 52; Berman *v.* Goldsand, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 735; Ruppel *v.* Donohue, (N. Y. City Ct. Gen. T.) 10 N. Y. Supp. 100.
Washington. — Williams *v.* Ninemire, 23 Wash. 393.
Wisconsin. — Lee *v.* Campbell, 77 Wis. 340.
See also generally the titles CONTRACTS, vol. 7, p. 88; PAROL EVIDENCE, vol. 21, p. 1077.
Parties to Contract — Alabama. — Fuller *v.* Gray, 116 Ala. 238; Steen *v.* Sanders, 116 Ala. 155.
Connecticut. — Alpert *v.* Bright, (Conn. 1902) 51 Atl. Rep. 521.
Delaware. — Buckingham *v.* Murray, 7 Houst. (Del.) 176.
Georgia. — Brady *v.* McKee, 30 Ga. 748.
Illinois. — Hartshorn *v.* Byrne, 147 Ill. 418; Ruggles *v.* Gatton, 50 Ill. 412; Voltz *v.* Stephani, 46 Ill. 54. See Lawrence *v.* Cowles, 13 Ill. 577.
Indiana. — Haas *v.* C. B. Cones, etc., Mfg. Co., 25 Ind. App. 469.
Iowa. — Lyons *v.* Thompson, 16 Iowa 62.
Kansas. — Beebe *v.* Carter, 54 Kan. 261; Burkhalter *v.* Farmer, 5 Kan. 477.
Massachusetts. — Welch *v.* Merrill, 10 Gray (Mass.) 91; Merrifield *v.* Robbins, 8 Gray (Mass.) 150.
Michigan. — Miller *v.* Jurczyk, 109 Mich. 637; Rossman *v.* Bock, 97 Mich. 430.
Minnesota. — Burgess *v.* Graff, 72 Minn. 96; Culver *v.* Scott, etc., Lumber Co., 53 Minn. 360; Bridgman *v.* Hallberg, 52 Minn. 376.
Missouri. — Seay *v.* Sanders, 88 Mo. App. 478.
New Jersey. — Herendeen Mfg. Co. *v.* Moore, 66 N. J. L. 74.
New York. — Wallot *v.* Weber, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 632; Wilshusen *v.* Binns, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 547; Kirchner *v.* Otto, (N. Y. City Ct. Gen. T.) 10 Misc. (N. Y.) 226; Woodward *v.* Remington, 81 Hun (N. Y.) 160; Meurer *v.* Von Kramer, 69 Hun (N. Y.) 125; Moore *v.* Meacham, 10 N. Y. 207.
North Carolina. — Gregg *v.* Mallett, 111 N. Car. 74.
Oregon. — Botefuhr *v.* Rometsch, 34 Oregon 491; Mullaney *v.* Evans, 33 Oregon 330; Davis *v.* Emmons, 32 Oregon 389.
Texas. — Hicks *v.* Bailey, 16 Tex. 229; Missouri, etc., R. Co. *v.* Yale, (Tex. Civ. App. 1901) 65 S. W. Rep. 57; Watson *v.* Winston, (Tex. Civ. App. 1897) 43 S. W. Rep. 852.
Wisconsin. — Zoesch *v.* Thielman, 105 Wis. 117.
Delivery and Acceptance — Alabama. — Wikle *v.* Johnson Laboratories, 132 Ala. 268; Moore *v.* Barber Asphalt Paving Co., 118 Ala. 563.
California. — Blumenthal *v.* Greenberg, 130 Cal. 384.
Colorado. — Clifford *v.* Gienger, 11 Colo. App. 83.
Georgia. — Dinkler *v.* Baer, 92 Ga. 432.
Iowa. — Gross *v.* Feehan, 110 Iowa 163.
Maine. — Greenleaf *v.* Hamilton, 94 Me. 118.
Maryland. — Hawley Down-Draft Furnace Co. *v.* Hooper, 90 Md. 390.
Massachusetts. — Bertha Mineral Co. *v.* Morrill, 171 Mass. 167.
Minnesota. — Cefalu *v.* Fitzsimmons-Derrig Co., 70 Minn. 255.
Missouri. — Adler *v.* Wagner, 47 Mo. App. 25.
New Hampshire. — Webster *v.* Clark, 30 N. H. 245.
New York. — Fitch *v.* Metropolitan Hotel Supply Co., 69 N. Y. App. Div. 611; Greene *v.* Seitz, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 312; Hammersen *v.* Schleicher, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 811; Sherwin-Williams Co. *v.* Dedrick, 39 N. Y. App. Div. 641; Stern *v.* Frommer, (N. Y. City Ct. Gen. T.) 10 Misc. (N. Y.) 219; Hoguet *v.* Mommer, 78 Hun (N. Y.) 459.
Pennsylvania. — Pierce *v.* Allegheny Bessemer Steel Co., 184 Pa. St. 55; Braddock Glass Co. *v.* Irwin, 153 Pa. St. 440, 31 W. N. C. (Pa.) 443.
West Virginia. — Cogar *v.* Burns Lumber Co., 46 W. Va. 256.
See Coyne *v.* Avery, 189 Ill. 378.
Title of Seller. — Rose *v.* Weinberger, 112 Ga. 628; Dougherty *v.* Holloway, 5 T. B. Mon. (Ky.) 314; McKenzie *v.* Vandecar, 105 Mich. 232; Mullaney *v.* Evans, 33 Oregon 330; Wright *v.* Sharp, 1 Browne (Pa.) 344.
Quality or Condition of Goods — United States. — Chateaugay Ore, etc., Co. *v.* Blake, 144 U. S. 476; Findlay *v.* Pertz, (C. C. A.) 74 Fed. Rep. 681; Ward *v.* Blake Mfg. Co., 56 Fed. Rep. 437, 12 U. S. App. 295.
Alabama. — Anniston Lime, etc., Co. *v.* Lewis, 107 Ala. 535.
California. — Malter *v.* Cutting Fruit Packing Co., 134 Cal. xix.
Colorado. — Hindry *v.* McPhee, 11 Colo. App. 398.
Georgia. — Means *v.* Subers, 115 Ga. 371; Mayes *v.* McCormick Harvesting Mach. Co., 110 Ga. 545; Ryals *v.* Johnson County Sav. Bank, 106 Ga. 525; Allen Buggy Co. *v.* Bush, 96 Ga. 772; Jones *v.* Cordele Guano Co., 94 Ga. 14.
Illinois. — Cantwell Eagle Brewing Co. *v.* Horst, 61 Ill. App. 330; Luetgert *v.* Volker, 153 Ill. 385, *affirming* 54 Ill. App. 287.
Indiana. — Cleveland Stone Co. *v.* Monroe County Oolitic Stone Co., 11 Ind. App. 423.

Iowa. — McCormick Harvesting Mach. Co., *v.* Okerstrom, 14 Iowa 260; Warder *v.* Horne, 110 Iowa 285; Schopp *v.* Taft, 106 Iowa 612; Elwood *v.* McDill, 105 Iowa 437; Boynton Furnace Co. *v.* Messner, 97 Iowa 254; National Horse Importing Co. *v.* Novak, 95 Iowa 596.

Kansas. — Aultman *v.* Miller, 52 Kan. 60.

Kentucky. — Louisville Lith. Co. *v.* Schedler, 63 S. W. Rep. 8, 23 Ky. L. Rep. 465; Russell *v.* Newdigate, (Ky. 1898) 44 S. W. Rep. 973; Bullock *v.* Bird, (Ky. 1897) 43 S. W. Rep. 234.

Louisiana. — Strahorn Hutton-Evans Commission Co. *v.* Red River Oil Co. 104 La. 664.

Maine. — Stockwell *v.* Craig, 20 Me. 378.

Massachusetts. — Mitchell *v.* Le Clair, 165 Mass. 308.

Missouri. — Roth *v.* Continental Wire Co., 94 Mo. App. 236; Glaeser *v.* Hoeffner, 68 Mo. App. 158.

New York. — Dommerich *v.* Garfunkel, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 743; Thompson *v.* Chatham Water Works Co., 51 N. Y. App. Div. 621; Mussinan *v.* New York Steam Co., 42 N. Y. App. Div. 625; Metz *v.* Virgil Practice-Clavier Co., (Supm. Ct. App. T.) 26 Misc. (N. Y.) 726; Crossman *v.* Lurman, 33 N. Y. App. Div. 422; Gleason *v.* Thom, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 29; Detroit White Lead Works *v.* Knaszak, (Buffalo Super. Ct. Gen. T.) 13 Misc. (N. Y.) 619; Hickok Mfg. Co. *v.* Blackhall, 88 Hun (N. Y.) 80; Van Camp Packing Co. *v.* McGuire, 86 Hun (N. Y.) 210.

Oregon. — Johnson *v.* Hamilton, 24 Oregon 320.

Pennsylvania. — Manbeck *v.* Shaffer, 16 Lanc. L. Rev. 321.

South Carolina. — Kauffman Milling Co. *v.* Stuckey, 37 S. Car. 7.

South Dakota. — Cook *v.* Sheehan, (S. Dak. 1902) 91 N. W. Rep. 452; Standard Rope, etc., Co. *v.* Olmem, 13 S. Dak. 296; Western Twine Co. *v.* Wright, 11 S. Dak. 521.

Tennessee. — Kentucky Saw Works *v.* Little River Land, etc., Co., (Tenn. Ch. 1897) 42 S. W. Rep. 527; Atlanta Guano Co. *v.* Phipps, (Tenn. Ch. 1897) 41 S. W. Rep. 1087.

Texas. — Florida Athletic Club *v.* Hope Lumber Co., 18 Tex. Civ. App. 161; Boehringer *v.* A. B. Richards Medicine Co., 9 Tex. Civ. App. 284; Battaglia *v.* Thomas, 5 Tex. Civ. App. 563.

Vermont. — Vermont Farm-Mach. Co. *v.* Batchelder, 68 Vt. 430.

Wisconsin. — Ashland Lumber Co. *v.* Detroit Salt Co., 114 Wis. 66; McClure *v.* Jefferson, 85 Wis. 208.

Quantity Sold and Delivered. — Consolidated Coal Co. *v.* Polar Wave Ice Co., 106 Fed. Rep. 798, 45 C. C. A. 638; Gibson *v.* Snow Hardware Co., 94 Ala. 346; Dickerson *v.* Sparks, 17 Ill. 178; Shrimpton *v.* Rosenbaum, 106 Mich. 68; Shrimpton *v.* Netzorg, 104 Mich. 225; Breen *v.* Moran, 51 Minn. 525; Baker *v.* Loring, 92 Hun (N. Y.) 61; Alger *v.* Morrill, 68 Vt. 598; Morford *v.* Frye, 13 Wash. 244; Hoffman *v.* Maffioli, 104 Wis. 630.

Price — United States. — Dodge *v.* Dickson Mfg. Co., (C. C. A.) 113 Fed. Rep. 218; North Chicago St. R. Co. *v.* Burnham, 102 Fed. Rep. 669, 42 C. C. A. 584.

California. — Kriess *v.* Faron, 118 Cal. 142.

Illinois. — Illinois Linen Co. *v.* Hough, 91 Ill. 63.

Indiana. — Hillenbrand *v.* Wittkemper, 79 Ind. 180; Diether *v.* Ferguson Lumber Co., 9 Ind. App. 173.

Iowa. — Grasmier *v.* Wolf, (Iowa 1902) 90 N. W. Rep. 813; Martin *v.* Shannon, 101 Iowa 620; Johnson *v.* Harder, 45 Iowa 677.

Louisiana. — Berges *v.* Daverede, (La. 1898) 23 So. Rep. 891.

Massachusetts. — Copeland *v.* Brockton St. R. Co., 177 Mass. 186; Bradbury *v.* Dwight, 3 Met. (Mass.) 31; Norris *v.* Spofford, 127 Mass. 85; Saunders *v.* Clark, 106 Mass. 331. See also Brewer *v.* Housatonic R. Co., 107 Mass. 277.

Michigan. — Wickes *v.* Swift Electric Light Co., 70 Mich. 322.

Nebraska. — Fry *v.* Tilton, 11 Neb. 456.

New York. — Clark *v.* Miller, 4 Wend. (N. Y.) 628; Vedder *v.* Leamon, 70 N. Y. App. Div. 252; Gilbert *v.* Manning, 54 Hun (N. Y.) 99.

Texas. — Dorsey Printing Co. *v.* Gainesville Cotton Seed Oil Mill, etc., Co., (Tex. Civ. App. 1901) 61 S. W. Rep. 556.

Vermont. — Kidder *v.* Smith, 34 Vt. 295; Kimball *v.* Locke, 31 Vt. 683.

West Virginia. — Boyd *v.* Gunnison, 14 W. Va. 1.

Wisconsin. — Bell *v.* Radford, 72 Wis. 402. See also Valpy *v.* Gibson, 4 C. B. 837, 56 E. C. L. 837; Allison *v.* Horning, 22 Ohio St. 138.

Value or Market Value — United States. — 3,109 Cases Champagne, 1 Ben. (U. S.) 241.

Alabama. — Anniston Lime, etc., Co. *v.* Lewis, 107 Ala. 535.

California. — Sanborn *v.* Cunningham, (Cal. 1893) 33 Pac. Rep. 894.

Georgia. — Ryals *v.* Johnson County Sav. Bank, 106 Ga. 525.

Illinois. — Newlan *v.* Dunham, 60 Ill. 233.

Indiana. — Kane *v.* Sefrit, 21 Ind. App. 74; Diether *v.* Ferguson Lumber Co., 9 Ind. App. 173.

Iowa. — Rice *v.* Appel, 111 Iowa 454.

Kentucky. — Beaty *v.* Scrivener, 3 T. B. Mon. (Ky.) 138.

Maine. — Norton *v.* Willis, 73 Me. 580; Warren *v.* Wheeler, 21 Me. 484.

Maryland. — Morris *v.* Columbian Iron Works, etc., Co., 76 Md. 354.

Massachusetts. — Shattuck *v.* Stoneham Branch R. Co., 6 Allen (Mass.) 115; Bouton *v.* Reed, 13 Gray (Mass.) 530; Brigham *v.* Evans, 113 Mass. 538.

Michigan. — Grabowsky *v.* Baumgart, 128 Mich. 267, 8 Detroit Leg. N. 793; Post *v.* Voorhees, 118 Mich. 366; Banghart *v.* Hyde, 94 Mich. 49; Lovejoy *v.* Michels, 88 Mich. 15; Locke *v.* Priestly Express Wagon, etc., Co., 71 Mich. 263.

Minnesota. — Deering Harvester Co. *v.* Melheim, 83 Minn. 359.

New Hampshire. — Watts *v.* Sawyer, 55 N. H. 38; Carr *v.* Moore, 41 N. H. 131; Ferguson *v.* Clifford, 37 N. H. 86.

New York. — Renaud *v.* Peck, 2 Hilt. (N. Y.) 137; Carey *v.* Baldwin, (Supm. Ct. App. Div.) 61 N. Y. Supp. 581; Staats *v.* Hausling, (N. Y. City Ct. Gen. T.) 22 Misc. (N. Y.) 526; Kittle *v.* Huntley, 67 Hun (N. Y.) 617; Logan *v.* Berkshire Apartment House, (C. Pl. Gen. T.) 3 Misc. (N. Y.) 296; Doyle *v.* Beaupre, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 289; Campbell *v.* Woodworth, 20 N. Y. 499, *reversing* 26

proof is upon the plaintiff to show a completed sale,[1] upon the credit of the defendant,[2] the terms of the contract,[3] the agreed price or reasonable value of the goods,[4] the quantity or amount sold and delivered,[5] and generally a compliance upon his part with the terms of the contract.[6] The burden of showing the truth of any affirmative defense which may be set up is on the defendant.[7] Thus, the burden of proving a set-off, recoupment, or counter-

Barb. (N. Y.) 648; Welling *v.* Ivoroyd Mfg. Co., 15 N. Y. App. Div. 116.

South Dakota. — Aultman Co. *v.* Ferguson, 8 S. Dak. 458.

Texas. — Cohen *v.* Simpson, (Tex. Civ. App. 1895) 32 S. W. Rep. 59.

Utah. — McCornick *v.* Sadler, 14 Utah 463.

Credit. — Dolan *v.* Paradice, 4 Colo. App. 314; Tibbetts *v.* Sumner, 19 Pick. (Mass.) 166; Heilbronn *v.* Herzog, 73 N. Y. App. Div. 188. See Lelar *v.* Brown, 15 Pa. St. 215. As to whom credit was extended, see *supra*, this note, *Parties to Contract.*

Payment and Nonpayment. — See generally the title PAYMENT, vol. 22, p. 513. See also Wikle *v.* Johnson Laboratories, 132 Ala. 268; Martin *v.* Shannon, 101 Iowa 620; Fitzgerald *v.* King, 79 Minn. 313; Cockrell *v.* Wood, 51 Neb. 269; Hitchings *v.* Kayser, 65 N. Y. App. Div. 302, May *v.* Behrends, (Tex. Civ. App. 1899) 50 S. W. Rep. 413.

Accounts and Account Books. — See the title DOCUMENTARY EVIDENCE, vol. 9, p. 903 *et seq.*

Fraud and Deceit. — See the title FRAUD AND DECEIT, vol. 14, p. 12. See also Beck, etc., Lith. Co. *v.* Houppert, 104 Ala. 503; 53 Am. St. Rep. 77; Hirschberg Optical Co. *v.* Richards, 62 Mo. App. 408.

Rescission. — Kentucky Lumber Co. *v.* Middleton, (Ky. 1897) 41 S. W. Rep. 48; Hight *v.* Bacon, 126 Mass. 10, 30 Am. Rep. 639; Burwell *v.* Chapman, 59 S. Car. 581; Johnson *v.* Hamilton, 24 Oregon 320. See also *supra*, this title, *Rescission or Modification of Contract.*

Lost Note. — In an action upon a lost note given in payment for goods the plaintiff may recover on the count for goods sold and delivered without the necessity of proving the contents of the note, proof of the loss standing in place of the surrender of the note. McMillan *v.* Bethold, 35 Ill. 250.

1. Burden of Showing Executed Sale. — Schutz *v.* Jordan, 141 U. S. 213; Small *v.* Paulk, 96 Ga. 781; Brink *v.* Chicago, etc., R. Co., 23 Iowa 473; Sackett *v.* Lowell, 32 Me. 164; Edmunds *v.* Wiggin, 24 Me. 505; Russell *v.* Wisconsin, etc., R. Co., 39 Minn. 145; Baltimore Brick Co. *v.* Coyle, 18 Pa. Super. Ct. 186. See also *supra*, this section, *Action for Price — Where Contract Is Executory.*

2. Burden of Proof as to Person Credited. — Alpert *v.* Bright, (Conn. 1902) 51 Atl. Rep. 521; Hunter *v.* Pherson, 89 Me. 71; Drummond *v.* Huyssen, 46 Wis. 188.

3. Burden of Showing Terms of Contract. — Rose *v.* Wells, 36 N. Y. App. Div. 593.

4. Burden of Showing Price or Value. — Lambert *v.* Seely, 2 Hilt. (N. Y.) 429; Butcher *v.* Consolidated Trust Co., 44 N. Y. App. Div. 370; Pelletreau *v.* United Electric Light, etc., Co., (C. Pl. Gen. T.) 10 Misc. (N. Y.) 769. But see Arnold *v.* Cason, (Mo. App. 1902) 69 S. W. Rep. 34.

5. Burden of Showing Amount Sold and Delivered. — Collins *v.* Gage, 69 Ark. 659; Hoffman House *v.* Hoffman House Cafe, 36 N. Y. App. Div. 176. But see Parcher *v.* Holmes, 68 N. H. 166.

Where the buyers agreed to pay for an estimated quantity of merchandise and undertook to weigh and keep an account of it, any uncertainty in the proof of the deficiency must be taken most strongly against them. Jones *v.* Murray, 3 T. B. Mon. (Ky.) 83.

6. Burden of Showing Performance. — Ruiz *v.* Norton, 4 Cal. 355, 60 Am. Dec. 618; Holt Live-Stock Co. *v.* Watkins, 21 Colo. 531; Harper *v.* Baird, 3 Penn. (Del.) 110; Coates *v.* Huffine, 13 Ind. App. 182; Patterson Gas Governor Co. *v.* Bayne, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 69; E. W. Bliss Co. *v.* U. S. Incandescent Gas Light Co., 78 Hun (N. Y.) 615; Patterson Gas Governor Co. *v.* Glenby, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 532; Byers *v.* Bonsall, 3 Pittsb. (Pa.) 482; Pontiac Shoe Mfg. Co. *v.* Hamilton, 18 Tex. Civ. App. 283; Drumm Seed, etc., Co. *v.* Bell, (Tex. Civ. App. 1895) 29 S. W. Rep. 796; Lewis *v.* Barré, 14 Manitoba 32. See Iowa Brick Co. *v.* Campbell, (Iowa 1900) 82 N. Y. Rep. 772.

7. Burden of Proving Affirmative Defense — *United States.* — Ward *v.* Blake Mfg. Co., 56 Fed. Rep. 437, 12 U. S. App. 295.

Georgia. — Christian *v.* Bryant, 102 Ga. 561.

Illinois. — Morris *v.* Wibaux, 159 Ill. 627.

Iowa. — Harvey *v.* Henry, 108 Iowa 168; Hoffman *v.* Hampton, 96 Iowa 319; Clement *v.* Drybread, 108 Iowa 701.

Kentucky. — Middleton *v.* Kentucky Lumber Co., 66 S. W. Rep. 42, 23 Ky. L. Rep. 1751.

Louisiana. — Edwards *v.* Plaquemine Ice, etc., Storage Co., 46 La. Ann. 360.

Massachusetts. — King *v.* Eagle Mills, 10 Allen (Mass.) 548; Briggs *v.* Humphrey, 5 Allen (Mass.) 314. See Lothrop *v.* Otis, 7 Allen (Mass.) 435.

Minnesota. — Perkins *v.* Schneider, 54 Minn. 368.

Missouri. — Arnold *v.* Cason, (Mo. App. 1902) 69 S. W. Rep. 34; Springfield Seed Co., *v.* Walt, 94 Mo. App. 76.

New York. — Cafre *v.* Lockwood, 22 N. Y. App. Div. 11; Rishel *v.* Weil, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 70; Keller *v.* Strauss, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 35; Sharples *v.* Angell, 46 N. Y. App. Div. 329. See Whitlock *v.* Bueno, 1 Hilt. (N. Y.) 72.

Texas. — May *v.* Behrends, (Tex. Civ. App. 1899) 50 S. W. Rep. 413. See Caruthers *v.* Cherry, 4 Tex. App. Civ. Cas. § 118.

But see Brown *v.* Raisin Fertilizer Co., 124 Ala. 221, holding that the burden is upon the seller to show a license to sell fertilizer.

Fraud and Deceit. — See the title FRAUD AND DECEIT, vol. 14, p. 12.

Payment. — See the title PAYMENT, vol 22, p. 513.

claim is upon the defendant.[1] The plaintiff has the burden of proving new matter in avoidance of an affirmative defense.[2]

h. PROVINCE OF COURT AND JURY. — In accordance with the usual rules,[3] questions of law are for the court,[4] and questions of fact are for the jury.[5]

3. Statutory Remedy Against Goods. — In addition to the remedies open to all creditors of judgment and execution, or, in proper cases, of attachment, the statutes of some states give the vendor of personalty a special remedy against the goods for the recovery of the price.[6]

1. Burden of Proving Set-off, Recoupment, or Counterclaim. — Cook *v.* Malone, 128 Ala. 662; Moulton *v.* Baer, 78 Ga. 215; Osgood *v.* Groseclose, 159 Ill. 511, *affirming* 58 Ill. App. 29; Scott *v.* Texas Constr. Co., (Tex. Civ. App. 1900) 55 S. W. Rep. 37.

2. Burden of Showing New Matter in Avoidance. — Springfield Seed Co. *v.* Walt, 94 Mo. App. 76.

3. See the title QUESTIONS OF LAW AND FACT, vol. 23, p. 543.

4. Questions for Court. — Greenleaf *v.* Gerald, 94 Me. 91.

5. Questions of Fact for Jury. — Unreasonable delay in payment. Peoria Grape Sugar Co. *v.* Turney, 175 Ill. 631, *affirming* 65 Ill. App. 656. Person to whom credit extended. Kimbrough *v.* Ragsdale, 69 Miss. 674; Klumph *v.* Bousfield, 112 Mich. 68. Compliance with contract, representation, or warranty. Cran *v.* Crane, 105 Fed. Rep. 869, 45 C. C. A. 96; Chicago Tip, etc., Co. *v.* Beardsley, 86 Ill. App. 184; Smith *v.* Independent School Dist., 112 Iowa, 35; Conklin *v.* Redemeyer Hollister Commission Co., 86 Mo. App. 190; Carey *v.* Baldwin, (Supm. Ct. App. Div.) 61 N. Y. Supp. 581; Patterson *v.* Brace, 198 Pa. St. 107; Harrisburg Foundry, etc., Works *v.* Lebanon City, 195 Pa. St. 331; Ingram *v.* Sumter Music House, 51 S. Car. 281; Bryan Cotton-Seed Oil Mill *v.* Fuller, (Tex. Civ. App. 1900) 57 S. W. Rep. 924. Materiality of false representations. Greenleaf *v.* Gerald, 94 Me. 91. Capacity of machine. Biloxi Canning Co. *v.* Stillwell-Bierce, etc., Co., (Miss. 1899) 25 So. Rep. 366. Seller's ability to perform. Stokes *v.* Mackay, 82 Hun (N. Y.) 449. Waiver of fraud. Heilbronn *v.* Herzog, 73 N. Y. App. Div. 188. Acceptance by buyer. Gates Lumber Co. *v.* Todd, 22 Ind. App. 148; St. Anthony Lumber Co. *v.* Bardwell-Robinson Co., 60 Minn. 199. Date for allowance of interest. District of Columbia *v.* Camden Iron Works, 15 App. Cas. (D. C.) 198, *judgment affirmed* 181 U. S. 453. Reasonable time. Bostain *v.* De Laval Separator Co., 92 Md. 483; Price *v.* Marthen, 124 Mich. 690, 7 Detroit Leg. N. 408; Acme Electric Lamp Co. *v.* Kingston Carriage Co., (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 823, *judgment affirmed* 65 N. Y. Supp. 1127, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 779. Existence and terms of contract. Brown *v.* Snider, 126 Mich. 198, 7 Detroit Leg. N. 774; Glauber Mfg. Co. *v.* Voter, 70 N. H. 332; Welsbach Light Co. *v.* Mayhew, 51 N. Y. App. Div. 157; Carey *v.* Baldwin, (Supm. Ct. App. Div.) 61 N. Y. Supp. 581. Construction of contract in view of parol evidence. Providence Mach. Co. *v.* Laurens Cotton Mills, 98 Fed. Rep. 198. Value of goods. Diamond Soda Water Mfg. Co. *v.* Hegeman, 74 N. Y. App. Div. 430. Substitution of new contract. Whitaker *v.* Eilenberg, 70 N. Y. App. Div. 489; Gorman *v.* Kennedy, 126 Mich. 182, 7 Detroit Leg. N. 747. Quantity sold and delivered. Boyce *v.* Barker, 119 Mich. 157. Satisfaction of buyer. McCormick Harvesting Mach. Co. *v.* Okerstrom, 114 Iowa 260. Amount of recovery. Day Bros. Lumber Co. *v.* Daniel, 62 S. W. Rep. 866, 23 Ky. L. Rep. 285. Excuse for nonacceptance. Louisville Lith. Co. *v.* Schedler, 63 S. W. Rep. 8, 23 Ky. L. Rep. 465.

6. Lex Fori or Lex Loci. — Such statutes pertain exclusively to the remedy, and accordingly the *lex fori* and not the *lex loci* controls. Therefore, where personal property in another state was sold there upon credit and afterwards removed to Arkansas, it may be seized in Arkansas in the vendee's possession and condemned to sale under the *Arkansas* statute in an action brought by the vendor to recover the purchase price, although the laws of the state where the goods were sold afforded no such remedy. Swanger *v.* Goodwin, 49 Ark. 287.

In the Absence of Statute conferring on the vendor any special remedies against the goods sold, where the goods have been sold on credit and have been delivered a vendor should proceed by attachment if he would subject the goods to sale for the price. Retaking possession without authority, and disposing of the goods is a conversion; and in an action therefor the indebtedness of the plaintiff to the defendant for the price is no defense. Huelet *v.* Reyns, (Supm. Ct. Spec. T.) 1 Abb. Pr. N. S. (N. Y.) 27.

The Right to Collect Promissory Notes given for the purchase money out of personal property sold conditionally, the seller retaining title, is extended by the Act of October 22, 1887, to the holder of such notes, and is not confined to the original payee. Consequently a transfer of such notes since the passage of said act, even if made without recourse on the payee, will not operate to divest the notes of their character as a debt for purchase money. By virtue of said act, taken in connection with section 3293 of the Code, which subjects property to attachment for its purchase money, the holder of notes such as the act describes may, while the property is in possession of the purchaser, proceed by attachment, and, after obtaining judgment, execute and have recorded the bill of sale provided for in the act, and then cause the execution issuing on such judgment to be levied upon the property, and thus enforce payment of the claim for purchase money. Cade *v.* Jenkins, 88 Ga. 791.

In Mississippi, the Act of March 11, 1884, amending Code, § 1255, confers upon the vendor of personal property the right to subject it to the payment of the purchase money. This statute does not confer upon the vendor a lien from the date of the sale, but merely

Thus, in Arkansas it is provided that in actions to recover the purchase price of property remaining in the hands of the vendee, such property shall not be exempt from seizure and sale under attachment, execution, or other process, and the plaintiff may in such action, upon petition duly certified, obtain an order from the court or clerk directing the officer to take and hold the property subject to the order of the court.[1] This statute does not create a continuous subsisting lien on the property for the purchase price, but merely excepts it from exemption for debt,[2] and provides a statutory process for impounding the chattel to prevent alienation, *pendente lite;* it does not imply that the lien exists independent of the process.[3] It is designed to enable the plaintiff to seize the goods at once without alleging any of the ordinary grounds for an attachment.[4] This statutory remedy can be enforced and the property followed and seized only so long as it remains in the possession or control of the original vendee.[5] It cannot be enforced against a third person who has in good faith acquired the possession and ownership from the vendee.[6] Thus, it cannot be enforced against an assignee for the benefit of creditors,[7] nor against the personal representatives of a deceased vendee,[8] nor where the property has been seized by the sheriff under an attachment in favor of a third person.[9] It does not take precedence over valid liens acquired by third persons.[10] The application may be made or seizure granted at the beginning of the suit or during its pendency.[11] The right of a vendor to have the property seized and applied in payment of the purchase price is not personal to the vendor, but passes to his assignee.[12] The defendant may give bond for the retention of the property as in cases of orders of delivery of personal property.[13]

gives him a right to acquire a lien from the commencement of his suit. Graham *v.* Thornton, (Miss. 1891) 9 So. Rep. 292; Frank *v.* Robinson, 65 Miss. 162.

The act requires that " if the plaintiff shall desire to establish a lien on such personal property whilst in the hands of the first vendee, he shall, on filing his declaration or evidence of debt, make affidavit stating that such property was sold by him, * * * describing in his affidavit the property," whereupon a writ of seizure is to be issued by the proper officer, and the property described seized and held as in the case of replevin. Accordingly a bill in equity seeking to subject property under the statute, which is not sworn to, and which contains no description of the property sold, and under which no writ was sued out under the statute for the seizure of the property, is insufficient to support a decree establishing a lien. Graham *v.* Thornton, (Miss. 1891) 9 So. Rep. 292.

1. **Arkansas Statute.** — Act of March 9, 1877; Ark. D., 1894, §§ 4727-4730. The sworn petition should describe the property and state its value. Swanger *v.* Goodwin, 49 Ark. 287.

2. Blass *v.* Hood, 57 Ark. 14; Fox *v.* Arkansas Industrial Co., 52 Ark. 450; Swanger *v.* Goodwin, 49 Ark. 290; Friedman *v.* Sullivan, 48 Ark. 215; Bridgeford *v.* Adams, 45 Ark. 136.

3. Blass *v.* Hood, 57 Ark. 14 [*citing* Swanger *v.* Goodwin, 49 Ark. 290; Bridgeford *v.* Adams, 45 Ark. 136; Friedman *v.* Sullivan, 48 Ark. 215; Creanor *v.* Creanor, 36 Ark. 91].

In Fox *v.* Arkansas Industrial Co., 52 Ark. 450, it is pointed out that the syllabus in Creanor *v.* Creanor, 36 Ark. 91, is misleading in that the opinion in that case does not refer to this privilege of the vendor as a lien, as the syllabus indicates, but denominates it an action of attachment only.

4. Fox *v.* Arkansas Industrial Co., 52 Ark. 450; Bridgeford *v.* Adams, 45 Ark. 136.

5. Bridgeford *v.* Adams, 45 Ark. 136; Fox *v.* Arkansas Industrial Co., 52 Ark. 450, *citing* Erwin *v.* Torrey, 8 Mart. (La.) 90, 13 Am. Dec. 279; Henning *v.* Steamer St. Helena, 5 La. Ann. 349.

6. Bridgeford *v.* Adams, 45 Ark. 136. *Compare* Lilliebridge *v.* Walsh, 104 Mich. 153.

7. **An Assignee for the Benefit of Creditors** takes *bona fide* within the meaning of the rule stated in the text. "He is not indeed such an innocent purchaser for value as to hold against an equity of a third party, which is in the nature of a lien upon the property itself; but in the absence of any such lien he takes absolutely, so far as the assignor is concerned, and is only under obligations to apply the property to the purposes of the trust." Bridgeford *v.* Adams, 45 Ark. 136.

8. Blass *v.* Hood, 57 Ark. 13.

9. Bryan-Brown Shoe Co. *v.* Block, 52 Ark. 458; Fox *v.* Arkansas Industrial Co., 52 Ark. 450.

10. Fox *v.* Arkansas Industrial Co., 52 Ark. 450.

11. Bridgeford *v.* Adams, 45 Ark. 136.

12. Creanor *v.* Creanor, 36 Ark. 91.

13. Arkansas Digest, 1894, § 4729.

The Bond authorized by statute is absolute for the payment of the judgment recovered in the action, and cannot be avoided by an offer to deliver up the property, or by a plea that the vendor has no title to it. Mayfield *v.* Creamer, 39 Ark. 460.

This statute does not authorize a summary judgment against the surety in the vendor's delivery bond, in the action against the pur-

In Missouri it is provided by statute that personal property shall not be exempt from execution upon a judgment for the purchase price thereof, except in the hands of an innocent purchaser for value and without notice of such prior claim for purchase money.[1] This statute is one of exemption merely, and does not create a lien,[2] nor confer upon the vendor any priority of right over other and prior attachment or execution creditors;[3] and the earlier cases, which held that upon the recovery of a judgment and the issuance of execution a lien sprang up which related back to the time of the sale and gave the vendor a priority over intermediate attaching or execution creditors,[4] have been overruled. Before judgment for the purchase price, equity will not interfere to preserve the property for the vendor.[5] The right of the vendor under this statute may be enforced by attachment under circumstances justifying a suit by attachment against the vendee.[6] The right to subject the property sold is incident to a note given for the purchase price and passes to the assignee of the note.[7]

In Michigan a similar statute exists.[8]

4. Recovery of Goods, Value, or Proceeds — *a.* BEFORE TITLE HAS PASSED. — If possession has been transferred, but the title has not passed, the vendor may recover the goods *in specie* by replevin,[9] or he may recover their value by trover for a conversion.[10]

Title Reserved until Payment. — Where goods are bargained for and delivered with an agreement that they shall remain the property of the vendor until they are paid for, if they are not paid for within the stipulated time the vendor may maintain replevin for the goods,[11] or detinue,[12] or trover for their value.[13]

chaser, as in forthcoming bonds in actions of attachment. Creanor *v.* Creanor, 36 Ark. 91.

1. **Missouri Statute.** — Rev. Stat. 1889, § 4914.

2. Barton *v.* Sitlington, 128 Mo. 177; Brownell, etc., Car Co. *v.* Barnard, 116 Mo. 667; Straus *v.* Rothan, 102 Mo. 261; Parker *v.* Rodes, 79 Mo. 88; Haworth *v.* Franklin, 74 Mo. 106; Norris *v.* Brunswick, 73 Mo. 257; Kane *v.* Manley, 63 Mo. App. 47; Lippmann *v.* Campbell, 53 Mo. App. 121; Finke *v.* Pike, 50 Mo. App. 564; Spitz *v.* Kerfoot, 42 Mo. App. 77.

3. Benton *v.* German-American Nat. Bank, 122 Mo. 332; Straus *v.* Rothan, 102 Mo. 261; Kane *v.* Manley, 63 Mo. App. 47; Knoxville Mantel, etc., Co. *v.* Coon, 61 Mo. App. 151; Lippmann *v.* Campbell, 53 Mo. App. 121; Finke *v.* Pike, 50 Mo. App. 564; Corning *v.* Rinehart Medicine Co., 46 Mo. App. 16; Steinwender *v.* Creath, 44 Mo. App. 365.

4. State *v.* Mason, 96 Mo. 127; Parker *v.* Rodes, 79 Mo. 88; Spitz *v.* Kerfoot, 42 Mo. App. 84; Lawrence *v.* Owens, 39 Mo. App. 319; Boyd *v.* J. M. Ward Furniture, etc., Co., 38 Mo. App. 211; Bolckow Milling Co. *v.* Turner, 23 Mo. App. 103.

5. Spitz *v.* Kerfoot, 42 Mo. App. 83; Woolfolk *v.* Kemper, 31 Mo. App. 421.

6. State *v.* Mason, 96 Mo. 127; Parker *v.* Rodes, 79 Mo. 91; Napa Valley Wine Co. *v.* Rinehart, 42 Mo. App. 171.

7. State *v.* Orahood, 27 Mo. App. 496.

8. Lillibridge *v.* Walsh, 97 Mich. 459.

9. **Replevin.** — Campion *v.* Smith, 46 Ill. App. 501; Salomon *v.* Hathaway, 126 Mass. 482; Lentz *v.* Flint, etc., R. Co., 53 Mich. 444; Kemper, etc., Dry Goods Co. *v.* Kidder Sav. Bank, 72 Mo. App. 226; Clay *v.* Bohonon, 54 N. H. 474. See generally the title REPLEVIN, ENCYC. OF PL. AND PR., vol. 18, p. 494.

10. **Trover.**—Sims *v.* James, 62 Ga. 260. See generally the title TROVER AND CONVERSION, ENCYC. OF PL. AND PR., vol. 21, p. 1009.

11. **Replevin** — *United States.*—Bauendahl *v.* Horr, 7 Blatchf. (U. S.) 548.

Arkansas. — Kirby *v.* Tompkins, 48 Ark. 273.

Connecticut. — Hughes *v.* Kelly, 40 Conn. 148.

Kansas. — Fleck *v.* Warner, 25 Kan. 492.

Kentucky. — Vaughn *v.* Hopson, 10 Bush (Ky.) 337.

Maine. — Pulsifer *v.* D'Estimauville, 86 Me. 96; Stone *v.* Perry, 60 Me. 48; Brown *v.* Haynes, 52 Me. 578; Leighton *v.* Stevens, 19 Me. 154.

Massachusetts. — Hubbard *v.* Bliss, 12 Allen (Mass.) 590; Hill *v.* Freeman, 3 Cush. (Mass.) 257; Coggill *v.* Hartford, etc., R. Co., 3 Gray (Mass.) 545; Salomon *v.* Hathaway, 126 Mass. 482; Robinson *v.* Way, 163 Mass. 212.

Michigan. — Wiggins *v.* Snow, 89 Mich. 476; Tufts *v.* D'Arcambal, 85 Mich. 185, 24 Am. St. Rep. 79; Whitney *v.* McConnell, 29 Mich. 12; Preston *v.* Whitney, 23 Mich. 260.

Mississippi. — Duke *v.* Shackleford, 56 Miss. 552.

New Hampshire. — Kimball *v.* Farnum, 61 N. H. 348.

Wisconsin. — Wheeler, etc., Mfg. Co. *v.* Teetzlaff, 53 Wis. 211.

See Schumacher *v.* Allis Co., 70 Ill. App. 556. *Compare* Myers *v.* Townsend, 103 Iowa 569.

12. **Detinue.** — McGinnis *v.* Savage, 29 W. Va. 362.

13. **Trover.** — Jones *v.* Snider, 99 Ga. 276, 25 S. E. Rep. 668; Hawkins *v.* Hersey, 86 Me. 399; Everett *v.* Hall, 67 Me. 499; Brown *v.* Haynes, 52 Me. 578; Sawyer *v.* Fisher, 32

b. WHERE TITLE HAS PASSED. — Where the property in the goods has passed to the purchaser as well as the possession, but the circumstances are such as to entitle the seller to rescind,[1] the seller, upon exercising his right to rescind, may recover the goods *in specie* or their value or proceeds in an appropriate form of action.[2]

Sales for Cash. — Where goods are sold for cash on delivery, upon default in payment the vendor may affirm the sale and sue for the price, or he may revoke the sale and sue in replevin for the recovery of the specific article sold,[3] or in trover as for a conversion,[4] unless he has waived the requirement of cash payment.[5]

Fraud. — Where a sale has been induced by fraud on the part of the vendee, the vendor may, at his election, waive the fraud, affirm the sale, and sue for the price,[6] or he may rescind the sale[7] and recover the goods or their value in an appropriate action.[8]

Me. 28; Tibbetts *v.* Towle, 12 Me. 341; Angier *v.* Taunton Paper Mfg. Co., 1 Gray (Mass.) 621, 61 Am. Dec. 436; Porter *v.* Pettengill, 12 N. H. 299; Brewer *v.* Ford, 54 Hun (N. Y.) 116, *affirmed* 126 N. Y. 643; Herring *v.* Hoppock, 15 N. Y. 409; Buckmaster *v.* Smith, 22 Vt. 203.

1. See *supra*, this title, *Rescission or Modification of Contract.*

2. **Replevin After Rescission.** — Wm. S. Merrill Chemical Co. *v.* Nickells, 66 Mo. App. 678, 2 Mo. App. Rep. 1378.

3. **Default in Payment — Replevin.** — Wells *v.* Merle, etc., Mfg. Co., 66 Ill. App. 292; Lentz *v.* Flint, etc., R. Co., 53 Mich. 444; Johnson-Brinkman Commission Co. *v.* Missouri Pac. R. Co., 52 Mo. App. 407, *reversed* upon another point in 126 Mo. 344, 47 Am. St. Rep. 675; Kingsley *v.* McGrew, 48 Neb. 812; Scher *v.* Roher, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 792; Rathowsky *v.* Dunn, (Supm. Ct. Tr. T.) 64 N. Y. Supp. 934; Morris *v.* Rexford, 18 N. Y. 552; Goldsmith *v.* Bryant, 26 Wis. 35.

4. **Trover.** — Kingman *v.* Hotaling, 25 Wend. (N. Y.) 423. See also Clark *v.* Edgell, 26 Vt. 108.

5. **Waiver of Cash Payment.** — Crawford *v.* Spraggins, 109 Ala. 353; Hudson Trust, etc., Inst. *v.* Carr-Curran Paper Mills Co., 58 N. J. Eq. 59. See also, *supra*, this title, *When Title Passes—Sale of Specific Chattels Unconditionally.*

6. **Fraud — Action for Price.** — Dietz *v.* Sutcliffe, 80 Ky. 650; Burnham *v.* Smith, 82 Mo. App. 35; Heilbronn *v.* Herzog, 165 N. Y. 98, *reversing* 33 N. Y. App. Div. 311. See generally the titles FRAUD AND DECEIT, vol. 14, p. 12; FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 210.

7. **Rescission for Fraud.** — Wheaton *v.* Baker, 14 Barb. (N. Y.) 594; Weed *v.* Page, 7 Wis. 503, in both of which cases it was held that the sale must be rescinded or affirmed as a whole. See also *supra*, this title, *Rescission or Modification of Contract.*

8. **Recovery of Goods or Value in Case of Fraud** — *United States.* — D'Wolf *v.* Babbett, 4 Mason (U. S.) 289; John V. Farwell Co. *v.* Hilton, 84 Fed. Rep. 293.

California. — Amer *v.* Hightower, 70 Cal. 440; Butler *v.* Collins, 12 Cal. 457.

Illinois. — Farwell *v.* Hanchett, 120 Ill. 573; Doane *v.* Lockwood, 115 Ill. 490; Moriarty *v.* Stofferan, 89 Ill. 528; Hacker *v.* Munroe, 61 Ill. App. 420; Richelieu Hotel Co. *v.* Miller, 50 Ill. App. 390.

Indiana. — Adam, etc., Co. *v.* Stewart, 157 Ind. 678; John H. Hibben Dry-Goods Co. *v.* Hicks, 26 Ind. App. 646; West *v.* Graff, 23 Ind. App. 410; Doherty *v.* Holliday, 137 Ind. 283.

Indian Territory. — Noble *v.* Worthy, 1 Indian Ter. 458.

Iowa. — Phelps *v.* Samson, 113 Iowa 145.

Kansas. — Salisbury *v.* Barton, 63 Kan. 552.

Kentucky. — Lane *v.* Robinson, 18 B. Mon. (Ky.) 630; Gibson *v.* Moore, 7 B. Mon. (Ky.) 94; Longdale Iron Co. *v.* Swift's Iron, etc., Works, 91 Ky. 191; Dietz *v.* Sutcliffe, 80 Ky. 650; Brown *v.* Popham, 15 Ky. L. Rep. 543; Cromie *v.* Crozier, 14 Ky. L. Rep. 858.

Maryland. — Dellone *v.* Hull, 47 Md. 112.

Massachusetts. — Thayer *v.* Turner, 8 Met. (Mass.) 550; Thurston *v.* Blanchard, 22 Pick. (Mass.) 18, 33 Am. Dec. 700.

Michigan. — Kirschbaum *v.* Jasspon, 123 Mich. 314.

Mississippi. — Gulledge *v.* Slayden-Kirksey Woolen Mills, 75 Miss. 297.

Missouri. — Standard Oil Co. *v.* Meyer Bros. Drug Co., 84 Mo. App. 76; Kansas Moline Plow Co. *v.* Wayland, 81 Mo. App. 305; Moore *v.* Hinsdale, 77 Mo. App. 217; Sweet *v.* Sullivan, 77 Mo. App. 128; Goebel *v.* Troll, 71 Mo. App. 123; Burnham *v.* Ellmore, 66 Mo. App. 617; Burnham *v.* Jacobs, 66 Mo. App. 628.

Nebraska. — Field *v.* Morse, 54 Neb. 789.

New York. — Beloit Bank *v.* Beale, 34 N. Y. 473; Roth *v.* Palmer, 27 Barb. (N. Y.) 652; Van Neste *v.* Conover, 20 Barb. (N. Y.) 548; Hunter *v.* Hudson River Iron, etc., Co., 20 Barb. (N. Y.) 501; Wheaton *v.* Baker, 14 Barb. (N. Y.) 597; McKnight *v.* Morgan, 2 Barb. (N. Y.) 173; Van Kleek *v.* Leroy, (Ct. App.) 4 Abb. Pr. N. S. (N. Y.) 433; Olmstead *v.* Hotailing, 1 Hill (N. Y.) 317; Cary *v.* Hotailing, 1 Hill (N. Y.) 311, 37 Am. Dec. 323; Scott *v.* Simmons, (C. Pl. Spec. T.) 34 How. Pr. (N. Y.) 67; Ladd *v.* Moore, 3 Sandf. (N. Y.) 591; Baker *v.* Robbins, 2 Den. (N. Y.) 136; M'Carty *v.* Vickery, 12 Johns. (N. Y.) 348; Tindle *v.* Birkett, 171 N. Y. 520, *affirming* 57 N. Y. App. Div. 450; Heilbronn *v* Herzog, 165 N. Y. 98, *reversing* 33 N. Y. App. Div. 311; Schoeneman *v.* Chamberlin, (Supm. Ct. App. T.) 29 Civ. Pro. (N. Y.) 137; Coursey *v.* Coe, 24 N. Y. App. Div. 271; Goulding *v.* Davidson, 26 N. Y. 606; Dows *v.* Perrin, 16 N. Y. 333.

Ohio — Baird *v.* Howard, 51 Ohio St. 571,

Breach by Vendee. — It has been held, where the buyer, after accepting part of goods sold on credit, refused to accept the rest, that the seller might treat the contract as rescinded and recover the value of the goods actually delivered.[1] So, where the seller fails to give notes and security for the price as agreed, the seller may recover the goods.[2]

c. ALTERNATIVE AND INCONSISTENT REMEDIES — ELECTION. — The right to recover the goods *in specie* or to recover the price or value or proceeds are alternative and inconsistent rights. The seller cannot do both, and it is usually held that an election to pursue either course, made with full knowledge of the facts, will preclude the subsequent adoption of the other course,[3] though there are some apparent exceptions or qualifications to this rule.[4] A recovery of judgment for the price or value has been held in some

46 Am. St. Rep. 550; Wilmot *v.* Lyon, 11 Ohio Cir. Ct. 238, 7 Ohio Cir. Dec. 394; Atlas Nat. Bank *v.* Rheinstrom, 6 Ohio Dec. 215, 4 Ohio N. P. 15.

Rhode Island. — Moore *v.* Watson, 20 R. I. 495.

Tennessee. — Rome Furniture, etc., Co. *v.* Walling, (Tenn. Ch. 1900) 58 S. W. Rep. 1094.

Texas. — Walsh *v.* Leeper Hardware Co., (Tex. Civ. App. 1899) 50 S. W. Rep. 630; Parks *v.* Lancaster, (Tex. Civ. App. 1896) 38 S. W. Rep. 262; Wells *v.* Sperry, (Tex. Civ. App. 1894) 27 S. W. Rep. 900.

Utah. — Belleville Pump, etc., Works *v.* Samuelson, 16 Utah 234.

Wisconsin. — Singer *v.* Schilling, 74 Wis. 369.

In Roth *v.* Palmer, 27 Barb. (N. Y.) 652, it was held that where the vendor repudiates a contract of sale of goods for fraud, he has his selection between contract and tort as to his form of action; he may waive the tort and sue in assumpsit for goods sold and delivered, and allow the rest of the transaction to come out in the evidence, and such waiver of tort does not ratify the previous contract. Singer *v.* Schilling, 74 Wis. 369, is to the same effect. But in Allen *v.* Ford, 19 Pick. (Mass.) 217, it was held that a vendor who rescinds the sale cannot maintain assumpsit against the vendee, but his proper remedy is trover, for the reason that the law will not imply a contract where there is an express one, even where the express contract is tainted with fraud.

1. Breach by Vendee. — Bartholomew *v.* Markwick, 15 C. B. N. S. 711, 109 E. C. L. 711. See also Hochster *v.* De La Tour, 2 El. & Bl. 678, 75 E. C. L. 678; Avery *v.* Bowden, 5 El. & Bl. 714, 85 E. C. L. 714; Rowbotham *v.* Wilson, 6 El. & Bl. 593, 88 E. C. L. 593; Reid *v.* Hoskins, 5 El. & Bl. 729, 85 E. C. L. 729; Wayne's Merthyr Steam Coal, etc., Co. *v.* Morewood, 46 L. J. Q. B. 746.

A contract for sale and delivery of bricks was partly complied with, but, delay arising from the weather, the buyer gave notice that he would not take the remainder It was held that, in the absence of unreasonable delay, the seller might tender the remainder and sue for the whole, or recover the market price for those delivered. Terwilliger *v.* Knapp, 2 E. D. Smith (N. Y.) 86.

2. Failure to Give Agreed Security. — J. I. Case Threshing Mach. Co. *v.* Eichinger, 15 S. Dak. 530.

3. Election of Remedies — *United States.*— Van Winkle *v.* Crowell, 146 U. S. 42; Hadden *v.* Natchaug Silk Co., 84 Fed. Rep. 80.

Alabama. — Shines *v.* Steiner, 76 Ala. 458.

California. — Parke, etc., Co. *v.* White River Lumber Co., 101 Cal. 37.

Connecticut. — Crompton *v.* Beach, 62 Conn. 25, 36 Am. St. Rep. 323; Bulkley *v.* Morgan, 46 Conn. 393.

Illinois. — Streator Tile Works *v.* Coe, 53 Ill. App. 483.

Kansas. — Evans *v.* Rothschild, 54 Kan. 747.

Missouri. — Bangs Milling Co. *v.* Burns, 152 Mo. 350. But see Johnson-Brinkman Commission Co. *v.* Central Bank, 116 Mo. 558, 38 Am. St. Rep. 615.

Nebraska. — Chadron First Nat. Bank *v.* McKinney, 47 Neb. 149.

New Jersey. — Stoutenburgh *v.* Konkle, 15 N. J. Eq. 33.

New York. — Rochester Distilling Co. *v.* Devendorf, 72 Hun (N. Y.) 428; Thompson *v.* Fuller, 62 Hun (N. Y.) 618, 16 N. Y. Supp. 486; Crossman *v.* Universal Rubber Co., 127 N. Y. 34; Beloit Bank *v.* Beale, 34 N. Y. 473; Morris *v.* Rexford, 18 N. Y. 552; Bach *v.* Tuch, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 611.

Pennsylvania. — Boyd *v.* Shiffer, 156 Pa. St. 100.

Texas. — Wear-Boogher Dry Goods Co. *v.* Crews, 23 Tex. Civ. App. 667; Wachsmuth *v.* Sims, (Tex. Civ. App. 1895) 32 S. W. Rep. 821; Krause *v.* Marx, 5 Tex. Civ. App. 397; Heinze *v.* Marx, 4 Tex. Civ. App. 599; Manhattan Cloak, etc., Co. *v.* Marx, (Tex. Civ. App. 1893) 23 S. W. Rep. 707.

Wisconsin. — Lee *v.* Burnham, 82 Wis. 209.

But see Bonaparte *v.* Clagett, 78 Md. 87.

Generally, as to ratification of contracts voidable because of fraud, see the title FRAUD AND DECEIT, vol. 14, p. 12.

4. See the following cases:

Arkansas. — Edgewood Distilling Co. *v.* Shannon, 60 Ark. 133.

Georgia. — Jones *v.* Snider, 99 Ga. 276, 25 S. E. Rep. 668.

Maryland.—Bonaparte *v.* Clagett, 78 Md. 87.

Michigan. — Munzer *v.* Stern, 105 Mich. 523, 55 Am. St. Rep. 468.

Missouri. — Johnson-Brinkman Commission Co. *v.* Missouri Pac. R. Co., 126 Mo. 344, 47 Am. St. Rep. 675.

New York. — Rochester Distilling Co. *v.* Devendorf, 72 Hun (N. Y.) 622; Welch *v.* Seligman, 72 Hun (N. Y.) 138; Schoeneman *v.* Chamberlin, 55 N. Y. App. Div. 351.

cases not to operate as a waiver of the right to recover the goods where there has been no satisfaction of the judgment.[1] An action for the price brought and prosecuted in ignorance of the facts conferring the right to rescind is no bar to a subsequent action to recover the goods based upon a rescission.[2]

d. As Against Third Persons. — Where the title has not passed from the seller, he may recover his goods or their value from a third person into whose possession the goods have come,[3] except where the statute has changed the rule, as has been done in many states in regard to conditional sales and chattel mortgages.[4] But where both the title and the possession have passed to the buyer, although the seller may have a right to rescind and recover his goods as against the buyer, he cannot do so as against a *bona fide* purchaser from the buyer, who took the goods for value and without notice.[5] He may, however, recover from one who took the goods while charged with notice of the facts or who has not parted with value upon the faith of the apparent title

Pennsylvania. — Turner *v.* Smith, 7 Kulp (Pa.) 139.

Texas. — Raby *v.* Sweetzer, 12 Tex. Civ. App. 380; Heinze *v.* Marx, 4 Tex. Civ. App. 599; Manhattan Cloak, etc., Co. *v.* Marx, (Tex. Civ. App. 1893) 23 S. W. Rep. 707.

In Brewer *v.* Ford, 54 Hun (N. Y.) 116, the court said: "The right asserted by the plaintiff that, under the contract, he may retain the title to the property, and at the same time enforce the vendee's promise to pay the purchase price, are not inconsistent, and both propositions have their foundation in the agreement, which was in all respects lawful as between the parties thereto. Suppose A should agree to sell B an article of personal property at a fixed price, which B agreed to pay at a future day, under a stipulation that the possession of the property should remain with the vendor, and the title not pass to the vendee until full performance of the buyer's promise to pay for the same. No one would assert, I think, that such an agreement was unlawful, and could not be enforced by a resort to proper legal remedies. The vendor could maintain an action on the vendee's promise to pay, and hold the title to the property, and retain the possession as a security for the payment of the judgment. Such an action would not be inconsistent with the right of the vendor to retain the title and possession until the vendee performed his promise. If it should be held that an action for the purchase money under such an agreement was inconsistent with the title in him, it would be, in effect, declaring the contract nugatory as to the vendor. So in the case before us, if the plaintiff cannot hold on to the title to the property without canceling the vendee's promise to pay for the same, he is deprived of one of the terms of his contract which is admitted to be lawful in every respect. The case we are considering does not apply to that class of cases where the rule is well settled, that when a contract is induced by a fraud, that fact does not render it void, or prevent the property from passing, but gives the defrauded party a right, on discovering the fraud, to elect whether he will continue to treat the contract as binding, or disaffirm it and resume the possession of the property. In such cases the contract continues in force until the party defrauded has determined by his election to avoid it, and when once rightfully determined it is determined forever. (Moller *v.* Tuska, 87 N. Y. 166; Morris *v.* Rexford, 18 N. Y. 552; Powers *v.* Benedict, 88 N. Y. 605.)" This was *affirmed* in Brewer *v.* Ford, 126 N. Y. 643, without opinion. See also Turner *v.* Smith, 7 Kulp (Pa.) 139. But *compare* Parke, etc., Co. *v.* White River Lumber Co., 101 Cal. 37.

The fact that a vendor of personal property brings an attachment suit against the vendee, which he afterwards dismisses on the advice of his attorneys, does not estop him from bringing replevin to recover the goods sold, in the absence of intervening rights or injury or change of position by reason of the attachment. Johnson-Brinkman Commission Co. *v.* Missouri Pac. R. Co., 126 Mo. 344, 47 Am. St. Rep. 675.

An action for damages for obtaining goods through false pretenses is in disaffirmance of the sale, and not inconsistent with a replevin action previously brought by the seller to recover the goods. Welch *v.* Seligman, 72 Hun (N. Y.) 138.

Replevin by a vendor, in which only a portion of the goods are recovered, is no bar to an action for damages to the extent of the balance on the ground of false representations by the vendee in obtaining the goods. Rochester Distilling Co. *v.* Devendorf, 72 Hun (N. Y.) 622.

1. Judgment Without Satisfaction. — Vaughn *v.* Hopson, 10 Bush (Ky.) 337; Root *v.* Lord, 23 Vt. 568.

2. Ignorance of Facts Authorizing Rescission. Wright *v.* George W. McAlpin Co., (Ky. 1896) 35 S. W. Rep. 1039; Rochester Distilling Co. *v.* Devendorf, 72 Hun (N. Y.) 428.

3. Where Title Has Not Passed. — Savannah Cotton-Press Assoc. *v.* MacIntyre, 92 Ga. 166; Graves *v.* Morse, 45 Neb. 604, Rathowsky *v.* Dunn, (Supm. Ct. Tr. T.) 64 N. Y. Supp. 934; Wilson *v.* Carroll, (Tex. Civ. App. 1899) 50 S. W. Rep. 222. See Wolf *v.* Shepherd, 103 Ala. 244.

4. See generally the titles Chattel Mortgages, vol. 5. p. 945; Conditional Sales, vol. 6, p. 436. See also Savannah Cotton-Press Assoc. *v.* MacIntyre, 92 Ga. 166.

5. Where Title Has Passed — Bona Fide Purchasers. — England *v.* Forbes, 7 Houst. (Del.) 301; Peninsular Stove Co. *v.* Ellis, 20 Ind. App. 491; Levi *v.* Bray, 12 Ind. App. 9; Levy *v.* Carr, 85 Hun (N. Y.) 289; Edelman *v.* Latshaw, 159 Pa. St. 644.

in the buyer.[1] The subject of *bona fide* purchasers will be hereafter separately considered.[2] Where the title has passed and no ground for rescission exists, as where it has been waived, the seller has no claim of any sort against a transferee of the buyer.[3] One who participates in committing a fraud upon the seller may, of course, be held liable to him.[4]

e. EVIDENCE AND BURDEN OF PROOF. — The usual rules of evidence are applicable.[5] Fraud is a question of fact for the jury.[6] The burden of show-

1. Recovery Against Purchaser with Notice — *United States.* — Browning *v.* De Ford, 178 U. S. 196; Morrow Shoe Mfg. Co. *v.* New England Shoe Co., 57 Fed. Rep. 685, 18 U. S. App. 616.

Alabama. — Maxwell *v.* Brown Shoe Co., 114 Ala. 304; Scheuer *v.* Goetter, 102 Ala. 313.

Colorado. — Reid *v.* Bird, 15 Colo. App. 116; Denver First Nat. Bank *v.* Schmidt, 6 Colo. App. 216.

Connecticut. — Soper Lumber Co. *v.* Halsted, etc., Co., 73 Conn. 547.

Delaware. — Truxton *v.* Fait, 1 Penn. (Del.) 483, 73 Am. St. Rep. 81; Fait, etc., Co. *v.* Truxton, 1 Penn. (Del.) 24.

Illinois. — Huthmacher *v.* Lowman, 66 Ill. App. 448; Wiener *v.* Straus, 66 Ill. App. 110; Engel *v.* Salomon, 41 Ill. App. 411. But see Detroit Steel, etc., Co. *v.* Whitney, 57 Ill. App. 164.

Indiana. — West *v.* Graff, 23 Ind. App. 410.

Iowa. — Starr *v.* Stevenson, 91 Iowa 684; Reed *v.* Brown, 89 Iowa 454, 48 Am. St. Rep. 406.

Kansas. — John S. Brittain Dry-Goods Co. *v.* Merkel, 10 Kan. App. 12; Kilpatrick-Koch Dry-Goods Co. *v.* Kahn, 53 Kan. 274.

Kentucky. — Hopkins County Bank *v.* Coffman, (Ky. 1900) 56 S. W. Rep. 718; Carstairs *v.* Kelley Co., (Ky. 1895) 29 S. W. Rep. 622.

Maine. — Hurd *v.* Bickford, 85 Me. 217; 35 Am. St. Rep. 353.

Michigan. — Schloss *v.* Feltus, 96 Mich. 619, 103 Mich. 525; Whitaker Iron Co. *v.* Preston Nat. Bank, 101 Mich. 146; Reid *v.* Johnson, 100 Mich. 445.

Missouri. — Kansas Moline Plow Co. *v.* Wayland, 81 Mo. App. 305; Burnham *v.* Ellmore, 66 Mo. App. 617; Wingate *v.* Buhler, 62 Mo. App. 418; Reid *v.* Lloyd, 52 Mo. App. 278; McClure *v.* School Dist., 66 Mo. App. 84, 2 Mo. App. Rep. 1291.

Nebraska. — Tootle *v.* Chadron First Nat. Bank, 42 Neb. 237.

New York. — Sheffield *v.* Mitchell, 31 N. Y. App. Div. 266; Depew *v.* Beakeas, (Supm. Ct. App. Div.) 44 N. Y. Supp. 774, 16 N. Y. App. Div. 631; Levy *v.* Carr, 85 Hun (N. Y.) 289; Horowitz *v.* Jacobs, (N. Y. City Ct. Gen. T.) 34 Misc. (N. Y.) 402.

Ohio. — Miehle Printing Press, etc., Co. *v.* Andrews-Jones Printing Co., 10 Ohio Cir. Dec. 1, 18 Ohio Cir. Ct. 158.

Oklahoma. — Browning *v.* DeFord, 8 Okla. 239.

Pennsylvania. — Bughman *v.* Central Bank, 159 Pa. St. 94, 33 W. N. C. (Pa.) 557; Schwartz *v.* McCloskey, 156 Pa. St. 258.

Texas. — Hall *v.* Hargadine-McKittrick Dry Goods Co., 23 Tex. Civ. App. 149; Walsh *v.* Leeper Hardware Co., (Tex. Civ. App. 1899) 50 S. W. Rep. 630; Friedman *v.* Boyd, (Tex. Civ. App. 1895) 31 S. W. Rep. 531; Blum *v.* Jones, (Tex. Civ. App. 1893) 23 S. W. Rep. 844.

But see Hazlehurst Lumber Co. *v.* Fay, (Miss. 1895) 18 So. Rep. 485.

2. See *infra*, this title, *Bona Fide Purchasers*. See also cases cited in preceding note.

3. Where No Ground for Rescission Exists. — Van Winkle *v.* Crowell, 146 U. S. 42; Detroit Steel, etc., Co. *v.* Whitney, 57 Ill. App. 164; Richelieu Wine Co. *v.* Ragland, 43 Ill. App. 257; Mathews *v.* Reinhardt, 43 Ill. App. 169, *affirmed* 149 Ill. 635; Levi *v.* Bray, 12 Ind. App. 9; Bentley *v.* Snyder, 101 Iowa 1; International, etc., R. Co. *v.* Ogburn, (Tex. Civ. App. 1901) 63 S. W. Rep. 1072; Walsh *v.* Leeper Hardware Co., (Tex. Civ. App. 1899) 50 S. W. Rep. 630; Raby *v.* Sweetzer, 12 Tex. Civ. App. 380.

4. Joint Wrong-doer. — Reid *v.* Johnson, 100 Mich. 445. See Mathews *v.* Reinhardt, 43 Ill. App. 169, *affirmed* 149 Ill. 635; Reese *v.* Reese, 157 Pa. St. 200.

5. Evidence — Admissibility and Sufficiency — *Fraud and Deceit.* — White *v.* Beal, etc., Grocer Co., 65 Ark. 278; Noble *v.* Worthy, 1 Indian Ter. 458; Wilcox *v.* Williamson Law Book Co., 92 Iowa 215; Rothschild *v.* Hays, 9 Kan. App. 193; Kirschbaum *v.* Jasspon, 119 Mich. 452; Blacker *v.* Ryan, 65 Mo. App. 230, 2 Mo. App. Rep. 1265; Sommer *v.* Adler, 36 N. Y. App. Div. 107; Meyerhoff *v.* Daniels, 173 Pa. St. 555, 51 Am. St. Rep. 782; Leedom *v.* Earls Furniture, etc., Co., 12 Utah 172.

False Representations and Reliance Thereon. — Goodyear Rubber Co. *v.* Schreiber, (Wash. 1902) 69 Pac. Rep. 648; Jandt *v.* Potthast, 102 Iowa 223; Brock *v.* Garson, 117 Mich. 550; Gulledge *v.* Slayden-Kirksey Woolen Mills, 75 Miss. 297; Moore *v.* Hinsdale, 77 Mo. App. 217.

Statements to Mercantile Agencies. — Tindle *v.* Birkett, 171 N. Y. 520; Ralph *v.* Fon Dersmith, 10 Pa. Super. Ct. 481; Rome Furniture, etc., Co. *v.* Walling, (Tenn. Ch. 1900) 58 S. W. Rep. 1094; Schwartz *v.* Mittenthal, (Tex. Civ. App. 1899) 50 S. W. Rep. 182; Woonsocket Rubber Co. *v.* Loewenberg, 17 Wash. 29, 61 Am. St. Rep. 902.

Intention Not to Pay for Goods. — Phelps *v.* Samson, 113 Iowa 145; Watson *v.* Silsby, 166 Mass. 57; Kirschbaum *v.* Jasspon, 119 Mich. 452; Gratton, etc., Mfg. Co. *v.* Troll, 77 Mo. App. 339; Miller *v.* White, 46 W. Va. 67, 76 Am. St. Rep. 791; Hart *v.* Moulton, 104 Wis. 349, 76 Am. St. Rep. 881.

Financial Condition of Buyer. — Waples-Platter Co. *v.* Turner, 83 Fed. Rep. 64, 49 U. S. App. 592; McKensie *v.* Rothschild, 119 Ala. 419; Phelps *v.* Samson, 113 Iowa 145; Diller *v.* Nelson, 10 Pa. Super. Ct. 449.

Conspiracy Between Buyer and Third Person. — McKenzie *v.* Weineman, 116 Ala. 194; Blum *v.* Jones, (Tex. Civ. App. 1893) 23 S. W. Rep. 844.

Ratification of Sale. — Boyd *v.* Shiffer, 156 Pa. St. 100.

6. Fraud a Question for Jury. — Gratton, etc.,

ing fraud or other sufficient ground for rescission is upon the seller.[1] The burden of showing that the defendant was a *bona fide* purchaser is upon the defendant.[2]

5. Resale and Action for Damages — *a.* STATEMENT OF RULE. — **In the United States** the rule in regard to resale by the seller of the goods, where they are still in his possession, is, that without any breach of the contract, and therefore without any of the consequences of such breach, he may, if the buyer, without cause, refuses to accept and pay for the goods sold within a reasonable time, resell the same and recover as damages against the buyer the difference between the contract price and the amount realized upon the resale.[3] In the

Mfg. Co. *v.* Troll, 77 Mo. App. 339; Mauger *v.* Slavin, 11 N. Y. App. Div. 483; Woonsocket Rubber Co. *v.* Loewenberg, 17 Wash. 29, 61 Am. St. Rep. 902. See generally the titles FRAUD AND DECEIT, vol. 14, p. 12; FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 210.

1. Burden of Proof. — Ellwood Mfg. Co. *v.* Faulkner, 87 Ill. App. 294.

2. See *infra*, this title, *Bona Fide Purchasers.* See also Wilk *v.* Key, 117 Ala. 285, holding that the burden is upon the defendant to show that he paid value and upon the plaintiff to show notice of the fraud.

3. Rule in United States — *United States.* — Walker *v.* Gooch, 10 Biss. (U. S.) 159; Pope *v.* Filley, 3 McCrary (U. S.) 190; Clews *v.* Jamieson, 182 U. S. 461; Hughes's Case, 4 Ct. Cl. 64; Hayes *v.* Nashville, (C. C. A.) 80 Fed. Rep. 641; McCulloh *v.* Smith, 44 Fed. Rep. 12.

Alabama. — Penn *v.* Smith, 104 Ala. 445; West *v.* Cunningham, 9 Port. (Ala.) 104, 33 Am. Dec. 300.

Arizona. — Slaughter *v.* Marlow, (Ariz. 1892) 31 Pac. Rep. 547.

California. — La Rue *v.* Groezinger, 84 Cal. 281, 18 Am. St. Rep. 179; Tustin Fruit Assoc. *v.* Earl Fruit Co., (Cal. 1898) 53 Pac. Rep. 693; King *v.* Sheward, 97 Cal. 235.

Colorado. — Magnes *v.* Sioux City Nursery, etc., Co., 14 Colo. App. 219.

Connecticut. — Hickock *v.* Hoyt, 33 Conn. 553.

Delaware. — Barr *v.* Logan, 5 Harr. (Del.) 52; Darby *v.* Hall, 3 Penn. (Del.) 25.

Georgia. — McCord *v.* Laidley, 87 Ga. 221; Barnett *v.* Terry. 42 Ga. 283.

Illinois. — Morris *v.* Wibaux, 159 Ill. 627; Roebling's Sons' Co. *v.* Lock Stitch Fence Co., 130 Ill. 661; Ullmann *v.* Kent, 60 Ill. 271; James H. Rice Co. *v.* Penn Plate Glass Co., 88 Ill. App. 407; Johnson *v.* Listman Mill Co., 79 Ill. App. 435; Thurman *v.* Wilson, 7 Ill. App. 312.

Indiana. — Johnson *v.* Powell, 9 Ind. 566.

Kentucky. — Sanders *v.* Bond, 66 S. W. Rep. 635, 23 Ky. L. Rep. 2084; Doherty *v.* Merchants' Nat. Bank, (Ky. 1899) 52 S. W. Rep. 832; Bell *v.* Offutt, 10 Bush (Ky.) 632; Cook *v.* Brandeis, 3 Met. (Ky.) 555.

Louisiana. — Gilly *v.* Henry, 8 Mart. (La.) 402, 13 Am. Dec. 291; Bartley *v.* New Orleans, 30 La. Ann. 264.

Maine. — Atwood *v.* Lucas, 53 Me. 508, 89 Am. Dec. 713.

Maryland. — Young *v.* Mertens, 27 Md. 114.

Massachusetts. — McLean *v.* Richardson, 127 Mass. 339; Whitney *v.* Boardman, 118 Mass. 242.

Michigan. — Williams *v.* Robb, 104 Mich. 242; Holland *v.* Rea, 48 Mich. 218.

Mississippi. — Hunter *v.* Talbot, 3 Smed. & M. (Miss.) 754.

Missouri. — Van Horn *v.* Rucker, 33 Mo. 391, 84 Am. Dec. 52; Ingram *v.* Matthien, 3 Mo. 209; Baker *v.* McKinney, 87 Mo. App. 361; Logan *v.* Carroll, 72 Mo. App. 613; Strauss *v.* Labsap. 59 Mo. App. 260.

New Hampshire. — Haines *v.* Tucker, 50 N. H. 313; Gordon *v.* Norris, 49 N. H. 376.

New York. — Westfall *v.* Peacock, 63 Barb. (N. Y.) 209; Passaic Mfg. Co. *v.* Hoffman, 3 Daly (N. Y.) 495; Sands *v.* Taylor, 5 Johns. (N. Y.) 395, 4 Am. Dec. 374; Bogart *v.* O'Regan, 1 E. D. Smith (N. Y.) 590; Fisher *v.* Libby, 2 Thomp. & C. (N. Y.) 672; Bement *v.* Smith, 15 Wend. (N. Y.) 493; Ackerman *v.* Rubens, 167 N. Y. 405; Moore *v.* Potter, 155 N. Y. 481, 63 Am. St. Rep. 692; Van Brocklen *v.* Smeallie, 140 N. Y. 70; Stengel *v.* Hewit, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 670; Schwartzenbach *v.* Hass, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 806; Petrie *v.* Stark, 79 Hun (N. Y.) 550; Knox *v.* Schoenthal, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 7; O'Brien *v.* Jones, 47 N. Y. Super. Ct. 67; Sherwood *v.* Ribbons, 6 N. Y. Wkly. Dig. 231.

Ohio. — Cullen *v.* Bimm, 37 Ohio St. 236; Diem *v.* Koblitz, 49 Ohio St. 41, 34 Am. St. Rep. 531; Ashley *v.* Walker, 8 Ohio Cir. Dec. 285, 15 Ohio Cir. Ct. 660.

Oklahoma. — Mansur-Tebbetts Implement Co. *v.* Willet, 10 Okla. 383.

North Carolina. — Hurlburt *v.* Simpson, 3 Ired. L. (25 N. Car.) 233. But see Curtis *v.* Piedmont Lumber Co., 114 N. Car. 530.

Pennsylvania. — Girard *v.* Taggart, 5 S. & R. (Pa.) 33, 9 Am. Dec. 335; M'Combs *v.* M'Kennan, 2 W. & S. (Pa.) 217, 37 Am. Dec. 507; Youghiogheny Iron, etc., Co. *v.* Smith, 66 Pa. St. 340; Patten's Appeal, 45 Pa. St. 151, 84 Am. Dec. 479; Hooper *v.* Bromley Brothers Carpet Co., 11 Pa. Super. Ct. 634.

Tennessee. — Cole *v.* Zucarello, 104 Tenn. 64, *citing* Dustan *v.* McAndrew, 44 N. Y. 72. *Overruling* Coffman *v.* Williams, 4 Heisk. (Tenn.) 233; McDonald *v.* Unaka Timber Co., 88 Tenn. 38; Paragon Refining Co. *v.* Lee, 98 Tenn. 645; Greer Machinery Co. *v.* McCrary, (Tenn. Ch. 1899) 52 S. W. Rep. 1027; Williams *v.* Godwin, 4 Sneed (Tenn.) 557.

Texas. — Waples *v.* Overaker, 77 Tex. 7, 19 Am. St. Rep. 727; Weathered *v.* Golden, (Tex. Civ. App. 1896) 34 S. W. Rep. 761; Heidenheimer *v.* Cleveland, 11 Tex. Civ. App. 546; Halbert *v.* Newell, (Tex. Civ. App. 1894) 27 S. W. Rep. 767.

Vermont. — Phelps *v.* Hubbard, 51 Vt. 489; Jones *v.* Marsh, 22 Vt. 144.

application of this rule there is no distinction between executed contracts where the title but not the possession has passed, and executory contracts where the seller tenders performance.[1] It seems that the seller is not compelled to exercise his right of resale, but may maintain a personal action against the buyer to recover the contract price or damages according as title has or has not passed,[2] but a few cases have taken the view that it is the seller's duty to resell in order to render the loss as light as possible.[3] Notice of intention to resell must be given to the buyer, as otherwise the seller may be deemed to have rescinded the contract.[4] The contract itself may regulate

Virginia. — Rosenbaum *v.* Weeden, 18 Gratt. (Va.) 785, 98 Am. Dec. 737.

Washington. — Neis *v.* O'Brien, 12 Wash. 358, 50 Am. St. Rep. 894.

Wisconsin. — Gehl *v.* Milwaukee Produce Co., 105 Wis. 573.

Canada. — John Abell Engine, etc., Co. *v.* McGuire, 13 Manitoba 454.

And see cases cited more specifically *infra*, this section.

Where the seller has his election between his remedy by resale or by a personal action against the buyer, he cannot, after making such election, abandon it and pursue another. Thus where the seller brings an action to recover the contract price of goods sold, he thereby affirms the contract and cannot thereafter resell the goods or disaffirm the contract and reclaim them. Westfall *v.* Peacock, 63 Barb. (N. Y.) 209; Dreyfuss *v.* Foster, (N. Y. City Ct. Gen. T.) 3 N. Y. Supp 54.

It was held by the city court of New York in Dreyfuss *v.* Foster, (N. Y. City Ct. Gen. T.) 3 N. Y. Supp. 54, that the seller could not, in his action for damages, recover the loss of storing the goods. But in Woods *v.* Cramer, 34 S. Car. 508, the court held otherwise.

1. Executed and Executory Contracts. — See cases cited in preceding note. But see Hewes *v.* Germain Fruit Co., 106 Cal. 441.

Although in cases of executory contracts a resale of the goods, where the buyer refuses to accept and pay for them, is usually classified as a remedy, it would seem that it cannot be strictly so called, since the title to the goods is still in the seller, and they are his to do with as he sees fit. His remedy is an action to recover damages for the breach of contract on the part of the buyer (see *supra*, this section, *Where Contract Is Executory*); but since these damages are measured by the difference between the contract price and the market value, a resale is usually effected as a safer means of determining what that market value is, though, of course, it is not necessary to resell. "As the computation of damages is tested by the market value, the result would be the same whether the seller resold the goods or retained them as he might do at their market valuation." 2 Schouler's Pers. Prop., § 519.

The theory that a resale of the goods in case of the breach of an executory contract is only a means of taking advantage of the seller's real remedy, viz., the recovery of the actual damage that he has sustained, is borne out by the uniform holding of the courts that when the resale occurs at a time, place, or in a manner which indicates that the price obtained is not fair evidence of the market value at the time and place when the delivery should have been made, the seller is not allowed to recover the entire difference between such retail price and the contract price. See Chapman *v.* Ingram, 30 Wis. 290; Rickey *v.* Tenbroeck, 63 Mo. 563; Andrews *v.* Hoover, 8 Watts (Pa.) 239. See also *infra* this section, *Manner, Time, and Place of Resale.*

2. Resale Not Imperative.—Lassing *v.* James, 107 Cal. 348; Darby *v.* Hall, 3 Penn. (Del.) 25; Minneapolis Threshing Mach. Co. *v.* McDonald, 10 N. Dak. 408.

The rule of damages in a case of resale is nothing but an application of the old doctrine that the seller may recover the difference between the contract price and the market value of the goods at the time and place of delivery. But a resale is not absolutely necessary in order to determine the market value of the goods, nor is the price obtained at such resale conclusive to show the amount the seller may recover. West *v.* Cunningham, 9 Port. (Ala.) 104, 33 Am. Dec. 300; White *v.* Kearney, 9 Rob. (La.) 501; Schwartzenbach *v.* Hass, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 806; Andrews *v.* Hoover, 8 Watts (Pa.) 239; Girard *v.* Taggart, 5 S. & R. (Pa.) 19, 9 Am. Dec. 327; Coffman *v.* Hampton, 2 W. & S. (Pa.) 377, 37 Am. Dec. 511.

3. Resale Held Necessary. — Gardner *v.* Caylor, 24 Ind. App. 521. See Loeb *v.* Stern, 99 Ill. App. 637.

4. Necessity and Sufficiency of Notice of Intention to Resell — *England.* — Long *v.* Preston, 2 M. & P. 262, 17 E. C. L. 205.

Connecticut. — Hickock *v.* Hoyt, 33 Conn. 553.

Georgia. — Davis Sulphur Ore Co. *v.* Atlanta Guano Co., 109 Ga. 607.

Illinois. — Neuberger *v.* Rountree, 18 Ill. App. 610. But see Wrigley *v.* Cornelius, 162 Ill. 92, *affirming* 61 Ill. App. 279.

Indiana. — Redmond *v.* Smock, 28 Ind. 370; Dill *v.* Mumford, 19 Ind. App. 609.

Iowa. — Ingram *v.* Wackernagel, 83 Iowa 82.

New York. — Lewis *v.* Greider, 49 Barb. (N. Y.) 606; Mallory *v.* Lord, 29 Barb. (N. Y.) 454; McEachron *v.* Randles, 34 Barb. (N. Y.) 301; Fancher *v.* Goodman, 29 Barb. (N. Y.) 316, *affirmed* Stacy *v.* Graham, 14 N. Y. 492; Schultz *v.* Bradley, 4 Daly (N. Y.) 29; Healy *v.* Utly, 1 Cow. (N. Y.) 345; Van Brocklen *v.* Smeallie, 140 N. Y. 70; O'Brien *v.* Jones, 47 N. Y. Super. Ct. 67; Whitney *v.* McLean, 4 N. Y. App. Div. 449; Case *v.* Simonds, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 253; Crooks *v.* Moore, 1 Sandf. (N. Y.) 297.

Tennessee. — Brady *v.* Isler, 9 Lea (Tenn.) 356; McClure *v.* Williams, 5 Sneed (Tenn.) 718; Winslow *v.* Harriman Iron Co., (Tenn. Ch. 1897) 42 S. W. Rep. 698.

the right of resale.[1]

In England the rule is different and not so simple.[2] There the right of resale may be exercised, strictly speaking, as a remedy only in the case of executed sales where the property is in the buyer but the possession remains in the seller, and where the right of resale is expressly reserved to the seller by the terms of the contract.[3] In the absence of such reservation, while the remedy is still available, it is nevertheless technically a breach of contract, for which the buyer may have an action for damages and recover the difference between the contract price and the price obtained on the resale, if the latter should exceed the former, or nominal damages if there be no difference or if the price obtained at resale is less than the contract price.[4] And the resale does

Texas. — Leonard *v.* Porter, 4 Tex. App. Civ. Cas. § 55.

See John Abell Engine, etc., Co. *v.* McGuire, 13 Manitoba 454. But see Magnes *v.* Sioux City Nursery, etc., Co., 14 Colo. App. 219 [*citing* Saladin *v.* Mitchell, 45 Ill. 79; Waples *v.* Overaker, 77 Tex. 7, 19 Am. St. Rep. 727; Clore *v.* Robinson, 100 Ky. 402; Mann *v.* National Linseed Oil Co., 87 Hun (N. Y.) 558; Ullmann *v.* Kent, 60 Ill. 273; Wrigley *v.* Cornelius, 162 Ill. 92].

In Waples *v.* Overaker, 77 Tex. 7, 19 Am. St. Rep. 727, it was said to be enough if the defaulting buyer has notice of the facts which give to the wrong seller the right to resell, when these consist of the absolute refusal of the buyer to comply with the contract of sale. See Ullmann *v.* Kent, 60 Ill. 273; 2 Schouler's Pers. Prop., § 551.

1. **Contract Regulations.** — John Abell Engine, etc., Co. *v.* McGuire, 13 Manitoba 454.

2. 2 Schouler's Pers. Prop., § 549, where it is said: "The judicial disposition manifested in so many states to treat a sale, with respect to passing the property in the goods, as conditional upon payment of the price, simplifies the situation, and in every way strengthens the unpaid seller's means of enforcing his legal rights, so long as he holds possession."

3. **Rule in England.** — The seller "may, however, by having expressly reserved the right to resell * * * in the original contract, stand with his remedy perfect." 2 Schouler's Pers. Prop., § 547. In such a case the seller may have his action against the buyer to recover any loss he may have sustained by reason of the difference between the contract price and the price obtained at the resale, but the buyer cannot recover any excess obtained over the contract price. Lamond *v.* Davall, 9 Q. B. 1030, 58 E. C. L. 1030, *overruling* Mertens *v.* Adcock, 4 Esp. 251. See Hagedorn *v.* Laing, 6 Taunt. 162, 1 E. C. L. 344. Sugden on Vendors (ed. of 1862), p. 39; John Abell Engine, etc., Co. *v.* McGuire, 13 Manitoba, 454.

In Martindale *v.* Smith, 1 Q. B. 389, 41 E. C. L. 592, it appeared that A sold to B stacks of oats then on A's ground under a written agreement by which B was to have the liberty to leave the stacks on the ground for four months and was to pay for them in twelve weeks from the agreement. At the end of twelve weeks A demanded payment, which was not made; afterwards B tendered payment, which A refused to accept, and after that A sold the stacks. It was held that the contract being executed, A's only remedy was **an action for the price,** and that, while he might retain the goods by virtue of his lien until payment, he was bound to deliver them up upon offer of payment if made while the goods still remained in his possession.

4. **In Regard to the Seller's Rights Where the Title Has Passed but Not the Possession** of the goods, it is said in Blackburn on Sales, 2d ed., p. 331; "The better opinion seems to be that in no case do they amount to a complete resumption of the right of property, or in other words to a right to rescind the contract of sale, but perhaps come nearer to the rights of a pawnee with a power of sale, than to any other common-law rights. At all events it seems that a resale by the vendor, whilst the purchaser continues in default, is not so wrongful as to authorize the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price or to resist paying any balance of it still due; nor yet so tortious as to destroy the vendor's right to retain and so entitle the purchaser to sue in trover." Benj. on Sales (6th ed.), p. 775; Valpy *v.* Oakeley, 16 Q. B. 941, 71 E. C. L. 941; Griffiths *v.* Perry, 1 El. & El. 680, 102 E. C. L. 680.

Since default of the buyer in accepting and paying for the goods does not give the seller the right to rescind the contract, a resale by the latter is not a rescission. Martindale *v.* Smith, 1 Q. B. 395, 41 E. C. L. 595. Therefore the buyer cannot recover any part of the price paid, or refuse to repay the remainder even if he is not in default; his sole remedy being a cross-action for damages. Stephens *v.* Wilkinson, 2 B. & Ad. 320, 22 E. C. L. 86; Page *v.* Cowasjee Eduljee, L. R., 1 P. C. 127. Nor can he, if in default, maintain trover against the seller. Milgate *v.* Kebble, 3 M. & G. 100, 42 E. C. L. 61; Lord *v.* Price, L. R., 9 Exch. 54; but if not in default he may maintain trover against the seller who has tortiously resold the goods. Gillard *v.* Brittan, 8 M. & W. 575; see Chinery *v.* Viall, 5 H. & N. 288.

In Summarizing the Law as deduced from these cases, Mr. Benjamin, in his work on Sales (6th ed.), p. 775, lays down the following: "An unpaid vendor, with the goods in his possession, has more than a mere lien on them; he has a special property analogous to that of a pawnee. But it is a breach of his contract to resell the goods, even on the buyer's default, for which damages may be recovered against him; but only the actual damages suffered, that is, the difference between the contract price and the market value on the resale; and if there be no proof of such difference, the recovery will be for nominal damages only."

not deprive the seller of his right to sue for the full contract price (though in such case the buyer could have his cross-action), or to sue for his loss on the resale.[1]

b. MANNER, TIME, AND PLACE OF RESALE. — The authorities lay down no particular rule as to the manner in which a resale must be made; but, since the measure of damages is to be ascertained by this means, it is essential that the seller act in good faith and under such circumstances as will be best calculated to produce the fair value of the property.[2] He must sell within a reasonable time.[3] While it is not absolutely necessary to give notice to the buyer of the time, place, and manner of the sale, it is better and safer to do so, when practicable, in order to avoid any charge of bad faith.[4] While a resale is generally made at or near the place of delivery fixed by the contract, still it is not necessarily at such place, though if made elsewhere it might

1. Maclean *v.* Dunn, 4 Bing. 722, 15 E. C. L. 129. And this is so even though the seller tortiously retakes the goods from the buyer. Page *v.* Cowasjee Eduljee, L. R., 1 P. C. 127; Stephens *v.* Wilkinson, 2 B. & Ad. 320, 22 E. C. L. 86.

2. Fair Sale in Good Faith Required — *United States.* — Clews *v.* Jamieson, 182 U. S. 461.

Alabama. — Penn *v.* Smith, 98 Ala. 560.

California. — Hewes *v.* Germain Fruit Co., 106 Cal. 441.

Colorado. — Magnes *v.* Sioux City Nursery, etc., Co., 14 Colo. App. 219.

Georgia. — Camp *v.* Hamlin, 55 Ga. 259.

Illinois. — Morris *v.* Wibaux, 159 Ill. 627; Roebling's Sons' Co. *v.* Lock Stitch Fence Co., 130 Ill. 670; Bagley *v.* Findlay, 82 Ill. 526; Saladin *v.* Mitchell, 45 Ill. 85; James H. Rice Co. *v.* Penn Plate Glass Co., 88 Ill. App. 407.

Louisiana. — Linseed, etc., Oil Co. *v.* Kearney, 14 La. Ann. 352.

Michigan. — Brownlee *v.* Bolton, 44 Mich. 221.

Missouri. — Rickey *v.* Tenbroeck, 63 Mo. 567; Strauss *v.* Labsap, 59 Mo. App. 260.

New York. — Ackerman *v.* Rubens, 167 N. Y. 405; Smith *v.* Pettee, 70 N. Y. 13; Mann *v.* National Linseed Oil Co., 87 Hun (N. Y.) 558; Lewis *v.* Greider, 49 Barb. (N. Y.) 606, *affirmed* 51 N. Y. 231; Sands *v.* Taylor, 5 Johns. (N. Y.) 395, 4 Am. Dec. 374; Crooks *v.* Moore, 1 Sandf. (N. Y.) 297; Austin *v.* Hartwig, 49 N. Y. Super. Ct. 256; Pollen *v.* Le Roy, 30 N. Y. 553.

Wisconsin. — Lindon *v.* Eldred, 49 Wis. 305.

3. Time of Resale — *England.* — Roth *v.* Taysen, 8 Asp. M. Cas. 120, 73 L. T. N. S. 628.

United States. — Guy *v.* U. S., 25 Ct. Cl. 61.

Illinois. — Saladin *v.* Mitchell, 45 Ill. 85.

Kansas. — Lawrence Canning Co. *v.* H. D. Lee Mercantile Co., 5 Kan. App. 77.

Missouri. — Logan *v.* Carroll, 72 Mo. App. 613; Rickey *v.* Tenbroeck, 63 Mo. 567.

New Hampshire. — Tripp *v.* Forsaith Mach. Co., 69 N. H. 233.

New York. — Lewis *v.* Greider, 49 Barb. (N. Y.) 606; Almy *v.* Simonson, 52 Hun (N. Y.) 535; Tilt *v.* La Salle Silk Mfg. Co., 5 Daly (N. Y.) 20; Smith *v.* Pettee, 70 N. Y. 13; Crooks *v.* Moore, 1 Sandf. (N. Y.) 297.

Ohio. — Ashley *v.* Walker, 8 Ohio Cir. Dec. 285, 15 Ohio Cir. Ct. 660.

Virginia. — Rosenbaum *v.* Weeden, 18 Gratt. (Va.) 785, 98 Am. Dec. 737.

Wisconsin. — Lindon *v.* Eldred, 49 Wis. 305.

What Is Reasonable Time. — See the titles QUESTIONS OF LAW AND FACT, vol. 23, p. 543; REASONABLE TIME, vol. 23, p. 971. See also cases cited *supra*, in this note.

The better rule seems to be that intimated by the English cases — *i. e.*, at a time reasonably near the time when delivery was to have been made according to the contract. Phillpotts *v.* Evans, 5 M. & W. 475; Stewart *v.* Cauty, 8 M. & W. 160; Pickering *v.* Bardwell, 21 Wis. 565. See also, as to necessity of immediate resale of stock not accepted, Vaupell *v.* Woodward, 2 Sandf. Ch. (N. Y.) 143; Dykers *v.* Townsend, 24 N. Y. 57.

4. Notice of Time and Place of Resale — *Alabama.* — West *v.* Cunningham, 9 Port. (Ala.) 104, 33 Am. Dec. 300.

Colorado. — Magnes *v.* Sioux City Nursery, etc., Co., 14 Colo. App. 219 [*citing* Holland *v.* Rea, 48 Mich. 218; Camp *v.* Hamlin, 55 Ga. 259; Pollen *v.* Le Roy, 30 N. Y. 549; Rosenbaum *v.* Weeden, 18 Gratt. (Va.) 785, 98 Am. Dec. 737; Van Brocklen *v.* Smeallie, 140 N. Y. 70].

Connecticut. — Hickock *v.* Hoyt, 33 Conn. 553.

Illinois. — Ullmann *v.* Kent, 60 Ill. 271.

New York. — Pollen *v.* Le Roy, 30 N. Y. 549, *affirming* 10 Bosw. (N. Y.) 38; Mann *v.* National Linseed Oil Co., 87 Hun (N. Y.) 558; Crooks *v.* Moore, 1 Sandf. (N. Y.) 297.

Pennsylvania. — Gaskell *v.* Morris, 7 W. & S. (Pa.) 32.

Virginia. — Rosenbaum *v.* Weeden, 18 Gratt. (Va.) 785, 98 Am. Dec. 737.

Wisconsin. — Lindon *v.* Eldred, 49 Wis. 305.

In McEachron *v.* Randles, 34 Barb. (N. Y.) 301, it was laid down that the right to resell can only be exercised after due notice to the purchaser of the time and place where the sale will be made. But this has been expressly overruled in later cases. McGibbon *v.* Schlessinger, 18 Hun (N. Y.) 225; Pollen *v.* Le Roy, 30 N. Y. 549, where Emott, J., said: "The law regards him (the seller), as it has been said in some cases, if in possession of the goods, as the agent *quoad hoc* of the vendee. But it is no part of such an agency, or of the duties involved in it, to notify the principal of the time and place at which the goods are to be sold or exposed for sale. Indeed, in a majority of cases, such a notice would be entirely impracticable. Unless the sale is to be public and at auction, no notice of the time and place can be given." See also Lewis *v.* Greider, 49 Barb. (N. Y.) 606.

tend to show that it was unfair and therefore not a real test of the market value of the goods.[1] It may be the duty of the seller to take the goods to the best and usual market for that class of goods.[2] The seller may himself become the purchaser if the sale is fairly conducted and the full market price is realized.[3]

6. Lien — *a.* EXISTENCE OF LIEN. — Generally speaking, in all cases where a sale is effected, and nothing is specified as to delivery or payment, the seller has a lien on the goods sold, that is, a right to retain them until the price is paid.[4] This rule, however, is subject to some modifications and restrictions. Thus, in the first place, a lien extends only to the price, not to any other claims which the seller may have against the buyer, as, for example, charges for storage, etc., where the former acts as bailee or warehouseman.[5]

1. Place of Resale. — Johnson *v.* Listman Mill Co., 79 Ill. App. 435; Lawrence Canning Co. *v.* H. D. Lee Mercantile Co., 5 Kan. App. 77; Rickey *v.* Tenbroeck, 63 Mo. 567; McGibbon *v.* Schlessinger, 18 Hun (N. Y.) 225; Chapman *v.* Ingram, 30 Wis. 290.

Where the price of the property depends on the market at the place other than the place of delivery, the seller may ship the property to such place and sell there on the buyer's refusal to accept at the specified time. Ingram *v.* Wackernagel, 83 Iowa 82.

Anderson *v.* Frank, 45 Mo. App. 482, was an action for breach of contract for the purchase of wool. The wool was to be delivered at a town where it appeared there was no local market for it. Kansas City was the nearest, though a limited, market, and St. Louis was the controlling market, and the wool was sent to the latter place for sale on the buyer's account. It was held that the sale was properly made at this place and the price obtained there controlled the measure of damages for the breach. *Distinguishing* Rickey *v.* Tenbroeck, 63 Mo. 563.

2. Lewis *v.* Greider, 49 Barb. (N. Y.) 606, *affirmed* in 51 N. Y. 231. See Waples *v.* Overaker, 77 Tex. 7, 19 Am. St. Rep. 727.

3. Repurchase by Seller. — Linseed, etc., Oil Co. *v.* Kearney, 14 La. Ann. 352; Strauss *v.* Labsap, 59 Mo. App. 260; Ackerman *v.* Rubens, 167 N. Y. 405; Lindon *v.* Eldred, 49 Wis. 305.

4. Lien — General Rule — *England.* — Miles *v.* Gorton, 2 Cromp. & M. 504; Nevius *v.* Schofield, 18 N. Bruns. 435.

United States. — Moore *v.* Newbury, 6 McLean (U. S.) 472. See McElwee *v.* Metropolitan Lumber Co., (C. C. A.) 69 Fed. Rep. 302.

Arkansas. — Creanor *v.* Creaner, 36 Ark. 91.

Indiana. — Bradley *v.* Michael, 1 Ind. 552.

Maine. — Milliken *v.* Warren, 57 Me. 46; Bradeen *v.* Brooks, 22 Me. 470.

Massachusetts. — Arnold *v.* Delano, 4 Cush. (Mass.) 33, 50 Am. Dec. 754; Haskins *v.* Warren, 115 Mass. 533; Ware River R. Co. *v.* Vibbard, 114 Mass. 447.

Michigan. — Burke *v.* Dunn, 117 Mich. 430.

Minnesota. — Crummey *v.* Raudenbush, 55 Minn. 426.

Missouri. — Straus *v.* Rothan, 41 Mo. App. 602; Napa Valley Wine Co. *v.* Rinehart, 42 Mo. App. 171.

New York. — Carlisle *v.* Kinney, 66 Barb. (N. Y.) 363; Cornwall *v.* Haight, 8 Barb. (N. Y.) 328; Palmer *v.* Hand, 13 Johns. (N. Y.) 434, 7 Am. Dec. 392; Cragin *v.* O'Connell, 169 N. Y. 573, 50 N. Y. App. Div. 339.

Pennsylvania. — White *v.* Welsh, 38 Pa. St. 420; Bowen *v.* Burk, 13 Pa. St. 146; National State Bank *v.* Korting Gas Engine Co., 3 Pa. Dist. 604.

Texas. — Gay *v.* Hardeman, 31 Tex. 250.

Wisconsin. — Bohn Mfg. Co. *v.* Hynes, 83 Wis. 388.

See generally the title LIENS, vol. 19, p. 3.

As to the waiver of a lien where the sale is on credit, see *infra*, this section, *By Waiver*.

"A Vendor's Lien Is in No Sense a Right of Rescission. On the contrary, it proceeds in affirmation of the contract and as a means of its enforcement. It is in the nature of a pledge raised or created by the law upon the happening of the insolvency of the vendee to secure the unpaid purchase money to the vendor. It is a mere right of detention and sale to satisfy the unpaid purchase money." Thompson, J., in Conrad *v.* Fisher, 37 Mo. App. 382. In the same case it was said further that "where the right of stoppage *in transitu* exists, the vendor's lien *a fortiori* exists. In other words, if there has been such a delivery, before the goods are started on their voyage, as cuts off the vendor's lien, there is no *transitu* in the sense which supports the right of stoppage *in transitu*." See the title STOPPAGE IN TRANSITU.

When a Thing Has Been Exchanged for another thing and a sum of money, the transaction is a sale to the extent of the money consideration, and the creditor is entitled to a seller's lien. Furniss's Succession, 34 La. Ann. 1013.

Sale of Different Goods for Lumping Price. — If it appear that the sale made embraced both real and personal property, unless it can be shown that a particular price was agreed on for the land as distinct from the aggregate amount allowed for both the land and the personalty, the seller's lien must be regarded as waived and abandoned. Alexander *v.* Hooks, 84 Ala. 605; Stringfellow *v.* Ivie, 73 Ala. 209; Wilkinson *v.* Parmer, 82 Ala. 367; Betts *v.* Sykes, 82 Ala. 378; McCandlish *v.* Keen, 13 Gratt. (Va.) 615.

So where the goods on which the seller's privilege is claimed have been sold in block, and for a lumping price, and when the proof sustains the privilege on a part and fails to sustain it on the rest of the goods, the impossibility of separating the price is fatal to the allowance of the privilege. Newman *v.* Cannon, 44 La. Ann. 579.

5. Lien Limited to Price. — Benj. on Sales (4th Am. ed.), § 796; Tiedeman on Sales, § 119. But see Holtz *v.* Peterson, 68 Iowa 741, wherein

Again, the lien exists only when the property in the goods has passed to the buyer,[1] while the goods themselves are still in the actual or constructive possession of the seller,[2] and it is confined to the subject-matter of the sale, not extending to goods which have been mingled with those sold.[3] This lien of the seller exists at common law without any express agreement, being impliedly a part of every contract of sale, and though, as will be seen hereafter, it may be divested by delivery or otherwise, there is nothing to prevent a new and different lien from arising by contract, which does not necessarily possess the same properties or become subject to the same limitations as the common-law lien, but which depends entirely on the agreement of the parties creating it.[4] Possession in the seller is not essential to the existence of a

under the *Iowa* statute, the seller of cattle was held to have a lien for feed.

This point has sometimes arisen in cases where one who had expended labor on certain articles, and had retained them for some time by virtue of his lien, claimed also charges for storage while so holding it. But such charges are not allowed; the holding is for the holder's own benefit and against the will of the owner. Crommelin *v.* New York, etc., R. Co., 10 Bosw. (N. Y.) 77, 1 Abb. App. Dec. (N. Y.) 472, 4 Keyes (N. Y.) 90, where a carrier held goods until freight should be paid. British Empire Shipping Co. *v.* Somes, El. Bl. & El. 353, 367, 96 E. C. L. 353, 367, where a shipwright claimed compensation for use of his dock during the time he held a vessel there by virtue of his lien.

1. Title Must Have Passed. — Eads *v.* Kessler, 121 Cal. 244; Carlisle *v.* Kinney, 66 Barb. (N. Y.) 363. See also Tiedeman on Sales, § 119; Dixon *v.* Yates, 5 B. & Ad. 313, 27 E. C. L. 86.

"The existence of a vendor's lien always presupposes that the title to the goods has passed to the vendee, since it would be an incongruous conception that a vendor might have a lien on his own goods." Thompson, J., in Conrad *v.* Fisher, 37 Mo. App. 382.

2. Possession Essential — *England.* — Newsom *v.* Thorton, 6 East 21.

United States. — *Ex p.* Foster, 2 Story (U. S.) 131.

Alabama. — Russell *v.* McCormick, 45 Ala. 587, 6 Am. Rep. 707; Stringfellow *v.* Ivie, 73 Ala. 209.

Arkansas. — Bryan-Brown Shoe Co. *v.* Block, 52 Ark. 458; Barstow *v.* Pine Bluff, etc., R. Co., 57 Ark. 334.

Indiana. — Slack *v.* Collins, 145 Ind. 569.

Maine. — Sawyer *v.* Fisher, 32 Me. 28.

Massachusetts. — Arnold *v.* Delano, 4 Cush. (Mass.) 33, 50 Am. Dec. 754; Parks *v.* Hall, 2 Pick. (Mass.) 212.

Minnesota. — Woodland Co. *v.* Mendenhall, 82 Minn. 483.

Missouri. — Vogelsang *v.* Fisher, 128 Mo. 386; Brownell, etc., Car Co. *v.* Barnard, 116 Mo. 667.

New Hampshire. — Pickett *v.* Bullock, 52 N. H. 354.

New York. — A. F. Engelhardt Co. *v.* Benjamin, 5 N. Y. App. Div. 475.

Ohio. — Jordan *v.* James, 5 Ohio 88.

Tennessee. — Boyd *v.* Mosely, 2 Swan (Tenn.) 693.

Vermont. — Robinson *v.* Morgan, 65 Vt. 37. See Curtin *v.* Isaacsen, 36 W. Va. 391. See also *infra*, this section, *Lien — How Divested — By Delivery.*

If the agreement is that the goods shall be paid for on delivery, and upon delivery being made the buyer refuses to pay, the seller, by virtue of his lien, may resume possession. And if delivery is partially completed and the buyer sells or pledges the goods received to a third person, but without notice to the seller, the latter's lien is not affected, and he may recover from such subsequent purchasers. Palmer *v.* Hand, 13 Johns. (N. Y.) 434, 7 Am. Dec. 392; Cornwall *v.* Haight, 8 Barb. (N. Y.) 327.

3. Limited to Specific Goods Sold. — Payne *v.* Buford, 106 La. 83; Newman *v.* Cannon, 43 La. Ann. 712; General Electric Co. *v.* Transit Equipment Co., 57 N. J. Eq. 460. See Scannell *v.* Beauvais, 38 La. Ann. 217; Shakspeare *v.* Ware, 38 La. Ann. 570.

4. Lien Reserved by Contract — *United States.* — Gregory *v.* Morris, 96 U. S. 619; Holly Mfg. Co. *v.* New Chester Water Co., 48 Fed. Rep. 879.

Alabama. — Wood *v.* Holly Mfg. Co., 100 Ala. 326, 46 Am. St. Rep. 56.

Iowa. — Grant *v.* Whitwell, 9 Iowa 157.

Kentucky. — Peneix *v.* Rodgers, (Ky. 1899) 49 S. W. Rep. 447; Rennebaum *v.* Atkinson, 103 Ky. 555.

Maine. — Sawyer *v.* Fisher, 32 Me. 28.

Minnesota. — Fletcher *v.* Lazier, 58 Minn. 326; Woodland Co. *v.* Mendenhall, 82 Minn. 483.

North Carolina. — Huyett, etc., Mfg. Co. *v.* Gray, 124 N. Car. 322; McNeil Pipe, etc., Co. *v.* Woltman, 114 N. Car. 178.

South Carolina. — Alexander *v.* Heriot, 1 Bailey Eq. (S. Car.) 223.

Texas. — Gay *v.* Hardeman, 31 Tex. 245.

Wisconsin. — Bunn *v.* Valley Lumber Co., 51 Wis. 376.

See generally the title LIENS, vol. 19, p. 3.

This contract lien may be created by a verbal as well as a written agreement. Burnham *v.* Marshall, 56 Vt. 365. *Compare*, as to this last proposition, Gay *v.* Hardeman, 31 Tex. 245, holding that a parol reservation in the sale of a personal chattel is neither by common law nor by statute a lien upon the thing sold. Possession by the seller is absolutely essential.

An agreement by the buyer that the chattel shall not be sold by him until after he has paid the purchase money does not create a lien on the chattel in favor of the seller; it is

contract lien, unless required by the contract.[1] Such contractual or equitable lien, unaccompanied by possession, cannot, it seems, be enforced against subsequent *bona fide* purchasers without notice, in the absence of statutory provision, but the statutes generally provide for the enforcement of such liens, when the proper notice has been given by record or otherwise.[2] So in many states liens under special circumstances have been established by statute for the protection of the seller.[3] The common-law lien must also be distinguished from the equitable lien allowed to vendors of land.[4]

b. How Divested — (1) *By Payment.* — Since the lien of the seller is solely for the purpose of securing the price of the goods sold, it is manifest that it is destroyed when full payment is made or tendered.[5] Part payment, however, does not divest the lien as to any portion of the goods, since it exists over the entire mass and is only removed by a payment in full.[6]

(2) *By Waiver.* — As the lien is a personal privilege belonging to the seller, it may, of course, be waived expressly.[7] It may also be waived by implication where the circumstances show that it was not intended that the vendor should retain possession until payment,[8] as where the goods are sold

a mere personal obligation. Welsh *v.* Parish, 1 Hill L. (S. Car.) 155.

It is competent for the parties to agree that the seller shall retain a lien upon the property sold as well as upon the article into which it shall be manufactured. And in such case the lien will attach upon the new article as fast as it comes into existence. Dunning *v.* Stearns, 9 Barb. (N. Y.) 630.

In Cooper *v.* Cleghorn, 50 Wis. 113, there was a sale of machinery on condition that it should remain the property of the seller until paid for. The machinery was so affixed to the buyer's mill that it could not be removed without material injury to the realty. It was held that the seller might enforce a lien on the building containing the machinery for the amount remaining due on the contract.

1. Possession under Contract Lien. — Peck *v.* Jenness, 7 How. (U. S.) 620; Sawyer *v.* Fisher, 32 Me. 28; Bradeen *v.* Brooks, 22 Me. 463; Burnham *v.* Marshall, 56 Vt. 365.

2. Lien as Against Bona Fide Purchasers — *United States.* — New Chester Water Co. *v.* Holly Mfg. Co., 53 Fed. Rep. 19, 3 U. S. App. 264; Holly Mfg. Co. *v.* New Chester Water Co., 48 Fed. Rep. 879.

Alabama. — Glass *v.* Tisdale, 106 Ala. 581.

Kentucky. — Bean *v.* Johnson, (Ky. 1895) 32 S. W. Rep. 175.

Minnesota. — Clark *v.* B. B. Richards Lumber Co., 68 Minn. 282.

Texas. — College Park Electric Belt Line *v.* Ide, 15 Tex. Civ. App. 273; Hoyt, etc., Co. *v.* Weiss, 10 Tex. Civ. App. 462; McClenney *v.* McClenney, 3 Tex. 197, 49 Am. Dec. 741.

Vermont. — Howard *v.* Witters, 60 Vt. 578; Barber *v.* Richardson, 57 Vt. 408; Bugbee *v.* Stevens, 53 Vt. 389; Ward *v.* Camp, 67 Vt. 461.

Wisconsin. — Bunn *v.* Valley Lumber Co., 51 Wis. 376; Cadle *v.* McLean, 48 Wis. 630.

See Vogelsang *v.* Fisher, (Mo. 1894) 28 S. W. Rep. 873. See also Tiedeman on Sales, § 121; 13 Cent. L. J., p. 133.

See also *infra*, this title, *Bona Fide Purchasers*, and the title, Conditional Sales, vol. 6, p. 436.

3. Statutory Liens. — State Trust Co. *v.* De La Vergne Refrigerating Mach. Co., (C. C. A.) 105 Fed. Rep. 468; National Foundry, etc., Works *v.* Oconto Water Co., 52 Fed. Rep. 43; Oconto Water Co. *v.* National Foundry, etc., Works, 59 Fed. Rep. 19, 18 U. S. App. 380; Eads *v.* Kessler, 121 Cal. 244; Holtz *v.* Peterson, 98 Iowa 741; Grunewald Co. *v.* Thompson, 104 La. 61; Monroe Bldg., etc., Assoc. *v.* Johnston, 51 La. 470.

4. See the title Vendor's Lien; and see *In re* Reefer, 9 Ohio Dec. 326, 6 Ohio N. P. 338.

5. Payment. — Martindale *v.* Smith, 1 Q. B. 394, 41 E. C. L. 595, holding that after tender of payment the lien is destroyed, and the seller cannot claim to rescind the contract after such tender on the ground that it was made after the appointed time. But see Adler *v.* Burton Lumber Co., 46 La. Ann. 379.

In Cory *v.* Barnes, 63 Vt. 456, the seller reserved a lien, and a note was given for the price. The buyer afterwards paid the amount of the note, and the seller agreed to indorse such payment on the note but did not do so. Afterwards the parties agreed to apply the payment to another note. It was held that in the interval between the payment and the agreement to apply it to the other note the seller had no lien on the property. See generally the title Tender. As to payment by note, bill, or check, see the title Payment, vol. 23, p. 513.

6. Partial Payments. — Wood *v.* Holly Mfg. Co., 100 Ala. 326, 46 Am. St. Rep. 56; Robinson *v.* Morgan, 65 Vt. 37.

Thus, it is said in Story on Sales (4th ed.), § 282, in speaking of the lien: "It is a right to retain goods sold until the whole price is paid. A partial payment, therefore, will not operate to destroy the lien of the vendor upon all the goods, but only to diminish it in value; every single portion of the property sold being covered by a lien for the smallest fraction of the price." Hodgson *v.* Loy, 7 T. R. 436.

7. Waiver of Lien. — Benj. on Sales (6th ed.), § 797.

8. Waiver of Lien by Implication. — Benj. on Sales (6th Am. ed.), § 797; Crug *v.* Gotham, (Conn. 1902) 51 Atl. Rep. 519; Crummey *v.* Raudenbush, 55 Minn. 426; Parks *v.* O'Connor, 70 Tex. 377; Robinson *v.* Morgan, 65 Vt. 37; Neff *v.* Baker, 82 Va. 401.

"The right of lien is to be deemed to be

on credit,[1] or where the seller takes some other security for the payment of the price.[2] Merely giving a promissory note payable on demand for the amount of the price will not operate to destroy the lien,[3] but the rule is otherwise where a note is made payable at a fixed future time.[4] If, however, at the time when the note is due, or the credit has expired, the seller still retains possession of the property, his lien revives and continues until payment.[5] And so, also, if before payment the buyer becomes insolvent, the lien is revived, the seller being still in possession.[6] The lien is lost by per-

waived when the party enters into a special agreement inconsistent with the existence of the lien or from which a waiver of it may be fairly inferred." Pickett *v.* Bullock, 52 N. H. 354. See also Spartali *v.* Benecke, 10 C. B. 212, 70 E. C. L. 212.

1. Waiver by Giving Credit — *England.* — Spartali *v.* Benecke, 10 C. B. 212, 70 E. C. L. 212; Crawshay *v.* Homfray, 4 B. & Ald. 50, 6 E. C. L. 386; Chambers *v.* Davidson, L. R. 1 P. C. 296; Lockett *v.* Nicklin, 2 Exch. 93.

Canada. — Troop *v.* Hart, 7 Can. Sup. Ct. 512.

United States. — Leonard *v.* Davis, 1 Black (U. S.) 476.

Illinois. — McNail *v.* Ziegler, 68 Ill. 224.

Massachusetts. — Arnold *v.* Delano, 4 Cush. (Mass.) 39, 50 Am. Dec. 756.

Missouri. — Redenbaugh *v.* Kelton, 130 Mo. 558.

Wisconsin. — Thompson *v.* Wedge, 50 Wis. 642.

Compare Badham *v.* Brabham, 54 S. Car. 400.

It is competent, however, for the parties to agree expressly that though the goods are sold on credit, yet the seller may retain possession until payment. And where this is the case, the sale on credit, of course, does not destroy the lien. But in the absence of such express agreement, or clear proof of a well-established usage, a sale on credit means, *ex vi terminorum*, a relinquishment of the lien. Benj. on Sales (6th Am. ed.), § 797; Hunter *v.* Talbot, 3 Smed. & M. (Miss.) 754; Tuthill *v.* Skidmore, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 445.

That a well-established usage in such cases may be admitted in evidence, see Field *v.* Lelean, 6 H. & N. 617, 30 L. J. Exch. 168, *overruling* Spartali *v.* Benecke, 10 C. B. 212, 70 E. C. L. 212, in so far as it asserts a contrary doctrine. See these cases reviewed in Benj. on Sales (6th ed.), §§ 797, 798.

2. Waiver by Taking Security for Price. — Benj. on Sales (4th Am. ed.), § 798; Horncastle *v.* Farran, 3 B. & Ald. 497, 5 E. C. L. 356; Hewison *v.* Guthrie, 2 Hodges 51, 3 Scott 298, 2 Bing. N. Cas. 755, 29 E. C. L. 477; Parker *v.* Byrnes, 1 Lowell (U. S.) 539; Westinghouse Electric Mfg. Co. *v.* Citizens' St. R. Co., (Ky. 1902) 68 S. W. Rep. 463; Musson *v.* Elliott, 30 La. Ann. 147; Dummer *v.* Smedley, 110 Mich. 466; Des Arts *v.* Leggett, 16 N. Y. 582. See also Pooley *v.* Great Eastern R. Co., 34 L. T. N. S. 537; Benedict *v.* Field, 16 N. Y. 595.

In Chambers *v.* Davidson, L. R. 1 C. P. 296, 4 Moo. P. C. C. N. S. 158, it is said: "The lien is not the result of an express contract. It is given by implication of law. If, therefore, a mercantile transaction which might involve a lien is created by express contract, and a security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security exclude the lien and limit their rights by the extent of the express contract that they have made."

In Page *v.* Edwards, 64 Vt. 124, it was held that where the seller of certain machinery to be placed in a mill afterwards took a mortgage on it together with other property, he did not thereby waive his lien reserved on the machinery in favor of a prior mortgagee of the mill, where such mortgage expressly stated that it was taken as a further security.

3. Note Given for Price. — Farmeloe *v.* Bain, 1 C. P. D. 445, 17 Moak 349; Clark *v.* Draper, 19 N. H. 419; Bristol *v.* Pearson, 107 N. Car. 562, 22 Am. St. Rep. 900; Arnold *v.* Carpenter, 16 R. I. 560; Campbell Printing Press, etc., Co. *v.* Powell, 78 Tex. 53.

In Jeckell *v.* Fried, 18 La. Ann. 192, S sold a machine to F, and being indebted to B, procured F to execute his note for the purchase money to B. Subsequently B transferred the note to A. It was held that the seller's privilege passed to A with the note.

4. Bunney *v.* Poyntz, 4 B. & Ad. 568, 24 E. C. L. 118; Thompson *v.* Wedge, 50 Wis. 642. See also *Re* Batchelder, 2 Lowell (U. S.) 245. *Compare* Adler *v.* Burton Lumber Co., 46 La. Ann. 379.

5. Revival of Lien. — Benj. on Sales (6th Am. ed.), § 825; Wilmshurst *v.* Bowker, 5 Bing. N. Cas. 541, 35 E. C. L. 218; New *v.* Swain, 1 Dans. & L. 123; Bunney *v.* Poyntz, 4 B. & Ad. 568, 24 E. C. L. 118; McElwee *v.* Metropolitan Lumber Co., 69 Fed. Rep. 302, 37 U. S. App. 266; Owens *v.* Weedman, 82 Ill. 409; Woodland Co. *v.* Mendenhall, 82 Minn. 483; Tuthill *v.* Skidmore, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 445. See Marinette Iron Works Co. *v.* Cody, 108 Mich. 381.

6. *England.* — Reader *v.* Knatchbull, 5 T. R. 218, note; Grice *v.* Richardson, 3 App. Cas. 319, 24 Moak 214.

United States. — McElwee *v.* Metropolitan Lumber Co., 69 Fed. Rep. 302, 37 U. S. App. 266.

Maryland. — Thompson *v.* Baltimore, etc., R. Co., 28 Md. 396.

Massachusetts. — Arnold *v.* Delano, 4 Cush. (Mass.) 41, 50 Am. Dec. 754.

Minnesota. — Crummey *v.* Raudenbush, 55 Minn. 426.

Mississippi. — Hunter *v.* Talbot, 3 Smed. & M. (Miss.) 757.

Missouri. — Vogelsang *v.* Fisher, 128 Mo. 386, (Mo. 1894) 28 S. W. Rep. 873; Southwestern Freight, etc., Press Co. *v.* Stanard, 44 Mo. 84, 100 Am. Dec. 255, *affirmed* Southwestern Freight, etc., Express Co. *v.* Plant, 45 Mo. 517.

New York. — Roget *v.* Merritt, 2 Cai. (N. Y.) 117; Benedict *v.* Field, 16 N. Y. 595.

mitting the goods upon which it exists to be so mingled or confused with other goods that they cannot be identified and separated.[1]

(3) *By Delivery.* — As the possession of the property, actual or constructive, by the seller is essential to the existence of the lien, it follows that whenever there has been a delivery in performance or execution of the contract of sale the lien is divested.[2] The delivery which satisfies the statute of frauds is not such a delivery as divests the lien.[3] A constructive delivery is sufficient, unless, notwithstanding such delivery, the seller retains the actual possession;[4] for example, a delivery to a common carrier as the agent of the

Pennsylvania. — White *v.* Welsh, 38 Pa. St. 420.

Vermont. — Robinson *v.* Morgan, 65 Vt. 37.

The waiver of lien by giving credit or taking a bill or note for payment is said to take place on the implied condition that the buyer will keep his credit good until the term of credit shall have expired, and for this reason the lien at once revives, if he become insolvent before delivery. Conrad *v.* Fisher, 37 Mo. App. 383.

1. Confusion of Goods. — Payne *v.* Buford, 106 La. 83; General Electric Co. *v.* Transit Equipment Co., 57 N. J. Eq. 460.

2. Lien Lost by Delivery — *United States.* — Gregory *v.* Morris, 96 U. S. 619.

Alabama. — Blackshear *v.* Burke, 74 Ala. 239.

Arkansas. — Obermier *v.* Core, 25 Ark. 564; Barnett *v.* Mason, 7 Ark. 253; Barstow *v.* Pine Bluff, etc., R. Co., 57 Ark. 334.

California. — Hewlet *v.* Flint, 7 Cal. 264.

Georgia. — Johnson *v.* Farnum, 56 Ga. 144.

Indiana. — Slack *v.* Collins, 145 Ind. 569.

Louisiana. — Elkin *v.* Harvy, 20 La. Ann. 545.

Massachusetts. — Chapman *v.* Searle, 3 Pick. (Mass.) 38; Parks *v.* Hall, 2 Pick. (Mass.) 212; Freeman *v.* Nichols, 116 Mass. 309; Haskins *v.* Warren, 115 Mass. 515.

Michigan. — Muskegon Booming Co. *v.* Underhill, 43 Mich. 629.

Minnesota. — Manchester Locomotive Works *v.* Truesdale, 44 Minn. 115.

Mississippi. — Frank *v.* Robinson, 65 Miss. 162.

Missouri. — Redenbaugh *v.* Kelton, 130 Mo. 558; Brownell, etc., Car Co. *v.* Barnard, 116 Mo. 667.

New York. — Palmer *v.* Hand, 13 Johns. (N. Y.) 434, 7 Am. Dec. 392; Lupin *v.* Marie, 6 Wend. (N. Y.) 77, 21 Am. Dec. 256; A. F. Engelhardt Co. *v.* Benjamin, 5 N. Y. App. Div. 475.

North Carolina. — Beam *v.* Blanton, 3 Ired. Eq. (38 N. Car.) 59.

Pennsylvania. — Lehigh Coal, etc., Co. *v.* Field, 8 W. & S. (Pa.) 241; Jenkins *v.* Eichelberger, 4 Watts (Pa.) 121, 28 Am. Dec. 691; Welsh *v.* Bell, 32 Pa. St. 17; Bowen *v.* Burk, 13 Pa. St. 146.

Tennessee. — Boyd *v.* Mosely, 2 Swan (Tenn.) 661.

Texas. — Lewis *v.* Steiner, 84 Tex. 364.

Virginia. — James *v.* Bird, 8 Leigh (Va.) 510, 31 Am. Dec. 668.

West Virginia. — Williams *v.* Gillespie, 30 W. Va. 586.

In *Louisiana*, the doctrine is stated that a seller's lien on personalty continues as long as the buyer's possession, but is lost by a sale and actual delivery by the buyer to a third person; but this delivery must be undoubted, and the change of possession must be actual and continued. Flint *v.* Rawlings, 20 La. Ann. 557; Fetter *v.* Field, 1 La. Ann. 80.

Delivery for Special Purpose. — It seems that the buyer may be let into possession of the goods for a special purpose or in a different character from that of buyer without thereby divesting the seller of his lien. Thus, the seller may refuse to deliver the property sold, but may lend it to the buyer for a specified time. Tempest *v.* Fitzgerald, 3 B. & Ald. 680, 5 E. C. L. 419; Marvin *v* Wallis, 6 El. & Bl. 726, 88 E. C. L. 726.

3. Sufficiency of Delivery. — In Arnold *v.* Delano, 4 Cush. (Mass.) 38, 50 Am. Dec. 756, the court, by Shaw, C. J., said. "There is manifestly a marked distinction between those acts which, as between vendor and vendee, upon a contract of sale, go to make a constructive delivery and vest the property in the vendee, and of actual delivery by the vendor to the vendee which puts an end to the right of the vendor to hold the goods as security for the price." See also Townsend *v.* Hargraves, 118 Mass. 333; Miller, J., in Thompson *v.* Baltimore, etc., R. Co., 28 Md. 407; Robinson, C. J., in Wegg *v.* Drake, 16 U. C. Q. B. 252.

4. Constructive Delivery — *England* — Farina *v.* Home, 16 M. & W. 119; Bill *v.* Bament, 9 M. & W. 36; Bentall *v.* Burn, 3 B. & C. 423, 10 E. C. L. 138; Godts *v.* Rose, 17 C. B. 229, 84 E. C. L. 229; Tansley *v.* Turner, 2 Bing. N. Cas. 151, 29 E. C. L. 288; Cooper *v.* Bill, 3 H. & C. 722.

Maine. — Newhall *v.* Vargas, 15 Me. 314, 33 Am. Dec. 617.

Maryland. — Thompson *v.* Baltimore, etc., R. Co., 28 Md. 407.

Massachusetts. — Haskell *v.* Rice, 11 Gray (Mass.) 240. *Compare* Douglas *v.* Shumway, 13 Gray (Mass.) 502.

Missouri. — Southwestern Freight, etc., Press Co. *v.* Stanard, 44 Mo. 71, 100 Am. Dec. 255; Conrad *v.* Fisher, 37 Mo. App. 352; Vogelsang *v.* Fisher, 128 Mo. 386, (Mo. 1894) 28 S. W. Rep. 873.

The Transfer of a Bill of Lading or Warehouse Receipt, where the seller does not retain actual possession, destroys the lien. Davis *v.* Russell, 52 Cal. 611, 28 Am. Rep. 647; Burton *v.* Curyea, 40 Ill. 325, 89 Am. Dec. 350; Newcomb *v.* Cabell, 10 Bush (Ky.) 460; Merchants', etc., Bank *v.* Hibbard, 48 Mich. 119, 42 Am. Rep. 465; Toledo Second Nat. Bank *v.* Walbridge, 19 Ohio St. 419, 2 Am. Rep. 408.

This rule may be altered when the bill of lading makes the seller himself the consignee.

buyer divests the lien.[1] This, however, is independent of the right of stoppage *in transitu*, so far as that right may be said to rest on the theory of a lien.[2] The delivery of a part of the goods sold divests the lien only as to such a part.[3] The mere marking of goods in the buyer's name and setting them aside or boxing them up under his order does not destroy the lien if the seller still retains the goods and has not agreed to give credit.[4] The question whether the delivery is such as to divest the lien is a question of fact for the jury.[5]

But in cases where delivery is made to a carrier, the seller's remedy is stoppage *in transitu* rather than the lien. Jones *v.* Jones, 8 M. & W. 431. See *supra*, this title, *Delivery of Goods*. See also the titles, BILLS OF LADING, vol. 4, p. 507; STOPPAGE IN TRANSITU.

In Townley *v.* Crump, 4 Ad. & El. 58, 31 E. C. L. 23, A, having goods in his warehouse at Liverpool, sold them to B and gave him a delivery order. The goods remained in the warehouse unpaid for until the buyer became bankrupt. In an action of trover by the assignee, evidence was given that the invariable usage in Liverpool was that goods sold while in the warehouse were delivered by the seller by giving the buyer a delivery order, and that thenceforth the possession was considered that of the buyer. It was held that the seller's right of lien was not divested by the giving of such order. For very similar cases, see Dixon *v.* Yates, 5 B. & Ad. 313, 27 E. C. L. 86; Boulter *v.* Arnott, 3 Tyrw. 267, 1 Cromp. & M. 333; Grice *v.* Richardson, 3 App. Cas. 319, 24 Moak 214. See also Keeler *v.* Goodwin, 111 Mass. 490. *Compare* White *v.* Welsh, 38 Pa. St. 396.

There Are Some Old Cases to the effect that the seller's lien is discharged so that it will not revive on the insolvency of the buyer by his agreeing to hold the goods as a warehouseman for the buyer. Hurry *v.* Mangles, 1 Campb. 452; Barrett *v.* Goddard, 3 Mason (U. S.) 107; Chapman *v.* Searle, 3 Pick. (Mass.) 38. But the more recent and better view is that the seller's lien is not destroyed by such an agreement between him and the buyer subject to the payment of warehouse rent by the vendee. Grice *v.* Richardson, 3 App. Cas. 319; Miles *v.* Gorton, 2 Cromp. & M. 504; Winks *v.* Hassall, 9 B. & C. 373, 17 E. C. L. 398; Conrad *v.* Fisher, 37 Mo. App. 352. Nor in such a case will the fact that the seller gives to the buyer a delivery order reciting that the seller holds the goods to the order of the buyer rent free until a date named, be such a delivery as to divest his lien. Townley *v.* Crump, 4 Ad. & El. 58, 31 E. C. L. 23.

1. Delivery to Common Carrier. — Smith *v.* Hudson, 6 B. & S. 431, 118 E. C. L. 431; Hart *v.* Bush, El. Bl. & El. 494, 96 E. C. L. 494; Meredith *v.* Meigh, 2 El. & Bl. 364, 75 E. C. L. 364; Norman *v.* Phillips, 14 M. & W. 277; Johnson *v.* Dodgson, 2 M. & W. 653; Dunlop *v.* Lambert, 6 Cl. & F. 600; Fragano *v.* Long, 4 B. & C. 219, 10 E. C. L. 313; Dawes *v.* Peck, 8 T. R. 330; Wait *v.* Baker, 2 Exch. 1; Boyd *v.* Mosely, 2 Swan (Tenn.) 661. *Compare* Vogelsang *v.* Fisher, (Mo. 1894) 28 S. W. Rep. 873.

2. See the title STOPPAGE IN TRANSITU.

3. Partial Delivery. — Dixon *v.* Yates, 5 B. & Ad. 313, 27 E. C. L. 86; Bunney *v.* Poyntz, 4 B. & Ad. 568, 24 E. C. L. 118; Simmons *v.* Swift, 5 B. & C. 857, 12 E. C. L. 388; Miles *v.* Gorton, 2 Cromp. & M. 504; McElwee *v.* Metropolitan Lumber Co., 69 Fed. Rep. 302, 37 U. S. App. 266; Parks *v.* Hall, 2 Pick. (Mass.) 206; Hamburger *v.* Rodman, 9 Daly (N. Y.) 93. See also Moeller *v.* Young, 5 El. & Bl. 7, 85 E. C. L. 7.

In Tansley *v.* Turner, 2 Bing. N. Cas. 151, 29 E. C. L. 288, the buyer had taken actual possession of a part of the trees sold, and the decision was that the seller's lien was destroyed. But the ground of the holding was expressly that the buyer had constructive possession of the whole. See also Slubey *v.* Heyward, 2 H. Bl. 504; Hammond *v.* Anderson, 1 B. & P. N. R. 69; Buckley *v.* Furniss, 17 Wend. (N. Y.) 505.

It is said in Benj. on Sales (6th ed.) § 805, that "there may be circumstances sufficient to show that there was no intention to separate the part delivered from the rest, and then the delivery of part operates as delivery of the whole and puts an end to the vendor's possession, and consequently to his lien." The rule, however, is only supported by *dicta* of Parke, J., in Dixon *v.* Yates, 5 B. & Ad. 313, 27 E. C. L. 86, and Taunton, J., in Betts *v.* Gibbins, 2 Ad. & El. 57, 29 E. C. L. 29; and see remarks of Pollock, C. B., to the contrary in Tanner *v.* Scovell, 14 M. & W. 28, also of Lord Ellenborough in Payne *v.* Shadbolt, 1 Campb. 427.

4. Marking or Setting Aside. — Townley *v.* Crump, 4 Ad. & El. 58, 31 E. C. L. 23; Proctor *v.* Jones, 2 C. & P. 532, 12 E. C. L. 248; Dixon *v.* Yates, 5 B. & Ad. 313, 27 E. C. L. 86; Goodall *v.* Skelton, 2 H. Bl. 316; Simmons *v.* Swift, 5 B. & C. 857, 12 E. C. L. 388; Boulter *v.* Arnott, 1 Cromp. & M. 333; Conrad *v.* Fisher, 37 Mo. App. 352.

5. Question for Jury. — Michigan Cent. R. Co. *v.* Phillips, 60 Ill. 190; Conrad *v.* Fisher, 37 Mo. App. 352; Potter Printing-Press Co. *v.* Schreiner, 47 N. Y. App. Div. 530; Chandler *v.* Fulton, 10 Tex. 2, 60 Am. Dec. 188, in which case the court said: "The conclusion to be drawn from the cases seems to be, that whether the final delivery has been effected, which determines the right of stoppage *in transitu*, is to be decided according to the intention of the parties in each case, by examining whether they contemplated any further and more absolute reduction into possession on the part of the vendee. With what intention the goods were delivered to an agent of the vendee, or any bailment of the goods was made, is of course a question of fact, to be decided by the jury." See also Abb. Shipping, 625.

XI. Remedies of Buyer — 1. In General. — The seller's breach of contract may arise from his default in delivering the goods, or from some defect in the goods delivered; there may be a breach of the principal contract for the transfer of the property and delivery of possession, or of the collateral contract of warranty either of quality or title. The subject, therefore, divides itself naturally into the buyer's remedies before and after taking possession.

2. Remedies Before Taking Possession — *a.* In General — **Executory Contracts of Sale.** — Where the contract of sale is executory so that no title has passed to the purchaser, the purchaser cannot maintain actions against the seller for his refusal to deliver the property sold which require for their basis the title to the property or right to possession. Thus, the purchaser cannot maintain in such a case trover against the seller for the conversion of the property,[1] nor can he maintain replevin to gain the possession of the property.[2] As a general rule, specific performance of a contract for the sale of goods or chattels will not be decreed, for the reason that ordinarily an action for damages affords an adequate remedy;[3] but specific performance has been decreed where the subject-matter of the sale possessed a peculiar interest or value, as in the case of an heirloom or object of *vertu*,[4] or a slave,[5] or a patent right.[6]

Executed Contracts. — Where the contract of sale is executed and title has passed to the purchaser, though the actual possession remains with the seller, the purchaser may, in case of the unauthorized refusal of the seller to deliver over the property, maintain trover for its conversion,[7] or replevin to secure the possession of the property.[8]

b. Damages for Nondelivery — (1) *In General.* — Where the contract of sale is either executed or executory, the purchaser on failure of the seller to deliver the property, in pursuance of the contract sold, may maintain an action for damages for breach of contract.[9] To entitle the purchaser to maintain such an action the seller must have made default in delivery,[10] and the

1. **Trover.** — Browning *v.* Hamilton, 42 Ala. 484; Kennedy *v.* Whitwell, 4 Pick. (Mass.) 466; Conway *v.* Bush, 4 Barb. (N. Y.) 564; Keeler *v.* Schmertz, 46 Pa. St. 135. See the title Trover and Conversion.

2. **Replevin.** — Carpenter *v.* Glass, 67 Ark. 135; Boutell *v.* Warne, 62 Mo. 350. See the title Replevin, *ante*, p. 475.

3. **Specific Performance.** — McLaughlin *v.* Piatti, 27 Cal. 461; Barton *v.* De Wolf, 108 Ill. 195; Somerby *v.* Buntin, 118 Mass. 279, 19 Am. Rep. 459; Jones *v.* Newhall, 115 Mass. 244, 15 Am. Rep. 97; Thorndike *v.* Locke, 98 Mass. 340; Slayton *v.* Riddle, 114 Pa. St. 464; Avery *v.* Ryan, 74 Wis. 591. See the title Specific Performance.

4. Falcke *v.* Gray, 4 Drew. 651, 5 Jur. N. S. 645; Williams *v.* Howard, 3 Murph. (7 N. Car.) 74.

5. Williams *v.* Howard, 3 Murph. (7 N. Car.) 74; Sarter *v.* Gordon, 2 Hill Eq. (S. Car.) 121; Young *v.* Burton, McMull. Eq. (S. Car.) 255.

6. Corbin *v.* Tracy, 34 Conn. 325; Satterthwait *v.* Marshall, 4 Del. Ch. 337; Todd *v.* Taft, 7 Allen (Mass.) 371; Leach *v.* Fobes, 11 Gray (Mass.) 506, 71 Am. Dec. 732; Clark *v.* Flint, 22 Pick. (Mass.) 231, 33 Am. Dec. 733; Adams *v.* Messinger, 147 Mass. 185, 9 Am. St. Rep. 679; Binney *v.* Annan, 107 Mass. 94, 9 Am. Rep. 10.

7. **Trover.** — Kennedy *v.* Whitwell, 4 Pick. (Mass.) 466. See the title Trover and Conversion.

8. **Replevin.** — Crounse *v.* Schrimpton, (N. Y. City Ct. Gen. T.) 10 Misc. (N. Y.) 51; Brewster *v.* Baxter, 2 Wash. Ter. 135; Abraham *v.* Karger, 100 Wis. 387. See also the title Replevin, *ante*, p. 475.

9. **Action for Damages for Nondelivery** — *United States.* — Lonergan *v.* Buford, 148 U. S. 581.

Illinois. — Consolidated Coal Co. *v.* Block, etc., Smelting Co., 36 Ill. App. 38.

Indiana. — Harvey *v.* Myer, 9 Ind. 391.

Michigan. — Thomas *v.* Greenwood, 69 Mich. 215.

Nebraska. — Denver, etc., R. Co. *v.* Hutchins, 31 Neb. 572.

New York. — Potter *v.* Hopkins, 25 Wend. (N. Y.) 417; Davis *v.* Shields, 24 Wend. (N. Y.) 322; Anderson *v.* Reed, 51 N. Y. Super. Ct. 326.

Pennsylvania. — Myers *v.* Drake, 10 Watts (Pa.) 110.

Texas. — Slaughter *v.* Moore, 17 Tex. Civ. App. 233.

Wisconsin. — Bacon *v.* Eccles, 43 Wis. 227.

10. Raisin Fertilizer Co. *v.* Barrow, Jr. Co., 97 Ala. 694; Coffin *v.* Reynolds, 21 Minn. 456; Guild *v.* Huwer, (Brooklyn City Ct. Gen. T.) 1 Misc. (N. Y.) 432; Hockersmith *v.* Hanley, 29 Oregon 27.

Delivery Prevented by Act of Purchaser. — Rogers *v.* Fenimore, (Del. 1898) 41 Atl. Rep. 886.

Destruction of Property. — In a contract for the sale of specific personal property, if before the title has vested in the purchaser the property is destroyed, without the fault of the seller, and therefore delivery is impossible, the purchaser may not recover damages for the breach of contract. There is an implied

purchaser must, of course, have performed all conditions precedent to his right to a delivery of the property.[1] Thus, where payment of the purchase price was a condition precedent to his right to delivery, he must show a tender of the price,[2] or circumstances excusing a tender,[3] such as the seller's unconditional refusal to deliver,[4] or notice from the seller to the buyer of his inability to deliver,[5] or acts on his part placing himself in such a position that a delivery is impossible.[6] Where by the contract of sale payment was not to be made in advance of delivery, the purchaser need not, of course, show a tender in order to enable him to recover for nondelivery.[7] Where payment was to be made on delivery, the purchaser in an action for damages for nondelivery must show that he was able, ready, and willing to pay,[8] though if the seller notifies the buyer of his inability to deliver the buyer need not show that he was able, ready, and willing to pay.[9]

(2) *Measure of Damages* — (a) **In General.** — Where the purchase price has not been paid by the purchaser, the measure of damages for breach of the contract through the nondelivery of the property is, as a general rule, the difference between the contract price and the market value of the property;[10]

condition to relieve the party when performance has become impossible without his default Dexter *v.* Norton, 47 N. Y. 62, 7 Am. Rep. 415.

Sale Contemplating Delivery from Growing Crop — Destruction of Crop. — Rice *v.* Weber, 48 Ill. App. 573; Ontario Deciduous Fruit Growers' Assoc. *v.* Cutting Fruit Packing Co., 134 Cal. 21.

1. Cresswell Ranch, etc., Co. *v.* Martindale, 63 Fed. Rep. 84, 27 U. S. App. 277; Hanson *v.* Slaven, 98 Cal. 377; Pape *v.* Ferguson, 28 Ind. App. 298; Stephenson *v.* Cady, 117 Mass. 6; King *v.* Faist, 161 Mass. 449; Bronson *v.* Wiman, 8 N. Y. 182; Lowry *v.* Barelli, 21 Ohio St. 324; Faber *v.* Hougham, 36 Oregon 428. See *supra*, this title, *Delivery*, with regard to the conditions precedent to the buyer's right to delivery.

2. **Tender of Price.** — Sivell *v.* Hogan, 115 Ga. 667; Pusey *v.* McElveen Commission Co., 93 Ga. 773; Pakas *v.* Hollingshead, (N. Y. City Ct. Gen. T.) 60 N. Y. Supp. 991; Lawrence *v.* Everett, (C. Pl. Gen. T.) 11 N. Y. Supp. 881.

3. Burbank *v.* Wood, 3 Jones L. (48 N. Car.) 30; Clark *v.* Bache, 186 Pa. St. 343, 42 W. N. C. (Pa.) 265.

4. Lea *v.* Ennis, 6 Houst. (Del.) 433; Lieberman *v.* Isaacs, 43 Minn. 186; Anderson *v.* Sherwood, 56 Barb. (N. Y.) 66; Fisher *v.* Dow, 72 Tex. 432.

5. Northwestern Iron, etc., Co. *v.* Hirsch, 94 Ill. App. 579.

6. Anderson *v.* Garth, 1 Stew. (Ala.) 160; Foster *v.* Leeper, 29 Ga. 294; Harriss *v.* Williams, 3 Jones L. (48 N. Car.) 483, 67 Am. Dec. 253.

7. Crystal Palace Flouring-Mills Co. *v.* Butterfield, 15 Colo. App. 246; Guilford *v.* Mason, 22 R. I. 422.

8. Phillips *v.* Williams, 39 Ga. 597; Tichenor *v.* Newman, 186 Ill. 264; Beard *v.* Sloan, 30 Ind. 279; Simmons *v.* Green, 35 Ohio St. 104.

Insolvency of Buyer. — Diem *v.* Koblitz, 49 Ohio St. 41, 34 Am. St. Rep. 531.

9. Missouri, etc., Coal Co. *v.* Pomeroy, 80 Ill. App. 144.

10. **Measure of Damages — General Rule** — *England.* — Valpy *v.* Oakeley, 16 Q. B. 941, 71 E. C. L. 941; Wilson *v.* Lancashire, etc., R. Co., 9 C. B. N. S. 632, 99 E. C. L. 632; Chinery *v.* Viall, 5 H. & N. 288; Peterson *v.* Ayre, 13 C. B. 353, 76 E. C. L. 353; Griffiths *v.* Perry, 1 El. & El. 680, 102 E. C. L. 680; Barrow *v.* Arnaud, 8 Q. B. 604, 55 E. C. L. 604.

United States. — Blydenburgh *v.* Welsh, Baldw. (U. S.) 331; Barnard *v.* Conger, 6 McLean (U. S.) 497; Halsey *v.* Hurd, 6 McLean (U. S.) 102; Rabaud *v.* D'Wolf, 1 Paine (U. S.) 580; Moffitt-West Drug Co. *v.* Byrd, (C. C. A.) 92 Fed. Rep. 290.

Alabama. — Clements *v.* Beatty, 87 Ala. 238; Bell *v.* Reynolds, 78 Ala. 511, 56 Am. Rep. 52; McFadden *v.* Henderson, 128 Ala. 221.

California. — Bullard *v.* Stone, 67 Cal. 477; Crosby *v.* Watkins, 12 Cal. 85; Tobin *v.* Post, 3 Cal. 373.

Colorado. — Staab *v.* Borax Soap Co., 12 Colo. App. 286.

Connecticut. — Crug *v.* Gorham, 74 Conn. 541; Jordan *v.* Patterson, 67 Conn. 473.

Delaware. — Barnesville Mfg. Co. *v.* Love, (Del. 1902) 52 Atl. Rep. 267; Love *v.* Barnesville Mfg. Co., 3 Penn. (Del.) 152.

Georgia. — Erwin *v.* Harris, 87 Ga. 333.

Illinois. — Capen *v.* De Steiger Glass Co., 105 Ill. 185; Driggers *v.* Bell, 94 Ill. 223; Van Arsdale *v.* Rundel, 82 Ill. 63; Kitzinger *v.* Sanborn, 70 Ill. 146; Phelps *v.* McGee, 18 Ill. 155; Hercules Coal, etc., Co. *v.* Central Invest. Co., 98 Ill. App. 427; Missouri, etc., Coal Co. *v.* Pomeroy, 80 Ill. App. 144; Rau *v.* Trumbull, 68 Ill. App. 490; Andrews *v.* Himrod, 37 Ill. App. 124; Loescher *v.* Deisterberg, 26 Ill. App. 520; Fletcher *v.* Patton, 21 Ill. App. 228.

Indiana. — Ward *v.* Burr, 5 Blackf. (Ind.) 116; Rahm *v.* Deig, 121 Ind. 283; Frink *v.* Tatman, 36 Ind. 259, 10 Am. Rep. 19; Zehner *v.* Dale, 25 Ind. 433; Kent *v.* Ginter, 23 Ind. 1.

Iowa. — Welch *v.* Urbany, 112 Iowa 531; Laporte Imp. Co. *v.* Brock, 99 Iowa 485, 61 Am. St. Rep. 245; Osgood *v.* Bauder, 75 Iowa 550; Louis Cook Mfg. Co. *v.* Randall, 62 Iowa 244; Harrison *v.* Charlton, 37 Iowa 134; Jemmison *v.* Gray, 29 Iowa 537; Boies *v.* Vincent, 24 Iowa 387.

Kansas. — York Draper Mercantile Co. *v.* Lusk, 45 Kan. 182, 6 Kan. App. 629; Gray *v.* Hall, 29 Kan. 705.

and where the price has been paid in advance the measure of damages in an action for breach of the contract is the market value of the property.[1]

Nondelivery of Part. — Where the seller delivers part of the goods sold but fails to deliver the balance, the general rule as to the amount of damages recoverable applies with respect to the part undelivered.[2]

Nominal Damages. — Even though the market value of the property purchased does exceed the contract price, the purchaser is entitled to recover at least nominal damages for the failure of the seller to deliver, on the principle that a breach of contract always entitles the party not in default to a

Kentucky. — Denhard *v.* Hirst, 64 S. W. Rep. 393, 23 Ky. L. Rep. 789; Parry Mfg. Co. *v.* Lyon, (Ky. 1901) 64 S. W. Rep. 436; Belcher *v.* Sellards, (Ky. 1897) 43 S. W. Rep. 676; Koch *v.* Godshaw, 12 Bush (Ky.) 318; Miles *v.* Miller, 12 Bush (Ky.) 134; Caldwell *v.* Reed, Litt. Sel. Cas. (Ky.) 366, 12 Am. Dec. 314.

Louisiana. — Camors *v.* Madden, 36 La. Ann. 425; Thompson *v.* Howes, 14 La. Ann. 45; Kory *v.* Layman, 108 La. 247; Porter *v.* Barrow, 3 La. Ann. 140. *Compare* Marchesseau *v.* Chaffee, 4 La. Ann. 25.

Maine. — Bush *v.* Holmes, 53 Me. 417.

Maryland. — Fisher *v.* Andrews, 94 Md. 46; Sloan *v.* Allegheny Co., 91 Md. 501; Pinckney *v.* Dambmann, 72 Md. 173; Camden Consol. Oil Co. *v.* Schlens, 59 Md. 31, 43 Am. Rep. 537; Kribs *v.* Jones, 44 Md. 396.

Massachusetts. — Bartlett *v.* Blanchard, 13 Gray (Mass.) 429; Shaw *v.* Nudd, 8 Pick. (Mass.) 9.

Michigan. — McKercher *v.* Curtis, 35 Mich. 478.

Minnesota. — Coxe *v.* Anoka Waterworks, etc., Co., (Minn. 1902) 91 N. W. Rep. 265; Reeves *v.* Cress, 80 Minn. 466.

Missouri. — Harrison Wire Co. *v.* Hall, etc., Hardware Co., 97 Mo. 289; Northrup *v.* Cook, 39 Mo. 208; White *v.* Salisbury, 33 Mo. 150; Chalice *v.* Witte, 81 Mo. App. 84; Griffith *v.* Kansas City Material, etc., Co., 46 Mo. App. 539; Price *v.* Vanstone, 40 Mo. App. 207; Shouse *v.* Niswaanger, 18 Mo. App. 236.

Nebraska. — Winside State Bank *v.* Lound, 52 Neb. 469; Forbes *v.* McClatchey, 52 Neb. 182; Boyer *v.* Cox, 34 Neb. 813; Denver, etc., R. Co. *v.* Hutchins, 31 Neb. 572; McCormick Harvesting Mach. Co. *v.* Jensen, 29 Neb. 102; Post *v.* Garrow, 18 Neb. 687; Wasson *v.* Palmer, 13 Neb. 378; Goodrich *v.* McClary, 3 Neb. 123.

New Hampshire. — Stevens *v.* Lyford, 7 N. H. 360.

New Jersey. — Stone *v.* West Jersey Ice Mfg. Co., 65 N. J. L. 20.

New York. — Vosbury *v.* Mallory, 70 N. Y. App. Div. 247; Abe Stein Co. *v.* Robertson, 167 N. Y. 101; Seckel *v.* Siff, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 693; Currie *v.* White, (N. Y. Super. Ct. Gen. T.) 6 Abb. N. S. (N. Y.) 352; Yorke *v.* Ver Planck, 65 Barb. (N. Y.) 316; Fishell *v.* Winans, 38 Barb. (N. Y.) 228; Havemeyer *v.* Cunningham, 35 Barb. (N. Y.) 515; Crist *v.* Armour, 34 Barb. (N. Y.) 378; Hamilton *v.* Ganyard, 34 Barb. (N. Y.) 204; Clark *v.* Dales, 20 Barb. (N. Y.) 42; Brock *v.* Knower, 37 Hun (N. Y.) 609; Laird *v.* Townsend, 5 Hun (N. Y.) 107; Norton *v.* Wales, 1 Robt. (N. Y.) 561; Kipp *v.* Wiles, 3 Sandf. (N. Y.) 585; Beals *v.* Terry, 2 Sandf. (N. Y.) 127; Belden *v.* Nicolay, 4 E. D. Smith (N. Y.) 14; Davis *v.* Shields, 24 Wend. (N. Y.) 322; Dey *v.* Dox, 9 Wend. (N. Y.) 129, 24 Am. Dec. 137; Gregory *v.* McDowel, 8 Wend. (N. Y.) 435; Strauss *v.* Scott, (Supm. Ct. Tr. T.) 29 Civ. Pro. (N. Y.) 81; Saxe *v.* Penokee Lumber Co., 159 N. Y. 371, *reversing* 11 N. Y. App. Div. 291; Miller *v.* Stern, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 690; Lister *v.* Windmuller, 52 N. Y. Super. Ct. 407; Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; McKnight *v.* Dunlop, 5 N. Y. 537, 55 Am. Dec. 370.

North Dakota. — Talbot *v.* Boyd, (N. Dak. 1902) 88 N. W. Rep. 1026; Patterson *v.* Plummer, 10 N. Dak. 95.

Ohio. — Smith *v.* Sloss Marblehead Lime Co., 57 Ohio St. 518.

Pennsylvania. — Miller *v.* Kennedy, 31 Pittsb. Leg. J. N. S. (Pa.) 274; Hamilton *v.* Kirby, 199 Pa. St. 466; Willock *v.* Crescent Oil Co., 184 Pa. St. 245; Kountz *v.* Kirkpatrick, 72 Pa. St. 376, 13 Am. Rep. 687; White *v.* Tompkins, 52 Pa. St. 363; Fessler *v.* Love, 48 Pa. St. 407; Bear *v.* Harnish, 3 Brews. (Pa.) 113; Arnold *v* Blabon, 147 Pa. St. 372; Canavan *v.* Neeld, 189 Pa. St. 208; Frey *v.* Lilly, 11 York. Leg. Rec. (Pa.) 104.

Tennessee. — Feder *v.* Gass, (Tenn. Ch. 1900) 59 S. W. Rep. 175; College Mill Co. *v.* Fidler, (Tenn. Ch. 1899) 58 S. W. Rep. 382; Thompson *v.* Woodruff, 7 Coldw. (Tenn.) 401; Harris *v.* Rodgers, 6 Heisk. (Tenn.) 626.

Texas. — American Well Works *v.* De Aguayo, (Tex. Civ. App. 1899) 53 S. W. Rep. 350; Steinlein *v.* S. Blaisdell Jr. Co., (Tex. Civ. App. 1898) 44 S. W. Rep. 200; Day *v.* Cross, 59 Tex. 595; Duncan *v.* McMahan, 18 Tex. 597.

Virginia. — Newbrough *v.* Walker, 8 Gratt. (Va.) 16, 56 Am. Dec. 127.

West Virginia. — Boyd *v.* Gunnison, 14 W. Va. 1; Hall *v.* Pierce, 4 W. Va. 107; Weltner *v.* Riggs, 3 W. Va. 445.

Wisconsin. — Merriman *v.* McCormick Harvesting Mach. Co., 96 Wis. 600; Hill *v.* Chipman, 59 Wis. 211; Cockburn *v.* Ashland Lumber Co., 54 Wis. 619.

1. Wells *v.* Abernethy, 5 Conn. 222; Winside State Bank *v.* Lound, 52 Neb. 469. *Compare* Ideal Wrench Co. *v.* Garvin Mach. Co., 65 N. Y. App. Div. 235.

2. Nondelivery of Part. — Cole *v.* Swanston, 1 Cal. 51, 52 Am. Dec. 288; Capen *v.* De Steiger Glass Co., 105 Ill. 185; Bush *v.* Holmes, 53 Me. 417; Bowker *v.* Hoyt, 18 Pick. (Mass.) 555; Horn *v.* Batchelder, 41 N. H. 86; Fishell *v.* Winans, 38 Barb. (N. Y.) 228; Snook *v.* Fries, 19 Barb. (N. Y.) 313; Elliott *v.* Espenhain, 59 Wis. 272. See Kehler *v.* Einstman, 38 Ill. App. 91.

remedy.[1] And in all cases the purchaser must prove with reasonable certainty the extent of his damages, or otherwise he will be entitled to only nominal damages.[2]

Absence of Market Value. — Where the property sold cannot be secured in the open market so as to enable the purchaser to indemnify himself by a purchase of similar property, some other rule than the difference between the market value and the contract price as the measure of damages must of necessity be adopted.[3]

(b) **"Market Value."** — The market value is considered as the price at which the property can be replaced, and does not necessarily mean the retail value of the property,[4] nor the wholesale value,[5] nor the price procurable at an auction sale.[6]

Inflated Market Value. — Where the market price at the place of delivery is unnaturally inflated by unlawful means, such value is not to be considered as the true market value.[7]

(c) **Time of Estimating Market Value.** — The market value is to be estimated as of the time for delivery,[8] and where the delivery was to be in instalments, the

1. Nominal Damages — *United States.* — Barnard *v.* Conger, 6 McLean (U. S.) 497; Moses *v.* Rasin, 14 Fed. Rep. 772.

Alabama. — Rose *v.* Bozeman, 41 Ala. 678.

Illinois. — Deere *v.* Lewis, 51 Ill. 254; Kehler *v.* Einstman, 38 Ill. App. 91.

Iowa. — Faulkner *v.* Closter, 79 Iowa 15; Wire *v.* Foster, 62 Iowa 114. *Compare* Bradley *v.* Smith, (Iowa 1898) 77 N. W. Rep. 506.

Kentucky. — Koch *v.* Godshaw, 12 Bush (Ky.) 320.

New Hampshire. — Woodbury *v.* Jones, 44 N. H. 209; Stevens *v.* Lyford, 7 N. H. 360.

New York. — Currie *v.* White, (N. Y. Super. Ct. Gen. T.) 6 Abb. Pr. N. S. (N. Y.) 352; Billings *v.* Vanderbeck, 23 Barb. (N. Y.) 546; Barnes *v.* Brown, 130 N. Y. 372.

Pennsylvania. — Wilson *v.* Whitaker, 49 Pa. St. 114; Roberts *v.* Andrews, 23 Pa. Co. Ct. 99.

South Dakota. — Zipp *v.* Colchester Rubber Co., 12 S. Dak. 218.

Compare Merriman *v.* McCormick Harvesting Mach. Co., 96 Wis. 600.

2. Staab *v.* Borax Soap Co., 12 Colo. App. 286.

3. *England.* — Borries *v.* Hutchinson, 18 C. B. N. S. 445, 114 E. C. L. 445; Hinde *v.* Liddell, L. R. 10 Q. B. 265.

California. — McKay *v.* Riley, 65 Cal. 623.

Connecticut. — Jordan *v.* Patterson, 67 Conn. 473.

Illinois. — Loescher *v.* Deisterberg, 26 Ill. App. 520; Ramsey *v.* Tully, 12 Ill. App. 463.

Indiana. — Vickery *v.* McCormick, 117 Ind. 594.

Kansas. — Halstead Lumber Co. *v.* Sutton, 46 Kan. 192.

Maryland. — Equitable Gas Light Co. *v.* Baltimore Coal Tar, etc., Co., 65 Md. 73.

Missouri. — Warren *v.* A. B. Mayer Mfg. Co., 161 Mo. 112.

New York. — More *v.* Knox, 52 N. Y. App. Div. 145.

North Dakota. — Patterson *v.* Plummer, 10 N. Dak. 95.

Oregon. — Prettyman *v.* Oregon R., etc., Co., 13 Oregon 341.

Pennsylvania. — Culin *v.* Woodbury Glass Works, 108 Pa. St. 220.

Virginia. — Trigg *v.* Clay, 88 Va. 330, 29 Am. St. Rep. 723.

West Virginia. — Davis *v.* Grand Rapids School-Furniture Co., 41 W. Va. 717.

4. "Market Value." — Wehle *v.* Haviland, 69 N. Y. 448. See the definition MARKET VALUE, vol. 19, p. 1153.

5. Haskell *v.* Hunter, 23 Mich. 305.

6. Gray *v.* Walton, 107 N. Y. 254.

7. Kountz *v.* Kirkpatrick, 72 Pa. St. 376, 13 Am. Rep. 687.

8. Time of Estimating Market Value — *England.* — Gainsford *v.* Carroll, 2 B. & C. 624, 9 E. C. L. 204; Barrow *v.* Arnaud, 8 Q. B. 604, 55 E. C. L. 604; Die Elbinger Actien-Gesellschaft, etc. *v.* Armstrong, L. R. 9 Q. B. 473; Leigh *v.* Paterson, 8 Taunt. 540, 4 E. C. L. 204; Ogle *v.* Vane, L. R. 2 Q. B. 275.

United States. — Douglass *v.* M'Allister, 3 Cranch (U. S.) 298; Shepherd *v.* Hampton, 3 Wheat. (U. S.) 200; Roberts *v.* Benjamin, 124 U. S. 64; Moffitt-West Drug Co. *v.* Byrd, (C. C. A.) 92 Fed. Rep. 290.

Arkansas. — Beaty *v.* Johnston, 66 Ark. 529.

Colorado. — Staab *v.* Borax Soap Co., 12 Colo. App. 286.

Delaware. — Love *v.* Barnesville Mfg. Co., (Del. 1901) 50 Atl. Rep. 536.

Illinois. — Long *v.* Conklin, 75 Ill. 32; Missouri, etc., Coal Co. *v.* Pomeroy, 80 Ill. App. 144.

Iowa. — Laporte Imp. Co. *v.* Brock, 99 Iowa 485, 61 Am. St. Rep. 245.

Kentucky. — Cole *v.* Ross, 9 B. Mon. (Ky.) 393, 50 Am. Dec. 517; Parry Mfg. Co. *v.* Lyon, (Ky. 1901) 64 S. W. Rep. 436; Belcher *v.* Sellards, (Ky. 1897) 43 S. W. Rep. 676. See Mattox *v.* Craig, 2 Bibb (Ky.) 584.

Louisiana. — Kory *v.* Layman, 108 La. 247.

Massachusetts. — Quarles *v.* George, 23 Pick. (Mass.) 400.

Michigan. — Chadwick *v.* Butler, 28 Mich. 349.

Minnesota. — Coxe *v.* Anoka Waterworks, etc., Co., (Minn. 1902) 91 N. W. Rep. 265.

Missouri. — Bush *v.* Fisher, 85 Mo. App. 1; Gill *v.* Johnson Brinkman Commission Co., 84 Mo. App. 456; Chalice *v.* Witte, 81 Mo. App. 84.

Nebraska. — Forbes *v.* McClatchey, 52 Neb. 182.

value is to be estimated as of the time the several instalments should have been delivered.[1] Where the price has been paid in advance, and the action is for damages for breach of the contract, the value is still to be estimated, according to the better doctrine, as of the time for delivery.[2]

Where No Express Time was Fixed for the Delivery, the market value for the purpose

New York. — Murray *v.* Gale, 52 Barb. (N. Y.) 427; Belden *v.* Nicolay, 4 E. D. Smith (N. Y.) 14; Reeve *v.* Gallivan, 89 Hun (N. Y.) 59; Norton *v.* Wales, 1 Robt. (N. Y.) 561; Saxe *v.* Penokee Lumber Co., 159 N. Y. 371; Freedman *v.* Dobson, (N. Y. City Ct. Gen. T.) 30 Misc. (N. Y.) 827.

Ohio. — Smith *v.* Sloss Marblehead Lime Co., 57 Ohio St. 518.

Tennessee. — M'Donald *v.* Hodge, 5 Hayw. (Tenn.) 85.

Texas. — Palestine Cotton-Seed Oil Co. *v.* Corsicana Cotton-Seed Oil Co., (Tex. Civ. App. 1901) 61 S. W. Rep. 433; Specialty Furniture Co. *v.* Kingsbury, (Tex. Civ. App. 1900) 60 S. W. Rep. 1030; Steinlein *v.* Blaisdell, (Tex. Civ. App. 1898) 44 S. W. Rep. 200.

Rise in Price Owing to Excise Laws. — In an action for nondelivery of whiskey by a certain day according to contract, the rise in price, owing to excise laws passed since the date of the contract, will not alter the rule for estimating damages. Edgar *v.* Boiles, 11 S. & R. (Pa.) 445.

Extension of Time for Delivery. — Value is to be estimated as of the time the property is deliverable according to the extension. Trask *v.* Hamburger, 70 N. H. 453. See also Northwestern Iron, etc., Co. *v.* Hirsch, 94 Ill. App. 579.

Notice by Seller Prior to Time for Delivery that he will not deliver does not change the rule. P. P. Emory Mfg. Co. *v.* Salomon, 178 Mass. 582.

1. Brown *v.* Muller, L. R. 7 Exch. 319; Roper *v.* Johnson, L. R. 8 C. P. 167; Boorman *v.* Nash, 9 B. & C. 145, 17 E. C. L. 344; *Exp.* Llansamlet Tin Plate Co., L. R. 16 Eq. 155; Tyers *v.* Rosedale, etc., Iron Co., L. R. 8 Exch. 305; Frost *v.* Knight, L. R. 7 Exch. 111; Missouri Furnace Co. *v.* Cochran, 8 Fed. Rep. 463; Hill *v.* Chipman, 59 Wis. 211; Johnson *v.* Allen, 78 Ala. 387, 56 Am. Rep. 34; Brock *v.* Knower, 37 Hun (N. Y.) 609; Hill *v.* Chipman, 59 Wis. 211.

2. **Price Paid in Advance** — *England.* — Startup *v.* Cortazzi, 2 C. M. & R. 165; Elliot *v.* Hughes, 3 F. & F. 387; Tempest *v.* Kilner, 2 C. B. 300, 52 E. C. L. 300; Shaw *v.* Holland, 15 M. & W. 136; Barned *v.* Hamilton, 2 R. & Can. Cas. 624.

United States. — Marsh *v.* McPherson, 105 U. S. 709. *Compare* Shepherd *v.* Hampton, 3 Wheat. (U. S.) 200.

Colorado. — Cofield *v.* Clark, 2 Colo. 101.

Connecticut. — Wells *v.* Abernethy, 5 Conn. 222. *Compare* West *v.* Pritchard, 19 Conn. 212.

Illinois. — Sleuter *v.* Wallbaum, 45 Ill 43.

Kentucky. — Yoder *v.* Allen, 2 Bibb (Ky.) 338; Pope *v.* Campbell, Hard. (Ky.) 34.

Louisiana. — Arrowsmith *v.* Gordon, 3 La. Ann. 105.

Maine. — Smith *v.* Berry, 18 Me. 122.

Maryland. — Baltimore Marine Ins. Co. *v.* Dalrymple, 25 Md. 269; Baltimore City Pass. R. Co. *v.* Sewell, 35 Md. 238, 6 Am. Rep. 402; Andrews *v.* Clark, 72 Md. 396.

Massachusetts. — Gray *v.* Portland Bank, 3 Mass. 364, 3 Am. Dec. 156; Wyman *v.* American Powder Co., 8 Cush. (Mass.) 168; Hussey *v.* Manufacturers, etc., Bank, 10 Pick. (Mass.) 415; Sargent *v.* Franklin Ins. Co., 8 Pick. (Mass.) 90, 19 Am. Dec. 306.

Michigan. — Chadwick *v.* Butler, 28 Mich. 349; Edwards *v.* Sanborn, 6 Mich. 348; Bowser *v.* Birdsell, 49 Mich. 5.

Mississippi. — Bickell *v.* Colton, 41 Miss. 368.

Nebraska. — Winside State Bank *v.* Lound, 52 Neb. 469.

New Hampshire. — Pinkerton *v.* Manchester, etc., R. Co., 42 N. H. 461. See Frothingham *v.* Morse, 45 N. H. 545.

Pennsylvania. — Wilson *v.* Whitaker, 49 Pa. St. 114; Huntingdon, etc., R., etc., Co. *v.* English, 86 Pa. St. 247; North *v.* Phillips, 89 Pa. St. 250; Smethurst *v.* Woolston, 5 W. & S. (Pa.) 106; Meason *v.* Philips, Add. (Pa.) 346.

Tennessee. — Coffman *v.* Williams, 4 Heisk. (Tenn.) 240.

Vermont. — Hill *v.* Smith, 32 Vt. 433; Humphreysville Copper Co. *v.* Vermont Copper Min. Co., 33 Vt. 92. See also Worthen *v.* Wilmot, 30 Vt. 555.

Virginia. — Enders *v.* Board of Public Works, 1 Gratt. (Va.) 364.

Wisconsin. — Noonan *v.* Ilsley, 17 Wis. 314, 84 Am. Dec. 742.

See also Clark *v.* Pinney, 7 Cow. (N. Y.) 681; Heilbroner *v.* Douglass, 45 Tex. 407.

Compare Maher *v.* Riley, 17 Cal. 415; Davenport *v.* Wells, 3 Iowa 242; Cannon *v.* Folsom, 2 Iowa 101, 63 Am. Dec. 474; Stapleton *v.* King, 40 Iowa 278; Myer *v.* Wheeler, 65 Iowa 390; Gilman *v.* Andrews, 66 Iowa 116; Kent *v.* Ginter, 23 Ind. 1; Randon *v.* Barton, 4 Tex. 289; Calvit *v.* McFadden, 13 Tex. 324; Brasher *v.* Davidson, 31 Tex. 190, 98 Am. Dec. 525; Cartwright *v.* McCook, 33 Tex. 612; Gregg *v.* Fitzhugh, 36 Tex. 127; Ranger *v.* Hearne, 37 Tex. 30; Davis *v.* Richardson, 1 Bay (S. Car.) 105; Cortelyou *v.* Lansing, 2 Cai. Cas. (N. Y.) 200; West *v.* Wentworth, 3 Cow. (N. Y.) 82; Clark *v.* Pinney, 7 Cow. (N. Y.) 687.

In California the market value is to be estimated within such reasonable time as will permit the purchaser to go into the market and purchase similar property. Bullard *v.* Stone, 67 Cal. 477. See also Love *v.* Barnesville Mfg. Co., 3 Penn. (Del.) 152; Turner *v.* Jackson, (Tenn. Ch. 1899) 63 S. W. Rep. 511.

And in New York, where property was to be delivered at a particular place for shipment to the purchaser, the market value was estimated as of the time the purchaser was notified of the failure to deliver, where he had exercised reasonable diligence to discover the cause of nonshipment. Boyd *v.* L. H. Quinn Co., (Supm. Ct. App. T.) 18 Misc. (N. Y.) 169.

of computing the damages was estimated with reference to the time of the refusal of the seller to deliver.[1]

Purchase in Market Before Time for Delivery. — Where before the time for the delivery of the personal property the seller notifies the purchaser that he will not make delivery, and the purchaser prior to the time for delivery purchases similar property at the then market value, which is an advance over the contract price, the purchaser cannot recover the amount of such advance, when at the time for delivery the market value had fallen below or to the contract price.[2]

(d) **Place for Estimation of Market Value.** — The market value of the property is to be estimated at the place of delivery;[3] and in estimating the value at the place of delivery evidence of the value at other places has been excluded.[4] But where the evidence of the value at the place of delivery is not clear, evidence of the value in neighboring localities has been admitted, as tending to show the value at the place of delivery.[5]

Absence of Market Value at Place of Delivery. — If the property has no market value at the place of delivery, the value may be shown by that at the nearest available market, making allowance for the cost of transporting the property from such market.[6] Where the property consisted of raw material for manufacture, and had no market value at the place of delivery and was difficult of transportation, the value at the place of delivery was arrived at by deducting from the value of the property at the place of delivery when manufactured the cost of manufacture.[7]

(e) **Proof of Market Value.** — The general rules of evidence apply to the admissibility of evidence to prove the market value,[8] the burden being upon the purchaser to show the market value and his consequential damage.[9] The market price may be determined by offers to sell made by dealers in the ordinary course of business, and answers of dealers to inquiries as to price are competent evidence.[10] To prove the market price on a certain day, evidence

1. Eastern R. Co. *v.* Benedict, 10 Gray (Mass.) 212; Williams *v.* Woods, 16 Md. 226; Guice *v.* Crenshaw, 60 Tex. 344; Tempest *v.* Kilner, 3 C. B. 249, 54 E. C. L. 249.

2. York-Draper Mercantile Co. *v.* Lusk, 6 Kan. App. 629.

3. **Place for Estimation of Market Value.** — Moffitt-West Drug Co. *v.* Byrd, (C. C. A.) 92 Fed. Rep. 290; Rau *v.* Trumbull, 68 Ill. App. 490; Missouri, etc., Coal Co. *v.* Pomeroy, 80 Ill. App. 144; Pape *v.* Ferguson, 28 Ind. App. 298; Jemmison *v.* Gray, 29 Iowa 537; Parry Mfg. Co. *v.* Lyon, 64 S. W. Rep. 436, 23 Ky. L. Rep. 884; Belcher *v.* Sellards, (Ky. 1897) 43 S. W. Rep. 676; Equitable Gas Light Co. *v.* Baltimore Coal Tar, etc., Co., 65 Md. 73; Bush *v.* Fisher, 85 Mo. App. 1; Saxe *v.* Penokee Lumber Co., 159 N. Y. 371; Reeve *v.* Gallivan, 89 Hun (N. Y.) 59; Boyd *v.* L. H. Quinn Co., (Supm. Ct. App. T.) 18 Misc. (N. Y.) 169; Smith *v.* Sloss Marblehead Lime Co., 57 Ohio St. 518; Steinlein *v.* S. Blaisdell Jr. Co., (Tex. Civ. App. 1898) 44 S. W. Rep. 200; Specialty Furniture Co. *v.* Kingsbury, (Tex. Civ. App. 1901) 60 S. W. Rep. 1030.

4. Fessler *v.* Love, 48 Pa. St. 407; Steinlein *v.* S. Blaisdell Jr. Co., (Tex. Civ. App. 1898) 44 S. W. Rep. 200.

5. Williamson *v.* Dillon, 1 Har. & G. (Md.) 445; Graham *v.* Frazier, 49 Neb. 90; Gregory *v.* McDowell, 8 Wend. (N. Y.) 435; Wemple *v.* Stewart, 22 Barb. (N. Y.) 154; Gordon *v.* Bowers, 16 Pa. St. 226.

6. **Absence of Market Value at Place of Delivery** — *United States.*— Grand Tower Co. *v.* Phillips, 23 Wall. (U. S.) 471.

California. — Bullard *v.* Stone, 67 Cal. 477.

Colorado. — Sellar *v.* Clelland, 2 Colo. 533.

Illinois. — Capen *v.* De Steiger Glass Co., 105 Ill. 185.

Indiana. — Vickery *v.* McCormick, 117 Ind. 594; Pape *v.* Ferguson, 28 Ind. App. 298.

Maine. — Berry *v.* Dwinel, 44 Me. 255; Furlong *v.* Polleys, 30 Me. 491, 50 Am. Dec. 635.

Minnesota. — Coxe *v.* Anoka Waterworks, etc., Co., (Minn. 1902) 91 N. W. Rep. 265.

New York. — Diefendorff *v.* Gage, 7 Barb. (N. Y.) 18; Wemple *v.* Stewart, 22 Barb. (N. Y.) 154; Richmond *v.* Bronson, 5 Den. (N. Y.) 56; Rice *v.* Manley, 66 N. Y. 82, 23 Am. Rep. 30.

Pennsylvania. — Hazleton Coal Co. *v.* Buck Mountain Coal Co., 57 Pa. St. 301.

Tennessee. — East Tennessee, etc., R. Co. *v.* Hale, 85 Tenn. 69; McDonald *v.* Unaka Timber Co., 88 Tenn. 38.

Virginia. — McCormick *v.* Hamilton, 23 Gratt. (Va.) 561.

See Johnson *v.* Allen, 78 Ala. 387, 56 Am. Rep. 34.

7. Equitable Gas Light Co. *v.* Baltimore Coal Tar, etc., Co., 65 Md. 73.

8. Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130.

9. Staab *v.* Borax Soap Co., 12 Colo. App. 286.

10. Harrison *v.* Glover, 72 N. Y. 451.

of the value within a reasonable time before and after such day has been held admissible.[1]

(f) **Special Damages.** — Not only can the general damages which are the necessary and immediate result of the breach of the contract of sale by the seller be recovered, but the purchaser may be entitled to recover special damages which can be considered to have been contemplated by the parties as the natural and probable result of its breach.[2] Special damages resulting to the purchaser from the failure of the seller to deliver the property cannot, however, be recovered if they were not within the contemplation of both the purchaser and the seller at the time the contract of sale was made.[3]

Injuries to Crops. — Thus, where machinery intended by the parties for use in curing or harvesting a particular crop is sold, damages for injuries to the crop have been allowed as special damages for nondelivery.[4]

Profits on Resale. — The profits which the purchaser could have made by a resale of the property in case it had been delivered by the seller are not an element of damages, when the seller at the time of the sale was not informed of such intention or contract for resale, as such profits cannot be considered as within the contemplation of the parties at the time of sale.[5] And this is

1. Boyd *v.* Gunnison, 14 W. Va. 1. *Compare* Freedman *v.* Dobson, (N. Y. City Ct. Gen. T.) 30 Misc. (N. Y.) 827; Belden *v.* Nicolay, 4 E. D. Smith (N. Y.) 14.

2. **Special Damages** — *England.* — Hydraulic Engineering Co. *v.* McHaffie, 4 Q. B. D. 670; Grebert-Borgnis *v.* Nugent, 15 Q. B. D. 85; Smeed *v.* Foord, 1 El. & El. 602, 102 E. C. L. 602; Fletcher *v.* Tayleur, 17 C. B. 21, 84 E. C. L. 21.

United States. — U. S. *v.* Behan, 110 U. S. 338; Taylor Mfg. Co. *v.* Hatcher Mfg. Co., 39 Fed. Rep. 440.

California. — Friend, etc., Lumber Co. *v.* Miller, 67 Cal. 464.

Colorado. — Jones *v.* Nathrop, 7 Colo. 1; Farrer *v.* Caster, (Colo. App. 1901) 67 Pac. Rep. 171.

Florida. — Brock *v.* Gale, 14 Fla. 523, 14 Am. Rep. 356.

Illinois. — Benton *v.* Fay, 64 Ill. 417.

Iowa. — Manville *v.* Western Union Tel. Co., 37 Iowa 214, 18 Am. Rep. 8; Myer *v.* Wheeler, 65 Iowa 390; Mann *v.* Taylor, 78 Iowa 355.

Maine. — Thoms *v.* Dingley, 70 Me. 100, 35 Am. Rep. 310.

Maryland. — Furstenburg *v.* Fawsett, 61 Md. 184.

Massachusetts. — Merrimack Mfg. Co. *v.* Quintard, 107 Mass. 127.

Michigan. — Liggett Spring, etc., Co. *v.* Michigan Buggy Co., 106 Mich. 445; Long *v.* Pruyn, 128 Mich. 57, 8 Detroit Leg. N. 540; Thomas Iron Co. *v.* Jackson Iron Co., (Mich. 1902) 91 N. W. Rep. 137, 9 Detroit Leg. N. 276.

Minnesota. — Mississippi, etc., Boom Co. *v.* Prince, 34 Minn. 71.

Missouri. — Shouse *v.* Neiswaanger, 18 Mo. App. 236; Chalice *v.* Witte, 81 Mo. App. 84; Warren *v.* A. B. Mayer Mfg. Co., 161 Mo. 112.

New York. — Hamilton *v.* McPherson, 28 N. Y. 76, 84 Am. Dec. 330; Passinger *v.* Thorburn, 34 N. Y. 635, 90 Am. Dec. 753; Myers *v.* Burns, 35 N. Y. 269; Ward *v.* New York Cent. R. Co., 47 N. Y. 32, 7 Am. Rep. 405; Devlin *v.* New York, 63 N. Y. 10; Parsons *v.* Sutton, 66 N. Y. 92; Wakeman *v.* Wheeler, etc., Mfg. Co., 101 N. Y. 205, 54 Am. Rep. 676; Hecla Powder Co. *v.* Sigua Iron Co., 157 N. Y. 437; Landsberger *v.* Magnetic Tel. Co., 32 Barb. (N. Y.) 530; Zabriskie *v.* Central Vermont R. Co., (Supm. Ct. Gen. T.) 13 N. Y. Supp. 735.

Ohio. — Burckhardt *v.* Burckhardt, 36 Ohio St. 261.

Pennsylvania. — Pittsburg Coal Co. *v.* Foster, 59 Pa. St. 365.

Texas. — Calvit *v.* McFadden, 13 Tex. 324; American Well Works *v.* De Aguayo, (Tex. Civ. App. 1899) 53 S. W. Rep. 350.

Virginia. — Perry Tie, etc., Co. *v.* Rennolds, (Va. 1902) 40 S. E. Rep. 919, 4 Va. Sup. Ct. 198.

Washington. — Skagit R., etc., Co. *v.* Cole, 2 Wash. 57; Sweeney *v.* Jamieson, 2 Wash. Ter. 254.

Wisconsin. — Richardson *v.* Chynoweth, 26 Wis. 657; Hammer *v.* Schoenfelder, 47 Wis. 455.

Demurrage Paid by Buyer. — Hockersmith *v.* Hanley, 29 Oregon 27.

3. Cory *v.* Thames Ironworks, etc., Co., L. R. 3 Q. B. 181; Moffitt-West Drug Co. *v.* Byrd, (C. C. A.) 92 Fed. Rep. 290; Mirandona *v* Burg, 51 La. Ann. 1190; Gill *v.* Johnson-Brinkman Commission Co., 84 Mo. App. 456; Warren *v.* A. B. Mayer Mfg. Co., 161 Mo. 112; Hawkins *v.* Deitz, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 200; Harris *v.* Springfield First Nat. Bank, (Tex. Civ. App. 1898) 45 S. W. Rep. 311; Lippert *v.* Saginaw Milling Co., 108 Wis. 512.

4. Neal *v.* Pender-Hyman Hardware Co., 122 N. Car. 104, 65 Am. St. Rep. 697.

5. **Profits on Resale** — *England.* — Williams *v.* Reynolds, 6 B. & S. 495, 118 E. C. L. 495; Thol *v.* Henderson, 8 Q. B. D. 457.

United States. — Lynch *v.* Wright, 94 Fed. Rep. 703.

Alabama. — Penn *v.* Smith, 104 Ala. 445; Young *v.* Cureton, 87 Ala. 727.

Georgia. — Orr *v.* Farmers' Alliance Warehouse, etc., Co., 97 Ga. 241.

Illinois. — Rhea Thielens Implement Co. *v.* Racine Malleable, etc., Iron Co., 89 Ill. App. 463.

Kentucky. — Denhard *v.* Hirst, (Ky. 1901) 64 S. W. Rep. 393; Koch *v.* Godshaw, 12 Bush (Ky.) 318.

especially true where the defendant, at the time of default in delivery, could have obtained other goods in the market at the place of delivery.[1] But where at the time of the contract of sale a resale of the property by the purchaser was in the contemplation of the parties, the profits which the purchaser could have made by a resale may be recovered as special damages;[2] and this is signally true where the property sold is not such as can be secured by the purchaser in the open market.[3]

(g) **Duty of Purchaser to Minimize Damages.** — The principle that the party who suffers from a breach of contract must so act as to make his damages as small as he reasonably can[4] applies equally to the breach of a contract of sale through the nondelivery of the property by the seller;[5] and this may require the purchaser, if able after notice of breach, to purchase in the market similar property at the contract price.[6] But the buyer, after notice of the refusal to deliver, is not required in advance of the time for delivery to purchase in the market at a greater price than the contract price.[7]

c. RECOVERY OF PRICE PAID. — Where the price has been paid in advance and the seller refuses to deliver the property, the seller, instead of suing for damages for breach of the contract of sale, may rescind the contract and recover the price paid.[8] So, also, where the character or quality of the property tendered for delivery by the seller does not comply with the requirement of the contract of sale, the purchaser may reject the same and sue for the recovery of the price paid in advance;[9] though this right of rejection may be expressly restricted by provisions in the contract of sale.[10]

Failure of Consideration. — It has been also held that the price paid could be recovered as money paid on a consideration which has failed.[11] And where

Maine. — Berry *v.* Dwinel, 44 Me. 255.

Michigan. — Wetmore *v.* Pattison, 45 Mich. 439; McKinnon *v.* McEwan, 48 Mich. 106, 42 Am. Rep. 458.

Nebraska. — Denver, etc., R. Co. *v.* Hutchins, 31 Neb. 572.

New York. — Schnitzler *v.* Kelly, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 327.

Pennsylvania. — Pennypacker *v.* Jones, 106 Pa. St. 237.

1. Low *v.* Craig, 8 Pa. Super. Ct. 622.

2. **Contract Contemplating Resale** — *Alabama.* — Bell *v.* Reynolds, 78 Ala. 511, 56 Am. Rep. 52.

Connecticut. — Hubbard *v.* Rowell, 51 Conn. 423.

Kentucky. — Gunther *v.* Taylor, 63 S. W. Rep. 439, 23 Ky. L. Rep. 536; Denhard *v.* Hirst, (Ky. 1901) 64 S. W. Rep. 393; Tradewater Coal Co. *v.* Lee, 68 S. W. Rep. 400, 24 Ky. L. Rep. 215.

Louisiana. — Barr *v.* Henderson, 105 La. 691.

Massachusetts. — Johnston *v.* Faxon, 172 Mass. 466.

Michigan. — Harrow Spring Co. *v.* Whipple Harrow Co., 90 Mich. 147, 30 Am. St. Rep. 421; Burrell *v.* New York, etc., Salt Co., 14 Mich. 34; Hopkins *v.* Sanford, 41 Mich. 243; Leonard *v.* Beaudry, 68 Mich. 312.

New York. — Ellis *v.* Miller, 164 N. Y. 434; Baxter *v.* Gilson, (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 812.

Oregon. — Hockersmith *v.* Hanley, 29 Oregon 27.

Pennsylvania. — Imperial Coal Co. *v.* Port Royal Coal Co., 138 Pa. St. 45.

Texas. — Neal *v.* Andrews, (Tex. Civ. App. 1900) 60 S. W. Rep. 459.

Virginia. — Perry Tie, etc., Co. *v.* Rennolds, (Va. 1902) 40 S. E. Rep. 919, 4 Va. Sup. Ct. 198.

Wisconsin. — Cockburn *v.* Ashland Lumber Co., 54 Wis. 619; Jones *v.* Foster, 67 Wis. 296.

3. France *v.* Gaudet, L. R. 6 Q. B. 199; Johnston *v.* Faxon, 172 Mass. 466; Miller *v.* Stern, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 690, *affirming* (N. Y. City Ct. Gen. T.) 24 Misc. (N. Y.) 769; More *v.* Knox, 169 N. Y. 591, *affirming* 52 N. Y. App. Div. 145.

4. See the title DAMAGES, vol. 8.

5. Bannon *v.* St. Bernard Coal Co., (Ky. 1897) 39 S. W. Rep. 252; Miller *v.* Mariner's Church, 7 Me. 51, 20 Am. Dec. 341; Parsons *v.* Sutton, 66 N. Y. 92; Saxe *v.* Penokee Lumber Co., 11 N. Y. App. Div. 291.

6. York-Draper Mercantile Co. *v.* Lusk, 6 Kan. App. 629; Consolidated Coal Co. *v.* Mexico Fire-Brick Co., 66 Mo. App. 296; More *v.* Knox, 52 N. Y. App. Div. 145; Parsons *v.* Sutton, 66 N. Y. 92; Saxe *v.* Penokee Lumber Co., 11 N. Y. App. Div. 291, 159 N. Y. 371. See also Hoopes *v.* East, 19 Tex. Civ. App. 531. *Compare* Rau *v.* Trumbull, 68 Ill. App. 490.

7. York-Draper Mercantile Co. *v.* Lusk, 6 Kan. App. 629.

8. **Recovery of Price Paid.** — Bush *v.* Canfield, 2 Conn. 485; Harvey *v.* Myer, 9 Ind. 391; Winside State Bank *v.* Lound, 52 Neb. 469. See IX. *Rescission.*

9. Little Rock Grain Co. *v.* Brubaker, 89 Mo. App. 1; Meader *v.* Cornell, 58 N. J. L. 375.

10. Clark *v.* Cliff Paper Co., 21 N. Y. App. Div. 623.

11. **Failure of Consideration.** — Rose *v.* Foord, 96 Cal. 152; Winn *v.* Morris, 94 Ga. 452;

several distinct articles are purchased at a fixed price per article and the price paid, and some of the articles are not delivered, the purchaser may recover the purchase price of the articles not delivered as for money had and received by the seller upon a consideration which has failed.[1] Where the buyer pays part of the purchase price in advance, he cannot, when he refuses without legal excuse to complete the purchase, and accept delivery of the property, recover any portion of the price.[2]

3. Remedies After Taking Possession — *a.* IN GENERAL. — Where there has been an acceptance by the purchaser of the property, it is, as a general rule, absolutely binding and conclusive upon him, and precludes him from alleging that the property is not of the character or quality called for by the contract,[3] and he therefore, as a general rule, has no remedy where the property is not of the character or quality required by the contract of sale.[4] But if there has been no unqualified acceptance of the property, the purchaser may sue for damages for breach of the contract through the failure of the seller to deliver property of the character and quality contracted for,[5] or may, in an action by the seller for the price, recoup the amount of such damages,[6] or plead in defense to an action for the price such defects as a partial failure of consideration.[7]

Measure of Damages. — Where the seller delivers property which is not of the quality stipulated for in the contract of sale, the measure of damages for breach of the contract is the difference in the market value at the time of delivery between the property delivered and the property contracted for,[8] though in some instances special damages may also be recovered.[9]

b. WARRANTY — (1) *In General.* — If the contract of sale contained a warranty as to the character and quality of the property, the purchaser may, after acceptance of the property, retain the same and maintain an action for damages for breach of the warranty,[10] and a mere privilege in the contract of sale permitting the purchaser to return the property does not deprive him of

Mabry *v.* Harp, 53 Kan. 398. See the titles CONSIDERATION, vol. 6; PAYMENT, vol. 22.

1. Biggerstaff *v.* Rowatt's Wharf, (1896) 2 Ch. 93.

2. Eddy, etc., Live-Stock Co. *v.* Blackburn, 70 Fed. Rep. 949, 30 U. S. App. 571; Rayfield *v.* Van Meter, 120 Cal. 416; Gibbons *v.* Hayden, 3 Kan. App. 38; Lexington Mill, etc., Co. *v.* Neuens, 42 Neb. 649; Leary *v.* Hegeman, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 195.

3. See VI. *Acceptance of Goods.*

4. Stelwagon *v.* Wilmington Coal-Gas Co., 2 Marv. (Del.) 184; Mayes *v.* Rogers, 47 Ill. App. 372; Berthold *v.* Seevers Mfg. Co., 89 Iowa 506; Talbot Paving Co. *v.* Gorman, 103 Mich. 403; Williams *v.* Robb, 104 Mich. 242; Durbrow, etc., Mfg. Co. *v.* Cuming, 35 N. Y. App. Div. 376; Nash *v.* Weidenfeld, 41 N. Y. App. Div. 511; Wallace *v.* Valentine, (C. Pl. Spec. T.) 10 Misc. (N. Y.) 645; Gleckler *v.* Slavens, 5 S. Dak. 364; Wilkins *v.* Burns, (Tex. Civ. App. 1893) 25 S. W. Rep. 431.

5. McCaa *v.* Elam Drug Co., 114 Ala. 74, 62 Am. St. Rep. 88; Wilson *v.* Western Fruit Co., 11 Ind. App. 89; Long *v.* Pruyn, 128 Mich. 57, 8 Detroit Leg. N. 540; Carleton *v.* Lombard, 149 N. Y. 137; Abe Stein Co. *v.* Robertson, 38 N. Y. App. Div. 311; Richardson *v.* Levi, 69 Hun (N. Y.) 432; Alpha Mills *v.* Watertown Steam Engine Co., 116 N. Car. 797; Tripis *v.* Gamble, (Tex. Civ. App. 1894) 28 S. W. Rep. 244.

6. Edwards *v.* Plaquemine Ice, etc., Co., 46 La. Ann. 360; Noble *v.* Buswell, 96 Me. 73; Aultman *v.* Hunter, 82 Mo. App. 632.

7. Miles *v.* Withers, 76 Mo. App. 87.

8. **Measure of Damages.** — Sloan *v.* Allegheny Co., 91 Md. 501; Granite Mills *v.* Keystone Oil Cloth Co., 15 Montg. Co. Rep. (Pa.) 36; Kauffman Milling Co. *v.* Stuckey, 37 S. Car. 7; Mobile Fruit, etc., Co. *v.* Boero, (Tex. Civ. App. 1900) 55 S. W. Rep. 361; Florida Athletic Club *v.* Hope Lumber Co., 18 Tex. Civ. App. 161; Harris *v.* Springfield First Nat. Bank, (Tex. Civ. App. 1898) 45 S. W. Rep. 311.

9. North Chicago St. R. Co. *v.* Burnham, (C. C. A.) 102 Fed. Rep. 669; Long *v.* Pruyn, 128 Mich. 57, 8 Detroit Leg. N. 540.

10. **Action for Damages for Breach of Warranty** — *Alabama.* — Milton *v.* Rowland, 11 Ala. 732; Cozzins *v.* Whitaker, 3 Stew. & P. (Ala.) 322.

Arkansas. — Plant *v.* Condit, 22 Ark. 454.

Georgia. — Vickery *v.* Chambers, 95 Ga. 665.

Illinois. — E. A. Moore Furniture Co. *v.* Sloane, 166 Ill. 457; Mears *v.* Nichols, 41 Ill. 207, 89 Am. Dec. 381.

Iowa. — Laporte Imp. Co. *v.* Brock, 99 Iowa 485, 61 Am. St. Rep. 245.

Kentucky. — Ewing *v.* Hauss, (Ky. 1899) 50 S. W. Rep. 249; Carter *v.* Stennet, 10 B. Mon. (Ky.) 250; Cook *v.* Gray, 2 Bush (Ky.) 121.

Maine. — Garland *v.* Spencer, 46 Me. 528.

Michigan. — Connell *v.* McNett, 109 Mich. 329.

Missouri. — Edwards *v.* Noel, 88 Mo. App. 434; Ross *v.* Barker, 30 Mo. 385; Thompson

the right to retain the same and sue for damages.[1] The contract of sale may, of course, expressly restrict the right of the purchaser to sue for breach of warranty.[2]

Recoupment and Counterclaim. — The purchaser may also, in an action by the seller for the price, recoup or counterclaim such damages in reduction of the seller's recovery,[3] or may rescind the contract of sale and recover the purchase price paid,[4] except where by provision in the contract of sale the right to rescind for breach of warranty is restricted;[5] and where the contract of sale provides an exclusive remedy for breach of warranty, it will defeat the buyer's right to recover the price paid in advance on the ground of a failure of consideration.[6]

(2) *Measure of Damages.* — The measure of damages for breach of warranty as to the character or quality of the property sold is, as a general rule, the difference between the actual value of the property and what its value would have been had it conformed to the warranty.[7] In the sale of machinery with

v. Botts, 8 Mo. 710; Kerr *v.* Emerson, 64 Mo. App. 159, 2 Mo. App. Rep. 1066.

New Jersey. — Higbie *v.* Rogers, (N. J. 1901) 48 Atl. Rep. 554.

New York. — Davis Provision Co. *v.* Fowler, 163 N. Y. 580; Osborn *v.* American Ink Co., (Supm. Ct. App. T.) 29 Misc. (N. Y.) 648; Davis Provision Co. *v.* Fowler, 20 N. Y. App. Div. 626, 47 N. Y. Supp. 205; Russell *v.* Corning Mfg. Co., 49 N. Y. App. Div. 610; Meagley *v.* Hoyt, 88 Hun (N. Y.) 328; Boorman *v.* Jenkins, 12 Wend. (N. Y.) 566, 27 Am. Dec. 158; Waring *v.* Mason, 18 Wend. (N. Y.) 425.

Ohio. — Tillyer *v.* Van Cleve Glass Co., 7 Ohio Cir. Dec. 209, 13 Ohio Cir. Ct. 99.

Oklahoma. — Osborne *v.* Walther, (Okla. 1902) 69 Pac. Rep. 953; Coyle *v.* Baum, 3 Okla. 695.

Pennsylvania. — Borrekins *v.* Bevan, 3 Rawle (Pa.) 23, 23 Am. Dec. 85.

South Carolina. — Parker *v.* Pringle, 2 Strobh. L. (S. Car.) 242.

Tennessee. — Garr *v.* Young, (Tenn. Ch. 1901) 62 S. W. Rep. 631.

Texas. — Ellis *v.* Tips, 16 Tex. Civ. App. 82; Taylor Cotton-Seed Oil, etc., Co. *v.* Humphrey, (Tex. Civ. App. 1895) 32 S. W. Rep. 225.

Vermont. — Vail *v.* Strong, 10 Vt. 457; Houghton *v.* Carpenter, 40 Vt. 588.

Virginia. — Eastern Ice Co. *v.* King, 86 Va. 97.

Wisconsin. — Dwight Bros. Paper Co. *v.* Western Paper Co., 114 Wis. 414; Nauman *v.* Ullman, 102 Wis. 92; Park *v.* Richardson, etc., Co., 81 Wis. 399; Morehouse *v.* Comstock, 42 Wis. 626; Bonnell *v.* Jacobs, 36 Wis. 59; Terry *v.* Allis, 16 Wis. 478; Fisk *v.* Tank, 12 Wis. 276; Getty *v.* Rountree, 2 Chand. (Wis.) 28, 2 Pin. (Wis.) 379, 54 Am. Dec. 138.

See also the titles IMPLIED WARRANTIES, vol. 15, p. 1210; WARRANTY.

1. Kemp *v.* Freeman, 42 Ill. App. 500; Gaar *v.* Patterson, 65 Minn. 449; Moore *v.* Emerson, 63 Mo. App. 137; Birch *v.* Kavanaugh Knitting Co., 165 N. Y. 617; Birch *v.* Kavanaugh Knitting Co., 34 N. Y. App. Div. 614; Blacknall *v.* Rowland, 118 N. Car. 418.

2. F. C. Austin Mfg. Co. *v.* Clendenning, 21 Ind. App. 459; Kirk *v.* Seeley, 63 Mo. App. 262, 2 Mo. App. Rep. 849; Birch *v.* Kavanaugh Knitting Co., 165 N. Y. 617; Gaar *v.* Stark, (Tenn. Ch. 1895) 36 S. W. Rep. 149; Hamilton *v.* Northey Mfg. Co., 31 Ont. 468.

3. Recoupment and Counterclaim — *United States.* — Pullman's Palace Car Co. *v.* Metropolitan St. R. Co., 157 U. S. 94; Florence Oil, etc., Co. *v.* Farrar, (C. C. A.) 109 Fed. Rep. 254.

Alabama. — Frith *v.* Hollan, 133 Ala. 583.

Arkansas. — Wilman *v.* Mizer, 60 Ark. 281.

Colorado. — Lozier *v.* Hannan, 12 Colo. App. 59.

Illinois. — Newton Rubber Works *v.* Home Rattan Co., 100 Ill. App. 421; Cook *v.* Tavener, 41 Ill. App. 642.

Indiana. — Kenney *v.* Bevilheimer, 158 Ind. 653; York Mfg. Co. *v.* Bonnell, 24 Ind. App. 667; Aultman *v.* Richardson, 10 Ind. App. 413.

Iowa. — Bixby *v.* Denison Normal School Assoc., (Iowa 1899) 78 N. W. Rep. 234; Alpha Checkrower Co. *v.* Bradley, 105 Iowa 537.

Kentucky. — South Bend Pulley Co. *v.* W. E. Caldwell Co., (Ky. 1899) 54 S. W. Rep. 12, (Ky. 1900) 55 S. W. Rep. 208.

Michigan. — Avery *v.* Burrall, 118 Mich. 672.

Missouri. — June *v.* Falkinburg, 89 Mo. App. 563; St. Louis Brewing Assoc. *v.* McEnroe, 80 Mo. App. 429.

Nebraska. — McConnell *v.* Lewis, 58 Neb. 188.

New Jersey. — Higbie *v.* Rogers, 63 N. J. Eq. 368.

New York. — Nash *v.* Weidenfeld, 41 N. Y. App. Div. 511.

North Carolina. — Huyett, etc., Mfg. Co. *v.* Gray, 124 N. Car. 322.

Ohio. — Tillyer *v.* Van Cleve Glass Co., 7 Ohio Dec. 209, 13 Ohio Cir. Ct. 99.

Pennsylvania. — Newton Rubber Works *v.* Kahn, 186 Pa. St. 306.

Texas. — Ellis *v.* Tips, 16 Tex. Civ. App. 82.

Washington. — Elliott *v.* Puget Sound, etc., Steamship Co., 22 Wash. 220.

Wisconsin. — Parry Mfg. Co. *v.* Tobin, 106 Wis. 286.

4. Aultman *v.* Wirth, 54 Ill. App. 17; Hoffman *v.* Independent Dist., 96 Iowa 319; Kerr *v.* Emerson, 64 Mo. App 159, 2 Mo. App. Rep. 1066; Fewell *v.* Deane, 43 S. Car. 257. See IX. *Rescission*

5. Eshleman *v.* Lightner, 169 Pa. St. 46.

6. Avery Planter Co. *v.* Peck, 86 Minn. 40.

7. Measure of Damages — General Rule — *England.* — Ashworth *v.* Wells, 78 L. T. N. S. 136.

United States. — Andrews *v.* Schreiber, 93

warranty, the purchaser has been permitted to recover the cost of making the machinery comply with the requirements of the warranty.[1]

Special Damages. — Special damages suffered by the purchaser which may fairly be supposed to have entered into the contemplation of the parties at the time of sale, and which might naturally be expected to follow from the breach of the warranty, have been allowed.[2] Thus, where seed was sold for planting

Fed. Rep. 367; Nashua Iron, etc., Co. *v.* Brush, (C. C. A.) 91 Fed. Rep. 213; Wilson *v.* New U. S. Cattle-Ranch Co., (C. C. A.) 73 Fed. Rep. 994.

Alabama. — Landman *v.* Bloomer, 117 Ala. 312.

California. — Silberhorn Co. *v.* Wheaton, (Cal. 1897) 51 Pac. Rep. 689.

Colorado. — Tilley *v.* Montelius Piano Co., 15 Colo. App. 204, 22 Am. St. Rep. 388; Cañon City Electric Light, etc., Co. *v.* Medart Patent Pulley Co., 11 Colo. App. 300.

Georgia. — Berry *v.* Shannon, 98 Ga. 459, 58 Am. St. Rep. 313.

Illinois. — E. A. Moore Furniture Co. *v.* Sloane, 166 Ill. 457; Heenan *v.* Redman, 101 Ill. App. 603; Atlas Furniture Co. *v.* E. S. Higgins Carpet Co., 71 Ill. App. 17; Skinner *v.* Mulligan, 56 Ill. App. 47.

Iowa. — Alpha Checkrower Co. *v.* Bradley, 105 Iowa 537; Eagle Iron Works *v.* Des Moines Suburban R. Co., 101 Iowa 289; Douglass *v.* Moses, (Iowa 1896) 65 N. W. Rep. 1004.

Kansas. — Loomis Milling Co. *v.* Vawter, 8 Kan. App. 437.

Kentucky. — Heilman Milling Co. *v.* Hotaling, (Ky. 1899) 53 S. W. Rep. 655; Ewing *v.* Hauss, (Ky. 1899) 50 S. W. Rep. 249; Sharpe *v.* Bettis, (Ky. 1895) 32 S. W. Rep. 395.

Minnesota. — Plano Mfg. Co. *v.* Richards, 86 Minn. 94; Benson *v.* Port Huron Engine, etc., Co., 83 Minn. 321; Miamisburg Twine, etc., Co. *v.* Wohlhuter, 71 Minn. 484; McCormick Harvesting Mach. Co. *v.* McNicholas, 66 Minn. 384; Hansen *v.* Gaar, 63 Minn. 94.

Mississippi. — Stillwell, etc., Co. *v.* Biloxi Canning Co., 78 Miss. 779.

Missouri. — June *v.* Falkinburg, 89 Mo. App. 563; St. Louis Brewing Assoc. *v.* McEnroe, 80 Mo. App. 429; Miles *v.* Withers, 76 Mo. App. 87; Brown *v.* Emerson, 66 Mo. App. 63; McCormick Harvesting Mach. Co. *v.* Heath, 65 Mo. App. 461.

Nebraska. — Burnham *v.* Meredith, (Neb. 1902) 91 N. W. Rep. 553; Dunn *v.* Bushnell, 63 Neb. 568.

New York. — Black *v.* Dudley, 75 N. Y. App. Div. 72; J. R. Alsing Co. *v.* New England Quartz, etc., Co., 66 N. Y. App. Div. 473; Ideal Wrench Co. *v.* Garvin Mach. Co., 65 N. Y. App. Div. 235; Steinhardt *v.* Phelps, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 730; Lockwood *v.* Dewey, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 751; North Collins Bank *v.* Cary Safe Co., 42 N. Y. App. Div. 233.

North Carolina. — Huyett, etc., Mfg. Co. *v.* Gray, 126 N. Car. 108, *denying rehearing* 124 N. Car. 322; Huyett-Smith Mfg. Co. *v.* Gray, 129 N. Car. 438; Hobbs *v.* Bland, 124 N. Car. 284.

Oregon. — Dean Pump Works *v.* Astoria Iron Works, 40 Oregon 83; Schumann *v.* Wager, 36 Oregon 65.

South Dakota. — Hermon *v.* Silver, 15 S. Dak. 476; Western Twine Co. *v.* Wright, 11 S. Dak. 521.

Tennessee. — Garr *v.* Young, (Tenn. Ch. 1901) 62 S. W. Rep. 631.

Texas. — Fay Fruit Co. *v.* Talerico, (Tex. Civ. App. 1902) 69 S. W. Rep. 196; Schuwirth *v.* Thumma, (Tex. Civ. App. 1902) 66 S. W. Rep. 691; Connor *v.* S. Blaisdell Jr. Co., (Tex. Civ. App. 1901) 60 S. W. Rep. 890; Snyder *v.* Baker, (Tex. Civ. App. 1896) 34 S. W. Rep. 981.

Wisconsin. — J. I. Case Plow Works *v.* Niles, etc., Co., 107 Wis. 9; Parry Mfg. Co. *v.* Tobin, 106 Wis. 286; J. Thompson Mfg. Co. *v.* Gunderson, 106 Wis. 449; Williams *v.* Thrall, 101 Wis. 337; Park *v.* Richardson, etc., Co., 91 Wis. 189.

1. Bixby *v.* Denison Normal School Assoc., (Iowa 1899) 78 N. W. Rep. 234; Bates *v.* Fish Bros. Wagon Co., 169 N. Y. 587; Morse *v.* Arnfield, 15 Pa. Super. Ct. 140; Dilley *v.* Ratcliff, (Tex. Civ. App. 1902) 69 S. W. Rep. 237; Graves *v.* Hillyer, (Tex. Civ. App. 1899) 48 S. W. Rep. 889; Williams *v.* Thrall, 101 Wis. 337. See also Bates *v.* Fish Bros. Wagon Co., 50 N. Y. App. Div. 38.

2. Special Damages — *England.* — Vogan *v.* Oulton, 81 L. T. N. S. 435.

United States. — Crane Co. *v.* Columbus Constr. Co., (C. C. A.) 73 Fed. Rep. 984.

Illinois. — Heenan *v.* Redmen, 101 Ill. App. 603; Deane *v.* Michigan Stove Co., 69 Ill. App. 106.

Indiana. — Elwood Planing Mills Co. *v.* Harting, 21 Ind. App. 408.

Iowa. — Brennecke *v.* Heald, 107 Iowa 376; Briggs *v.* M. Rumely Co., 96 Iowa 202; National Horse-Importing Co. *v.* Novak, 95 Iowa 596.

Kentucky. — Tyler *v.* Moody, 63 S. W. Rep. 433, 23 Ky. L. Rep. 584.

Michigan. — Tatro *v.* Brower, 118 Mich. 615.

Minnesota. — Evenson *v.* Keystone Mfg. Co., 83 Minn. 164; Hendrickson *v.* Back, 74 Minn. 90.

Nebraska. — Nye, etc., Co. *v.* Snyder, 56 Neb. 754; Burr *v.* Redhead, etc., Co., 52 Neb. 617.

New York. — Russell *v.* Corning Mfg. Co., 49 N. Y. App. Div. 610; Dommerich *v.* Garfunkel, (N. Y. City Ct. Gen. T.) 28 Misc. (N. Y.) 433; Bruce *v.* Fiss, etc., Horse Co., (Supm. Ct. Tr. T.) 26 Misc. (N. Y.) 472; Jones *v.* Mayer, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 586.

North Carolina. — Kester *v.* Miller, 119 N. Car. 475.

Ohio. — Smoots *v.* Foster, 9 Ohio Cir. Dec. 218, 16 Ohio Cir. Ct. 612.

Oklahoma. — Coyle *v.* Baum, 3 Okla. 695.

Pennsylvania. — McCormick Harvesting Mach. Co. *v.* Nicholson, 17 Pa. Super. Ct. 188.

and did not comply with the warranty, the purchaser was allowed to recover the difference in the value of the crop raised from the seed delivered and the value of the crop which would have been raised had the seed been of the quality warranted.[1] And where fruit trees were sold for planting, with warranty as to quality, the purchaser was allowed to recover as damages for breach of the warranty the difference in the value which would have been added to his land if the trees had been of the quality warranted.[2] And where animals sold with warranty of soundness had a contagious disease, which was communicated to other animals of the purchaser, the purchaser was permitted to recover the damages resulting from the communication of the disease.[3] And where a horse was sold with warranty as to soundness for driving, damages for personal injuries to the buyer and for injuries to his vehicle from the horse running away were allowed for breach of the warranty.[4] So, also, where the seller had knowledge at the time of sale that the purchaser was buying for resale or to fulfil an existing contract of sale, special damages due to the inability of the buyer to resell or comply with a contract to sell were allowed.[5] The special damages, however, to be recoverable, must be such as may fairly be supposed to have entered into the contemplation of the parties at the time the contract of sale was made.[6]

Rescission. — Where the contract is rescinded for breach of warranty and the seller accepts back the property, the measure of damages is the price paid.[7]

Duty of Purchaser to Minimize Damages. — The principle that the party who suffers from a breach of contract must so act as to make his damages as small as possible applies equally to the breach of a warranty in a contract of sale.[8]

c. FRAUD AND DECEIT. — If the contract of sale or the acceptance of the property was induced by the fraud and deceit of the seller, the purchaser may still maintain an action for damages for such fraud and deceit,[9] or may recoup his damages in an action by the seller for the price.[10] But unless the contract of sale is rescinded for the fraud and deceit the purchaser cannot set up such fraud and deceit as a bar to the action of the seller for the price.[11] For fraud

Rhode Island. — Kent *v.* Halliday, 23 R. I. 182.

Tennessee. — Reedy *v.* Weakley, (Tenn. Ch. 1897) 39 S. W. Rep. 739.

Texas. — Dilley *v.* Ratcliff, (Tex. Civ. App. 1902) 69 S. W. Rep. 237; Miller-Stone Mach. Co. *v.* Balfour, (Tex. Civ. App. 1901) 61 S. W. Rep. 972; Danner *v.* Ft. Worth Implement Co., 18 Tex. Civ. App. 621; Osborne *v.* Poindexter, (Tex. Civ. App. 1896) 34 S. W. Rep. 299.

Wisconsin. — Optenberg *v.* Skelton, 109 Wis. 241.

1. Edgar *v.* Joseph Breck, etc., Corp., 172 Mass. 581; Dunn *v.* Bushnell, 63 Neb. 568; Landreth *v.* Wyckoff, 67 N. Y. App. Div. 145; Hoopes *v.* East, 19 Tex. Civ. App. 531. See also Phillips *v.* Vermillion, 91 Ill. App. 133; Reiger *v.* Worth Co., 127 N. Car. 230.

2. Heilman *v.* Pruyn, 122 Mich. 301.

3. Snowden *v.* Waterman, 105 Ga. 384; McCann *v.* Ullman, 109 Wis. 574.

4. Bruce *v.* Fiss, etc., Horse Co., 47 N. Y. App. Div. 273.

5. Merkley *v.* Phillips, (Ky. 1899) 53 S. W. Rep. 1037; Carleton *v.* Lombard, (N. Y. 1900) 56 N. E. Rep. 1133, 19 N. Y. App. Div. 297, 149 N. Y. 137; Reese *v.* Miles, 99 Tenn. 398; Guetzkow Bros. Co. *v.* Andrews, 92 Wis. 214, 53 Am. St. Rep. 909.

6. De Loach Mill Mfg. Co. *v.* Bonner, 64 Ark. 510; Canon City Electric Light, etc., Co. *v.* Medart Patent Pulley Co., 11 Colo. App. 300; Elwood *v.* McDill, 105 Iowa 437; Sharpe *v.* Bettis, (Ky. 1895) 32 S. W. Rep. 395; Joseph *v.* Richardson, 2 Pa. Super. Ct. 208, 38 W. N. C. (Pa.) 487; Reedy *v.* Weakley, (Tenn. Ch. 1897) 39 S. W. Rep. 739.

7. Ideal Wrench Co. *v.* Garvin Mach. Co., 65 N. Y. App. Div. 235; Lewis *v.* Doyle, 13 N. Y. App. Div. 291. See IX. *Rescission.*

8. Brush *v.* Smith, 111 Iowa 217; Bates *v.* Fish Bros. Wagon Co., 169 N. Y. 587, 50 N. Y. App. Div. 38; Bruce *v.* Fiss, etc., Horse Co., 47 N. Y. App. Div. 273.

9. **Fraud and Deceit.** — Strand *v.* Griffith, (C. C. A.) 97 Fed. Rep. 854; Hennessy *v.* Damourette, 15 Colo. App. 354, 22 Am. St. Rep. 410; Garland *v.* Spencer, 46 Me. 528; Weaver *v.* Shriver, 79 Md. 530; True *v.* Sanborn, 27 N. H. 383; Stewart *v.* Lyman, 62 N. Y. App. Div. 182; Setzar *v.* Wilson, 4 Ired. L. (26 N. Car.) 501; Cornelius *v.* Molloy, 7 Pa. St. 293; Hubby *v.* Stokes, 22 Tex. 217; McCord-Collins Commerce Co. *v.* Levi, 21 Tex. Civ. App. 109; Vail *v.* Strong, 10 Vt. 457.

10. Johnson *v.* St. Louis Butchers' Supply Co., 60 Ark. 387; Bell *v.* Sheridan, 21 D. C. 370; Beasley *v.* Huyett, etc., Mfg. Co., 92 Ga. 273; Weaver *v.* Shriver, 79 Md. 530; Brockhaus *v.* Schilling, 52 Mo. App. 73; Mills *v.* Johnson, 3 Tex. Civ. App. 359; Lewis *v.* Taylor, (Tex. Civ. App. 1893) 24 S. W. Rep. 92; Griffith *v.* Strand, 19 Wash. 686.

11. Toby *v.* Oregon Pac. R. Co., 98 Cal. 490.

and deceit on the part of the seller the buyer may be entitled to rescind the contract and defeat an action for the price.[1]

d. DELAY IN DELIVERY. — The acceptance of a delivery of the goods sold after the time stipulated in the contract for delivery does not necessarily waive the delay in the delivery,[2] and where such delay has not been waived, the buyer may maintain an action for damages therefrom,[3] or may recoup his damages from such delay when sued by the seller for the purchase price.[4]

The Measure of Damages for delay in delivery should be such as may fairly and reasonably be considered as arising naturally or such as may reasonably be supposed to have been in the contemplation of both parties at the time the contract was made as the probable result of the breach of the contract.[5]

XII. BONA FIDE PURCHASERS — 1. Protection Afforded Bona Fide Purchasers — *a.* IN GENERAL. — It is a well-settled general rule that a person cannot be deprived of his title to personal property without his consent, express or implied, and where no fraud or misleading acts on his part are shown; this doctrine is exemplified by the maxim *caveat emptor*, and the owner of property is entitled to recover it even from a *bona fide* purchaser who purchased the property from a mere possessor.[6] Where property is tortiously taken

1. See IX. *Rescission.*

2. **Delay in Delivery** — *Delaware.* — Phœnix Lock Works *v.* Capelle Hardware Co., 9 Houst. (Del.) 232.

Illinois. — Ramsey *v.* Tully, 12 Ill. App. 463.

Kansas. — Halstead Lumber Co. *v.* Sutton, 46 Kan. 192.

Kentucky. — Belcher *v.* Sellards, (Ky. 1897) 43 S. W. Rep. 676.

Maryland. — Bagby *v.* Walker, 78 Md. 239.

Michigan. — Crane *v.* Wilson, 105 Mich. 554; Duplanty *v.* Stokes, 103 Mich. 630; McKinnon Mfg. Co. *v.* Alpena Fish Co., 102 Mich. 221.

New York. — Fitch *v.* Kennard, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 95; Nicholas *v.* Venable, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 109; Roby *v.* Reynolds, 65 Hun (N. Y.) 486; Gaylord *v.* Karst, (C. Pl. Gen. T.) 17 N. Y. Supp. 720.

Texas. — Strain *v.* Pauley Jail Bldg., etc., Co., 80 Tex. 622.

Washington. — Dignan *v.* Spurr, 3 Wash. 309.

See VI. *Acceptance of Goods*,

3. Wimshurst *v.* Deeley, 2 C. B. 253, 52 E. C. L. 253; Ramish *v.* Kirschbraum, 107 Cal. 659; Washington, etc., R. Co. *v.* American Car Co., 5 App. Cas. (D. C.) 524; Van Winkle *v.* Wilkins, 81 Ga. 93, 12 Am. St. Rep. 299; Baldwin *v.* Farnsworth, 10 Me. 414, 25 Am. Dec. 252; Redlands Orange Growers Assoc. *v.* Gorman, 76 Mo. App. 184; Phillips *v.* Taylor, 49 N. Y. Super. Ct. 318; New Haven, etc., Co. *v.* Quintard, 1 Sweeny (N. Y.) 89; Scott *v.* Texas Constr. Co., (Tex. Civ. App. 1900) 55 S. W. Rep. 37.

4. Redlands Orange Growers Assoc. *v.* Gorman, 76 Mo. App. 184.

5. **Measure of Damages.** — Cory *v.* Thames Ironworks, etc., Co., L. R. 3 Q. B. 181; Blanchard *v.* Pacific Rolling-Mill Co., (Cal. 1894) 36 Pac. Rep. 584; Washington, etc., R. Co. *v.* American Car Co., 5 App. Cas. (D. C.) 524; Lonergan *v.* Waldo, 179 Mass. 135; Davis Provision Co. *v.* Fowler, 20 N. Y. App. Div. 626, *affirmed* 163 N. Y. 580· D. A. Tompkins Co. *v.* Dallas Cotton Mill, 130 N. Car. 347; Simpson Brick-Press Co. *v.* Marshall, 5 S. Dak. 528; Ellis *v.* Tips, 16 Tex. Civ. App. 82; Tyler Car, etc., Co. *v.* Wettermark, 12 Tex. Civ. App. 399. See also Whalon *v.* Aldrich, 8 Minn. 346; Boomer *v.* Flagler, 51 N. Y. Super. Ct. 211; Dilley *v.* Ratcliff, (Tex. Civ. App. 1902) 69 S. W. Rep. 237.

6. **Caveat Emptor** — *England.* — Hoare *v.* Parker, 2 T. R. 376.

Alabama. — Johnson *v.* Boyles, 26 Ala. 576; Larkins *v.* Eckwurzel, 42 Ala. 322, 94 Am. Dec. 651; Leigh *v.* Mobile, etc., R. Co., 58 Ala. 178.

Arkansas. — Andrews *v.* Cox, 42 Ark. 473, 48 Am. Rep. 68; Jetton *v.* Tobey, 62 Ark. 84.

California. — Williams *v.* Team, 131 Cal. 64.

Colorado. — Flick *v.* Graham, 5 Colo. App. 88.

Connecticut. — Baldwin *v.* Porter, 12 Conn. 473; Forbes *v.* Marsh, 15 Conn. 384; Hart *v.* Carpenter, 24 Conn. 427; Clark *v.* Hale, 34 Conn. 398; Romeo *v.* Martucci, 72 Conn. 504, 77 Am. St. Rep. 327; Harrison *v.* Clark, 74 Conn. 18.

Georgia. — Mayer *v.* Wiltberger, Ga. Dec. (pt. ii.) 20.

Illinois. — Fawcett *v.* Osborn, 32 Ill. 411, 83 Am. Dec. 278; Burton *v.* Curyea, 40 Ill. 320, 89 Am. Dec. 350; Klein *v.* Seibold, 89 Ill. 540; Hutchinson *v.* Oswald, 17 Ill. App. 28; Schwamb Lumber Co. *v.* Schaar, 94 Ill. App. 544.

Indiana. — Duke *v.* Strickland, 43 Ind. 494; Payne *v.* June, 92 Ind. 252.

Iowa. — Oswald *v.* Hayes, 42 Iowa 104.

Kansas. — Daniel *v.* McLucas, 8 Kan. App. 299.

Kentucky. — Pool *v.* Adkisson, 1 Dana (Ky.) 110; Reid *v.* King, 89 Ky. 388.

Louisiana. — Dyson *v.* Phelps, 14 La. Ann. 733; Alexander *v.* Gusman, 16 La. Ann. 251.

Maine. — Lunt *v.* Whitaker, 10 Me. 310.

Maryland. — Browning *v.* Magill, 2 Har. & J. (Md.) 308; Levi *v.* Booth, 58 Md. 305, 42 Am. Rep. 332; Hopper *v.* Callahan, 78 Md. 529.

Michigan. — Hoppin *v.* Avery, 87 Mich. 551.

Mississippi. — Ketchum *v.* Brennan, 53 Miss. 596.

Nebraska. — Ransom *v.* Schmela, 13 Neb. 73.

New York. — Farmers, etc., Nat. Bank *v.* Hazeltine, 78 N. Y. 104, 34 Am. Rep. 518; Farmers, etc., Nat. Bank *v.* Logan, 74 N. Y.

from the owner, he is not bound to pursue it diligently and recapture it under penalty of losing his title in case the property is sold by the tortfeasor to a *bona fide* purchaser,[1] and the mere fact that the owner of property sold by a third person without authority to a *bona fide* purchaser does not immediately seek to recover possession from the purchaser will not deprive him of his right to do so.[2]

Money — Exception. — The general rule has been held not to apply, from the necessity of the case, to money or that which is a circulating medium used and employed as money, and therefore, if a mere possessor of such property passes it to the possession of another upon a valuable consideration and without notice, the owner cannot recover it from the latter.[3]

b. PURCHASER FROM THIEF. — A *bona fide* purchaser of stolen property from a thief acquires no title as against the owner,[4] nor can the purchaser

568; Barnard *v.* Campbell, 55 N. Y. 464, 14 Am. Rep. 289; Pease *v.* Smith, 61 N. Y. 480; McGoldrick *v.* Willits, 52 N. Y. 612; Hamill *v.* Gillespie, 48 N. Y. 556; Creegan *v.* Robertson, 74 Hun (N. Y.) 22; Edgerly *v.* Bush, 81 N. Y. 199; Hodge *v.* Sexton, 1 Hun (N. Y.) 576; Williams *v.* Merle, 11 Wend. (N. Y.) 80, 25 Am. Dec. 604; Everett *v.* Coffin, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551; Saltus *v.* Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; Covill *v.* Hill, 4 Den. (N. Y.) 323; Wheelwright *v.* Depeyster, 1 Johns. (N. Y.) 471, 3 Am. Dec. 345; Wooster *v.* Sherwood, 25 N. Y. 278; Hentz *v.* Miller, 94 N. Y. 64; Ohio, etc., R. Co. *v.* Kasson, 37 N. Y. 218; Brower *v.* Peabody, 13 N. Y. 121, 11 How. Pr. (N. Y.) 492; Ballard *v.* Burgett, 40 N. Y. 314; Spraights *v.* Hawley, 39 N. Y. 441, 100 Am. Dec. 452; Wyckoff *v.* Vicary, 75 Hun (N. Y.) 409; Dillingham *v.* Ladue, 35 Barb. (N. Y.) 38; Wiles *v.* Clapp, 41 Barb. (N. Y.) 645; Sage *v.* Shepard, etc., Lumber Co., 4 N. Y. App. Div. 290, *affirmed* 158 N. Y. 672; Spaulding *v.* Brewster, 50 Barb. (N. Y.) 142; Roberts *v.* Dillon, 3 Daly (N. Y.) 50; Caldwell *v.* Bartlett, 3 Duer (N. Y.) 341; Florence Sewing Mach. Co. *v.* Warford, 1 Sweeny (N. Y.) 433; Linnen *v.* Cruger, 40 Barb. (N. Y.) 633; Wilson *v.* Nason, 4 Bosw. (N. Y.) 155; Western Transp. Co. *v.* Marshall, 37 Barb. (N. Y.) 509. *Compare* Manning *v.* Monaghan, 1 Bosw. (N. Y.) 459.

Ohio. — Larrowe *v.* Beam, 10 Ohio 498; Dean *v.* Yates, 22 Ohio St. 388. *Compare* Pike *v.* Equitable Nat. Bank, 2 Ohio Dec. 1, 1 Ohio N. P. 205.

Oklahoma. — Quinton *v.* Cutlip, 1 Okla. 302.

Oregon.—Church *v.* Melville, 17 Oregon 413.

Pennsylvania. — McMahon *v.* Sloan, 12 Pa. St. 230, 51 Am. Dec. 601; Decan *v.* Shipper, 35 Pa. St. 239, 78 Am. Dec. 334; Barker *v.* Dinsmore, 72 Pa. St. 427, 13 Am. Rep. 697; Henry F. Miller, etc., Piano Co. *v.* Parker, 155 Pa. St. 208, 35 Am. St. Rep. 873.

Rhode Island. — Woods *v.* Nichols, 21 R. I. 537.

South Carolina. — Carmichael *v.* Buck, 10 Rich. L. (S. Car.) 332, 70 Am. Dec. 226; Hill *v.* Burgess, 37 S. Car. 604, 15 S. E. Rep. 963.

Texas. — Case *v.* Jennings, 17 Tex. 661; Manly *v.* Culver, 20 Tex. 143; Leath *v.* Uttley, 66 Tex. 82; New York, etc., Land Co. *v.* Hyland, 8 Tex. Civ. App. 601; Gulf, etc., R. Co. *v.* Taylor, 18 Tex. Civ. App. 571.

Vermont. — Gray *v.* Stevens, 28 Vt. 1, 65 Am. Dec. 216; Bucklin *v.* Beals, 38 Vt. 653.

Purchase from Parents of Property of Children. — Manley *v.* Culver, 20 Tex. 143.

Sale by Husband of Personalty of Wife. — Williams *v.* Tam, 131 Cal. 64; Klein *v.* Seibold, 89 Ill. 540.

1. Duty of Owner to Pursue Property. — Sargeant *v.* Marshall, 28 Ill. App. 177.

2. Harrison *v.* Clark, 74 Conn. 18 (delay of nine weeks after knowledge of sale).

3. Money. — Mobile, etc., R. Co. *v.* Felrath, 67 Ala. 189; Montague *v.* Ficklin, 18 Ill. App. 99; Depew *v.* Robards, 17 Mo. 580; Lord *v.* Wilkinson, 56 Barb. (N. Y.) 593. See also Jelton *v.* Tobey, 62 Ark. 84.

4. Purchase from Thief — *England.* — Hargreave *v.* Spink, (1892) 1 Q. B. 25; White *v.* Spettigue, 13 M. & W. 606; Gimson *v.* Woodfull, 2 C. & P. 41, 12 E. C. L. 20; Peer *v.* Humphrey, 2 Ad. & El. 495, 29 E. C. L. 158; Scattergood *v.* Sylvester, 15 Q. B. 506, 69 E. C. L. 506; Marsh *v.* Keating, 1 Bing. N. Cas. 198, 27 E. C. L. 354.

United States. — Bangor Electric Light, etc., Co. *v.* Robinson, 52 Fed. Rep. 520.

Illinois. — Newkirk *v.* Dalton, 17 Ill. 413; Sharp *v.* Parks, 48 Ill. 511, 95 Am. Dec. 565; Cassidy *v.* Elk Grove Land, etc., Co., 58 Ill. App. 39.

Indiana. — Robinson *v.* Skipworth, 23 Ind. 311; Breckenridge *v.* McAfee, 54 Ind. 141.

Iowa. — Barton *v.* Faherty, 3 Greene (Iowa) 327.

Kentucky. — Basset *v.* Green, 2 Duv. (Ky.) 560.

Maine. — Boody *v.* Keating, 4 Me. 164; Belknap *v.* Milliken, 23 Me. 381.

Massachusetts. — Dame *v.* Baldwin, 8 Mass. 518.

Michigan. — Morgan *v.* Hodges, 89 Mich. 404.

New York. — Mowrey *v.* Walsh, 8 Cow. (N. Y.) 238; Soltau *v.* Gergau, 48 Hun (N. Y.) 537, *affirmed* 119 N. Y. 380, 16 Am. St. Rep. 843; Hoffman *v.* Carow, 22 Wend. (N. Y.) 285; Bassett *v.* Spofford, 45 N. Y. 387, 6 Am. Rep. 101, *affirming* 2 Daly (N. Y.) 432; Newton *v.* Porter, 69 N. Y. 133, 25 Am. Rep. 152, *affirming* 5 Lans. (N. Y.) 416; Hentz *v.* Miller, 94 N. Y. 64; Knox *v.* Eden Musee Americain Co., 148 N. Y. 441, 51 Am. St. Rep. 700; Soltau *v.* Loewenthal, (Supm. Ct. Gen. T.) 16 N. Y. St. Rep. 790; Lovell *v.* Shea, 60 N. Y. Super. Ct. 412; Mills *v.* Miller, 12 N. Y. Wkly. Dig. 221.

Ohio. — Howk *v.* Minnick, 19 Ohio St. 462, 2 Am. Rep. 413.

from a thief transfer a good title to a *bona fide* purchaser.[1] In *England*, where *bona fide* purchasers in market overt were protected, a *bona fide* purchaser at such a sale of stolen property was protected in his title as against the owner.[2] This rule, however, was subsequently changed by statute, and the owner, after prosecution of the thief to conviction, was entitled to recover the property from such a purchaser.[3]

Statutory Larceny. — Though by statute the obtaining of property by false pretenses is declared to be larceny still the distinctions which existed prior to such an enactment between the obtaining of property by false pretenses and the crime of larceny, as far as concerns the rights of the persons purchasing the property from the wrongdoer, are still observed.[4]

c. PURCHASER FROM LIFE TENANT. — A *bona fide* purchaser of personalty from the owner of a life interest therein does not acquire a good title as against the remainderman or owner of the executory interest.[5]

d. PURCHASER FROM COTENANT. — A purchaser from a cotenant in possession of personalty, though *bona fide*, acquires only the interest of his vendor.[6]

e. PURCHASER FROM BAILEE. — A mere bailee to whom the possession of personal property is intrusted by the owner cannot transfer a good title, even to a *bona fide* purchaser, as against the bailor, where the bailor has been guilty of no fraud or misleading acts other than the mere delivery of the possession of the property to the bailee.[7]

Pennsylvania. — Bixler *v.* Saylor, 68 Pa. St. 148; Barker *v.* Dinsmore, 72 Pa. St. 427, 13 Am. Rep. 697.

Texas. — Dodd *v.* Arnold, 28 Tex. 97; Hull *v.* Davidson, 6 Tex. Civ. App. 588.

Washington. — Rumpf *v.* Barto, 10 Wash. 382.

See also Porth *v.* Lux, 40 Mo. App. 162.

An Agreement between the owner of stolen property and a *bona fide* purchaser that the latter may retain part of the property in consideration of the return of the balance is without consideration. Morgan *v.* Hodges, 89 Mich. 404.

Stock Certificate Indorsed in Blank Stolen from Safe Deposit Vault by one of the occupants in common. Bangor Electric Light, etc., Co. *v.* Robinson, 52 Fed. Rep. 520. See also the title STOCK AND STOCKHOLDERS.

Purchase from Servant of Stolen Property. — A master may intrust his property to the custody of his servant without incurring the peril of losing his title thereto if the servant steals and disposes of it to another. There must be something more than the mere intrusting to a servant of the custody of a chattel, and the consequent opportunity for theft, in order to preclude the master from reclaiming it, if stolen by the servant and sold to another. Knox *v.* Eden Musee Americain Co., 148 N. Y. 441, 51 Am. St. Rep. 700, *reversing* 74 Hun (N. Y.) 483.

Property Stolen by Bailee to Whom It Was Delivered to Show to Customers. — Rumpf *v.* Barto, 10 Wash. 382.

1. Remote Purchaser. — Basset *v.* Green, 2 Duv. (Ky.) 560.

Stolen Horse, Purchased by Government, Branded and Resold. — Basset *v.* Green, 2 Duv. (Ky.) 560.

2. Markets Overt. — Hargreave *v.* Spink, (1892) 1 Q. B. 25; Moyce *v.* Newington, 4 Q. B. D. 32.

3. Bentley *v.* Vilmont, 12 App. Cas. 471; Scattergood *v.* Sylvester, 15 Q. B. 506, 69 E. C. L. 506; Walker *v.* Matthews, 8 Q. B. D. 109.

4. Statutory Larceny. — Hutchinson *v.* Watkins, 17 Iowa 475; Soltau *v.* Gerdau, 48 Hun (N. Y.) 537, *affirmed* 119 N. Y. 380, 16 Am. St. Rep. 843. See *infra*, this section, *Purchaser from Fraudulent Vendee.*

5. Purchaser from Life Tenant. — Hoare *v.* Parker, 2 T. R. 376. See the title REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS, *ante*, p. 374.

6. Purchase from Cotenant. — Williams *v.* Tam, 131 Cal. 64. See the title JOINT TENANTS AND TENANTS IN COMMON, vol. 17, p. 646.

7. Purchase from Bailee — *Connecticut.* — Harrison *v.* Clark, 74 Conn. 18.

Illinois. — Hutchinson *v.* Oswald, 17 Ill. App. 28; Montague *v.* Ficklin, 18 Ill. App. 99.

Indiana. — Kitchell *v.* Vanadar, 1 Blackf. (Ind.) 356, 12 Am. Dec. 249; Leffler *v.* Watson, 13 Ind. App. 176.

Iowa. — Baehr *v.* Clark, 83 Iowa 313.

Kentucky. — Chism *v.* Woods, Hard. (Ky.) 540.

Louisiana. — Reid *v.* Mayo, 45 La. Ann. 1091.

Massachusetts. — Coggill *v.* Hartford, etc., R. Co., 3 Gray (Mass.) 545.

Minnesota. — Bjork *v.* Bean, 56 Minn. 244; Hedderly *v.* Backus, 53 Minn. 27.

New Jersey. — Midland R. Co. *v.* Hitchcock, 37 N. J. Eq. 549.

New York. — Linnen *v.* Cruger, 40 Barb. (N. Y.) 633; Smith *v.* Clews, 58 Hun (N. Y.) 609, 35 N. Y. St. Rep. 669, *affirmed* 124 N. Y. 664; Saunders *v.* Payne, (C. Pl. Gen. T.) 36 N. Y. St. Rep. 733; Hodge *v.* Sexton, 1 Hun (N. Y.) 576; Covill *v.* Hill, 4 Den. (N. Y.) 323; Wooster *v.* Sherwood, 25 N. Y. 278.

Ohio. — Roland *v.* Gundy, 5 Ohio 202; Frank *v.* Ingalls, 41 Ohio St. 560.

Pennsylvania. — Mann *v.* English, 7 Pa. Co.

f. PURCHASER FROM LESSEE. — Where land is leased together with personal property thereon, a *bona fide* purchaser of the personalty from the lessee does not acquire a title as against the lessor.[1]

g. PURCHASER FROM CONDITIONAL VENDEE. — At common law, in case of conditional sales where the title was reserved by the vendor until certain conditions were performed by the vendee, to whom the possession was delivered, the purchaser's possession was regarded merely as that of an ordinary bailee, and he could not transfer, even to a *bona fide* purchaser, any greater interest than he owned.[2] At the present, however, statutes have been enacted in practically all jurisdictions for the protection of *bona fide* purchasers from conditional vendors to whom possession is delivered.[3]

h. PURCHASER FROM PLAINTIFF IN REPLEVIN. — Where the plaintiff in a replevin action acquires possession of the property, he cannot, as against the defendant, transfer a good title, even to a *bona fide* purchaser.[4]

i. SUBSEQUENT PURCHASER FROM VENDOR WHO RETAINS POSSESSION. — Where a vendor of personal property is allowed by his vendee to continue in possession of the property, and thus to give to the world a colorable appearance of continued ownership, the title of a subsequent *bona fide* purchaser from such vendor will be upheld as against the first vendee,[5] and *a fortiori* one to whom the owner of property merely contracts to sell has no claim which he can enforce against a subsequent *bona fide* purchaser from such owner.[6]

Purchaser from Chattel Mortgagor. — At common law a mortgage of personal property was good as against even subsequent *bona fide* purchasers from the mortgagor who had been permitted by the mortgagee to remain in possession of the mortgaged property,[7] but such a *bona fide* purchaser may be entitled

Ct. 637; McMahon *v.* Sloan, 12 Pa. St. 230, 51 Am. Dec. 601; Chamberlain *v.* Smith, 44 Pa. St. 431; Henry F. Miller, etc., Piano Co. *v.* Parker, 155 Pa. St. 208, 35 Am. St. Rep. 873.

Tennessee. — McFerrin *v.* Perry, 1 Sneed (Tenn.) 314.

Vermont. — Heacock *v.* Walker, 1 Tyler (Vt.) 338.

Sale by Bailee to Whom Diamonds Were Delivered "on Approval." — Smith *v.* Clews, 114 N. Y. 190, 11 Am. St. Rep. 627.

Sale by Florist of Plant Bailed for Storage. — Mann *v.* English, 7 Pa. Co. Ct. 637.

Bailee for Hire. — Henry F. Miller, etc., Piano Co. *v.* Parker, 155 Pa. St. 208, 35 Am. St. Rep. 873.

1. **Purchase from Lessee.** — Hopper *v.* Callahan, 78 Md. 529.

2. **Purchase from Conditional Vendee** — *Alabama.* — Dudley *v.* Abner, 52 Ala. 572.

Arkansas. — McIntosh *v.* Hill, 47 Ark. 363; Simpson *v.* Shackelford, 49 Ark. 63.

Georgia. — Goodwin *v.* May, 23 Ga. 208; Bowen *v.* Frick, 75 Ga. 786.

Iowa. — Baker *v.* Hall, 15 Iowa 277.

Massachusetts. — Gilbert *v.* Thompson, 3 Gray (Mass.) 550, note; Coggill *v.* Hartford, etc., R. Co., 3 Gray (Mass.) 545.

Mississippi. — Ketchum *v.* Brennan, 53 Miss. 596.

Missouri. — Parmlee *v.* Catherwood, 36 Mo. 479; Kingsland-Ferguson Mfg. Co. *v.* Culp, 85 Mo. 548; Tufts *v.* Thompson, 22 Mo. App. 564.

New York. — Ballard *v.* Burgett, 47 Barb. (N. Y.) 646; Puffer *v.* Reeve, 35 Hun (N. Y.) 480, 15 Abb. N. Cas. (N. Y.) 388; Ballard *v.* Burgett, 40 N. Y. 314; Austin *v.* Dye, 46 N. Y. 500.

Ohio. — Sanders *v.* Keber, 28 Ohio St. 630.

Tennessee. — McCombs *v.* Guild, 9 Lea (Tenn.) 81.

Compare Michigan Cent. R. Co. *v.* Phillips, 60 Ill. 190; Lewis *v.* Palmer, Hill & D. Supp. (N. Y.) 68; Wait *v.* Green, 36 N. Y. 556; Steelyards *v.* Singer, 2 Hilt. (N. Y.) 96; Rawls *v.* Deshler, 4 Abb. App. Dec. (N. Y.) 12.

3. Bridget *v.* Cornish, 1 Mackey (D. C.) 29; Eidson *v.* Hedger, 38 Mo. App. 52; Moyer *v.* McIntyre, 43 Hun (N. Y.) 58; Campbell Printing Press, etc., Co. *v.* Oltrogge, 13 Daly (N. Y.) 247; Butts *v.* Screws, 95 N. Car. 215; Knittel *v.* Cushing, 57 Tex. 354, 44 Am. Rep. 598. See the title CONDITIONAL SALES, vol. 6, p. 487.

4. **Purchase from Plaintiff in Replevin.** — Mannausau *v.* Wallace, 87 Mich. 543. See the title REPLEVIN, *ante*, p. 475.

5. **Subsequent Purchaser from Vendor Retaining Possession.** — The Schooner Romp, Olc. Adm. 196; Flanigan *v.* Pomeroy, 85 Minn. 264; Plaisted *v.* Holmes, 58 N. H. 619; Shaw *v.* Levy, 17 S. & R. (Pa.) 99. See also Valley Nat. Bank *v.* Frank, 12 Mo. App. 460; Dirigo Tool Co. *v.* Woodruff, 41 N. J. Eq. 336; Creegan *v.* Robertson, 74 Hun (N. Y.) 22. *Compare* Wolfley *v.* Rising, 8 Kan. 297; Brown *v.* Wilmerding, 5 Duer (N. Y.) 220; Hunn *v.* Bowne, 2 Cai. (N. Y.) 38. See the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 210.

6. Cullom *v.* Guillot, 18 La. Ann. 608; Thomas *v.* Ramsey, 47 Mo. App. 84; Seymour *v.* Montgomery, 4 Abb. App. Dec. (N. Y.) 207, 1 Keyes (N. Y.) 463; Burt *v.* Dutcher, 34 N. Y. 493.

7. **Purchasers from Chattel Mortgagor.** — U. S. *v.* Hooe, 3 Cranch (U. S.) 89; D'Wolf *v.*

to protection on account of the subsequent conduct of the mortgagee,[1] and at the present time the statutes in the several jurisdictions, in order to render a mortgage good as against subsequent *bona fide* purchasers, require the mortgage to be recorded or the possession of the property to be taken by the mortgagee.[2]

j. PURCHASER FROM VENDEE OF PERSON NON SUI JURIS. — A sale of personalty by a person *non sui juris*, such as infants[3] or lunatics,[4] is voidable at the option of such a vendor, and the sale may be rescinded and the property recovered, even as against a *bona fide* purchaser from the vendee.

k. PURCHASER OF PROPERTY SUBJECT TO LANDLORD'S LIEN. — The question with regard to the protection afforded to *bona fide* purchasers of property subject to an express or statutory landlord's lien has been heretofore fully discussed.[5]

l. PURCHASER FROM ONE INTRUSTED WITH APPARENT OWNERSHIP. — Where the owner of property designedly or by negligence intrusts another with the title or indicia of the ownership of personal property, and the latter sells the property to a *bona fide* purchaser, such purchaser will be protected in his title as against the owner, upon the principle that where one of two innocent parties must suffer through the fraud of a third person, the loss should fall upon the one who by his act created the circumstances which permitted the fraud to be perpetrated.[6] Thus, where a sale was made on

Harris, 4 Mason (U. S.) 515; High *v.* Brown, 46 Iowa 259; Abbott *v.* Goodwin, 20 Me. 408; Lunt *v.* Whitaker, 10 Me. 310; Hoppin *v.* Avery, 87 Mich. 551; Spraights *v.* Hawley, 39 N. Y. 441, 100 Am. Dec. 452; Hamill *v.* Gillespie, 48 N. Y. 556; Bissell *v.* Hopkins, 3 Cow. (N. Y.) 166, 15 Am. Dec. 259. *Compare* The Schooner Romp, Olc. Adm. 196, 20 Fed. Cas. No. 12,030; Lewis *v.* Stevenson, 2 Hall (N. Y.) 63; Brown *v.* Riley, 22 Ill. 46; Gillilan *v.* Kendall, 26 Neb. 82, 18 Am. St. Rep. 766; Hurt *v.* Reeves, 5 Hayw. (Tenn.) 50.

1. Cleckley *v.* Hull, 30 Ga. 838.

2. See the titles CHATTEL MORTGAGES, vol. 5, p. 1008 *et seq.*; RECORDING ACTS, *ante*, p. 73.

3. **Purchase from Infants.** — Hill *v.* Anderson, 5 Smed. & M. (Miss.) 216. See the title INFANTS, vol. 16, p. 288.

4. **Same — Lunatics.** — Harris *v.* Harris, 64 Cal. 108. See the title INSANITY, vol. 16, p. 558 *et seq.*

5. See the title LANDLORD AND TENANT, vol. 18, pp. 330, 342 *et seq.*

6. **Purchase from One Intrusted with Apparent Ownership** — *England.* — London Joint Stock Bank *v.* Simmons, (1892) A. C. 201; Lickbarrow *v.* Mason, 2 T. R. 70.

United States. — The Sloop Mary, 1 Paine (U. S.) 671, 16 Fed. Cas. No. 9,187; Calais Steamboat Co. *v.* Van Pelt, 2 Blackf. (U. S.) 372.

Alabama. — Wilkinson *v.* Solomon, 83 Ala. 438; Bent *v.* Jerkins, 112 Ala. 485.

Arkansas. — Sadler *v.* Lewers, 42 Ark. 148.

California. — Winter *v.* Belmont Min. Co., 53 Cal. 428; Behlow *v.* Fischer, 102 Cal. 208. See also Goldstone *v.* Merchants Ice, etc., Co., 123 Cal. 625.

Georgia. — Ezzard *v.* Frick, 76 Ga. 512.

Illinois. — Michigan Cent. R. Co. *v.* Phillips, 60 Ill. 191; Young *v.* Bradley, 68 Ill. 553; Sibley *v.* Tie, 88 Ill. 287; Holland *v.* Swain, 94 Ill. 154; Western Union Cold Storage Co. *v.* Bankers' Nat. Bank, 176 Ill. 260.

Kentucky. — Mueller *v.* Engeln, 12 Bush (Ky.) 441.

Maine. — George W. Merrill Furniture Co. *v.* Hill, 87 Me. 17; Tourtellott *v.* Pollard, 74 Me. 418.

Missouri. — Depew *v.* Robards, 17 Mo. 580; Cramer *v.* Groseclose, 53 Mo. App. 648; Van Frank *v.* Walther, 84 Mo. App. 472; Patchin *v.* Biggerstaff, 25 Mo. App. 535; Lawrence *v.* Owens, 39 Mo. App. 318; Ess *v.* Griffith, 128 Mo. 50. See also Hawk *v.* Applegate, 37 Mo. App. 32.

Nevada. — Stone *v.* Marye, 14 Nev. 362.

New Jersey. — Prall *v.* Tilt, 27 N. J. Eq. 393.

New York. — Shearer *v.* Barrett, Hill & D. Supp. (N. Y.) 70; McCauley *v.* Brown, 2 Daly (N. Y.) 426; Fitzgerald *v.* Fuller, 19 Hun (N. Y.) 180; Ludden *v.* Hazen, 31 Barb. (N. Y.) 650; McNeil *v.* New York Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341, 55 Barb. (N. Y.) 59; Smith *v.* Clews, 105 N. Y. 283, *reversing* 33 Hun (N. Y.) 501; Wait *v.* Green, 36 N. Y. 556, *affirming* 35 Barb. (N. Y.) 585, 62 Barb. (N. Y.) 241; Crocker *v.* Crocker, 31 N. Y. 507, 88 Am. Dec. 291; Crawford *v.* Dox, 5 Hun (N. Y.) 507; Saltus *v.* Everett, 20 Wend. (N. Y.) 268, 32 Am. Dec. 541; Farmers', etc., Nat. Bank *v.* Logan, 74 N. Y. 568.

Pennsylvania. — Scott *v.* Massey, 18 Pa. Super. Ct. 372.

South Carolina. — Folk *v.* Sanders, 36 S. Car. 582.

Texas. — Therriault *v.* Compere, (Tex. Civ. App. 1898) 47 S. W. Rep. 750.

Where Vendor in Conditional Sale Gives Unconditional Bill of Sale. — Scarbrough *v.* Alcorn, 74 Tex. 358.

Written Indicia of Ownership. — In *New York* it has been held that the rule, that a sale to a *bona fide* purchaser by one in possession and clothed with the indicia of ownership passes title as against the true owner, requires written indicia of ownership. Penfield *v.* Dunbar, 64 Barb. (N. Y.) 239.

Bill of Sale Intended as Mortgage. — Where the owner of personalty executes a bill of sale thereof, intended, however, as a mortgage, a

the terms that payment should be made on delivery, and the seller delivered the property without exacting payment, a *bona fide* purchaser from such vendee should be protected.[1] So, also, where a sale is for cash and the vendor accepts for the price the check of the vendee, upon delivery of the property, which is dishonored, a *bona fide* purchaser from such vendee will acquire a good title,[2] and where a vendor sells property and delivers it to the vendee on his agreement to give a note for it at a future day with security, a sale of it by such vendee to another party, without knowledge of such arrangement, will pass the title to the latter, and he will hold the property as against the first vendor. So, also, where a pledgee redelivers the pledge to the pledgor for his own use and benefit, a *bona fide* purchaser from the pledgor will be protected as against the claim of the pledgee.[3] But the mere shipment of goods sold for cash to the consignee, the consignor retaining the bills of lading, does not confer upon the consignee indicia of ownership so that he can, as against the consignor, transfer a good title to a *bona fide* purchaser where the carrier delivers possession without the bills of lading being produced.[4]

m. PURCHASER FROM FRAUDULENT VENDEE. — Where a sale of property is secured by fraud on the part of the vendee, the sale is voidable only, the title to the property passing to the vendee, and before the sale is avoided by the vendor the vendee may transfer a perfect title to a *bona fide* purchaser for value.[5]

Identity. — Where the fraud consists in a misrepresentation by the vendee as to his identity or through his misrepresentation that he is acting as the

bona fide purchaser from such mortgagee will be entitled to protection. Folk *v.* Sanders, 36 S. Car. 582.

1. Sale for Cash — Delivery Without Payment — *Illinois.* — Michigan Cent. R. Co. *v.* Phillips, 60 Ill. 190; Young *v.* Bradley, 68 Ill. 553; Ashland Block Assoc. *v.* Edward Thompson Co., 94 Ill. App. 501.

New York. — Beavers *v.* Lane, 6 Duer (N. Y.) 232; Comer *v.* Cunningham, 77 N. Y. 391, 33 Am. Dec. 626; Durbrow *v.* McDonald, 5 Bosw. (N. Y.) 130; Parker *v.* Baxter, 19 Hun (N. Y.) 410; Western Transp. Co. *v.* Marshall, 37 Barb. (N. Y.) 509, *affirmed* 4 Abb. App. Dec. (N. Y.) 575, 6 Abb. Pr. N. S. (N. Y.) 280; Blossom *v.* Champion, 28 Barb. (N. Y.) 217; Smith *v.* Lynes, 5 N. Y. 41.

Virginia. — Old Dominion Steamship Co. *v.* Bruckhardt, 31 Gratt. (Va.) 664.

Compare Andrew *v.* Dieterich, 14 Wend. (N. Y.) 32.

2. Dishonored Check in Payment. — Hide, etc., Nat. Bank *v.* West, 20 Ill. App. 61; Cochran *v.* Stewart, 57 Minn. 499. See also Johnson-Brinkman Commission Co. *v.* Central Bank, 116 Mo. 558, 38 Am. St. Rep. 615. *Compare* National Bank of Commerce *v.* Chicago, etc., R. Co., 44 Minn. 224, 20 Am. St. Rep. 566.

Agreement to Give Notice. — Brundage *v.* Camp, 21 Ill. 330; Farquharson *v.* United Typewriter, etc., Co., 94 Ill. App. 350.

3. Redelivery of Pledge. — Britton *v.* Harvey, 47 La. Ann. 259.

4. Consignments. — Freeman *v.* Kraemer, 63 Minn. 242.

5. Purchase from Fraudulent Vendee — *England.* — Babcock *v.* Lawson, 4 Q. B. D. 394, 5 Q. B. D. 284; Attenborough *v.* London, etc., Dock Co., 3 C. P. D. 450.

Alabama. — Le Grand *v.* Eufaula Nat. Bank, 81 Ala. 123, 60 Am. Rep. 140; Robinson *v.* Levi, 81 Ala. 134; Scheuer *v.* Goetter, 102 Ala. 313; Peterson *v.* Steiner, 108 Ala. 629; Wilk *v.* Key, 117 Ala. 285.

Arkansas. — Sadler *v.* Lewers, 42 Ark. 148.

Colorado. — Nicholls *v.* McShane, 16 Colo. App. 165.

Connecticut. — Williamson *v.* Russell, 39 Conn. 406.

Delaware. — Mears *v.* Waples, 3 Houst. (Del.) 581; Truxton *v.* Fait, etc., Co., 1 Penn (Del.) 483, 73 Am. St. Rep. 81.

Georgia. — Nicol *v.* Crittenden, 55 Ga. 497; Kern *v.* Thurber, 57 Ga. 172.

Illinois. — Jennings *v.* Gage, 13 Ill. 610, 56 Am. Dec. 476; Brundage *v.* Camp, 21 Ill. 330; Fawcett *v.* Osborn, 32 Ill. 411, 83 Am. Dec. 278; Armstrong *v.* Lewis, 38 Ill. App. 164; Butters *v.* Haughwout, 42 Ill. 18, 89 Am. Dec. 401; Chicago Dock Co. *v.* Foster, 48 Ill. 508; Ohio, etc., R. Co. *v.* Kerr, 49 Ill. 458; Chicago Dock Co. *v.* Foster, 48 Ill. 18; Michigan Cent R. Co. *v.* Phillips, 60 Ill. 191; McNab *v.* Young, 81 Ill. 11; Henson *v.* Westcott, 82 Ill. 224; Dickerson *v.* Evans, 84 Ill. 451; Doane *v.* Lockwood, 115 Ill. 490; Catlin *v.* Warren, 16 Ill. App. 418; Reid *v.* Sheffy, 99 Ill. App. 189.

Indiana. — Sharp *v.* Jones, 18 Ind. 314, 81 Am. Dec. 359; Bell *v.* Cafferty, 21 Ind. 411; Harris *v.* Mercer, 22 Ind. 329; Gregory *v.* Schoenell, 55 Ind. 101; Curme *v.* Rauh, 100 Ind. 247; Moore *v.* Moore, 112 Ind. 149, 2 Am. St. Rep. 170.

Iowa. — Perkins *v.* Anderson, 65 Iowa 398.

Kansas. — Wilson *v.* Fuller, 9 Kan. 176.

Kentucky. — Wood *v.* Yeatman, 15 B. Mon. (Ky.) 270; Newson *v.* Lycan, 3 J. J. Marsh. (Ky.) 440, 20 Am. Dec. 156; Gibson *v.* Moore, 7 B. Mon. (Ky.) 92.

Maine. — Trott *v.* Warren, 11 Me. 227; Ditson *v.* Randall, 33 Me. 202; Titcomb *v.* Wood, 38 Me. 561; Abbott *v.* Marshall, 48 Me. 44.

agent of a third person, and the intention of the vendor is to sell to the person whom the vendee misrepresents himself to be, or to the principal for whom the vendee represents himself as agent, no title passes to the fraudulent vendee, due to the mistake as to his identity, and a subsequent transfer of the property by such vendee, though to a *bona fide* purchaser, will not transfer a good title as against the original vendor.[1]

Statutory Crime. — The fact that the statutes designate as larceny or render felonious the act of the vendee in securing the sale by fraudulent representation does not prevent a *bona fide* purchaser from such a vendee from acquiring a good title as against the original vendor.[2]

n. PURCHASER FROM VENDEE IN SALE FRAUDULENT AS TO CREDITORS. — Though a sale is invalid as against creditors of the vendor, being in fraud

Maryland. — Hall *v.* Hinks, 21 Md. 406; Lincoln *v.* Qnynn, 68 Md. 299, 6 Am. St. Rep. 446; Higgins *v.* Barrington Lodge, 68 Md. 229, 6 Am. St. Rep. 437.

Massachusetts. — Hoffman *v.* Noble, 6 Met. (Mass.) 68, 39 Am. Dec. 711; Rowley *v.* Bigelow, 12 Pick. (Mass.) 312, 23 Am. Dec. 607; George *v.* Kimball, 24 Pick. (Mass.) 241; Moody *v.* Blake, 117 Mass. 23, 19 Am. Rep. 394; Sawyer Lumber Co. *v.* Boston, etc., R. Co., 173 Mass. 502.

Michigan. — Doyle *v.* Dobson, 74 Mich. 562.

Minnesota. — Cochran *v.* Stewart, 21 Minn. 435.

Mississippi. — Greenville First Nat. Bank *v.* Cook Carriage Co., 70 Miss. 587.

Missouri. — Overton *v.* Brown, 63 Mo. App. 49; 1 Mo. App. Rep. 599; Standard Oil Co. *v.* Meyer Bros. Drug Co., 74 Mo. App. 446.

New Hampshire. — Bradley *v.* Obear, 10 N. H. 477; Kingsbury *v.* Smith, 13 N. H. 109; Farley *v.* Lincoln, 51 N. H. 577, 12 Am. Rep. 182; Sleeper *v.* Davis, 64 N. H. 59, 10 Am. St. Rep. 377; Porell *v.* Cavanaugh, 69 N. H. 364.

New York. — Crocker *v.* Crocker, 31 N. Y. 507, 88 Am. Dec. 291; Dows *v.* Greene, 32 Barb. (N. Y.) 490; Mowrey *v.* Walsh, 8 Cow. (N. Y.) 238; Lewis *v.* Palmer, Hill & D. Supp. (N. Y.) 68; Root *v.* French, 13 Wend. (N. Y.) 570, 28 Am. Dec. 482; Ball *v.* Shell, 21 Wend. N. Y.) 222; Hoffman *v.* Carow, 22 Wend. (N. Y.) 318; Western Transp. Co. *v.* Marshall, 4 Abb. App. Dec. (N. Y.) 575; Smith *v.* Lynes, 5 N. Y. 41; Ash *v.* Putnam, 1 Hill (N. Y.) 307; Fassett *v.* Smith, 23 N. Y. 252; Paddon *v.* Taylor, 44 N. Y. 371; Devoe *v.* Brandt, 53 N. Y. 462; Barnard *v.* Campbell, 58 N. Y. 73, 17 Am. Rep. 208; Conrow *v.* Little, 115 N. Y. 387, *reversing* 41 Hun (N. Y.) 395; Jonassen *v.* Eames, (Supm. Ct. Gen. T.) 51 N. Y. St. Rep. 13, *affirmed* 142 N. Y. 653; Trigg *v.* Hitz, (Supm. Ct. Gen. T.) 17 Abb. Pr. (N. Y.) 436; Malcom *v.* Loveridge, 13 Barb. (N. Y.) 372; Wheaton *v.* Baker, 14 Barb. (N. Y.) 594; Hunter *v.* Hudson River Iron, etc., Co., 20 Barb. (N. Y.) 493; Dows *v.* Greene, 32 Barb. (N. Y.) 490; Lacker *v.* Rhoades, 45 Barb. (N. Y.) 499; Barnard *v.* Campbell, 65 Barb. (N. Y.) 286; Williamson *v.* Mason, 12 Hun (N. Y.) 97; Benedict *v.* Williams, 48 Hun (N. Y.) 123; Levy *v.* Carr, 85 Hun (N. Y.) 289; Cooper Mfg. Co. *v.* De Forest, 5 N. Y. App. Div. 43; Hinck *v.* Wilmerding, (N. Y. City Ct. Gen. T.) 17 Misc. (N. Y.) 71; Craig *v.* Marsh, 2 Daly (N. Y.) 61; Meacham *v.* Collignon, 7 Daly (N. Y.) 402; Caldwell *v.* Bartlett, 3 Duer (N. Y.) 341; Beavers *v.* Lane, 6 Duer (N. Y.) 232; Holbrook *v.* Vose, 6 Bosw. (N. Y.) 111; Williams *v.* Birch, 6 Bosw. (N. Y.) 299; Steelyards *v.* Singer, 2 Hilt. (N. Y.) 96; Manufacturers, etc., Bank *v.* Farmers, etc., Nat. Bank, 2 Thomp. & C. (N. Y.) 395; Kelty *v.* Simmons, 22 N. Y. Wkly. Dig. 28. *Compare* Francheris *v.* Henriques, (C. Pl. Gen. T.) 24 How. Pr. (N. Y.) 165.

North Dakota. — Tetrault *v.* O'Connor, 8 N. Dak. 15.

Ohio. — Dean *v.* Yates, 22 Ohio St. 388.

Pennsylvania. — Thompson *v.* Lee, 3 W. & S. (Pa.) 479; Farrell *v.* Nathans, 1 Phila. (Pa.) 557, 12 Leg. Int. (Pa.) 162; Sinclair *v.* Healy, 40 Pa. St. 417, 80 Am. Dec. 589; Neff *v.* Landis, 110 Pa. St. 204; Edelman *v.* Latshaw, 159 Pa. St. 644; Dettra *v.* Kestner, 147 Pa. St. 566; Schwartz *v.* McCloskey, 156 Pa. St. 258.

Tennessee. — Arendale *v.* Morgan, 5 Sneed (Tenn.) 703; Hawkins *v.* Davis, 5 Baxt. (Tenn.) 698; Sword *v.* Young, 89 Tenn. 126.

Virginia. — Williams *v.* Given, 6 Gratt. (Va.) 268; Old Dominion Steamship Co. *v.* Burckhardt, 31 Gratt. (Va.) 664; Jones *v.* Christian, 86 Va. 1017.

Wisconsin. — Shufeldt *v.* Pease, 16 Wis. 659.

Necessity for Delivery to Fraudulent Vendee. — In order to vest title in the fraudulent vendee so that he can transfer a good title to a *bona fide* purchaser, the property must have been delivered by the original vendor to such vendee; it is not sufficient that after the contract of sale was made such vendee acquired possession without the knowledge and consent of the vendor. Dean *v.* Yates, 22 Ohio St. 388.

1. Mistake as to Identity of Purchaser. — Wyckoff *v.* Vicary, 75 Hun (N. Y.) 409, *distinguishing* Davis *v.* Bechstein, 69 N. Y. 440, 25 Am. Rep. 218. See also Reid *v.* Sheffy, 99 Ill. App. 189. *Compare* Perkins *v.* Anderson, 65 Iowa 398; Craig *v.* Marsh, 2 Daly (N. Y.) 61; Hawkins *v.* Davis, 8 Baxt. (Tenn.) 506; Sword *v.* Young, 89 Tenn. 126.

2. Statutory Crime. — Nicholls *v.* McShane, 16 Colo. App. 165; Benedict *v.* Williams, 48 Hun (N. Y.) 123; Keyser *v.* Harbeck, 3 Duer (N. Y.) 373; Malcom *v.* Loveridge, 13 Barb. (N. Y.) 372; Fassett *v.* Smith, 23 N. Y. 252; Soltau *v.* Gerdau, 48 Hun (N. Y.) 537, *affirmed* 119 N. Y. 380, 16 Am. St. Rep. 843; Cochran *v.* Stewart, 21 Minn. 435. See also Abbott *v.* Marshall, 48 Me. 44; Sawyer Lumber Co. *v.* Boston, etc., R. Co., 173 Mass. 502; Peabody *v.* Fenton, 3 Barb. Ch. (N. Y.) 463. *Compare* Andrew *v.* Dieterich, 14 Wend. (N. Y.) 31; Robinson *v.* Dauchy, 3 Barb. (N. Y.) 20.

of their rights, a *bona fide* purchaser from such vendee may nevertheless be protected in his title.[1]

o. PURCHASER FROM AGENT WITH OSTENSIBLE POWER TO SELL. — Where a principal intrusts his agent with personal property and the ostensible power to sell, a *bona fide* purchaser from such an agent will be entitled to protection.[2]

p. PURCHASER OF NEGOTIABLE PAPER. — The question with regard to the protection afforded *bona fide* purchasers of negotiable paper has been heretofore fully discussed.[3]

q. PROTECTION AFFORDED PURCHASERS AS AGAINST EQUITABLE RIGHTS. — The general rule of equity that where the equities are equal the law will prevail applies with regard to rights in personal property, and a *bona fide* purchaser who acquires the legal title to personal property without notice of earlier equitable rights will be protected in his purchase as against them.[4]

r. PURCHASERS IN MARKET OVERT. — In *England*, where personal property was sold in *market overt*, *bona fide* purchasers were protected, irrespective of the title of the vendor.[5] This doctrine in regard to sales in *market overt* has never been adopted in the United States.[6]

1. Sale Fraudulent as to Creditors. — Walker *v.* Miller, (C. C. A.) 59 Fed. Rep. 869; Heroy *v.* Kerr, 2 Abb. App. Dec. (N. Y.) 359, *affirming* (N. Y. Super. Ct. Gen. T.) 21 How. Pr. (N. Y.) 409. See the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 285.

2. Purchase from Ostensible Agent. — Bent *v.* Jerkins, 112 Ala. 485; New Haven Wire Co. Cases, 57 Conn. 352. See the title AGENCY, vol. 1, p. .

3. Negotiable Paper. — See the title BILLS AND NOTES, vol. 4, p. 65.

Purchaser of Stolen Negotiable Paper. — Dutchess County Mut. Ins. Co. *v.* Hachfield, 73 N. Y. 226.

4. Purchaser as Against Equitable Rights — *United States.* — Oakes *v.* Tonsmierre, 49 Fed. Rep. 447.

Illinois. — Esterly Harvesting Co. *v.* Hill, 36 Ill. App. 99.

Michigan. — Bates *v.* Smith, 83 Mich. 347.

Missouri. — Skinner *v.* Oakes, 10 Mo. App. 45; Martin *v.* Johnson, 23 Mo. App. 96.

New York. — Averill *v.* Barber, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 255.

Pennsylvania. — Seeley *v.* Garey, 109 Pa. St. 301.

South Dakota. — La Crosse Boot, etc., Mfg. Co. *v.* Mons Anderson Co., 9 S. Dak. 560.

Contract to Mortgage. — Braxton *v.* Bell, 92 Va. 229.

5. Markets Overt — English Rule. — 2 Bl. Com. 449; Horwood *v.* Smith, 2 T. R. 750; Hargreave *v.* Spink, (1892) 1 Q. B. 25; Moran *v.* Pitt, 42 L. J. Q. B. 47; Hiern *v.* Mill, 13 Ves. Jr. 122; Cundy *v.* Lindsay, 3 App. Cas. 459, 47 L. J. Q. B. 481. See also Edgerly *v.* Bush, 16 Hun (N. Y.) 80 (*construing* Code Lower Canada, Act 1789).

What Constitutes a Sale in Market Overt — Custom in London. — 2 Bl. Com. 449; Worcester's Case, Moo. K. B. 360; Hill *v.* Smith, 4 Taunt. 533; Lyons *v.* De Pass, 11 Ad. & El. 326, 39 E. C. L. 106; Lee *v.* Bayes, 18 C. B. 600, 86 E. C. L. 600.

Modern Markets. — The protection afforded purchasers upon sale in *market overt* extends to modern markets established by act of Parliament, and is not confined to ancient markets. Ganly *v.* Ledwidge, Ir. R. 10 C. L. 33.

A Pledge cannot be sustained as a sale in *market overt.* Hartop *v.* Hoare, 1 Wils. C. Pl. 8.

A Sale by Sample is not entitled to the privilege of a sale in *market overt;* as, to constitute a sale in *market overt*, the property sold must be present in the market during the whole of the transaction. Crane *v.* London Dock Co., 5 B. & S. 313, 117 E. C. L. 313.

There Is No Market Overt for Ships, and therefore a purchaser of a ship cannot claim protection as a purchaser upon a sale in a *market overt.* Hooper *v.* Gumm, L. R. 2 Ch. 282.

Liability of Person Conducting Sale for Conversion. — Ganly *v.* Ledwidge, Ir. R. 10 C. L. 33; Delaney *v.* Wallis, 15 Cox C. C. 525, 13 L. R. Ir. 31.

6. United States Doctrine — *United States.* — Ventress *v.* Smith, 10 Pet. (U. S.) 175.

Arkansas. — Jetton *v.* Tobey, 62 Ark. 84.

Illinois. — Fawcett *v.* Osborn, 32 Ill. 426, 83 Am. Dec. 278; Sharp *v.* Parks, 48 Ill. 511, 95 Am. Dec. 565.

Maine. — Coombs *v.* Gorden, 59 Me. 111.

Maryland. — Browning *v.* Magill, 2 Har. & J. (Md.) 308.

Massachusetts. — Dame *v.* Baldwin, 8 Mass. 519; Towne *v.* Collins, 14 Mass. 500.

New Hampshire. — Bryant *v.* Whitcher, 52 N. H. 158.

New York. — Wheelwright *v.* Depeyster, 1 Johns. (N. Y.) 480, 3 Am. Dec. 345; Mowrey *v.* Walsh, 8 Cow. (N. Y.) 238; Farmers', etc., Nat. Bank *v.* Logan, 74 N. Y. 568; Andrew *v.* Dieterich, 14 Wend. (N. Y.) 31; Edgerly *v.* Bush, 81 N. Y. 199.

Ohio. — Roland *v.* Gundy, 5 Ohio 202.

Pennsylvania. — Hosack *v.* Weaver, 1 Yeates (Pa.) 478; Lecky *v.* McDermott, 8 S. & R. (Pa.) 500; Hardy *v.* Metzgar, 2 Yeates (Pa.) 347; Easton *v.* Worthington, 5 S. & R. (Pa.) 130.

Vermont. — Heacock *v.* Walker, 1 Tyler (Vt.) 341; Griffith *v.* Fowler, 18 Vt. 390.

Sale at Public Horse Market Established by Law. — Browning *v.* Magill, 2 Har. & J. (Md.) 308.

2. Who Are Bona Fide Purchasers — *a.* IN GENERAL. — A *bona fide* purchaser is one who takes the property for value in good faith and without notice of the adverse interest sought to be enforced against him; all of these elements must be present.[1] In order to render one a purchaser, it is necessary that he acquire the legal title or a legal interest in the property; it is insufficient that he has acquired an equitable interest in the property,[2] and therefore to constitute one a purchaser for value the sale to him must have been completed by a delivery;[3] still a constructive delivery may be sufficient,[4] such as a transfer of a bill of lading.[5]

Purchaser at Public Auction. — A purchaser at a public auction may be entitled to protection as a *bona fide* purchaser.[6]

Pledgee. — A pledgee may claim protection as a *bona fide* purchaser to the extent of his lien.[7]

Mortgagee. — A mortgagee of chattels may be entitled to protection as a *bona fide* purchaser.[8]

Assignee of Chattel Mortgage. — An assignee of a chattel mortgage may be entitled to protection as a *bona fide* purchaser.[9]

Assignee in Bankruptcy or Insolvency. — An assignee in bankruptcy [10] or in insolvency [11] is not a *bona fide* purchaser, but stands merely in the shoes of his assignor.

Assignee for Benefit of Creditors. — Assignees for the benefit of creditors, and, of course, the creditors for whose benefit the assignment is made, are regarded as mere volunteers, not parting with value, and cannot claim the protection afforded *bona fide* purchasers;[12] but a purchaser from such an assignee may

1. Barnard *v.* Campbell, 58 N. Y. 73, 17 Am. Rep. 208, *reaffirming* 55 N. Y. 456, 14 Am. Rep. 289, which *affirmed* 65 Barb. (N. Y.) 286.

2. **Equitable Rights.** — Defiance Mach. Works *v.* Trisler, 21 Mo. App. 69; Caldwell *v.* Bartlett, 3 Duer (N. Y.) 341; Anketel *v.* Converse, 17 Ohio St. 11, 91 Am. Dec. 115.

3. Beavers *v.* Lane, 6 Duer (N. Y.) 232; Hamburger *v.* Rodman, 9 N. Y. Wkly. Dig. 469; Kinsey *v.* Leggett, 71 N. Y. 387.

4. Goldstone *v.* Merchants' Ice, etc., Co., 123 Cal. 625.

5. Dows *v.* Rush, 28 Barb. (N. Y.) 157. See the title BILLS OF LADING, vol. 4, p. 507.

6. **Public Auction.** — The Schooner Romp, Olc. Adm. 196, 20 Fed. Cas. No. 12,030; Jaqueth *v.* Merritt, 29 Hun (N. Y.) 584.

7. **Pledgee.** — Western Union Cold-Storage Co. *v.* Bankers Nat. Bank, 176 Ill. 260, *affirming* 73 Ill. App. 410; Michigan Cent. R. Co. *v.* Phillips, 60 Ill. 190; Wood *v.* Yeatman, 15 B. Mon. (Ky.) 270; Prall *v.* Tilt, 27 N. J. Eq. 393; Williams *v.* Birch, 6 Bosw. (N. Y.) 299; Western Transp. Co. *v.* Marshall, (Ct. App.) 6 Abb. Pr. N. S. (N. Y.) 280, 4 Abb. App. Dec. (N. Y.) 575, *affirming* 37 Barb. (N. Y.) 509; Levy *v.* Carr, 85 Hun (N. Y.) 289; Rawls *v.* Deshler, 4 Abb. App. Dec. (N. Y.) 12; Parker *v.* Baxter, 19 Hun (N. Y.) 410; Durbrow *v.* McDonald, 5 Bosw. (N. Y.) 130. See the title PLEDGE AND COLLATERAL SECURITY, vol. 22, p. 839.

8. **Mortgagee** — *United States.* — Commercial Nat. Bank *v.* Pirie, 82 Fed. Rep. 799, 49 U. S. App. 596.

Arkansas. — Garner *v.* Wright, 52 Ark. 385.

Iowa. — Hesser *v.* Wilson, 36 Iowa 152; Clark *v.* Barnes, 72 Iowa 563; Smith *v.* Dayton, 94 Iowa 102.

Maryland. — Lincoln *v.* Quynn, 68 Md. 299, 6 Am. St. Rep. 446.

Michigan. — Zucker *v.* Karpeles, 88 Mich. 413.

Missouri. — Taylor *v.* Smith, 47 Mo. App. 141.

New Hampshire. — Plaisted *v.* Holmes, 58 N. H. 619.

New York. — Kelty *v.* Simmons, 22 N. Y. Wkly. Dig. 28.

Texas. — Wynne *v.* Admire, 4 Tex. Civ. App. 45; Barnes *v.* Gray, 14 Tex. Civ. App. 439.

Vermont. — Passumpsic Sav. Bank *v.* St. Johnsbury First Nat. Bank, 53 Vt. 82.

Virginia. — Chapman *v.* Chapman, 91 Va. 397, 50 Am. St. Rep. 846; Braxton *v.* Bell, 92 Va. 232.

Washington. — Murray *v.* Guse, 10 Wash. 25.

9. **Assignee of Chattel Mortgage.** — Myers *v.* Hazzard, 50 Fed. Rep. 155; Tison *v.* People's Sav., etc., Assoc., 57 Ala. 323; Barbour *v.* White, 37 Ill. 164; Martindale *v.* Burch, 57 Iowa 291; Sleeper *v.* Chapman, 121 Mass. 404; McNally *v.* Bailey, 65 N. H. 208; Gould *v.* Marsh, 1 Hun (N. Y.) 566, 4 Thomp. & C. (N. Y.) 128; Lawrence *v.* Weeks, 107 N. Car. 119; Wynne *v.* Admire, 4 Tex. Civ. App. 45; Graham *v.* Blinn, 3 Wyo. 746.

10. **Assignee in Bankruptcy.** — Donaldson *v.* Farwell, 93 U. S. 631; Montgomery *v.* Bucyrus Mach. Works, 92 U. S. 257.

11. **Assignee in Insolvency.** — Bussing *v.* Rice, 2 Cush. (Mass.) 48; Farley *v.* Lincoln, 51 N. H. 577, 12 Am. Rep. 182; Vandoren *v.* Todd, 3 N. J. Eq. 397. See the title INSOLVENCY AND BANKRUPTCY, vol. 16, p. 630.

12. **Assignees for Benefit of Creditors** — *United States.* — German Sav. Inst. *v.* Idae, 8 Fed. Rep. 106; Omaha First Nat. Bank *v.* Mastin Bank, 48 Fed. Rep. 433; Kelley-Goodfellow Shoe Co. *v.* Milligan, 58 Fed. Rep. 161, 12 U.

be a *bona fide* purchaser.[1]

Attaching Creditors. — Attaching creditors are not entitled to protection as *bona fide* purchasers.[2]

Execution Creditors. — Execution creditors are not regarded as *bona fide* purchasers.[3]

Purchasers at Execution Sale. — Where the execution creditor purchases at the execution sale he is not regarded as a *bona fide* purchaser;[4] the contrary, however, has been held true as to third persons purchasing at such a sale.[5]

S. App. 610; Clements *v.* Berry, 11 How. (U. S.) 398.

Alabama. — Granger's L., etc., Ins. Co. *v.* Kamper, 73 Ala. 325; Sayre *v.* Weil, 94 Ala. 466.

Arkansas. — Bridgeford *v.* Adams, 45 Ark. 136.

Connecticut. — Palmer *v.* Thayer, 28 Conn. 237.

District of Columbia. — Colbert *v.* Baetjer, 4 App. Cas. (D. C.) 416; Fechheimer *v.* Hollander, 21 D. C. 76.

Florida. — Shad *v.* Livingston, 31 Fla. 89.

Illinois. — Willis *v.* Henderson, 5 Ill. 13, 38 Am. Dec. 120; O'Hara *v.* Jones, 46 Ill. 288; Wetherell *v.* Thirty-first St. Bldg., etc., Assoc., 153 Ill. 361; Schwartz *v.* Messinger, 64 Ill. App. 495.

Indiana. — Davis *v.* Newcomb, 72 Ind. 413.

Iowa. — Arnold *v.* Grimes, 2 Iowa 1; Roberts *v.* Corbin, 26 Iowa 315, 96 Am. Dec. 146.

Kentucky. — Corn *v.* Sims, 3 Met. (Ky.) 391; Drake *v.* Ellman, 80 Ky. 434; Exchange, etc., Bank *v.* Stone, 80 Ky. 109; Bank of Commerce *v.* Payne, 86 Ky. 446; Todd *v.* Johnson, 99 Ky. 548; Walker *v.* Walker, (Ky. 1897) 41 S. W. Rep. 315; Bridgford *v.* Barbour, 80 Ky. 529, 4 Ky. L. Rep. 470; Milburn Wagon Works *v.* Edwards, 7 Ky. L. Rep. 835; Tandy *v.* Robbins, 8 Ky. L. Rep. 265.

Maine. — State *v.* Patten, 49 Me. 383.

Maryland. — Ferrall *v.* Farnen, 67 Md. 76.

Massachusetts. — Chace *v.* Chapin, 130 Mass. 128.

Michigan. — Pierson *v.* Manning, 2 Mich. 445.

Minnesota. — Gere *v.* Murray, 6 Minn. 305.

Mississippi. — Paine *v.* Aberdeen Hotel Co., 60 Miss. 360.

Missouri. — Hach *v.* Hill, (Mo. 1890) 14 S. W. Rep. 739; Gregory *v.* Tavenner, 38 Mo. App. 627.

Montana. — Merchants' Nat. Bank *v.* Greenhood, 16 Mont. 395.

Nebraska. — Salladin *v.* Mitchell, 42 Neb. 859.

New Hampshire. — Peterborough Sav. Bank *v.* Hartshorn, 67 N. H. 156.

New Jersey. — Van Waggoner *v.* Moses, 26 N. J. L. 570; Shaw *v.* Glen, 37 N. J. Eq. 32.

New York. — Griffin *v.* Marquardt, 17 N. Y. 28; Rosenbaum *v.* Lawson, (N. Y. City Ct. Gen. T.) 3 N. Y. Supp. 657; Eckhardt *v.* Epstein, 58 N. Y. Supr. Ct. 288; Maas *v.* Goodman, 2 Hilt. (N. Y.) 275; American Sugar Refining Co. *v.* Fancher, 145 N. Y. 552; Paige *v.* Waring, 14 N. Y. Wkly. Dig. 524; Matter of Howe, 1 Paige (N. Y.) 125; Addison *v.* Burckmyer, 4 Sandf. Ch. (N. Y.) 498; Reed *v.* Sands, 37 Barb. (N. Y.) 185; Harris *v.* Hart, 6 Duer (N. Y.) 606; Averill *v.* Loucks, 6 Barb. (N. Y.) 470.

North Carolina. — Wallace *v.* Cohen, 111 N. Car. 103.

Ohio. — Williams *v.* Miller, 2 Ohio Dec. (Reprint) 119, 1 West. L. Month. 409.

Oregon. — Jacobs *v.* Ervin, 9 Oregon 52; Helm *v.* Gilroy, 20 Oregon 517; O'Connell *v.* Hansen, 29 Oregon 173.

Pennsylvania. — Knowles *v.* Lord, 4 Whart. (Pa.) 500, 34 Am. Dec. 525; Campbell's Appeal, 20 Pittsb. Leg. J. (Pa.) 101; Reynolds *v.* Taylor, 24 Pittsb. Leg. J. (Pa.) 28; Ayers's Estate, 5 Pa. Co. Ct. 540.

Rhode Island. — James *v.* Mechanics' Nat. Bank, 12 R. I. 460; Williams *v.* Winsor, 12 R. I. 9.

South Carolina. — Mairs *v.* Smith, 3 McCord L. (S. Car.) 52; Tibbetts *v.* Weaver, 5 Strobh. L. (S. Car.) 144.

Tennessee. — Nashville Trust Co. *v.* Nashville Fourth Nat. Bank, 91 Tenn. 336; Stainback *v.* Junk Bros. Lumber, etc., Co., 98 Tenn. 306.

Texas. — Keller *v.* Smalley, 63 Tex. 512; Johnson *v.* Stratton, 6 Tex. Civ. App. 431; Christian *v.* Hughes, 12 Tex. Civ. App. 622.

Wisconsin. — Lee *v.* Simmons, 65 Wis. 523.

Compare Anderson *v.* Lachs, 59 Miss. 111; Douglass Merchandise Co. *v.* Laird, 37 W. Va. 687; Wickham *v.* Martin, 13 Gratt. (Va.) 427; Oberdorfer *v.* Meyer, 88 Va. 384.

1. **Purchase from Assignee.** — Van Frank *v.* Walther, 84 Mo. App. 472; Grieve *v.* McGovern, (C. Pl. Gen. T.) 18 N. Y. Supp. 444; McElwain *v.* Willis, 9 Wend. (N. Y.) 548; Pine *v.* Rikert, 21 Barb. (N. Y.) 469; Sheldon *v.* Stryker, 42 Barb. (N. Y.) 287; Ames *v.* Blunt, 5 Paige (N. Y.) 13; Wilson *v.* Marion, 72 Hun (N. Y.) 639, 25 N. Y. Supp. 1066. *Compare* Weaver *v.* Barden, 3 Lans. (N. Y.) 338.

2. **Attaching Creditors.** — Gates Iron Works *v.* Cohen, 7 Colo. App. 341; La Salle Pressed-Brick Co. *v.* Coe, 65 Ill. App. 619; Buffington *v.* Gerrish, 15 Mass. 156, 8 Am. Dec. 97; Wiggin *v.* Day, 9 Gray (Mass.) 97; Bradley *v.* Obear, 10 N. H. 477; Dickson *v.* Culp, 9 Baxt. (Tenn.) 57; Fitzsimmons *v.* Joslin, 21 Vt. 129, 52 Am. Dec. 46; Perrin *v.* Reed, 35 Vt. 2; Field *v.* Stearns, 42 Vt. 106.

3. **Execution Creditors.** — Hayes *v.* Reilly, 49 N. Y. Super. Ct. 334, *affirmed* 98 N. Y. 661; Naugatuck Cutlery Co. *v.* Babcock, 22 Hun (N. Y.) 481. *Compare* Schwartz *v.* McCloskey, 156 Pa. St. 258 (execution creditor of fraudulent vendee whose debt was incurred subsequent to sale of vendor); Van Duzor *v.* Allen, 90 Ill. 499.

4. **Purchase by Execution Creditor.** — Nonotuck Silk Co. *v.* Levy, 75 Ill. App. 55; Devve *v.* Brandt, 53 N. Y. 462.

Compare Creegan *v.* Robertson, 74 Hun (N. Y.) 22.

5. Claflin *v.* Cottman, 77 Ind. 58. See also Piper *v.* Hilliard, 52 N. H. 209.

b. VALUE — (1) *In General.* — To constitute one a *bona fide* purchaser he must have been a purchaser for value; that is, he must have parted with value at the time of his purchase or before notice of the adverse interest sought to be enforced against him, so that in case he is deprived of the property he cannot be placed in the position he was prior to his purchase.[1]

Purchase on Credit. — Where the purchase is made on credit, the promise of the purchaser to pay the price does not, before the price has been actually paid, constitute him a *bona fide* purchaser,[2] and this is equally true when the consideration of the purchase is a promise to pay an indebtedness owing to a third person.[3]

(2) *Giving Security for Purchase Price.* — The mere giving of a non-negotiable security for the future payment of the purchase price will not render the purchaser a *bona fide* purchaser,[4] and the mere giving of a negotiable paper for the price would not render the purchaser a *bona fide* purchaser;[5] as where the note is still in the hands of the seller and is past due, so that a subsequent holder cannot enforce it as a *bona fide* holder, the giving of the note will not render the purchaser a *bona fide* purchaser.[6] If, however, the security given for the price is negotiable paper, and has been negotiated by the seller to a *bona fide* holder, so that it may be enforced against the purchaser, if he is compelled to surrender the property, the purchaser is to be considered a *bona fide* purchaser.[7]

(3) *Pre-existing Indebtedness* — (a) **In General.** — The taking of personal property in payment of a pre-existing indebtedness does not, as a general rule, render the purchaser a *bona fide* purchaser, as he is not considered to have parted with value, and if the purchaser is deprived of the property, he is in no worse condition than before his purchase.[8] One who takes a chattel mortgage or a pledge to secure a pre-existing indebtedness cannot claim protection as a

1. Value. — People's Sav. Bank *v.* Bates, 120 U. S. 556; Ukiah Bank *v.* Gibson, 109 Cal. 197; Peters *v.* Brandon, 5 Kan. App. 879; Regier *v.* Shreck, 47 Neb. 667; Barnard *v.* Campbell, 55 N. Y. 456, 14 Am. Rep. 289, *reaffirmed* 58 N. Y. 73, 17 Am. Rep. 208; Sheffield *v.* Mitchell, 31 N. Y. App. Div. 266; Beavers *v.* Lane, 6 Duer (N. Y.) 232; Spicer *v.* Waters, 65 Barb. (N. Y.) 227; Mitchell *v.* Worden, 20 Barb. (N. Y.) 253; Crawford *v.* Dox, 5 Hun (N. Y.) 507; Schelley *v.* Diehl, 13 N. Y. Wkly. Dig. 228; Kinsey *v.* Leggett, 71 N. Y. 387; Perkins *v.* Frank, (Tex. Civ. App. 1901) 64 S. W. Rep. 236; Hamilton-Brown Shoe Co. *v.* Lyons, 6 Tex. Civ. App. 633.

Promise by Surety to Principal to Pay Suretyship Indebtedness, as the price of a purchase, does not make him a *bona fide* purchaser. Peters *v.* Brandon, 5 Kan. App. 879.

2. Purchase on Credit. — Jetton *v.* Tobey, 62 Ark. 84; Reed *v.* Brown, 89 Iowa 454, 48 Am. St. Rep. 406; Peters *v.* Brandon, 5 Kan. App. 879, 48 Pac. Rep. 870; Partridge *v.* Rubin, 15 Daly (N. Y.) 344; Reed *v.* Gannon, 3 Daly (N. Y.) 414.

3. Nix *v.* Wiswell, 84 Wis. 334.

4. Giving Nonnegotiable Note. — Ukiah Bank *v.* Gibson, 109 Cal. 197; Hayden *v.* Charter Oak Driving Park, 63 Conn. 142; Weaver *v.* Barden, 49 N. Y. 286, *reversing* 3 Lans. (N. Y.) 338; Spicer *v.* Waters, 65 Barb. (N. Y.) 227; Jewett *v.* Palmer, 7 Johns. Ch. (N. Y.) 65, 11 Am. Dec. 401; Perkins *v.* Frank, (Tex. Civ. App. 1901) 64 S. W. Rep. 236; Parry *v.* Libbey, 166 Mass. 112.

5. Negotiable Paper. — Wetmore *v.* Woods, 1 Mo. App. Rep. 508; Chancellor *v.* Bell, 45 N. J. Eq. 538; Freeman *v.* Deming, 3 Sandf. Ch. (N. Y.) 327.

6. Ukiah Bank *v.* Gibson, 109 Cal. 197; Freemen *v.* Deming, 3 Sandf. Ch. (N. Y.) 327.

7. Negotiation of Negotiable Paper. — Ukiah Bank *v.* Gibson, 109 Cal. 197; Nicol *v.* Crittenden, 55 Ga. 497.

8. Pre-existing Indebtedness — General Rule — *United States.* — Commercial Nat. Bank *v.* Pirie, 49 U. S. App. 596, 82 Fed. Rep. 799; Western Land, etc., Co. *v.* Plumb, 27 Fed. Rep. 598; Morse *v.* Cohannet Bank, 3 Story (U. S.) 364; People's Sav. Bank *v.* Bates, 120 U. S. 556.

Alabama. — Gadsden First Nat. Bank *v.* Sproull, 105 Ala. 275.

Arkansas. — Ames Iron Works *v.* Kalamazoo Pulley Co., 63 Ark. 87.

California. — Sargent *v.* Sturm, 23 Cal. 359, 83 Am. Dec. 118.

Colorado. — Reid *v.* Bird, 15 Colo. App. 116.

Florida. — Glinski *v.* Zawad, 8 Fla. 405; Foster *v.* Ambler, 24 Fla. 519.

Iowa. — Reed *v.* Brown, 89 Iowa 454, 48 Am. St. Rep. 406; Starr *v.* Stevenson, 91 Iowa 684.

Maine. — Hurd *v.* Bickford, 85 Me. 217, 35 Am. St. Rep. 353. *Compare* Lee *v.* Kimball, 45 Me. 172.

Michigan. — McGraw *v.* Solomon, 83 Mich. 442; Burns *v.* Caskey, 100 Mich. 94; Schloss *v.* Feltus, 103 Mich. 525.

Mississippi. — Gulledge *v.* Slayden-Kirksey Woolen Mills, 75 Miss. 297.

New Hampshire. — Sleeper *v.* Davis, 64 N. H. 59, 10 Am. St. Rep. 377.

New York. — Crosby *v.* Delaware, etc.,

bona fide purchaser.[1] But when the mortgagee or pledgee, at the time of taking his mortgage or pledge to secure a pre-existing debt, extends by a binding contemporaneous agreement the time of payment of such debt, he has been considered a purchaser for value.[2] This rule that a discharge of a pre-existing indebtedness will not render a purchaser of personalty a *bona fide* purchaser applies in jurisdictions in which it is held that one who takes a negotiable paper for a pre-existing indebtedness may be a *bona fide* purchaser.[3]

Minority Rule. — In some few jurisdictions it is held that the absolute satisfaction and discharge of an antecedent debt owing by the vendor to the purchaser is as effective as a contemporaneous payment of money to constitute the purchaser a *bona fide* purchaser.[4] And where there is a mortgage or pledge to secure a pre-existing indebtedness, if there be such a valid binding

Canal Co., 23 N. Y. Wkly. Dig. 467; Meacham *v.* Collignon, 7 Daly (N. Y.) 402; Cowles *v.* Kiehel, (Supm. Ct. Spec. T.) 65 N. Y. Supp. 349; Gowing *v.* Warner, (N. Y. City Ct. Gen. T.) 29 Misc. Rep. 593, *affirmed* (Supm. Ct. App. T.) 30 Misc. (N. Y.) 593; Rochester Distilling Co. *v.* Devendorf, 72 Hun (N. Y.) 428; Wiles *v.* Clapp, 41 Barb. (N. Y.) 645; Victoria Paper Mills Co. *v.* New York, etc., Co., (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 179; Weaver *v.* Barden, 49 N. Y. 286; Taft *v.* Chapman, 50 N. Y. 445; Barnard *v.* Campbell, 58 N. Y. 73, 17 Am. Rep. 208; Stevens *v.* Brennan, 79 N. Y. 254; Root *v.* French, 13 Wend. (N. Y.) 570, 28 Am. Dec. 482; Asher *v.* Deyoe, 77 Hun (N. Y.) 531; Deeley *v.* Dwight, 16 Daly (N. Y.) 300.

Ohio. — Eaton *v.* Davidson, 46 Ohio St. 355; Grever *v.* Taylor, 53 Ohio St. 621. See also Wheeling, etc., R. Co. *v.* Koontz, 61 Ohio St. 551, 76 Am. St. Rep. 435. *Compare* Clements *v.* Doerner, 40 Ohio St. 632.

Oklahoma. — *Compare* Phelps, etc., Co. *v.* Halsell, 11 Okla. 1.

Texas. — McKamey *v.* Thorp, 61 Tex. 648; Overstreet *v.* Manning, 67 Tex. 657; Hamilton-Brown Shoe Co. *v.* Lyons, 6 Tex. Civ. App. 633; Finks *v.* Buck, (Tex. Civ. App. 1894) 27 S. W. Rep. 1094; Avery *v.* Mansur, etc., Implement Co., (Tex. Civ. App. 1896) 37 S. W. Rep. 466; Lewis *v.* Bell, (Tex. Civ. App. 1897) 40 S. W. Rep. 747.

Vermont. — Poor *v.* Woodburn, 25 Vt. 235; Downs *v.* Belden, 46 Vt. 674.

Washington. — Woonsocket Rubber Co. *v.* Loewenberg, 17 Wash. 29, 61 Am. St. Rep. 902.

1. Mortgage or Pledge — *Colorado.* — Reid *v.* Bird, 15 Colo. App. 116. See also Nicholls *v.* McShane, 16 Colo. App. 165.

Georgia. — Dinkler *v.* Potts, 90 Ga. 103.

Indiana. — Rauh *v.* Waterman, (Ind. App. 1902) 63 N. E. Rep. 42, (Ind. App. 1901) 61 N. E. Rep. 743.

Iowa. — P. Cox Shoe Co. *v.* Adams, 105 Iowa 402; Pelpd, etc., Co. *v.* Samson, 113 Iowa 145.

Kansas. — John S. Brittain Dry-Goods Co. *v.* Merkel, 10 Kan. App. 12.

Michigan. — McGraw *v.* Solomon, 83 Mich. 442.

Mississippi. — Gulledge *v.* Slayden-Kirksey Woolen Mills, 75 Miss. 297.

Nebraska. — Henry *v.* Vliet, 36 Neb. 138; Phenix Iron Works Co. *v.* McEvony, 47 Neb. 228, 53 Am. St. Rep. 527. *Compare* Henry *v.* Vliet, 33 Neb. 130, 29 Am. St. Rep. 478; Tootle *v.* Chadron First Nat. Bank, 34 Neb. 863, *affirmed* 42 Neb. 237.

New York. — Wood *v.* Robinson, 22 N. Y. 564; Root *v.* French, 13 Wend. (N. Y.) 570, 28 Am. Dec. 482; Stevens *v.* Brennan, 79 N. Y. 254; Thompson *v.* Van Vechten, 27 N. Y. 568; Van Slyck *v.* Newton, 10 Hun (N. Y.) 554; Woodburn *v.* Chamberlin, 17 Barb. (N. Y.) 446.

Ohio. — Goldsmith *v.* Hain, 1 Ohio Cir. Dec. 185, 1 Ohio Cir. Ct. 333.

Pennsylvania. — Ashton's Appeal, 73 Pa. St. 153; Maynard *v.* Philadelphia Sixth Nat. Bank, 98 Pa. St. 250; Callendar *v.* Kelly, 190 Pa. St. 455.

Texas. — Wolf *v.* Lachman, (Tex. Civ. App. 1892) 20 S. W. Rep. 867.

Utah. — Belleville Pump, etc., Works *v.* Samuelson, 16 Utah 234.

Vermont. — Poor *v.* Woodburn, 25 Vt. 235.

2. Extension of Time of Payment. — Adam, etc., Co. *v.* Stewart, 157 Ind. 678; Fuller *v.* Claflin, 51 Hun (N. Y.) 609; La Manna *v.* Munroe, 48 N. Y. App. Div. 495; Berner *v.* Kaye, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 1; Hale *v.* Omaha Nat. Bank, 39 N. Y. Super. Ct. 207; Barnes *v.* Gray, 14 Tex. Civ. App. 439.

3. Rule as to Negotiable Paper Not Applied. — People's Sav. Bank *v.* Bates, 120 U. S. 556, *distinguishing* Swift *v.* Tyson, 16 Pet. (U. S.) 1; Reid *v.* Bird, 15 Colo. App. 116; Reed *v.* Brown, 89 Iowa 454, 48 Am. St. Rep. 406.

The reason that the satisfaction of a pre-existing debt is regarded as a valuable consideration for the transfer of commercial paper, so as to bring its holder within the rule, and is not so regarded as to goods corporeal merely, is not because of any difference in the consideration itself, for there is no difference. The distinction grows out of the difference in the character or quality of the thing transferred in its relation to trade and commerce. Ames Iron Works *v.* Kalamazoo Pulley Co., 63 Ark. 92.

4. Minority Rule. — Sweeney *v.* Bixler, 69 Ala. 539; Peterson *v.* Steiner, 108 Ala. 629; Foxworth *v.* Brown, 120 Ala. 59; Wilk *v.* Key, 117 Ala. 285; Gadsden First Nat. Bank *v.* Sproull, 105 Ala. 275; Butters *v.* Haughwout, 42 Ill. 18, 89 Am. Dec. 401; Kranert *v.* Simon, 65 Ill. 344; Feder *v.* Abrahams, 28 Mo. App. 454; Lawrence *v.* Owens, 39 Mo. App. 318; Napa Valley Wine Co. *v.* Rinehart, 42 Mo. App. 171; Taylor *v.* Smith, 47 Mo. App. 141; Shufeldt *v.* Pease, 16 Wis. 659; Rice *v.* Cutler, 17 Wis. 351, 84 Am. Dec. 747.

contemporaneous agreement to extend the debt to a future time as will disable the mortgagee or pledgee from suing before that time, there is such a new consideration as will constitute the mortgagee or pledgee a *bona fide* purchaser;[1] but a mortgagee or pledgee, when the mortgage or pledge is to secure a pre-existing indebtedness, is not even in such jurisdiction to be considered a *bona fide* purchaser when the taking of the pledge or mortgage did not postpone his right to enforce the indebtedness.[2]

(b) **Antecedent Debt as Part Consideration.** — Though the discharge of an antecedent debt may not be sufficient to render the purchaser a *bona fide* purchaser, still, if a part of the price is satisfied by the discharge of an antecedent debt and the balance by the payment of money or its equivalent, the purchaser will, if the latter constitutes a greater part of the price, be entitled to protection as a *bona fide* purchaser,[3] and undoubtedly such a purchaser would be entitled to protection to the extent of the new consideration passing at the time of his purchase.[4]

(c) **Surrender of Security.** — Where property is taken by the purchaser in payment of a pre-existing indebtedness and he surrenders the security by which the pre-existing indebtedness was secured, so that it cannot be enforced, he is then considered as having parted with value so as to be entitled to protection as a *bona fide* purchaser.[5] Thus, where a landlord surrenders his lien for rent in consideration of a transfer of property in payment of rent in arrears, he is considered a purchaser for value,[6] and the same is true where the purchaser surrenders a note of the defendant on which a third person was liable as indorser or surety.[7] A mere credit upon a judgment against the seller of the purchase price is not such a surrender of a security as will render the purchaser a *bona fide* purchaser.[8] So, also, the mere cancellation and surrender of the seller's unsecured notes, in consideration of a transfer of personalty, will not, according to some authorities, render the purchaser a *bona fide* purchaser,[9]

1. Sweeney *v.* Bixler, 69 Ala. 539; Napa Valley Wine Co. *v.* Rinehart, 42 Mo. App. 171; Watson *v.* Sidney F. Woody Printing Co., 56 Mo. App. 145.

2. Sweeney *v.* Bixler, 69 Ala. 539; Crawford *v.* Spencer, 92 Mo. 498, 1 Am. St. Rep. 745; State Bank *v.* Frame, 112 Mo. 502; Napa Valley Wine Co. *v.* Rinehart, 42 Mo. App. 171; Hall *v.* Missouri Pac. R. Co., 50 Mo. App. 179; Dymock *v.* Missouri, etc., R. Co., 54 Mo. App. 400; Watson *v.* Sidney F. Woody Printing Co., 56 Mo. App. 145; Swafford Bros. Dry-Goods Co. *v.* Jacobs, 66 Mo. App. 362, 2 Mo. App. Rep. 1334; Kemper, etc., Dry-Goods Co. *v.* Kidder Sav. Bank, 81 Mo. App. 280. *Compare* Kraner *v.* Simon, 65 Ill. 344; Taylor *v.* Smith, 47 Mo. App. 141; Henry *v.* Vliet, 33 Neb. 130, 29 Am. St. Rep. 478.

3. **Antecedent Debt as Part of Price.** — Commercial Nat. Bank *v.* Pirie, 49 U. S. App. 596, 82 Fed. Rep. 799; Foxworth *v.* Brown, 120 Ala. 59; Woolridge *v.* Thiele, 55 Ark. 45 (eight hundred dollars paid in cash and credit of four thousand one hundred dollars on pre-existing debt). *Compare* Gavin *v.* Armistead, 57 Ark. 574, 38 Am. St. Rep. 262; Haraszthy *v.* Shandel, 1 Colo. App. 137; Titcomb *v.* Wood, 38 Me. 561; Zucker *v.* Karpeles, 88 Mich. 413. See also Preston *v.* Threefoot, (Miss. 1899) 24 So. Rep. 703; Kingsbury *v.* Smith, 13 N. H. 109; Farwell *v.* Prescott, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 833; Wear Boogher Dry-Goods Co. *v.* Crews, 23 Tex. Civ. App. 667. See also Keith *v.* Heffelfinger, 12 Neb. 497. *Compare* Eaton *v.* Davidson, 46 Ohio St. 355.

In Victoria Paper Mills Co. *v.* New York, etc., Co., (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 179, *affirmed* (Supm. Ct. App. T.) 28 Misc. (N. Y.) 123, it was held that the payment of a small amount in addition to the discharge of the pre-existing indebtedness would not render the purchaser a *bona fide* purchaser where it was shown that the small amount was not advanced for the purpose of purchasing the property or to pay value for the same, but was paid for the purpose, under advice of counsel, of rendering the purchaser a *bona fide* purchaser and rendering the purchase valid as against persons who might claim the goods as having been procured from them through the fraud of the seller.

4. Cooper M'f'g. Co. *v.* De Forest, 5 N. Y. App. Div. 43.

5. **Surrender of Security.** — Robinson *v.* Fairbanks, 81 Ala. 132; Robinson *v.* Levi, 81 Ala. 134; Foster *v.* Ambler, 24 Fla. 519; Burns *v.* Caskey, 100 Mich. 94; Park Bank *v.* Watson, 42 N. Y. 490, 1 Am. Rep. 573; Lane *v.* Logue, 12 Lea (Tenn.) 681; Finks *v.* Buck, (Tex. Civ. App. 1894) 27 S. W. Rep. 1094.

6. **Surrender of Landlord's Lien.** — Finks *v.* Buck, (Tex. Civ. App. 1894) 27 S. W. Rep. 1094. See also Sharp *v.* Carmody, (Ky. 1895) 32 S. W. Rep. 749.

7. **Surrender of Secured Note.** — Farwell *v.* Prescott, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 833.

8. **Credit on Judgment.** — Ames Iron Works *v.* Kalamazoo Pulley Co., 63 Ark. 87.

9. **Surrender of Seller's Note.** — Eaton *v.* Davidson, 46 Ohio St. 355; Hamilton-Brown Shoe Co. *v.* Lyons, 6 Tex. Civ. App. 633.

though the contrary has also been held.[1] And this latter would undoubtedly be true where the note evidencing the pre-existing indebtedness had been surrendered so long before the adverse interest in the property was sought to be enforced against the purchaser that an action on the note would be barred by the statute of limitations.[2]

(4) *Adequacy of Price.* — Though gross inadequacy of the purchase price may be sufficient to prevent the purchaser from being entitled to protection as a *bona fide* purchaser, as tending to show want of good faith in the making of the purchase,[3] still, the price paid by the purchaser need not be the full value of the property to entitle him to protection as a *bona fide* purchaser; it is sufficient for such purpose that he has paid a fair price.[4]

c. GOOD FAITH—To constitute one a *bona fide* purchaser, his purchase must have been made in good faith. While the question of good faith is generally connected with the question of notice on the part of the purchaser of the adverse interest sought to be enforced against him,[5] still, other elements than notice may be sufficient to prevent the purchaser from being a good faith purchaser.[6]

Fraud upon Creditors. — Thus, though the purchaser pays a present valuable consideration and takes without notice of the adverse interest sought to be enforced against him, still, if his purchase was made with the fraudulent intent to hinder and delay the general creditors of his seller, he cannot be considered as a *bona fide* purchaser.[7]

Fraud upon Purchaser's Seller. — It has been held that the fact that the person claiming to be a *bona fide* purchaser fraudulently misrepresented to his seller the value of the thing given by him in payment, and thereby committed a fraud upon his seller, would not prevent the purchaser from being a *bona fide* purchaser.[8]

Usury. — Where the consideration consists of several independent items, the fact that one of such items is tainted with usury will not affect the whole consideration so as to prevent the purchaser from being a *bona fide* purchaser,[9] and the same has been held true though the entire consideration was tainted with usury, as the question of usury is only a question between the purchaser and his seller.[10]

d. NOTICE — (1) *In General.* — To constitute one a *bona fide* purchaser he must have made his purchase without notice of the adverse interest sought to be enforced against him.[11] Notice is to be distinguished from knowledge,

1. Levy *v.* Yazbeck, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 136; Powers *v.* Freeman, 2 Lans. (N. Y.) 127; Paddon *v.* Taylor, 44 N. Y. 371. 10 Abb. Pr. N. S. (N. Y.) 370. See also Farwell *v.* Prescott, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 833; Peterson *v.* Steiner, 108 Ala. 629. *Compare* Asher *v.* Deyoe, 77 Hun (N. Y.) 531.

Past-due Note. — The fact that the surrender was past due is immaterial. Powers *v.* Freeman, 2 Lans. (N. Y.) 127, *citing* Day *v.* Saunders, 3 Keyes (N. Y.) 347.

2. Dunlap *v.* Green, 23 U. S. App. 154.

3. **Inadequacy of Price — Good Faith.** — McNeil *v.* Finnegan, 33 Minn. 375; Preston *v.* Threefoot, (Miss. 1899) 24 So. Rep. 703; Anderson *v.* Nicholas, 28 N. Y. 600; Moyer *v.* Bloomingdale, 38 N. Y. App. Div. 227; Green *v.* Humphry, 50 Pa. St. 212. See also Victoria Paper Mills Co. *v.* New York, etc., Co., (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 179.

4. **Fair Price.** — Collins *v.* Rosenham, (Ky. 1897) 43 S. W. Rep. 726; Dudley *v.* Gould, 6 Hun (N. Y.) 97; Harbison *v.* Knoxville Iron Co., 103 Tenn. 421, 76 Am. St. Rep. 682; Johnson *v.* Newman, 43 Tex. 628. See also Preston *v.* Threefoot, (Miss. 1899) 24 So. Rep. 703.

5. See *infra*, this section, *Notice.*

6. **Evidence of Bad Faith — Character of Purchaser.** — Johnson *v.* Carnley, 10 N. Y. 570, 61 Am. Dec. 762.

7. **Fraud.** — Lynch *v.* Beecher, 38 Conn. 490; Moyer *v.* Bloomingdale, 38 N. Y. App. Div. 227. See also Phillips *v.* Reitz, 16 Kan. 396; Gregory *v.* Whedon, 8 Neb. 373. *Compare* Engel *v.* Salomon, 41 Ill. App. 411.

8. Dudley *v.* Abner, 52 Ala. 572.

9. **Usury.** — Peterson *v.* Steiner, 108 Ala. 629.

10. Williams *v.* Tilt, 36 N. Y. 319, *overruling* Ramsdell *v.* Morgan, 16 Wend. (N. Y.) 574; Keutgen *v.* Parks, 2 Sandf. (N. Y.) 60. *Compare* Le Grand *v.* Eufaula Nat. Bank, 81 Ala. 131, 60 Am. Rep. 140; Saltmarsh *v.* Tuthill, 13 Ala. 390; McCall *v.* Rogers, 77 Ala. 349; Wailes *v.* Couch, 75 Ala. 134; Thompson *v.* Van Vechten, 6 Bosw. (N. Y.) 373.

11. **Notice** — *United States.* — The Canal Boat Independence, 9 Ben. (U. S.) 395; Rateau *v.* Bernard, 3 Blatchf. (U. S.) 244; Myers *v.* Hazzard, 50 Fed. Rep. 155; Phelps *v.* Elliott, 35

and if the buyer has notice of facts which would put a reasonably prudent man upon inquiry which would have resulted in the ascertainment of the adverse interest sought to be enforced against him, he will be deemed to have taken with notice, and cannot assert the rights of a *bona fide* purchaser.[1]

Fed. Rep. 455; Riederer *v.* Pfaff, 61 Fed. Rep. 872; Trask *v.* Jacksonville, etc., R. Co., 124 U. S. 515.

Alabama. — Smith *v.* Zurcher, 9 Ala. 208; Boyd *v.* Beck, 29 Ala. 703; Mayer *v.* Taylor, 69 Ala. 403, 44 Am. Rep. 522.

California. — Harms *v.* Silva, 91 Cal. 636; Fette *v.* Lane, (Cal. 1894) 37 Pac. Rep. 914.

Colorado. — Crane *v.* Chandler, 5 Colo. 21; Cassidy *v.* Harrelson, 1 Colo. App. 458.

Illinois. — Hathorn *v.* Lewis, 22 Ill. 395.

Indiana. — Muncie Nat. Bank *v.* Brown, 112 Ind. 474; Anderson *v.* Oskamp, 10 Ind. App. 168.

Iowa. — Seevers *v.* Delashmutt, 11 Iowa 174, 77 Am. Dec. 139; Greither *v.* Alexander, 15 Iowa 470.

Kansas. — Corbin *v.* Kincaid, 33 Kan. 649; Neerman *v.* Caldwell, 50 Kan. 61.

Maryland. — Hudson *v.* Warner, 2 Har. & G. (Md.) 415.

Michigan. — Wetherell *v.* Spencer, 3 Mich. 123; Doyle *v.* Stevens, 4 Mich. 87; Paulus *v.* Nunn, 48 Mich. 190; Read *v.* Horner, 90 Mich. 152; Flory *v.* Comstock, 61 Mich. 522.

Minnesota. — Marsh *v.* Armstrong, 20 Minn. 81, 18 Am. Rep 355; Tolbert *v.* Horton, 31 Minn. 518; Ludlum *v.* Rothschild 41 Minn. 218; Hayden *v.* Dwyer, 47 Minn. 246; Donahue *v.* Quackenbush, 75 Minn. 43.

Missouri. — Hall *v.* Mullanphy Planing Mill Co., 16 Mo. App. 454; Wright *v.* Bircher, 72 Mo. 179, 37 Am. Rep. 433; Johnson-Brinkman Commission Co. *v.* Missouri Pac. R. Co., 72 Mo. App. 437; Dieckman *v.* Young, 87 Mo. App. 530.

Nebraska. — Weeping Water Electric Light Co. *v.* Haldeman, 35 Neb. 139; Ransom *v.* Schmela, 13 Neb. 73; Russell *v.* Longmoor, 29 Neb. 209; Wagner *v.* Steffin, 38 Neb. 392; Railsback *v.* Patton, 34 Neb. 490.

Nevada. — Moresi *v.* Swift, 15 Nev. 215.

New Hampshire. — Gooding *v.* Riley, 50 N. H. 400; Piper *v.* Hilliard, 58 N. H. 198.

New Jersey. — Williamson *v.* New Jersey Southern R. Co , 26 N. J. Eq. 398; De Kay *v.* Hackensack Water Co., 38 N. J. Eq. 159; Bernheimer *v.* Verdon, 63 N. J. Eq. 312, 49 Atl. Rep. 732.

New York. — Tuttle *v.* Jackson, 6 Wend. (N. Y.) 213, 21 Am. Dec. 306; Sanger *v.* Eastwood, 19 Wend. (N. Y.) 514; Gildersleeve *v.* Landon, 73 N. Y. 609; Gregory *v.* Thomas, 20 Wend. (N. Y.) 17; Lewis *v.* Palmer, 28 N. Y. 271; Crocker *v.* Crocker, 31 N. Y. 507, 88 Am. Dec. 291; Porter *v.* Parks, 49 N. Y. 564; Schelley *v.* Diehl, 13 N. Y. Wkly. Dig. 228; Moyer *v.* Bloomingdale, 38 N. Y. App. Div. 227, *distinguishing* Williams *v.* Tilt, 36 N. Y. 319; Gowing *v.* Warner, (N. Y. City Ct. Gen. T.) 29 Misc. (N. Y.) 593, *affirmed* (Supm. Ct. App. T.) 30 Misc. (N. Y.) 593; Meacham *v.* Collignon, 7 Daly (N. Y.) 402; Hill *v.* Beebe, 13 N. Y. 556; Thompson *v.* Van Vechten, 6 Bosw. (N. Y.) 373; Potter *v.* Traders' Nat. Bank, 70 Hun (N. Y.) 53; Tiffany *v.* Warren, 37 Barb. (N. Y.) 571, 24 How. Pr. (N. Y.) 293; Pearse *v.* Pettis, 47 Barb. (N. Y.) 276; McLachlin *v.* Brett, 105 N. Y. 391.

Ohio. — Day *v.* Munson, 14 Ohio St. 488; Simons *v.* Pierce, 16 Ohio St. 215; Miller *v.* Toledo Bank, 1 Ohio Dec. (Reprint) 392, 8 Wes. L. J. 536; Whitaker *v.* Westfall, 1 Ohio Cir. Dec. 509, 2 Ohio Cir. Ct. 321; Welte *v.* Faller, 5 Ohio Dec. (Reprint) 590, 6 Am. L. Rec. 766, 7 Ohio Dec. (Reprint) 456, 3 Cinc. L. Bul. 347; Huber Mfg. Co. *v.* Sweney, 5 Ohio Cir. Dec. 331, 11 Ohio Cir. Ct. 193.

Pennsylvania. — Coble *v.* Nonemaker, 78 Pa. St. 501; Kichline *v.* Lobach, 125 Pa. St. 295; Eichenlaub *v.* Hall, 163 Pa. St. 201, 34 W. N. C. (Pa.) 523; Callendar *v.* Kelly, 190 Pa. St. 455.

South Carolina. — Hill *v.* Burgess, 37 S. Car. 604, 15 S. E. Rep. 963; Anderson *v.* Aiken, 11 Rich. Eq. (S. Car.) 232.

Tennessee. — Polk *v.* Foster, 7 Baxt. (Tenn.) 98; Carson *v.* Jones, (Tenn. Ch. 1900) 60 S. W. Rep. 175.

Texas. — Hull *v.* Quest, 2 Tex. Unrep. Cas. 564; Freiberg *v.* Magale, 70 Tex. 116; Bell *v.* Gammon, 3 Tex. App. Civ. Cas., § 404; Snyder *v.* Austin First Nat. Bank, (Tex. Civ. App. 1895) 32 S. W. Rep. 162.

Washington. — Darland *v.* Levins, 1 Wash. 582; Mendenhall *v.* Kratz, 14 Wash. 453; Hinchman *v.* Point Defiance R. Co., 14 Wash. 349.

Wisconsin. — Hicks *v.* Smith, 77 Wis. 146.

1. Putting on Inquiry — *Alabama.* — Cleveland Woolen Mills *v.* Sibert, 81 Ala. 140; Hoyt, etc., Mfg. Co. *v.* Turner, 84 Ala. 523; Maxwell *v.* Brown Shoe Co., 114 Ala. 304.

California. — Williams *v.* Tam, 131 Cal. 64.

Colorado. — Nicholls *v.* McShane, 16 Colo. App. 165.

District of Columbia. — The Ella, 84 Fed. Rep. 471.

Illinois. — Jones *v.* Glathart, 100 Ill. App. 631; D. M. Sechler Carriage Co. *v.* Lane, 71 Ill. App. 360; Seass *v.* Manion, 92 Ill. App. 471.

Indiana. — Perrine *v.* Barnard, 142 Ind. 448.

Iowa. — Allen *v.* McCalla, 25 Iowa 464, 96 Am. Dec. 56.

Kansas. — Phillips *v.* Reitz, 16 Kan. 396; Patterson *v.* Temple, 5 Kan. App. 442.

Kentucky. — Miles *v.* Blanton, 3 Dana (Ky.) 525.

Louisiana. — Reid *v.* Mayo, 45 La. Ann. 1091.

Michigan. — Williams *v.* Bresnahan, 66 Mich. 634; Cochran *v.* Stewart, 21 Minn. 435; Tolbert *v.* Horton, 31 Minn. 518.

Missouri. — Dawson *v.* Coffey, 48 Mo. App. 109; Edmonston *v.* Wilson, 49 Mo. App. 491.

Nebraska. — Omaha Book Co. *v.* Sutherland, 10 Neb. 334; Regier *v.* Shreck, 47 Neb. 667.

New Hampshire. — Johnson *v.* Willey, 46 N. H. 75; Cooper *v.* Newman, 45 N. H. 339; Stowe *v.* Meserve, 13 N. H. 46.

New York. — Danforth *v.* Dart, 4 Duer (N. Y.) 101; Reed *v.* Gannon, 50 N. Y. 345, *revers-*

To constitute notice on account of knowledge of facts putting the purchaser upon inquiry, the facts must have been such as would have reasonably awakened suspicion in the mind of the purchaser.[1]

Possession as Notice. — While actual possession of the personal property in which an adverse interest is sought to be enforced against a purchaser would undoubtedly be notice to such purchaser of the adverse interest of the possessor,[2] still, the possession, to have such effect, must be actual as distinguished from a constructive possession.[3]

Lis Pendens. — The doctrine of notice to purchasers of personal property through the pendency of an action to enforce a claim thereto has been heretofore fully discussed.[4]

Quitclaim Deed of Chattels. — The rule that a grantee in a quitclaim deed of real property does not occupy the position of a *bona fide* purchaser[5] has been held not to apply to a bill of sale of chattels in the form of a quitclaim deed.[6]

(2) *Time of Notice.* — Where a purchase is made on credit and payment subsequently made, it is sufficient to prevent the purchaser from becoming a *bona fide* purchaser, that he acquired notice of the interest attempted to be asserted against him at any time before the payment was made.[7] But where the purchaser has paid part of the price before notice, he would be entitled to the protection afforded a *bona fide* purchaser to the extent of such payment.[8]

(3) *Purchaser with Notice from Bona Fide Purchaser.* — After property has been passed into the hands of a *bona fide* purchaser, a purchaser from him stands in his shoes, and is entitled to the same protection as the *bona fide* purchaser, irrespective of notice on his part.[9]

3. Burden of Proof as to Bona Fide Purchase. — The rule of proof of *bona fide* purchase is that the party asserting it must make proof of the purchase payment.[10] This done, it has been held that he need go no further and prove

ing 3 Daly (N. Y.) 414; Caldwell *v.* Bartlett, 3 Duer (N. Y.) 341; Anderson *v.* Nicholas, 28 N. Y. 600, *affirming* 5 Bosw. (N. Y.) 121; McCormick *v.* Venable, 58 Hun (N. Y.) 608, 12 N. Y. Supp. 152; Lighte *v.* Finan, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 148; Lewis *v.* Stevenson, 2 Hall (N. Y.) 63; Pringle *v.* Phillips, 5 Sandf. (N. Y.) 157.

Tennessee. — Levins *v.* W. O. Peoples Grocery Co., (Tenn. Ch. 1896) 38 S. W. Rep. 733.

Texas. — Roos *v.* Lewyn, 5 Tex. Civ. App. 593.

1. Kyle *v.* Ward, 81 Ala. 120; Le Grand *v.* Eufaula Nat. Bank, 81 Ala. 123, 60 Am. Rep. 140; Bell *v.* Tyson, 74 Ala. 353; Dole *v.* Akron Bank, 8 Colo. App. 127; Foster *v.* Ambler, 24 Fla. 519; Gosney *v.* Frost, 27 Ill. 53; Lawrence *v.* McKenzie, 88 Iowa 432; Smith *v.* Crawford County State Bank, 99 Iowa 282; Seybell *v.* National Currency Bank, (C. Pl. Gen. T.) 4 Abb. Pr. N. S. (N. Y.) 352, 2 Daly (N. Y.) 383; Lord *v.* Wilkinson, 56 Barb. (N. Y.) 593, Le Gierse *v.* Whitehurst, 66 Tex. 244.

Rumor. — Black *v.* Thornton, 31 Ga. 641.

Reputation of Purchaser's Vendor. — Thus, in case of a purchase from a fraudulent vendee, it is not enough to charge the purchaser with notice to show that it was generally known in the neighborhood that the vendee was a common mercantile swindler. Cleveland Woolen Mills *v.* Sibert, 81 Ala. 140. See also Gosney *v.* Frost, 27 Ill. 53.

2. **Possession.** — Smalley *v.* Ellet, 36 Ill. 500; Seass *v.* Manion, 92 Ill. App. 471; Gagnon *v.* Brown, 47 Kan. 83; Doyle *v.* Stevens, 4 Mich. 87; Finn *v.* Donahoe, 83 Mich. 165; Vining *v.* Millar, 109 Mich. 205.

3. Black Rock Bank *v.* Decker, 65 Ark. 33; Menzies *v.* Dodd, 19 Wis. 343.

4. See the title NOTICE OF PENDENCY AND LIS PENDENS, vol. 21, p. 626 *et seq.*

5. See the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 510 *et seq.*

6. Rosenbaum *v.* Foss, 4 S. Dak. 184.

7. **Time of Notice.** — Gadsden First Nat. Bank *v.* Sproull, 105 Ala. 275; Ukiah Bank *v.* Gibson, 109 Cal. 197; Hayden *v.* Charter Oak Driving Park, 63 Conn. 142; Phinizy *v.* Few, 19 Ga. 66; Jones *v.* Glathart, 100 Ill. App. 631; Cummings *v.* Tovey, 39 Iowa 195; Peters *v.* Brandon, 5 Kan. App. 879; Marsh *v.* Armstrong, 20 Minn. 81, 18 Am. Rep. 355; Schloss *v.* Feltus, 96 Mich. 619; Haescig *v.* Brown, 34 Mich. 503; Regier *v.* Shreck, 47 Neb. 667; Sargent *v.* Eureka Spund Apparatus Co., 46 Hun (N. Y.) 19; Freeman *v.* Deming, 3 Sandf. Ch. (N. Y.) 327; Abilene Mill, etc., Co. *v.* Finley, (Tex. Civ. App. 1896) 34 S. W. Rep. 311.

8. Merrill *v.* Dawson, Hempst. (U. S.) 563, 17 Fed. Cas. No. 9,469, *affirmed* 11 How. (U. S.) 375; Dougherty *v.* Cooper, 77 Mo. 528.

9. **Purchaser from Bona Fide Purchaser.** — Oakes *v.* Tonsmierre, 49 Fed. Rep. 447. See also Ketchum *v.* Packer, 65 Conn. 544; Tyler *v.* Safford, 31 Kan. 608. See also Johnson-Brinkman Commission Co. *v.* Missouri Pac. R. Co., 72 Mo. App. 437; Williamson *v.* Mason, 12 Hun (N. Y.) 97. See also Herring *v.* Cannon, 21 S. Car. 212, 53 Am. Rep. 661; McKnight *v.* Gordon, 13 Rich. Eq. (S. Car.) 222, 94 Am. Dec. 164; Barber *v.* Richardson, 57 Vt. 408.

10. **Burden of Proof.** — Sumner *v.* Woods, 52

that he made such purchase and payment in good faith and without notice; if it be desired to avoid the effect of the purchase and payment, it must be met by counterproof that, before the payment, the purchaser had actual or constructive notice of the outstanding interest sought to be enforced against him;[1] though in most jurisdictions the purchaser must not only show that he is a purchaser for value, but also a purchaser in good faith and without notice.[2]

SALESMAN. (See also the title COMMERCIAL TRAVELERS OR DRUMMERS, vol. 6, p. 223.) — See note.[3]

SALOON. (See also the titles INNS AND INNKEEPERS, vol. 16, p. 505; INTOXICATING LIQUORS, vol. 17, p. 189, and see HOTEL, vol. 15, p. 766; RESTAURANT, *ante*, p. 839.) — A saloon is a place of refreshment;[4] a hall of reception; a large public room or parlor; an apartment for a specified public use;[5] as, the saloon of a steamboat, a refreshment saloon, or the like.[6] In common parlance, the word is used to designate a place where intoxicating liquors are sold, and this restricted meaning may be given to it where the context or other circumstances require it.[7] But while this confined signification

Ala. 94; Gadsden First Nat. Bank *v.* Sproull, 105 Ala. 275; Peterson *v.* Steiner, 108 Ala. 629; Wilk *v.* Key, 117 Ala. 285; Starr *v.* Stevenson, 91 Iowa 684; Mather *v.* Freelove, (Supm. Ct. Gen. T.) 3 N. Y. St. Rep. 424; Seymour *v.* McKinstry, 106 N. Y. 230; Stevens *v.* Brennan, 79 N. Y. 254; Levy *v.* Cooke, 143 Pa. St. 607. *Compare* Johnson *v.* Newman, 43 Tex. 628.

1. Gadsden First Nat. Bank *v.* Sproull, 105 Ala. 275; Peterson *v.* Steiner, 108 Ala. 629; Wilk *v.* Key, 117 Ala 285; Arbuckle *v.* Gates, 95 Va. 802. See also Nicholls *v.* McShane, 16 Colo. App. 165; Goodyear Rubber Co. *v.* Schreiber, 29 Wash. 94.

2. *Arkansas.* — Fomby *v.* Colquitt, 56 Ark. 537.

Iowa. — Starr *v.* Stevenson, 91 Iowa 684.

Kansas. — Salisbury *v.* Barton, 63 Kan. 552; Kilpatrick-Koch Dry-Goods Co. *v.* Kahn, 53 Kan. 274.

Michigan. — Caulfield *v.* Curry, 63 Mich. 594; Costigan *v.* Howard, 100 Mich. 335; Whitaker Iron Co. *v.* Preston Nat. Bank, 101 Mich. 146; Cappon, etc., Leather Co. *v.* Preston Nat. Bank, 114 Mich. 263.

Minnesota. — McNeil *v.* Finnegan, 33 Minn. 375; Wright *v.* Larson, 51 Minn. 321, 38 Am. St. Rep. 504; Newton *v.* Newton, 46 Minn. 33.

Missouri. — Leedom *v.* J. W. Ward Furniture, etc., Co., 38 Mo. App 425; Reid *v.* Lloyd, 52 Mo. App. 278. *Compare* O'Connor, etc., Range, etc., Co. *v.* Alexe, 28 Mo. App. 184; Standard Oil Co. *v.* Meyer Bros. Drug Co., 74 Mo. App. 446.

Nebraska. — Ransom *v.* Schmela, 13 Neb. 73.

New York. — McPherren *v.* Homan, 2 N. Y. App. Div. 264; Berner *v.* Kaye, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 1; Strickland *v.* Leggett, 66 Hun (N. Y.) 633, 21 N. Y. Supp. 356; King *v.* Jacobson, 58 Hun (N. Y.) 610, 12 N. Y. Supp. 584; Benedict *v.* Williams, 48 Hun (N. Y.) 123; Devoe *v.* Brandt, 53 N. Y. 462, *reversing* 58 Barb. (N. Y.) 493; Salomon *v.* Van Praag, (Supm. Ct. Tr. T.) 48 How. Pr. (N. Y.) 338; Stevens *v.* Brennan, 79 N. Y. 254; Grossman *v.* Walters, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 471; Moyer *v.* Bloomingdale, 38 N. Y. App. Div. 227; La Manna *v.* Munroe, 48 N. Y. App. Div. 495; Mather *v.* Freelove, (Supm. Ct. Gen. T.) 3 N. Y. St. Rep. 424, 25 N. Y. Wkly. Dig. 343; Levy *v.* Yazbeck, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 136. *Compare* Lewis *v.* Palmer, Hill & D. Supp. (N. Y.) 68; Hinck *v.* Wilmerding, (N. Y. City Ct. Gen. T.) 17 Misc. (N. Y.) 71.

Pennsylvania. — Tainter *v* Hyneman, 6 Phila. (Pa.) 202, 24 Leg. Int. (Pa.) 52; Bughman *v.* Central Bank, 159 Pa. St. 94, 33 W. N. C. (Pa.) 557.

3. **Salesman.** — In Hand *v.* Cole, 88 Tenn. 400, it was held that a traveling ***salesman*** was a clerk.

4. **Saloon — Place of Refreshment.** — Worcester's Dict., *followed* in Kitson *v.* Ann Arbor, 26 Mich. 326.

A ***saloon*** is supposed to be a place for obtaining refreshment; and a pool table belonging to it is not, as matter of law, exempt from execution as apparatus necessary to enable the ***saloon*** keeper to carry on his business. Goozen *v.* Phillips, 49 Mich. 7.

5. **Hall of Reception.** — Webst. Dict., *followed* in Clinton *v.* Grusendorf, 80 Iowa 120. See also *Ex p.* Livingston, 20 Nev. 282.

6. **Refreshment Saloon and Restaurant Used Synonymously.** — State *v.* Hogan, 30 N. H. 272; State *v.* Clark, 28 N. H. 176.

7. **Place Where Intoxicating Liquors Are Sold.** — Cardillo *v.* People, 26 Colo. 355; Dewar *v.* People, 40 Mich. 401, 29 Am. Rep. 545; McDougall *v.* Giacomini, 13 Neb. 434; *Ex p.* Livingston, 20 Nev. 282; State *v.* Donaldson, 12 S. Dak. 262; Pearce *v.* State, 35 Tex. Crim. 150. See also Cahill *v.* Campbell, 105 Mass. 40.

Minor. (See generally the title GAMING, vol. 12, p. 672 *et seq.*) — In Snow *v.* State, 50 Ark. 557, it was held that a place where cider, birch beer, ginger ale, and like refreshments were served after the manner of dramshops was a ***saloon*** within a statute making it a misdemeanor for the keeper of any dramshop or ***saloon*** to permit a minor to play therein at any game of pool.

Saloon, House, or Building. — An inclosed park of four acres containing an uninclosed and uncovered platform for dancing, is not a "***saloon***, house, or building," within the *Connecticut* statute concerning the sale of intoxi-

may be given to "saloon," it has been frequently held tnat the word does not necessarily import a place where liquors are sold.[1]

SALT. — See note 2.

SALT LICK — SALT SPRING. — See LICK, vol. 19, p. 1.

cating liquors, no liquors having been sold upon the platform. State *v.* Barr, 39 Conn. 41.

Tobacco Shop. — In State *v.* Hogan, 30 N. H. 268, it was held that a shop which was used for the manufacture and sale of tobacco, snuff, and cigars was not a ***saloon***.

Saloon Purposes — Brewery. — A statute provided for the abatement of a liquor nuisance, and prescribed that it should be done by (among other things) securely closing the building as against the use and occupation thereof for ***saloon*** purposes. It was held that the word ***saloon***, as here used, meant more than a place for the retail of intoxicating drinks, and included all places which were made nuisances by the violation of the prohibitory liquor law, and that the statute thus authorized and directed the closing of a brewery which was found to be a nuisance on account of the unlawful manufacture of beer therein. Craig *v.* Werthmueller, 78 Iowa 599.

Saloon Keeper. — In Cahill *v.* Campbell, 105 Mass. 40, it was held that the term "***saloon*** keeper," when applied to a business carried on in a country town, was sufficiently definite to sustain the certificate of a married woman, under a statute requiring a married woman to file a certificate containing a description of any business proposed to be done by her on her separate account.

Same — Single Sale — Wagon. — In Sparta *v.* Boorom, (Mich. 1902) 89 N. W. Rep. 436, it was said: "We are of the opinion, however, that the warrant does not state a case. It charges a single sale, is silent as to the place and circumstances, except that it was not made as a druggist, and states that the defendant 'thereby' became a ***saloon*** keeper. We are not prepared to say that a wagon might not constitute a ***saloon***, or that a ***saloon*** might not be movable, or that it would be any the less a ***saloon*** because it was continually moved from place to place, but that is not the charge here. The general village incorporation act did not authorize the prohibition of the sale of liquor in general terms, and it omitted to enlarge the meaning of the word ***saloon***. The term has a common and well-understood meaning, and this meaning must be applied to this act. 1 How. Ann. Stat., § 2; Comp. Laws (1897), § 50. It did not authorize the village council to enlarge its meaning by calling every man who should make a sale of liquor a ***saloon*** keeper, and the cases which hold that a single sale may be evidence to show a man a ***saloon*** keeper, where it occurred in a ***saloon***, are not in point."

1. Term Does Not Necessarily Import Place Where Liquor Is Sold. — Snow *v.* State, 50 Ark. 561; Clinton *v.* Grusendorf, 80 Iowa 120; Kitson *v.* Ann Arbor, 26 Mich. 325; Goozen *v.* Phillips, 49 Mich. 7; Wolf *v.* Lansing, 53 Mich. 369; Springfield *v.* State, (Tex. App. 1890) 13 S. W. Rep. 752; Early *v.* State, 23 Tex. App. 364; State *v.* Mansker, 36 Tex. 364; McMurtry *v.* State, 38 Tex. Crim. 521.

A ***saloon*** may or may not mean a place for the retailing of spirituous liquors. Brewer, etc., Brewing Co. *v.* Boddie, 181 Ill. 623; Springfield *v.* State, (Tex. App. 1890) 13 S. W. Rep. 752.

Although spirituous liquors are frequently kept at a ***saloon*** with or without a license, yet they do not necessarily form an element in the definition of a ***saloon***. State *v.* Hogan, 30 N. H. 272.

"A house or room used for retailing spirituous liquors is sometimes improperly called a ***saloon***, but this improper use of the word cannot impart to it any such legal signification." State *v.* Mansker, 36 Tex. 365.

Saloons, Taverns, and Eating Houses. — In Mt. Pleasant *v.* Vansice, 43 Mich. 363, it was held that an authority "to license ***saloons***, taverns, and eating houses" did not authorize a license for the sale of liquor. The court said: "It is not possible to contend that ***saloons***, taverns, and eating houses are, in contemplation of law, inseparable from the sale of ardent spirits."

An Indictment for Arson alleged that the defendant wilfully set fire to and burned a certain building called a ***saloon***. It was held that the indictment was bad for not showing for what purpose the building burned was used. The court said: "From its being called 'a ***saloon***' we might infer that whoever called it by that name understood that it was either a spacious and elegant apartment for the reception of company, or for works of art, as Webster defines the word, or that the building was used as a shop for the retail of intoxicating liquors." State *v.* O'Connell, 26 Ind. 267.

Saloon Distinguished from Dramshop. — See DRAMSHOP, vol. 10, p. 261.

2. Refuse Salt. — In Carroll *v.* Walton, etc., Co., 48 Fed. Rep. 125, it was said: "Refuse ***salt*** is not a fertilizer material, in any acceptation of that term, and is used as a mechanical ingredient only, by the manufacturers of fertilizers, who also sometimes use ***salt***cake, but for a different purpose."

Chemical Salts. — In Mason *v.* Robertson, 29 Fed. Rep. 685, it was said: "A chemical ***salt*** is, speaking generally, and not with scientific precision, the combination of an acid and a base. A base is the union of a metal and oxygen. It is a most general term. I cannot think that, within the meaning of the statute, the term 'chemical compound and ***salt***' enumerates the article of bichromate of soda." This case arose upon the construction of a tariff act. See also the title REVENUE LAWS, *ante*, p. 883, and see Fink *v.* U. S., 170 U. S. 584.

SALVAGE.

By the Editorial Staff.

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CROSS-REFERENCES.

For matters of PROCEDURE, *see in the* ENCYCLOPÆDIA OF PLEADING AND PRACTICE *the following titles:* *ADMIRALTY*, vol. 1, p. 249; *SHIPPING*, vol. 20, p. 246.

For other matters of SUBSTANTIVE LAW *and* EVIDENCE *related to this subject, see in this work the title* *ADMIRALTY JURISDICTION*, vol. 1, p. 645, *and the cross-references there given.*

I. Definition. — The term "salvage," while sometimes used to express the property saved or the service rendered, is generally employed to denote the compensation allowed to persons by whose voluntary assistance a ship or its cargo or both have been saved, in whole or in part, from impending peril, or recovered after actual loss.[1] And it is in this sense that the term will be used in this article.

1. Salvage Defined — *England.* — The San Bernardo, 1 C. Rob. 178; The Neptune, 1 Hag. Adm. 227; The Clifton, 3 Hag. Adm. 117; The Gas Float Whitton No. 2, (1896) P. 49; The Thetis, 3 Hag. Adm. 14; The Chetah, L. R. 2 P. C. 207; The Fulham, (1899) P. 251; Lohre *v.* Aitchison, 3 Q. B. D. 568.

United States. — The Independence, 2 Curt. (U. S.) 350, 13 Fed. Cas. No. 7,014, *affirmed* in U. S. Supreme Ct., case not reported; Williamson *v.* The Brig Alphonso, 1 Curt. (U. S.) 376; Stone *v.* The Jewell, 41 Fed. Rep. 103; Sonderburg *v.* The Ocean Tow Boat Co., 3 Woods (U. S.) 146; The Sabine, 101 U. S. 384; The Blackwall, 10 Wall. (U. S.) 1; The Sandringham, 10 Fed. Rep. 556; The Liholiho *v.* 1,206 Bags Sugar, 9 Hawaii 323; The H. B. Foster, Abb. Adm. 222; The Annie Henderson, 15 Fed. Rep. 550; Muntz *v.* A Raft Timber, 15 Fed. Rep. 555; Acosta *v.* The Halcyon, 1 Fed. Cas. No. 32; Browning *v.* Baker, 2 Hughes (U. S.) 30, 4 Fed. Cas. No. 2,041, *affirmed*, case unreported; Spencer *v.* Steamboat Charles Avery, 1 Bond (U. S.) 119; The Brandow, 29 Fed. Rep. 878; The Old Natchez, 9 Fed. Rep. 478; Bean *v.* The Ship Grace Brown, 2 Hughes (U. S.) 112, 2 Fed. Cas. No. 1,171; Weeks *v.* The Snow Catharina Maria, 2 Pet. Adm. 424; Candee *v.* Sixty-Eight Bales Cotton, 48 Fed. Rep. 479; The Fannie Brown, 30 Fed. Rep. 215; The Catalina, (C. C. A.) 105 Fed. Rep. 635; Lea *v.* Ship Alexander, 2 Paine (U. S.) 466; Talbot *v.* Seeman, 1 Cranch (U. S.) 1; Clarke *v.* The Brig Dodge Healy, 4 Wash. (U. S.) 657; Waterbury *v.* Myrick, Blatchf. & H. Adm. 34; The M. B. Stetson, 1 Lowell (U. S.) 121; The A. D. Patchin, 1 Blatchf. (U. S.) 414; Fretz *v.* Bull, 12 How. (U. S.) 466; McGinnis *v.* Steamboat Pontiac, 5 McLean (U. S.) 359; Adams *v.* Bark Island City, 1 Cliff. (U. S.) 210; Taber *v.* Jenny, 1 Sprague (U. S.) 315; A Raft Spars, Abb. Adm. 293; The Steamboat Cheeseman *v.* Two Ferryboats, 2 Bond (U. S.) 375; Hume *v.* J. D. Spreckels, etc., Co., (C. C. A.) 115 Fed. Rep. 51; Davey *v.* The Mary Frost, 3 Cent. L. J. 419, 7 Fed. Cas. No. 3,591; Browning *v.* Baker, 2 Hughes (U. S.) 41; Clarke *v.* Brig Dodge Healy, 4 Wash. (U. S.) 651, 5 Fed.

Ground of Compensation. — Compensation as salvage is not viewed by the admiralty courts merely as pay on the principle of *quantum meruit* or as a remuneration *pro opere et labore*, but as a reward given for perilous services voluntarily rendered, and as an inducement to mariners to embark in such dangerous enterprises to save life and property.[1]

II. Essential Elements of Valid Salvage Claim — 1. In General. — Three elements are, as a general rule, necessary to a valid salvage claim: first, a marine peril; second, service voluntarily rendered; third, success in whole or in part, or, at least, a contribution to success.[2]

2. Peril of the Property Saved. — While, as a general rule, the property saved must have been in peril,[3] and mere speculative danger will not be sufficient,[4] it is not necessary that loss shall have been inevitable or that the danger shall have been such that escape from it by other means would have been impossible;[5] it will be sufficient if, at the time the service was rendered, there was imminent probable danger or a reasonable apprehension of danger,[6] or, it has been held, if the ship has encountered any damage or misfortune

Cas. No. 2,849; Fifty Thousand Feet Timber, 2 Lowell (U. S.) 64, 9 Fed. Cas. No. 4,783; The El Dorado, 2 U. S. App. 524; The Dupuy De Lome, 13 U. S. App. 666; Cope *v.* Vallette Dry Dock Co., 119 U. S. 628; The Clarita, 23 Wall. (U. S.) 16; The Schooner Emulous, 1 Sumn. (U. S.) 207, 8 Fed. Cas. No. 4,480; The Alabamian, 1 Fed. Cas. No. 128; Murphy *v.* Dunham, 38 Fed. Rep. 510; The Hyderabad, 11 Fed. Rep. 749, 11 Biss. (U. S.) 112; Kennedy *v.* Ricker, Smith (N. H.) 432, 14 Fed. Cas. No. 7,705; McConnochie *v.* Kerr, 9 Fed. Rep. 50; Hand *v.* The Schooner Elvira, Gilp. (U. S.) 60, 11 Fed. Cas. No. 6,015.

New York. — Baker *v.* Hoag, 7 Barb. (N. Y.) 116.

1. Ground of Allowance of Salvage Compensation. — The India, 1 W. Rob. 406; The Hector, 3 Hag. Adm. 90; Union Tow-Boat Co. *v.* The Bark Delphos, Newb. Adm. 412; The Sabine, 101 U. S. 384; The Katie Collins, 21 Fed. Rep. 409; The Fannie Brown, 30 Fed. Rep. 215; Coulon *v.* The Brig Neptune, 2 Pet. Adm. 356, 6 Fed. Cas. No. 3,273. And see *infra*, this title, *Amount of Award*.

2. Elements of Valid Claim in General. — The Ranger, 9 Jur. 119; The Sabine, 101 U. S. 384; Hall *v.* Barque Paquet Bot De Cayenne, 7 Phila. (Pa.) 550, 27 Leg. Int. (Pa.) 364, 11 Fed. Cas. No. 5,941; Johnson *v.* The Industry, 13 Fed. Cas. No. 7,391; The Schooner John Wurts, Olc. Adm. 462, 13 Fed. Cas. No. 7,434; Hennessey *v.* The Ship Versailles, 1 Curt. (U. S.) 353, 11 Fed. Cas. No. 6,365; Waite *v.* The Brig Antelope, Bee Adm. 233, 28 Fed. Cas. No. 17,045; Spencer *v.* Steamboat Charles Avery, 1 Bond (U. S.) 117; The Fannie Brown, 30 Fed. Rep. 215.

3. Property Must Have Been in Peril — *England.* — Akerblom *v.* Price, 7 Q. B. D. 129, 50 L. J. Q. B. 629; The Aglaia, 13 P. D. 160; Turnbull *v.* The Ship Strathnaver, 1 App. Cas. 58; The Charlotte, 3 W. Rob. 71; The Cornelius Cornell, 26 Law Rep. 677.

United States. — The Plymouth Rock, 9 Fed. Rep. 413; McConnochie *v.* Kerr, 9 Fed. Rep. 50; The Dolcoath, 16 Fed. Rep. 264; The Oregon, 27 Fed. Rep. 871; The Fannie Brown, 30 Fed. Rep. 215; Stone *v.* The Jewell, 41 Fed. Rep. 103; The Alamo, (C. C. A.) 75 Fed. Rep. 602; Seven Coal Barges, 2 Biss. (U. S.) 297; The Steamer Saragossa, 1 Ben. (U. S.) 551; The Steamboat Cheeseman *v.* Two Ferryboats, 2 Bond (U. S.) 363; Blagg *v.* The Steamboat E. M. Bicknell, 1 Bond (U. S.) 270, 3 Fed. Cas. No. 1,476; The Mount Washington, 17 Fed. Cas. No. 9,887; The Independence, 2 Curt. (U. S.) 350; The Thomas Hilyard, 55 Fed. Rep. 1015; The Maria Pike, 16 Fed. Cas. No. 9,081; The C. D. Bryant, 19 Fed. Rep. 603; The Calcutta, 4 Fed. Cas. No. 2,298; The Augusta, 2 Fed. Cas. No. 646.

Pennsylvania. — Turner *v.* The Mary E. Long, 14 Phila. (Pa.) 598, 38 Leg. Int. (Pa.) 187.

Property on Board of Rescuing Ship Not in Peril so as to Make Third Vessel Receiving It a Salvor. — A Box Bullion, 1 Sprague (U. S.) 57.

Loss of Rudder. — The mere loss of the rudder is not in itself a conclusive circumstance as to the danger in which a ship should be regarded, but its importance depends on the other circumstances of the case, such as the weather, the size and situation of the vessel. The Alaska, 23 Fed. Rep. 597. See also Hope *v.* The Brig Dido, 2 Paine (U. S.) 245

Thus a vessel of considerable size that had lost her rudder in rough weather has been held a proper subject of salvage. Towle *v.* The Great Eastern, 24 Fed. Cas. No. 14,110. See also The Alaska, 23 Fed. Rep. 597.

Evidence of Perilous Condition. — In a suit for salvage against a boat and cargo, a written instrument of abandonment signed by the officers of the boat is admissible in evidence to prove the perilous situation of the vessel. Blagg *v.* The Steamboat E. M. Bicknell, 1 Bond (U. S.) 270, 3 Fed. Cas. No. 1,476.

4. Speculative Danger Insufficient. — Union Tow-Boat Co. *v.* The Bark Delphos, Newb. Adm. 412; McGinnis *v.* The Steamboat Pontiac, Newb. Adm. 130; Talbot *v.* Seeman, 1 Cranch (U. S.) 1.

5. Lamar *v.* The Penelope, 14 Fed. Cas. No. 8,007. And see cases in note immediately above.

6. Reasonable Apprehension of Danger Sufficient. — The Aztecs, 21 L. T. N. S. 797; Trumbull *v.* The Ship Strathnaver, 1 App. Cas. 58; The Raikes, 1 Hag. Adm. 246; Seven Coal Barges, 2 Biss. (U. S.) 297; Holmes *v.* The Sloop Joseph C. Griggs, 1 Ben. (U. S.) 81, 12 Fed. Cas. No. 6,640.

which might have exposed her to destruction if the services had not been rendered.[1] The fact of peril is to be ascertained from the circumstances surrounding the vessel at the time when the salvage service commences, and the fact of the escape of the vessel is not to be taken as proof that there was no peril.[2] And so, as a general rule, no salvage compensation can be claimed for approaching without request a vessel where the danger, if any ever existed, was over before the would-be salvors reached the vessel.[3]

Effect of Request for Service. — After assistance has been asked for and accepted, those responsible therefor are estopped to deny the necessity for the assistance.[4]

3. Service Rendered — *a.* IN GENERAL. — The general rule has been laid down that wherever service has been rendered in saving property on the sea or wrecked on the coast of the sea, the service is, in the sense of the maritime law, a salvage service.[5]

1. The Charlotte, 3 W. Rob. 71.

2. McGinnis *v.* The Steamboat Pontiac, Newb. Adm. 130; The Schooner Emulous, 1 Sumn. (U. S.) 207.

3. The Giacomo, 3 Hag. Adm. 344. And see The Henrietta, 3 Hag. Adm. 345, note.

4. **Operation of Request for Assistance as Estoppel to Deny Peril.** — The Huntsville, 12 Fed. Cas. No. 6,916; Sanderson *v.* The Ann Johnson, 21 Fed. Cas. No. 12,297*a*; Stevens *v.* The Steamboat S. W. Downs, Newb. Adm. 458, 23 Fed. Cas. No. 13,411.

5. **The Service Rendered — In General.** — The Schooner Emulous, 1 Sumn. (U. S.) 207; Cromwell *v.* Bark Island City, 1 Cliff. (U. S.) 221; The Schooner John Wurts, Olc. Adm. 462, 13 Fed. Cas. No. 7,434.

See Further as Illustrating the Rule, the following cases:

England. — The Duke of Clarence, 1 W. Rob. 346; The Æolus, L. R. 4 A. & E. 29; The Prince of Wales, 6 Notes Cas. (Eng.) 39.

United States. — Staten Island, etc., Ferry Co. *v* The Thomas Hunt, 22 Fed. Cas. No. 13,326; The Wallace 41 Fed. Rep. 894; The Richard S. Garrett, 55 Fed. Rep. 90; The Hudson, 68 Fed. Rep. 936; The Emma C. Knowles, 116 Fed. Rep. 781; The George W. Clyde, (C. C. A.) 86 Fed. Rep. 665. 80 Fed. Rep. 157; The City of Puebla, 79 Fed. Rep. 982; The Moonlight, 72 Fed. Rep. 282; The Rita, 88 Fed. Rep. 523; Spencer *v.* Steamboat Charles Avery, 1 Bond (U. S.) 117; The Centurion, 1 Ware (U. S.) 477, 5 Fed. Cas. No. 2,554; Crary *v.* The Schooner Eldorado, (U. S. Dist. Ct.) 24 How. Pr. (N. Y.) 128, 6 Fed. Cas. No. 3,362; Johnson *v.* The Industry, 13 Fed. Cas. No. 7,391; Baker Salvage Co. *v.* The Excelsior, 19 Fed. Rep. 436; The New Orleans, 23 Fed. Rep. 909; The Cloud, 29 Fed. Rep. 272; The W. D. B., Hask. (U. S.) 236, 29 Fed. Cas. No. 17,306; Winso *v.* The Conelius Grinnell, 26 Law Rep. 677, 30 Fed. Cas. No. 17,883.

Extinguishing Fire on Shipboard — *England.* — The City of Newcastle, 71 L. T. N. S. 848.

United States. — Wilmington Transp. Co *v.* The Old Kensington, 39 Fed. Rep 496; The Vanloo, 39 Fed. Rep. 570; The Roman Prince, 88 Fed. Rep. 336; The Labrador, 39 Fed. Rep. 503; Gibson *v.* The Alice Clark, 39 Fed. Rep. 621; The Rahway, 46 Fed. Rep. 809; The Isaac May, 46 Fed. Rep. 79; Gaynor *v.* The Gler, 31 Fed. Rep. 425; The James A. Garfield, 31 Fed. Rep. 175; Bowers *v.* The European, 44 Fed. Rep. 484; The O. M. Hitchcock, 25 Fed. Rep. 777; The Rio Grande, 22 Fed. Rep. 914 The Despatch, 50 Fed. Rep. 611; The General Knox, 74 Fed. Rep. 575; The Rita, 62 Fed. Rep. 761, 23 U. S. App. 435; The Lighter No. 14, 53 Fed. Rep. 143; The Lydia, 49 Fed. Rep. 666; Gibson *v.* The Alice Clark, 39 Fed. Rep. 621; The Bay of Naples, 44 Fed. Rep. 90; The Independent, 113 Fed. Rep. 702; The H. E. Runnels, 82 Fed. Rep. 755. 54 U. S. App. 245, The Arkansas, 84 Fed. Rep. 361; The Brandywine, 87 Fed. Rep. 652, 59 U. S. App. 16; The Barnegat, 55 Fed. Rep. 92; The Perseverance, 27 Fed. Rep. 478; The Key West, 11 Fed. Rep. 911; The Merjulio, 68 Fed. Rep. 935; The Georgia, 53 Fed. Rep. 933; Alexander *v.* Car Floats Nos. 1, 3, 4, and 5, 64 Fed. Rep. 887.

Removing Vessel from Vicinity of Fire — *England.* — The Tees, Lush. 505.

United States. — The William P. Hood, 114 Fed. Rep. 983; The Schooner Jacob E. Ridgway, 8 Ben. (U. S.) 179, 13 Fed. Cas. No. 7,155; The Alice M. Minot, 30 Fed. Rep. 212; Wilson *v.* Winchester, 30 Fed. Rep. 204; Howard *v.* The Rose, 34 Fed. Rep. 928; Gibson *v.* The Alice Clark, 39 Fed. Rep. 621; The Barge No. 127, 113 Fed. Rep. 529; The Peru, 99 Fed. Rep. 783; The Kaiser Wilhelm der Grosse, 106 Fed. Rep. 963; The Coya, 108 Fed. Rep. 413; The D. L. & W. No. 6 C., 53 Fed. Rep. 284; The Elena G., 61 Fed. Rep. 519; The Helen F. Robbins, 55 Fed. Rep. 1015; The City of Atlanta, 56 Fed. Rep. 252; The John Swan, 50 Fed. Rep. 447; The Holland, 44 Fed. Rep. 362; The Kenilworth, 41 Fed. Rep. 523; The Louisiana, 34 Fed. Rep. 663; The Khio, 46 Fed. Rep. 207; The Lone Star, 35 Fed. Rep. 793, *affirming* 34 Fed. Rep. 807; The Rose, 31 Fed. Rep. 176; The New York, 34 Fed. Rep. 922; The Bessie Whiting, 35 Fed. Rep. 79; The Carondelet, 36 Fed. Rep 714; The Kaaterskill, 48 Fed. Rep. 701; The Marie, 39 Fed. Rep. 501; The Oregon, 27 Fed. Rep. 871; The Avoca, 39 Fed. Rep. 567. See also The Straits of Gibraltar, 32 Fed. Rep. 297. But see Stevens *v.* The Steamboat S. W. Downs, Newb. Adm. 458, 23 Fed. Cas. No. 13,411.

Placing Navigator on Board of Vessel — *England.* — The Golondrina, L. R. 1 A. & E. 334; The Rasche, L. R. 4 A. & E. 127; The Skibladner, 3 P. D. 24; The Charlotte Wylie, 2 W. Rob. 495.

United States. — The Mabel, 22 Fed. Rep. 543; Williamson *v.* The Brig Alphonso, 1 Curt. (U. S.) 376; U. S. Mail Steamship Co. *v.* The

b. EXERCISE OF SKILL. — The salvage service may consist exclusively in the exercise of skill without any risk of life, expenditure of money, or the application of any extraordinary means.[1]

c. GIVING ADVICE. — Advice may, in certain circumstances, constitute a salvage service.[2] But it seems that the mere giving of information or advice as to locality, even to a foreign vessel, will not amount to a salvage service.[3]

d. SENDING ASSISTANCE TO DISTRESSED VESSEL. — A vessel going out of her way to procure assistance for the relief of a distressed ship is entitled to salvage.[4]

e. RECAPTURE. — The rescue or recapture of a vessel from the enemy,[5] or from pirates,[6] is a salvage service.

Taking Must Be Lawful. — To warrant the awarding of salvage on recapture, the taking must be lawful, for no claim can be maintained in a court of justice founded on an act in itself tortious.[7]

Recapture of Neutral Vessel or by Neutral Power. — On a recapture, therefore, made by a neutral power no claims for salvage can arise, because the act of retaking is a hostile act not justified by the situation of the nation to which the vessel

John Potter, 28 Fed. Cas. No. 16,792*a*; The J. L. Bowen, 5 Ben. (U. S.) 296, 13 Fed. Cas. No. 7,322, *citing* The Bark Czarina, 2 Sprague (U. S.) 48, 6 Fed. Cas. No. 3,531; The Roe, Swabey 84; The Janet Mitchell, Swabey 111; Lamar *v.* The Penelope, 14 Fed. Cas. No. 8,007; Butterworth *v.* The Washington, 4 Fed. Cas. No. 2,253; Coffin *v.* The Brig Akbar, 5 Fed. Rep. 456; The F. I. Merryman, 27 Fed. Rep. 313.

Placing Seamen on Board of Vessel. — The Wilhelmina, 1 Notes Cas. (Eng.) 376; The T. F. Oakes, 87 Fed. Rep. 229; Moore *v.* The Caribon, 17 Fed. Cas. No. 9,753*a*.

Relieving Stranded Vessel. — The Thomas B. Garland, 83 Fed. Rep. 1018; The Dolcoath, 16 Fed. Rep. 264; The Barney Eaton, 1 Biss. (U. S.) 242, 2 Fed. Cas. No. 1,028; The Sterling, 20 Fed. Rep. 751; Ulster Steam Ship Co. *v.* Cape Fear Towing, etc., Co., (C. C. A.) 94 Fed. Rep. 214; The Thornley, (C. C. A.) 98 Fed. Rep. 735; The James Turpie, 113 Fed. Rep. 700; The Maggie Ellen, 19 Fed. Rep. 221; The Agnes I. Grace, 49 Fed. Rep. 662; French *v.* The Steamer Excelsior, 5 Hughes (U. S.) 416, The Ranger, 75 Fed. Rep. 688; The Cassandra Adams, 30 Fed. Rep. 379; Scott *v.* The City of Worcester, 45 Fed. Rep. 119; The Joseph Laughlin *v.* The James Rumsey, 40 Fed. Rep. 909. But see Montgomery *v.* The Steamboat T. P. Leathers, Newb. Adm. 421, 17 Fed. Cas. No. 9,736.

Extricating from Collision. — The Woburn Abbey, 21 L. T. N. S. 707; The Annapolis, Lush. 355; The Vandyck, 47 L. T. N. S. 695, 5 Asp. M. Cas. 17; Pope *v.* The Sapphire, 19 Fed. Cas. No. 11,276.

Lying By in Readiness to Render Assistance. — The Philotaxe, 29 L. T. N. S. 515, 2 Asp. M. Cas. 141; The Ship Puritan, 7 Ben. (U. S.) 571, 20 Fed. Cas. No. 11,474; Allen *v.* Ship Canada, Bee Adm. 90, 1 Fed. Cas. No. 219; The Courier, 6 Fed. Cas. No. 3,283; The Indiana, 22 Fed. Rep. 925; The Lucy P. Miller, 48 Fed. Rep. 121; The Joseph Laughlin *v.* The James Rumsey, 40 Fed. Rep. 909.

Saving Cargo though Ship Is Lost. — The Santipore, 1 Spinks 231; The Medora, 1 Spinks 17; Hartfort *v.* Jones, 1 Ld. Raym. 393; The Steamship Circassian, 2 Ben. (U. S.) 171, 5 Fed. Cas. No. 2,723.

Services of Little Difficulty or Importance. — The Bomarsund, Lush. 77.

1. Exercise of Skill. — Lea *v.* Ship Alexander, 2 Paine (U. S.) 466; Boardman *v.* The Bethel, 3 Fed. Cas. No. 1,585.

2. Giving Advice as Salvage Service. — The Eliza, Lush. 536. See also American Ins. Co. *v.* Johnson, Blatchf. & H. Adm. 30.

3. See The Little Joe, Lush. 88.

4. Sending Assistance to Distressed Vessel. — The Sarah, 3 P. D. 39; The Ocean, 2 W. Rob. 91; The Crown, 6 Fed. Cas. No. 3,450; The Flottbek, (C. C. A.) 118 Fed. Rep. 954.

5. Recapture from Enemy. — The Progress, Edw. Adm. 210; Brevoor *v.* The Ship Fair American, 1 Pet. Adm. 87, 4 Fed. Cas. No. 1,847; Bas *v.* Tingy, 4 Dall. (U. S.) 37; Clayton *v.* The Ship Harmony 1 Pet. Adm. 70, 5 Fed. Cas. No. 2,871; The Schooner Adeline, 9 Cranch (U. S.) 244.

Recapture from a Confederate Cruiser. — Strout *v.* The Cuba, 23 Fed. Cas. No. 13,549.

Salvage Given to Captor in Lieu of Prize Money. — The Deer, 1 Lowell (U. S.) 95.

But in The Victory, 2 Sprague (U. S.) 226, it was held that vessels which pick up enemy's goods thrown overboard during a chase are entitled to them as captors, not as salvors.

Meritorious Service Necessary. — Talbot *v.* Seeman, 1 Cranch (U. S.) 1.

To Constitute Recapture the property must be taken from the actual or constructive possession of the enemy. The Edward and Mary, 3 C. Rob. 305; Phillips *v.* M'Call, 4 Wash. (U. S.) 141, 19 Fed. Cas. No. 11,104; The Ann Green, 1 Gall. (U. S.) 274.

Salvage Allowed to Ship Purchased from Enemy for Purpose of Restoration to Owner. — The Henry, Edw. Adm. 192.

As to the right to restoration upon the payment of salvage, see the title INTERNATIONAL LAW, vol. 16, p. 1189.

6. Recapture from Pirates. — Parter *v.* The Friendship, 18 Fed. Cas. No. 10,783; Davison *v.* Seal-skins, 2 Paine (U. S.) 324, 7 Fed. Cas. No. 3,661.

7. Taking Must Be Lawful. — Talbot *v.* See-

making the recapture belongs in relation to that from the possession of which such recaptured vessel was taken.[1] A neutral to whom was given a vessel captured by one belligerent from another is entitled to salvage where, before final adjudication, war breaks out between the country of the neutral and the country in which the ship is owned.[2] And salvage will be allowed for the recapture of a neutral armed vessel in the possession of the enemy, if there were well-founded reasons for the opinion that she was in imminent hazard of being condemned as a prize.[3]

f. SALVAGE AND TOWAGE DISTINGUISHED. — While towage and salvage involve widely different considerations, service of a towage character may be entitled to salvage compensation where it is rendered to a vessel in distress. A distinction generally accepted, in theory if not in application, is that a towage service is an employment of one vessel to expedite the voyage of another when nothing more is required than the acceleration of her progress, where, as when towage is rendered to a disabled vessel with the obvious purpose of relief from circumstances of danger either present or reasonably to be apprehended, and not merely to expedite her passage, compensation upon salvage principles is to be allowed.[4]

man, 1 Cranch (U. S.) 1; Davison *v.* Sealskins, 2 Paine (U. S.) 324.

1. Talbot *v.* Seeman, 1 Cranch (U. S.) 1; Davison *v.* Seal-skins, 2 Paine (U. S.) 324.

Recapture of Neutral Property by Neutral from Friendly Power. — Waite *v.* The Brig Antelope, Bee Adm. 233, 28 Fed. Cas. No. 17,045; Peck *v.* Randall, 1 Johns. (N. Y.) 165.

2. The Adventure, 8 Cranch (U. S.) 221.

3. Talbot *v.* Seeman, 1 Cranch (U. S.) 1, 4 Dall. (U. S.) 34; Murray *v.* Schooner Charming Betsy, 2 Cranch (U. S.) 64.

Recapture of Ransomed Vessel and Extinguishment of Ransom Claim. — Moodie *v.* Brig Harriet, Bee Adm. 128, 17 Fed. Cas. No. 9,744.

4. Distinction Between Salvage and Towage — *England.* — The Lady Egidia, Lush. 513; The Albion, Lush. 282; The Charles Adolphe, Swabey 153; The Herman Ludwig, Young (Nova Scotia) 211; Turnbull *v.* The Ship Strathnaver, 1 App. Cas. 58; The Jubilee, 4 Asp. M. Cas. 275; The Princess Alice, 3 W. Rob. 138; The Agamemnon, 48 L. T. N. S. 880; The Reward, 1 W. Rob. 177; The Harbinger, 16 Jur. 729, 20 Eng. L. & Eq. 641; Hine *v.* The Steam-Tug Thomas J. Scully, 6 Can. Exch. 318; The H. B. Foster, Abb. Adm. 222.

United States. — The Egypt, 17 Fed. Rep. 359; The Alaska, 23 Fed. Rep. 597; The J. C. Pfluger, 109 Fed. Rep. 93; The Flottbek, (C. C. A.) 118 Fed. Rep. 954; Phillips *v.* The U. S., 19 Fed. Cas. No. 11,107; The Raven, 27 Fed. Rep. 470; The Steamer Saragossa, 1 Ben. (U. S.) 551; The Steamship Rebecca Clyde, 5 Ben. (U. S.) 98, 20 Fed. Cas. No. 11,621; The Brig Minnie Miller, 6 Ben. (U. S.) 117, 17 Fed. Cas. No. 9,638; The D. W. Vaughan, 9 Ben. (U. S.) 26, 8 Fed. Cas. No. 4,222; The M. B. Stetson, 1 Lowell (U. S.) 119, 16 Fed. Cas. No. 9,363; The Allegiance, 6 Sawy. (U. S.) 68, 1 Fed. Cas. No. 207, James T. Abbott, 2 Sprague (U. S.) 101, 13 Fed. Cas. No. 7,202; The Henry Frank, 4 Woods (U. S.) 127; The Athenian, 3 Fed. Rep. 248; Atlas Steam-Ship Co. *v.* The Steam-Ship Colon, 4 Fed. Rep. 469; Ehrman *v.* The Steam-Ship Swiftsure, 4 Fed. Rep. 463, 5 Hughes (U. S.) 228; McConnochie *v.* Kerr, 9 Fed. Rep. 50; The Plymouth Rock, 9 Fed. Rep. 413; The Leipsic, 10 Fed. Rep. 585, 5 Fed. Rep. 108; The Hyderabad, 11 Fed. Rep. 749, 11 Biss. (U. S.) 112; The Arendal, 14 Fed. Rep. 580; The C. & C. Brooks, 17 Fed. Rep. 548; The Millinocket, 17 Fed. Cas. No. 9,609; Howard *v.* The Manhattan No. 12, 20 Fed. Rep. 391; The Young America, 20 Fed. Rep. 926; The M. Vandercook, 24 Fed. Rep. 472; The Wisconsin, 30 Fed. Rep. 879; The Mira A. Pratt, 31 Fed. Rep. 572; The Taylor Dickson, 33 Fed. Rep. 886; The Erin, 36 Fed. Rep. 712; The Italia, 42 Fed. Rep. 416; The Jarlen, 43 Fed. Rep. 176; New England Terminal Co. *v.* The M. Vandercook, 45 Fed. Rep. 262; The Tancarville, 45 Fed. Rep. 903; The Scow No. 19, 46 Fed. Rep. 406; The Dennis Valentine, 47 Fed. Rep. 664; Transfer No. 1, 53 Fed. Rep. 610; The O. C. De Witt, 59 Fed. Rep. 620; The Chinese Prince, 61 Fed. Rep. 697; The Hekla, 62 Fed. Rep. 941; The Spokane, 67 Fed. Rep. 254; The Beaconsfield, 67 Fed. Rep. 144; The Dania, 70 Fed. Rep. 398; The Catalina, (C. C. A.) 105 Fed. Rep. 633; Fulmer *v.* Patterson, 14 Phila. (Pa.) 527, 36 Leg. Int. (Pa.) 496, 9 Fed. Cas. No. 5,152; Phillips *v.* The U. S., 19 Fed. Cas. No. 11,107; Sturgis *v.* The Steamboat Joseph Johnson, (U. S. Dist. Ct.) 19 How. Pr. (N. Y.) 229, 23 Fed. Cas. No. 13,576; The Veendam, 46 Fed. Rep. 489; The Schooner J. F. Farlan, 3 Ben. (U. S.) 206, 13 Fed. Cas. No. 7,313, 8 Blatchf. (U. S.) 207, 13 Fed. Cas. No. 7,314; The Emily B. Souder, 15 Blatchf. (U. S.) 185, 8 Fed. Cas. No. 4,458; The Camanche, 8 Wall. (U. S.) 448; The Viola, 55 Fed. Rep. 829, 3 U. S. App. 637; The Golden Gate, 57 Fed. Rep. 661; The Weber Bros., 88 Fed. Rep. 92; The J. C. Pfluger, 109 Fed. Rep. 93; The Entire, 8 Fed. Cas. No. 4,502; The Morning Star, 6 Blatchf. (U. S.) 154, 17 Fed. Cas. No. 9,818; Sturgis *v.* The Vickery, 23 Fed. Cas. No. 13,577*a*; Corwin *v.* The Barge Jonathan Chase, 2 Fed. Rep. 268; Atlas Steam-Ship Co. *v.* The Steam-Ship Colon, 4 Fed. Rep. 469; The Rialto, 15 Fed. Rep. 124; The Cyclone, 16 Fed. Rep. 486; The Wasp, 34 Fed. Rep. 222; Spreckles *v.* The Brussels, 38 Fed. Rep. 524; South Carolina Steam-Boat Co. *v.* The Nellie Floyd, 39 Fed. Rep. 221; The W. F. Garrison, 1 Lowell (U. S.) 139, 29 Fed. Cas. No. 17,475; Bowley *v.* God-

g. SERVICES RENDERED ON REQUEST. — While a request for assistance to a vessel in peril is not necessary to a salvage service,[1] services rendered are not deprived of their salvage character merely because they were rendered upon request.[2] And, indeed, persons who assist a vessel in distress at the request of her master or owner with no definite arrangement for compensation must ordinarily be paid as salvors.[3]

4. Success of Service — *a.* IN GENERAL. — Salvage reward being for benefits actually conferred and not for meritorious exertions alone, proof of success to some extent is as essential as proof of service, for if the property is not saved, or, in case of capture, if it is not retaken, no compensation will be allowed.[4] But it is not necessary that the result should be brought about solely by the claimant, for if the vessel has been actually rescued from a situation of peril, all who have contributed at any stage of the rescuing operations are entitled to a share of the reward,[5] although the part taken by each would not of itself have produced that result.[6] And the rule applies if some effective assistance is rendered, although the most efficient part of the work was done by others.[7]

dard, 1 Lowell (U. S.) 154; The Steamship Emily B. Souder, 7 Ben. (U. S.) 550, 8 Fed. Cas. No. 4,455; The D. W. Vaughan, 9 Ben. (U. S.) 26, 8 Fed. Cas. No. 4,222; The Steamship Colon, 10 Ben. (U. S.) 60, 6 Fed. Cas. No. 3,024; The Steamer Costa Rica, 3 Sawy. (U. S.) 610, 6 Fed. Cas. No. 3,262; The James T. Abbott, 2 Sprague (U. S.) 101, 13 Fed. Cas. No. 7,202; Compagnie Commerciale De Transport, etc., *v.* Charente Steamship Co., 60 Fed. Rep. 921, 13 U. S. App. 662; The Obdam, 72 Fed. Rep. 543; The Great Northern, 72 Fed. Rep. 678; The Santa Ana, 107 Fed. Rep. 527; Hume *v.* J. D. Spreckles, etc., Co., (C. C. A.) 115 Fed. Rep. 51; Blunt *v.* The Frank, 3 Fed. Cas. No. 1,577.

Question of Fact. — "Whether a particular service was one of salvage or towage is always a question of fact to be ascertained from a consideration of the circumstances under which the court shall find the service was rendered." The J. C. Pfluger, 109 Fed. Rep. 93.

1. Request Not Essential to Salvage Service. — The Annapolis, Lush. 355; Spencer *v.* Steamboat Charles Avery, 1 Bond (U. S.) 117.

2. Salvage Services Rendered upon Request. — Adams *v.* Bark Island City, 1 Cliff. (U. S.) 210; The Independence, 2 Curt. (U. S.) 350. See also The S. A. Rudolph, 39 Fed. Rep. 331.

3. Persons Rendering Assistance on Request Without Agreement as to Compensation. — Emerson *v.* Bark Pandora, Newb. Adm. 438, 8 Fed. Cas. No. 4,442; Adams *v.* Bark Island City, 1 Cliff. (U. S.) 210; The Louisa Jane, 2 Lowell (U. S.) 295, 15 Fed. Cas. No. 8,532; The Osteonthe, 18 Fed. Cas. No. 10,608*a*; A Lot Whalebone, 51 Fed. Rep. 916.

For discussion of the effect of agreements for compensation, see *infra*, *Contracts for Salvage*.

4. Success of Service Necessary — *England.* — The Lockwoods, 9 Jur. 1017; Snow *v.* Aylan, 8 Jur. N. S. 753; The Chetah, 5 Moo. P. C. C. N. S. 278; The Zephyrus, 1 W. Rob. 329; The India, 1 W. Rob. 406; The Eintracht, 2 Asp. M. Cas. 198; The Dygden, 1 Notes Cas. (Eng.) 115; The Lepanto, (1892) P. 122; The Killeena, 6 P. D. 193; General Steam Nav. Co. *v.* De Jersey, 15 Moo. P. C. 486, Lush. 515.

United States. — The Sabine, 101 U. S. 384; The H. B. Foster, Abb. Adm. 222; The Sailor's Bride, Brown Adm. 68, 21 Fed. Cas. No. 12,220; The Aberdeen, 27 Fed. Rep. 479; The Steamboat Cheeseman *v.* Two Ferryboats, 2 Bond (U. S.) 363; Browning *v.* Baker, 2 Hughes (U. S.) 30, 4 Fed. Cas. No. 2,041, *affirmed* case unreported; The Whitaker, 1 Sprague (U. S.) 282, 29 Fed. Cas. No. 17,525; The Ship Henry Ewbank, 1 Sumn. (U. S.) 400; The Blackwall, 10 Wall. (U. S.) 1; The Choteau, 9 Fed. Rep. 211, *affirming* New Harbor Protection Co. *v.* The Steamer Charles P. Chouteau, 5 Fed. Rep. 463; The Brabo, 33 Fed. Rep. 884; The Angeline Anderson, 34 Fed. Rep. 925; Crary *v.* The Schooner El Dorado, (U. S. Dist. Ct.) 24 How. Pr. (N. Y.) 128, 6 Fed. Cas. No. 3,362; The Golden Gate, 57 Fed. Rep. 661; The L. W. Perry, 71 Fed. Rep. 745; Curry *v.* The Loch Goil, 6 Fed. Cas. No. 3,495; The Huntsville, 12 Fed. Cas. No. 6,916; The Strathnevis, 76 Fed. Rep. 855; Boyd *v.* The Towner, 3 Fed. Cas. No. 1,748*a*; Bryan's Case, 6 Ct. Cl. 128; The Barque Island City, 1 Black (U. S.) 128; Montgomery *v.* The Steamboat T. P. Leathers, Newb. Adm. 421, 17 Fed. Cas. No. 9,736.

Compensation Allowed on Principle of Quantum Meruit. — The Lepanto, (1892) P. 122; The Killeena, 6 P. D. 193; Hewett *v.* Aylan, 15 Moo P. C. 329; The Sailor's Bride, Brown Adm. 68, 21 Fed. Cas. No. 12,220; Seven Coal Barges, 2 Biss. (U. S.) 297; Byrne *v.* Johnson, 53 Fed. Rep. 840, 2 U. S. App. 520, *reversing* 50 Fed. Rep. 959.

5. McGinnis *v.* The Steamboat Pontiac, Newb. Adm. 130; Seven Coal Barges, 2 Biss. (U. S.) 297; The Strathnevis, 76 Fed. Rep. 855; The Henry Steers, Jr., 110 Fed. Rep. 578; The Flottbek, (C. C. A.) 118 Fed. Rep. 954.

This Rule Was Applied to one who rendered some assistance but without fault on his part was unable to perform his contract for the entire service. The Hestia, (1895) P. 193; The Aztecs, 21 L. T. N. S. 797; The Strathnevis, 76 Fed. Rep. 855; The Camellia, 9 P. D. 27.

Recovery of Anchors After Completion of General Salvage Services No Part of Service. — Colby *v.* Watson, 6 Moo. P. C. 334.

6. Hewett *v.* Aylan, 15 Moo. P. C. 329. See also The Rosalind, 12 L. T. N. S. 553.

Preventing Loss until Assistance Arrives. — The Mary N. Hogan, 30 Fed. Rep. 381; The Underwriter, 4 Blatchf. (U. S.) 94, 24 Fed. Cas. No. 14,341.

7. The Genessee, 12 Jur. 401.

Salvage will not be awarded, however, where the ship in distress extricates herself before the intended salvors come up, though risk was incurred;[1] nor where services were rendered if they were not required.[2]

b. EFFECT OF REQUEST FOR AID. — In *England* the rule has been laid down that efforts to give assistance by request or under an engagement, to a ship in distress, will, although the ship receives no benefit therefrom, be rewarded as being in the nature of salvage services, if the ship is otherwise saved,[3] but in the *United States* the question seems to be unsettled.[4]

5. Risk Incurred by Salvor. — To constitute a salvage service it is not necessary that any risk of injury to person or property of the salvor be incurred.[5] But, of course, the danger to which the salvor or his property may be exposed is a material factor on the question of the amount of compensation to be awarded.[6]

III. SUBJECTS OF SALVAGE — 1. In General. — Ships and their cargoes are, as a general rule, spoken of as the only proper subjects of maritime claim for salvage.[7]

2. Government Property. — Government property, like the property of an

1. The Ranger, 3 Notes Cas. (Eng.) 589, 9 Jur. 119.

Circumstances May Justify Payment by Salvee of Expenses Incurred. — But though no salvage may be awarded, yet circumstances may justify the court in directing the expenses of parties attempting to render a service, to be paid by the ship which had been in danger. The Ranger, 9 Jur. 119.

2. The Brandow, 29 Fed. Rep. 878.

Presence of Other Salvors Rendering Service Unnecessary. — The Avoca, 39 Fed. Rep. 567.

3. The Undaunted, Lush. 90. See also The Cambrian, 76 L. T. N. S. 504; The Aztecs, 21 L. T. N. S. 797; The Melpomene, 29 L. T. N. S. 405; The Benlarig, 14 P. D. 3.

Unsuccessful Attempt, by Request, Taken into Consideration in Making Award for Subsequent Successful Services. — The Avenir, Ir. R. 2 Eq. 111.

4. Some of the authorities seem to adopt the English view. See The M. B. Stetson, 1 Lowell (U. S.) 119; The Flottbek, (C. C. A.) 118 Fed. Rep. 954.

But in The Henry Steers, Jr., 110 Fed. Rep. 578, it was held that a request for aid by a vessel in distress does not authorize compensation therefor unless the aid rendered is helpful in the final saving of the property.

5. Incurring Risk by Salvor Unnecessary. — The Westminster, 1 W. Rob. 232; The Pericles, Brown L. 81; The Phantom, L. R. 1 A. & E. 58; The Steamboat Narragansett, Olc. Adm. 388; The Acacia, 1 Fed. Cas. No. 22; Boardman *v.* The Bethel, 3 Fed. Cas. No. 1,585; The Plymouth Rock, 9 Fed. Rep. 413; The Fannie Brown, 30 Fed. Rep. 215; Blagg *v.* The Steamboat E. M. Bicknell, 1 Bond (U. S.) 270, 3 Fed. Cas. No. 1,476; Spencer *v.* Steamboat Charles Avery, 1 Bond (U. S.) 117; The Narragansett, 1 Blatchf. (U. S.) 211.

6. See *infra*, this title, *Amount of Award.*

7. Subjects of Salvage in General. — Wells *v.* The Gas Float Whitton No. 2, (1897) A. C. 337; Cope *v.* Vallette Dry Dock Co., 119 U. S. 625, *affirming* 10 Fed. Rep. 142.

Derelict Boat. — Maltby *v.* A Steam Derrick-Boat, 3 Hughes (U. S.) 477, 16 Fed. Cas. No. 9,000.

Vessel Anchored in Perilous Position. — The Union Express, Brown Adm. 516, 24 Fed. Cas. No. 14,363.

Stranded Vessel. — Congdon *v.* The Eleanor, 42 Fed. Rep. 543.

Drifting Yacht. — Lahey *v.* The Yacht Maple Leaf, 6 Can. Exch. 173.

Dismasted Vessel. — The Independence, 2 Curt. (U. S.) 350, 13 Fed. Cas. No. 7,014.

Dismantled Steamboat. — It has been held that salvage services can be rendered to a dismantled steamboat, moored on a navigable river, and undergoing alterations and repairs for the purpose of being fitted for use as a wharf-boat. The Old Natchez, 9 Fed. Rep. 476, *affirmed* 9 Fed. Rep. 478.

But in The Steamboat Hendrick Hudson, 3 Ben. (U. S.) 419, it was held that a dismantled steamboat used as a hotel and saloon, though capable of being towed from place to place, is not the subject of salvage.

Drifting Canal Boat. — Stilwell *v.* The Major Anderson, 23 Fed. Cas. No. 13,452; The Canal-Boat Ontario, 8 Ben. (U. S.) 500, 18 Fed. Cas. No. 10,541; The Canal-Boat Cap. Geo. W. Wright, 8 Ben. (U. S.) 219; The William A. Taylor, 47 Fed. Rep. 70.

Ferryboats. — The Steamboat Cheeseman *v.* Two Ferryboats, 2 Bond (U. S.) 363.

A Bath House Built on Boats and designed for navigation and transportation, is a subject of salvage. The Public Bath No. 13, 61 Fed. Rep. 692.

Barge Adrift Held Subject of Salvage. — The Mac, *overruling* 7 P. D. 38, 126; The Lee, 24 Fed. Rep. 47; Seven Coal Barges, 2 Biss. (U. S.) 297; Seaman *v.* Erie R. Co., 2 Ben. (U. S.) 128, 21 Fed. Cas. No. 12,582; Scows 9, 16, and 24, 45 Fed. Rep. 901; The Albany, 42 Fed. Rep. 64; The Rescue *v.* The George B. Roberts, 64 Fed. Rep. 139; Fletcher *v.* The John I. Bardy, 19 App. Cas. (D. C.) 174.

Bills of Exchange or Other Papers Evidencing a Debt or Title Not Subject of Salvage. — The Emblem, 8 Fed. Cas. No. 4,434, 2 Ware (U. S.) 68.

Use in Trade and Commerce, of the property saved, is not essential to salvage. The Public Bath No. 13, 61 Fed. Rep. 692.

individual, is, in general, subject to salvage compensation.[1] Such compensation may be enforced against the United States by a personal action,[2] or by a proceeding *in rem*,[3] unless, in order to sustain the proceeding, it is necessary to invade the actual possession of the federal authorities under process of the court.[4]

Vessel in Public Service of Foreign Country. — And since every government accords to every other friendly power the same respect to its dignity and sovereignty which it enjoys within its own dominions, no proceeding *in rem* can be had against a vessel in the public service of a foreign country.[5]

3. Property Lost or Found Floating at Sea. — There has been some conflict of decision with respect to claims for salvage service in rescuing goods lost at sea and found floating upon the surface or cast upon the shore. Where they have belonged to a ship or vessel as part of its furniture or cargo, they clearly come under the head of wreck, flotsam, jetsam, ligan or derelict, and salvage may be claimed upon them.[6] And even where they have no connection with a ship or vessel, as in the case of a drifting raft of timber, some authorities have held them the subject of salvage.[7] But the jurisdiction of the admiralty courts over salvage does not extend to all property exposed to perils of the sea, even though it is used to assist navigation.[8]

4. Life Salvage. — In the absence of statute, salvage for the saving of human

1. Government Property. — The S. L. Davis, 6 Blatchf. (U. S.) 138, 22 Fed. Cas. No. 12,939, *affirmed* 10 Wall. (U. S.) 15; The Marquis of Huntly, 3 Hag. Adm. 246. See also The Santissima Trinidad, 7 Wheat. (U. S.) 283; U. S *v.* Wilder, 3 Sumn. (U. S.) 308; The Siren, 7 Wall. (U. S.) 161.

Bringing in Royal Fish. — Cinque Ports *v.* Rex, 2 Hag. Adm. 438.

Government Vessel. — In The Himalaya, Swabey 515, salvage was allowed for drawing a government vessel off a mud bank.

In the English Courts, when it is made to appear that property of the government ought in justice to contribute to salvage, it seems to be the usual course of proceeding for the proper officer of the government to consent in court that it may take jurisdiction of the matter. This consent is given by the authority of the king, who thus submits to be sued in his own courts. The Marquis of Huntly, 3 Hag. Adm. 246. See also The Davis, 10 Wall. (U. S.) 15.

2. Personal Action Against United States. — U. S. *v.* Morgan, (C. C. A.) 99 Fed. Rep. 570.

3. Personal Property of Government on Board of Private Vessel. — The Davis, 10 Wall. (U. S.) 15. See also U. S. *v.* Wilder, 3 Sumn. (U. S.) 308.

Mails. — The mails of the United States cannot be considered in this regard as property or as liable to detention or sale, nor is the salvage to be enhanced at the expense of the other property because of the saving of the mails. The Merchant, 17 Fed. Cas. No. 9,435.

Mail Bags may perhaps be considered as property, but not their contents; and both are upon principles of public policy to be exempted from detention or sale upon a claim of salvage. The Merchant, 17 Fed. Cas. No. 9,435.

4. See The Davis, 10 Wall. (U. S.) 15; Briggs *v.* Light-Boat Upper Cedar Point, 11 Allen (Mass.) 181.

Property Held under Customs Laws. — The Marion, 99 Fed. Rep. 448.

5. Vessel in Public Service of Foreign Country. — Long *v.* The Tampico, 16 Fed. Rep. 491. And this although the cargo belonged to a private individual. The Constitution, 4 P. D. 39.

6. Hartshorn *v.* Twenty-Five Cases Silk, 11 Fed. Cas. No. 6,168*a*. See Cope *v.* Vallette Dry Dock Co , 119 U. S. 625

Boilers Fallen from Steamboat. — The Silver Spray's Boilers, Brown Adm. 349.

Cotton Dumped from a Lighter and Found Floating Away. — Twenty-three Bales Cotton, 9 Ben. (U. S.) 48, 24 Fed. Cas. No. 14,284.

The Common-law "Wreck of the Sea," if found within high water mark on shore, is within the privilege of salvage. The Brig John Gilpin, Olc. Adm. 77.

Goods Being Towed. — It has been intimated that where goods are being towed from place to place, although they are not, strictly speaking, cargo, yet they partake of its character and are closely analogous, and that where they have broken loose and are in peril the law of salvage applies in the one case as well as in the other. Wells *v.* Gas Float Whitton No. 2, (1897) A. C. 337.

7. Rafts of Timber Found Drifting. — A Raft Spars, Abb. Adm. 485, 20 Fed. Cas. No. 11,529; Fifty Thousand Feet Timber, 2 Lowell (U. S.) 64; Bywater *v.* A Raft Piles, 42 Fed. Rep. 917 (*distinguishing* Tome *v.* Four Cribs Lumber, Taney (U. S.) 543); Muntz *v.* A Raft Timber, 15 Fed. Rep. 555; Whitmire *v.* Cobb, (C. C. A.) 88 Fed. Rep. 91; Keteltas *v.* Raft Timber, 14 Fed. Cas. No. 7,741*a*. *Compare* Palmer *v.* Rouse, 3 H. & N. 505; Raft of Timber, 2 W. Rob. 251; Nicholson *v.* Chapman, 2 H. Bl. 254; Gastrel *v.* A Cypress Raft, 2 Woods (U. S.) 213; A Raft Cypress Logs, 1 Flipp. (U. S.) 543.

8. Floating Dry-dock Not the Subject of Salvage. — Cope *v.* Vallette Dry Dock Co., 119 U. S. 625, *affirming* 10 Fed. Rep. 142. See also Salvor Wrecking Co. *v.* Sectional Dock Co., 3 Cent. L. J. 640, 21 Fed. Cas No. 12,273.

A Gas Float Used for Purpose of Lightship Not Subject of Salvage. — Wells *v.* Gas Float Whitton No. 2, (1897) A. C. 337.

life dissociated from the saving of property is not allowed,[1] except for the saving of the life of a slave;[2] but if life is saved in connection with the preservation of property, it is proper for the court reasonably to enhance the salvage on that account.[3]

In England, under the Merchant Shipping Act, life salvage is expressly provided for under specified conditions.[4]

5. Wearing Apparel. — The wearing apparel of passengers, or of the crew, and other things belonging to them *ejusdem generis*, are privileged, and are not properly included in the class of property on which salvage is to be allowed, and should forthwith be delivered up to the owners.[5]

IV. Who May Be Salvors — 1. In General. — As a general rule, all persons who do not occupy a relation to the vessel or property to be salved which imposes upon them a duty to preserve the same may, through the rendition of services in the preservation of such vessel or property, occupy the position of and may be entitled to remuneration as salvors.[6] On the other hand, a person who occupies such a relation to the salved property that a duty is imposed upon him to render the services for which a salvage reward is claimed cannot demand remuneration as a salvor.[7] Persons who, through their fault, have contributed to place a vessel or cargo in the perils which render necessary the services for which salvage reward is claimed are not entitled to salvage;[8]

1. Salvage for Saving Human Life Not Allowed. — The Zephyrus, 1 W. Rob. 329; The Attacapas, 3 Ware (U. S.) 65, 2 Fed. Cas. No. 637; Baker *v.* The Ship "Tros," 10 Phila. (Pa.) 223, 31 Leg. Int. (Pa.) 133, 2 Fed. Cas. No. 783; Lamar *v.* The Penelope, 14 Fed. Cas. No. 8,007; The Mulhouse, 22 Law Rep. 276, 17 Fed. Cas. No. 9,910; The Ship Puritan, 7 Ben. (U. S.) 571, 20 Fed. Cas. No. 11,474; The Plymouth Rock, 9 Fed. Rep. 413; The George W. Clyde, 80 Fed. Rep. 157. *Compare* Marcy *v.* Chambers, 15 La. Ann. 77.

2. Salvage for Saving Lives of Slaves. — Gedney *v.* L'Amistad, 10 Fed. Cas. No. 5,294*a*; Bass *v.* Five Negroes, Bee Adm. 201, 2 Fed. Cas. No. 1,093; Small *v.* The Schooner Messenger, 2 Pet. Adm. 284, 22 Fed. Cas. No. 12,961.

3. The Aid, 1 Hag. Adm. 84; The Mulhouse, 22 Law Rep. 276, 17 Fed. Cas. No. 9,910; Hart *v.* Seven Cases of Specie, 2 Hawaii 175.

4. Provision for Life Salvage under English Merchant Shipping Act. — The Bartley, Swabey 198; The Coromandel, Swabey 205; Cargo ex Woosung, 3 Asp. M. Cas. 50; The Pensacola, Brown & L. 306; The Cairo, L. R. 4 A. & E. 184; The Johannes, Lush. 182; The Annie, 12 P. D. 50; The Renpor, 8 P. D. 115; The Anna Helena, 5 Asp. M. Cas. 142; The Eintracht, 29 L. T. N. S. 851, 2 Asp. M. Cas. 198; The Atlantic, Young (Nova Scotia) 170; The Fusilier, Brown & L. 350; The Zephyr, 2 Hag. Adm. 43; The Cargo ex Schiller, 2 P. D. 145; The Queen Mab, 3 Hag. Adm. 242; The Pacific, (1898) P. 170, 67 L. J. P. 65; Silver Bullion, 2 Spinks 70; The Cargo ex Sarpedon, 3 P. D. 28. See also The Thomas Fielden, 32 L. J. Adm. 61.

5. Wearing Apparel. — The Willem III., L. R. 3 A. & E. 487; The Rising Sun, 1 Ware (U. S.) 385, 20 Fed. Cas. No. 11,858.

6. Persons Not under Duty to Preserve Property — *England.* — The Gas Float Whitton No. 2, (1896) P. 49.

United States. — McGinnis *v.* The Steamboat Pontiac, Newb. Adm. 130; The Schooner Wave *v.* Hyer, 2 Paine (U. S.) 131; The Florida, 22 Fed. Rep. 617; The Cherokee, 31 Fed. Rep. 167; Browning *v.* Baker, 2 Hughes (U. S.) 30, 4 Fed. Cas. No. 2,041; The Ottawa, 1 Lowell (U. S.) 274, 18 Fed. Cas. No. 10,617; Williamson *v.* The Brig Alphonso, 1 Curt. (U. S.) 376, 30 Fed. Cas. No. 17,749.

New York. — Baker *v.* Hoag, 7 N. Y. 555.

Day Watchman — Night Services. — A day watchman, who was under no duty, by reason of his employment, to render services at night after he had been regularly relieved by the night watchman, has been held entitled to claim salvage remuneration for services rendered at night after he had been so relieved. The Florida, 22 Fed. Rep. 617.

7. Persons under Duty to Preserve Property. — 3 Kent's Com. 246.

England. — The Sappho, 8 Moo. P. C. C. N. S. 66.

United States. — Hobart *v.* Drogan, 10 Pet. (U. S.) 122; The Schooner Wave *v.* Hyer, 2 Paine (U. S.) 131; The Clarita, 23 Wall. (U. S.) 1; Murphy *v.* The Ship Suliote, 5 Fed. Rep. 99; The Baker, 25 Fed. Rep. 771; Kidney *v.* The Ocean Prince, 38 Fed. Rep. 259; The Nebraska, (C. C. A.) 75 Fed. Rep. 598; The C. F. Bielman, 108 Fed. Rep. 878; Beane *v.* The Schooner Mayurka, 2 Curt. (U. S.) 72, 2 Fed. Cas. No. 1,175; The John Perkins, 21 Law Rep. 87, 13 Fed. Cas. No. 7,360; Mesner *v.* Suffolk Bank, 1 Law Rep. 249, 17 Fed. Cas. No. 9,493. See also The Angeline, 1 Fed. Cas. No. 385.

8. Person Negligently Imperilling Property. — Cargo ex Capella, L. R. 1 A. & E. 356; The Hannibal, L. R. 2 A. & E. 55; The Clarita, 23 Wall. (U. S.) 1; The Aguan, 48 Fed. Rep. 320.

Associates of a Salvor with whom a master corruptly agrees to wreck his ship cannot recover salvage. Malone *v.* The Pedro, 16 Fed. Cas. No. 8,995.

A Tug, through whose negligence the tow is put in a dangerous position, is not entitled to salvage for its rescue of the tow. The Brig Homely, 8 Ben. (U. S.) 495.

but persons otherwise entitled as salvors cannot be defeated in making their claim because the vessel was fraudulently imperiled by her master, unless it appears that they were parties to the fraud, or were cognizant of it while it was going on, and did not interfere to prevent it, as far as they could, or unless they endeavored to conceal the master's misconduct and screen him from detection.[1] To entitle a person to salvage remuneration he must have participated in the rendition of the salvage services;[2] and all persons aiding in the rendition of the salvage services are entitled to share in the salvage award.[3] When part of the crew from the salving vessel is placed on the salved vessel to navigate her or to aid in her navigation, the entire crew of the salving vessel is considered as aiding in the salvage services so as to be entitled to share in the award.[4] So, also, where the salvage services consist of a long towage, the whole crew of the salving vessel is entitled to share in the award.[5]

Unlicensed Wrecking Vessels. — A law requiring vessels engaged in wrecking on the coast of Florida to have a wrecking license justifies the exclusion of unlicensed vessels from participating in salvage services, and sharing in the awards therefor, only when licensed vessels are present which are capable of rendering the required services, and if the services of unlicensed vessels are accepted they are entitled to salvage remuneration.[6]

Shipwrecked Persons. — Shipwrecked persons who render services in the preservation of a derelict are entitled to salvage reward.[7]

Minors and Apprentices. — A minor[8] or an apprentice[9] may render salvage services, and the reward is to be paid to the minor or apprentice personally and not to the father or the master.

Corporations. — Corporations owning vessels and rendering services to vessels in distress may be entitled to salvage reward.[10]

1. Brevoor *v.* The Ship Fair American, 1 Pet. Adm. 87; Malone *v.* The Pedro, 16 Fed. Cas. No. 8,995.

2. The Coriolanus, 15 P. D. 103.

3. The Bark Lovetand, 5 Fed. Rep. 105.

A Tug Towing under the Direction of the Fire Department of a City, fire engines commonly used on land, from a wharf, into a harbor where a vessel is on fire, and laying alongside of the burning vessel while the engines throw water upon her, is entitled to salvage, the fire being successfully extinguished. The owners of the tug will not be deprived of salvage because the representatives of the fire department have not made a claim as cosalvors. The Blackwall, 10 Wall. (U. S.) 1.

A Mate is not to be denied salvage compensation because the service performed by him was at the command of the master, as the master has no right to compel the mate to perform a salvage service. Williamson *v.* The Brig Alphonso, 1 Curt. (U. S.) 376.

4. **Crew of Salving Vessel.** — The Great Eastern, 11 L. T. N. S. 516; The Baltimore, 2 Dods. 132; The Mountaineer, 2 W. Rob. 7; The Charles, L. R. 3 A. & E. 536; Butterworth *v.* The Washington, 4 Fed. Cas. No. 2,253; The Brig Huntress, 1 Phila. (Pa.) 122, 7 Leg. Int. (Pa.) 202, 12 Fed. Cas. No. 6,912. See also the section *Apportionment of Salvage*.

Part of a ship's crew going on board a vessel found in distress and bringing her into port have no exclusive claim in the salvage due for her preservation. The members of the crew who remained in their own ship, if equally ready to go, are equally entitled to the reward. The Baltimore, 2 Dods. 132.

5. Hine *v.* The Steam-Tug Thomas J. Scully, 6 Can. Exch. 318.

6. Pent *v.* Two Thousand Eight Hundred and Fifty Dollars, 19 Fed. Cas. No. 10,961*a*.

7. The Two Friends, 2 W. Rob. 349.

8. **Minor.** — Browning *v.* Baker, 2 Hughes (U. S.) 30, 4 Fed. Cas. No. 2,041.

9. **Apprentice.** — Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 240, 16 Fed. Cas. No. 9,230; The Two Friends, 2 W. Rob. 349. See also The Columbine, 2 W. Rob. 186.

10. **Corporations.** — The Cybele, 47 L. J. Adm. 86; Union Tow-Boat Co. *v.* The Bark Delphos, Newb. Adm. 412; The Camanche, 8 Wall (U. S.) 448; The Blackwall, 10 Wall. (U. S.) 1; The Excelsior, 123 U. S. 40; The Egypt, 17 Fed. Rep. 359; The Venezuela, 50 Fed. Rep. 607; The Birdie, 7 Blatchf. (U. S.) 238, 3 Fed. Cas. No. 1,432; The Morning Star, 6 Blatchf. (U. S.) 154, 17 Fed. Cas. No. 9,818; The Ship Stratton Audley, 3 Ben. (U. S.) 241, 23 Fed. Cas. No. 13,529, *affirmed* 8 Blatchf. (U. S.) 264, 23 Fed. Cas. No. 13,530.

Salvage rewards should be granted as freely to incorporated companies engaged in wrecking and salvage business as to individuals. The Kimberley, 40 Fed. Rep. 289.

In Baker *v.* Hemenway, 2 Lowell (U. S.) 501, the court, in reviewing the decisions as to salvage awards to corporations, said: "It has been held by the courts there (New York) that a corporation organized for saving vessels, and paying its men wages which did not vary with the service performed, could not be salvors. The decision was overruled by the Supreme Court. See The Morning Star, 6 Blatchf. (U. S.) 154; The Camanche, 8 Wall.

Ships Sailing in Company. — Where ships sail in company without any special mutual obligation having been entered into to aid each other in distress, the crew of one rendering services to the other in distress may be entitled to salvage remuneration,[1] but when they sail under agreement to render mutual assistance a claim by one for salvage services to the other cannot be sustained.[2]

Tug Aiding Tow. — A steam tug, in case she performs extraordinary services outside of her towage contract, may be entitled to salvage compensation if it appears that the services were meritorious, and saved the property from an impending peril which supervened subsequent to the original towing undertaking.[3] And a contract for towage service to certain ships within certain limits does not preclude a claim for salvage for extraordinary services rendered outside of such limits. Still, to entitle a tug to claim salvage for services rendered to her tow the services must have been extraordinary and not within the contemplation of the towage contract.[4]

Tow Aiding Tug. — Where a tug with tow becomes disabled, and the tow renders services in aid of the tug, the tow may be entitled to salvage award.[5]

Between Tugs Assisting in Tow. — So, also, where one tug assists another which became disabled while the two were making a tow, the former was held entitled to salvage remuneration.[6]

Vessels in Collision. — Where two vessels come in collision, if one is not disabled, it is her duty to render all possible aid to the other, and salvage claim cannot be made, as a general rule, for such services,[7] and this is especially true

(U. S.) 448. In the meantime, two more cases of the kind have arisen in that district, and Judge Blatchford, refusing salvage, had allowed to the corporation what he called a liberal allowance for work and labor. The Schooner J. F. Farlan, 3 Ben (U. S.) 206; The Ship Stratton Audley, 3 Ben. (U. S.) 241. When these cases were reviewed in the Circuit Court, the decision of the Supreme Court had reversed the rule on which they were avowedly decided; but Judge Woodruff, nevertheless, affirmed the decrees, as having awarded a sufficient salvage. The J. F. Farlan, 8 Blatchf. (U. S.) 207; The Stratton Audley, 8 Blatchf. (U. S.) 264. That affirmance was wrong, unless Judge Blatchford had in fact, though not in name, given salvage. And such I suppose to be the case. He spoke of a liberal compensation; but liberality is salvage; there is no place for liberality in an action of contract. The Circuit Court in effect decided in those cases that salvage performed by means of towage in the harbor of New York should be compensated without any close attention to the amount saved, but rather as a liberal and enlarged compensation for work and labor."

1. Ships Sailing in Company. — Williamson *v.* The Brig Alphonso, 1 Curt. (U. S.) 376, 30 Fed. Cas. No. 17,749. See also The Liholiho *v.* 1206 Bags Sugar, 9 Hawaii 323.

The owners, master and crew of a steamship, chartered to the government as a transport under the ordinary form of government charter, incorporating the transport regulations (by which it is provided that " when necessary, steam transports will be required to tow other vessels "), are entitled to recover for salvage service rendered to a ship and her freight, even though the services be rendered with the assistance of a naval officer and naval seamen, and the salved vessel be laden (*inter alia*) with government stores. The Bertie, 55 L. T. N. S. 520, 6 Asp. M. Cas. 26.

2. Thus, where vessels sail as salvors, and under an agreement to render mutual assistance, the court will not entertain a claim for salvage services rendered by one to the other. The Zephyr, 2 Hag. Adm. 43.

3. Tug Aiding Tow. — The I. C. Potter, L. R. 3 A. & E. 296; The Minnehaha, Lush. 335; The Saratoga, Lush. 318; The Galatea, Swabey 349; Five Steel Barges, 15 P. D. 142; The Pericles, Brown & L. 80; The Connemara, 108 U. S. 352; The Plymouth Rock, 12 Fed. Rep. 634; The City of Haverhill, 66 Fed. Rep. 159. See also The Clarita, 23 Wall. (U. S.) 1.

4. The Liverpool, (1893) P. 154.

Thus, a steamer, though under the circumstances justified in casting off a tow after the latter's collision with another vessel, is not entitled to salvage for subsequently taking the tow to safety because of the contract of towage. The Annapolis, Lush. 355.

5. Tow Aiding Tug. — The I. J. Merritt, 106 Fed. Rep. 970.

6. Tugs Assisting in Tow. — The Levi Davis, 9 Fed. Rep. 715.

7. Vessels in Collision. — The Clarita, 23 Wall. (U. S.) 1. See also The Celt, 3 Hag. Adm. 328; The Ericsson, Swabey 38; The Despatch, Swabey 140; Beane *v.* The Schooner Mayurka, 2 Curt. (U. S.) 72, 2 Fed. Cas. No. 1,175.

Collision Between Tow and Vessel — Aid Rendered by Tug. — A collision occurred between two vessels, A and B. A was in tow of a steam tug; the tug afterwards rendered assistance to B. B was found solely to blame for the collision. It was held that the tug's right of salvage remuneration was not affected by 25 & 26 Vict., c. 63, § 33, which makes it the duty of ships mutually to assist one another after a collision. The Hannibal, L. R. 2 A. & E. 53.

where the collision was owing to the fault of the vessel rendering the services for which salvage is claimed.[1]

Stevedore and Employees. — The employees of a stevedore, who under contract was loading a cargo, sleeping upon the vessel during the labor of loading were considered in the same class as passengers and crew of the vessel and denied a salvage reward for services in extinguishing a fire on the vessel.[2] But a stevedore who had contracted to discharge the cargo of a vessel was held entitled to salvage remuneration for services in aid of the vessel and part of the cargo unloaded, rendered necessary through the distress of the vessel occurring while being unloaded.[3]

2. Officers and Crew of Salved Vessel. —The officers and seamen belonging to the vessel salved cannot, as a general rule, claim a salvage remuneration for services rendered in aid of the vessel or its cargo when in distress.[4] Where the crew of a vessel have been discharged from further duty to preserve the vessel, they may be entitled to salvage remuneration for subsequent services in her preservation.[5] Thus, when a vessel has been abandoned by her master

1. The Glengaber, L. R. 3 A. & E. 534; The Clarita, 23 Wall. (U. S.) 1; The Sampson, 4 Blatchf. (U. S.) 31; The Chas. E. Soper, 19 Fed. Rep. 844.

2. **Employees of Stevedore.** — Kidney *v.* The Ocean Prince, 38 Fed. Rep. 259.

3. The R. D. Bibber, 33 Fed. Rep. 55.

4. **Officers and Crew of Salved Vessel** — *England.* — Newman *v.* Walters, 3 B. & P. 612; The Neptune, 1 Hag. Adm. 235; The Robert and Anne, 1 Stuart Adm. (L. C.) 253; The Governor Raffles, 2 Dods. 14; The Speedwell, 21 Law Rep. 99.

United States. — Miller *v.* Kelly, Abb. Adm. 564; The Clarita, 23 Wall. (U. S.) 1; Lea *v.* Ship Alexander, 2 Paine (U. S.) 466; The Schooner Wave *v.* Hyer, 2 Paine (U. S.) 131; McGinnis *v.* The Steamboat Pontiac, Newb. Adm. 130; The Antelope, 1 Lowell (U. S.) 130; Hobart *v.* Drogan, 10 Pet. (U. S.) 108; The Olive Branch, 1 Lowell (U. S.) 286; The Barney Eaton, 1 Biss. (U. S.) 242; Coffin *v.* The Brig Akbar, 5 Fed. Rep. 456; Kidney *v.* The Ocean Prince, 38 Fed. Rep. 259; The C. P. Minch, (C. C. A.) 73 Fed. Rep. 859; The Nebraska, C. C. A.) 75 Fed. Rep. 598; The C. F. Bielman, 108 Fed. Rep. 878; The Acorn, 21 Law Rep. 99, 1 Fed. Cas. No. 30; The D. M. Hall *v.* The John Land, 7 Fed. Cas. No. 3,939; The D. W. Vaughan, 9 Ben. (U. S.) 26, 8 Fed. Cas. No. 4,222; Hand *v.* The Schooner Elvira, Gilp. (U. S.) 60, 11 Fed. Cas. No. 6,015; The Holder Borden, 1 Sprague (U. S.) 144, 12 Fed. Cas. No. 6,600; The John Perkins, 21 Law Rep. 87, 13 Fed. Cas. No. 7,360; Le Tigre's Case, 3 Wash. (U. S.) 567, 15 Fed. Cas. 8,281; Mesner *v.* Suffolk Bank, 1 Law Rep. 249, 17 Fed. Cas. No. 9,493; Miller *v.* Kelly, Abb. Adm. 564, 17 Fed. Cas. No. 9,577; The Olive Branch, 1 Lowell (U. S.) 286, 18 Fed. Cas. No. 10,490; Phillips *v.* M'Call, 4 Wash. (U. S.) 141, 19 Fed. Cas. No. 11,104; Roberts *v.* The Ocean Star, 20 Fed. Cas. No. 11,908; The Ship Two Catherines, 2 Mason (U. S.) 319, 24 Fed. Cas. No. 14,288; Hobart *v.* Drogan, 10 Pet. (U. S.) 108.

One member of the crew of a disabled vessel is not entitled to salvage merely because he did extra labor on account of the sickness of the other members of the crew. Coffin *v.* The Brig Akbar, 5 Fed. Rep. 456.

A seaman cannot have salvage for the boat which has brought him to land after the loss of his ship. Price *v.* Sears, 2 Lowell (U. S.) 553, 19 Fed. Cas. No. 11,416.

A Master for any ordinary services in saving the vessel or cargo cannot assert a claim for salvage. McGinnis *v.* The Steamboat Pontiac, Newb. Adm. 130.

In disaster, the master of the vessel is the agent and representative of the cargo as well as of the ship with regard to matters connected with its safety and preservation and is not entitled to salvage remuneration for preserving the cargo. The Aguan, 48 Fed. Rep. 320.

Ship's Surgeon. — Phillips *v.* M'Call, 4 Wash. (U. S.) 141, 19 Fed. Cas. No. 11,104.

Steamboats. — The rules of the marine law relative to the exertions required of seamen in cases of shipwreck, or of disaster at sea, are equally applicable to navigation by steamboats. Mesner *v.* Suffolk Bank, 1 Law Rep. 249, 17 Fed. Cas. No. 9,493.

A Promise of Reward to the crew of the distressed vessel, to secure their exertions in saving a passenger's property, was held not to be binding, for want of consideration. Mesner *v.* Suffolk Bank, 1 Law Rep. 249, 17 Fed. Cas. No. 9,493.

5. **Exception to Rule.** — 3 Kent's Com. 248.

England. — The Vrede, Lush. 322; The Le Jonet, L. R. 3 A. & E. 556; The Sillery, 1 Stuart Adm. (L. C.) 182; The Isabella, 1 Stuart Adm. (L. C.) 281; The Warrior, Lush. 476.

United States. — The Holder Borden, 1 Sprague (U. S.) 144; The Ship Two Catherines, 2 Mason (U. S.) 319; Taylor *v.* The Cato, 1 Pet. Adm. 48; The Aguan, 48 Fed. Rep. 320; Cartwell *v.* The Ship John Taylor, Newb. Adm. 341, 5 Fed. Cas. No. 2,482; The John Perkins, 21 Law Rep. 87, 13 Fed. Cas. No. 7,360; The Olive Branch, 1 Lowell (U. S.) 286, 18 Fed. Cas. No. 10,490; The Schooner Triumph, 1 Sprague (U. S.) 428, 24 Fed. Cas. No. 14,183; Connor *v.* The British Ship Virginia, 2 Hawaii 171. See also Anonymous, 1 Fed. Cas. No. 430; The Massasoit, 1 Sprague (U. S.) 97; The Mary Hale, 16 Fed. Cas. No. 9,213. *Compare* Phillips *v.* M'Call, 4 Wash. (U. S.) 141, 19 Fed. Cas. No. 11,104.

and crew, the members of the crew are regarded as discharged from their contract as mariners and as owing no further duty to exert themselves in the preservation of the vessel, and if after such abandonment they render services in the preservation of the vessel and cargo, they may be entitled to salvage remuneration.[1] So, also, the duty of the crew of a vessel ceases upon her capture by the enemy, and for subsequent services in the rescue of the vessel they may be entitled to reward as salvors,[2] but the crew of a vessel cannot claim salvage reward for rescuing the vessel from mutineers.[3] The arrest and detention of a vessel in a civil suit do not work an abandonment of her so as to enable the master to claim salvage remuneration for services in saving her from a storm while under the charge of the marshal.[4] So, also, the surrender of a stranded vessel by the owners to the insurers does not discharge the master and crew from their duty to preserve the vessel so as to entitle them to salvage reward for such services.[5]

Discharge Through Abandonment. — The discharge of the crew, through abandonment, from their duty as members of the crew to preserve the vessel and cargo, must be clearly shown in order to enable them to claim salvage reward for services rendered in the preservation of the vessel and cargo,[6] and the abandonment must have been without hope of recovery.[7]

Improper Discharge of Crew by Master. — The fact that upon the ship being wrecked the master, disregarding the interests of the owner of the vessel, improperly discharges the crew, does not render such discharge ineffectual for the purpose of enabling the crew to claim salvage reward for subsequent services in the preservation of the vessel and cargo, unless it is proved that the crew fraudulently accepted their discharge.[8]

3. Ship's Agents. — Where a ship's agent renders extraordinary services in saving the vessel and cargo, he may be entitled to salvage reward,[9] but for ordinary services that fairly pertain to his employment, he is not so entitled.[10]

4. Passengers on Salved or Salving Vessel — **Passengers on Salved Vessel.** — Passengers upon vessels are considered as under a duty to aid the vessel when in distress, and cannot, as a general rule, claim salvage compensation for services

1. Abandonment of Vessel and Discharge of Crew. — 3 Kent's Com. 246.

England. — The Florence, 16 Jur. 572, 20 Eng. L. & Eq. 607; The Warrior, Lush. 476; The Le Jonet, 41 L. J. Adm. 95.

United States. — The Umatilla, 29 Fed. Rep. 252; The Barney Eaton, 1 Biss. (U. S.) 242, 2 Fed. Cas. No. 1,028; Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 240, 16 Fed. Cas. No. 9,230; Morehouse *v.* The Jefferson, 1 Pet. Adm. 46, 17 Fed. Cas. No. 9,793; Taylor *v.* The Cato, 1 Pet. Adm. 48, 23 Fed. Cas. No. 13,786; Coady *v.* 1,200 Barrels Oil, 2 Hawaii 34; Connor *v.* The British Ship Virginia, 2 Hawaii 171. *Compare* Mesner *v.* Suffolk Bank, 1 Law Rep. 249, 17 Fed. Cas. No 9,493.

Part of Crew Remaining on Vessel After Abandonment by Master and Greater Part of Crew. — The Umatilla, 29 Fed. Rep. 252.

A Mate Who Remains on Board an Injured Vessel Which Had Been Abandoned by the Rest of the Crew, and who assists a towing steamship in getting her to port, is entitled to salvage compensation. The Le Jonet, 41 L. J. Adm. 95.

2. Rescue After Capture by Enemy. — 3 Kent's Com. 247; The Beaver, 3 C. Rob. 292; Sir Peter, 2 Dods. 73; Brevoor *v.* The Ship Fair American, 1 Pet. Adm. 87, 4 Fed. Cas. No. 1,847; Clayton *v.* The Ship Harmony, 1 Pet. Adm. 70, 5 Fed. Cas. No. 2,871; Kennedy *v.* Ricker, Smith (N. H.) 432, 14 Fed. Cas. No. 7,705; Strout *v.* The Cuba, 23 Fed. Cas. No. 13,549; Williams *v.* The Suffolk Ins. Co., 3 Sumn. (U. S.) 270, 29 Fed. Cas. No. 17,738.

Ransoming Vessel. — Though the general rule is that a capture dissolves the contract of master and seamen, the relationship is restored upon the ransoming of the vessel, and they are not entitled to salvage reward for bringing into port the vessel ransomed. Phillips *v.* M'Call, 4 Wash. (U. S.) 141, 19 Fed. Cas. No. 11,104.

3. Rescue from Mutineers. — The Governor Raffles, 2 Dods. 14.

4. Detention of Vessel in Civil Action. — The Nebraska, (C. C. A.) 75 Feb. Rep. 598.

5. Surrender to Insurer. — The C. F. Bielman, 108 Fed. Rep. 878.

6. Discharge Through Abandonment. — The Warrior, Lush. 476.

7. The John Perkins, 21 Law Rep. 87. 13 Fed. Cas. No. 7,360; The C. P. Minch, (C. C. A.) 73 Fed. Rep. 859; The Acorn, 3 Ware (U. S.) 98.

8. The Warrior, Lush. 476. *Compare* The Missouri's Cargo, 1 Sprague (U. S.) 260, 17 Fed. Cas. No. 9,654.

9. Ship's Agent. — The Cargo ex Honor, L. R. 1 A. & E. 87; The Kate B. Jones, (1892) P. 366.

10. Acosta *v.* The Halcyon, 1 Fed. Cas. No. 32.

A Purchase by a Ship's Agent of Salvage Claims of third persons inures to the benefit of his

rendered.[1] Still, a passenger may be entitled in extraordinary instances to salvage reward for services in aid of a vessel when in distress,[2] as where he remains by the distressed vessel after opportunity to land,[3] or where the vessel has been abandoned by the crew and passengers and he subsequently aids in preserving the vessel.[4] So, also, if passengers should assist in recapturing the vessel from an enemy, they would be entitled to salvage reward.[5]

Passengers on Salving Vessel. — Of course, passengers on the salving vessel who render services in aid of another vessel are entitled to share in the salvage award,[6] but passengers on the salving vessel who refuse to assist in the salvage service are not entitled to share in the salvage award.[7]

Soldiers on Transport. — It has been held that soldiers in transport under contract between the owners of the vessel and the government were not to be regarded as passengers so as to prevent their recovery of salvage reward for services in aid of the vessel.[8]

5. Crew of Salving Vessel. — The crew of a salving vessel are, of course, entitled to salvage reward.[9]

Crews of Vessels Owned by Same Persons. — Where salvage services are performed by one ship to another, and both ships belong to the same owners, the crew of the salving ship are, as a general rule, entitled to salvage remuneration;[10]

principal. The W. D. B., Hask. (U. S.) 236, 29 Fed. Cas. No. 17,306.

1. Passengers on Salved Vessel — Salvage Denied. — 3 Kent's Com. 245.

England. — Bligh *v.* Simpson, 3 Moo. P. C. C. N. S. 51; The Branston, 2 Hag. Adm. 3, note; The Viede, Lush. 322; The Two Friends, 1 C. Rob. 271; The Stella Marie, Young (Nova Scotia) 16.

United States. — The Brabo, 33 Fed. Rep. 884; Kidney *v.* The Ocean Prince, 38 Fed. Rep. 259; The Barney Eaton, 1 Biss. (U. S.) 242; The Clarita, 23 Wall. (U. S.) 1; Beane *v.* The Schooner Mayurka, 2 Curt. (U. S.) 78; The Brig Anastasia, 1 Ben. (U. S.) 166; Hobart *v.* Drogan, 10 Pet. (U. S.) 108; The Connemara, 108 U. S. 352; The Steamer Merrimac, 1 Ben. (U. S.) 201, 17 Fed. Cas. No. 9,473; Brady *v.* American Steamship Co., 1 Am. L. T. N. S. 402, 10 Phila. (Pa.) 283, 31 Leg. Int. (Pa.) 237, *Compare* Bond *v.* The Brig Cora, 2 Wash. (U. S.) 80.

Shipwrecked Sailors Taken on Board of a Vessel which they assisted in working were held not entitled to salvage reward. The C. G. Cranmer, 34 Fed. Rep. 405. *Compare* The Salacia, 2 Hag. Adm. 262.

2. Exception — Extraordinary Services. — 3 Kent's Com. 246.

England. — Newman *v.* Walters, 3 B. & P. 612; The Salacia, 2 Hag. Adm. 269.

United States. — The Brabo, 33 Fed. Rep. 884; Candee *v.* Sixty-Eight Bales Cotton, 48 Fed. Rep. 479; The Barney Eaton, 1 Biss. (U. S.) 242, 2 Fed. Cas. No. 1,028; Clayton *v.* The Ship Harmony, 1 Pet. Adm. 70, 5 Fed. Cas. No. 2,871; Brady *v.* American Steamship Co., 10 Phila. (Pa.) 283, 31 Leg. Int. (Pa.) 237, 19 Fed. Cas. No. 10,945; Strout *v.* The Cuba, 23 Fed. Cas. No. 13,549; Towle *v.* The Great Eastern, 24 Fed. Cas. No. 14,110; Hobart *v.* Drogan, 10 Pet. (U. S.) 108; The Connemara, 108 U. S. 352.

Devising Means to Control Rudder. — The services of a passenger, who, after the officers of the ship in two days of effort have exhausted all the means to get control of the rudder, devises and, with the aid of men put under his direction by the captain, executes a plan for that purpose, thereby rescuing the ship from peril, are of such extraordinary character, and beyond the line of the passenger's duty to assist in working the ship by usual and well known means, as to entitle him to salvage, although he may have obtained his idea from a previous unsuccessful experiment of the engineer. Towle *v.* The Great Eastern, 24 Fed. Cas. No. 14,110.

3. The Steamer Merrimac, 1 Ben. (U. S.) 201.

4. The Stella Marie, Young (Nova Scotia) 16.

5. Recapture from Enemy. — The Two Friends, 1 C. Rob. 271.

6. Passengers on Salving Vessel. — Newman *v.* Walters, 3 B. & P. 612; The Salacia, 2 Hag. Adm. 262; The Connemara, 108 U. S. 352; Bond *v.* The Brig Cora, 2 Wash. (U. S.) 80; The Brabo, 33 Fed. Rep. 884; The Schooner Charles Henry, 1 Ben. (U. S.) 8, 5 Fed. Cas. No. 2,617; The Waterloo, Blatchf. & H. Adm. 1141.

7. The Schooner Charles Henry, 1 Ben. (U. S.) 8, 5 Fed. Cas. No. 2,617.

8. Soldiers on Transport. — The Steamer Merrimac, 1 Ben. (U. S.) 201, 17 Fed. Cas. No. 9,473.

9. Crew of Salving Vessel. — The Pride of Canada, Brown & L. 208; The Mountaineer, 2 W. Rob. 7; The Baltimore, 2 Dods. 132; The Tornado, Cohen's Adm. L. 108; Hine *v.* The Steam-Tug Thomas J. Scully, 6 Can. Exch. 318; The Cetewayo, 9 Fed. Rep. 717; Baker Salvage Co. *v.* The Taylor Dickson, 40 Fed. Rep. 261.

The fact that a vessel is engaged in wrecking does not raise the presumption that the wages of her crew are in lieu of any share in the salvage which may be earned by her. The Tornado, Cohen's Adm. L. 108; The Cetewayo, 9 Fed. Rep. 717.

10. The Glenfruin, 10 P. D. 103; The Miranda, L. R. 3 A. & E. 561; The Waterloo, 2 Dods. 433; The Sappho, 8 Moo. P. C. C. N. S. 66; The Caroline, Lush. 334; The Steamer Colima, 5 Sawy. (U. S.) 181, 6 Fed. Cas. No. 2,996; The

but where, under the general contract of employment, the several crews of the same vessel-owner are under obligation to render services to one another when in distress, the same principle which prevents the crew of a vessel from claiming salvage reward for the preservation of their vessel, prevents them from claiming such reward for services rendered to another.[1]

6. Insurer. — Where the insurer of a vessel and cargo interposes for his own interest in aid of the vessel in distress, he is not entitled to claim salvage reward for his services.[2]

7. Owner of Salving Vessel. — The owner of the salving vessel has always been considered as entitled to salvage reward for the use of his vessel in rendering salvage services though he was not present when the salvage services were rendered.[3] The fact that part owners of the salving vessel were also part owners of another vessel, through whose negligent navigation the salved vessel was placed in peril, does not deprive the salving vessel of claim for salvage reward.[4]

Vessel under Charter. — Where salvage services are rendered by a vessel under charter, the owner of the vessel, as a general rule, and not the charterer, is considered as entitled to the salvage earned by the vessel,[5] though under special charter-parties, where the charterer is *pro hac vice* the owner of the vessel, the charterer and not the owner of the vessel may be entitled to the salvage earned by the chartered vessel.[6]

8. Owner of Cargo on Salving Vessel. — The owner of the cargo on the salving vessel is not considered as a salvor or entitled to share in the salvage award, though the cargo was exposed to increased danger through the rendition of the salvage services;[7] and the fact that the bill of lading allows the ren-

Liholiho *v.* 1206 Bags Sugar, 9 Hawaii 324. *Compare* The Maria Jane, 14 Jur. 857.

1. The C. F. Bielman, 108 Fed. Rep. 878; The Maria Jane, 14 Jur. 857, *distinguished* in The Sappho, 8 Moo. P. C. C. N. S. 66.

2. **Insurer.** — The Lydia A. Harvey, 84 Fed. Rep. 1000.

An Agent at Lloyds is not entitled to sue as a salvor for the mere hiring and engaging of men to assist a vessel in distress. The Lively, 3 W. Rob. 64. *Compare* Browning *v.* Baker, 2 Hughes (U. S.) 30.

3. **Owner of Salving Vessel** — *England.* — The Glengaber, L. R. 3 A. & E. 534; The Roe, Swabey 85; The Norden, 1 Spinks 185; The Haidee, 1 Notes Cas. (Eng.) 598; The Princess Helena, Lush. 190; The San Bernardo, 1 C. Rob. 178. *Compare* The Charlotte, 3 W. Rob. 68.

United States. — A Lot Whalebone, 51 Fed. Rep. 916; Morse *v.* Pomroy Coal Co., 75 Fed. Rep. 428; The Holder Borden, 1 Sprague (U. S.) 144, 12 Fed. Cas. No. 6,600; Waterbury *v.* Myrick, Blatchf. & H. Adm. 34, 29 Fed. Cas. No. 17,253; The Ship Nathaniel Hooper, 3 Sumn. (U. S.) 542; Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 269; The Ship Henry Ewbank, 1 Sumn. (U. S.) 424; Union Tow-Boat Co. *v.* The Bark Delphos, Newb. Adm. 412.

See also Hawkins *v.* Avery, 32 Barb. (N. Y.) 551. *Compare* Emerson *v.* Bark Pandora, Newb. Adm. 438, 8 Fed. Cas. No. 4,442; The Schooner Arlington, 2 Ben. (U. S.) 511; The Steamboat Jack Jewett, 2 Ben. (U. S.) 463, 13 Fed. Cas. No. 7,122.

The Board of Trade, as Owners of a Steam Tug belonging to Ramsgate harbor, may sue for an award of salvage in respect of service rendered by the steam tug. The Cybele, 3 P. D. 8.

Waiver of Right to Salvage. — The Vila, 63 Fed. Rep. 1017.

Apportionment of Award. — See *infra*, the section *Apportionment of Salvage*, with regard to the apportionment of the salvage between the salving vessel and the persons rendering the salvage service.

4. By the improper navigation of a steam tug B., a vessel at anchor was set adrift and placed in jeopardy. A steam tug W. rendered assistance to the drifting vessel. It was held that the owners of the W. were entitled to recover salvage reward for the services rendered, notwithstanding some of them were also owners of the vessel which occasioned the mischief. The Glengaber, L. R. 3 A. & E. 534.

5. **Vessels under Charter.** — The Waterloo, 2 Dods. 433; Thurgar *v.* Morley, 3 Meriv. 20; The Alfen, Swabey 189; The Ship Nathaniel Hooper, 3 Sumn. (U. S.) 542.

A transport ship, hired by government, and performing, by orders of the officer of a queen's ship, salvage services not within the terms of the charter-party, is entitled to a share of the amount awarded as salvage. The Nile, L. R. 4 A. & E. 449. See also The Bertie, 55 L. T. N. S. 520, 6 Asp. M. Cas. 26.

6. **Special Charters — Salvage Awarded Charterer.** — The Maria Jane, 14 Jur. 857; The Scout, L. R. 3 A. & E. 512; The Kaiser Wilhelm der Grosse, 106 Fed. Rep. 963.

A Tow Company Hiring One of Its Tugs to a Wrecking Company for a Per Diem Compensation is not entitled to any portion of the salvage resulting from the saving of a ship by means of the tug. Baker Salvage Co. *v.* The Taylor Dickson, 40 Fed. Rep. 261.

7. **Owner of Cargo on Salving Vessel.** — The Coriolanus, 59 L. J. Adm. 59, The Persian Monarch, 23 Fed. Rep. 820; Compagnie Com-

dition of the salvage services does not entitle the shipper to share in the salvage award.[1]

Actual Damage to Cargo. — The owner of the cargo on the salving vessel is not entitled to share in the salvage award though the cargo actually suffers damage by reason of the rendition of the salvage services.[2]

Tug with Tow. — Where a tug with tow renders salvage services to another vessel, the tow is not entitled to a share in the salvage award though in rendering the salvage services the tug may have made a deviation affecting the insurance on the tow.[3]

9. Charterer of Salved or Salving Vessel. — The charterer of a vessel may be entitled to salvage reward for salvage services rendered to the chartered vessel.[4] Thus, where a vessel under charter, while being navigated by the charterer, is wrecked without his fault, the duty of the charterer to preserve the vessel has been held to cease with the occurrence, and he has been held entitled to claim compensation as salvage for service subsequently rendered in her preservation.[5] The question whether the charterer or the owner of the chartered vessel is entitled to salvage earned by the chartered vessel has been previously discussed.[6]

10. Owner of Salved Vessel. — The owner of the salved vessel or property salved is not to be regarded as a salvor for services rendered in the preservation of his own property,[7] but the fact that the claimant for salvage services has a part interest in the property does not defeat his claim for remuneration for such services.[8] The owner or part owner of the salved vessel is not entitled to salvage reward for services in the preservation of the cargo of his vessel which, under the contract of affreightment, he was under obligation to render,[9] but the fact that the claimant for salvage reward was the owner or part owner in the salved vessel does not prevent him from being awarded salvage remuneration for services in the preservation of the cargo, when there was no obligation or duty resting upon him to render such services.[10]

merciale De Transport, etc. *v.* Charente Steamship Co., (C. C. A.) 60 Fed. Rep. 921, *reversing* 55 Fed. Rep. 93; The Hekla, 62 Fed. Rep. 941; The Ship Nathaniel Hooper, 3 Sumn. (U. S.) 542; Bond *v.* The Brig Cora, 2 Wash. (U. S.) 80.

1. Compagnie Commerciale De Transport, etc. *v.* Charente Steamship Co., (C. C. A.) 60 Fed. Rep. 921, *reversing* 55 Fed. Rep. 93.

2. The Persian Monarch, 23 Fed. Rep. 820. Thus, where cattle, being transported on the salving vessel, suffer damage by reason of the loss of time in the rendition of the salvage services, the shipper is not entitled to share in the salvage award. The Hekla, 62 Fed. Rep. 941.

3. The Ephraim and Anna, 21 Fed. Rep. 346.

4. **Charterer of Salved Vessel.** — The Collier, L. R. 1 A. & E. 83; The New Orleans, 23 Fed. Rep. 909. *Compare* The Maria Jane, 14 Jur. 857.

5. Browning *v.* Baker, 2 Hughes (U. S.) 30.

6. See *supra*, this section, *Owner of Salving Vessel*.

7. **Owner of Salved Property.** — Benjamin *v.* The Watchman, 21 Law Rep. 40, 3 Fed. Cas. No. 1,305.

Mistake as to Ownership. — Where a person renders services to a vessel which he at the time believes to be his own, he is not precluded from claiming salvage reward in respect of such services if it turns out that the vessel is not his property. The Liffey, 58 L. T. N. S. 351, 6 Asp. N. Cas. 255.

8. A Lot Whalebone, 51 Fed. Rep. 916; Strout *v.* The Cuba, 23 Fed. Cas. No. 13,549 (recapture of vessel from enemy by part owner); Morse *v.* Pomroy Coal Co., 75 Fed. Rep. 428 (owners of salved vessel stockholders in corporation rendering salvage services). See also The Caroline, Lush. 334.

The Fact that the Salvor Held a Mortgage upon the Vessel salved which was not due, the mortgagors being the owners and in possession, does not deprive him of the right to salvage reward. He cannot be considered in the light of an owner. The Barney Eaton, 1 Biss. (U. S.) 242.

9. **Salving Cargo.** — The Glenfruin, 10 P. D. 103 (salved and salving vessels belonging to same persons).

10. The Miranda, L. R. 3 A. & E. 561; The Cargo ex Laertes, 12 P. D. 187 (salved and salving vessels belonging to same persons); The Liholiho *v.* 1206 Bags Sugar, 9 Hawaii 323 (salved and salving vessels belonging to same persons, salvage against cargo allowed).

The cargo on board of a stranded vessel may be subjected to salvage for services rendered in saving both vessel and cargo by another vessel belonging to the same owner. Pacific Mail Steamship Co. *v.* Ten Bales Gunny Bags, 3 Sawy. (U. S.) 187.

The owners of a vessel saving another of their vessels and her cargo, where the latter had broken down without any fault on the part of the owners or crew, where the cargo was carried subject to "accidents from ma-

11. Persons Furnishing Appliances. — Persons who merely furnish tools or appliances for use in rendering salvage services are not entitled to remuneration as salvors,[1] and a person whose funds are pledged by another to secure a vessel for salvage services has been held not to be entitled to share in the salvage award as cosalvor.[2] There is an exception to this rule, however, in favor of the owner of the salving vessel.[3]

12. Public Officers or Employees — *a.* IN GENERAL. — Where a public officer or an employee acting within his official duty renders services to a vessel in distress, he is not entitled to salvage reward for such services,[4] but where such an officer goes beyond the limits of his official duty in giving assistance he is entitled to salvage remuneration.[5]

b. PILOTS. — Pilots are denied salvage compensation for any exertions or services rendered while acting within the line of their duty,[6] but like other persons they may become salvors in legal contemplation if they perform extraordinary services outside of the line of their duty,[7] and this has been

chinery," are entitled to salvage against the cargo. The Miranda, L. R. 3 A. & E. 561.

Rescue of Vessel by Owner from Enemy — Salvage Against Cargo Allowed. — Strout *v.* The Cuba, 23 Fed. Cas. No. 13,549.

1. **Persons Furnishing Appliances.** — The Ottawa, 1 Lowell (U. S.) 274, 18 Fed. Cas. No. 10,617 (use of oxen).

2. Thus, where a ship-master did not use the vessel of the libellant, but pledged funds belonging to the libellant and others to procure another vessel in which the salvage service was effected, it was held that the libellant could not proceed *in rem* against the salvage money as a cosalvor. Waterbury *v.* Myrick, Blatchf. & H. Adm. 34, 29 Fed. Cas. No. 17,253.

3. See *supra*, this section, *Owner of Salving Vessel*.

4. **Public Officers or Employees.** — The Aquila, 1 C. Rob. 37; Le Tigre's Case, 3 Wash. (U. S.) 567.

5. The Aquila, 1 C. Rob. 37; The Huntsville, 12 Fed. Cas. No. 6,916.

United States Soldiers. — The Steamer Merrimac, 1 Ben. (U. S.) 201.

Master and Crew of Vessel Maintained in City to Keep Harbor Free of Ice. — The Arendal, 14 Fed. Rep. 580.

6. **Pilots.** — The Joseph Henry, 1 C. Rob. 306; The Æolus, L. R. 4 A. & E. 29; The Monarch, 12 P. D. 5; The Clarita, 23 Wall. (U. S.) 1; Dulany *v.* The Sloop Peragio, Bee Adm. 212; Le Tigre's Case, 3 Wash (U. S.) 567; The Schooner Wave *v.* Hyer, 2 Paine (U. S.) 131. See also The General Palmer, 2 Hag. Adm. 176; 3 Kent's Com. 246.

7. *England.* — Newman *v.* Walters, 3 B. & P. 616; The Joseph Harvey, 1 C. Rob. 306; The Frederick, 1 W. Rob. 16; The Cumberland, 9 Jur. 191; The Hebe, 2 W. Rob. 247; Halsey *v.* Albertuszen, 11 Moo. P. C. 313, *affirming* Swabey 226; The Saratoga, Lush. 318; The Nicholaas Witzen, 3 Hag. Adm. 369; The Anders Knape, 4 P. D. 213; The Rosehaugh, 1 Spinks 261; The Eugenie, 3 Notes Cas. (Eng.) 430.

United States. — Hobart *v.* Drogan, 10 Pet. (U. S.) 108; The Schooner Wave *v.* Hyer, 2 Paine (U. S.) 131; The Clarita, 23 Wall. (U. S.) 1; The Brig Susan, 1 Sprague (U. S.) 499; The Wave, Blatchf. & H. Adm. 235, 29 Fed. Cas. No. 17,297; Flanders *v.* Tripp, 2 Lowell (U. S.) 15; Le Tigre's Case, 3 Wash. (U. S.) 567; Lea *v.* Ship Alexander, 2 Paine (U. S.) 466; Dulany *v.* Sloop Peragio, Bee Adm. 212, 7 Fed. Cas. No. 4,123; Hand *v.* The Schooner Elvira, Gilp. (U. S.) 60, 11 Fed. Cas. No. 6,015; Browning *v.* Baker, 2 Hughes (U. S.) 30, 4 Fed. Cas. No. 2,041; Bean *v.* The Ship Grace Brown, 2 Hughes (U. S.) 112, 2 Fed. Cas. No. 1,171; Montgomery *v.* The Steamboat T. P. Leathers, Newb. Adm. 421, 17 Fed. Cas. No. 9,736; Hope *v.* The Brig Dido, 2 Paine (U. S.) 243, 12 Fed. Cas. No. 6,679; Roff *v.* Wass, 2 Sawy. (U. S.) 389, 20 Fed. Cas. No. 11,999; The Blackwall, 10 Wall. (U. S.) 1; The Grid, 21 Fed. Rep. 423; The Alaska, 23 Fed. Rep. 597; The Wisconsin, 32 Fed. Rep. 111, *affirming* 30 Fed. Rep. 846; McDonald *v.* The Resolute, 38 Fed. Rep. 923; The Cachemire, 38 Fed. Rep. 518; The Charles Wetmore, 51 Fed. Rep. 449; Blunt *v.* The Frank, 3 Fed. Cas. No. 1,577; Curry *v.* The Loch Goil, 6 Fed. Cas. No. 3,495; Topping *v.* The Warren, 24 Fed. Cas. No. 14,101.

If a vessel in peril hoists her colors at the fore topmast head, it is deemed a request for assistance, although it is the usual sign for a pilot. The Brig Susan, 1 Sprague (U. S.) 499, 23 Fed. Cas. No. 13,630.

But pilots, induced by an ambiguous signal to put off from the shore to the assistance of a ship, are not entitled to salvage reward if the actual condition of the ship shows that the signal was for a pilot only. The Little Joe, Lush. 88, 6 Jur. N. S. 783; The Otto Hermann, 33 L. J. Adm. 189.

Pilot Employed by Towing Vessel. — A pilot employed to pilot a vessel which is towing another vessel in distress is entitled to salvage if he runs risks outside of what can reasonably be considered to have been within the ordinary scope of his employment as pilot. The Santiago, 70 L. J. P. 12, 83 L. T. N. S. 439, 9 Asp. M. Cas. 147.

Vessel Stranded Outside of Pilot Waters. — In Lea *v.* Ship Alexander, 2 Paine (U. S.) 466, a pilot was held entitled to salvage remuneration for assistance to a vessel stranded outside of pilot waters. So, also, in The Hedwig, 1 Spinks 19, a pilot was allowed salvage for assistance rendered to a vessel outside of pilotage waters; and in The Aglaia, 13 P. D. 160, and The Felix, 1 Spinks 23, note, the same

held true though by statute pilots are required to render services to vessels in distress.[1]

c. COAST GUARD. — In *England* officers and men of the coast guard have been awarded remuneration for services in aid of distressed vessels, as such services are not within their official duties.[2]

d. LIGHTHOUSE KEEPER. — It is no part of the official duty of a lighthouse keeper to render services in the preservation of vessels in distress, and he may, in case he renders such services, be entitled to salvage compensation.[3]

e. OFFICERS AND CREW OF MEN OF WAR. — In *England* it is not considered a part of the public duties of the officers and crew of a government vessel to render services to vessels in distress from the general perils of navigation, and they have been held entitled to salvage remuneration for services rendered to such vessels;[4] and the same doctrine has been recognized in the *United States*,[5] but owing to the fact that their own property is not risked in such services, and as they are under pay from the government, a smaller award is made in favor of such officers and crew than in favor of other persons for similar services.[6]

f. MUNICIPAL FIRE DEPARTMENTS. — A municipal fire department whose duty it is to extinguish vessels on fire cannot claim salvage remuneration for such services.[7]

V. CONTRACTS FOR SALVAGE — 1. In General. — Viewed as a reward, a salvage is not properly a subject of any binding contract,[8] but a contract therefor will be recognized only so far as it accords with the court's equitable discretion,[9] and as a guide in fixing the compensation for the services rendered.[10]

was allowed though the signal given by the salved vessel was for a pilot.

1. Lea *v.* Ship Alexander, 2 Paine (U. S.) 466; Hobart *v.* Drogan, 10 Pet. (U. S.) 108. *Compare* The Schooner Wave *v.* Hyer, 2 Paine (U. S.) 131.

2. Coast Guard. — The Hebe, 7 Notes Cas. (Eng.) Supp. i; Silver Bullion, 2 Spinks 70. See also The Clifton, 3 Hag. Adm. 117.

Under the general rule that a person not actually occupied in effecting a salvage service is not entitled to share in the salvage remuneration, the claim of an officer of a coast guard attachment, who sent his men and boat, but did not assist in person, was rejected. The Vine, 2 Hag. Adm. 1.

3. Lighthouse Keeper. — The Ottawa, 1 Lowell (U. S.) 274, 18 Fed. Cas. No. 10,617; The Afton, Young (Nova Scotia) 136. See also The Emma, 3 W. Rob. 151.

4. Officers and Crew of Men of War. — The Mary Ann, 1 Hag. Adm. 158; The Louisa, 1 Dods. 317; Cargo ex Ulysses, 58 L. J. Adm. 11; The Ewell Grove, 3 Hag. Adm. 200; The Wilsons, 1 W. Rob. 172; The Mary Anne, 1 Hag. Adm. 158; The Rapid, 3 Hag. Adm. 419; The Rosalie, 1 Spinks 188; The Lustre, 3 Hag. Adm. 154; The Cargo ex Woosung, 1 P. D. 260; The Charlotte Wylie, 2 W. Rob. 495; The Bertie, 55 L. T. N. S. 520; The Mary Pleasants, Swabey 224; The Sir Francis Burton, 2 Hag. Adm. 156; The Dalhousie, 1 P. D. 271; The Earl of Eglinton, Swabey 7; The Alma, Lush. 378. See also The Walker, Stew. Adm. (Nova Scotia) 105. *Compare* The Herman, Young (Nova Scotia) 111; The John, Young (Nova Scotia) 129; The Iodine, 3 Notes Cas. (Eng.) 140.

Rescue from Enemy. — The crew and officers of a king's ship are not entitled to salvage for rescue from the enemy of a hired transport engaged in the same expedition. The Belle, Edw. Adm. 66.

5. The Harvest, 1 Sprague (U. S.) 537, 11 Fed. Cas. No. 6,176; The Brig Huntress, 1 Phila. (Pa.) 122, 7 Leg. Int. (Pa.) 202, 12 Fed. Cas. No. 6,912; The Mulhouse, 22 Law Rep. 276, 17 Fed. Cas. No. 9,910. See also Browning *v.* Baker, 2 Hughes (U. S.) 30. *Compare* Smith *v.* The Josephine, 22 Fed. Cas. No. 13,069.

The Officers and Crew of a Foreign Vessel of War are entitled to salvage in cases civil and maritime, as other vessels are. Robson *v.* The Huntress, 2 Wall. Jr. (C. C.) 59, 20 Fed. Cas. No. 11,971.

Necessity for Extraordinary Services. — The Josephine, 2 Blatchf. (U. S.) 322, 13 Fed. Cas. No. 7,546.

6. The Earl of Eglinton, Swabey 7; The Rosalie, 1 Spinks 188; The Mulhouse, 22 Law Rep. 276, 17 Fed. Cas. No. 9,910.

7. Municipal Fire Departments. — Murphy *v.* The Ship Suliote, 5 Fed. Rep. 99; The Baker, 25 Fed. Rep. 771; Firemen's Charitable Assoc. *v.* Ross, 60 Fed. Rep. 456, 13 U. S. App. 643; Davey *v.* The Barkentine Mary Frost, 2 Woods (U. S.) 306, 7 Fed. Cas. No. 3,592. *Compare* The Huntsville, 12 Fed. Cas. No. 6,916.

8. Salvage Contracts. — The Schiedam, 48 Fed. Rep. 923; The Alert, 56 Fed. Rep. 721. See also Chapman *v.* The Greenpoint's Engines, 38 Fed. Rep. 671.

Enactments of Foreign Countries Regarding Salvage Contracts. — See The Elfrida, 172 U. S. 186, 201.

9. Enforcement Discretionary. — Williams *v.* The Barge Jenny Lind, Newb. Adm. 443, 29 Fed. Cas. No. 17,723; The Alert, 56 Fed. Rep. 721.

10. Guide to Compensation.—The Delambre, 9

If the service is of short duration, and there is no reasonable doubt of success, and it differs but slightly from the ordinary business of the salvor, the fact that an agreement was entered into to pay in any event will have but little influence upon the award.[1]

2. Who May Make — *a.* POWER OF MASTER. — Where the necessity arises for salvage services the master is not required to obtain special authority from the owners to enter into a contract therefor,[2] but is competent as their agent to make such a contract;[3] and a fair and equitable contract entered into by him is binding upon the owners.[4] Such a contract, unless it is otherwise expressly provided, creates a lien upon the vessel, subject, however, to the revisory power of the court.[5] The general rule that the contract, to be enforceable, must be reasonable and equitable, and not made under compulsion, also applies to a contract made by the master.[6] In all such cases, unless his acts are ratified by the owners, his conduct will be carefully scrutinized by the court, and his contracts will not be regarded as binding unless they appear to have been *bona fide* and such as a discreet owner would probably have made under like circumstances. If he settles the amount by agreement, those claiming under it must show that the salvage allowed was reasonable and just. If he refers the matter to arbitrators, those who claim the benefit of the award must show that the proceedings were fair and the referees worthy of the trust.[7]

Power to Bind Cargo. — In contracting for such services the master's powers are not limited to binding the vessel therefor, but he may also bind the cargo.[8]

Consul Acting for Master. — When the master cannot, from any reason, act, and applies to the consul of the flag to which he belongs, or to his agent, any agreement made by the latter, if just and equitable, will be upheld.[9]

b. POWER OF OWNER OF CARGO. — The owner of the cargo who has no interest in the vessel cannot enter into an agreement for salvage services which will be binding on the vessel.[10]

c. POWER OF INSURERS. — The insurers cannot bind the cargo or the vessel by a contract when neither is shown to have derived any benefit therefrom.[11]

3. Principles Regulating Validity. — Agreements for salvage services compensation are subject to the general principles regulating the validity of contracts. If the agreement is valid it should be enforced. If not valid it will be set aside in accordance with the general rule affecting all contracts.[12] Where the contract is reasonable and equitable, free from fraud, misrepresen-

Fed. Rep. 775; The Agnes I. Grace, 49 Fed. Rep. 662; The H. B. Foster, Abb. Adm. 222; The Don Carlos, 47 Fed. Rep. 746.

Previous Contracts as Guide to Fixing Compensation for Subsequent Service. — Bearse *v.* Three Hundred and Forty Pigs Copper, 1 Story (U. S.) 314.

Contract with Third Person as Evidence of Value of Services. — Sturgis *v.* The Vickery, 23 Fed. Cas No. 13,577*a*.

1. Pope *v.* The Sapphire, 19 Fed. Cas. No. 11,276.

2. **Master May Make.** — The G. W. Jones, 48 Fed. Rep 925. See also The A. D. Patchin, 1 Blatchf. (U. S.) 414.

3. The Henry, 15 Jur. 183, 2 Eng. L. & Eq. 564.

4. **Contract of Master Binding.** — The True Blue, 2 W. Rob. 176; The Arthur, 6 L. T. N. S. 556; Houseman *v.* The Schooner North Carolina, 15 Pet. (U. S.) 40; The Thornley, (C. C. A.) 98 Fed. Rep. 735; The Sir William Armstrong, 53 Fed. Rep. 145; The G. W. Jones, 48 Fed. Rep. 925; Eads *v.* The Steamboat H. D. Bacon, Newb. Adm. 274, 8 Fed. Cas. No. 4,232.

5. **Lien Created by.** — Gager *v.* The A. D. Patchin, 1 Am. L. J. N. S. 529, 9 Fed. Cas. No. 5,170.

6. Warder *v.* The La Belle Creole, 1 Pet. Adm. 31. See *infra*, this section, *Principles Regulating Validity*.

7. Houseman *v.* The Schooner North Carolina, 15 Pet. (U. S.) 40.

8. **Master May Bind Cargo.** — The Alert, 56 Fed. Rep. 721; The Wellington, 48 Fed. Rep. 475. See also The Cumbrian, 57 L. T. N. S. 205 *Compare* The Raisby, 10 P. D. 114.

Master's Admissions and Declarations Admissible Against Owner. — Eads *v.* The Steamboat H. D. Bacon, Newb. Adm. 274, 8 Fed. Cas. No. 4,232.

9. The Crus V., Lush. 583.

10. **Owner of Cargo Cannot Bind Vessel.** — The Union Express. Brown Adm. 516.

11. **Insurer's Contract.** — The Steamboat Narragansett, Olc. Adm. 388.

12. **Enforcement.**—The Clandeboye, (C. C. A.)

tation, and oppression, and fairly entered into without compulsion, it will, as a general rule, be enforced.[1]

Availability of Other Assistance. — In passing upon the question of the fairness of the contract the court will take into consideration the fact that other assistance was available.[2]

Deliberation. — Another element to be considered in determining the validity of the contract is the question whether it was entered into after due deliberation.[3] When there have been definite and distinct agreements, with ample time for consideration on the part of the parties, the court will be repugnant to set them aside.[4]

Validity Presumed. — If the agreement was proved it should be presumed to be fair and equitable, and the burden is upon those resisting to show that its enforcement would be contrary to equity and justice, or that it was procured by fraud or compulsion.[5]

4. Ratification. — Any question as to the acceptance of an offer for salvage service before the work commenced is removed by subsequent assent, ratification, and acquiescence.[6]

5. Effect — *a.* UPON NATURE OF SERVICE. — An agreement for specific compensation does not alter the nature of the service as a salvage service, but only furnishes the rule of compensation.[7]

Effect on Remedy. — A proceeding *in rem* is not barred merely because the measure of compensation is limited by the contract, but the contract hypothecates the ship, giving the creditor a lien thereon.[8] The salvors may, however,

70 Fed. Rep. 631; The Sir William Armstrong, 53 Fed. Rep. 145.

1. *England.* — The Firefly, Swabey 240; The Henry, 15 Jur. 183, 2 Eng. L. & Eq. 564; The Prinz Heinrich, 13 P. D. 31; The Strathgarry, (1895) P. 264; The Helen and George, Swabey 368; Connolly *v.* The Steamship Dracona, 5 Can. Exch. 146; The Theodore, Swabev 351; The True Blue, 2 W. Rob. 176; The British Empire, 6 Jur. 608.

United States. — The H. B. Foster, Abb. Adm 222; Bondies *v.* Sherwood, 22 How. (U. S.) 214; The Bark J. G. Paint, 1 Ben. (U. S.) 545; Bowley *v.* Goddard, 1 Lowell (U. S.) 154; Buchanan *v.* Barr, 5 Sc. Sess. Cas. 973; The Independence, 2 Curt. (U. S.) 350; Bearse *v.* Three Hundred and Forty Pigs Copper, 1 Story (U. S.) 314; The Elfrida, 172 U. S. 186; Post *v.* Jones, 19 How. (U. S.) 150; The Schooner Emulous, 1 Sumn. (U. S.) 210; Harley *v.* Four Hundred and Sixty-Seven Bars Railroad Iron, 1 Sawy. (U. S.) 1; The Whitaker, 1 Sprague (U. S.) 282, 29 Fed. Cas. No. 17,525; Bounty *v.* Kerrin, 3 Fed. Cas. No. 1,697*a*; The Ellen Holgate, 8 Fed. Cas. No. 4,375*a*; Gager *v.* The A. D. Patchin, 1 Am. L. J. N. S. 529, 9 Fed. Cas. No. 5,170; The Osteonthe, 18 Fed. Cas. No. 10,608*a*; Spreckels *v.* The State of California, 45 Fed. Rep. 647; Elphicke *v.* White Line Towing Co., (C. C. A.) 106 Fed. Rep. 945; The Agnes I. Grace, (C. C. A.) 51 Fed. Rep. 958; The Sir William Armstrong, 53 Fed. Rep. 145; The Jessomene, 47 Fed. Rep. 903; The Thornley, (C. C. A.) 98 Fed. Rep. 735; The Alert, 56 Fed. Rep. 721; The Sirius, 53 Fed. Rep. 611; The Clotilda, Hask. (U. S.) 412, 5 Fed. Cas. No. 2,903; The Wellington, 48 Fed. Rep. 475; The Schiedam, 48 Fed. Rep. 923.

2. **Other Assistance Available.** — The Wellington, 48 Fed. Rep. 475; The Jessomene, 47 Fed. Rep. 903; The Alert, 56 Fed. Rep. 721; The Agnes I. Grace, (C. C. A.) 51 Fed. Rep. 958.

3. **Deliberation in Making.** — The Elfrida, 172 U. S. 186; The Young America, 20 Fed. Rep. 926; The Thornley, (C. C. A.) 98 Fed. Rep. 735; The G. W. Jones, 48 Fed. Rep. 925; Brooks *v.* The Steamer Adirondack, 2 Fed. Rep. 387.

4. The British Empire, 6 Jur. 608; Gager *v.* The A. D. Patchin, 1 Am. L. J. N. S. 529, 9 Fed. Cas. No. 5,170; The Agnes I. Grace, (C. C. A.) 51 Fed. Rep. 958; The Thornley, (C. C. A.) 98 Fed. Rep. 735.

5. **Presumption.** — Connolly *v.* The Steamship Dracona, 5 Can. Exch. 146, *affirmed* on appeal 5 Can. Exch. 207; The Helen and George, Swabey 368; The Elfrida, 172 U. S. 186; The Clotilda, Hask. (U. S.) 412, 5 Fed. Cas. No. 2,903; Eads *v.* The Steamboat H. D. Bacon, Newb. Adm. 274, 8 Fed. Cas. No. 4,232. *Compare* The British Empire, 6 Jur. 608.

6. The Ellen Holgate, 8 Fed. Cas. No. 4,375*a*.

7. **Nature of Service Not Affected.** — The Silver Spray's Boilers, Brown Adm. 349; The Independence, 2 Curt. (U. S.) 350; The Schooner Emulous, 1 Sumn. (U. S.) 207, 8 Fed. Cas. No. 4,480; The Roanoke, 50 Fed. Rep. 574; The A. D. Patchin, 1 Blatchf. (U. S.) 414; The Brig Susan, 1 Sprague (U. S.) 499; Pope *v.* The Sapphire, 19 Fed. Cas. No. 11,276, Harley *v.* Four Hundred and Sixty-seven Bars Railroad Iron, 1 Sawy. (U. S.) 1; Williams *v.* The Barge Jenny Lind, Newb. Adm. 443, 29 Fed. Cas. No. 17,723; Bowley *v.* Goddard, 1 Lowell (U. S.) 154.

8. The Williams, Brown Adm. 208; The Roanoke, 50 Fed. Rep. 574; The Louisa Jane, 2 Lowell (U. S.) 295; The Union Express, Brown Adm. 516, 24 Fed. Cas. No. 14,363; Gager *v.* The A. D. Patchin, 1 Am. L. J. N. S. 529, 9 Fed. Cas. No. 5,170; Collins *v.* Steamboat Fort Wayne, 1 Bond (U. S.) 476, 6 Fed. Cas. No. 3,012.

by express provision waive their lien.[1]

b. As a Bar to Salvage Compensation. — To bar a claim for salvage where salvage services have been rendered, it is necessary to plead and prove a binding contract to pay at all events for work, labors, and service, without regard to the result.[2] Nothing short of a binding engagement to pay at all events will bar a meritorious claim for salvage.[3] Thus it has been held that the claim was not barred by mere request of the salvee for aid without a discussion as to the terms,[4] nor by a promise to pay the bill if thought reasonable,[5] nor by an agreement for liberal payments,[6] nor by an agreement to refer the matter to arbitration.[7]

Presumption and Burden of Proof. — If the service rendered is in the nature of salvage, the presumption is that it was rendered for a salvage compensation,[8] and the burden of proof is on the person asserting the contract to show affirmatively its existence and nature.[9] While in determining whether an agreement has been entered into the court will consider all the surrounding circumstances,[10] the evidence must clearly show a definite and explicit bargain.[11]

Exemption — How Shown. — Where the claim set up is a discharge from liability to salvage under any circumstances whatever and this claim is founded on written documents, the discharge should appear in express terms, and in a contract that by the use of clear and explicit terms should remove all doubt respecting the common understanding of both parties. But where the exemption is based on a usage as generally understood by all parties which is satisfactorily established, the exemption will be allowed.[12]

c. Upon Services Outside of Contract. — The fact that a contract is made for the performance of certain services does not deprive the salvor of his right of compensation, if, though not performing the services called for by the contract, he rendered salvage service and did not forfeit his claim to compensation by subsequent conduct.[13]

Previous Services. — Where the services were discontinuous, and the agreement made by the master covered the services rendered prior thereto, as well as the subsequent services, it does not bind the crew as to the services rendered before the agreement, they having acquired valid rights, which the master of the salvee vessel had no authority to bargain away.[14]

1. The Thornley, (C. C. A.) 98 Fed. Rep. 735.

Contract Does Not Affect Admiralty Jurisdiction in United States. — The Louisa Jane, 2 Lowell (U. S.) 295; The Roanoke, 50 Fed. Rep. 574; Gager *v.* The A. D. Patchin, 1 Am. L. J. N. S. 529, 9 Fed. Cas. No. 5,170; The Alert, 56 Fed. Rep. 721.

2. **When Salvage Barred.** — The Marquette, Brown Adm. 364; The Lustre, 3 Hag. Adm. 154; The Mulgrave, 2 Hag. Adm. 77; The Solway Prince, (1896) P. 120; The Marion Teller, Cassell's Dig. Sup. Ct. (Can.) 521; The Independence, 2 Curt. (U. S.) 350; The Huntsville, 12 Fed. Cas. No. 6,916; The Whitaker, 1 Sprague (U. S.) 282; Squire *v.* One Hundred Tons Iron, 2 Ben. (U. S.) 21; Hennessey *v.* The Ship Versailles, 1 Curt. (U. S.) 353, 11 Fed. Cas. No. 6,365; The Brig Susan, 1 Sprague (U. S.) 499, 23 Fed. Cas. No. 13,630; The Enright, 12 Fed. Rep. 157; Gould's Case, 1 Ct. Cl. 184. See also The Stratton Audley, 8 Blatchf. (U. S.) 264.

3. **Contract Must Be Absolute.** — Coffin *v.* The Schooner John Shaw, 1 Cliff. (U. S.) 230; Adams *v.* Bark Island City, 1 Cliff. (U. S.) 210; The Huntsville, 12 Fed. Cas. No. 6,916. See also cases cited in preceding note.

4. The R. R. Rhodes, (C. C. A.) 82 Fed. Rep. 751.

5. The Independence, 2 Curt. (U. S.) 350.

6. Bowley *v.* Goddard, 1 Lowell (U. S.) 154.

7. The La Purisima Concepcion, 13 Jur. 545.

8. **Service Presumed to Be for Salvage Compensation.** — Bowley *v.* Goddard, 1 Lowell (U. S.) 154; The Independence, 2 Curt. (U. S.) 350.

9. **Burden of Proof.** — The Arthur, 6 L. T. N. S. 556; The Resultatet, 17 Jur. 353; The British Empire, 6 Jur. 608; The Brig Susan, 1 Sprague (U. S.) 499; Elphicke *v.* White Line Towing Co., (C. C. A.) 106 Fed. Rep. 945.

10. Dominy *v.* Anchors, Sails, etc., 1 Ben. (U. S.) 77.

11. **Sufficiency of Evidence.** — Bowley *v.* Goddard, 1 Lowell (U. S.) 154; Pope *v.* The Sapphire, 19 Fed. Cas. No. 11,276; Gould's Case, 1 Ct. Cl. 184.

12. **Proof of Exemption.** — The Sappho, L. R. 3 A. & E. 142; The Steamer Colima, 5 Sawy. (U. S.) 181.

Contracts of Consortship. — Pent *v.* Two Thousand Eight Hundred and Fifty Dollars, 19 Fed. Cas. No. 10,961*a*.

13. The Gary *v.* The Sherman, Chase (U. S.) 468.

14. The Inchmaree, (1899) P. 111.

d. Upon Rights of Third Persons — (1) *Parties in Interest* — (a) In General. — Other persons not parties to the agreement, but parties in interest, are not concluded by it in respect to the sum agreed on as compensation for the salvage service,[1] but an adjustment made under such circumstances will be regarded as affording a safe rule of valuation.[2]

Agent of Salvors. — One held out as the agent of the several independent salvors may bind them by a contract entered into with the salvee, even though they have conferred no formal authority upon him.[3]

(b) Members of Crew. — In cases of salvage the master of the salving vessel may bind his own interest, and the interest of his employers, by an agreement with the owner of the vessel saved as to the quantum of salvage to be paid; but such an agreement will not be conclusive upon the rest of the crew if made without their sanction and concurrence.[4] So, an agreement between the master of the salvor and the agent of the owners of the salvee, whereby the master and owners were to receive fifty per cent., does not compel the seamen of the salvee to look to the remaining fifty per cent. for their compensation.[5] Nor will the contract, even when made with the consent of a part of the crew, bind the others.[6] A settlement made for their service by an agent authorized by the seamen is binding upon them, and they have no recourse against the salvee after settlement has been made by their agent. Even if no previous authority has been given by them, their demands on the person collecting the salvage for their share ratifies the settlement made by him.[7] But an agent appointed by the crew under power of attorney to bring suit or otherwise settle and adjust any claim they may have for salvage services can only do what the terms of the power authorize him to do, and is not authorized to receive payment of the sum awarded for salvage or to apportion the salvage among them, and where such has been done the crew may recover of the owners the amount so awarded and paid to their agent.[8]

(2) *Subcontractors.* — The salvor performing salvage services under contract is not, by virtue of his employment, an agent of the owners authorized to create any liability in favor of a subcontractor beyond that for which he contracted.[9]

Salvage Compensation. — A subcontractor employed by the principal salvor with the permission or under the direction of the master of the salvee and for a stipulated compensation is not entitled to salvage for his services.[10] It is otherwise, however, where no absolute compensation is stipulated. But the court will protect the salvee so that he shall not be compelled to pay in all more than the amount stipulated in the original contract.[11]

The Subcontractor Cannot Maintain a Suit with the original contractor to recover the compensation agreed on between the salvee and the contractor where the subcontractor's agreement precludes him from sharing in the compensation,

1. Rights of Third Persons. — Collins *v.* Steamboat Fort Wayne, 1 Bond (U. S.) 476, 6 Fed. Cas. No. 3,012. See also The Missouri's Cargo, 1 Sprague (U. S.) 260.

2. The Steamboat Narragansett, Olc. Adm. 388. See also *supra*, this title, *Contracts for Salvage — In General.*

3. Dominy *v.* Anchors, Sails, etc., 1 Ben. (U. S.) 77.

4. Contract as Affecting Crew. — The Britain, 1 W. Rob. 40; The Sarah Jane, 2 W. Rob. 111; The Delambre, 9 Fed. Rep. 775; The Olive Mount, 50 Fed. Rep. 563. *Compare* The Nasmyth, 10 P. D. 41.

Statutory Prohibition of Abandonment of Salvage Claim by Seamen. — See The Ganges, L. R. 2 A. & E. 370; The Cetewayo, 9 Fed. Rep. 717.

5. Cartwell *v.* The Ship John Taylor, Newb. Adm. 341, 5 Fed. Cas. No. 2,482.

6. The Sansone, 3 Ir. Jur. 258.

7. The Olive Mount, 50 Fed. Rep. 563. *Compare* The Sarah Jane, 2 W. Rob. 111, holding that the demand estops the seamen as to third parties only.

8. Churchill *v.* McKay, 20 Can. Sup. Ct. 472.

9. Salvor Cannot Bind Salvee by Contract. — The Marquette, Brown Adm. 364; The Silver Spray's Boilers, Brown Adm. 349. See also The Whitaker, 1 Sprague (U. S.) 282, 29 Fed. Cas. No. 17,525.

10. The Yucatan, 30 Fed. Cas. No 18,194; The Whitaker, 1 Sprague (U. S.) 282, 29 Fed. Cas. No. 17,525.

11. The Whitaker, 1 Sprague (U. S.) 282, 29 Fed. Cas. No. 17,525.

and is for a specific compensation.[1]

c. CONTRACT FOR LIFE SALVAGE. — It is doubtful whether, where an agreement is made only for the purpose of life salvage without regard to any saving of the property of the ship's owner, even though it be in a case of necessity, the master has power to bind the owner to a money payment, as the subject-matter is not for the benefit of the owner's property.[2] So, too, it has been held that a claim for life salvage will not be recognized as to passengers disembarked from a stranded vessel in accordance with an agreement with the master of that vessel where no need or danger existed, and that the master in making the agreement acted as agent of the passengers, not of the owners.[3]

6. Grounds for Setting Aside — *a.* DURESS. — To impugn a salvage contract on the ground of duress, it is not necessary that such duress should be shown as would require a court of law to set aside an ordinary contract,[4] but the court will refuse to enforce the contract where the salvor has taken advantage of his situation and availed himself of the perils and necessities of the others to drive a bargain.[5]

Forfeiture of Compensation by Misconduct. — The act of the crew of the salvee in compelling the master of the salvee and the salvors under stress of circumstance to enter into an agreement to give exorbitant pay, forfeits all salvage compensation.[6]

b. FRAUD. — A salvage contract may, just as any other contract, be set aside on the ground that it was entered into corruptly or fraudulently.[7]

Subsequent Lawful Performance. — Where the service has been lawfully performed, though under a fraudulent agreement whereby the master was to receive a certain percentage of the compensation agreed upon, the salvors will be awarded compensation less the percentage promised the master.[8]

Burden of Proof. — The burden of proving the fraud is upon the party alleging it.[9]

c. MISREPRESENTATION. — The agreement may be vitiated by misrepresentations on the part of the master of the salvee,[10] or of the salvor, when

1. The Marquette, Brown Adm. 364.

2. **Life Salvage.** — The Renpor, 8 P. D. 115.

3. The Mariposa, (1896) P. 273.

4. **Duress.** — The Mark Lane, 15 P. D. 135; The Elfrida, 172 U. S. 186; The Thornley, (C. C. A.) 98 Fed. Rep. 735.

5. *England.* — The Mark Lane, 15 P. D. 135; The Cargo ex Woosung, 1 P. D. 260; The Medina, 2 P. D. 5; The Silesia, 5 P. D. 177; The Rialto, (1891) P. 175; The Helen and George, Swabey 368; The America, 2 Stuart Adm. (L. C.) 214.

United States. — Post *v.* Jones, 19 How. (U. S.) 150; The Elfrida, 172 U. S. 186; The Thornley, (C. C. A.) 98 Fed. Rep. 735; The C. & C. Brooks, 17 Fed. Rep. 548; The Schooner Emulous, 1 Sumn. (U. S.) 210; The Young America, 20 Fed. Rep. 926; The Clotilda, Hask. (U. S.) 412, 5 Fed. Cas. No. 2,903; The Tennasserim, 47 Fed. Rep. 119; The Schooner Jacob E. Ridgway, 8 Ben. (U. S.) 179; The Ship Henry Ewbank, 1 Sumn. (U. S.) 400; Books *v.* The Steamer Adirondack, 2 Fed. Rep. 387; The G. W. Jones, 48 Fed. Rep. 925; Gager *v.* The A. D. Patchin, 1 Am. L. J. N. S. 529, 9 Fed. Cas. No. 5,170; The Bark J. G. Paint, 1 Ben. (U. S.) 545; Boggs *v.* The Loutra, 3 Fed. Cas. No. 1,601; The Brig Wexford, 6 Ben. (U. S.) 119; Cowell *v.* The Brothers, Bee Adm. 136; The Jessomene, 47 Fed. Rep. 903; The Sirius, (C. C. A.) 57 Fed. Rep. 851; The Independence, 2 Curt. (U. S.) 350; Bearse *v.* Three Hundred and Forty Pigs Copper, 1 Story (U. S.) 314, 2 Fed. Cas. No. 1,193.

Hawaii. — Wilder's Steamship Co. *v.* The Brigantine Lurline, 11 Hawaii 83.

6. The York, 30 Fed. Cas. No. 18,140.

7. **Fraud.** — The Henry, 15 Jur. 183, 2 Eng. L. & Eq. 564; The Theodore, Swabey 351; The Crus V., Lush. 583; The Generous, L. R. 2 A. & E. 57; The Enchantress, Lush. 93; The Alfrida, 172 U. S. 186; The Sir William Armstrong, 53 Fed. Rep. 145; The Roanoke, 50 Fed. Rep. 574; Church *v.* Seventeen Hundred and Twelve Dollars, 5 Fed. Cas. No. 2,713; The Clandeboye, (C. C. A.) 70 Fed. Rep. 631; Coffin *v.* The Schooner John Shaw, 1 Cliff. (U. S.) 230; Houseman *v.* The Schooner North Carolina, 15 Pet. (U. S.) 40. See also *infra*, this title, *Effect of Negligence or Misconduct of Salvor*.

Award by Interested Arbitrators Not Binding. — Church *v.* Seventeen Hundred and Twelve Dollars, 5 Fed. Cas. No. 2,713.

8. Church *v.* Seventeen Hundred and Twelve Dollars, 5 Fed. Cas. No. 2,713.

9. The Henry, 15 Jur. 183, 2 Eng. L. & Eq. 564; Coffin *v.* The Schooner John Shaw, 1 Cliff. (U. S.) 230.

10. **Misrepresentation.** — The Kingalock, 1 Spinks 263; The Repulse, 2 W. Rob. 396; The

they are material and relate to matters which can by any reasonable probability affect the service to be performed.[1] But the agreement will not be set aside merely because there has been a misrepresentation or concealment of some immaterial fact.[2]

d. MISTAKE. — In passing upon the validity of the contract the court must take note of the fact of a mutual mistake if that is proved to exist.[3]

e. EXCESSIVE COMPENSATION — (1) *In General.* — A contract calling for a compensation which is so excessive as to be unreasonable and exorbitant will not be sustained.[4]

Hard Bargain. — The mere fact that the bargain is a hard one,[5] or that the amount of compensation seems large or excessive,[6] and greater than the amount which the court would have awarded for such a service,[7] is not alone sufficient ground for setting aside a contract which was fairly entered into without fraud or compulsion,[8] and after due deliberation and with other means of assistance procurable.[9] Where, however, the amount agreed upon by the salvors is so disproportionate to the services and risk as to be unjust and inequitable, the court will not be governed by the agreement, but will award them such larger amount as will give them proper compensation.[10]

(2) *Subsequent Circumstances Altering Difficulty of Performance.* — The court will not set aside an agreement at the instance of the salvors for a fixed sum for salvage assistance merely because change of circumstances alters the extent of the stipulated service so that greater difficulties were introduced into its performance than were originally contemplated.[11] Also if, at the time the contract was made, the compensation stipulated appeared to be just and reasonable in view of the value of the property at stake, the danger from which it was to be rescued, the risk of the salvors and the salving property, the time and labor probably necessary to effect the salvage, and the contingency of losing all in case of failure, the sum should not be reduced for unexpected

Henry, 15 Jur. 183, 2 Eng. L. & Eq. 564. See also The Clandeboye, (C. C. A.) 70 Fed. Rep. 631; The Elfrida, 172 U. S. 186.

1. Eldridge *v.* Forty-One Bars Railroad Iron, 8 Fed. Cas. No. 4,334.

2. The Jonge Andries, Swabey 226; The Canova, L. R. 1 A. & E. 54; The Repulse, 2 W. Rob. 396; The Henry, 15 Jur. 183, 2 Eng. L. & Eq. 564.

3. The Alert, 56 Fed. Rep. 721.

4. **Unreasonable Compensation** — *England.* — The Rialto, (1891) P. 175; The Nimrod, 14 Jur. 942; The Silesia, 5 P. D. 177.

United States. — The Tornado, 109 U. S. 110; The Sirius, 53 Fed. Rep. 611, (C. C. A.) 57 Fed. Rep. 851; The Schooner Emulous, 1 Sumn. (U. S.) 207; The C. & C. Brooks, 17 Fed. Rep. 548; The Schiedam, 48 Fed. Rep. 923; The Don Carlos, 47 Fed. Rep. 746; The Sophia Hanson, 16 Fed. Rep. 144; The Steamer Leipsic, 5 Fed. Rep. 108; Collins *v.* Steamboat Fort Wayne, 1 Bond (U. S.) 476, 6 Fed. Cas. No. 3,012; The Bark J. G. Paint, 1 Ben. (U. S.) 545; The Jacob E. Ridgway, 8 Ben. (U. S.) 179, 13 Fed. Cas. No. 7,155; The Brig Homely, 8 Ben. (U. S.) 495; Two Hundred and Two Tons Coal, 7 Ben. (U. S.) 343; Cowell *v.* The Brothers, Bee Adm. 136, 6 Fed. Cas. No. 3,294; Schutz *v.* Ship Nancy, Bee Adm. 139, 21 Fed. Cas. No. 12,493; The Clotilda, Hask. (U. S.) 412, 5 Fed. Cas. No. 2,903; Sturgis *v.* The Edward, 23 Fed. Cas. No. 13,575; Eads *v.* The Steamboat H. D. Bacon, Newb. Adm. 274, 8 Fed. Cas. No. 4,232. See also Chapman *v.* The Greenpoint's Engines, 38 Fed. Rep. 671

Hawaii. — Wilder's Steamship Co. *v.* The Brigantine Lurline, 11 Hawaii 83.

5. **Contract Must Be Exorbitant.** — The Firefly, Swabey 240; The Elfrida, 172 U. S. 186; The Sir William Armstrong, 53 Fed. Rep. 145; The Thornley, (C. C. A.) 98 Fed. Rep. 735; Bounty *v.* Kerrin, 3 Fed. Cas. No. 1,697*a*; Brooks *v.* The Steamer Adirondack, 2 Fed. Rep. 387; The Silver Spray's Boilers, Brown Adm. 349. See also The Mulgrave, 2 Hag. Adm. 77; The True Blue, 2 W. Rob. 176; The Henry, 15 Jur. 183, 2 Eng. L. & Eq. 564; The Prinz Heinrich, 13 P. D. 31; The Strathgarry, (1895) P. 264.

6. The Henry, 15 Jur. 183, 2 Eng. L. & Eq. 564; The Strathgarry, (1895) P. 264; The Agnes I. Grace, (C. C. A.) 51 Fed. Rep. 958; The Elfrida, 172 U. S. 186; The Alert, 56 Fed. Rep. 721; The Wellington, 48 Fed. Rep. 475; The Swiftsure, 29 Fed. Rep. 462; The Thornley, (C. C. A.) 98 Fed. Rep. 735.

7. The Thornley, (C. C. A.) 98 Fed. Rep. 735; Brooks *v.* The Steamer Adirondack, 2 Fed. Rep. 387.

8. The Elfrida, 172 U. S. 186; Brooks *v.* The Steamer Adirondack, 2 Fed. Rep. 387.

9. The Alert, 56 Fed. Rep. 721; The Agnes I. Grace, (C. C. A.) 51 Fed. Rep. 958.

10. The Phantom, L. R. 1 A. & E. 58.

11. The True Blue, 2 W. Rob. 176; The Resultatet, 17 Jur. 353; Halsey *v.* Albertuszen, 11 Moo. P. C. 313, *affirming* Swabey 226; The Cato, 35 L. J. Adm. 116; The Waverley, L. R. 3 A. & E. 369; Harley *v.* Four Hundred and Sixty-seven Bars Railroad Iron, 1 Sawy. (U. S.) 1.

success in accomplishing the work unless the compensation for the work actually done be grossly exorbitant.[1]

Impossible Contract. — If, however, the circumstances make the service wholly different from that contemplated by the parties and render the original contract impossible of performance, the court will deal with the question as though no contract had been made.[2]

7. Performance. — To warrant a recovery under a contract to deliver the vessel safely, it is not necessary that she should be salved in such sound condition as she was before the necessity for salvage arose.[3]

8. Payment. — Salvors by receiving payment from the owner of the salved vessel for their services abandon their right to the proportionate share which would otherwise be awarded.[4]

9. Abandonment. — The agreement may be abandoned by mutual consent and in such case has no effect as to the rights of the parties.[5] If, however, the salvee avails himself of the services of the salvor under a reasonable and valid contract, he cannot thereafter repudiate the contract.[6]

VI. Amount of Award — 1. In General. — The admiralty law does not contain any hard and fast rule for the determination on a percentage basis of the amount to be awarded for salvage services, but each case is to be determined by the special facts and circumstances appearing therein.[7]

2. Quantum Meruit. — Salvage awards are not assessed upon the *quantum meruit* principle, but on the general principles of maritime law, rewarding persons who, by great and perhaps hazardous exertions, bring in a ship, for which exertions, if not successful, nothing would have been paid, and as an inducement for the prompt rendition of salving services.[8] On the other hand

1. The Elfrida, 172 U. S. 186; The Sirius, 53 Fed. Rep. 611.

2. The Westbourne, 14 P. D. 132.

3. The Thornley, (C. C. A.) 98 Fed. Rep. 735.

4. The Sarah Jane, 2 W. Rob. 111; Spencer *v.* Steamboat Charles Avery, 1 Bond (U. S.) 117; Brevoor *v.* The Ship Fair American, 1 Pet. Adm. 87.

5. **Abandonment.** — The Samuel, 15 Jur. 407; The Repulse, 2 W. Rob. 396; The Afrisca, 1 Spinks 299.

6. The Roanoke, 50 Fed. Rep. 574; The Sir William Armstrong, 53 Fed. Rep. 145; The Ellen Holgate, 8 Fed. Cas. No. 4,375*a*.

7. **No Percentage Basis for Award** — *England.* — The Persia, 1 Spinks 166; The Cuba, Lush. 14; The Henry, 15 Jur. 183, 2 Eng. L. & Eq. 564; The Thetis, 3 Hag. Adm. 14; The Ardincaple, 3 Hag. Adm. 151; The Ewell Grove, 3 Hag. Adm. 200.

Canada. — The W. G. Putnam, Young (Nova Scotia) 271.

United States. — The Blackwall, 10 Wall. (U. S.) 1; The Egypt, 17 Fed. Rep. 367; The Boyne, 98 Fed. Rep. 444; The Sandringham, 10 Fed. Rep. 573; The Baker, 25 Fed. Rep. 771; The Fairfield, 30 Fed. Rep. 700; The Fannie Brown, 30 Fed. Rep. 215; The R. D. Bibber, 33 Fed. Rep. 55; The Pomona, 37 Fed. Rep. 444; Stone *v.* Jewell, 41 Fed. Rep. 103; Candee *v.* Sixty-eight Bales Cotton, 48 Fed. Rep. 479; The Elm Branch, 106 Fed. Rep. 952; The Coya, 108 Fed. Rep. 413; Fisher *v.* The Sybil, 5 Hughes (U. S.) 61, 9 Fed. Cas. No. 4,824; The Schooner John Wurts, Olc. Adm. 462, 13 Fed. Cas. No. 7,434; Pent *v.* The Ocean Belle, 19 Fed. Cas. No. 10,961; Western Transp. Co. *v.* The Great Western, 4 West. L. Month. 281, 29 Fed. Cas. No. 17,443; The Marie Anne, 5 Hughes (U. S.) 462; Talbot *v.* Seeman, 1 Cranch (U. S.) 1; Tyson *v.* Prior, 1 Gall. (U. S.) 133, 24 Fed. Cas. No. 14,319; Hand *v.* The Schooner Elvira, Gilp. (U. S.) 60, 11 Fed. Cas. No. 6,015; The Schooner Emulous, 1 Sumn. (U. S.) 207, 8 Fed. Cas. No. 4,480; Smith *v.* The Schooner Joseph Stewart, Crabbe (U. S.) 218, 22 Fed. Cas. No. 13,070; The Schooner John Wurts, Olc. Adm. 462, 13 Fed. Cas. No. 7,434; The Birdie, 7 Blatchf. (U. S.) 238, 3 Fed. Cas. No. 1,432.

Hawaii. — Coady *v.* 1,200 Barrels Oil, 2 Hawaii 34; Phillips *v.* Rawlins, 2 Hawaii 150; The Liholiho *v.* 1,206 Bags Sugar, 9 Hawaii 323; Wilder's Steamship Co. *v.* The Brigantine Lurline, 11 Hawaii 83.

In cases of civil salvage the court of admiralty does not recognize the rule of proportion, but awards an equitable remuneration for the service rendered, though such remuneration is more liberally allotted in cases of large value. The Salacia, 2 Hag. Adm. 262.

In appreciating and properly rewarding salvage services, no rule but that which a sound discretion may suggest, upon a view of all the circumstances of each particular case, can be laid down, and yet men possessing equal liberality and minds equally intelligent would vary materially from each other in fixing the quantum of reward. Bond *v.* The British Brig Cora, 2 Pet. Adm. 375, 2 Wash. (U. S.) 280.

8. **Quantum Meruit Not Basis of Award** — *England.* — Roy *v.* The Royal Middy, 12 C. L. Rep. 309, 2 Stuart Adm. (L. C.) 82; The William Beckford, 3 C. Rob. 355; The Industry, 3 Hag. Adm. 203; Aitchison *v.* Lohre, 4 App. Cas. 755, 49 L. J. Q. B. 123; The Hector, 3 Hag. Adm. 90; Nicholson *v.* Chapman, 2 H. Bl. 254; Bird *v.* Gibb, 8 App. Cas. 559.

the amount awarded may be below a *quantum meruit* allowance.[1] The amount of the award should not be out of all proportion to the services actually rendered,[2] and should be regarded in the light of remuneration and reward, and not in the light of prize.[3]

3. Considerations in Determining Award — *a.* In General — **Element that Reward Is Contingent.** — The element that the reward to salvors is contingent upon the event of their services being effectual, is a material consideration in fixing the amount of the award,[4] and where the salvage services consist chiefly of towage and are rendered under a contract for absolute payment of a certain sum in case the services are unsuccessful, this may be considered as an element in reduction of the award for salvage.[5]

Steamers Favored. — Where salvage services are rendered by merchant steamers they should be favored in determining the amount of the award,[6] and care should be taken not to establish a precedent through insufficient remuneration, which would tend to discourage merchant steamers from rendering assistance at sea when there is real or apparent danger.[7]

United States. — The Steamboat Narragansett, Olc. Adm. 388; Warder *v.* La Belle Creole, 1 Pet. Adm. 31; The John E. Clayton, 4 Blatchf. (U. S.) 372; The Independence, 2 Curt. (U. S.) 350, 13 Fed. Cas. No. 7,014; The Blackwall, 10 Wall. (U. S.) 1; The Attacapas, 3 Ware (U. S.) 65, 2 Fed. Cas. No. 637; Brevoor *v.* The Ship Fair American, 1 Pet. Adm. 87, 4 Fed. Cas. No. 1,847; The D. M. Hall *v.* The John Land, 7 Fed. Cas. No. 3,939; Hartshorn *v.* Twenty-Five Cases Silk, 11 Fed. Cas. No. 6,168*a;* Montgomery *v.* The Steamboat T. P. Leathers, Newb. Adm. 421, 17 Fed. Cas. No. 9,736; Scott *v.* The Clara E. Bergen, 21 Fed. Cas. No. 12,526*a;* The Sandringham, 10 Fed. Rep. 572; The Queen of the Pacific, 21 Fed. Rep. 459; The Katie Collins, 21 Fed. Rep. 409; The Baker, 25 Fed. Rep. 771; The Gallego, 30 Fed. Rep. 271; The Fannie Brown, 30 Fed. Rep. 215; The Sabine, 101 U. S. 384. *Compare* Pent *v.* The Ocean Belle, 19 Fed. Cas. No. 10,961.

"Compensation as salvage is not viewed by the admiralty courts merely as pay on the principle of a *quantum meruit* or as a remuneration *pro opere et labore*, but as a reward given for perilous services voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property." The Blackwall, 10 Wall. (U. S.) 1.

1. The Carl Schurz, 2 Flipp. (U. S.) 330; Hattrick *v.* The Spanish Bark, 11 Fed. Cas. No. 6,218*a;* The Lamington, (C. C. A.) 86 Fed. Rep. 675. *Compare* Bark Edwards, 12 Fed. Rep. 508.

2. The Compagnie Générale Transatlantique *v.* The F. T. Barry, L. R. 6 P. C. 468.

3. "Salvage should be regarded in the light of compensation and reward, and not in the light of prize. The latter is more like a gift of fortune conferred without regard to the loss or sufferings of the owner, who is a public enemy, whilst salvage is the reward granted for saving the property of the unfortunate, and should not exceed what is necessary to insure the most prompt, energetic, and daring effort of those who have it in their power to furnish aid and succor. Anything beyond that would be foreign to the principles and purposes of salvage; anything short of it would not secure its objects." Murphy *v.* Ship Suliote, 5 Fed. Rep. 99.

4. **Contingency of Reward.** — Bird *v.* Gibb, 8 App. Cas. 559, 52 L. J. P. C. 57; Aitchison *v.* Lohre, 4 App. Cas. 755; The Brig John Gilpin, Olc. Adm. (U. S.) 77; The Brig John Gilpin, Olc. Adm. 88; The Sandringham, 10 Fed. Rep. 572; The Missouri's Cargo, 1 Sprague (U. S.) 260, 17 Fed. Cas. No. 9,654.

5. The Edenmore, (1893) P. 79; The Elmbank, (C. C. A.) 69 Fed. Rep. 104. See also The Kimberley, 40 Fed. Rep. 289.

6. **Steamers Favored** — *England.* — The Ella Constance, 15 L. J. Adm. 191; The Alfen, Swabey 189; The Otto Hermann, 33 L. J. Adm. 189; The Palmyra, 25 L. T. N. S. 884, 1 Asp. M. Cas. 182; The General Palmer, 5 Notes Cas. (Eng.) 159, note; The Spirit of the Age, Swabey 286; The Santipore, 1 Spinks 231; The Earl Grey, 3 Hag. Adm. 363; The Raikes, 1 Hag. Adm. 246.

United States. — Brooks *v.* The Ship William Penn, 2 Hughes (U. S.) 144, 4 Fed. Cas. No. 1,965; Hennessey *v.* The Ship Versailles, 1 Curt. (U. S.) 353, 11 Fed. Cas. No. 6,365; The Huntsville, 12 Fed. Cas. No. 6,916, Montgomery *v.* The Steamboat T. P. Leathers, Newb. Adm. 421, 17 Fed. Cas. No. 9,736; The Blackwall, 10 Wall. (U. S.) 1; The Steamer Adirondack, 5 Fed. Rep. 213; Wilder's Steamship Co. *v.* The Brigantine Lurline, 11 Hawaii 83. *Compare* The Allegiance, 6 Sawy. (U. S.) 68, 1 Fed. Cas. No. 207.

Other circumstances being alike, steamboats, as having the ability to render more prompt and efficacious assistance than sail vessels are encouraged by a more liberal reward. The Raikes, 1 Hag. Adm. 246.

"This is most rightfully so, when they turn aside from their voyage or leave other pursuits to go as mere volunteers to vessels in distress." The H. B. Foster, Abb. Adm. 222.

"Steam vessels are always considered as entitled to a liberal reward, not only because the service is usually rendered by a costly instrumentality, but because the service is in general rendered with greater promptitude and is of a more effectual character." The Blackwall, 10 Wall. (U. S.) 1.

7. The Emily B. Souder, 15 Blatchf. (U. S.) 185.

Professional Salvors. — So, also, it seems that individuals and companies maintaining an equipment especially for the rendition of salvage services are to be favored.[1]

The Character of the Cargo salved is always to be considered in fixing the award.[2]

Relation of Salvors to Property Salved. — The relation of the salvors to the property and vessel salved is to be considered.[3]

Cause of Necessity for Salvage Services. — As a general rule the cause which gave rise to the necessity for the rendition of salvage services is immaterial;[4] still, the fact that the master of the salved vessel or cargo wilfully caused the wreck of the vessel has been considered.[5]

Act of Salvor as Contributing Cause to Salved Vessel's Danger. — The fact that the acts of the salvors were a contributing cause in placing the salved vessel in the position where the rendition of salvage services was required is, of course, to be considered in fixing the amount of the award for such services.[6]

The Number of Salvors. — The fact that a large number of vessels and persons were employed in the rendition of the salvage services, and that therefore the total salvage award is to be divided amongst many, is not of itself an element for consideration nor a reason for increasing the award to a greater amount than would have been allowed to a less number efficiently performing the same services.[7]

Misconduct of Salvors. — Misconduct on the part of salvors in misrepresenting the amount of property salved, while it may not be ground for forfeiture of their entire claim for salvage, should be considered as an element lessening the amount of the award.[8] So, also, where the salvors make exaggerated statements as to the extent and character of their services, this will lessen the

1. Professional Salvors. — The Brig Susan, 1 Sprague (U. S.) 499, 23 Fed. Cas. No. 13,630; Coast Wrecking Co. *v.* Phœnix Ins. Co., 13 Fed. Rep. 127, 20 Blatchf. (U. S.) 557; Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914; Virden *v.* The Caroline, 6 Am. L. Reg. 222, 28 Fed. Cas. No. 16,956; The Andrew Adams, 36 Fed. Rep. 205; Walter *v.* The Montgomery, 29 Fed. Cas. No. 17,120. *Compare* Sturgis *v.* Vickery, 23 Fed. Cas. No. 13,577*a*.

The fact that wrecking vessels are maintained by the salvors at heavy expense and often unemployed is not to be considered, but if by the maintenance of a wreckage service the salvors are able to render more efficient aid, that is to be considered in estimating the value of the services rendered when that is the test of compensation, and whenever salvage service is rendered its usefulness and efficiency are always to be considered by whomsoever it is rendered. The J. F. Farlan, 8 Blatchf. (U. S.) 207.

"Salvages ought never to be graduated at higher rates than the good of commerce really requires; and whenever it appears that more vessels and men are employed in the business of saving property than the good of commerce truly requires, it is evident that the rates of salvage have been too high — too stimulating — and the court should at once be admonished that the good of commerce requires that they should be reduced." *Per* Marvin, J. Pent *v.* The Ocean Belle, 19 Fed. Cas. No. 10,961.

2. Jerby *v.* 194 Slaves, Bee Adm. 226, 13 Fed. Cas. No. 7,288 (negroes); Warder *v.* La Belle Creole, 1 Pet. Adm. 31, 29 Fed. Cas. No. 17,165 (plate and jewels).

3. Bean *v.* The Ship Grace Brown, 2 Hughes (U. S.) 112.

Where Part Owner of Salved Vessel Is Part Owner of Salving Vessel. — Where a part owner of the salving vessel has an interest in the vessel salved, in awarding the amount of salvage to his co-owners of the salving vessel and her crew, the amount of salvage is to be computed by deducting from the value of the entire salvage service the share which would have been awarded to such part owner. The Caroline, Lush. 334.

4. Cause of Necessity for Services. — Browning *v.* Baker, 2 Hughes (U. S.) 30, 4 Fed. Cas. No. 2,041.

5. Malone *v.* The Pedro, 16 Fed. Cas. No. 8,995.

6. Shersby *v.* Hibbert, 6 Moo. P. C. 90.

Prior Refusal of Salvors to Give Tow. — The Bolivar *v.* The Chalmette, 1 Woods (U. S.) 397.

Pilot as Salvor. — It is against public policy to allow to a pilot boat liberal salvage where the rescued vessel was run aground through the fault of her pilot. The Relief, 51 Fed. Rep. 252.

7. Number of Salvors. — Union Tow-Boat Co. *v.* The Bark Delphos, Newb. Adm. 412; The Albus, 1 Fed. Cas. No. 148; The Crown, 5 Adm. Rec. 675, 6 Fed. Cas. No. 3,450; Moore *v.* The Caribon, 17 Fed. Cas. No. 9,753*a*; The Mt. Washington, 4 Adm. Rec. 523, 17 Fed. Cas. No. 9,887; Sanderson *v.* The Ann Johnson, 3 Adm. Rec. 159, 21 Fed. Cas. No. 12,297*a*. *Compare* The D. M. Hall *v.* The John Land, 7 Fed. Cas. No. 3,939.

The compensation will not be increased because of the employment of an unnecessary number of vessels. The Ashburton, 2 Fed. Cas. No. 575.

8. Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914. See *infra*, this title, *Effect of Negligence or Misconduct of Salvor.*

amount of the award which would otherwise be made.[1]

Usage of Port. — If the rate of compensation for salvage services is established by a usage of the port well known to all parties, the award may be affected or controlled by such usage.[2]

Value of Precedents in Determining Award. — In determining the amount to be awarded as salvage it is hardly safe to make comparisons of cases of awards adjudged unless, at the same time, careful attention is given and proper discrimination made as to the facts and special circumstances existing in each case; the dissimilar facts are generally so marked, especially those relating to value, time, risk, and skill, as to render the decision in one case an unsafe guide in another;[3] still, as far as practicable, where circumstances show a similarity of reasoning and common points of agreement as to amount of award, the trial courts should consider the precedents of adjudged cases.[4]

Conflict of Laws. — The rules of law applied by the courts of the country to which the salved vessel belongs, in determining the amount of the award, are not to be considered, but the law of the forum in which the award is made governs.[5]

b. LIBERAL AWARD — PUBLIC POLICY. — It has frequently been said that on the grounds of public policy the reward to salvors should be a liberal one, as it is desirable that one vessel should be encouraged in rendering services to another vessel in distress.[6] Another reason for liberality is to make the compensation such as will in some measure guarantee the honesty of the salvors, so that they shall not be tempted to pay themselves by the embezzlement of property left without protection.[7] Salvors are also favored with liberal rewards for the reason that but for their services the entire property salved might have been lost.[8] On the other hand, the award for salvage services should not be so large and out of proportion to the services actually rendered as to cause vessels, in situations in which it is expedient that they should quickly accept salvage services, to hesitate and decline to receive them because of the ruinous cost.[9]

1. The Alma, 5 Nova Scotia 789.

2. **Usage.** — The Louisa Jane, 2 Lowell (U. S.) 295.

3. **Value of Precedents.** — The Haxby, 83 Fed. Rep. 715, 42 U. S. App. 610.

4. The Neto, 15 Fed. Rep. 819; The John & Albert, 4 Adm. Rec. 534, 13 Fed. Cas. No. 7,333; Union Tow-Boat Co. *v.* The Bark Delphos, Newb. Adm. 412.

5. The Compagnie Générale Transatlantique *v.* The F. T. Barry, L. R. 6 P. C. 468.

6. **Liberal Reward — Public Policy** — *England.* — The Raikes, 1 Hag. Adm. 246; The Industry, 3 Hag. Adm. 203; The Sarah, 1 C. Rob. 313, note; The Clifton, 3 Hag. Adm. 118; The Eastern Monarch, Lush. 81; The Werra, 12 P. D. 52.

United States. — Union Tow-Boat Co. *v.* The Bark Delphos, Newb. Adm. 412; McGinnis *v.* The Steamboat Pontiac, Newb. Adm. 130; Fisher *v.* The Sybil, 5 Hughes (U. S.) 61, 9 Fed. Cas. No. 4,824, *decree affirmed* 4 Wheat. (U. S.) 98; Bond *v.* The Brig Cora, 2 Wash. (U. S.) 80; The Missouri's Cargo, 1 Sprague (U. S.) 260, 17 Fed. Cas. No. 9,654; The Brig Anna, 6 Ben. (U. S.) 166, 1 Fed. Cas. No. 398; The Schooner Emulous, 1 Sumn. (U. S.) 207; Ehrman *v.* Steam-Ship Swiftsure, 4 Fed. Rep. 467; Ehrman *v.* The Swiftsure, 5 Hughes (U. S.) 228; Coast Wrecking Co. *v.* Phœnix Ins. Co., 13 Fed. Rep. 127; The Egypt, 17 Fed. Rep. 359; The Mary E. Dana, 17 Fed. Rep. 353; The Flower City, 16 Fed. Rep. 866; The Queen of the Pacific, 21 Fed. Rep. 459; The Baker, 25 Fed. Rep. 771; The Fairfield, 30 Fed. Rep. 700; The Fannie Brown, 30 Fed. Rep. 215; The Gallego, 30 Fed. Rep. 271; The Amity, (C. C. A.) 69 Fed. Rep. 111; The Great Northern, 72 Fed. Rep. 678; The Elm Branch, 106 Fed. Rep. 952; The Coya, 108 Fed. Rep. 413; Brooks *v.* The Ship William Penn, 2 Hughes (U. S.) 144, 4 Fed. Cas. No. 1,965; Brevoor *v.* The Ship Fair American, 1 Pet. Adm. 87, 4 Fed. Cas. No. 1,847; Montgomery *v.* The Steamboat T. P. Leathers, Newb. Adm. 421, 17 Fed. Cas. No. 9,736; Warder *v.* La Belle Creole, 1 Pet. Adm. 31, 29 Fed. Cas. No. 17,165; The Waterloo, Blatchf. & H. Adm. 114, 29 Fed. Cas. No. 17,257; The W. F. Garrison, 1 Lowell (U. S.) 139, 29 Fed. Cas. No. 17,475; Wilder's Steamship Co. *v.* The Brigantine Lurline, 11 Hawaii 90. *Compare* The Crown, 5 Adm. Rec. 675, 6 Fed. Cas. No. 3,450; Pent *v.* The Ocean Belle, 19 Fed. Cas. No. 10,961.

"**A Great Steam Navigation Company** is peculiarly bound to encourage salvage assistance; they owe it to the public; they are particularly engaged in carrying passengers; they are large contractors for carrying the mail." The London Merchant, 3 Hag. Adm. 394.

7. The Attacapas, 3 Ware (U. S.) 65; The Blackwall, 10 Wall. (U. S.) 1.

8. Collins *v.* Steamboat Ft. Wayne, 1 Bond (U. S.) 476, 6 Fed. Cas. No. 3,012.

9. Ehrman *v.* Steam-Ship Swiftsure, 4 Fed.

c. CHARACTER OF SERVICES. — The character of the services rendered by the salvors is to be considered in fixing the award,[1] including the severity and duration of the services and expenses incurred,[2] and the promptitude, skill, and judgment involved therein;[3] and in awarding the amount for salvage services well performed, the court considers the shortness of the duration of such services as an element of meritoriousness, rather than as an element tending to lessen the amount to be awarded.[4] The unskilful manner in which the salvage services were rendered or the relaxation of diligence on the part of the salvors, and the consequent injury to the vessel or property salved, is to be considered as an element lessening the amount to be awarded as salvage;[5] but where there has been no wilful misconduct or neglect on the part of the salvors, their mere failure to make all exertions within their power is no ground for forfeiture of their claim for salvage.[6] To encourage the

Rep. 463, 5 Hughes (U. S.) 228. See also The Waterloo, Blatchf. & H. Adm. 114.

"The principle is that the compensation should be such that it will offer a proper inducement to the rendering of these extraordinary services at sea, and yet not so great that it will deter the parties in need of aid from the acceptance of the service." The Steamship Colon, 10 Ben. (U. S.) 60, 6 Fed. Cas. No. 3,024.

1. Character of Services — *England.* — The Otto Hermann, 33 L. J. Adm. 189; The Industry, 3 Hag. Adm. 203; The London Merchant, 3 Hag. Adm. 394; The Clifton, 3 Hag. Adm. 118; The Chetah, 5 Moo. P. C. C. N. S. 273.

United States. — The Bolivar *v.* The Chalmette, 1 Woods (U. S.) 397, 3 Fed. Cas. No. 1,611; Robson *v.* The Huntress, 2 Wall. Jr. (C. C.) 59; The Waterloo, Blatchf. & H. Adm. 114; Hand *v.* The Schooner Elvira, Gilp. (U. S.) 60, 11 Fed. Cas. No. 6,015; The George Gilchrist, 1 Lowell (U. S.) 234; The Steamboat Cheeseman *v.* Two Ferry Boats, 2 Bond (U. S.) 363; The Blackwall, 10 Wall. (U. S.) 1; The Mary E. Dana, 17 Fed. Rep. 353; The Egypt, 17 Fed. Rep. 359; The Alaska, 23 Fed. Rep. 597; The Queen of the Pacific, 25 Fed. Rep. 610; The Baker, 25 Fed. Rep. 771; The Fairfield, 30 Fed. Rep. 700; The Oxford, 66 Fed. Rep. 584; The Strathnevis, 76 Fed. Rep. 855; Ulster Steam Ship Co. *v.* Cape Fear Towing, etc., Co., (C. C. A.) 94 Fed. Rep. 214; The Flottbek, (C. C. A.) 118 Fed. Rep. 954; The Liholiho *v.* 1206 Bags Sugar, 9 Hawaii 329; Wilder's Steamship Co. *v.* The Brigantine Lurline, 11 Hawaii 90; Coffin *v.* The Schooner John Shaw, 1 Cliff. (U. S.) 230, 5 Fed. Cas. No. 2,949; Curry *v.* The Loch Goil, 6 Fed. Cas. No. 3,495; Hartshorn *v.* Twenty-Five Cases Silk, 11 Fed. Cas. No. 6,168*a*; The Howard, 12 Fed. Cas. No. 6,752; The John E. Clayton, 4 Blatchf. (U. S.) 372, 18 How. Pr. (N. Y.) 319, 13 Fed. Cas. No. 7,338; The Marathon, 5 Adm. Rec. 88, 16 Fed. Cas. No. 9,058; Pope *v.* The Sapphire, 19 Fed. Cas. No. 11,276; Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914; Sanderson *v.* The Ann Johnson, 3 Adm. Rec. 159, 21 Fed. Cas. No. 12,297*a*.

2. Severity and Duration of Services. — The Brig John Gilpin, Olc. Adm. 77; The F. A. Everett, 4 Adm. Rec. 621, 8 Fed. Cas. No. 4,603; The Mulhouse, 22 Law Rep. 276, 17 Fed. Cas. No. 9,910; Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914; Scott *v.* The Clara E. Bergen, 21 Fed. Cas. No. 12,526*a*; The Katie Collins, 21 Fed. Rep. 409; The Queen of the Pacific, 21 Fed. Rep. 459, 25 Fed. Rep. 610.

Increased Labor on Account of Inadequate Means of rendering services. — Curry *v.* The H. J. May, 6 Fed. Cas. No. 3,494.

Diving for Property is a factor enhancing remuneration. Buckley *v.* The William M. Jones, 4 Fed. Cas. No. 2,095; The Nathaniel Kimball, 4 Adm. Rec. 679, 17 Fed. Cas. No. 10,033; The Telamon, 4 Adm. Rec. 570, 23 Fed. Cas. No. 13,820; The Northwester, 10 Adm. Rec. 415, 18 Fed. Cas. No. 10,333; The America, 1 Adm. Rec. 449, 1 Fed. Cas. No. 279.

3. Skill and Judgment — *England.* — The Palmyra, 10 L. C. Rep. 144, 2 Stuart Adm. (L. C.) 4; The Perla, Swabey 230.

United States. — Bean *v.* The Ship Grace Brown, 2 Hughes (U. S.) 112; Robson *v.* The Huntress, 2 Wall. Jr. (C. C.) 59; Union Tow-Boat Co. *v.* The Bark Delphos, Newb. Adm. 412; The Blackwall, 10 Wall. (U. S.) 1; The Sandringham, 10 Fed. Rep. 556; The Annie Henderson, 15 Fed. Rep. 550; The Katie Collins, 21 Fed. Rep. 409; The Flottbek, (C. C. A.) 118 Fed. Rep. 954; The Isaac Allerton, 5 Adm. Rec. 612, 13 Fed. Cas. No. 7,088; The John & Albert, 4 Adm. Rec. 534, 13 Fed. Cas. No. 7,333; The J. F. Farlan, 8 Blatchf. (U. S.) 207, 13 Fed. Cas. No. 7,314; Scott *v.* The Clara E. Bergen, 21 Fed. Cas. No. 12,526*a*.

A Misjudgment of Salvors in endeavoring to bring a vessel to harbor under circumstances not most advantageous, whereby she was grounded, will effect a reduction of their award. The Perla, Swabey 230.

4. The Northumberland *v.* Andalusia, 12 L. T. N. S. 584; The United Kingdom *v.* The Syrian, 14 L. T. N. S. 833. See also The Queen of the Pacific, 21 Fed. Rep. 459, 25 Fed. Rep. 610.

"Promptitude" is "a very principal ingredient in such services." City of Edinburgh, 2 Hag. Adm. 333.

5. Negligence on Part of Salvors. — Shersby *v.* Hibbert, 6 Moo. P. C. 90; The Haxby, 42 U. S. App. 610; The Bark John G. Paint, 2 Ben. (U. S.) 174; The Mulhouse, 22 Law Rep. 276, 17 Fed. Cas. No. 9,910. See also The Bay of Naples, 44 Fed. Rep. 90; Pent *v.* The Ocean Belle, 19 Fed. Cas. No. 10,961.

6. The Haxby, 42 U. S. App. 610; The Strathnevis, 76 Fed. Rep. 855. See also The Oxford, 66 Fed. Rep. 584; likewise the section, *infra*, *Effect of Negligence or Misconduct of Salvor*.

salvor to do his duty and to harmonize his duty with his interest as far as is right, he should be better paid when he saves the vessel than when the vessel is lost and the cargo only is saved.[1]

Readiness to Render Services. — Where salvage services have been rendered and the salved vessel dispenses with further assistance, the salving vessel has the right to have the further services which she was ready and able to render taken into account in the award.[2]

d. VALUE OF PROPERTY SALVED. — One of the first things to be considered in determining the amount of salvage to be awarded is the value of the property salved;[3] and a higher percentage is to be awarded when the property salved is small and a smaller percentage when the value is large.[4] The consideration of the value of the property salved as an element in fixing the award does not mean that the value is to be taken as absolutely the most important element, but that it is the subject-matter out of which the claim arises and the fund to be distributed between the original owners and the salvors,[5] and through the consideration of such value the quantum of the award must not be out of all proportion to the services actually rendered.[6]

Estimation of Value. — The value of the property salved is to be determined by its market value,[7] and is to be calculated at the place where the salvage services terminated;[8] but where the vessel or property has not a market value in the port where the salvage services terminated, its value in a neighboring port, less the expense and proper charges incident to taking the property or vessel to such port, may be considered as its salved value.[9] The value of the

1. Pent *v.* The Ocean Belle, 19 Fed. Cas. No. 10,961; The Isaac Allerton, 5 Adm. Rec. 612, 13 Fed. Cas. No. 7,088.

"There are three reasons for this rule. First. Where the vessel is lost there is usually a large loss of property, and owners and underwriters cannot so well afford to pay a large sum of money for saving the residue. Second. When the vessel is lost there is a less sum to award salvage out of. Third. The rule makes it the interest of the salvors to exert themselves to save the ship." The Philah, 5 Adm. Rec. 693, 19 Fed. Cas. No. 11,091*a*.

2. The Maasdam, 6 Reports 716, 69 L. T. N. S. 659.

3. Value of Property Salved — *England.* — The William Beckford, 3 C. Rob. 355; The Industry, 3 Hag. Adm. 203; The Blenden-Hall, 1 Dods. 421; The Werra, 12 P. D. 52; The James Dixon, 2 L. T. N. S. 696.

United States. — The Haxby, 42 U. S. App. 610; The Annie Henderson, 15 Fed. Rep. 550; Bean *v.* The Ship Grace Brown, 2 Hughes (U. S.) 112; The Ship Henry Ewbank, 1 Sumn. (U. S.) 400; Spencer *v.* Steamboat Charles Avery, 1 Bond (U. S.) 117; Hand *v.* The Schooner Elvira, Gilp. (U. S.) 60; The Blackwall, 10 Wall. (U. S.) 1; Murphy *v* Ship Suliote, 5 Fed. Rep. 99; Anderson *v.* The Edam, 13 Fed. Rep. 135; The Katie Collins, 21 Fed. Rep. 409; The Neto, 15 Fed. Rep. 819; The Egypt, 17 Fed. Rep. 359; The Cairnsmore, 20 Fed. Rep. 519; The Queen of the Pacific, 21 Fed. Rep. 459, 25 Fed. Rep. 610; The Gallego, 30 Fed. Rep. 271; The Fairfield, 30 Fed. Rep. 700; The Mira A. Pratt, 31 Fed. Rep. 572; The Flottbek, (C. C. A.) 118 Fed. Rep. 954; Montgomery *v.* The Steamboat T. P. Leathers, Newb. Adm. 421, 17 Fed. Cas. No. 9,736; Robson *v.* The Huntress, 2 Wall. Jr. (C. C.) 59, 20 Fed. Cas. No. 11,971; Scott *v.* The Clara E. Bergen, 21 Fed. Cas. No. 12,526*a*; The Liholiho *v.* 1206 Bags Sugar, 9 Hawaii 329; Wilder's Steamship Co. *v.* The Brigantine Lurline, 11 Hawaii 90. *Compare* The Alaska, 75 Fed. Rep. 430.

4. Fisher *v.* The Sybil, 5 Hughes (U. S.) 61, 9 Fed. Cas. No. 4,824; The Nathan Hannan, 17 Fed. Cas. No. 10,029; Montgomery *v.* The Steamboat T. P. Leathers, Newb. Adm. 421, 17 Fed. Cas. No. 9,736; The Mississippi, 10 Adm. Rec. 610, 17 Fed. Cas. No. 9,651; The Philah, 5 Adm. Rec. 693, 19 Fed. Cas. No. 11,091*a*; The Rising Sun, 1 Ware (U. S.) 385, 20 Fed. Cas. No. 11,858; Smith *v.* The Schooner Joseph Stewart, Crabbe (U. S.) 218, 22 Fed. Cas. No. 13,070; The Liholiho *v.* 1206 Bags Sugar, 9 Hawaii 323; Wilder's Steamship Co. *v.* The Brigantine Lurline, 11 Hawaii 90.

"In fixing a proportion of the value the court is in the habit of giving a smaller proportion where the property is large and a higher proportion where the value is small; and for this obvious reason, that in property of small value, a small proportion would not hold out a sufficient encouragement; whereas in cases of considerable value, a smaller proportion would afford no inadequate compensation." The Blenden-Hall, 1 Dods. 414.

5. The Werra, 12 P. D. 52; The Syrian, 2 Maritime Law Cas. 387; Bowley *v.* Goddard, 1 Lowell (U. S.) 154.

6. The Compagnie Générale Transatlantique *v.* The F. T. Barry, L. R. 6 P. C. 468.

7. Estimation of Value. — Wilder's Steamship Co. *v.* The Brigantine Lurline, 11 Hawaii 90.

8. The George Dean, Swabey 290; The Norma, Lush. 124; The Selina, 2 Notes Cas. (Eng.) 18.

9. Wilder's Steamship Co. *v.* The Brigantine Lurline, 11 Hawaii 90. See also th George Dean, Swabey 290.

property is to be considered in the condition in which it is salved.[1] Thus, where repairs are made to the salved vessel, the cost of such repairs is to be deducted in fixing the salved value of the vessel,[2] and other necessary expenses, where the property is sold in salving proceedings, incurred in placing it before intending purchasers.[3] Where the property salved consists of merchandise which is subject to import duties, which are paid thereon upon the landing of the property, the amount of such duties is to be deducted from the price for which the property is sold in determining the salved value of the property.[4] So, also, where the import duty has been paid on the cargo, subject to repayment in case of destruction before landing, the value of the cargo is to be computed on the basis of duty unpaid.[5] An *ex parte* sale of the property salved by the owners does not conclusively fix the value of the property for the purpose of determining the award for salvage.[6] Liens existing upon the property salved at the time the services were rendered are not to be considered in estimating the value of the property salved.[7] The value of the freightage salved to the owners has been considered in estimating the value of the property salved.[8] Where the vessel salved was adrift through the negligence of the owner and likely to injure neighboring vessels, the fact that the owner was, through the rendition of salving service, saved from probable liability for injuries to such vessels may be considered;[9] but if the predicament of the salved vessel was not caused by negligence imputable to the owner, the fact that through the rendition of the salving services injury to property of third persons was avoided cannot be considered.[10]

Depreciation in Value. — Where the salved property depreciates in value after the salvage services have been rendered, the salvors must bear their share of such loss.[11]

e. PERILS FROM WHICH PROPERTY SALVED. — The perils from which the property was salved is a material consideration, a larger amount being awarded as salvage where such perils were imminent than where they were small,[12]

1. The Haxby, (C. C. A.) 83 Fed. Rep. 715.
2. The Haxby, (C. C. A.) 83 Fed. Rep. 715; The Lamington, (C. C. A.) 86 Fed. Rep. 675.
3. The Lamington, (C. C. A.) 86 Fed. Rep. 675.
4. The Waterloo, Blatchf. & H. Adm. 114, 29 Fed. Cas. No. 17,257.
5. Cornell Steamboat Co. *v.* 1,883 Bags Sugar, 108 Fed. Rep. 277.
6. The Thomas L. James, 115 Fed. Rep. 566.
7. The D. W. Vaughan, 9 Ben. (U. S.) 26, 8 Fed. Cas. No. 4,222.
8. Murphy *v.* Ship Suliote, 5 Fed. Rep. 99; The Sandringham, 10 Fed. Rep. 556.

The value of freight salved is to be reckoned *pro rata itineris peracti*, and the other equities of the case. The Norma, Lush. 124.

9. Stebbins *v.* Five Mud Scows, 50 Fed. Rep. 227.
10. The Baker, 25 Fed. Rep. 771, (vessel on fire).
11. The Carl Schurz, 2 Flipp. (U. S.) 330.
12. **Perils from Which Property Salved** — *England.* — The Edenmore, (1893) P. 79; The Industry, 3 Hag. Adm. 203; The Nimrod, 14 Jur. 942; The Lancaster, 9 P. D. 14; The Clifton, 3 Hag. Adm. 118; The Werra, 12 P. D. 52, (steamship losing propeller); The Chetah, 5 Moo. P. C. C. N. S. 278.

United States. — Bean *v.* The Ship Grace Brown, 2 Hughes (U. S.) 112; The Waterloo, Blatchf. & H. Adm. 115; Robson *v.* The Huntress, 2 Wall. Jr. (C. C.) 59; Union Tow-Boat Co. *v.* The Bark Delphos, Newb. Adm. 412; The Ship Henry Ewbank, 1 Sumn. (U. S.) 400; Spencer *v.* Steamboat Charles Avery, 1 Bond (U. S.) 117; Bowley *v.* Goddard, 1 Lowell (U. S.) 154; Evans *v.* The Ship Charles, Newb. Adm. 329; The Blackwall, 10 Wall. (U. S.) 1; Murphy *v.* Ship Suliote, 5 Fed. Rep. 99; The Rosedale, 20 Fed. Rep. 447; The Katie Collins, 21 Fed. Rep 409; The Queen of the Pacific, 21 Fed. Rep. 459, 25 Fed. Rep. 610; The Mira A. Pratt, 31 Fed. Rep. 572; The Fairfield, 30 Fed. Rep. 700; The Gallego, 30 Fed. Rep. 271; The Fannie Brown, 30 Fed. Rep. 215; The Bay of Naples, 44 Fed. Rep. 90; The Alice Blanchard, 106 Fed. Rep. 238; The Monticello, 81 Fed. Rep. 211; The Flottbek, (C. C. A.) 118 Fed. Rep. 954; The O. C. Hanchett, 45 U. S. App. 761, 22 C. C. A. 678; The H. B. Foster, Abb. Adm. 222, 11 Fed. Cas. No. 6,290; The Steamer Saragossa, 1 Ben. (U. S.) 551, 21 Fed. Cas. No. 12,334; The Alabamian, 2 Adm. Rec 254, 1 Fed. Cas. No. 128; Anonymous, 1 Adm. Rec. 149, 1 Fed.Cas. No. 430; The Annie Leland, 1 Lowell (U. S.) 310, 1 Fed. Cas. No. 421; The Ellen Hood. 5 Adm. Rec. 347, 8 Fed. Cas No. 4,377; The Euphrasia, 4 Adm. Rec. 136, 8 Fed. Cas. No. 4,545; The Georgiana, 1 Lowell (U. S.) 91, 10 Fed. Cas. No. 5,355; Hartshorn *v.* Twenty-five Cases Silk, 11 Fed. Cas. No. 6,168*a*; The John & Albert, 4 Adm. Rec. 534, 13 Fed. Cas. No. 7,333; The Kristrel, 4 Adm. Rec. 175, 14 Fed. Cas. No. 7,935; The Marathon, 5 Adm. Rec. 88, 16 Fed. Cas. No. 9,058; Montgomery *v.* The Steamboat T. P. Leathers, Newb Adm. 421, 17 Fed. Cas. No. 9,736; The

and in this connection the likelihood or probability of other assistance reaching the salved vessel before the danger would become imminent must be considered.[1] Thus, in case of salvage services rendered in harbors where abundant assistance is at hand, large awards should not be made,[2] and it has been said that save in exceptional cases the courts should not award the same measure of compensation for salvage services rendered upon rivers and the inland waters of great lakes as for the same services rendered upon the ocean.[3]

f. PERSONAL PERILS OF SALVORS. — The personal danger incurred by the salvors is to be considered.[4]

g. RISKS AND SACRIFICES OF SALVING SHIP. — The risks and degree of danger to which the salving ship was exposed are to be considered in determining the amount of salvage to be awarded,[5] and for this purpose the value of the salving ship may be considered in so far as it may have exposed the owner of the salving ship to greater loss.[6] In determining the risks incurred by the salving ship the conditions to be considered are such as prevail at the time the services are entered upon and by casualties which experience teaches practical seamen are liable to happen in the ordinary course of events.[7] Good fortune in encountering fair weather and lack of mishap while the services are being rendered are not to be considered as an element to lessen the amount of the award.[8]

Mt. Washington, 4 Adm. Rec. 523, 17 Fed. Cas. No. 9,887; The Scotsman, 5 Adm. Rec. 79, 21 Fed. Cas. No. 12,515; Scott *v.* The Clara E. Bergen, 21 Fed Cas. No. 12,526*a;* Wilder's Steamship Co *v.* The Brigantine Lurline, 11 Hawaii 83; The Liholiho *v.* 1,206 Bags Sugar, 9 Hawaii 329.

1. The Monticello, 81 Fed. Rep. 211; The Boyne, 98 Fed. Rep. 444; Pent *v.* The Ocean Belle, 19 Fed. Cas. No. 10,961; The George Gilchrist, 1 Lowell (U. S.) 234, 10 Fed. Cas. No. 5,333.

2. The O. C. Hanchett, 76 Fed. Rep. 1003, 22 C. C. A. 678, 45 U. S. App. 761; Wilder's Steamship Co. *v.* The Brigantine Lurline, 11 Hawaii 90.

3. Ensign *v.* The Peerless, 12 Chicago Leg. N. 41, 8 Fed. Cas. No. 4,494; Mattingly *v.* 357 Bales Cotton, 2 Flipp. (U. S.) 288, 16 Fed. Cas. No. 9,294.

4. Personal Perils of Salvors — *England.* — The Electric, 5 L. C. Rep. 53; The Pericles, Brown & L. 80; The Norden, 1 Spinks 185; The London Merchant, 3 Hag. Adm. 394; The Clifton, 3 Hag. Adm. 118; The Chetah, 5 Moo. P. C. C. N. S. 278; The Eastern Monarch, Lush. 81.

United States. — The Emblem, 2 Ware (U. S.) 68; Bean *v.* The Ship Grace Brown, 2 Hughes (U. S.) 112; Union Tow-Boat Co. *v.* The Bark Delphos, Newb. Adm. 412; Bond *v.* The British Brig Cora, 2 Pet. Adm. 375, 2 Wash. (U. S.) 80; Spencer *v.* Steamboat Charles Avery, 1 Bond (U. S.) 117; The Attacapas, 3 Ware (U. S.) 65; The Blackwall, 10 Wall. (U. S) 1; Murphy *v.* Ship Suliote, 5 Fed. Rep. 99; The Annie Henderson, 15 Fed. Rep. 550; The Sandringham, 10 Fed. Rep. 556; The Katie Collins, 21 Fed. Rep. 409; The Queen of the Pacific, 21 Fed. Rep. 459, 25 Fed. Rep. 610; The Mira A. Pratt, 31 Fed Rep. 572; The Fairfield, 30 Fed. Rep. 700; The Helen F. Robbins, 55 Fed. Rep. 1014; The Amirty, (C. C. A.) 69 Fed. Rep. 111; The Great Northern, 72 Fed. Rep. 678; The Haxby, 83 Fed. Rep. 715, 42 U. S. App. 610; The Flottbek, (C. C. A.) 118 Fed. Rep. 954; **Hartshorn** *v.* Twenty-Five Cases Silk, 11 Fed. Cas. No. 6,168*a;* The John & Albert, 4 Adm. Rec. 534, 13 Fed. Cas. No. 7,333; Montgomery *v.* The Steamboat T. P. Leathers, Newb. Adm. 421, 17 Fed. Cas. No. 9,736; The Isaac Allerton, 5 Adm. Rec. 612, 13 Fed. Cas. No. 7,088; The M. B. Stetson, 1 Lowell (U. S.) 119, 16 Fed. Cas. No. 9,363; Scott *v.* The Clara E. Bergen, 21 Fed. Cas. No. 12,526*a;* Wilder's Steamship Co. *v.* The Brigantine Lurline, 11 Hawaii 83; The Liholiho *v.* 1,206 Bags Sugar, 9 Hawaii 329.

Consideration of Injuries Received by Salvor. — The Helen F. Robbins, 55 Fed. Rep. 1014; The Bark John G. Paint, 2 Ben. (U. S.) 174, 13 Fed. Cas. No. 7,346.

Proximity of Life Saving Station as tending to lessen personal risk. The Haxby, 42 U. S. App. 610.

5. Risks to Salving Vessel — *England.* — The Phantom, L. R. 1 A. & E. 58; The Edenmore, (1893) P. 79; The Nimrod, 14 Jur. 942; The Lancaster, 9 P. D. 14; Carmichael *v.* Brodie, L. R. 1 P. C. 454, 4 Moo. P. C. N. S. 374; The Chetah, 5 Moo. P. C. C. N. S. 278; The Werra, 12 P. D. 52.

United States. — The Blackwall, 10 Wall. (U. S.) 1; The Haxby, 42 U. S. App. 610; Murphy *v.* Ship Suliote, 5 Fed. Rep. 99; The Mary E. Dana, 17 Fed. Rep. 353; The Egypt, 17 Fed. Rep. 359; The Queen of the Pacific, 21 Fed. Rep 459, 25 Fed. Rep. 610; The Gallego, 30 Fed. Rep. 271; The Mira A. Pratt, 31 Fed. Rep. 572; The Bay of Naples, 44 Fed. Rep. 90; The Amity, (C. C. A.) 69 Fed. Rep. 111; The Great Northern, 72 Fed. Rep. 678, The Alice Blanchard, 106 Fed. Rep. 238; The Flottbek, (C. C. A.) 118 Fed. Rep. 954; The John & Albert, 4 Adm. Rec. 534, 13 Fed. Cas No. 7,333; Hartshorn *v.* Twenty-Five Cases Silk, 11 Fed. Cas. No. 6,168*a.*

6. The Werra, 12 P. D. 52.

7. The Young America, 20 Fed. Rep. 926; The Great Northern, 72 Fed. Rep. 678; Bean *v.* The Ship Grace Brown, 2 Hughes (U. S.) 112, 2 Fed. Cas. No. 1,171.

8. The Great Northern, 72 Fed. Rep. 678; The Waverly, 78 Fed. Rep. 191; Sturtevant *v.*

Actual Loss or Injury to the salving vessel incurred without negligence on the part of the salvors is to be considered in fixing the award,[1] but it has been held that injuries to the salving vessel are only to be considered for the purpose of showing the perils and dangers incurred by the salving vessel, and not for the purpose of an allowance for the amount of such injuries.[2] So, also, the time the salving ship lost in delay caused by the rendition of the services,[3] but not the loss of possible profits which the salving vessel might otherwise have made.[4] So, also, the loss of information which would have led to the profitable employment of the salving vessel cannot be considered as an element enhancing the amount of the award.[5]

Forfeiture of Insurance. — The fact that the salving vessel, by reason of the rendition of the salvage services, forfeited insurance policies upon the vessel or cargo is an element to be considered in determining the amount of the award.[6]

Risk of Incurring Liability to Owner of Cargo. — So, also, the fact that the owners of the salving vessel may, through the rendition of the salving services, have subjected themselves to actions on the part of the owners of the cargo, is to be considered.[7]

h. VALUE OF SALVING SHIP AND PROPERTY EMPLOYED. — While the value of the salving ship and property employed by the salvors in the salving services is to be taken into consideration, in so far as it may have exposed the salvors to the risk of loss,[8] it is not a consideration which will largely increase

The Bark George Nicholaus, Newb. Adm. 449, 23 Fed. Cas. No. 13,578.

1. Injuries to Salving Vessel. — The Baku Standard *v.* The Angèle, (1901) A. C. 549, 70 L. J. P. C. 98; The Sunniside, 8 P. D. 137; The Thomas Blyth, Lush. 16; The Mud Hopper, 40 L. T. N. S. 462, 4 Asp. M. Cas. 403; Bird *v.* Gibb, 8 App. Cas. 559, 52 L. J. P. C. 57; Sonderburg *v.* The Ocean Tow Boat Co., 3 Woods (U. S.) 146; The Benison, 36 Fed. Rep. 793.

Presumption Is that Injuries to Salving Vessel Were Not Caused by Salvor's Negligence. — The Thomas Blyth, Lush. 16; The Baku Standard *v.* The Angèle, (1901) A. C. 549.

Remote Injuries. — A steamer was delayed several hours off Cape May by rendering a salvage service, and in consequence thereof arrived at Pollock Rip at low water, and struck in going over, receiving severe injuries. It was held that such injuries were too remote and could not be considered in the award for the salvage services. Winso *v.* The Cornelius Grinnell, 26 Law Rep. 677, 30 Fed. Cas. No. 17,883.

2. The Sunniside, 8 P. D. 137; The Rainger, 2 Hag. Adm. 42; The City of Chester, 9 P. D. 182; The Steamer Saragossa, 1 Ben. (U. S.) 553; Hattrick *v.* The Spanish Bark, 11 Fed. Cas. No. 6,218*a*.

3. Loss Through Delay. —The Werra, 12 P. D. 52; The Baku Standard *v.* The Angèle, (1901) A. C. 549; The Graces, 2 W. Rob. 294; The Edenmore, (1893) P. 79.

Demurrage During Repair of Injuries Received. — The Mud Hopper, 40 L. T. N. S. 462.

When a Ferry Boat Abandons a Regular Trip to give aid to a ship in distress, the nature of the ferry boat's employment, the inconvenience that arises from leaving the regular trip, the danger of complaint by passengers in case she does so, are things to be considered in determining the amount of her award. The Bay of Naples, 44 Fed. Rep. 90.

Where a Fishing Smack Is Actually Taken Off a Lucrative Employment to render a salvage service, the circumstance of her being so diverted from her occupation will form an essential ingredient in the salvage award. Where, however, she is not so engaged at the time, the award of the court will not be influenced by the consideration of the earnings she might have gained during her detention in the salvage service. The Louisa, 3 W. Rob. 99.

4. The Nicolai Heinrich, 17 Jur. 329.

5. The Cybele, 3 P. D. 8.

6. Forfeiture of Insurance. — The Aletheia, 13 W. R. 279; The Farnley Hall, 46 L. T. N. S. 216, 4 Asp. M. Cas. 499; Kirby *v.* The Scindia, 4 Moo. P. C. C. N. S. 84; Carmichael *v.* Brodie, L. R. 1 P. C. 454, 4 Moo. P. C. N. S. 374; Papayanni *v.* Hocquard, L. R. 1 P. C. 250; The Schooner Boston, 1 Sumn. (U. S.) 328, 3 Fed. Cas. No. 1,673; Bond *v.* The Brig Cora, 2 Wash. (U. S.) 80; The Ship Henry Ewbank, 1 Sumn. (U. S.) 400; Blagg *v.* The Steamboat E. M. Bicknell, 1 Bond (U. S.) 270, 3 Fed. Cas. No. 1,476; Sturtevant *v.* The Bark George Nicholaus, Newb. Adm. 449, 23 Fed. Cas. No. 13,578; Warder *v.* La Belle Creole, 1 Pet. Adm. 31, 29 Fed. Cas. No. 17,165. See also The Steamship Colon, 10 Ben. (U. S.) 60, 6 Fed. Cas. No. 3,024.

A sum paid by the salving vessel to underwriters as an increased premium goes to the enhancement of the compensation. The Edenmore, (1893) P. 79.

7. Liabilities to Owner of Cargo. — Papayanni *v.* Hocquard, L. R. 1 P. C. 250; Carmichael *v.* Brodie, L. R. 1 P. C. 454, 4 Moo. P. C. N. S. 374. See also The Bay of Naples, 44 Fed. Rep. 90.

8. Value of Property Employed in Salvage Services. — The Waterloo, Blatchf. & H. Adm. 114; The Blackwall, 10 Wall. (U. S.) 1; Coast Wrecking Co. *v.* Phenix Ins. Co., 20 Blatchf. (U. S.) 557; The Katie Collins, 21 Fed. Rep. 409; The Queen of the Pacific, 25 Fed. Rep. 610; The

the amount of the award.[1] On the other hand, the fact that the value of the salving vessel is small will not detract from the amount of the award.[2]

i. SAVING HUMAN LIFE. — The fact that human lives were saved when in imminent danger is to be considered in awarding the amount of salvage.[3]

4. Maximum Award. — An award should not, as a general rule, be made of such an amount as to deprive the owners of the property salved of all benefit from the services, as the doctrine of salvage derives its support from the consideration that, however insufficient the award may be to the salvor, something — a residuum — is left to the owner,[4] and an award of fifty per cent. of the value of the property salved has frequently been considered as the maximum to be awarded in any case,[5] though in special instances a larger percentage has been allowed,[6] and in some instances the whole of the property salved has been awarded to the salvors, though in such instances, as a general rule, the owners of the property made no claim.[7]

5. Review of Award. — While the amount of the award is to a great extent within the discretion of the trial court,[8] and on appeal the appellate tribunals have adopted a general rule of noninterference,[9] still on appeal from salvage

Flottbek, (C. C. A.) 118 Fed. Rep. 954; Hartshorn *v.* Twenty-Five Cases Silk, 11 Fed Cas. No. 6,168*a;* The Ida L. Howard, 1 Lowell (U. S.) 2, 12 Fed. Cas. No 6,999; Scott *v.* The Clara E. Bergen, 21 Fed. Cas. No. 12,526*a;* The Liholiho *v.* 1,206 Bags Sugar, 9 Hawaii 329; Wilder's Steamship Co. *v.* The Brigantine Lurline, 11 Hawaii 90.

In the Coast Wrecking Co. *v.* Phenix Ins. Co., 20 Blatchf. (U. S.) 557, where salvage services were rendered by a wrecking company, the cost of equipment and maintenance of the appliances of the wrecking company were considered.

1. The Werra, 12 P. D. 52; Sturgis *v.* The Steamboat Joseph Johnson, (U. S. Dist. Ct.) 19 How. Pr. (N. Y.) 229, 23 Fed. Cas. No. 13,576.

2. Bligh *v.* Simpson, 3 Moo. P. C. C. N. S. 51.

3. **Saving Human Life.** — The Eastern Monarch, Lush. 81; The Ardincaple, 3 Hag. Adm. 151; The London Merchant, 3 Hag. Adm. 394; Wilder's Steamship Co. *v.* The Brigantine Lurline, 11 Hawaii 90.

The saving of life is an ingredient in a salvage service which is always highly esteemed by the courts. The mere preservation of life, it is true, this court has no power of remunerating; it must be left to the bounty of the individuals; but if it can be connected with the preservation of property, whether by accident or not, then the court can take notice of it, and it is always willing to join that to the animus displayed in the first instance. Sturtevant *v.* The Bark George Nicholaus, Newb. Adm. 440, 23 Fed. Cas. No. 13,578.

4. **Residuum for Owners.** — The Carl Schurz, 2 Flipp. (U. S.) 330, 5 Fed. Cas. No. 2,414; Smith *v.* The Schooner Joseph Stewart, Crabbe (U. S.) 218; The Neto, 15 Fed. Rep. 819; Scott *v.* The Clara E. Bergen, 21 Fed. Cas. No. 12,526*a;* The L. W. Perry, 71 Fed. Rep. 745; The Lamington, (C. C. A.) 86 Fed. Rep. 675; The Waterloo, Blatchf. & H. Adm. 114, 29 Fed. Cas. No. 17,257; Williams *v.* The Adolphe, 19 Am. Jur. 219, 29 Fed Cas. No. 17,712. See also The Amethyst, 2 Ware (U. S.) 28.

5. **Moiety Award as Maximum.** — 3 Kent's Com. 246; The Frances Mary, 2 Hag. Adm. 89; The Elliotta, 2 Dods. 75; The R. M. Mills, 3 L. T. N. S. 513; The Inca, Swabey 370, 12 Moo. P. C. 189; The Britannia, 3 Hag. Adm. 153; British Consul *v.* 22 Pipes, etc., Bee Adm. 178, 4 Fed. Cas. No. 1,900; McGinnis *v.* The Steamboat Pontiac, Newb. Adm. 130; Bearse *v.* Three Hundred and Forty Pigs Copper, 1 Story (U. S.) 314, 2 Fed. Cas. No. 1,193; The Carl Schurz, 2 Flipp. (U. S.) 330; The Andrew Adams, 36 Fed. Rep. 205; The Lamington, (C. C. A.) 86 Fed. Rep. 675, *reversing* 80 Fed. Rep. 159; Cross *v.* Ship Bellona, Bee Adm. 193, 6 Fed. Cas. No. 3,428; Morehouse *v.* The Jefferson, 1 Pet. Adm. 46, 17 Fed. Cas. No. 9,793; Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 240, 16 Fed. Cas. No. 9,230; Two Hundred and Ten Barrels Oil, 1 Sprague (U. S.) 91, 24 Fed. Cas. No. 14,297; Coady *v.* 1,200 Barrels Oil, 2 Hawaii 34; The Liholiho *v.* 1,206 Bags Sugar, 9 Hawaii 323.

6. The Elephant, 64 L. T. N. S. 543; The Schooner Emulous, 1 Sumn. (U. S.) 207; Schoolcraft *v.* The Steamer Carrie, 5 Hughes (U. S.) 445; Bark Edwards, 12 Fed. Rep. 508; The Lahaina, 19 Fed. Rep. 923; The Brewster, 4 Adm. Rec. 116, 4 Fed. Cas. No. 1,852; Curry *v.* The H. J. May, 6 Fed. Cas. No. 3,494; Bean *v.* The Ship Grace Brown, 2 Hughes (U. S.) 112, 2 Fed. Cas. No. 1,171; The Waterloo, Blatchf. & H. Adm. 114, 29 Fed. Cas. No. 17,257; Williams *v.* The Adolphe, 19 Am. Jur. 219, 29 Fed. Cas. No. 17,712.

7. The William Hamilton, 3 Hag. Adm. 168; Hayden *v.* The Bark C. W. Cochrane, 3 Woods (U. S.) 304; The Cairnsmore, 20 Fed. Rep. 519; Llewellyn *v.* Two Anchors and Chains, 1 Ben. (U. S.) 80; The Zealand, 1 Lowell (U. S.) 1, 30 Fed. Cas. No. 18,205; The Burlington, 73 Fed. Rep. 258; Ashbahs *v.* The Trusty, 2 Fed. Cas. No. 573*a*.

8. **Discretion of Trial Court.** — Kirby *v.* The Scindia, L. R. 1 P. C. 241; The Cherokee, 31 Fed. Rep. 167; The Indiana, 22 Fed. Rep. 925.

9. **Review on Appeal — Noninterference** — *England.* — Bligh *v.* Simpson, 3 Moo. P. C. C. N. S. 51; The Baku Standard *v.* The Angèle, (1901) A. C. 549, 84 L. T. N. S. 788, 9 Asp. M. Cas. 197; The Clarisse, Swabey 129; Kirby *v.* The Scindia, 4 Moo. P. C. C. N. S. 84; Gann *v.* Brun, 12 Moo. P. C. 340; The Lancaster, 9 P. D. 14; Prindiville *v.* National Steam Nav.

awards appellate courts have frequently modified the decision of the trial courts,[1] both on the ground that the award was excessive,[2] and that the award was too small.[3]

6. Derelicts — *a.* WHAT CONSTITUTES A DERELICT — (1) *In General.* — The term derelict, which may include other personal property than boats or vessels,[4] is generally defined as property or vessels abandoned at sea by the master and crew without the hope of recovering the same (*sine spe recuperandi*), and without the intention of returning thereto (*sine animo revertendi*).[5]

Necessity for Nonappearance of Owners. — To constitute a derelict it is not necessary that no owner should afterwards appear to claim the property.[6]

(2) *The Abandonment.* — To constitute the property a derelict it must have been abandoned;[7] thus, where a vessel breaks loose in a harbor from its moorings and is found adrift, it cannot be considered a derelict though no one is on board.[8] So, also, where a ship laden with lead and iron was sunk in shal-

Co., 5 Moo. P. C. C. N. S. 344; The Woburn Abbey, 21 L. T. N. S. 707; The Vesta, 2 Hag. Adm. 189; Kirby *v.* The Scindia, L. R. 1 P. C. 241; The Campagnie Générale Transatlantique *v.* The F. T. Barry, L. R. 6 P. C. 468; The Cuba, Lush. 14; Green *v.* Bailey, 12 Moo. P. C. 346; Trask *v.* Maddox, 2 Moo. P. C. C. N. S. 243; The Glengyle, (1898) A. C. 519, 67 L. J. P. 87. See also Sir Francis Burton, 2 Hag. Adm. 156.

United States. — The Anna, 10 Blatchf. (U. S) 456; Hobart *v.* Drogan, 10 Pet. (U. S.) 108; The Baker, 25 Fed. Rep. 771; Scott *v.* Four Hundred and Forty-Five Tons Coal, 40 Fed. Rep. 260, *affirming* 39 Fed. Rep. 285; The Akaba, 54 Fed. Rep. 197, 8 U. S. App. 316; The Amity, 69 Fed. Rep. 110, 30 U. S. App. 304; The R. R. Rhodes, (C. C. A.) 82 Fed. Rep. 751; The Laura, 83 Fed. Rep. 311, 52 U. S. App. 282; The Thornley, (C. C. A.) 98 Fed. Rep. 735; The Trefusis, 98 Fed. Rep. 314, 39 C. C. A. 96; Simpson *v.* Dollar, (C. C. A.) 109 Fed. Rep. 814; The Anna, 10 Blatchf. (U. S.) 456, *affirming* 6 Ben. (U. S.) 166, 1 Fed. Cas. No. 401; The Schooner Boston, 1 Sumn. (U. S.) 328, 3 Fed. Cas No. 1,673; The Delaware, 6 Blatchf. (U. S.) 527, 7 Fed. Cas. No. 3,761; Virden *v.* The Caroline, 6 Am. L. Reg. 222, 28 Fed. Cas. No. 16,956; The Liholiho *v.* 1,206 Bags Sugar, 9 Hawaii 329; Wilder's Steamship Co. *v.* The Brigantine Lurline, 11 Hawaii 95.

1. The Star of Persia, 57 L. T. N. S. 839.

In salvage cases there is no rule binding a court of appeal not to interfere with an award, unless the amount is so large or so small that no reasonable person could fairly arrive at that sum; but the amount awarded will be diminished or increased, if, after careful consideration of the facts and after giving every possible weight to the view of the judge, the court is of the opinion that the amount is so large as to be unjust to the owners of the ship which has been in distress or so small as to be unjust to the salvors. The Accomac, (1891) P. 349.

2. **Excessive Awards Reduced.** — The Chetah, 5 Moo. P. C. C. N. S. 278; Gore *v.* Bethel, 12 Moo. P. C. 189; The Campagnie Générale Transatlantique *v.* The F. T. Barry, L. R. 6 P. C. 468; The Penobscot, 106 Fed. Rep. 419, 45 C. C. A. 372; Murphy *v.* Ship Suliote, 5 Fed. Rep. 99; The Bay of Naples, (C. C. A.) 48 Fed. Rep. 737, *reversing* 44 Fed. Rep. 90; The Oxford, 66 Fed. Rep. 590, 30 U. S. App. 153, reducing compensation awarded in 66 Fed. Rep. 584; The Elmbank, (C. C. A.) 69 Fed. Rep. 104; The Haxby, (C. C. A.) 83 Fed. Rep. 715; The Bay of Naples, 1 U. S. App. 47; The Lamington, (C. C. A.) 86 Fed. Rep. 675; The New Camelia, (C. C. A.) 105 Fed. Rep. 637; Mattingly *v.* 357 Bales Cotton, 2 Flipp. (U. S.) 288, 16 Fed. Cas. No. 9,294.

3. **Insufficient Awards Increased.** — The Thetis, 2 Knapp. 390; Papayanni *v.* Hocquard, 4 Moore P. C. C. N. S. 101, L. R. 1 P. C. 250; Arnold *v.* Cowie, 8 Moo. P. C. C. N. S. 22, L. R. 3 P. C. 589; The City of Berlin, 2 P. D. 187; The Messenger, Swabey 191.

4. **Derelicts — Property Other than Vessels.** — Hartshorn *v.* Twenty-Five Cases Silk, 11 Fed. Cas. No. 6,168*a*; Hollingsworth *v.* Seventy Doubloons, etc., 12 Fed. Cas. No. 6,620. See also Gardner *v.* Ninety-Nine Gold Coins, 111 Fed. Rep. 552 (money found on drowned person).

5. **Definition** — *England.* — The Aquila, 1 C. Rob. 37; The Clarisse, Swabey 129; The Zeta, L. R. 4 A. & E. 460.

United States. — Rowe *v.* The Brig ——, 1 Mason (U. S.) 372; The B. C. Terry, 9 Fed. Rep. 920; The Hyderabad, 11 Fed. Rep. 749; The Cairnsmore, 20 Fed. Rep. 519; The Fairfield, 30 Fed. Rep. 700; Murphy *v.* Dunham, 38 Fed. Rep. 503; Browning *v.* Baker, 2 Hughes (U. S.) 30, 4 Fed. Cas. No. 2,041; The Bee, 1 Ware (U. S.) 336, 3 Fed. Cas. No. 1,219; Fisher *v.* The Sybil, 5 Hughes (U. S.) 61, 9 Fed. Cas. No. 4,824, *decree affirmed* 4 Wheat. (U. S.) 98; Lewis *v.* The Elizabeth and Jane, 1 Ware (U. S.) 33, 15 Fed. Cas. No 8,321; Montgomery *v.* The Steamboat T. P. Leathers, Newb. Adm 421, 17 Fed. Cas. No. 9,736.

Wreck and Derelict Considered. — "I continue to think that there is no difference between wreck and derelict, except that the property is, in the one instance, found on land; in the other, at sea." British Consul *v.* 22 Pipes, etc., Bee Adm. 178, 4 Fed. Cas. No. 1,900.

6. The Aquila, 1 C. Rob. 37.

7. **Abandonment.** — The Beaver, 3 C. Rob. 292; Clark *v.* Chamberlain, 2 M. & W. 78.

8. The Zeta, L. R. 4 A. & E. 460.

In The Canal-Boat Ontario, 8 Ben. (U. S.) 500, 18 Fed. Cas. No. 10,541, it was held that a canal boat breaking loose from her tow in a harbor still in sight of the tow which was watching her was not a derelict.

low water and left by the crew, it was held that, as the ship must have remained immovable until human skill was applied to its recovery, there was not an abandonment so as to render her a derelict.[1] The length of time which the property has been abandoned is immaterial in fixing its character as a derelict,[2] but where the abandonment by the master and crew of the salved vessel was contemporaneous with the occupation by the salving vessel, it has been held that it was not a case of derelict.[3] The presence of slaves on the vessel who were being carried as cargo will not prevent it from being a derelict.[4]

Cause of Abandonment. — The cause of the abandonment, whether a voluntary dereliction or arising from accident or necessity, is immaterial in determining the question of derelict or not.[5] Thus, it is immaterial that the danger did not justify the master and crew in abandoning the vessel.[6] Where the salving vessel encountering a vessel in distress refuses a tow, for the purpose of compelling her master and crew to abandon her, and after such abandonment returns to the salved vessel and tows her to port, she is not to be considered a derelict.[7]

Place of Abandonment. — While to constitute property a derelict it is assumed that the abandonment must be upon the seas,[8] still the abandonment need not be upon the high seas.[9]

(3) *Spes Recuperandi and Animus Revertendi.* — The abandonment must be *sine spe recuperandi* and *sine animo revertendi* to constitute the vessel a derelict.[10] The mere desertion of the vessel by the master and crew does not render her a derelict.[11] Thus, a mere quitting of a ship for the purpose of procuring assistance from shore and with the intention of then returning does not render the ship a derelict.[12] So, also, where, at the time of a collision

1. The Barefoot, 14 Jur. 841.

2. **Length of Time of Abandonment.** — Thus, where the master and crew had left their vessel in a sinking condition and had taken to the long boat, and were picked up by another vessel while yet in sight of the wreck, the vessel and cargo were considered as derelict. The Schooner Boston, 1 Sumn. (U. S.) 328, 3 Fed. Cas. No. 1,673.

3. The Lovett Peacock, 1 Lowell (U. S.) 143, 15 Fed. Cas. No. 8,555. See, however, The Columbia, 3 Hag. Adm. 428.

4. Flinn *v.* Leander, Bee Adm. 260, 9 Fed. Cas. No. 4,870.

5. **Cause of Abandonment.** — Rowe *v.* The Brig ——, 1 Mason (U. S.) 373. *Compare* Warder *v.* La Belle Creole, 1 Pet. Adm. 31, 29 Fed. Cas. No. 17,165.

6. Evans *v.* The Ship Charles, Newb. Adm. 329.

7. The Margaret, Young (Nova Scotia) 171.

A vessel in distress from which the salving vessel takes the master and crew may, however, be a derelict, where the salving vessel lies by until the weather abates and then tows the vessel to port. The Sylph, 2 Can. L. T. 607.

8. **Place of Abandonment.** — Baker *v.* Hoag, 7 N. Y. 555.

9. Baker *v.* Hoag, 7 N. Y. 555 (vessel sunk in Hudson River); The Sarah Bell, 4 Notes Cas. (Eng.) 144 (vessel abandoned on Hasborough Sands).

A vessel may be derelict on navigable streams and tidewaters. The B. C. Terry, 9 Fed. Rep. 920.

10. **Spes Recuperandi, etc.** — *England.* — The Beaver, 3 C. Rob. 292; The Fenix, Swabey 13; The Aquila, 1 C. Rob. 37.

Canada. — The Scotswood, Young (Nova Scotia) 25.

United States. — The Schooner Emulous, 1 Sumn. (U. S.) 207; The Laura, 14 Wall. (U. S.) 336; The Barque Island City, 1 Black (U. S.) 121; Tyson *v.* Prior, 1 Gall. (U. S.) 133; Cromwell *v.* Bark Island City, 1 Cliff. (U. S.) 221; The Bark Cleone, 6 Fed. Rep. 517; The Hyderabad, 11 Fed. Rep. 749; The Attacapas, 3 Ware (U. S.) 65, 2 Fed. Cas. No. 637; Bean *v.* The Ship Grace Brown, 2 Hughes (U. S.) 112, 2 Fed. Cas. No. 1,171; The Bee, 1 Ware (U. S.) 336, 3 Fed. Cas. No. 1,219; Montgomery *v.* The Steamboat T. P. Leathers, Newb. Adm. 421, 17 Fed. Cas. No. 9,736; The Senator, Brown Adm. 372, 21 Fed. Cas. No. 12,664; Murray *v.* U. S., 3 U. S. App. 637, 55 Fed. Rep. 832. *Compare* The Genessee, 12 Jur. 401.

A vessel abandoned by the master and crew, where the master expressed an intention to save her if possible, although discouraged by the person to whom he expressed his intention, cannot be deemed a derelict. The Laura, 14 Wall. (U. S.) 336.

11. The H. B. Foster, Abb. Adm. 222.

12. **Leaving for Assistance.** — The Aquila, 1 C. Rob. 37; The Rowena, Young (Nova Scotia) 255; Cromwell *v.* Bark Island City, 1 Cliff. (U. S.) 221; The Barque Island City, 1 Black (U. S.) 121; Montgomery *v.* The Steamboat T. P. Leathers, Newb. Adm. 421, 17 Fed. Cas. No. 9,736.

Where the master and crew left a stranded ship to procure assistance, and in their absence she floated off, she cannot be deemed derelict. The Rowena, Young (Nova Scotia) 255.

A vessel having run on shore and been got off, water logged and disabled, was anchored, and the master then quitted with all his crew

between vessels, the crew of one vessel abandons her under the belief that she is sinking, this does not necessarily render the vessel a derelict.[1] The intention to abandon *sine spe recuperandi* may be inferred from the circumstances of the case,[2] and where a vessel is found at sea actually deserted and in a dangerous condition, it will be presumed that she was abandoned *sine spe recuperandi*, and is therefore a derelict, though it is not shown with what intention the crew left her.[3] A mere vague general hope or intention, if the opportunity arises, on the part of the master and crew of the deserted vessel or the owners to return to or attempt to rescue the vessel will not prevent the vessel from becoming a derelict.[4]

Change of Intention. — Where the abandonment is *sine spe recuperandi* and *sine animo revertendi*, the vessel is a derelict, though the master subsequently changes his mind and attempts to rescue her.[5]

(4) *Animus Derelinquendi.* — To constitute a derelict it has been considered that there must have been an *animus derelinquendi* on the part of the owners or the master of the vessel, and that, therefore, where a vessel is captured by the enemy and subsequently abandoned by it, it is not a derelict,[6] and the salvor should be rewarded merely for a recapture.[7]

(5) *Anchored Vessels.* — An anchored vessel deserted by the master and crew may be considered a derelict,[8] though the fact that the vessel is anchored is, of course, a material consideration in determining the intention with which the desertion was made.[9]

(6) *Sunken and Stranded Vessels* — Sunken vessels have been regarded as derelicts,[10] and a stranded vessel abandoned by her crew and master was considered a derelict, though she was afterwards sold by her owner as she lay.[11]

(7) *Quasi-derelicts.* — A vessel may be considered a *quasi*-derelict though it has not been actually deserted, as where it is helpless on account of the

for the express purpose of obtaining steam assistance. On the next day he returned with a steamer and found that salvors had taken possession. It was held that the vessel was not a derelict. The Champion, Brown & L. 69.

1. Collisions. — The Cosmopolitan, 6 Notes Cas. (Eng) 17; The Fenix, Swabey 13.

Where, immediately after a collision, the master and crew of one of the vessels, who had left her under the supposition that she was about to go down, remained about her in small boats, she cannot be deemed derelict. Mesner *v.* Suffolk Bank, 1 Law Rep. 249, 17 Fed. Cas. No. 9,493.

2. The Pickwick, 16 Jur. 670.

3. The Cosmopolitan, 6 Notes Cas. (Eng.) 17. See also Evans *v.* The Ship Charles, Newb. Adm. 329; The Ann L. Lockwood, 37 Fed. Rep. 233.

Where a vessel was picked up with four to five feet of water in the hold, her compass and the seamen's clothes having been taken off, the court pronounced against her as a derelict, though it did not appear that her crew had left *sine spe recuperandi*. The Gertrude, 30 L. J. Adm. 130.

4. Vague Intention. — Coromandel, Swabey 208; The L'Esperance, 1 Dods. 47; The Laura, 14 Wall. (U. S.) 336; The Fairfield, 30 Fed. Rep. 700; The Burlington, 73 Fed. Rep. 258; The Georgiana, 1 Lowell (U. S.) 91, 10 Fed. Cas. No. 5,355. See also The Genessee, 12 Jur. 401; The Hyderabad, 11 Fed. Rep. 749.

5. Change of Intention. — The Sarah Bell, 4 Notes Cas (Eng.) 146; Murphy *v.* Dunham, 38 Fed. Rep. 503; The Schooner Boston, 1 Sumn. (U. S.) 328, 3 Fed. Cas. No. 1,673.

Salvors Preventing Return of Master. — A ship abandoned without justifiable cause by a master is yet not a derelict where he subsequently endeavored to return but was prevented by the salvors. The Charles Forbes, Young (Nova Scotia) 172.

6. Animus Revertendi. — The John and Jane, 4 C. Rob 216.

In Montgomery *v.* The Steamboat T. P. Leathers, Newb. Adm. 426, the court in considering the case of The John & Jane, 4 C. Rob. 216, said: "In another case, that of The Jonge Johannes, 4 C. Rob. 263, the learned judge seems to have entertained an opinion that if a vessel be captured and afterwards abandoned by her captor, it is not properly a case of derelict, because neither the owner nor those who were in possession as his agents have committed any act of dereliction. So that in this view, to constitute a derelict there must be a voluntary abandonment by the master and crew. But this opinion, as appears from later cases (The Lord Nelson, Edw. Adm. 79, and The Blenden-Hall, 1 Dods. 414), has been silently retracted, and certainly it is not the recognized doctrine in this country."

7. See the title WAR.

8. Anchored Vessels. — The Laura, 14 Wall. (U. S.) 336; The Ann L. Lockwood, 37 Fed. Rep. 233.

9. Cromwell *v.* Bark Island City, 1 Cliff. (U. S.) 221.

10. Baker *v.* Hoag, 7 N. Y. 555; The Burlington, 75 Fed. Rep. 258. *Compare* The Barefoot, 14 Jur. 841.

11. The Cairnsmore, 20 Fed. Rep. 519.

death and sickness of its crew.[1] And where a vessel was found abandoned, though there was no evidence of the intention with which the abandonment was made, and therefore the vessel may not have been a derelict, it was held that the decisions awarding compensation in instances of derelicts might be referred to as precedents in determining the amount of the award.[2]

b. AMOUNT OF SALVAGE AWARD. — The right of property in the derelicts is not in the salvors, but remains in the owners, whose abandonment was caused by necessity, to whom return should be made on the payment of salvage,[3] and in the absence of a claim on their part passes to the crown,[4] and in the United States to the government,[5] the salvors being only entitled to their award for the salvage services. The rule was adopted at an early date in case of derelicts to allow a moiety of the property salved.[6] This rule has, however, been long abandoned,[7] and while in such cases a moiety of the property salved is frequently awarded,[8] still there is now no general rule, *ex jure,* which

1. Quasi-derelict. — Sturtevant *v.* The Bark George Nicholaus, Newb. Adm. 449, 23 Fed. Cas. No. 13,578.

2. The Brig Anna, 6 Ben. (U. S.) 166, 1 Fed. Cas. No 398.

3. Right of Property in Derelicts. — The Amethyst, 2 Ware (U. S.) 28, 1 Fed. Cas. No. 330; British Consul *v.* 22 Pipes, etc., Bee Adm. 178; Lewis *v.* The Elizabeth and Jane, 1 Ware (U. S.) 33, 15 Fed. Cas. No. 8,321; Gardner *v.* Ninety-Nine Gold Coins, 111 Fed. Rep. 552; Russell *v.* Forty Bales Cotton, 21 Fed. Cas. No. 12,154; Peabody *v.* Proceeds Twenty-Eight Bags Cotton, 2 Am. Jur. 119, 19 Fed. Cas. No. 10,869; Wilkie *v.* 205 Boxes Sugar, Bee Adm. 82, 29 Fed. Cas. No. 17,662; Warder *v.* La Belle Creole, 1 Pet. Adm. 31, 29 Fed. Cas. No. 17,165. See also Murphy *v.* Dunham, 38 Fed. Rep. 503; The Aquila, 1 C. Rob. 35, *citing* Sir Leoline Jenkins (Life of Sir Leoline Jenkins, vol. 1, p. 89), where, in speaking of derelicts, the court said: "Of these the Admiralty has but the custody, and the owner may recover them within a year and a day."

The cases of dereliction in which the doctrine that things abandoned become the property of the first occupant is found generally to run on the principle of a voluntary abandonment by the owner with his free consent, and not on such a relinquishment as force, necessity, or danger compels. Warder *v.* La Belle Creole, 1 Pet. Adm. 21, 29 Fed. Cas. No. 17,165.

4. The Aquila, 1 C. Rob. 37; Rex *v.* Property Derelict, 1 Hag. Adm. 383, note.

5. Peabody *v.* Proceeds Twenty-Eight Bags Cotton, 2 Am. Jur. 119, 19 Fed. Cas. No. 10,869. See also Rowe *v.* The Brig ——, 1 Mason (U. S.) 372, 20 Fed. Cas. No. 12,093. *Compare* Russell *v.* Forty Bales Cotton, 21 Fed. Cas. No. 12,154.

6. Early Moiety Rule. — Kirby *v.* The Scindia, 4 Moo. P. C C. N. S. 84; Sprague *v.* One Hundred and Forty Barrels Flour, 2 Story (U. S.) 195, 6 Law Rep. 14.

Civil Law — By the Ordinance of Louis XIV. one-third is the rule of salvage fixed in all cases of derelicts. The Ship Henry Ewbank, 1 Sumn. (U. S.) 400.

The Rhodian Law distinguished between the two cases where property was found abandoned in the open sea and where it had been raised from its bottom, giving one-fifth when the property was found abandoned but floating, and when property was raised from the bottom one-third to one-half, according to the depth of the water, thus recognizing that in cases of derelicts as well as others the amount of labor expended should be taken into account. The Brig Anna, 6 Ben. (U. S.) 166.

7. Abandonment of Moiety Rule — *England.* — The Minerva, 9 W. R. 81; The Marie Victoria, 2 Stuart Adm. (L. C.) 109; The Charlotta, 2 Hag. Adm. 361; The Genessee, 12 Jur. 401; The Aquila, 1 C. Rob. 37; The Janet Court, (1897) P. 59; The Scindia, L. R. 1 P. C. 241; The Compagnie Générale Transatlantique *v.* The F. T. Barry, L. R. 6 P. C. 468.

Canada. — The Scotswood, Young (Nova Scotia) 25; The Tickler, Young (Nova Scotia) 166.

United States. — The Brig Anna, 6 Ben. (U. S.) 166, *affirmed* 10 Blatchf. (U. S.) 456; Evans *v.* The Ship Charles, Newb. Adm. 329; The H. B. Foster, Abb. Adm. 222; Post *v.* Jones, 19 How. (U. S.) 150; The B. C. Terry, 9 Fed. Rep. 920; Bark Edwards, 12 Fed. Rep. 508; The Bark Lovetand, 5 Fed. Rep. 105; The Annie Henderson, 15 Fed. Rep. 550; The Eleanor, 48 Fed. Rep. 842; The Fairfield, 30 Fed. Rep. 700; The Lamington, (C. C. A.) 86 Fed. Rep. 675; The Elizabeth and Jane, 1 Ware (U. S.) 27, 8 Fed. Cas. No. 4,356; Fisher *v.* The Sybil, 5 Hughes (U. S.) 61, 9 Fed. Cas. No. 4,824, *affirmed* 4 Wheat. (U. S.) 98; The Georgiana, 1 Lowell (U. S.) 91, 10 Fed. Cas. No. 5,355; Hall *v.* The Paquet Bot De Cayenne, 7 Phila. (Pa.) 550, 27 Leg. Int. (Pa.) 364, 11 Fed. Cas. No. 5,941; The Ida L. Howard, 1 Lowell (U. S.) 2, 12 Fed. Cas. No. 6,999; The L. T. Knights, 1 Lowell (U. S.) 396, 15 Fed. Cas. No. 8,585; The Rising Sun, 1 Ware (U. S.) 385, 20 Fed. Cas. No. 11,858; Taylor *v.* The Cato, 1 Pet. Adm. 48, 23 Fed. Cas. No. 13,786; Two Hundred and Ten Barrels Oil, 1 Sprague (U. S.) 91, 24 Fed. Cas. No. 14,297, *cited* 1855, Sprague, Mass.; Walter *v.* The Montgomery, 29 Fed. Cas. No. 17,120. *Compare* The Cayenne, 2 Abb. (U. S.) 42, 5 Fed. Cas. No. 2,532.

8. Allowance of Moiety. — *England.* — The Sylph, 2 Can. L. T. 607; The Pride of England, 2 Stuart Adm. (L. C.) 189; The Columbia, 3 Hag. Adm. 428; The Craigs, 5 P. D. 186; The Blenden-Hall, 1 Dods. 414; The Lord Nelson, Edw. Adm. 79; The Effort, 3 Hag. Adm. 165; The Reliance, 2 Hag. Adm. 90, note; The Watt, 2 W. Rob. 70; The Rasche, L. R. 4 A. & E. 127.

requires any particular percentage allowance to the salvors, but the amount of the award is, as in other cases, to be determined upon the circumstances of each particular case,[1] taking into consideration the increased risk of loss to the salved property,[2] the difficulty on the part of salvors in boarding derelicts,[3] the additional labor thrown upon the crew of the salving vessel by reason of the placing of men upon the derelict,[4] and also the danger to navigation from drifting derelicts.[5] While it has been said that in case of derelicts the award should be greater than in case of property not abandoned,[6] still, as a general rule, a moiety is the maximum award, even in case of derelicts,[7] though a greater allowance than fifty per cent. has been awarded,[8] and in some instances of derelicts where the value of the property was very small and no owner appeared, the whole of the property has been awarded to the salvors.[9]

c. RIGHT OF SALVORS TO POSSESSION. — In case of derelicts, the salvors have the right to retain the exclusive possession of the vessel as against the former master and crew in order to carry the vessel to port.[10]

VII. APPORTIONMENT OF SALVAGE — 1. Proportion to Be Paid by Vessel, Freight, and Cargo. — The general rule is that where a ship and cargo are saved by common or continuous labor or services, carried on with a view of saving both the ship and cargo, the salvage expenses are properly to be apportioned upon the ship, freight, and cargo in proportion to their respective

Canada. — The Ida Barton, Young (Nova Scotia) 240.

United States. — The Ship Henry Ewbank, 1 Sumn. (U. S.) 400; The Bark Lovetand, 5 Fed. Rep. 105; The Agnes Manning, 59 Fed. Rep. 481; The Schooner Boston, 1 Sumn. (U. S.) 328, 3 Fed. Cas. No. 1,673; Ashbahs *v.* The Trusty, 2 Fed. Cas. No. 573*a*; The Schooner Charles Henry, 1 Ben. (U. S.) 8, 5 Fed. Cas. No. 2,617; Concklin *v.* The Brigantine Harmony, 1 Pet. Adm. 34, 6 Fed. Cas. No. 3,089; The Cumberland, 6 Fed. Cas. No. 3,470; The Galaxy, Blatchf. & H. Adm. 270, 9 Fed. Cas. No. 5,186; Hartshorn *v.* Twenty-Five Cases Silk, 11 Fed. Cas. No. 6,168*a*; Hindry *v.* The Schooner Priscilla, Bee Adm. 1, 12 Fed. Cas. No. 6,515; The Schooner John Wurts, Olc. Adm. 462, 13 Fed. Cas. No. 7,434; Johnson *v.* Certain Goods, 6 Law Rep. 118, 13 Fed. Cas. No. 7,377; The John E. Clayton, 4 Blatchf. (U. S.) 372, 18 How. Pr. (N. Y.) 319, 13 Fed. Cas. No. 7,338; The Lovett Peacock, 1 Lowell (U. S.) 143, 15 Fed. Cas. No. 8,555; The Schooner Saxon, 4 Ben. (U. S.) 18, 21 Fed. Cas. No. 12,412; Sprague *v.* One Hundred and Forty Barrels Flour, 2 Story (U. S.) 195, 22 Fed. Cas. No. 13,253; Perrin *v.* A Quantity of Oil, 2 Hawaii 116.

1. The Janet Court, (1897) P. 59; The W. G. Putnam, Young (Nova Scotia) 271; The Aquila, 1 C. Rob. 37; The Fortuna, 4 C. Rob. 193; Kirby *v.* The Scindia, 4 Moo. P. C. C. N. S. 84; The Splendid, 12 L. T. N. S. 585; The Minerva, 1 Spinks 271; Post *v.* Jones, 19 How. (U. S.) 150; Candee *v.* Sixty-Eight Bales Cotton 48 Fed. Rep. 479; The Brig Anna, 6 Ben. (U. S.) 166, 1 Fed. Cas. No. 398; Fisher *v.* The Sybil, 5 Hughes (U. S.) 61, 9 Fed. Cas. No. 4,824; Flinn *v.* The Leander, Bee Adm. 260, 9 Fed. Cas. No. 4,870; The Ida L. Howard, 1 Lowell (U. S.) 2, 12 Fed. Cas. No. 6,999; Howland *v.* Two Hundred and Ten Barrels Oil, 7 Law Rep. 377, 12 Fed. Cas. No. 6,801; M'Donough *v.* Dannery, 3 Dall. (U. S.) 190, 16 Fed. Cas. No. 9,212*a*; Rowe *v.* The Brig ——, 1 Mason (U. S.) 372, 20 Fed. Cas. No. 12,093; Wilder *v.* Bark Eskbank, 6 Hawaii 219.

No valid reason can be assigned for fixing the reward for salving derelict property at "not more than a half or less than a third of the property saved." The true principle in all cases is adequate regard according to the circumstances of the case. Post *v.* Jones, 19 How. (U. S.) 150.

2. The Janet Court, (1897) P. 59; The Georgiana, 1 Lowell (U. S.) 91, 10 Fed. Cas. No. 5,355; Hall *v.* The Paquet Bot De Cayenne, 7 Phila. (Pa.) 550, 27 Leg. Int. (Pa.) 364, 11 Fed. Cas. No. 5,941.

3. The Janet Court, (1897) P. 59.

4. The Janet Court, (1897) P. 59; M'Donough *v.* Dannery, 3 Dall. (U. S.) 190, 16 Fed. Cas. No. 9,212*a*.

5. The Brig Anna, 6 Ben. (U. S.) 166, 1 Fed. Cas. No. 398.

6. Wilder's Steamship Co. *v.* The Brigantine Lurline, 11 Hawaii 83; Gore *v.* Bethel, 12 Moo. P. C. 189; The Flower City, 16 Fed. Rep. 866.

7. The Frances Mary, 2 Hag. Adm. 89; L'Esperance, 1 Dods. 47; The Schooner Emulous, 1 Sumn. (U S.) 207.

The salvors of a chest found floating at sea, containing gold coin are (notwithstanding the character of the property found and the absence of any marks of identification), entitled to no more than a moiety, no particular effort having been exerted to save it. Hollingsworth *v.* Seventy Doubloons, etc., 12 Fed. Cas. No. 6,620.

8. Bark Edwards, 12 Fed. Rep. 508; The Henry R. Tilton, 53 Fed. Rep. 139.

9. The William Hamilton, 3 Hag. Adm. 168; Two Bales Cotton, Young (Nova Scotia) 135; The Cairnsmore, 20 Fed. Rep. 519.

10. The Champion, Brown & L. 69; The Amethyst, 2 Ware (U. S.) 28, 1 Fed. Cas. No. 330.

The master and the mariners, having lost the possession, cannot resume it. Lewis *v.* The Elizabeth and Jane, 1 Ware (U. S.) 33, 15 Fed. Cas. No. 8,321.

values, as in a case of general average.[1] Each article of the cargo, whether it be of great value and little bulk, and so easily saved, as money or jewelry, or of great bulk and little value, as coal or lumber, and so saved with difficulty, is charged with the same rate of salvage as the ship or freight, or any other article of the cargo.[2] In cases, however, where the community of interest has ceased, and salvage services are not performed for the common benefit, the salvage charges will not be apportioned *pro rata*, but one rate may be awarded against the ship and another against the cargo, or the rate may differ as between different parts of the cargo.[3] And where the ship is lost and the voyage is broken up, each article of the cargo is to be charged with its own particular expense of saving.[4]

2. Among Whom to Be Distributed — *a.* IN GENERAL. — Salvage is generally distributed between the owners of the vessel and her officers and crew.[5] A treatment of the particular persons who may be entitled to salvage has already been presented.[6]

Assignment of Seamen's Claims. — The owner, or master, of the vessel cannot extinguish the claims of seamen for salvage who have not appeared to claim their share, by taking an assignment from them, and such an assignment will be void,[7] unless, at least, it bears an unmistakable mark of good faith and fair dealing.[8]

b. DIFFERENT SETS OF SALVORS — (1) *First Salvors.* — The law favors the first salvors, and does not allow others to share with them in the enterprise and compensation unless, and only so far as, there is a necessity for it.[9]

1. Ship, Freight, and Cargo to Pay Pro Rata. — The Mulhouse, 22 Law Rep. 276, 17 Fed. Cas. No. 9,910. To the same effect are The Emma, 2 W. Rob. 315; The Vesta, 2 Hag. Adm. 189; Briggs *v.* Merchant Traders Ship Loan, etc., Assoc., 13 Jur. 787; The Miranda, L. R. 3 A. & E. 561; The James Armstrong, L. R. 4 A. & E. 380; The Clotilda, Hask. (U. S.) 412, 5 Fed. Cas. No. 2,903; The Ottawa, 1 Lowell (U. S.) 274, 18 Fed. Cas. No. 10,617; Roberts *v.* The Ocean Star, 20 Fed. Cas. No. 11,908; The Winifred, 102 Fed. Rep. 988. See also Moran *v.* Jones, 7 El. & Bl. 523, 90 E. C. L. 523; The Antelope, 1 Lowell (U. S.) 130; Montgomery *v.* The Steamboat T. P. Leathers, Newb. Adm. 421; Bevan *v.* U. S. Bank, 4 Whart. (Pa.) 301. And see the title GENERAL AVERAGE, vol. 14, p. 978.

How Value of Cargo Determined. — The Peace, Swabey 115.

Ship and Cargo Must Each Pay Its Own Share of Salvage, and neither can be made liable for the salvage due from the other. The Mary Pleasants, Swabey 224; The Raisby, 10 P. D. 114; The Pyrennee, Brown & L. 189; The Colonel Adams, 19 Fed. Rep. 795; The Alaska, 23 Fed. Rep. 597. See also The Kristrel, 14 Fed. Cas. No. 7,935.

Different Rates of Salvage may be assessed upon different parts of the property saved according to the labor expended upon those parts, if the justice of the case requires it. The Albion Lincoln, 1 Lowell (U. S.) 71; Scott *v.* Four Hundred and Forty-Five Tons Coal, 39 Fed. Rep. 285, 40 Fed. Rep. 260.

2. Same Rate Paid by All Cargo. — The Mulhouse, 22 Law Rep. 276, 17 Fed. Cas. No. 9,910. To the same effect are The Vesta, 2 Hag. Adm. 189; The Albion Lincoln, 1 Lowell (U. S.) 71; The St. Paul, 82 Fed. Rep. 104, (C. C. A.) 86 Fed. Rep. 340. See also The Emma, 2 W. Rob. 315; McAndrews *v.* Thatcher, 3 Wall. (U. S.) 347; Coast Wrecking Co. *v.* Phœnix Ins. Co., 13 Fed. Rep. 127, 20 Blatchf. (U. S.) 557; Bevan *v.* U. S. Bank, 4 Whart. (Pa.) 301.

Specie and Bullion to Pay Pro Rata Share. — The Longford, 6 P. D. 60; The St. Paul, 82 Fed. Rep. 104, (C. C. A.) 86 Fed. Rep. 340; Nelson *v.* Belmont, 21 N. Y. 36. See also Pacific Mail Steamship Co. *v.* New York, etc., Min. Co., (C. C. A.) 74 Fed. Rep. 564. *Compare* The Emma, 2 W. Rob. 315.

3. When Different Rate Charged. — The City of Worcester, 42 Fed. Rep. 916; The St. Paul, 82 Fed. Rep. 104, (C. C. A.) 86 Fed. Rep. 340. See also McAndrews *v.* Thatcher, 3 Wall. (U. S.) 347; The Alabamian, 1 Fed. Cas. No. 128; The L'Amerique, 35 Fed. Rep. 835; Pacific Mail Steamship Co. *v.* New York, etc., Min. Co., (C. C. A.) 74 Fed. Rep. 564.

4. The Mulhouse, 22 Law Rep. 276, 17 Fed. Cas. No. 9,910; Roberts *v.* The Ocean Star, 20 Fed. Cas. No. 11,908.

5. See *infra*, this section, *Proportion to Be Received by Distributees.*

All Crew Entitled to Share Salvage if they are willing to share in the labor. The Baltimore, 2 Dods. 132; The Centurion, 1 Ware (U. S.) 477, 5 Fed. Cas. No. 2,554. And see *supra*, this title, *Who May Be Salvors.*

6. See *supra*, this title, *Who May Be Salvors.*

7. Claims of Seamen Not Extinguished by Assignment. — The Rosario, 2 P. D. 41; The Mary Anne, 11 L. T. N. S. 85; The Steamer Adirondack, 5 Fed. Rep. 213. See also The Pride of Canada, Brown & L. 208.

8. The Schooner Edward Lee, 3 Ben. (U. S.) 114, 8 Fed. Cas. No. 4,292.

9. First Salvors Favored. — The Charlotta, 2 Hag. Adm. 361; The Effort, 3 Hag. Adm. 165; The Dantzic Packet, 3 Hag. Adm. 383; The Pickwick, 16 Jur. 669, 20 Eng. L. & Eq. 628; The Clarisse, Swabey 129; The Maria, Edw.

Persons dispossessing original salvors without reasonable cause are entitled to no compensation for services performed by them, but the whole reward goes to those who were wrongfully dispossessed.[1]

Assistance. — Where, however, it is doubtful whether the first salvors can, with the means at their disposal, save the ship and cargo, they are not justified in refusing assistance.[2] If the first salvors are assisted by other salvors, they do not lose their original right to salvage; but the second salvors only partake in the salvage according to their merit.[3] Prior salvors have no right, while the master of the ship is in command, to interfere with further assistance and to attempt to exclude subsequent salvors.[4]

Abandonment. — If the first salvors abandoned a vessel before rendering any beneficial service, they are not entitled to salvage, however meritorious their exertions may have been.[5] There must, however, be an actual abandonment, as well as an intention to abandon, in order to deprive salvors of their right of salvage.[6]

(2) *Cosalvors.* — Success is essential to a claim for salvage; and if the property is not saved, or if it perish, or if, in case of capture, it is not retaken, no compensation can be allowed.[7] More than one set of salvors, however, may contribute to the result, and in such cases all who engaged in the enterprise and materially contributed to the saving of the property are entitled to share in the reward which the law allows for such meritorious service.[8] Where a salvage is finally effected, those who meritoriously contributed to that result are entitled to a share in the reward, although their services may not have been as effective as those of other salvors, or although the part they took, standing by itself, would not, in fact, have produced it.[9]

Effect of Failure of Some of the Salvors to Claim Compensation. — Salvors are not deprived of a remedy because another set of salvors neglect or refuse to join in the suit.[10] And where some of the salvors decline asserting a claim for salvage compensation, their proportion will not accrue to the benefit of either their cosalvors or the owner of the saving vessel, but to the benefit of the owners of the property saved.[11]

Adm. 175; The Glory, 14 Jur. 676; Hand *v.* The Schooner Elvira, Gilp. (U. S.) 60, 11 Fed. Cas. No. 6,015; The Cairnsmore, 20 Fed. Rep. 519. See also The Eugene, 3 Hag. Adm. 156; The Brig John Gilpin, Olc. Adm. 77; The Mimi, 17 Fed. Cas. No. 9,627*a*; A Quantity Iron, 2 Sprague (U. S.) 51.

1. No Salvage to Second Salvors. — The Blenden-Hall, 1 Dods. 414; The Fleece, 3 W. Rob. 278; The J. W. Husted, 36 Fed. Rep. 604. See also The Kathleen, L. R. 4 A. & E. 269.

2. When Proper to Accept Assistance. — The Glory, 14 Jur. 676; The Cairnsmore, 20 Fed. Rep. 519. See also The Pickwick, 16 Jur. 669, 20 Eng. L. & Eq. 628; The Steamboat Cheeseman *v.* Two Ferryboats, 2 Bond (U. S.) 363.

3. First Salvors Do Not Lose Salvage. — The Ship Henry Ewbank, 1 Sumn. (U. S.) 400. See also The Clarisse, Swabey 129; The Magdalen, 31 L. J. Adm. 22, 5 L. T. N. S. 807.

4. The Dantzic Packet, 3 Hag. Adm. 383.

5. Effect of Abandonment. — The India, 1 W. Rob. 406; The Tolomeo, 7 Fed. Rep. 497. See also The John Wurts, Olc. Adm. 462.

What Constitutes Abandonment. — The Jonge Bastiaan, 5 C. Rob. 287; The Barque Island City, 1 Black (U. S.) 121; The Tolomeo, 7 Fed. Rep. 497.

6. Actual Abandonment Necessary. — The Ship Henry Ewbank, 1 Sumn. (U. S.) 400.

7. Success Essential. — The Blackwall, 10 Wall. (U. S.) 1; The Albion Lincoln, 1 Lowell (U. S.) 71; The Tolomeo, 7 Fed. Rep. 497; The Steamboat Cheeseman *v.* Two Ferryboats, 2 Bond (U. S.) 363.

8. Salvage by Several Sets of Salvors. — The Blackwall, 10 Wall. (U. S.) 1; The Huntsville, 12 Fed. Cas. No. 6,916; Norris *v.* The Bark Island City, 1 Cliff. (U. S.) 219. 1 Black (U. S.) 121; The Rahway, 46 Fed. Rep. 809; Peacock *v.* Three Million Feet Lumber, 93 Fed. Rep. 983. See also The Maude, 36 L. T. N. S. 26; The Mabel, 22 Fed. Rep. 543, 10 Sawy. (U. S.) 501.

Assistance by Licensed Wrecking Vessels. — Acosta *v.* The Halcyon, 1 Fed. Cas. No. 31.

9. All Participating in Salvage Entitled. — The Atlas, Lush. 518; The Jonge Bastiaan, 5 C. Rob. 322; The Genessee, 12 Jur. 401; The Samuel, 15 Jur. 407; The Barque Island City, 1 Black (U. S.) 121; The Ida L. Howard, 1 Lowell (U. S.) 2; Muntz *v.* A Raft Timber, 15 Fed. Rep. 555; Gaynor *v.* The Gler, 31 Fed. Rep. 425; The Vanloo, 39 Fed. Rep. 570; The General Knox, 74 Fed. Rep. 575; The Magnolia, 3 Can. L. T. 107.

Compensation when Services Could Have Been Dispensed With. — The Despatch, 50 Fed. Rep. 611; Alexander *v.* Car Floats No. 1, 3, 4 & 5, 64 Fed. Rep. 887.

10. All Salvors Need Not Bring Suit. — The Blackwall, 10 Wall. (U. S.) 1.

11. Owners of Property Benefited by Failure to Claim Salvage. — The Blackwall, 10 Wall. (U.

3. Proportion to Be Received by Distributees — *a.* By Owners and Officers and Crew. — An examination of the cases will show that there is no fixed rule with respect to the apportionment of the salvage reward between the owners of the salving vessel and her officers and crew. The distribution, in all cases of this kind, is a matter resting in the discretion of the court, and is to be governed largely by the peculiar circumstances of each individual case.[1] As salvage is awarded for the encouragement of promptness, energy, efficiency, and heroic endeavor in saving life and property in peril, the claims of the master and crew who exhibit these qualities are regarded with the most favorable consideration,[2] and formerly the larger part of the salvage award was generally apportioned to the officers and crew,[3] one-third being usually considered a proper amount for the owners to receive.[4]

Steamers Favored. — In later times the introduction of steam power has effected a considerable change in the distribution of the salvage award, and the owners now generally receive as much as or more than the crew. It is equitable, when a steamer is the principal salvor, that the owners, on whom the chief risk and all the expense fall, should be awarded a much higher proportion than owners were formerly.[5]

S.) 1; Evans *v.* The Ship Charles, Newb. Adm. 329.

1. Distribution Dependent upon Circumstances of Case — *England.* — The Waterloo, 2 Dods. 443; The San Bernardo, 1 C. Rob. 178; The Caroline, 2 W. Rob. 124; The Nicolina, 2 W. Rob. 175; The Columbine, 2 W. Rob. 186; The Albion, 3 Hag. Adm. 254; The Hope, 3 Hag. Adm. 423; The Columbia, 3 Hag. Adm. 428; The Andrina, L. R. 3 A. & E. 286.

United States. — Bond *v.* The Brig Cora, 2 Wash. (U. S.) 87; Warder *v.* The La Belle Creole, 1 Pet. Adm. 45; Concklin *v.* The Brigantine Harmony, 1 Pet. Adm. 34; Taylor *v.* The Cato, 1 Pet. Adm. 48; The Galaxy, Blatchf. & H. Adm. 270, 9 Fed. Cas. No. 5,186; Sonderburg *v.* The Ocean Tow Boat Co., 3 Woods (U. S.) 146; Compagnie Commerciale De Transport, etc., *v.* Charente Steamship Co., (C. C. A.) 60 Fed. Rep. 921; The Steamer Adirondack, 5 Fed. Rep. 213; Cape Fear Towing, etc., Co. *v.* Pearsall, (C. C. A.) 90 Fed. Rep. 435.

New York. — Hawkins *v.* Avery, 32 Barb. (N. Y.) 551.

When Salvors Many and Tonnage Small, Largest Part of Award to Crew. — Pent *v.* Two Thousand Eight Hundred and Fifty Dollars, 19 Fed. Cas. No. 10,961*a*.

Deviation of Vessel an Important Element. — Markham *v.* Simpson, 22 Fed. Rep. 743. See also Carmichael *v.* Brodie, L. R. 1 P. C. 454; Warder *v.* The La Belle Creole, 1 Pet. Adm. 31; The Waterloo, Blatchf. & H. Adm. 114.

Vitiation of Insurance by Deviation to Be Considered. — Carmichael *v.* Brodie, L. R. 1 P. C. 454. But see The Deveron, 1 W. Rob. 180.

Loss of Cargo Belonging to Owner Considered in Apportionment. — Williams *v.* The Adolphe, 29 Fed. Cas. No. 17,712.

Scheme for Apportionment Suggested by Counsel at Request of Court. — The Craigs, 5 P. D. 186.

Person Dissatisfied May Apply to the Court of Admiralty. — The Princess Helena, Lush. 196; The Rosario, 2 P. D. 41; The Pride of Canada, Brown *v.* L. 208.

No Award to Crew for Towage Services. — The Emily B. Souder, 15 Blatchf. (U. S.) 185; The J. C. Pfluger, 109 Fed. Rep. 93.

No Salvage Allowed Owner When Vessel Not in Peril. — The Magnolia, 3 Can. L. T. 107.

Owner and Crew May Agree as to Distribution. — The Afrika, 5 P. D. 192. See also The Wilhelm Tell, (1892) P. 337.

Inequitable Agreement Not Binding. — The Enchantress, Lush. 93.

Agreement Made Before Services Rendered Not Binding. — The Louisa, 2 W. Rob. 22.

2. Actual Salvors Favored. — Cape Fear Towing, etc., Co. *v.* Pearsall, (C. C. A.) 90 Fed. Rep. 435. To the same effect are The Enchantress, Lush. 93; The Brig C. W. Ring, 2 Hughes (U. S.) 99; The Compagnie Commerciale De Transport, etc., *v.* Charente Steamship Co., (C. C. A.) 60 Fed. Rep. 921; The Alma, 5 Nova Scotia 789. See also Howland *v.* Two Hundred and Ten Barrels Oil, 7 Law Rep. 377, 12 Fed. Cas. No. 6,801.

3. Larger Part to Officers and Crew. — The Nicolina, 2 W. Rob. 175; The Baltimore, 2 Dods. 136; The Jane, 2 Hag. Adm. 338. See also The Alma, 5 Nova Scotia 789.

4. One-third Allotted to Owners. — The Haase, 1 C. Rob. 286; Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 240; Concklin *v.* The Brigantine Harmony, 1 Pet. Adm. 34; Bond *v.* The Brig Cora, 2 Wash. (U. S.) 80; Evans *v.* The Ship Charles, Newb. Adm. 329; Union Tow Boat Co. *v.* The Bark Delphos, Newb. Adm. 412; The Ship Henry Ewbank, 1 Sumn. (U. S.) 400; The Barque Island City, 1 Black (U. S.) 121; Norris *v.* The Bark Island City, 1 Cliff. (U. S.) 219; Cromwell *v.* Bark Island City, 1 Cliff. (U. S.) 221; The Schooner Charles Henry, 1 Ben. (U. S.) 8, 5 Fed. Cas. No. 2,617; The Steamer Saragossa, 1 Ben. (U. S.) 551; The Lovett *v.* Peacock, 1 Lowell (U. S.) 143; Sewell *v.* Nine Bales Cotton, 5 Phila. (Pa.) 508, 21 Leg. Int. (Pa.) 236, 21 Fed. Cas. No. 12,683; Williams *v.* The Adolphe, 29 Fed. Cas. No. 17,712; Hartshorn *v.* Twenty-Five Cases Silk, 11 Fed. Cas., No. 6,168*a*.

5. Rule When Steamer Is Salving Vessel — *England.* — The Saint Nicholas, Lush. 29; The Enchantress, Lush. 93; The Princess Helena, Lush. 190; The Perla, Swabey 230; The Spirit of the Age, Swabey 286; The Himalaya, Swabey 515; The Alfen, Swabey 190; Papay-

b. By Officers and Members of Crew. — The part of the salvage award allotted to the officers and crew is usually distributed among them in proportion to their wages;[1] but the captain [2] and mate,[3] because of their rank and the responsibility of their positions, generally receive a larger share in proportion than the other members of the ship's company. No inflexible rule of division can be stated, however, and the shares of the officers and crew are often awarded in accordance with the particular circumstances of the case.[4]

Where Share Increased. — Such of the officers and crew as have made extra exertions, or run unusual risks, should have their shares increased;[5] and in distributing the award some recognition should be made of special losses or injuries suffered by those engaged in rendering the services.[6]

c. By Different Sets of Salvors. — Apportionment of the award

anni *v.* Hocquard, L. R. 1 P. C. 250; The Beulah, 1 W. Rob. 477; The Raikes, 1 Hag. Adm. 246; The Howard, 3 Hag. Adm. 256, note; The Earl Grey, 3 Hag. Adm. 363.

Canada. — The Alma, 5 Nova Scotia 789.

United States. — The Steamer Leipsic, 5 Fed. Rep. 108; The Steamer Adirondack, 5 Fed. Rep. 213; The New Orleans, 23 Fed. Rep. 909; Gaynor *v.* The Gler, 31 Fed. Rep. 425; The Pomona, 37 Fed. Rep. 815; The Rahway, 46 Fed. Rep. 809; Cape Fear Towing, etc., Co. *v.* Pearsall, (C. C. A.) 90 Fed. Rep. 435; The Cavalier, 102 Fed. Rep. 527; The Winnifred, 102 Fed. Rep. 988; The Kaiser Wilhelm der Grosse, 106 Fed. Rep. 963; The Coya, 108 Fed. Rep. 413; The Brig C. W. Ring, 2 Hughes (U. S.) 99; Brooks *v.* The Ship William Penn, 2 Hughes (U. S.) 144; The Steamer Saragossa, 1 Ben. (U. S.) 551.

1. In Proportion to Wages — *England.* — The Perla, Swabey 230; The Pride of Canada, Brown & L. 208; The Andrina, L. R. 3 A. & E. 286; The Britain, 1 W. Rob. 40; The Howard, 3 Hag. Adm. 256, note; The Craigs, 5 P. D. 186.

United States. — The Lovett Peacock, 1 Lowell (U. S.) 143, 15 Fed. Cas. No. 8,555; Sewell *v.* Nine Bales Cotton, 5 Phila. (Pa) 508, 21 Leg. Int. (Pa.) 236, 21 Fed. Cas. No. 12,683; The Steamship Rebecca Clyde, 5 Ben. (U S.) 98, 20 Fed. Cas. No. 11,621; The Brig Anna, 6 Ben. (U. S.) 166, 1 Fed. Cas. No. 398; The Steamer Leipsic, 5 Fed. Rep. 108; The Steamer Adirondack, 5 Fed. Rep. 213; The Alaska, 23 Fed. Rep. 597; The New Orleans, 23 Fed. Rep. 909; The Pomona, 37 Fed. Rep. 815; Cape Fear Towing, etc., Co. *v.* Pearsall, (C. C. A.) 90 Fed. Rep. 435; Peacock *v.* Three Million Feet Lumber, 93 Fed. Rep. 983; The Cavalier, 102 Fed. Rep. 527; The Kaiser Wilhelm der Grosse, 106 Fed. Rep. 963; The Coya, 108 Fed. Rep. 413.

2. Master's Share — *England.* — The Baltimore, 2 Dods. 136; The Waterloo, 2 Dods. 433; The Princess Helena, Lush. 190; The Andrina, L. R. 3 A. & E. 286; The Pride of Canada, Brown & L. 208; Papayanni *v.* Hocquard, L. R. 1 P. C. 250; Carmichael *v.* Brodie, L. R. 1 P. C. 454; The Beulah, 1 W. Rob. 477; The Caroline, 2 W. Rob. 124; The Columbine, 2 W. Rob. 186; The Perla, Swabey 230; The Spree, (1893) P. 147.

Canada. — The Magnolia, 3 Can. L. T. 107.

United States. — The Ship Henry Ewbank, 1 Sumn. (U. S.) 400; Bond *v.* The Brig Cora, 2 Wash. (U. S.) 80; The Steamship Rebecca Clyde, 5 Ben. (U. S.) 98, 20 Fed. Cas. No. 11, 621; The Schooner Charles Henry, 1 Ben. (U. S.) 8, 5 Fed. Cas. No. 2,617; The Galaxy, Blatchf. & H. Adm. 270, 9 Fed. Cas., No. 5,186; The Steamer Leipsic, 5 Fed. Rep. 108; The Steamer Adirondack, 5 Fed. Rep. 213; The Alaska, 23 Fed. Rep. 597; The Pomona, 37 Fed. Rep. 815; The Wellington, 52 Fed. Rep. 605; The Winifred, 102 Fed. Rep. 988; The Kaiser Wilhelm der Grosse, 106 Fed. Rep. 963.

Master's Share Twice Mate's. — The Ship Henry Ewbank, 1 Sumn. (U. S.) 400; The Galaxy, Blatchf. & H. Adm. 270, 9 Fed. Cas. No. 5,186; Williams *v.* The Adolphe, 29 Fed. Cas. No. 17,712; The Magnolia, 3 Can. L. T. 107.

Master's Share Reduced for Dereliction of Duty. — The Waterloo, Blatchf. & H. Adm. 114.

Master's Share Increased when, by agreement between him and the owner, a part of the ordinary risk of the owner is shifted to the master. The Brig Anna, 6 Ben. (U. S.) 166, 1 Fed. Cas. No. 398.

3. Mate's Share. — The Martha, 3 Hag. Adm. 436; The Beulah, 1 W. Rob. 477; The Caroline, 2 W. Rob. 124; The Columbine, 2 W. Rob. 186; Carmichael *v.* Brodie, L. R. 1 P. C. 454; The Magnolia, 3 Can. L. T. 107; Bond *v.* The Brig Cora, 2 Wash. (U. S.) 80; The Galaxy, Blatchf. & H. Adm. 270, 9 Fed. Cas. No. 5,186.

4. Shares Dependent upon Circumstances. — The Columbine, 2 W. Rob. 186; The Ship Henry Ewbank, 1 Sumn. (U. S.) 400; The Wellington, 54 Fed. Rep. 901, 52 Fed. Rep. 605.

Engineer and Assistant Allotted More than Master. — Gaynor *v.* The Gler, 31 Fed. Rep. 425.

Pilot and Master Given Equal Shares. — Brooks *v.* The Ship William Penn, 2 Hughes (U. S.) 144, 4 Fed. Cas. No. 1,965.

Nonnavigating Members of Crew awarded a smaller share than the active navigating part of the crew. The Spree, (1893) P. 147.

5. Increased Share for Extra Exertions. — The Saint Nicholas, Lush. 29; The Jane, 2 Hag. Adm. 338; The Columbine, 2 W. Rob. 186; Bond *v.* The Brig Cora, 2 Wash. (U. S.) 80; The Ship Henry Ewbank, 1 Sumn. (U. S.) 400; Bell *v.* The Sloop Ann, 2 Pet. Adm. 278; U. S. Mail Steamship Co. *v.* The John Potter, 28 Fed. Cas. No. 16,792*a;* The Charles Henry, 1 Ben. (U. S.) 8, 5 Fed. Cas. No. 2,617; The Winifred, 102 Fed. Rep. 988.

6. Compensation for Injuries. — The Jonge Bastiaan, 5 C. Rob. 287; The Cyclone, 16 Fed. Rep. 486.

among sets of salvors is based chiefly on the nature of the efforts made and the character of the services rendered by them.[1] In adjusting conflicting claims the fact that one of the vessels was the first upon the scene, and that another was more active or more serviceable after she came up, should be considered.[2] Salvors who happen to find and rescue a very valuable part of the cargo are not usually compensated in proportion to its value. This is only one of the elements of the computation.[3]

VIII. THE LIEN — 1. In General. — Salvors, under the maritime law, have a lien upon the property saved, which enables them to maintain a suit *in rem* against the ship or cargo, or both when both are saved in whole or in part.[4] And this whether the vessel is foreign or domestic.[5]

Foundation of Right to Lien. — The lien of a salvor never goes, in the absence of a contract expressly made, upon the idea of a debt due by the owner to the salvor for services rendered, as at common law, but upon the principle that the service creates a property in the thing saved.[6]

Lien Recognized by Common-law Courts. — The courts of common law will recognize the lien in the salvors so long as they retain possession of the goods saved, as, for instance, where the salvor is the defendant in an action for trover.[7]

2. Priority. — The priority of a salvage lien over liens for seamen's wages, repairs and supplies, bottomry bonds, customs duties, and collision claims has been discussed elsewhere in this work.[8]

3. How Lien May Be Lost — *a.* IN GENERAL. — It requires the most unequivocal acts on the part of the salvors to satisfy the courts that they intend to abandon their liens and to resort to the owners.[9]

b. NECESSITY OF POSSESSION. — The mere permitting the owner to be in possession of the property saved does not constitute an abandonment or waiver of the lien; the lien may exist independently of the possession.[10]

c. EFFECT OF AGREEMENT. — In some cases it has been held that a

1. Nature of Services Determines Compensation. — The Jonge Bastiaan, 5 C. Rob. 322; The Livietta, 8 P. D. 24; The Genessee, 12 Jur. 401; The Oscar, 2 Hag. Adm. 257; The Propeller Genesee Chief *v.* Fitzhugh, 12 How. (U. S.) 443; The Albion Lincoln, 1 Lowell (U. S.) 71; The Athalia, 2 Fed. Cas. No. 598; The Mulhouse, 22 Law Rep. 276, 17 Fed. Cas. No. 9,910. See also The Coya, 108 Fed. Rep. 413.

Services at Fire. - In apportioning the sum awarded as salvage among several tugs, which had rendered salvage services at a fire, the court held that it was proper to consider (a) their time of arrival; (b) their value, size and power; (c) their position and the presumptive effectiveness of their services; (d) their aid in rescuing persons from the fire or from the water; and (e) their remaining by, as requested, after the principal service had been performed. The Kaiser Wilhelm der Grosse, 106 Fed. Rep 963.

Rule When One Set Saves Life and Another Property. — The Mulhouse, 22 Law Rep. 276, 17 Fed. Cas. No. 9,910; The Heindall, Young (Nova Scotia) 132.

2. Time of Arrival to Be Considered. — The Cyclone, 16 Fed. Rep. 486.

3. Not in Proportion to Value of Cargo Saved. — The Albion Lincoln, 1 Lowell (U. S.) 71.

4. The Lien. — The Nicolai Heinrich, 17 Jur. 329; Hartfort *v.* Jones, 1 Ld. Raym. 393; The Flora, Young (Nova Scotia) 48; The Sabine, 101 U. S. 384; The Carl Schurz, 2 Flipp. (U. S.) 330; Eads *v.* The Steamboat H. D. Bacon, Newb. Adm. 274, 8 Fed. Cas. No. 4,232; Bryan's Case, 6 Ct. Cl. 128.

Action Against Proceeds of Salved Property. — Waterbury *v.* Myrick, Blatchf. & H. Adm. 34, 29 Fed. Cas. No. 17,253. See also Studley *v.* Baker, 2 Lowell (U. S.) 205, 23 Fed. Cas. No. 13,559.

5. Chapman *v.* The Greenpoint's Engines, 38 Fed. Rep. 671.

6. The Carl Schurz, 2 Flipp. (U. S.) 330, 5 Fed. Cas. No. 2,414.

7. Lien Recognized by Common-law Courts. — Hartfort *v.* Jones, 1 Ld. Raym. 393, Baring *v.* Day, 8 East 57; Baker *v.* Hoag, 7 N. Y. 555. See also Studley *v.* Baker, 2 Lowell (U. S.) 205.

8. See the title MARITIME LIENS, vol. 19, p. 1121.

Priority of Lien for Wages of Seamen Remaining with Wreck. — It is the duty of seamen, so long as their personal safety permits, to remain by the wreck of a vessel, and save as much as possible, and upon compliance with this obligation, the fragments of the vessel and the outfit constitute a fund pledged for the payment of their wages, which will not be postponed to the claim of the salvors. The Schooner Davidson, 9 Biss. (U. S.) 275.

9. Eads *v.* The Steamboat H. D. Bacon, Newb. Adm 274, 8 Fed. Cas. No 4,232.

10. Possession Not Essential to Existence of Lien. — The Eleanora Charlotta, 1 Hag. Adm. 156; The Sabine, 101 U. S. 384; Eads *v.* The Steamboat H. D. Bacon, Newb. Adm. 274, 8 Fed. Cas. No. 4,232; Nickerson *v.* The John Perkins, 3 Ware (U. S.) 87, 18 Fed. Cas. No. 10,252; The Missouri's Cargo, 1 Sprague (U. S.) 260, 17 Fed. Cas. No. 9,654.

special or express contract with the owners fixing the compensation to be paid for salvage is a bar to a libel *in rem*.[1] But modern doctrine is to the contrary, and it is held that nothing short of a distinct agreement to pay the stipulated sum, whether the services be successful or not, will change the character of the salvage service into a mere ordinary contract of employment and deprive it of its maritime lien.[2]

Subsequent Acceptance of Note. — Where a lien for salvage has once attached, and notes have been given for the services, the burden of proof is upon the party alleging that the notes were intended to detach the lien.[3]

4. Assignment. — A salvage lien has been held to be personal and not assignable.[4] On the other hand, it has been held that the assignment of a claim arising from an agreement to pay a specified sum for salvage services will carry the lien securing the debt where the parties so intended.[5]

5. Lien of Different Sets of Salvors. — The vessel, freight, and cargo, or what is saved of them, is one fund, upon the whole of which all the salvors, though not associated by any contract among themselves, have a lien for such sum as upon the whole is found due to each; the lien is not upon the specific property rescued by a particular set of salvors.[6]

IX. Right of Possession — 1. In General — Derelicts. — The finders of a derelict have the right as salvors to the exclusive possession thereof until their just demands shall be satisfied or until the vessel is taken into the custody of the law, provided other assistance is not necessary to the safety of the derelict.[7]

Vessel Not a Derelict. — But, as a general rule, unless a vessel has been utterly abandoned, and is in contemplation of law a derelict, the occupying salvor has no right to the exclusive possession, and is bound to surrender possession to the master on his appearing and claiming charge, and the master can in such case employ whom he pleases and take what measures he thinks proper for the preservation of the ship.[8] The court will, however, be guided by the circumstances of each case in determining whether or not the master of the salvor's vessel is justified in refusing to allow the crew of the salved vessel to return to their own ship before the completion of the salvage.[9] And if the vessel is at the time of the demand by the master in such a critical position that there may be risk of loss or damage to her unless the salvors are allowed to complete their operations, it seems that they may retain possession pending such completion.[10]

1. See The Ella, 48 Fed. Rep. 569.

2. Effect of Agreement to Pay Stipulated Sum for Salvage Services. — Chapman *v.* The Greenpoint's Engines, 38 Fed. Rep. 671; The Ella, 48 Fed. Rep. 569; The Camanche, 8 Wall. (U. S.) 448; Adams *v.* Bark Island City, 1 Cliff. (U. S.) 210; Gager *v.* The A. D. Patchin, 1 Am. L. J. N. S. 529, 9 Fed. Cas. No. 5,170. See also The Huntsville, 12 Fed. Cas. No. 6,916; The Steamer Colima, 5 Sawy. (U. S.) 181; The Roanoke, 50 Fed. Rep. 574.

Contract Held to Be on Owner's Credit and Not to Support Lien. — The Enos *v.* Soule, 95 Fed. Rep. 483.

3. The J. E. Potts, 54 Fed. Rep. 539.

4. Lien Not Assignable. — Sturtevant *v.* The Bark George Nicholaus, Newb. Adm. 449, 23 Fed. Cas. No. 13,578; The City of Manitowoc, 5 Quebec 108.

5. The M. Vandercook, 24 Fed. Rep. 472.

6. The Albion Lincoln, 1 Lowell (U. S.) 71, 1 Fed. Cas. No. 144.

7. Right of Finder to Possession of Derelict. — The Tritonia, 5 Notes Cas. (Eng.) Supp. 1. The Brig John Gilpin, Olc. Adm. 77; The Ida L. Howard, 1 Lowell (U. S.) 2, 12 Fed. Cas. No. 6,999; The Bee, 1 Ware (U. S.) 336, 3 Fed. Cas. No. 1,219; Hartshorn *v.* Twenty-Five Cases Silk, 11 Fed. Cas. No. 6,168*a*; The Hyderabad, 11 Fed. Rep. 749, 11 Biss. (U. S.) 112.

8. Duty to Surrender Vessel Not a Derelict. — The Pinnas, 59 L. T. N. S. 526, 6 Asp. M. Cas. 313; The Barefoot, 14 Jur. 841; The Glascow Packet, 2 W. Rob. 307; The Champion, Brown & L. 69; The Bark Cleone, 6 Fed. Rep. 517. *Compare* The Royal William, 1 Stuart Adm. (L. C.) 107.

Nonallowance of Costs on Account of Retention of Brig's Chain. — The Brig Minnie Miller, 6 Ben. (U. S.) 117, 17 Fed. Cas. No. 9,638.

Custom to Retain Anchor Condemned. — One Anchor and Chain, 2 Lowell (U. S.) 549, 18 Fed. Cas. No. 10,517.

In Case of Capture and Recapture the property remains with the recaptors until salvage is paid. Marshall *v.* Delaware Ins. Co., 2 Wash. (U. S.) 54.

Forfeiture of Compensation. — For a discussion of retention of possession by the salvor, as a ground of forfeiture of compensation, see *infra*, *Effect of Negligence or Misconduct of Salvor*.

9. The Cleopatra, 37 L. J. Adm. 31.

10. The Pinnas, 59 L. T. N. S. 526, 6 Asp. M. Cas. 313.

Retaining Possession to Secure Compensation. — In some cases it is said salvors have the right to retain possession to secure for themselves the compensation which may be due.[1] But it has been held that the rule has no place where no possession has been acquired by a complete salvage service and where there was no necessity for retention for security, as where the circumstances were such that the ship could not escape the process of the court.[2]

2. Property under Control of Court. — In a proceeding *in rem* in admiralty the court takes possession of the property, and it remains in its possession until some order for restoration or delivery to the claimant is given. Generally, the libel being dismissed or the libellant's demand being satisfied, the order for restitution to the claimant is given, of course, but neither a dismissal of the libel nor a satisfaction of the libellant's demands will *per se* operate to reinvest the claimant with possession, and the claimant's title may become a subject of controversy and the propriety of restoring the property to him will then rest in the sound discretion of the court.[3]

3. Detention by Receiver of Wreck. — In *England* special provision is made by statute for the detention by the "receiver of wreck" of property liable for salvage until payment is made or process is issued.[4]

X. Effect of Negligence or Misconduct of Salvor — 1. In General. — Even where meritorious services have been performed, the right to salvage reward may be diminished or entirely forfeited by the misconduct of the salvor.[5] Thus, one or the other of these consequences has been held to

1. See The Glascow Packet, 2 W. Rob. 307.

Attempt of Master to Take Vessel to Distant Port. — The master has no right to insist that the ship or property shall proceed or be taken to a distant port inconvenient for the salvors without first satisfying their demands, and if the master insists, the salvors are justified in going so far as to resist his attempt, take control of the ship, and take it to a convenient port and place it in the custody of the law. The La Bruce, 14 Fed. Cas. No. 7,963. See also The Houthhandel, 1 Spinks 25; The Nicolai Heinrich, 17 Jur. 329. *Compare* Byrne *v.* Johnson, (C. C. A.) 53 Fed. Rep. 840, *overruling* The El Dorado, 50 Fed. Rep. 956.

2. The Glascow Packet, 2 W. Rob. 307. See also the Brig Minnie Miller, 6 Ben. (U. S.) 117, 17 Fed. Cas. No. 9,638.

3. The Byron, 4 Fed. Cas. No. 2,275; The Nathaniel Kimball, 17 Fed. Cas. No. 10,033; The Osteonthe, 18 Fed. Cas. No. 10,608*a*.

Refusal to Restore to Master. — The Montserat, 17 Fed. Cas. No. 9,740.

Right to Delivery on Bail. — It has been said that the owner of neither the ship nor the cargo has, as a matter of right, any claim to have either of them delivered on bail at an appraisement, and unless the salvors assent to a delivery it is not the usual practice of the court to direct a delivery on appraisement, but that if either the ship or the cargo be perishable or may sustain injury from the salvage proceedings, a sale may be and usually is authorized by the court. The Nathaniel Hooper, 3 Sumn. (U. S.) 542, 17 Fed. Cas. No. 10,032.

4. The Fulham, (1899) P. 251.

Release by Receiver of Wreck on Security. — In The Lady Katherine Barham, Lush. 404, it was held that, after release of the salved property by the receiver of wreck upon security to his satisfaction, salvors have no right to detain the property or to arrest it by warrant of the Admiralty Court; and in such case a release with costs will be granted against the salvors.

5. **Effect of Salvor's Misconduct on Right to Compensation.** — The Dosseitei, 10 Jur. 865; The Neptune, 1 W. Rob. 297; The Charles Adolphe, Swabey 153; The Cherubim, Ir. R. 2 Eq. 172; The Atlas, Lush. 518; The Rowena, Young (Nova Scotia) 255; Coady *v.* 1,200 Barrels Oil, 2 Hawaii 34.

Promptly Filing Libel Against Goods Salved No Cause for Forfeiture. — Twenty-three Bales Cotton, 9 Ben. (U. S.) 48, 24 Fed. Cas. No. 14,284.

Claim for Slight Services Lost by Laches. — The Rapid, 3 Hag. Adm. 419. See also Ryan *v.* Ship Cato, Bee Adm. 241, 21 Fed. Cas. No. 12,184.

Violent and Overbearing Conduct on the Part of Salvors as Ground for Reduction. — The Marie, 7 P. D. 203.

Refusal to Take Crew on Board. — In The Lisbon, Ir. R. 1 Eq. 144, it was held that the misconduct of salvors who took possession of a vessel, whose crew they knew were in distress on shore waiting to return to her, was punishable by a small award.

But in The Orbona, 1 Spinks 161, it was held that salvors in possession of a ship abandoned by all her crew who could get away were under no obligation to wait to take the crew on board again.

Taking Vessel Farther from Home Port than Necessary Matter for Reduction. — The Rowena, Young (Nova Scotia) 255.

The Extent of the Diminution or Forfeiture is measured, it has been said, not so much by the amount of the damage or loss sustained by the owner of the property saved, as by the moral quality or degree of turpitude of the act complained of. The Cape Packet, 3 W. Rob. 122; The Mulhouse, 22 Law Rep. 276, 17 Fed. Cas. No. 9,910. See also The Henry Steers, Jr., 110 Fed. 578.

follow where the salvor forced his services on the master against his will,[1] or offered resistance to the master's authority,[2] or refused to accept necessary assistance when offered.[3]

So the Voluntary Abandonment of an attempt to rescue a vessel in peril works a forfeiture of the right to salvage.[4]

Refusal to Perform Services and Hindering Others. — So a forfeiture may arise from a refusal to perform services at an important moment and the pursuance of a course embarrassing to others actually engaged in the service.[5]

So the Embezzlement or fraudulent concealment of the property salved or a portion thereof will generally work a forfeiture of the salvage reward.[6]

When Wilful or Criminal Misconduct Held Necessary to Forfeiture. — In Snow *v.* Aylan, 8 Jur. N. S. 753, it was held that where success is finally attained no misconduct short of that which is wilful and may be considered criminal will work an entire forfeiture of the salvage, and that a mistake or misconduct other than criminal which diminishes the value of the property salved or occasions expense to the owner is properly considered in the amount of compensation to be awarded. See also The D. M. Hall *v.* The John Land, 7 Fed. Cas. No. 3,939.

Intent in Effecting Salvage Immaterial Apart from Conduct. — Le Tigre's Case, 3 Wash. (U. S.) 567, 15 Fed. Cas. No. 8,281; The Cherokee, 31 Fed. Rep. 167.

Misconduct of Crew During Time of Rendering Salvage Service Alone Material.— The Centurion, 1 Ware (U. S.) 490, 5 Fed. Cas. No. 2,554.

1. Aid Forced on Master Not Entitled to Compensation. — New Harbor Protection Co. *v.* The Steamer Charles P. Chouteau, 5 Fed. Rep. 463, *affirmed* The Choteau, 9 Fed. Rep. 211; The Akaba, 54 Fed. Rep. 197, 8 U. S. App. 316; The Pohatcong, 77 Fed. Rep. 996; The Brig Susan, 1 Sprague (U. S.) 499, 23 Fed. Cas. No. 13,630; The Rahway, 46 Fed. Rep. 809. See also Clarke *v.* Brig Dodge Healy, 4 Wash. (U. S.) 651, 5 Fed. Cas. No. 2,849.

Taking Possession of Vessel Left in Hands of Agent. — The Bark Cleone, 6 Fed. Rep. 517.

Taking Possession of Barge Left Where It Was a Common Usage to Leave Barges. — The Upnor, 2 Hag. Adm. 3.

Services Before Rejection Entitled to Reward. — It has been intimated that if competent persons upon request subject themselves to labor, danger, and expense to get on board of the vessel and then offer their services for such reward as the law will give them, if such offer is rejected some compensation should be made for the labor, expense, and danger so incurred, at least in cases where the vessel subsequently comes to a place of safety. The Brig Susan, 1 Sprague (U. S.) 499, 23 Fed. Cas. No. 13,630.

2. Resisting Master's Authority. — The Dolcoath, 16 Fed. Rep. 264; The Cherokee, 31 Fed. Rep. 167; The Black Boy, 3 Hag. Adm. 386, note.

Resistance of Master's Authority Resulting in Forfeiture. — The Barefoot, 14 Jur. 841; The Capella, (1892) P. 70. See also The Yucatan, 30 Fed. Cas. No. 18,194. See also Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914.

Resistance Considered as Going to Diminution of Compensation. — The Simpson, 3 Ir. Jur. Adm. 270; The Charles Forbes, Young (Nova Scotia) 172.

Forfeiture for Refusal to Surrender Possession of Vessel Not a Derelict. — The Barefoot, 14 Jur. 841; The Champion, Brown & L. 69. See also The Yan-Yean, 8 P. D. 147.

Refusal to Surrender to Third Person Not Known to be Owner's Agent No Ground for Forfeiture of Compensation. — Twenty-Three Bales Cotton, 9 Ben. (U. S.) 48.

No Compensation for Services Obtruded After Formal Discharge. — The Glascow Packet, 2 W. Rob. 307.

Diminution of Compensation on Account of Attempted Exclusion of Other Salvors Appointed by Master. — The Dantzic Packet, 3 Hag. Adm. 383.

Refusal of Salvors to Interrupt the Work of Saving Cotton for the Purpose of Rescuing an Anchor and Chain Not Misconduct. — The Northwester, 18 Fed. Cas. No. 10,333.

Where Resistance to the Master Is Necessary in order to avoid the destruction of the vessel, it seems that diminution of salvage will be made. The D. M. Hall *v.* The John Land, 7 Fed. Cas. No. 3,939.

3. Refusal to Accept Necessary Assistance. — The Concordia, 6 Fed. Cas. No. 3,092; One Anchor and Chain, 2 Lowell (U. S.) 549, 18 Fed. Cas. No. 10,517. See also The Berlin, 3 Ir. Jur. N. S. 34; The Elizabeth, 8 Ir. Jur. 340; The Gudrun, 5 Ir. Jur. N. S. 361.

Derelict. — The Ida L. Howard, 1 Lowell (U. S.) 2, 12 Fed. Cas. No. 6,999.

Fact Considered in Diminution of Compensation. — The Dosseitei, 10 Jur. 865; The Cambria, Prit. Adm. Dig. 774.

Fact Held to Give Rise to Forfeiture. — The Martha, Swabey 489; The Yan-Yean, 8 P. D. 147.

4. Forfeiture for Abandonment Before Completion. — Ross *v.* The Angeline Anderson, 35 Fed. Rep. 796; The Algitha, 17 Fed. Rep. 551. See also The Killeena, 6 P. D. 193.

But when salvors are prevented by stress of weather, fog or darkness, or other circumstances beyond their control, from rendering further assistance, and there has been no wilful disregard of duty on their part towards the imperilled ship, there should be no forfeiture. The Strathnevis, 76 Fed. Rep. 855.

5. Anonymous, 1 Fed. Cas. No. 429.

Reduction of Officer's Compensation for Refusal of Personal Assistance. — The Lovett Peacock, 1 Lowell (U. S.) 143, 15 Fed. Cas. No. 8,555.

Crew Unfit for Service on Account of Intoxication. — The Mulhouse, 22 Law Rep. 276, 17 Fed. Cas. No. 9,910.

6. Forfeiture Arising from Embezzlement — *England.* — The Lady Worsley, 2 Spinks 253; Trott *v.* Le Clé, Colles 219.

Spoliation. — And the same has been held of the spoliation of the vessel or of the property salved,[1] except in case of urgent necessity.[2]

Fraudulent Conduct. — So, if the salvor is guilty of fraud,[3] as where he performs unnecessary labors, or delays the work for the purpose of magnifying the salvage service and thereby securing a greater compensation, the entire compensation will, as a general rule, be forfeited.[4]

Negligence or Unskilfulness. — Salvors are bound to use the same care and skill in keeping the property in their custody as would be exercised by persons of ordinary skill and prudence in the business undertaken,[5] and a failure to

United States. — The Rising Sun, 1 Ware (U. S.) 385, 20 Fed. Cas. No. 11,858; Flinn *v.* Leander, Bee Adm 260, 9 Fed. Cas. No. 4,870; The Schooner Boston, 1 Sumn. (U. S.) 328, 3 Fed. Cas. No. 1,673; The Barque Island City, 1 Black (U. S.) 121; Mason *v.* Ship Blaireau, 2 Cranch (U. S.) 240, 16 Fed. Cas. No. 9,230; Cromwell *v.* The Bark Island City, 1 Cliff. (U. S.) 221; Lears *v.* One Cask Oil, 15 Fed. Cas. No. 8,161*a;* The L. T. Knights, 1 Lowell (U. S.) 396, 15 Fed. Cas. No. 8,585; Harley *v.* Gawley, 2 Sawy. (U. S.) 7, 11 Fed. Cas. No. 6,069; Nickerson *v.* The John Perkins, 3 Ware (U. S.) 87, 18 Fed. Cas. No. 10,252; The Sumner's Apparel, Brown Adm. 52, 23 Fed. Cas. No. 13,608; The Mulhouse, 22 Law Rep. 276, 17 Fed. Cas. No. 9,910.

Embezzlement in Port. — The Schooner Boston, 1 Sumn. (U. S.) 328, 3 Fed. Cas. No. 1,673.

Embezzlement of Articles of Trifling Value. — And the rule applies though the articles be of little value and are abandoned as worthless. Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914; Anonymous, 1 Fed. Cas. No. 429.

But the failure through thoughtlessness to make prompt return of trifling articles is no ground for forfeiture. Anonymous, 1 Fed. Cas. No. 429. See also The L. T. Knights, 1 Lowell (U. S.) 396, 15 Fed. Cas. No. 8,585.

Appropriating Wearing Apparel. — Salvors taking clothes from a salved vessel in wet and boisterous weather will not be charged with felonious intent, but the value thereof will be deducted from their compensation. The Louisa, 7 Jur. 182.

No Reduction for Necessary Consumption of Stores. — The use and consumption by salvors, in the course of their service, and for their necessary subsistence, of stores found on board a derelict, is proper, although they could have brought stores of their own on board without great inconvenience. The Ida L. Howard, 1 Lowell (U. S.) 2, 12 Fed. Cas. No. 6,999.

Repentance and Return of Property as Restoring Original Rights. — See The Rising Sun, 1 Ware (U. S.) 385, 20 Fed. Cas. No. 11,858; The Mulhouse, 22 Law Rep. 276, 17 Fed. Cas. No. 9,910.

Effect of Embezzlement on Cosalvor. — Embezzlement by a salvor does not work to the prejudice of his cosalvors who are innocent. The Rising Sun, 1 Ware (U. S.) 385, 20 Fed. Cas. No. 11,858; Nickerson *v.* The John Perkins, 3 Ware (U. S.) 87, 18 Fed. Cas. No. 10,252; The Missouri's Cargo, 1 Sprague (U. S.) 260.

But the rule is otherwise where the cosalvor connives at the embezzlement. The Barque Island City, 1 Black (U. S.) 121.

Failure to Prevent Plundering by Others. — Salvors are not only bound to scrupulous honesty themselves, but while the property is in their custody they are jointly required to employ every reasonable degree of diligence to preserve it from plunder by others. Any negligence in this respect if not visited with an entire forfeiture of salvage will be remembered in fixing the amount. The John Perkins, 21 Law Rep. 87, 13 Fed. Cas. No. 7,360; The Mulhouse, 22 Law Rep. 276, 17 Fed. Cas. No. 9,910; Nickerson *v.* The John Perkins, 3 Ware (U. S.) 87, 18 Fed. Cas. No. 10,252.

Failure of Officers to Prevent Embezzlement by Crew. — Cromwell *v.* Bark Island City, 1 Cliff. (U. S.) 221.

1. Forfeiture for Spoliation. — Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914; The Isaac Allerton, 13 Fed. Cas. No. 7,088; James *v.* The Sarah A. Boice, 13 Fed. Cas. No. 7,183; The Bello Corrunes, 6 Wheat. (U. S.) 152. See also The Francis Ashby, 9 Fed. Cas. No. 5,040.

Countenancing Spoliation as Ground for Forfeiture. — Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914.

2. The Holder Borden, 1 Sprague (U. S.) 144, 12 Fed. Cas. No. 6,600. See also The Isaac Allerton, 13 Fed. Cas. No. 7,088.

3. Compensation Forfeited by Fraud. — Clayton *v.* The Ship Harmony, 1 Pet. Adm. 70, 5 Fed. Cas. No. 2,871; The Barque Island City, 1 Black (U. S.) 121; Western Transp. Co. *v.* The Great Western, 29 Fed. Cas. No. 17,443. See also The C. M. Titus, 11 Fed. Rep. 442.

Fraud in Proceeding to Recover Salvage. — Church *v.* Seventeen Hundred and Twelve Dollars, 4 Adm. Rec. 647, 5 Fed. Cas. No. 2,713.

Suppression of Facts as Ground for Reduction of Award. — The Clandeboye, (C. C. A.) 70 Fed. Rep. 631, 25 U. S. App 453.

Putting on Shore the Master and Crew of a ship in distress with a view to increasing the value of the salvors' services is an act which will effect a reduction of the compensation which they would otherwise receive. The Magnolia, 2 Ir. Jur. N. S. 235, 29 L. T. N. S. 40.

4. The Byron, 4 Fed. Cas. No. 2,275; The Aurora, 2 Fed. Cas. No. 659; The Mount Washington, 17 Fed. Cas. No. 9,887.

Reduction for Sham Exhibition of Work. — Alexander *v.* Car Floats No. 1, 3, 4 & 5, 64 Fed. Rep. 887.

Mere Fact of Employment of Unnecessary Number of Salvors No Ground for Forfeiture. — Sanderson *v.* The Ann Johnson, 21 Fed. Cas. No. 12,297*a*.

5. The Mulhouse, 22 Law Rep. 276, 17 Fed. Cas. No 9,910; The Henry Steers, Jr., 110 Fed. Rep. 578.

exercise such care or skill will be punished either by a partial [1] or, in aggravated cases, by total forfeiture [2] of compensation.

Acts of Salvor Making Salvage Necessary. — Salvors are not entitled to reward for saving property which they have by their own wrongful acts contributed to place in jeopardy.[3] But it has been held that a vessel rendering salvage assistance is not deprived of her right to reward by the fact that she is employed by a vessel whose misconduct renders her employment necessary.[4]

2. Effect of Misconduct of Crew on Owner's Right to Reward. — Whenever a valuable salvage service has been performed by the master and crew — a real benefit done to the owners of the property saved — the owner of the salvor vessel, being innocent, is entitled to be remunerated for the use of his vessel according to the actual service rendered, notwithstanding any neglect or mis-

Independent Action for Negligence. — Indeed it has been held that where the salvor's act or omission amounts to culpable negligence proximately resulting in separable and distinguishable injury to the property, recovery may be had therefor in a suitable action, and the damages may be lessened by the value of the salvage services given. Serviss *v.* Ferguson, (C. C. A.) 84 Fed. Rep. 202; The Henry Steers, Jr., 110 Fed. Rep. 578. See also The C. S. Butler, L. R. 4 A. & E. 178.

But no liability attaches where the salving vessel acts in good faith and with reasonable judgment and skill. The Laura, 14 Wall. (U. S.) 336.

Not Liable for Misconduct of Pilot to Whom Property is Delivered. — Salvors having brought a vessel in distress to a situation of safety from ordinary peril but not to anchor, and having given up the charge to a licensed pilot, are not prejudiced as to their claim by injury subsequently happening to the ship from the negligence of such pilot. The Bomarsund, Lush. 77.

1. Compensation Reduced on Account of Negligence. — The Cape Packet, 3 W. Rob. 122; The Ashburton, 2 Fed. Cas. No. 575; Curry *v.* The H. J. May, 6 Fed. Cas. No. 3,494; The Diadem, 7 Fed. Cas. No. 3,874; The Northwester, 18 Fed. Cas. No. 10,333; The Senator, Brown Adm. 372, 21 Fed. Cas. No. 12,664; The Sultan, 23 Fed. Cas. No. 13,601; Baker *v.* The Slobodna, 35 Fed. Rep. 537. See also The C. S. Butler, L. R 4 A. & E. 178.

Want of Skill Apart from Negligence. — The Dwina, (1892) P. 58.

When Unskilful Person Justified in Undertaking Rescue. — While a person without knowledge of navigation might not be justified in undertaking the rescue of a ship where nautical skill is required if other persons with the adequate skill are at hand, yet allowance will be made where there are no other persons present capable of rendering more efficient assistance. The Henry Steers, Jr., 110 Fed. Rep. 578.

No Reduction for Unavoidable Accident. — The Herman, 12 Fed. Cas. No. 6,406; Stevens *v.* The Steamboat S. W. Downs, Newb. Adm. 458, 23 Fed. Cas. No. 13,411.

2. Forfeiture Arising from Aggravated Negligence. — The Mulhouse, 22 Law Rep. 276, 17 Fed. Cas. No. 9,910; Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914; The Henry Steers, Jr., 110 Fed. Rep. 578; The Bark John G. Paint, 2 Ben. (U. S.) 174, 13 Fed. Cas. No. 7,346.

Negligence of Salvor Placing Ship in Peril as Great as That from Which She Is Rescued. — Shersby *v.* Hibbert, 6 Moo. P. C. 91; The Yan-Yean, 8 P. D. 147; The Benlarig, 14 P. D. 3.

Wilful Negligence. — Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914.

3. Acts of Salvor Making Salvage Service Necessary. — The Ashland, 19 Fed. Rep. 651; The Washington *v.* The Saluda, 29 Fed. Cas. No. 17,232.

Collision Through Fault of Salving Vessel. — The Glengaber, L. R. 3 A. & E. 534; The Sampson, 4 Blatchf. (U. S.) 28; Mesner *v.* Suffolk Bank, 1 Law Rep. 249, 17 Fed. Cas. No. 9,493; The Samuel H. Crawford, 6 Fed. Rep. 906.

And thus it has been held though the vessel salved was also in fault. The Minnie C. Taylor, 52 Fed. Rep. 323; Cargo ex Capella, L. R. 1 A. & E. 356.

Services Rendered by Innocent Party to Collision. — The 25 and 26 Vict., c. 63, § 33, does not debar the innocent sufferer in a collision from salvage reward for services subsequently rendered to the other party to the collision. The Retriever *v.* The Queen, 17 L. T. N. S. 329.

Setting Vessel on Fire. — The Clarita, 23 Wall. (U. S.) 1.

Where Vessel Salved Was Placed in Danger by Breach of Contract by the Salving Vessel. — The Krona, 28 Fed. Rep. 318.

Danger Arising from Improper Performance of Towage Contract. — If the danger from which the vessel was rescued was occasioned or materially contributed to by a tug, under contract to tow a vessel, whether by wilful misconduct or by negligence or by want of reasonable skill or equipments, which are implied in the towage contract, no claim to salvage arises. Ward *v.* McCorkill, 15 Moo. P. C. 133; The Robert Dixon, 5 P. D. 54; The Duke of Manchester, 2 W. Rob. 470.

Vessel Wrecked in Pursuance of Agreement Between Master and Salvor. — Church *v.* Seventeen Hundred and Twelve Dollars, 5 Fed. Cas. No. 2,713.

Failure to Warn Vessel of Danger. — American Ins. Co. *v.* Johnson, Blatchf. & H. Adm. 9, 1 Fed. Cas. No. 303, in which remuneration was allowed for services performed, but not in the character of compensation for a salvage service.

Compensation Allowed in Absence of Fault on Sailor's Part. — The Grace Dollar, 103 Fed. Rep. 665.

4. The Glengaber, L. R. 3 A. & E. 534.

conduct of the master or crew working a forfeiture or reduction of their shares.[1] But it has been held that the owner of a vessel employed as a business in rendering salvage services, while not subject to punishment by forfeiture of his compensation in such case, will be liable for the negligence or misconduct of the master and crew to the value of his interest in the vessel.[2]

3. To Whose Benefit Forfeited Shares Accrue. — When the shares of any salvors are forfeited, they do not, as a general rule, accrue to their cosalvors to increase their shares, but are reserved for the owners of the property saved.[3] However, a different rule may be applied, as the question rests in the sound discretion of the court.[4]

4. Conclusiveness of Evidence of Misconduct Required. — It has been held that the evidence to establish misconduct must be conclusive,[5] by which, it is said, is meant that it must be such as leaves no reasonable doubt in the mind of the judge.[6]

5. Burden of Proof. — The burden of proof is on those who impute the misconduct.[7]

XI. REMEDIES — 1. Suit Against Property Salved or Owner. — Suits in admiralty for salvage may be *in rem* against the property saved or the proceeds thereof, or in some instances *in personam* against the owner.[8] Thus, an action *in personam* may be maintained against the party at whose request and for whose benefit the salvage service was performed,[9] or where the property was delivered by the salvor to the owner before legal proceedings were instituted,[10] or where the property has been taken from the salvor by a sheriff by virtue of a writ of replevin in a state court.[11]

2. Suit by Owner Against Salvor. — Or suit may be brought by the owner against the salvors for restitution of his property after payment of salvage.[12]

3. Suit by One Salvor Against Another for Distribution. — So a salvage suit in admiralty may be brought by one salvor against another for a distribution where the entire reward has been paid to the latter or has otherwise come into his hands.[13]

1. Effect of Crew's Misconduct on Owner's Right to Reward. — The Mulhouse, 22 Law Rep. 276, 17 Fed. Cas. No. 9,910 (*distinguishing* The Duke of Manchester, 2 W. Rob. 470; The Cape Packet, 3 W. Rob. 122); The Rising Sun, 1 Ware (U. S.) 385, 20 Fed. Cas. No. 11,858; The Gov. Ames, (C. C. A.) 108 Fed. Rep. 969.

2. The Mulhouse, 22 Law Rep. 276, 17 Fed. Cas. No. 9,910. See also The Katie Collins, 21 Fed. Rep. 409.

3. The Rising Sun, 1 Ware (U. S.) 385; Flinn *v.* The Leander, Bee Adm. 260, 9 Fed. Cas. No. 4,870. See also Anonymous, 1 Fed. Cas. No. 429.

4. Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914.

Where Negligence Causing Forfeiture Has Increased Labors of Other Salvors. — Anonymous, 1 Fed. Cas. No. 429.

5. The Charles Adolphe, Swabey 153.

A Negotiation by the Owner to Refer a Claim of Salvage to Arbitration is inoperative to create an estoppel against him to set up a defense on the ground of the salvors' misconduct. The Martha, Swabey 489.

6. Snow *v.* Aylan, 8 Jur. N. S. 753.

7. Snow *v.* Aylan, 8 Jur. N. S. 753; The Alexandra, 104 Fed. Rep. 904.

8. The Hope, 3 C. Rob. 215; The Sabine, 101 U. S. 384.

Action at Common Law. — In Lipson *v.* Harrison, 24 Eng. L. & Eq. 208, it was held that no action will lie at common law against the owner to recover for salvage services unless the salvor can prove a contract with the owner of the property saved or with an agent. See also Brevoor *v.* The Ship Fair American, 1 Pet. Adm. 87. *Compare* Newman *v.* Walters, 3 B. & P. 612.

9. The Sabine, 101 U. S. 384. See also Seaman *v.* Erie R. Co., 2 Ben. (U. S.) 128.

Implied Request. — Baxter *v.* Heilner, 38 Fed. Rep. 668.

Services Must Be Performed for Defendant's Benefit. — Miller *v.* Kelly, Abb. Adm. 564, 17 Fed. Cas. No. 9,577.

10. The Trelawney, 3 C. Rob. 216, note; The Emblem, 2 Ware (U. S.) 68, 8 Fed. Cas. No. 4,434; Seaman *v.* Erie R. Co., 2 Ben. (U. S.) 128, 21 Fed. Cas. No. 12,582; The Independence, 2 Curt. (U. S.) 350.

11. Hudson *v.* Whitmire, 77 Fed. Rep. 846.

12. Post *v.* Jones, 19 How. (U. S.) 150. See also Studley *v.* Baker, 2 Lowell (U. S.) 205.

13. Jewett *v.* Hill, *referred to* in Studley *v.* Baker, 2 Lowell (U. S.) 205, 23 Fed. Cas. No. 13,559.

Suit by Crew Against Master. — Fernald *v.* Two Logs Mahogany, *referred to* in Studley *v.* Baker, 2 Lowell (U. S.) 205, 23 Fed. Cas. No. 13,559; The Centurion, 1 Ware (U. S.) 490, 5 Fed. Cas. No. 2,554.

Action by Owner Against Master. — Cook *v.* Ellery, *referred to* in Studley *v.* Baker, 2 Lowell (U. S.) 205, 23 Fed. Cas. No. 13,559.

SAME. (See also SAID, *ante.*) — "Same" means not different or other; identical.[1] But "the same" does not always mean identical, not different or other; it frequently means of the kind or species, though not the specific thing. It is often used as a substitute for that which has been used before, and is employed in the sense of a pronoun. In this sense it is very frequently employed in legal documents and pleadings.[2] "The same" gen-

See also Waterbury *v.* Myrick, Blatchf. & H. Adm. 34.

Proceeding by Seamen Against Owners for a Share. — Studley *v.* Baker, 2 Lowell (U. S.) 205, 23 Fed. Cas. No. 13,559. See also The Olive Mount, 50 Fed. Rep. 563.

No Action at Common Law. — Atkinson *v.* Woodhall, 1 H. & C. 170. *Compare* Blake *v.* Patten, 15 Me. 173; Hawkins *v.* Avery, 32 Barb. (N. Y.) 551.

1. Same Means Not Different or Other; Identical. — U. S. *v.* East Tennessee, etc., R. Co., 13 Fed. Rep. 644.

Same Causes of Action. (See also CAUSE OF ACTION, vol. 5, p. 776.) — Although the forms of actions may be different, the causes may be the *same*. Harlow *v.* Bartlett, 170 Mass. 591.

Same Court. — A statute provided that if a sheriff should not execute a writ, complaint should be brought in the *same* court that granted the execution. It was held that the Superior Court was the *same* court within the meaning of this statute, although sitting in another county from that in which the action was brought. Burrows *v.* Fitch, Kirby (Conn.) 114.

Same Demand. — A writ was first sued out for the "balance of account, seventy-five dollars." The second suit was for an account, the items of which amounted to two hundred and twenty-three dollars and fifty-seven cents, but no credit was given. It was held that the second suit was not an action for the *same* demand. Marble *v.* Hinds, 67 Me. 203.

Same General Business — Fellow Servant. (See generally the title FELLOW SERVANTS, vol. 12, p. 991.) — In Northern Pac. R. Co. *v.* Herbert, 116 U. S. 653, it was said: "The words '*same* general business' * * * have reference to the general business of the department of service in which the employee is engaged, and do not embrace business of every kind which may have some relation to the affairs of the employer, or even be necessary for their successful management." See also Webb *v.* Denver, etc., R. Co., 7 Utah 367.

Fellow Servants — Same Grade. — A statute provided that all persons who were engaged in the common service of a railway corporation, and who, while so engaged, were "working together to a common purpose, of *same* grade, neither of such persons being intrusted by such corporations with any superintendence or control over their fellow employees," were fellow servants. In construing this provision the court said: "What do the words 'of *same* grade' mean as used in the second section of the Act of February 28, 1893? We are relieved of every difficulty in the decision of this question by the act itself. Immediately following these words are the following: 'Neither of such persons being intrusted by such corporation with any superintendence or control over their fellow employees.' It seems to us the latter words can serve no purpose unless it be to explain the words 'of *same* grade' which precede them. * * * If, therefore, neither the fireman nor the engineer had superintendence or control of the other they were fellow servants, otherwise they were not." Kansas City, etc., R. Co. *v.* Becker, 63 Ark. 485. See also Gulf, etc., R. Co. *v.* Warner, 89 Tex. 475.

Fellow Servant — Same Undertaking. — See Camp *v.* Hall, 39 Fla. 535.

Same Ground. — In consideration of employment, a traveling salesman agreed to pay to his employer a certain sum if he should travel for any other house in the *same* trade on any part of the *same* ground. It was held that extrinsic evidence was properly admitted to explain the meaning of the term *same* ground. Mumford *v.* Gething, 7 C. B. N. S. 305, 97 E. C. L. 305.

Same Place or Town — Notice of Dishonor. — See Westfall *v.* Farwell, 13 Wis. 509, and see the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 424.

2. The Same. — Thus, "to deliver policies and receive premiums upon the '*same*' is equivalent to deliver policies and receive premiums upon 'them;' or, substituting the noun for its representative pronoun, to deliver policies and receive premiums upon 'policies.'" Crapo *v.* Brown, 40 Iowa 493. And see Brockway *v.* Rowley, 66 Ill. 99.

Same in Sense of Similar or Like. — In *In re* Dougherty, 27 Vt. 325, it was held that the words "*same* offense," as used in a statute to prevent traffic in intoxicating liquors, meant a similar or like offense.

As ordinarily understood, the word *same*, when used in comparison, means "of like kind, species, sort, dimensions, or the like; not differing in character, or in quality or qualities compared; corresponding; not discordant; similar; like." Webst. Dict., *followed* in Cobb *v.* Lincoln, 15 Neb. 88.

But "like" and *same* are not always synonymous. See LIKE, vol. 19, p. 130, note.

Same Execution. — Harden *v.* Moores, 7 Har. & J. (Md.) 12.

Same Manner. — In Wilder's Steamship Co. *v.* Low, (C. C. A.) 112 Fed. Rep. 164, it was said: "The phrase 'in the *same* manner' has a well-understood meaning in legislation, and that meaning is not one of restriction or limitation, but of procedure. It means by similar proceedings, so far as such proceedings are applicable to the subject-matter." See also Phillips *v.* Middlesex County, 122 Mass. 260.

Same Punishment. — A statute provided that an accessory should receive the *same* punishment for receiving stolen goods as would be inflicted on the person who had stolen the goods. In construing this statute the court

erally refers to the next preceding antecedent,[1] but may grammatically refer to more than one antecedent.[2]

SAME OFFENSE. — See the title JEOPARDY, vol. 17, p. 580.

SAMPLE. — The word "sample" in both its legal and its popular acceptation, means that which is taken out of a large quantity as a fair representation of the whole — a part shown as a specimen.[3]

SAMPLE MERCHANTS. — See note 4.

SANCTION. — In the original sense of the word, a sanction is a penalty or punishment provided as a means of enforcing obedience to a law.[5] In jurisprudence, a law is said to have a sanction when there is a state which will intervene if it is disobeyed or disregarded.[6] Hence the controversy as to whether international law has a sanction.

SANE — SANITY. (See generally the title INSANITY, vol. 16, p. 558.) —

said: "This may mean that the sentence of the principal, in case of his conviction, shall be the exact measure of that pronounced upon the accessory, but the better construction probably is that the latter shall not exceed what the former might have been if the court had seen proper to inflict the maximum of the law. At all events, where, as in this case, the direct penalty put upon the accessory is the *same* as that put upon the principal, and the difference is only in the amount of the money alternative, the pecuniary commutation, we think there is no departure from the statute." Anderson *v.* State, 63 Ga. 678.

Same Term of Court. — In Wilson *v.* Wilson, 23 Neb. 461, it was said: "The language that 'the appellee may, at the *same* term of said court,' is to be taken as words of enlargement, permission, and privilege, meaning even at, or as early as, the *same* term of the court, and by no means in the sense of a restriction to the *same* term of the court, and to that term only."

Same Transportation Facilities. — See Hazleton Coal Co. *v.* Buck Mountain Coal Co., 57 Pa. St. 313.

1. Next Antecedent. (See also SAID, *ante*.) — 2 Kent's Com. 555; Wilkinson *v.* State, 10 Ind. 372; Hancock *v.* Hancock, 14 Pick. (Mass.) 75. See also Huskisson *v.* Lefevre, 26 Beav. 160.

Same Refers to Same Antecedent Where Used Several Times in Same Sentence of Will. — See Phillips's Estate, 28 W. N. C. (Pa.) 230.

"Connived at the Same." — A statute provided for the forfeiture of the interest in land on which a distillery was situated of every person who knowingly had suffered or permitted the business of a distiller to be there carried on, or who had connived at the *same*. In construing this provision the court said: "One word, however, seems to be called for, in this place, relative to the terms 'has connived at the *same*.' It is argued that this means connived at the fraud or intent to defraud. Neither the terms used nor their connection warrant any such interpretation. The interest of one who permits the business of a distiller to be there carried on is forfeited. That language is entirely explicit; and connived at 'the *same*' means connived at the carrying on of the business of a distiller there." U. S. *v.* Spring Valley Distillery, 11 Blatchf. (U. S.) 266.

Devise. — A devise of "an estate called L." to A. for life "and after his decease I give and bequeath the *same* unto" B, without words of limitation, was held to give to B. only a life interest. Doe *v.* Lean, 1 Q. B. 229, 41 E. C. L. 515. But this case was on a will made previously to the statute 1 Vict., c. 26, and seems to have turned on the word "estate" as implying merely local situation, and not describing the interest of the testatrix in the land, rather than as laying down that because A. was to have a life estate, therefore B. was to have "the *same*."

2. Court *v.* Buckland, 1 Ch. D. 610.

Same May Refer to Any One of Several Antecedents. — O'Neale *v.* Cleaveland, 3 Nev. 493.

3. Sample. — Webber *v.* Com., 33 Gratt. (Va.) 904.

Sales by Sample. — See the title IMPLIED WARRANTIES, vol. 15, p. 1225.

4. Sample Merchants. — In White *v.* Com., 78 Va. 484, in construing a statute which imposed a license tax upon *sample merchants*, the court said: "A *sample merchant* is one who sells or offers to sell any description of goods, wares, or merchandise by sample, card, description, or other representation, verbal or otherwise, or who acts as agent for the sale or collection of orders by sample or description list, such as is furnished by the C. O. D. Supply Company of America or any similar company."

5. Sanction. — Just. Inst. 2, 1, 10.

6. Holland's Jurisprudence 60.

Sanction of an Oath "is a belief that the Supreme Being will punish falsehood; and whether that punishment is administered by remorse of conscience, or in any other mode in this world, or is reserved for the future state of being, cannot affect the question, as the sum of the matter is a belief that God is the avenger of falsehood." Blocker *v.* Burruss, 2 Ala. 355. See generally the title OATHS AND AFFIRMATIONS, vol. 21, p. 743.

Sanctioned may mean either authorized or ratified. Aikins *v.* Dominion Live Stock Assoc., 17 Ont. Pr. 309.

Sanctioning Right. — In Tiffin Glass Co. *v.* Stoehr, 54 Ohio St. 164, which was an action by a servant against his master for breach of contract in discharging him, the court said: "By the breach of the contract an end was put to the relation of master and servant, and a new right accrued in favor of the plaintiff as against the defendant — a right to recover damages for the breach of the contract. This is called by some authors a *sanctioning*, and by others a 'remedial,' or 'secondary' right."

Sane means whole, sound, in a healthful state, and is applicable equally to the mind and to the body.[1]

SANITARY. — The word "sanitary" is defined to mean pertaining to or designed to secure sanity or health; relating to the preservation of health.[2]

SANITARY DISTRICT. (See also the titles BOARDS OF HEALTH, vol. 4, p. 596; MUNICIPAL CORPORATIONS, vol. 20, p. 1123.) — A sanitary district is a municipal corporation organized to secure, preserve, and promote the public health.[3]

SANS RECOURS. — See the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, pp. 276, 478, 486, and see WITHOUT RECOURSE.

SARDINES. — See note 4.

SARSAPARILLA. — See the title FIRE INSURANCE, vol. 13, p. 116.

SATISFACTION IN EQUITY. — "Satisfaction may be defined in equity to be the donation of a thing, with the intention, expressed or implied, that it is to be an extinguishment of some existing right or claim of the donee. It usually arises in courts of equity as a matter of presumption, where a man, being under an obligation to do an act (as to pay money), does that by will which is capable of being considered as a performance or satisfaction of it, the thing performed being *ejusdem generis* with that which he has engaged to perform. Under such circumstances, and in the absence of all countervailing circumstances, the ordinary presumption in courts of equity is that the testator has done the act in satisfaction of his obligation."[5]

SATISFACTION PIECE. — In practice, a satisfaction piece is a memorandum in writing, entitled in a cause, stating that satisfaction is acknowledged between the parties, plaintiff and defendant. Upon this being duly acknowledged and filed in the office where the record of the judgment is, the judgment becomes satisfied, and the defendant discharged from it.[6]

SATISFACTORY ANSWER. — See note 7.

1. **Sane.** — Den *v.* Vancleve, 5 N. J. L. 760.
Sane or Insane. — See the title LIFE INSURANCE, vol. 19, p. 76.
Sanity. — In Stinson *v.* Bowlware, 3 McCord L. (S. Car.) 254, it was said: "Our word *sanity*, which we generally use to express a soundness of mind, is nothing more nor less than *sanitas* with an English termination, which is here used with reference to a bodily infirmity, and which has acquired that limited sense, in our language, from use alone. The plain English word 'sound,' unless restricted by the adjunct 'body' or 'mind,' is considered as embracing both."

2. **Sanitary.** — Webst. Dict., *quoted* in People *v.* Nelson, 133 Ill. 579; *In re* Theresa Drainage Dist., 90 Wis. 305.
Numbers — Public or Private Relation. — In *In re* Theresa Drainage Dist., 90 Wis. 305, it was said: "The word is of purely abstract meaning. It is utterly devoid of any suggestion of numbers or of public or private relation. It imports neither. For such purpose it is strictly neutral and impartial. Without some qualifying word, it is inoperative to designate the purpose as a public one, or as in the interest of the public health."

3. **Sanitary District.** — People *v.* Nelson, 133 Ill. 579.

4. **Sardines — Revenue Laws.** — See Wieland *v.* San Francisco, (C. C. A.) 104 Fed. Rep. 541; *In re* Wieland, 98 Fed. Rep. 101.

5. **Satisfaction.** — Story's Eq. Jur., § 1099, *quoted* in Green *v.* Green, 49 Ind. 423.

6. **Satisfaction Piece.** (See generally the title JUDGMENTS AND DECREES, vol. 17, p. 858 *et seq.*) — Burr. L. Dict. See also Lownds *v.* Remsen, 7 Wend. (N. Y.) 40.

7. **Satisfactory Answer.** — See Ross *v.* Van Etten, 7 Manitoba 598.

SATISFY, SATISFACTION, ETC.

By Thomas Johnson Michie.

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II. **Evidence — Instructions**, 1235.
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CROSS-REFERENCES.

See the titles ACCORD AND SATISFACTION, vol. 1, p. 408; *CHATTEL MORTGAGES*, vol. 5, p. 945; *LEGACIES AND DEVISES*, vol. 18, p. 769; *PAYMENT*, vol. 22, p. 513; *and see APPROVE — APPROVER — APPROVEMENT*, vol. 2, p. 519; *CLEAR*, vol. 6, p. 109; *ENTIRE, ENTIRELY, ETC.*, vol. 11, p. 48.

I. Definitions. — The word "satisfy" means to free from doubt, suspense, or uncertainty; to set the mind at rest;[1] also, "to comply with the rightful demands of; to give what is due to; to answer or discharge, as a claim, debt, legal demand, or the like; to pay off; to requite; as, to satisfy an execution."[2] The term "satisfied," in legal understanding, when applied to a note or bond, means that the note or bond is paid.[3]

Satisfaction. — Satisfaction is defined to mean that which satisfies; compensation; indemnification; reward; remuneration; requital; amends; atonement; recompense; the payment of a legal debt or demand; the discharging or cancelling a judgment or a mortgage by paying the amount of it.[4]

1. Satisfy. — Knights of Pythias *v.* Steele, 107 Tenn. 1.

When Governor Satisfied — Organization of New Counties. — Merchants Nat. Bank *v.* McKinney, 2 S. Dak. 116.

Become Satisfied — Public Utility. — Bryan *v.* Moore, 81 Ind. 12.

Satisfaction of the Court — Service by Publication. — Davis *v.* Cook, 9 S. Dak. 319.

Satisfactory Cause. — In May *v.* Hammond, 144 Mass. 151, it was held that a recital in a magistrate's certificate authorizing the arrest of a poor debtor that "after due hearing I am satisfied, upon the evidence, that the charge made in said affidavit is true" was a sufficient compliance with the provision of a *Massachusetts* statute requiring the magistrate to certify that he was satisfied that there was "reasonable cause to believe" that the charge contained in the affidavit on which the arrest was asked for was true. But in Smith *v.* Bean, 130 Mass. 298, it was held that a recital in a similar certificate that satisfactory cause has been shown for the arrest was not equivalent to the statement required by the statute. See also Stone *v.* Carter, 13 Gray (Mass.) 575; Wood *v.* Melius, 8 Allen (Mass.) 434; Webber *v.* Davis, 5 Allen (Mass.) 393.

Clear and Satisfactory. — See Clear, vol. 6, pp. 111, 112, notes.

2. Discharge. — Kronebusch *v.* Raumin, 6 Dak. 246, *quoting* Webst. Dict.

3. Satisfied — Indebtedness. — Reynolds *v.* Thomas, 1 Root (Conn.) 306.

Paid to Our Satisfaction. — See Pay — Payable — Paid, vol. 22, p. 511, note.

4. Satisfaction. — Rivers *v.* Blom, 163 Mo. 442, *quoting* Webst. Dict.

Story's Definition. — See the title Equitable Election, vol. 11, p. 63.

Discharge and Satisfaction Compared. — See Rivers *v.* Blom, 163 Mo. 442.

Satisfaction of Judgment. (See generally the titles Executions, vol. 11, p. 702 *et seq.*; Judgments and Decrees, vol. 17, p. 858 *et seq.*) — In Gilchrist *v.* Branch Bank, 11 Ala. 408, it was held that a memorandum indorsed by the sheriff on a fi. fa. in the words "case arranged in bank as per instructions" was not equivalent to a return of satisfied, nor sufficient ground to enter satisfaction of the judgment, or to quash a subsequent execution.

In Aultman *v.* McGrady, 58 Iowa 118, it was held that an indorsement upon an execution that "the within execution was satisfied by defendant giving security for said money" was not evidence of satisfaction.

In Planters Bank *v.* Calvit, 3 Smed. & M. (Miss.) 194, it was said: "Satisfaction is a technical term, and in its application to judg-

II. Evidence — Instructions. — "To be satisfied of the truth of a fact or proposition in law is to have every reasonable doubt of its truth removed from the mind." [1]

ments it means the payment of the money due by the judgment, which payment must be entered of record, and nothing but this is a legal satisfaction of a judgment."

Satisfaction of Legacy. — See the title Legacies and Devises, vol. 18, p. 769 *et seq.*

Satisfaction and Ademption of Legacies Distinguished. — See the title Ademption of Legacies, vol. 1, p. 611.

Satisfaction of Debt by Legacies. — See the title Legacies and Devises, vol. 18, p. 769.

Satisfaction of Mortgages. — See the title Mortgages, vol. 20, p. 1055 *et seq.*

1. Evidence. — Field *v.* Kinnear, 5 Kan. 237, *quoted* in State *v.* Adams, 20 Kan. 327. See also generally the titles Evidence, vol. 11, p. 490 *et seq.*; Reasonable Doubt, vol. 23, p. 948.

Satisfactory Evidence. — In Territory *v.* Bannigan, 1 Dak. 446, *quoting* 1 Greenleaf on Evidence, § 2, it was said: "By satisfactory evidence, which is sometimes called sufficient evidence, is intended that amount of proof which ordinarily satisfies an unprejudiced mind, beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined; the only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of a common man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest." See also Richmond, etc., R. Co. *v.* Trammel, 53 Fed. Rep. 201; Hopper *v.* Ashley, 15 Ala. 467; White *v.* Chicago, etc., R. Co., 1 S. Dak. 336; Knights of Pythias *v.* Steele, 107 Tenn. 1. And see the title Evidence, vol. 11, p. 491.

Opinion of Witnesses. — In Davidson *v.* Bowden, 5 Sneed (Tenn.) 129, it was said: "By the emphatic expression 'satisfactory proof' is meant such proof as demonstrates, or clearly and certainly establishes, the truth of the fact or point in issue." And in this case it was held that the opinion of a witness, unaccompanied by facts or reasons clearly sustaining its correctness, was not satisfactory proof.

Ability to Perform Working Contract. — By the charter of the city of Trenton it was provided that a contract for street improvements extending in cost to the sum of two hundred dollars and over must be awarded to the lowest bidder or bidders "who shall give satisfactory proof of his or their ability to furnish the requisite materials and perform the work properly." In State *v.* Board of Public Works, 57 N. J. L. 580, it was held that the determination of who was the lowest bidder, with this qualification, rested, not in the exercise of an arbitrary, unlimited discretion of the board, but upon the exercise of a *bona fide* judgment based upon facts tending reasonably to the support of such determination.

Fraud. — In Walker *v.* Collins, (C. C. A.) 59 Fed. Rep. 74, it was held that it was no error to charge that it devolves upon one who alleges fraud to show the same by satisfactory proof, *i. e.*, proof to the satisfaction of the jury. See also Jones *v.* Simpson, 116 U. S. 615; Hatch *v.* Bayley, 12 Cush. (Mass.) 30; and see the title Fraud and Deceit, vol. 14, p. 201 *et seq.*

Statute of Frauds. — In Hutton *v.* Doxsee, (Iowa 1902) 89 N. W. Rep. 79, the defendants asked the trial court to instruct the jury that "when it is sought to take a case out of the statute of frauds, and avoid its operation in nullifying the contract, upon the ground of part performance, it is indispensable that the parol contract or gift should be established by clear, unequivocal, and definite testimony, and the acts claimed to be done thereunder should be equally clear and definite, and referable exclusively to the said agreement or gift." This instruction was refused, but the court charged as follows: "Before the plaintiff would be entitled to recover, he must satisfy you from the evidence that the plaintiff did pay some part of the purchase price of said premises, or that he has, with the actual or implied consent of the said M. H. Hutton, taken possession of said premises under and by virtue of said contract." The Appellate Court said: "There was no error in refusing the instruction asked. The word satisfy is as strong as the words used in the instruction asked. Rosenbaum *v.* Levitt, 109 Iowa 292." See also the title Statute of Frauds.

Satisfactory Proof — Shall Be Satisfied. — In Bronson *v.* Gutches, 17 N. Y. App. Div. 205, it was said: "The words of the present statute, 'satisfactory proof,' mean practically the same thing as the words 'if the justice shall be satisfied' in the former; and it seems to me that the same construction should be given to the present statute as was given to the former one." This case arose upon the construction of a statute providing that where a justice of the peace is a material witness for the defendant, the action may be continued before another justice.

In a civil case, an instruction that the jury must be satisfied has been held to require too great a degree of certainty. Finks *v.* Cox, (Tex. Civ. App. 1895) 30 S. W. Rep. 513; Louisville, etc., R. Co. *v.* Sullivan Timber Co., 126 Ala. 103; Rolfe *v.* Rich, 149 Ill. 439; McMillan *v.* Baxley, 112 N. Car. 578; McGill *v.* Hall, (Tex. Civ. App. 1894) 26 S. W. Rep. 132; Grigg *v.* Jones, (Tex. Civ. App. 1894) 26 S. W. Rep. 885; Feist *v.* Boothe, (Tex. Civ. App. 1893) 27 S. W. Rep. 33. See also Marshall *v.* Thames F. Ins. Co., 43 Mo. 588.

Thus, in Fordyce *v.* Chancey, 2 Tex. Civ. App. 24, it was said: "The special charge requested * * * required that the jury be 'satisfied' that the apprehended results would flow from the injuries. This exacted too high a degree of proof for a civil case, and the charge was properly refused."

And in Mitchell *v.* Hindman, 47 Ill. App. 431, the court was asked to give the following instruction: "The jury are instructed, on behalf of the defendants, that the plaintiff in this case is bound to prove to the satisfaction of the jury, by a clear preponderance of the evidence," etc. It was held that this instruction was defective in the use of the words "satisfaction" and "clear."

III. CONTRACTS — 1. General Rule. — The courts have had frequent occasion to interpret contracts for the rendition of services, the sale or manufacture of articles, etc., in which it was agreed that the services should be satisfactory to the employer, or that the article should satisfy the purchaser. And where there is an agreement that an act shall be done in a manner satisfactory to the promisee, it is generally held that he is the sole arbiter of the performance according to the agreement. It is not enough to show that the promisee ought to be satisfied and that his discontent is without reason.[1] But it has

So in Kelch *v.* State, 55 Ohio St. 146, it was said: "To satisfy the mind, according to the common notion of mankind, is to free it from doubt, to set it at rest. This is the primary meaning of the word, according to all the lexicographers, when used in this connection. To accomplish this result — to 'satisfy' a body of men of the truth of a disputed fact — requires much more than a preponderance of the evidence."

And in Knights of Pythias *v.* Steele, 107 Tenn. 1, it was said: "Now, it is necessary that the jury should be satisfied that there is a preponderance one way or the other, but this does not mean that it must be satisfied of the truth of the fact itself."

But in Carstens *v.* Earles, 26 Wash. 676, it was held that to require a fact to be established by a preponderance of the evidence satisfactory to the minds of the jury did not require more than a preponderance of evidence.

An instruction that a fact must be proved to the satisfaction of the jury has been held not to require a greater degree of evidence than a preponderance. Callan *v.* Hanson, 86 Iowa 420.

And it has been said that satisfactory proof is such as flows fairly from a preponderance of evidence. Meyers *v.* Com., 83 Pa. St. 141; Rudy *v.* Com., 128 Pa. St. 508.

Same — Believe and Satisfied Used Interchangeably. — See BELIEF — BELIEVE, vol. 3, p. 914, note. See also Callan *v.* Hanson, 86 Iowa 420; Procter *v.* Loomis, 35 Mo. App. 486; Berry *v.* Wilson, 64 Mo. 164; Lemon *v.* Chanslor, 68 Mo. 342, 30 Am. Rep. 799; Wise *v.* Joplin R. Co., 85 Mo. 178; Carstens *v.* Earles, 26 Wash. 676.

1. Promisee Sole Judge of His Satisfaction — *England.* — Stadhard *v.* Lee, 3 B. & S. 364, 113 E. C. L. 364; Andrews *v.* Belfield, 2 C. B. N. S. 779, 89 E. C. L. 779.

United States. — Silsby Mfg. Co. *v.* Chico, 24 Fed. Rep. 893; Campbell Printing-Press Co. *v.* Thorp, 36 Fed. Rep. 414.

Connecticut. — Zaleski *v.* Clark, 44 Conn. 218, 26 Am. Rep. 446.

Illinois. — Goodrich *v.* Van Nortwick, 43 Ill. 445; Buckley *v.* Meidroth, 93 Ill. App. 460.

Maryland. — Lynn *v.* Baltimore, etc., R. Co., 60 Md. 404, 45 Am. Rep. 741; Baltimore, etc., R. Co. *v.* Brydon, 65 Md. 198, 57 Am. Rep. 318.

Massachusetts. — Aiken *v.* Hyde, 99 Miss. 183; Williams Mfg. Co. *v.* Standard Brass Co., 173 Mass. 356; McCarren *v.* McNulty, 7 Gray (Mass.) 139.

Michigan. — Sullivan *v.* Ross, 124 Mich. 292.

New York. — Glenny *v.* Lacy, (N. Y. City Ct. Tr. T.) 1 N. Y. Supp. 513.

Pennsylvania. — Waymart Water Co. *v.* Waymart, 4 Pa. Super. Ct. 211; Seeley *v.* Wells, 120 Pa. St. 75; Hartman *v.* Blackburn, 7 Pittsb. Leg. J. (Pa.) 140.

Rhode Island. — Pennington *v.* Howland, 21 R. I. 65.

West Virginia. — Osborne *v.* Francis, 38 W. Va. 321.

See also McCormick Harvesting Mach. Co. *v.* Chesrown, 33 Minn. 32.

To Do Good Work and Give Satisfaction. — A contract was as follows: "We hereby agree to let Peter Ellis have the sample Plano binder, 1885, at same price that Mr. Rheam has his for, and the binder is to do good work and give satisfaction; and if not, the said Ellis is to pay for use of same." It was held that the agreement that the binder was to do good work and give satisfaction embraced independent conditions, and unless the binder gave satisfaction to Mr. Ellis, as well as doing good work, he was not obliged to keep and pay for the machine. Plano Mfg. Co. *v.* Ellis, 68 Mich. 101. *Compare* May *v.* Hoover, 112 Ind. 455, set out *infra*, this section, *Cases Holding Reasonable Compliance Sufficient.*

Contract to Support. — Hart *v.* Hart, 22 Barb. (N. Y.) 606.

Elevator. — Singerly *v.* Thayer, 108 Pa. St. 291.

Organ. — McClure *v.* Briggs, 58 Vt. 82, 56 Am. Rep. 557

Portrait. — Gibson *v.* Cranage, 39 Mich. 49, 33 Am. Rep. 351; Pennington *v.* Howland, 21 R. I. 65. To the same effect see Gibson *v.* Cranage, 39 Mich. 49, 33 Am. Rep. 351; Hoffman *v.* Gallaher, 6 Daly (N. Y.) 42.

Railroad Location. — Where the subscription to the capital stock of a railroad company was upon condition that the road "be located through the town of B., satisfactory to the selectmen of said town," it was held not to be sufficient for the company to show that "said road was located wisely, prudently, and judiciously for the interests of said corporation and said town," without showing that it was also satisfactory to the selectmen. Bucksport, etc., R. Co. *v.* Brewer, 67 Me. 295.

Services. — In Rossiter *v.* Cooper, 23 Vt. 522, the court said: "It seems to us quite clear that, by the terms of the contract, either party, upon becoming dissatisfied, was at liberty to put an end to the contract, and that such party was under no legal obligation to apprise the other party of the grounds of his dissatisfaction. This case is distinguishable from that of Seaver *v.* Morse, 20 Vt. 620. There either party had the right to terminate the contract, upon becoming dissatisfied, 'provided, when the cause of dissatisfaction was made known, it could not be removed.' No such qualification is attached to the agreement in this case." See also Bush *v.* Koll, 2 Colo. App. 48; Provost *v.* Harwood, 29 Vt. 219;

been held that the decision of the person to be satisfied must be made in good faith.[1]

2. Matters of Taste. — It has been said that if the task to be performed does not involve a matter of taste, fancy, or judgment, but involves only common experience, such as an ordinary job of mechanical work, or the quality of material, a different rule applies, and that in such cases the law will say that what in reason ought to satisfy a contracting party does satisfy him.[2]

Evans *v.* Bennett, 7 Wis. 404 And see the title MASTER AND SERVANT, vol. 20, p. 15.

But in Sloan *v.* Hayden, 110 Mass. 141, where the plaintiff contracted to do a piece of work for the defendants and allowed the defendants to retain his wages until it was fulfilled to "their entire satisfaction," it was held that the defendants could not wrongfully discharge or withhold any part of his wages under the pretense that he had not worked to their satisfaction. The court said: "The provision that the fund is to be held by the defendants until the contract is fulfilled to their entire satisfaction must be construed to mean their reasonable satisfaction."

A contract between a theatrical manager and an actor provided that if at any time the manager should feel satisfied that the actor was incompetent to perform the duties which he had contracted to perform, the manager might annul the contract by giving two weeks' notice. In construing this contract in Smith *v.* Robson, (N. Y. City Ct. Gen. T.) 6 Misc. (N. Y.) 604, the court said: "It has been repeatedly held by this and other courts in this state that contracts similar to the one at bar did not give a party the right to discharge the plaintiff summarily." *Citing* Brandt *v.* Godwin, (N. Y. City Ct. Tr. T.) 3 N. Y. Supp. 807, 15 Daly (N. Y.) 456; Grinnell *v.* Kiralfy, 55 Hun (N. Y.) 422.) But this case was reversed in Smith *v.* Robson, (C. Pl. Gen. T.) 6 Misc. (N. Y.) 639, but was afterwards affirmed by the Court of Appeals in Smith *v.* Robson, 148 N. Y. 252, where it was held that the contract was not within the rule applying to contracts made to gratify taste, serve personal convenience, or satisfy individual preference.

But it has been held that a contract to employ a servant for a year if he "could fill the place satisfactorily" might be terminated by the employer when, in his judgment, the agent failed to meet that requirement of the contract. The court said that the word "satisfactorily" referred to the mental condition of the employer, and not to that of the court or jury. Tyler *v.* Ames, 6 Lans. (N. Y.) 280. See also Spring *v.* Ansonia Clock Co., 24 Hun (N. Y.) 175.

Sewing Cotton Bales. — Allen *v.* Mutual Compress Co., 101 Ala. 574.

Steel Plate Bank Drafts. — Gray *v.* Alabama Nat. Bank, (N. Y. City Ct. Tr. T.) 10 N. Y. Supp. 5.

Suit of Clothes. — Brown *v.* Foster, 113 Mass. 136, 18 Am. Rep. 463.

Title. — As to when title passes where goods are left on trial on agreement that if they prove satisfactory they shall be paid for, see the title SALES, *ante*.

Satisfaction of Architect. — A building contract provided that the work should be done under the direction and to the satisfaction of the architect. It was held that where the architect certified that he had examined and accepted the work, the owner could not show that the work was not done in accordance with the contract, in the absence of evidence of fraud and collusion between the builder and the architect. Kennedy *v.* Poor, 151 Pa. St. 472. See also the title WORKING CONTRACTS.

In Pormann *v.* Walsh, 97 Wis. 356, it was held, where a building contract was to be performed to the satisfaction of the architect and also to the satisfaction of the owner, that the owner might withhold his approval even though the builder obtained the certificate of the architect.

1. Decision Must Be Made in Good Faith. — Buckley *v.* Meidroth, 93 Ill. App. 460; Waymart Water Co. *v.* Waymart, 4 Pa. Super. Ct. 211; Singerly *v.* Thayer, 108 Pa. St. 291; Hartford Sorghum Mfg. Co. *v.* Brush, 43 Vt. 528; Daggett *v.* Johnson, 49 Vt. 345; McClure *v.* Briggs, 58 Vt. 82, 56 Am. Rep. 557. See also the title MASTER AND SERVANT, vol. 20, p. 15.

The vendee is not at liberty to say that he is dissatisfied when in reality he is satisfied. In other words, his discontent must be genuine. Campbell Printing Press Co. *v.* Thorp, 36 Fed. Rep. 417.

Where a party is in fact satisfied, he cannot fraudulently declare that he is not satisfied. Silsby Mfg. Co. *v.* Chico, 24 Fed. Rep. 893.

An actress's contract provided that if her employer should feel satisfied that she was incompetent to perform the duties for which she had contracted in good faith, then her employer might annul the contract by giving a week's notice. It was held that the words "in good faith" referred to the previous expression "shall feel satisfied," and that the party employed was thereby protected from capricious or arbitrary discharge from employment. Grinnell *v.* Kiralfy, 55 Hun (N. Y.) 422.

But in Gray *v.* Alabama Nat. Bank, (N. Y. City Ct. Tr. T.) 10 N. Y. Supp. 5, it was said that it is even doubtful whether the good faith of the promisee's decision can be inquired into. And see the cases cited in the preceding note.

2. Matters of Taste Not Involved. — Duplex Safety Boiler Co. *v.* Garden, 101 N. Y. 387; Brooklyn *v.* Brooklyn City R. Co., 47 N. Y. 475; Missell *v.* Globe Mut. L. Ins. Co., 76 N. Y. 117; Gray *v.* Alabama Nat. Bank, (N. Y. City Ct. Tr. T.) 10 N. Y. Supp. 5; Hummel *v.* Stern, 21 N. Y. App. Div. 544.

Satisfactory Proof. — Thompson *v.* Security Trust, etc., Ins. Co., 63 S. Car. 290, *explaining* Bethea *v.* Northeastern R. Co., 26 S. Car. 91.

Satisfactory Lease. — Mullally *v.* Greenwood, 127 Mo. 138, 48 Am. St. Rep. 613.

It would seem, however, that this distinction between articles involving taste, fancy, etc., and those of mechanical utility is put too strongly. It is true that most of the cases in which the courts have held that where the promisee is to be satisfied he is the sole judge of his own satisfaction are cases involving fancy, taste, etc. But there would seem to be no reason why the promisee should not, if he so chooses, make such a contract.[1]

3. Cases Holding Reasonable Compliance Sufficient. — Though the general rule is settled as above, there are cases seemingly exceptional in which it is held that a party "is satisfied" when he "ought to be satisfied," and that he is not allowed to make an unreasonable or capricious decision. But it would seem that in these cases the subject-matter or context of the contract controlled the word "satisfactory," and that therefore they are not truly exceptions to the rule, although from the language of the decisions it might at first appear that they were.[2]

SAUCE. — "Sauce" is defined as "a mixture or composition to be eaten with food for improving its relish; a relishing condiment; appetizing addition to the principal material of a dish."[3]

1. Promisee Sole Judge though Matters of Taste Not Involved. — See Walter A. Wood Reaping, etc., Mach. Co. *v.* Smith, 50 Mich. 570. See also cases set out *supra*, this section, *General Rule*.

Question of Taste Involved. — In cases which involve personal taste there is no question as to the right of a purchaser to reject an article arbitrarily, where the vendor has agreed that he shall be satisfied with it. Pennington *v.* Howland, 21 R. I. 65. And see the cases *supra*, this section, *General Rule*.

2. Unreasonable or Capricious Decisions Not Allowed. — Baltimore, etc., R. Co. *v.* Brydon, 65 Md. 198, 57 Am. Rep. 318; Wetterwulgh *v.* Knickerbocker Bldg. Assoc., 2 Bosw. (N. Y.) 381. See also Church *v.* Cheape, 64 Fed. Rep. 971.

Thus, in Braunstein *v.* Accidental Death Ins Co., 1 B. & S. 782, 101 E. C. L. 782, it was said that where one party has to perform a contractual obligation to the "satisfaction" of the other — *e. g.*, furnish "proof satisfactory" of death or accident — this does not give to that other the power to act capriciously — he can ask for only a reasonable fulfilment of the obligation.

And so it has been held that a condition to furnish a title "satisfactory" to the purchaser entitles him to make only the usual objections. Lord *v.* Stephens, 1 Y. & C. Exch. 222.

"The words 'satisfactory indorser' have a recognized commercial signification. It must be an indorsement satisfactory to the payee, and not to the maker. The payee cannot capriciously reject such indorser, but must show good and satisfactory reasons for such rejection. In other words, he must accept an indorser whom he ought to accept." Cutter *v.* Cutter, 48 N. Y. Super. Ct. 470, *affirmed* 98 N. Y. 628.

To Do Good Work and Give Satisfaction. — The vendor of a binder warranted it to do good work and give satisfaction. In construing this warranty in May *v.* Hoover, 112 Ind. 455, the court said: "It was to do good work and give satisfaction. It was not to give satisfaction regardless of the sort of work it would do, but to give satisfaction by reason of doing good work. And, *e converso*, the failure to give satisfaction was not to be regardless of the sort of work the machine would do, but by reason of its not doing good work. In other words, to give Sidener the right to return the machine, it was necessary that it should appear that it was defective and would not do good work, and for that reason did not give satisfaction." *Compare* Plano Mfg. Co. *v.* Ellis, 68 Mich. 101, set out *supra*, this section, *General Rule*.

In Good and Workmanlike Manner. — A contract provided for the erection of a furnace "in a good and workmanlike manner" and guaranteed the furnace to work satisfactorily in melting iron. In construing this contract the court said: "We think the word 'satisfactorily,' as used in the contract, did not mean that the defendant obligated himself, in erecting the furnace, to satisfy any whim or caprice of the plaintiff's officers or agents, but that it meant that he should do the work reasonably well." Pope Iron, etc., Co. *v.* Best, 14 Mo. App. 502.

Best Workmanlike Manner — Entire Satisfaction. — See ENTIRE, ENTIRELY, ETC., vol. 11, p. 48.

Does What Is Claimed for It. — In Clark *v.* Rice, 46 Mich. 308, a purchaser agreed to pay for a machine "if on trial of thirty days the machine is satisfactory or does what is claimed for it." It was held that if the machine met the warranty the purchaser must pay for it whether he was or was not satisfied.

In Skilful and Proper Manner and to Satisfaction of Defendant. — In Rawlins *v.* Honolulu Soap Works Co., 9 Hawaii 264, it was held, where the plaintiff agreed to do work in a "skilful and proper manner and to the satisfaction of" the defendant, that the defendant was bound to be satisfied if the work was done in a skilful and proper manner.

3. Sauce. — Bogle *v.* Magone, 152 U. S. 623, *quoting* Webst. Dict. This case arose upon the construction of a tariff act. See generally the title REVENUE LAWS, *ante*.

SAVANNA. — See note 1.
SAVE. — See note 2.
SAVING CLAUSE. — See the title STATUTES.

1. Savanna. — In Stapleford *v.* Brinson, 2 Ired. L. (24 N. Car.) 312, it was said: "Although a *savanna* may not be as well defined as some other natural objects, yet it cannot be seriously questioned that it is a natural boundary, in the sense in which that term is used in the construction of deeds. It is a natural open meadow, not uncommon in the lower parts of this state."

2. Save.— In the Law of Salvage the word *saved* is used in the sense of "salved," *i. e.*, "*saved* by salvors." The Schiller, 2 P. D. 150; 21 Moak 571. See generally the title SALVAGE, *ante*.

Save All Rights. — A statute provided that an appeal, when taken from an order, should "stay all proceedings thereon, and *save* all rights affected thereby." In construing this provision the court said: "There is no room in the statute for the distinction suggested by the relator, between what might be termed 'active orders,' or those contemplating or directing something to be done to make them effectual, and what the counsel designates 'passive orders,' which of themselves, and without anything further, effect the desired end. Perhaps that distinction might be claimed if the statute stopped with the clause 'shall stay all proceedings thereon.' But those words, with the words 'and *save* all rights affected thereby,' show more than the intent to merely arrest affirmative action on the order; show the intent that the order, when appealed from and stayed, shall not affect any rights — in other words, that it shall be inoperative pending the appeal." State *v.* Duluth St. R. Co., 47 Minn. 370. See generally the title STATUTES.

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CROSS-REFERENCES.

As to Gifts and Trusts of Savings Banks Deposits, see the titles, respectively, GIFTS, vol. 14, p. 1006; *TRUSTS AND TRUSTEES.*

See also the titles BANKS AND BANKING, vol. 3, p. 787, *and references there given; CORPORATIONS (PRIVATE)*, vol. 7, p. 620; *DOCUMENTARY EVIDENCE*, vol 9, p. 877; *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 850; *OFFICERS AND AGENTS OF PRIVATE CORPORATIONS*, vol. 21, p. 833; *RECEIVERS*, vol. 23, p. 992; *TAXATION (CORPORATE)*.

I. Definition, Nature, and Distinctions — 1. Savings Institutions in the Strict Sense. — A savings bank, in the strict sense of the term, is an institution, the object of which is, to quote the language of some of the early charters, "to receive and safely invest the savings of mechanics, laborers, servants, minors and others, thus affording to such persons the advantages of security and interest for their money, and in this way ameliorating the condition of the poor and laboring classes by engendering habits of industry and frugality." The deposits constitute the only resources of the institution; no capital, as in the case of banks of deposit and discount, stands between the depositor and loss. Whilst on the one hand the depositors have no voice in the management, nor even in the selection of the persons to whom the management is intrusted, on the other hand the members of the corporation have no property interests in its funds, of which they are by law constituted the managers and guardians. The profits, after deducting the necessary expenses of conducting the business, inure wholly to the benefit of the depositors in dividends or in a reserved surplus for their greater security. This, the primary and fundamental idea of a savings bank, has, in some states, never been departed from.[1]

1. For Statements of the Nature and Functions of Savings Banks, see Huntington *v.* National Sav. Bank, 96 U. S. 388; Redemption Bank *v.* Boston, 125 U. S. 60; Coite *v.* Savings Soc., 32 Conn. 173; Osborn *v.* Byrne, 43 Conn. 155, 21 Am. Rep. 641; Bradlee *v.* Warren Five Cents Sav. Bank, 127 Mass. 107, 34 Am. Rep. 351; Reed *v.* Home Sav. Bank, 130 Mass. 443, 39 Am. Rep. 468; Com. *v.* Reading Sav. Bank, 133 Mass. 16, 43 Am. Rep. 495, 137 Mass. 431; Com. *v.* People's Five Cents Sav. Bank, 5 Allen (Mass.) 432, Lewis *v.* Lynn Sav. Inst., 148 Mass. 235, 12 Am. St. Rep. 535, Hannon *v.* Williams, 34 N. J. Eq. 255, 38 Am. Rep. 378; Williams *v.* McKay, 46 N. J. Eq. 25.

Bond with Security to Be Filed — Not Capital. — In Huntington *v.* National Sav. Bank, 96 U. S. 388, the charter required the corporation to file a bond with security in a specified sum, and it was contended that such bond should be considered as capital contributed by the corporators, and therefore that they had a pecuniary interest which entitled them to a division of the profits, a share of the capital, and a beneficial interest in the franchise. But the court held that the bond was in no sense capital owned by the corporation or corporators, but was required solely for the security of the depositors or creditors of the institution.

The Words "Incorporated Banks," in *Massachusetts* Pub. Stat., c. 203, § 41, concerning embezzlements, apply to savings banks. Com. *v.* Warner, 173 Mass. 541. *Compare* Com. *v.* Pratt, 137 Mass. 98.

2. Savings Banks Assimilated to Ordinary Banks. — In many states, however, there has sprung up a system of so-called savings banks which is very closely assimilated to ordinary commercial banks in all essentials. They are required to have a capital stock and stockholders; the depositors have no share in the profits of the business, beyond the interest paid on their deposits; and the profits all belong to the stockholders.[1]

3. Importance of the Distinction. — The differences between the two systems as outlined above should be constantly borne in mind, as they account for some of the apparent inconsistencies and conflicts in the authorities.

4. Co-operative Banks in Massachusetts. — In Massachusetts there are banks known as co-operative banks. Such institutions are subject to the supervision of the savings-bank commissioners, and in their organization and general features are closely allied to savings banks.[2]

5. Tests as to True Character of Institution — Charter Powers — Name. — The nature of the bank is to be determined, not by the designation in the charter, but by its organization, powers, and mode of doing business as provided in such instrument.[3] In order to be a savings institution, it is not necessary that the name of the corporation should, in any manner, express the fact that it is such.[4]

Issuance of Certificates of Deposit. — Where a savings bank conducts the business usual with ordinary commercial banks, and is, under the law, empowered to issue certificates of deposits to stockholders, the fact that it issues such certificates does not determine the character of the business transacted by it.[5]

II. Incorporation and Powers — 1. Incorporation. — An exhaustive discussion of this topic with reference to corporations generally has been presented elsewhere in this work.[6] Here it is intended to give only certain principles that are peculiar to the class of corporations under discussion.[7]

1. Savings Institutions with Attributes of Commercial Banks. — In Mitchell *v.* Beckman, 64 Cal. 117, the bank in question was held to be not a savings bank but an ordinary commercial bank possessing all the attributes of such an institution.

Savings banks organized under the *Colorado* statute are not institutions for the sole conduct of the business ordinarily done by such organizations. Colorado Sav. Bank *v.* Evans, 12 Colo. App. 334. This case contains an admirable description of the true savings institution, and a statement of the more important distinctions between it and the ordinary commercial bank.

Nature of Particular Bank Left Undecided — California. — Whether the Pacific bank should be held to be a savings bank or a commercial bank was raised in several cases, in each of which the question was left undecided. Murphy *v.* Pacific Bank, 119 Cal. 334; Crane *v.* Pacific Bank, 106 Cal. 68; McGowan *v.* McDonald, 111 Cal. 57, 52 Am. St. Rep. 149.

2. Jewett *v.* West Somerville Cooperative Bank, 173 Mass. 54, 73 Am. St. Rep. 259.

3. Tests — Charter Powers. — Mitchell *v.* Beckman, 64 Cal. 117; Green *v.* Odd Fellows' Sav., etc., Bank, 65 Cal. 71; Los Angeles *v.* State L. & T. Co., 109 Cal. 396; State *v.* Lincoln Sav. Bank, 14 Lea (Tenn.) 42; State *v.* Nashville Sav. Bank, 16 Lea (Tenn.) 111. In the last case save one, it was also held that the power given to married women and minors to make deposits, and when their deposits reached a specified sum to have them converted into stock at their option, did not denote the nature of the bank.

4. Name. — Los Angeles *v.* State L. & T. Co., 109 Cal. 396.

Where a Bank Is in Fact a Stockholders' Commercial Bank and not a savings bank, the name it bears as that of a savings bank is, in the absence of proof that the depositors were deceived thereby, of no importance, and with the charter and by-laws before the depositors showing the real character of the bank, it cannot be assumed that they were misled and deceived by the name. Ward *v.* Johnson, 95 Ill. 215.

5. Murphy *v.* Pacific Bank, 119 Cal. 334.

6. See the title Corporations (Private), vol. 7, p. 639.

7. Banking Powers — Submission to Vote of People. — The *Illinois* Act of 1887, relating to the incorporation, supervision, etc., of savings institutions, was held to be unconstitutional and void for the reason that it conferred banking powers and was not adopted by vote of the people as required by the constitution. Reed *v.* People, 125 Ill. 592.

A Savings Institution Is Not Authorized by §§ 56, 57, *Minnesota* Public Statutes, which authorize a certain number of persons desirous of forming any benevolent or charitable society, to become a corporation upon taking certain prescribed steps. Sheren *v.* Mendenhall, 23 Minn. 92.

License as Broker. — Savings banks incorporated under Mo. Gen. Stat. 1865, c. 68, p. 365, §§ 1–4, are not required to take out licenses as brokers under the statute regulating that subject (c. 24, p. 247, Wagn. Mo. Stat.). State *v.* Field, 49 Mo. 270.

Capital Stock. — Under the *California* Civil

Defective Incorporation. — Where parties have associated themselves together in organizing a savings bank under a general law, and have proceeded in good faith to take all the steps supposed necessary to complete such incorporation, and on the faith thereof engaged in business as a corporation for a series of years, a person who has repeatedly dealt with them as such corporation will not, when sued on a note and mortgage held by it, be permitted to show, as a defense to the action, that there was some mere technical omission in the steps prescribed for incorporation.[1] But an attempted incorporation may be so defective as to fail to secure to the stockholders exemption from individual liability for corporate debts.[2]

2. Powers — *a.* GENERAL STATEMENT. — **In the Essential Features of Their Organization** savings banks are, like other corporations, creations of the law for the more convenient transaction of business to be done by them. They are capable of corporate action, and, like other corporations, are liable for such action. Toward the public and toward individuals their obligations are similar to those of corporations generally.[3]

Particular Powers. — In addition to the powers enumerated in this section, other special powers are discussed in their appropriate places throughout the article.

b. BANKING POWERS. — Savings banks have no authority to do a general banking business, not even to engage in the business of discounting bank paper, unless expressly authorized.[4] It is no part of the business for which they are established, to give a market value to, or obtain a market for, the negotiable paper of persons or other corporations, by guaranteeing or indorsing it.[5] Nor are they banks of issue and circulation.[6]

c. BORROWING MONEY. — It would seem that a savings bank has, in common with other corporations created for business purposes, authority to bor-

Code, §§ 572 and 574, savings bank and loan corporations may be formed with or without capital stock. Security Sav. Bank, etc., Co. *v.* Hinton, 97 Cal. 214; Los Angeles *v.* State L. & T. Co., 109 Cal. 396; Murphy *v.* Pacific Bank, 119 Cal. 334.

Subject to Control of Legislature — Investments. — The Provident Institution for Savings in Boston, although chartered in 1816, is nevertheless subject to the general laws of the commonwealth passed since that time, relating to the investment of deposits by savings banks and institutions for savings. Opinion of the Judges, 9 Cush. (Mass.) 604.

Escheat. — The Philadelphia Funds Savings Society is not a charitable but a business corporation, and the *Pennsylvania* acts relating to escheat (Acts of 1855 and 1869) are inapplicable. West's Appeal, 64 Pa. St. 186.

Statute Superseded. — *Minnesota* Laws of 1867, c. 23, for the incorporation of savings associations, were superseded by the Laws of 1875, c. 84, except as to savings banks and associations previously organized. Richards *v.* Minnesota Sav. Bank, 75 Minn. 196.

Pretense of Being Savings Bank. — Statutes are to be found prohibiting any bank, banker, corporation, or person from advertising or exposing a sign as a savings bank, or soliciting or receiving deposits as a savings bank. The object of such a statute is not to confer upon savings institutions a monopoly of that class of business, but to protect the public against deception and imposition by persons or corporations under the claim or pretense of being a savings bank. People *v.* Binghamton Trust Co., 65 Hun (N. Y.) 384, *affirmed* 139 N. Y. 185. In this case the facts were held not to show a violation by the trust company of the statute.

Statute Requiring Written Reports to Banking Department — False Verification — Perjury. — People *v.* Ostrander, 64 Hun (N. Y.) 335, 135 N. Y. 638.

1. Pape *v.* Capitol Bank, 20 Kan. 440, 27 Am. Rep. 183.

2. See Kaiser *v.* Lawrence Sav. Bank, 56 Iowa 104, 41 Am. Rep. 85.

3. Reed *v.* Home Sav. Bank, 130 Mass. 443, 39 Am. Rep. 468, holding that such an institution may be liable to an action for malicious prosecution.

4. **General Banking Business.** — *In re* Jaycox, 12 Blatchf. (U. S.) 209; Bradlee *v.* Warren Five Cents Sav. Bank, 127 Mass. 109, 34 Am. Rep. 351. And see *infra*, this title, *Loans and Investments*.

5. Bradlee *v.* Warren Five Cents Sav. Bank, 127 Mass. 109, 34 Am. Rep. 351.

6. Savings Bank *v.* Collector, 3 Wall. (U. S.) 495; Eaves *v.* People's Sav. Bank, 27 Conn. 229, 71 Am. Dec. 59.

The act incorporating the Louisiana Savings Company was not intended to create a banking institution; it conferred no power to issue notes for circulation, and the laws relative to banking corporations are not applicable to such an institution. State *v.* Louisiana Sav. Co., 12 La. Ann. 568.

The lien given by the general banking act of *Pennsylvania* upon stock does not apply to savings banks, but only to banks of issue. Merchants' Bank *v.* Shouse, 102 Pa. St. 488.

row money required in its business, and to give its notes or pledge its securities to that end.[1]

d. TRUSTS. — In *New Jersey* the charters of savings banks in some cases empower such institutions to accept and execute all trusts that may be committed to them by any person whatsoever, by will or otherwise, or transferred to them by order of court.[2]

Perpetual Trusts. — In *Massachusetts* savings banks are empowered by statute to receive on deposit funds in perpetual trust "for maintaining cemeteries or cemetery lots."[3]

e. SUPPLYING CLERKS FOR PUBLIC SALES. — It is not competent for a savings bank to agree to furnish clerks for public sales to keep the account of the sales and to take notes with good security, and to be responsible for the exercise of care on the part of such clerks, and consequently it is not liable where, under such circumstances, a clerk takes a note with a forged indorsement.[4]

f. SURETY FOR PUBLIC OFFICERS. — The officers of a savings bank have no authority to bind the corporation as surety of a public officer for the faithful performance of his duties.[5]

III. LEGAL RELATION BETWEEN BANK AND DEPOSITORS — 1. Difficulty of Accurate Definition. — It is difficult, if not impracticable, to define accurately, for all purposes, the legal relation that exists between a savings bank and its depositors. The attempted definitions to be found in the cases are not to be accepted as complete, but are at best only partial and incomplete statements, turning largely upon the particular matter involved. This latter circumstance, together with the radical differences between the savings-banks' systems as they exist to-day, as already pointed out,[6] will account for some of the conflict in the cases.

2. The Various Views. — It is certain, however, that the relation is not that of partners,[7] nor is the bank a bailee.[8] According to some authorities, such banks are regarded as trustees for their depositors;[9] but in a well-considered case the institution was said to have assumed "additional and more onerous

1. Fifth Ward Sav. Bank *v.* Jersey City First Nat. Bank, 48 N. J. L. 513. See also Ward *v.* Johnson, 95 Ill. 215.

The Provision of the California Act of 1862, § 10, making it unlawful for savings banks "to contract any debt or liability against the corporation for any purpose whatever," is not to receive a literal construction, and by an examination of the whole act and the amendatory act of 1864, "it is plain that the legislature intended that such corporations should have, and that they were given, power to incur all liabilities necessary to fulfil the objects and purposes thereof." Laidlaw *v.* Pacific Bank, (Cal. 1902) 67 Pac. Rep. 897.

2. **Trusts.** — See Vail *v.* Newark Sav. Inst., 32 N. J. Eq. 627. In this case the transaction involved was held not to constitute a special trust, but a deposit not differing materially from the ordinary deposits of the bank, and therefore not entitled to preference.

3. Gates *v.* White, 139 Mass. 353. See also Green *v.* Hogan, 153 Mass. 467.

4. Willett *v.* Farmers' Sav. Bank, 107 Iowa 69.

5. *In re* Miner's Bank, 13 W. N. C. (Pa.) 370.

6. See the preceding section.

That the relation of debtor and creditor exists between the savings bank having a capital and its depositors, but not where depositors share proportionately in profits and loss, and where the managers of the fund are but trustees for the members, see Wells *v.* Black, 117 Cal. 157, 59 Am. St. Rep. 162; Los Angeles *v.* State L. & T. Co., 109 Cal. 396.

7. **Law of Partnership Not Applicable.** — Makin *v.* Savings Inst., 23 Me. 350, 41 Am. Dec. 349; Savings Inst. *v.* Makin, 23 Me. 360.

8. **Bank Not Bailee.** — Eaves *v.* People's Sav. Bank, 27 Conn. 229, 71 Am. Dec. 59.

9. **A Savings Bank Is a Mere Trustee** for the benefit of the depositors. Matter of Newark Sav. Inst., 28 N. J. Eq. 552; Stockton *v.* Mechanics, etc., Sav. Bank, 32 N. J. Eq. 163. See also Dodd *v.* Una, 40 N. J. Eq. 672; Berry *v.* Windham, 59 N. H. 288, 47 Am. Rep. 202. At least to such an extent as to authorize the parties to call upon a court of chancery for directions when necessary in reference to the distribution of the assets of a solvent savings bank, upon the winding up of the institution, Morristown Sav. Inst. *v.* Roberts, 42 N. J. Eq. 496; or to prevent the statute of limitations from running, with respect to a claim by depositors against the managers for losses occasioned by their mismanagement, Williams *v.* McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775.

In Hun *v.* Cary, 82 N. Y. 65, 37 Am. Rep. 546, it was said that the relation existing between a savings bank and its trustees is that of principal and agent, and that between the trustees and the depositors is that of trustee and *cestui que trust*.

And in Savings Bank *v.* New-London, 20

and responsible duties than attach to a common trustee." [1] Again, they have been characterized as "large incorporated agencies for receiving and loaning the money of their depositors." [2] And by still other courts the relation is said to be the ordinary one of debtor and creditor.[3]

3. The Prevailing View. — It would seem that it cannot be incorrect to say that the relation presents a twofold aspect; that is, it must surely be conceded that there is a kind of trust relation, for special purposes, at least, growing out of the peculiar nature of the corporate business, but withal lacking some of the important elements of a trust pure and simple; [4] nevertheless, it would appear, upon both reason and authority, that the primary relation is that of debtor and creditor and not that of trustee and *cestui que trust*.

To Put the Matter in Another Way, the bank receives the deposit, taking title to it and engaging to repay it, with its increase, according to the contract under which it is made. When payment is made the claim of the depositor is extinguished; in the event of refusal to pay, the depositor may sue the bank for his deposit and recover a money judgment. Here, it must be conceded, is nothing more than a debt.[5]

IV. Officers and Agents — 1. Trustees, Directors, or Managers — *a.* Eligibility. — By some of the statutes a director or officer of a bank of circulation or discount and deposit is made ineligible to act as trustee or officer of a savings bank.[6]

b. Illegal Agreement for Election. — An agreement by a trustee of a savings institution, for a consideration, to secure the election of another to

Conn. 111, the court refers to deposits in savings banks as "money put into the hands of trustees to be loaned out."

1. Makin *v.* Savings Inst., 23 Me. 350, 41 Am. Dec. 349. See also Savings Inst. *v.* Makin, 23 Me. 360.

2. **Large Incorporated Agencies.** — Coite *v.* Savings Soc., 32 Conn. 173; Osborn *v.* Byrne, 43 Conn. 155, 21 Am. Rep. 641; Bunnell *v.* Collinsville Sav. Soc., 38 Conn. 203, 9 Am. Rep. 380. See also Price *v.* Savings Soc., 64 Conn. 366, 42 Am. St. Rep. 198. In the last case but one it was said: "If the money deposited is lost, the depositor loses it through the instrumentality of his agent and he has no cause to complain." See some of these cases referred to by a *New York* case in the next note following.

3. **Debtor and Creditor.** — Robinson *v.* Aird, (Fla. 1901) 29 So. Rep. 633; Reed *v.* Home Sav. Bank, 130 Mass. 443, 39 Am. Rep. 468; Lewis *v.* Lynn Sav. Inst., 148 Mass. 235, 12 Am. St. Rep. 535; Knecht *v.* U. S. Savings Inst., 2 Mo. App. 563, People *v.* Mechanics, etc., Sav. Inst., 92 N. Y. 7; Fowler *v.* Bowery Sav. Bank, 113 N. Y. 450, 10 Am. St. Rep. 479; People *v.* Barker, 154 N. Y. 128, 19 N. Y. App. Div. 628, 17 Misc. (N. Y.) 180; Zinn *v.* Mendel, 9 W. Va. 580. See also Eaves *v.* People's Sav. Bank, 27 Conn. 229, 71 Am. Dec. 59; People *v.* Barker, 154 N. Y. 122, *reversing* 19 N. Y. App. Div. 64.

Recovery of Funds Lost by Negligence of Directors. — In Chester *v.* Halliard, 36 N. J. Eq. 313, Chief Justice Beasley declared that depositors in an insolvent savings bank, who sought to recover from directors moneys of the bank lost by their negligence, were but creditors of the corporation.

Connecticut Cases Explained. — In People *v.* Barker, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 180, the court, referring to certain Connecticut cases wherein it was said that savings banks are large incorporated agencies for receiving and loaning the money of their depositors, etc., (see the preceding note), said: "But when these cases are considered in the light of the facts upon which they rest, I think it becomes plain that the court simply intended to express the idea that, associated with a direct obligation to repay the deposit on demand, there was also a fiduciary relation between the bank and the depositor, growing out of the peculiar nature of the corporate business."

Stockholders and Creditors. — "In a savings bank, the depositors bear, in great degree, the same relation to each other and to the property of the bank as do the stockholders in other monetary institutions. To the corporation itself they occupy the double relation of stockholders and creditors. In prosperity, they are the stockholders among whom the profits are divided. In case of insolvency, they are the creditors, and usually the only creditors, among whom the remaining assets are to be distributed." Hannon *v.* Williams, 34 N. J. Eq. 255, 38 Am. Rep. 378.

4. People *v.* Barker, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 180, *per* Beekman, J.

5. People *v.* Barker, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 180, *per* Beekman, J.

6. **Eligibility of Trustee.** — People *v.* Conklin, 7 Hun (N. Y.) 188, holding, where the defendant was elected a director of a national bank and acted in that capacity, that his election to and acceptance of such office vacated his office as trustee; but that when such national bank had become insolvent and a receiver was appointed to convert the assets into money and distribute the same among the creditors and stockholders, the defendant, by allowing himself to be nominated and voted for as trustee, must be considered as having abandoned his position as director.

the position of trustee, is manifestly void on the ground of public policy, and a promissory note given for such promise is likewise void, being given for an illegal consideration.[1]

c. POWERS — (1) *General Rule.* — Savings bank officers cannot assume responsibilities or enter into contracts or transactions so as to bind the bank, unless such acts are clearly incidental to the duties imposed upon them.[2]

(2) *Trustees De Facto.* — The action of the board of trustees in accepting the terms of an assignment for creditors, is not affected by the circumstance of an irregularity in their election. They are officers *de facto* and the only persons empowered to act for the institution.[3]

d. DUTIES AND LIABILITIES GENERALLY — (1) *Measure of Care and Diligence* — (a) **The Rule Stated.** — Trustees are not held to the highest degree of care and diligence, for if such were required it would be difficult to find responsible persons to occupy such positions. On the other hand, they cannot be let off with the lowest degree of care, for in such case few persons would be willing to deposit money in savings banks with the understanding that the trustees were bound only to exercise slight care. The true rule is that such trustees are bound to the exercise of ordinary care and prudence, that degree of care and prudence that men prompted by self-interest generally exercise in their own affairs.[4]

(b) **Want of Qualifications.** — A trustee cannot excuse responsibility for loss occasioned by his failure to exercise ordinary care and judgment, by alleging that he did not possess them; by voluntarily taking the position he engages that he does possess and will exercise them.[5]

(c) **No Compensation for Services.** — The rule of ordinary care and diligence in the management of the affairs of savings banks by the trustees is not altered by the fact that they receive no compensation.[6]

(d) **Mere Errors of Judgment.** — The trustees are bound to observe the limits placed upon their powers in the charter, and if they transcend such limits and cause damage they incur liability. If they act fraudulently or do a wilful wrong, they are responsible for all the damage they cause to the bank or its depositors; but if they act in good faith within the limits of the powers conferred, using proper diligence and prudence, they are not responsible for mere errors of judgment.[7]

(e) **Honesty of Intentions.** — Trustees must bring to the discharge of their duties ordinary competency, together with reasonable vigilance and care. They cannot excuse imprudence or indifference by showing honesty of intention coupled with gross ignorance and inexperience, or coupled with an absorption of their time and attention in their private affairs.[8]

(f) **Ignorance of Fundamental Law.** — It is inexcusable for a director not to read and know the provisions of the fundamental law controlling the bank. He

1. **Illegal Agreement.** — Dickson *v.* Kittson, 75 Minn. 168, 74 Am. St. Rep. 447.

2. Greeley *v.* Nashua Sav. Bank, 63 N. H. 145. And see generally the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 21, p. 833.

3. Greene *v.* A. & W. Sprague Mfg. Co., 52 Conn. 330.

4. **Rule as to Degree of Care.** — Hun *v.* Cary, 82 N. Y. 65, 37 Am. Rep. 546.

In Maisch *v.* Saving Fund, 5 Phila. (Pa.) 30, 19 Leg. Int. (Pa.) 140, it was held that the directors of a saving fund having no interest, direct or indirect, and receiving no benefit or advantage, are gratuitous mandatories simply and liable only for fraud or such gross negligence as amounts to fraud. See also Leffman *v.* Flanigan, 5 Phila. (Pa.) 155, 419, 20 Leg. Int. (Pa.) 148, 21 Leg. Int. (Pa.) 125.

5. Hun *v.* Cary, 82 N. Y. 65, 37 Am. Rep 546.

6. Williams *v.* McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; Hun *v.* Cary, 82 N. Y. 65, 37 Am. Rep. 546.

7. Hun *v.* Cary, 82 N. Y. 65, 37 Am. Rep. 546.

"If [directors] commit an error of judgment through mere recklessness or want of ordinary prudence and skill, the corporation may hold them responsible for the consequences." Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 17 Am. St. Rep. 84.

8. Williams *v.* McKay, 46 N. J. Eq. 25; Hun *v.* Cary, 82 N. Y. 74, 37 Am. Rep. 546.

In Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 17 Am. St. Rep. 84, it was held that though the directors were ignorant of the affairs of the bank, and were not guilty of bad

can be excused only when, after taking due care to understand those provisions, he honestly mistakes them.[1]

(g) **Delegation of Duties to Committees.** — It is competent for the managers to define the duties of the officers of the bank, and in order to facilitate the transaction of business appoint small committees from their number to superintend those officers and dispose of detail and routine work that could not readily be disposed of by the more numerous and unwieldy board of managers. But it does not follow that the managers may relax vigilance and rely entirely upon officers and committees; they must still exercise a reasonable supervision.[2]

(2) *Liability as Sureties — California Constitution.* — The California constitution makes the directors sureties for their fellow-directors and for the officers of the corporation for moneys, when so misappropriated as to make the officer misappropriating liable, and authorizing the creditors and stockholders to sue.[3]

(3) *Representations as to Solvency.* — In a suit by a depositor against a director for deceit in representing that the bank was solvent, and that it could not be insolvent without his knowledge as he was on the finance committee, there can be no recovery unless there was a fraudulent purpose to deceive, and that is a question for the jury.[4]

(4) *Representations as to Extent of Their Own Liability.* — The publication by directors in a newspaper and the entry in the pass books of a statement that "directors and stockholders are personally liable for all debts and engagements of the bank," do not constitute a contract with depositors, but if the statement is false it will afford a foundation for an action for deceit.[5]

(5) *Degrees of Liability.* — The degrees of liability of managers of a savings bank have been thus stated: First, "those managers who were concerned in, and who profited by, an unlawful, imprudent, or negligent transaction that resulted in a loss; second, those who, though concerned in such a transaction, did not profit by it; third, those who, though they did not know of the transaction which occasioned the loss, by negligent and improper discharge of some duty specially imposed upon them, made such loss possible; fourth, those who, though they did not know of the transaction which occasioned the loss, negligently omitted to perform a duty specially charged upon them, the proper performance of which would have prevented the loss; and fifth, those who, though not charged by the by-laws with any special duty, failed to exercise that reasonable circumspection over the affairs of the bank which the law demands of them." [6]

faith, they were guilty of such negligence as rendered them liable to the depositors.

1. Williams *v.* McKay, 46 N. J. Eq. 25. See also Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 17 Am. St. Rep. 84.

2. Williams *v.* McKay, 46 N. J. Eq. 25. See also Keasbey *v.* Wilkinson, 51 N. J. Eq. 29.

3. Winchester *v.* Howard, 136 Cal. 432.

Provision Self-executing — Valid. — The *California* constitution (§ 3, art. 12), in regard to the liability of corporate directors and officers, is self-executing and is not in contravention to the fourteenth amendment of the federal constitution. Winchester *v.* Howard, 136 Cal. 432.

If the Trustees Wilfully Use the Funds for an Unauthorized Purpose and a loss ensues, they must make good the loss, although they in good faith sought to promote the interests of the depositors and were not seeking personal advantage. Winchester *v.* Howard, 136 Cal. 432.

The Liability Is Not Penal in the Technical Sense, as it allows no recovery as a punishment, but only to compensate for a loss. Winchester *v.* Howard, 136 Cal. 432.

The Liability May Be Enforced by an Assignee of a Depositor, and also by a depositor who becomes such after the act of misappropriation complained of. The consent of all the stockholders to a misappropriation by the directors would not deprive the creditors of their right to enforce the liability created by the constitution. Winchester *v.* Howard, 136 Cal. 432.

4. Cowley *v.* Smyth, 46 N. J. L. 380, 50 Am. Rep. 432.

5. Westervelt *v.* Demarest, 46 N. J. L. 37, 50 Am. Rep. 400.

6. Williams *v.* McKay, 46 N. J. Eq. 40. And see Dodd *v.* Wilkinson, 42 N. J. Eq. 649.

As Between Receiver and Managers. — In a suit by a receiver against the managers, where a loss has resulted from dishonesty, disregard of the charter's requirements, or culpable negligence, all of them who are chargeable with such faults must be held alike responsible, so far as the receiver is concerned, without reference to the degree of dereliction, but

(6) *Liability of Estate of Deceased Trustee.* — The executors of a deceased trustee are liable to respond out of his estate for his frauds as trustee, if any be proved.[1]

(7) *Ratification — Presumption — Evidence.* — Ratification by the trustees of the president's acts will not be inferred, in the absence of proof showing knowledge on the part of the trustees of such acts.[2] Where there has been a long-continued and systematic violation of the charter by the president and committeemen, there arises a *prima facie* presumption that such course of misconduct was known to the managers.[3] It is competent to consider the illegal course of conduct in which trustees have engaged when present with their associates, in order to determine whether they are liable for like illegal acts done by such associates in their absence.[4]

(8) *By-laws Defining Duties — Amendment.* — Where the duties of the trustees are defined by the by-laws, which contain a provision that the by-laws can be amended only after giving certain notice, a resolution regulating generally the duties of the president is invalid where the required notice was not given.[5]

2. President — *a.* ELECTION. — Where the statute required the vote of a majority of the trustees present for the election of an officer, and at a certain meeting twelve trustees were present, six of whom voted for one person for president, four for another, and one for a third, and one trustee did not vote, there was held to be no election.[6]

b. SALARY. — Where the resolution fixing the president's compensation provided that "he receive such sum or sums from the net profits of the institution as such profits, after paying the incidental expenses, may warrant," not to exceed a designated sum, and during one of the years for which a claim was made, government bonds owned by the bank had appreciated in value, it was held that in the absence of a sale of the bonds at the end of the year, or a mutual agreement as to their value and dispensing with a sale, the increase in market value was not "profits" within the contemplation of the agreement.[7]

c. POWER TO BIND BANK — **Sale of Securities.** — Where the bank authorized its president to dispose of certain securities held by it as collateral, and there was no restriction in regard to the plan or mode of sale, there is implied authority on the part of the president to contract with a broker to offer the stock for sale on the exchange, and the bank is liable for the act of the president whereby the broker suffers loss in not being able to deliver such stock sold by him.[8]

as between themselves there may be degrees of liability according to the degrees of culpability. Williams *v.* McKay, 46 N. J. Eq. 25.

The Directors Who Do Not Participate and Who Never Took Their Seats in the board, and against whom there is no charge of knowledge of the frauds, are not liable. Maisch *v.* Saving Fund, 5 Phila. (Pa.) 30, 19 Leg. Int. (Pa.) 140.

Right of Action Against Trustees under Former Statutes Determined. — The *New York* Act of 1875, c. 371, in regard to savings banks, was intended not only to revise the laws relating to such corporations, but to treat the whole subject *de novo*, prescribe a sole and complete rule for their existence and the exercise of their powers, and, as there is no saving clause, if any right of action existed against the trustee for penalties or forfeiture under former statutes it was determined by the operation of this act. Van Dyck *v.* McQuade, 86 N. Y. 38.

1. Wilkinson *v.* Dodd, 40 N. J. Eq. 123, 41 N. J. Eq. 566.

Legal Representatives of Deceased Trustee Liable for Loss Due to Misconduct. — Paine *v.* Barnum, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 303.

2. French *v.* O'Brien, (Supm. Ct.) 52 How. Pr. (N. Y.) 394.

3. Williams *v.* McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775.

4. Dodd *v.* Wilkinson, 42 N. J. Eq. 647, *affirming* 42 N. J. Eq. 234.

5. French *v.* O'Brien, (Supm. Ct.) 52 How. Pr. (N. Y.) 394.

6. People *v.* Conklin, 7 Hun (N. Y.) 188.

Neglect to Attend Meetings. — In *In re* Cardiff Sav. Bank, (1892) 2 Ch. 100, it was held that neglect of the president to attend the bank meetings was not neglect or omission of the duties which should have been performed at such meetings, which would render him personally liable for frauds committed upon the bank made possible by reason of such neglect.

7. Jennery *v.* Olmstead, 36 Hun (N. Y.) 536.

8. Sistare *v.* Best, 88 N. Y. 529, *affirming* 24 Hun (N. Y.) 384.

As to Deposits. — And where a bank authorizes the establishment of a savings department with interest for depositors, and no particular person as a bank official is charged with this work, then if the president holds himself out as clothed with this power and the public take him at his word and pay money into his hands with instructions so to deposit it, the bank is liable therefor to such depositors.[1]

For Labor and Materials. — In the absence of any evidence of the authority of the president and treasurer, other than that which may be inferred from the offices which they hold, they may not bind the bank for labor and materials in completing a building on land subject to a building-loan mortgage; and the circumstance that the transaction takes the form of a sale to the bank will not estop the bank to deny the debt.[2]

3. Treasurer or Cashier — *a.* OFFICIAL BOND — (1) *By-law Requiring.* — A by-law requiring the cashier to give bonds for the faithful performance of his duties is reasonable and within the scope of the power conferred by a statute authorizing all corporations to make by-laws not inconsistent with existing laws, for the management of their property, the regulation of their affairs, etc.[3]

(2) *Formal Approval Unnecessary.* — The bond of the treasurer may be binding, notwithstanding there has been no formal approval of it by a vote of the trustees.[4]

(3) *Duration of Security.* — In *Massachusetts*, where the statute requires trustees to be elected annually and to appoint a treasurer who shall hold his office during their pleasure, the office of treasurer is not an annual one, and a bond given by him for an indefinite period is a continuing bond.[5] But where the treasurer is elected for a period of one year, a bond conditioned for the faithful performance of his duties "during his continuance in office," without more, is not a continuing security, but is confined to the term of office under the appointment which was made when the bond was given.[6]

(4) *Sureties — Verbal Statements or Printed Reports by Trustees* — **There Is No Privity of Representation** between the bank and the sureties of the treasurer, who are induced to go upon his bond by verbal statements made by the trustees of the bank's soundness, but which were not intended or understood to be made in their official capacity or with any expectation of their reaching the sureties, or with any belief or reason to believe that they would induce any one to become a surety of the treasurer.[7]

And a Statutory Requirement of Publication of the Reports of the Bank's Condition by a committee of the trustees does not create between the public and the bank such a privity of representation as to warrant a person to become a surety on the official bond of the treasurer, on the faith of a statement in the report that the examinations of the bank were thorough.[8]

1. Bickley *v.* Commercial Bank, 43 S. Car. 528.

2. Slattery *v.* North End Sav. Bank, 175 Mass. 380.

3. Savings Bank *v.* Hunt, 72 Mo. 597, 37 Am. Rep. 449.

4. Johnson *v.* Gerald, 169 Mass. 500.

Certificate of Custodian — Massachusetts Statute. — It is no defense to an action on the treasurer's bond that the attested copy of the bond sent to the commissioners of savings banks was not accompanied by a certificate of the custodian of the bond that the original was in his possession, as required by Mass. St. 1889, c. 180. Johnson *v.* Gerald, 169 Mass. 500.

5. **Duration of Security.** — Com. *v.* Reading Sav. Bank, 129 Mass. 73.

6. Ulster County Sav. Inst. *v.* Ostrander, 163 N. Y. 430, *affirming* 15 N. Y. App. Div. 173 (motion for reargument *denied*, 164 N. Y. 585). In this case the court *distinguishes* Ulster County Sav. Inst. *v.* Young, 15 N. Y. App. Div. 181, *affirmed* 161 N. Y. 23, upon the ground that the bond contained an additional provision to the effect that it should be binding for all the time the person named should hold the office, even though he should hold under successive appointments; in which circumstances it was considered to be plain that the bond was intended as a continuing security during all the time the officer should hold office.

7. Ashuelot Sav. Bank *v.* Albee, 63 N. H. 152, 56 Am. Rep. 501.

8. Ashuelot Sav. Bank *v.* Albee, 63 N. H. 152, 56 Am. Rep. 501.

b. POWERS — CERTAIN TRANSACTIONS CONSIDERED — (1) *Nature of the Office.* — The treasurer of a savings bank is an officer of much more limited powers than the cashier of a commercial bank. His duties more nearly resemble those of the paying and receiving tellers of banks.[1]

(2) *Borrowing Money and Pledging Securities.* — The treasurer, authorized to carry on the general business of the bank, has not, by virtue of his office merely, power to borrow money in behalf of the bank and to pledge its securities as collateral, and whether or not such officer was held out by the bank as possessing such authority in a particular case is a question of fact for the jury.[2]

(3) *Sale and Transfer of Securities* — **The Treasurer Has No Authority to Assign** to a purchaser a mortgage belonging to the bank, and the circumstance that by verbal consent and under the direction of the investment committee he has assigned a few other mortgages relating to other and distinct estates, is not sufficient to invest him with a general authority to assign mortgages nor to entitle the assignee to infer that he has such authority, even if this fact had been known to him.[3]

Commercial Paper. — The treasurer, merely by virtue of his office, has no authority to transfer to a purchaser notes belonging to the bank.[4]

Fraud. — Where the treasurer, acting within his authority, assigns a mortgage on behalf of the bank and indorses the note to a *bona fide* purchaser, a good title passes, although the officer acted in fraud of the bank and converted to his own use the proceeds.[5]

Vote of Trustees — Cashier. — Where the charter of a savings bank required the affirmative vote of at least five trustees to authorize a sale or transfer of securities, a transfer by the cashier to a trustee of the bank passes no title.[6]

(4) *Indorsing Negotiable Paper.* — The treasurer cannot bind the bank by indorsing its name upon a promissory note, although the bank receives the proceeds, and a provision of the by-laws that " his signature shall be binding upon the corporation " does not give such authority, but simply contemplates his signature to necessary papers and in discharge of obligations of the corporation.[7]

1. **Nature of Office of Treasurer.** — Fifth Ward Sav. Bank *v.* Jersey City First Nat. Bank, 48 N. J. L. 513; Com. *v.* Reading Sav. Bank, 133 Mass. 16, 43 Am. Rep. 495.

2. **Borrowing — Pledge.** — Fifth Ward Sav. Bank *v.* Jersey City First Nat. Bank, 47 N. J. L. 357, 48 N. J. L. 513.

In Fifth Ward Sav. Bank *v.* Jersey City First Nat. Bank, 47 N. J. L. 357, Chief Justice Beasley said: " It would be truly disastrous to these valuable institutions if they cannot appoint a treasurer and deposit in his custody their moneys and securities, without such situation giving rise to an inevitable inference that such official has been clothed with an unlimited capacity to contract loans, and sell and pledge such securities." *Quoted* with approval in Fifth Ward Sav. Bank *v.* Jersey City First Nat. Bank, 48 N. J. L. 513.

In Holden *v.* Metropolitan Nat. Bank, 138 Mass. 48, 151 Mass. 112, it was held that the treasurer of a savings bank had no authority to borrow money in the name of the bank, or to transfer or to pledge shares of stock owned by it, or to procure new certificates therefor.

3. Holden *v.* Phelps, 135 Mass. 61.

While from Time to Time a Savings Bank Must Dispose of Its Notes, Mortgages and Other Securities, as it becomes desirable to raise money or change investments in accomplishing the objects for which it was formed, this is not a matter within the ordinary duties of the treasurer and it is not unreasonable that those purchasing such securities should see that the purchase is made and the securities transferred by authority of the board of investment. Holden *v.* Phelps, 135 Mass. 61.

Where the Trustees by Vote Confer Authority upon the treasurer to assign mortgages, this is not so far beyond their power that one honestly dealing with him in the purchase of a mortgage is thereby deprived of the benefit of the assignment thereof. Com. *v.* Reading Sav. Bank, 137 Mass. 431.

4. Holden *v.* Upton, 134 Mass. 177. And see *supra*, the preceding subdivision.

Where the Treasurer Is Accustomed to Receive Payment of Notes due to the bank, he has authority to surrender to the makers the notes which are paid, such collateral securities as may be held therefor, and to execute such transfers as may be necessary to revest the property in the original owners. Holden *v.* Upton, 134 Mass. 177.

5. Whiting *v.* Wellington, 10 Fed. Rep. 810.

6. Zimmerman *v.* Miller, 2 Penny. (Pa.) 226. In this case the court said that the same rules as to the power and authority of a cashier cannot be applied to the transactions of a savings bank as to ordinary commercial banks.

7. Bradlee *v.* Warren Five Cents Sav. Bank,

Without Recourse. — The authority of the treasurer to indorse, without recourse, a note payable to the bank, but in which the bank has no interest, to enable the owner to bring suit thereon in his own name, may be inferred from the conduct of the trustees, without express direction or vote.[1]

(5) *Contract for Delay to Principal Debtor.* — Where the treasurer, according to the common usage of the bank, performs an act that amounts to a contract which would discharge a surety on a note, the bank is bound by his act.[2] But where the by-laws prescribe that the treasurer shall notify the principal and sureties of any dues unattended to and require prompt payment of the same, an omission of this duty does not discharge the sureties upon a note due to the bank.[3]

(6) *Executing Release.* — The treasurer has not, by virtue of his office merely, authority to execute a release in the name of the bank.[4]

(7) *Receiving Securities for Safekeeping.* — A bank is not estopped to deny its authority to receive for safekeeping government bonds delivered to its treasurer or his clerk, where the bank never received the bonds or their avails.[5]

(8) *Foreclosing Mortgage.* — Even though the treasurer has not authority by virtue of his office to foreclose a mortgage held by the bank, he certainly has such authority when authorized to do so by the board of investment.[6]

(9) *Entering upon Mortgaged Land to Gather Crops.* — The treasurer may, in behalf of the bank, enter and take possession of land upon which the bank holds a mortgage, for the purpose of gathering the growing crops.[7]

(10) *Representations as to Mortgage.* — Although the treasurer represents that a particular mortgage which he assigns is a first mortgage, this does not estop the bank to show that it holds a prior mortgage on the same lands.[8]

(11) *Accepting Order for Building Materials.* — It has been held that, assuming that the bank might bind itself, by the acceptance of an order given for materials to be used in the completion of a building on which it had a building loan, its treasurer could not bind it by such an acceptance without express authority.[9]

(12) *Fraudulent Issuance of Pass Books.* — In one instance the bank was exonerated from liability for the act of its treasurer in fraudulently receiving money and issuing pass books which did not comply with the by-laws of the institution.[10]

(13) *False Statements as to Depositor's Account.* — There is no duty to third persons imposed upon the treasurer, by virtue of his office, to state what the condition of a depositor's account is, so as to enable them to take assignments or transfers thereof, and therefore, in all that he does or says in this character, he is to be deemed rather the agent of the parties than of the bank, and the latter is not to be held responsible for his false statements.[11]

(14) *Instituting Suit.* — The treasurer may cause suit to be instituted on an overdue note and take all the subsequent steps necessary in order to secure

127 Mass. 107, 34 Am. Rep. 351. And see *supra*, the preceding subdivision.

1. Chase *v.* Hathorn, 61 Me. 505.

2. New Hampshire Sav. Bank *v.* Ela, 11 N. H. 335 (contract for delay in favor of the principal debtor).

3. New Hampshire Sav. Bank *v.* Downing, 16 N. H. 187.

4. Dedham Sav. Inst. *v.* Slack, 6 Cush. (Mass.) 408. In this case the facts were held not to amount to a ratification by the bank of its officer's act.

5. Greeley *v.* Nashua Sav. Bank, 63 N. H. 145.

For a case where it was held that the bank was charged with notice of title in the plaintiff to a bond deposited by her husband with the cashier of the bank for safe keeping, and that a subsequent transfer of the bond by him to the bank was void, see Zugner *v.* Best, 44 N. Y. Super. Ct. 393.

6. North Brookfield Sav. Bank *v.* Flanders, 161 Mass. 335.

7. Bangor Sav. Bank *v.* Wallace, 87 Me. 28.

8. Com. *v.* Reading Sav. Bank, 137 Mass. 431.

9. Jewett *v.* West Somerville Co-operative Bank, 173 Mass. 54, 73 Am. St. Rep. 259.

10. Kelley *v.* Chenango Valley Sav. Bank, 22 N. Y. App. Div. 202, *reversing* 21 Misc. (N. Y.) 240.

11. Holden *v.* Phelps, 135 Mass. 61.

the avails of the suit without a vote of the trustees to that effect.[1]

4. Secretary. — A savings bank is not bound by fraudulent interpolations in its records, made by the recording officer, as to third persons who have not acted upon or been misled by them. It would not be in his power, by acts thus fraudulently done, to impose upon the bank a liability which it had not assumed.[2] But where innocent third parties have been misled by such interpolations, or by his certification of records which he has fraudulently altered, the injury resulting therefrom must be borne by the bank whose officer he is, which is estopped to deny the correctness of the record.[3]

5. Clerks and Agents. — **Where the Authority of the Clerk** was limited to receiving deposits and issuing pass books therefor, a special agreement by him changing the terms and conditions of withdrawal printed in the books will not bind the bank unless knowledge thereof is brought home to the bank.[4]

An Agreement by an Agent to give notice to a surety in case of default on the part of the makers of a note pledged as collateral does not bind the bank in the absence of some authority conferred upon him to make the agreement.[5]

V. Pass Books — 1. Not Negotiable. — The pass book of a savings bank cannot be regarded as negotiable. It imports a liability of the bank to the depositor for the amount of moneys entered therein as deposited, and an agreement to repay at such time and in such manner as he shall direct.[6]

It Is Unlike the Certificate Issued by a Commercial Bank, the purpose of which is to enable the person receiving it to obtain credit in the public markets and to carry his funds safely to remote places. The pass book is not issued with any design to induce third persons to give credit to the holder, but its sole purpose is to put in a shape convenient for the depositor and the bank a statement of the accounts between them.[7]

By-law — Written Order. — A by-law authorizing the pass book to be transferred "to order" cannot constitute it a negotiable instrument in a commercial sense as to third parties, even supposing that it could have such effect between the immediate parties.[8] Nor will a written order by the depositor directing payment to a third person or bearer, render such book negotiable.[9]

2. Issuance Procured by Fraud. — Where a pass book is obtained from the bank by gross fraud it must be considered in law as not having been issued by the bank.[10]

3. As Evidence. — The pass book is admissible in evidence, at least to show the amount of money received from the depositor by the bank, and this, not-

1. Bristol County Sav. Bank *v.* Keavy, 128 Mass. 298.

2. **Fraudulent Interpolation of Records.** — Holden *v.* Hoyt, 134 Mass. 181; Com. *v.* Reading Sav. Bank, 137 Mass. 431.

3. Com. *v.* Reading Sav. Bank, 137 Mass. 431.

By a vote of the trustees, the treasurer was empowered to discharge and release all mortgages belonging to the bank. The treasurer, who was also secretary, altered the records so as to read "discharge, assign and release," and by means of this fraudulent interpolation succeeded in disposing of a large number of mortgages. It was held that a purchaser in good faith and without notice obtained a title by estoppel against the bank by virtue of the certificate of its recording officer that a certain vote was found upon its records. Whiting *v.* Wellington, 10 Fed. Rep. 810; Holden *v.* Whiting, 29 Fed. Rep. 881; Com. *v.* Reading Sav. Bank, 137 Mass. 431; Holden *v.* Phelps, 141 Mass. 456.

4. Riley *v.* Albany Sav. Bank, 36 Hun (N. Y.) 513, *affirmed* 103 N. Y. 669.

5. New Hampshire Sav. Bank *v.* Downing, 16 N. H. 187.

6. **Negotiability.** — Kummel *v.* Germania Sav. Bank, 127 N. Y. 488; Wall *v.* Emigrant Industrial Sav. Bank, 64 Hun (N. Y.) 249; Smith *v.* Brooklyn Sav. Bank, 101 N. Y. 58, 54 Am. Rep. 653; Eaves *v.* People's Sav. Bank, 27 Conn. 229, 71 Am. Dec. 59. See also Pierce *v.* Boston Five Cents Sav. Bank, 129 Mass. 425, and *infra*, this title, *Deposits*.

7. McCaskill *v.* Connecticut Sav. Bank, 60 Conn. 311, 25 Am. St. Rep. 323. Here the court said further: "By this we do not, of course, intend to have it implied that the depositor cannot sell his right to the money. Like any other nonnegotiable chose in action it may be sold, subject to the equities and defenses between the original parties." See also the title CERTIFICATES OF DEPOSIT, vol. 5, p. 801.

8. Witte *v.* Vincenot, 43 Cal. 325.

9. McCaskill *v.* Connecticut Sav. Bank, 60 Conn. 300, 25 Am. St. Rep. 323.

10. McCaskill *v.* Connecticut Sav. Bank, 60 Conn. 300, 25 Am. St. Rep. 323.

withstanding the book contains printed conditions of deposit and payment.[1]

4. Recovery of — Measure of Damages. — In an action of replevin to recover a pass book which had been wrongfully taken from the plaintiff and come into the possession of the bank, the court considered the case one to be governed by the ordinary rules as to damages.[2]

VI. Deposits — 1. Presumption of Ownership. — Where One Deposits Money to His Individual Credit, this fact shows *prima facie* that it belongs to him, but not conclusively so.[3]

The Entries on the books of the bank and on the depositor's pass book are not conclusive evidence of the true ownership of the deposit.[4]

2. By-laws as the Contract — *a.* Necessity and Propriety. — It is recognized that some rules and regulations in reference to the repayment of deposits are necessary alike for the protection of the depositor and of the bank, and when the rules are within the restrictions of the charter or statute, and are reasonable, they should be sustained.[5]

b. Method of Adoption. — The adoption of rules regulating the method of business and constituting conditions in the contract between the bank and its depositors may be shown by their long use with the knowledge and approval of the trustees, as well as by record of a formal vote.[6]

c. When Binding upon Depositor — (1) *Assent Essential — Notice.* — Such rules and regulations, if properly communicated and assented to by the depositor, constitute the agreement, and each party must keep it in order to preserve rights against the other.[7]

In the Absence of Any Rules Assented to by Its Customers, a savings bank is to be governed by the same legal principles applicable to other moneyed corporations.[8]

(2) *How Assent Shown.* — **The Signature of the Depositor** to the rules and regulations of the bank is but one way of showing the depositor's agreement to be bound thereby, but not the only way, as an agreement on his part may be implied from his conduct.[9] And although the by-laws provide that depositors shall subscribe their names in a book kept by the bank as a means of assenting to the rules and conditions, this method of assenting was not intended to

1. Brown *v.* Abington Sav. Bank, 119 Mass. 69.

Prima Facie Evidence of Bank's Indebtedness to Amount of Balance Shown. — Atlanta Trust and Banking Co. *v.* Close, 115 Ga. 939.

2. Wegner *v.* Second Ward Sav. Bank, 76 Wis. 242, the court allowing interest at seven per cent. from the time the bank refused to deliver the pass book up to the verdict, notwithstanding the deposit drew only three per cent. interest.

3. **Deposits.** — Bessemer Sav. Bank *v.* Anderson, (Ala. 1902) 32 So. Rep. 716.

4. Kennebec Sav. Bank *v.* Fogg, 83 Me. 374.

5. Appleby *v.* Erie County Sav. Bank, 62 N. Y. 17.

Savings Banks May, and Usually Do, Prescribe Regulations under which the money shall be returned to the depositor, and it may require proof of his identity, production of the pass book or an account of it if it cannot be produced, and any other evidence which may be reasonable to satisfy the bank that the claimant is the person entitled to the deposit. Kelly *v.* Emigrant Industrial Sav. Bank, 2 Daly (N. Y.) 227.

6. Ladd *v.* Augusta Sav. Bank, 96 Me. 510.

7. **Assent of Depositor.** — Appleby *v.* Erie County Sav. Bank, 62 N. Y. 12; Allen *v.* Williamsburgh Sav. Bank, 69 N. Y. 314. And see the cases generally throughout this section.

The Rules Printed in the Pass Book are, when properly made known to the depositor, a part of the contract between him and the institution. Israel *v.* Bowery Sav. Bank, 9 Daly (N. Y.) 507. See Eaves *v.* People's Sav. Bank, 27 Conn. 229, 71 Am. Dec. 59, where it was held that the rules had not been brought distinctly to the knowledge of the depositor and he was therefore not bound by them.

By-laws Enacted After Time of Deposit — No Notice. — In Kimins *v.* Boston Five Cents Sav. Bank, 141 Mass. 33, 55 Am. Rep. 441, by the contract between the bank and the depositor, the latter agreed to be governed by the by-laws, and they were contained in the pass book given to him. By these by-laws the trustees were empowered to alter or amend the by-laws. The bank paid the money to a third person on a forged order, and it was held that the right of the true depositor to recover from the bank was to be determined by the by-laws in force when the contract was made and not by a subsequently enacted by-law of which no notice was given to him. And to the same effect is Hudson *v.* Roxbury Sav. Inst., 176 Mass. 522.

8. Allen *v.* Williamsburgh Sav. Bank, 69 N. Y. 314; Mills *v.* Albany Exch. Sav. Bank, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 251.

9. Ladd *v.* Augusta Sav. Bank, 96 Me. 510.

be exclusive, but a depositor's assent may be shown in other ways, as for instance, that he received and retained his pass book which contained such by-laws and conditions.[1]

(3) *Illiteracy of Depositor.* — The inability of the depositor to read the rules of the pass book delivered to him is an immaterial circumstance, as in such a case common prudence would require that he have them read to him.[2]

d. RIGHT OF DEPOSITOR TO RELY UPON PUBLISHED RULES. — Depositors are entitled to rely on the published rules and regulations as to the mode in which deposits can be withdrawn.[3]

e. BY-LAW PURPORTING TO CHANGE STATUTE. — In the case of a savings bank organized under the general banking law of *Michigan*, the requirement of the general statute that the deposit shall be paid to the depositor or his legal representatives, cannot be changed by a by-law to the effect that the institution shall not be liable to a depositor for payment to one presenting the pass book, although he acquired possession of the book by stealing, unless the attention of the depositor is called to the by-law, and he assents thereto, actually or impliedly.[4]

3. Deposits in Excess of Statutory Limit. — While the bank cannot be permitted to avail itself of its own violation of the law in receiving deposits in excess of the statutory limit so as to deprive an innocent depositor of his money, so on the other hand, the depositor himself cannot be deemed to be in a position where he can benefit by receiving an increase of his deposits by way of interest.[5]

4. Unauthorized Special Deposits. — Although a bank is unauthorized to receive special deposits, yet having received such and appropriated them to its use, it is liable to repay and will not be heard to claim that such business was unauthorized.[6]

5. Conditions Precedent to Payment — *a.* NOTICE OF WITHDRAWAL. — Among the usual rules of savings banks is one whereby they reserve to themselves the right to require of the depositor notice for a specified period of his intention to withdraw his deposit before he may become entitled to a return of his money. It has been said that such provision is not for the benefit of the bank solely, but is intended also to protect the depositor against fraud or forgery.[7] The bank, through its appropriate officers, may waive the right to the notice of withdrawal stipulated for in the by-laws.[8]

b. PRESENTATION OF PASS BOOK. — A by-law requiring the presentation of the pass book as a condition of payment by the bank is a reasonable one, and will be enforced even against an administrator who does not furnish evi-

1. Gifford *v.* Rutland Sav. Bank, 63 Vt. 108, 25 Am. St. Rep. 744.

2. Burrill *v.* Dollar Sav. Bank, 92 Pa. St. 134, 37 Am. Rep. 669.

3. Peoples' Sav. Bank *v.* Cupps, 91 Pa. St. 315. See also Allen *v.* Williamsburgh Sav. Bank, 69 N. Y. 314.

4. Ackenhausen *v.* People's Sav. Bank, 110 Mich. 175, 64 Am. St. Rep. 338.

5. Taylor *v.* Empire State Sav. Bank, 66 Hun (N. Y.) 538.

6. Cogswell *v.* Rockingham Ten Cents Sav. Bank, 59 N. H. 43.

7. **Notice of Withdrawal.** — Wegner *v.* Second Ward Sav. Bank, 76 Wis. 242.

8. Hudson *v.* Roxbury Sav. Inst., 176 Mass. 522; Riley *v.* Albany Sav. Bank, 36 Hun (N. Y.) 513, *affirmed* without opinion 103 N. Y. 669.

Refusal of Payment Based on Another Ground. — In Abramowitz *v.* Citizens' Sav. Bank, (N. Y. City Ct. Gen. T.) 17 Misc. (N. Y.) 297, it was held that an action by a depositor to recover his deposit claimed to have been improperly paid to another is not brought prematurely when, upon applying for the money, the bank refused payment, not on the ground that it was entitled to ninety days' notice of withdrawal, but on the ground that the money had already been paid to some one else. And as to the necessity for demand before suit, see the titles BANKS AND BANKING, vol. 3, p. 839; DEMAND, vol. 9, p. 200.

Waiver of Compliance with By-law Requiring Third Person to Present Written Authority from Depositor. — Atlanta Trust and Banking Co. *v.* Close, 115 Ga. 939.

Suspension of Institution. — It was held that no cause of action arose against the managers of the Freedman's Savings & Trust Company from the fact that a depositor, in pursuance of the rules of the company, gave a specified notice of withdrawal of his account, which expired before the suspension of the company and before the commissioners qualified and took possession of its effects. Schoyer *v.* Creswell, 3 MacArthur (D. C.) 5.

dence of its loss or destruction, or in some way account for its nonproduction.[1] A by-law requiring the production of the pass book and another requiring notice to the bank in case of loss of such book, when construed together do not mean that in case of loss the nonproduction of the book should be a bar to the right of the depositor to demand and sue for his money.[2]

c. INDEMNITY IN ABSENCE OF PASS BOOK — **Reasonableness.** — A provision in the by-laws to the effect that in case a pass book is lost or destroyed the deposit shall not be repaid unless the bank shall first receive satisfactory indemnity, has been said to be a reasonable provision.[3] But not all of the rules on this point are so stringent. The most common provision is that "no withdrawal will be allowed without the book," or language to that effect.

Analogy to Payment of Note. — Even under such a rule it has been said that the bank is "as much entitled to the production and offer of the pass book upon a demand for the deposit as the maker of a note, payable to bearer, to an offer of the note upon payment when payment is demanded," and, in the absence of the book, the bank cannot be required to pay without being indemnified.[4]

More Liberal View. — It would seem, however, that circumstances might arise under which so rigid an enforcement would be unreasonable and unwarranted. To illustrate: Where the question of identity is settled in favor of the applicant, and the fact of destruction of the book established satisfactorily, there is no good reason for requiring indemnity.[5]

Against Personal Representative. — The requirement should seemingly be insisted upon less strictly against an administrator representing the rights of creditors, since in asserting their rights to the fund it cannot be supposed that the book would be under their control.[6] And where the by-laws recognize

1. Warhus *v.* Bowery Sav. Bank, 21 N. Y. 544, *affirming* 5 Duer (N. Y.) 67.

Where, in an Action by an Administrator against a savings bank to recover the deposit of his intestate, it is shown that the pass book has been destroyed, its production is excused. Hudson *v.* Roxbury Sav. Inst., 176 Mass. 522.

By-law Authorizing Payment to Legal Representative. — Referring to the rules of a bank which provided as follows: "The officers and clerks will endeavor to prevent frauds on depositors, but all payments made to any person producing the proper deposit pass book shall be good and valid payments;" and also the following: "On the decease of any depositor, the amount standing to the credit of the deceased shall be paid to his or her legal representative;" — the court in Farmer *v.* Manhattan Sav. Inst., 60 Hun (N. Y.) 462, said: "The two rules operate upon an entirely different state of circumstances — the one being to protect the bank against the carelessness of the depositor, and the other to protect the depositor when he is no longer in a position to protect himself." And at another place the court said: "The reason for the rule in regard to the presentation of the pass book entirely ceases upon the death of the depositor." *Quoted* approvingly in Podmore *v.* South Brooklyn Sav. Inst., 48 N. Y. App. Div. 218.

Provision for Duplicate Book. — In Mitchell *v.* Home Sav. Bank, 38 Hun (N. Y.) 255, it was provided by the by-laws of the bank that in case of loss of a pass book, on satisfactory proof and adequate indemnity, a duplicate might be issued; also that no person should have the right to demand or receive any sum without his pass book. It was held that the depositor could not recover his deposit without producing the original pass book or procuring another by offering adequate indemnity, notwithstanding the fact that the bank had not received notice from any person making claim to the deposit, and that the depositor testified that he had not transferred the pass book or assigned his account.

2. Wagner *v.* Howard Sav. Inst., 52 N. J. L. 225.

3. Mills *v.* Albany Exch. Sav. Bank, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 251.

4. Heath *v.* Portsmouth Sav. Bank, 46 N. H. 78, 88 Am. Dec. 194.

5. Hudson *v.* Roxbury Sav. Inst., 176 Mass. 522.

In Warhus *v.* Bowery Sav. Bank, 21 N. Y. 543, the tendering of a bond of indemnity does not seem to have been considered necessary to a recovery.

May Not Insist upon Perfect Security. — It has been said that notwithstanding the consequences to the bank in case of wrongful payment of a deposit, it cannot insist upon a bond of indemnity or upon being made secure, beyond the peradventure of doubt or risk. Cosgriff *v.* Hudson City Sav. Inst., (Supm. Ct. Eq. T.) 24 Misc. (N. Y.) 4.

6. **Personal Representative of Depositor.** — Wall *v.* Provident Sav. Inst., 6 Allen (Mass.) 320. In this case the fund was claimed by a third person not a party to the suit.

Inability to Obtain Book from Family of Deceased Depositor. — In Palmer *v.* Providence Sav. Inst., 14 R. I. 68, 51 Am. Rep. 341, the

the impossibility at times of producing the book, as by a further provision that "in the case of lost books, the bank will decide as to the person to whom payment shall be made," the bank is not warranted in refusing to pay to the executor of the depositor except upon the presentation of the pass book or the tender of satisfactory indemnity, where the book has been lost for a number of years and no third party has made claim to the deposit.[1]

A Statute Requiring Indemnity Against Lost Instruments in Suit, and expressly relating to negotiable instruments, is inapplicable to a savings bank pass book, the latter being a nonnegotiable instrument.[2]

Where Money Is Deposited by an Agent Who Signs the Principal's Name on the book that the bank kept for such purpose, and delivers to his principal a deposit book that he received from the bank, in which the deposit is credited to his principal, the latter, upon being refused payment by the bank, although furnishing evidence of his ownership and of the circumstances under which the deposit was made, may bring an action against the bank for the deposit without offering a bond of indemnity, and this notwithstanding there was a custom of the bank requiring depositors to sign their names when making their first deposit and not to receive deposits by one person for the benefit of another unless so entered on their books.[3]

6. Liability for Payment to Wrong Person — *a.* TERMS OF USUAL BY-LAWS. — Most of the savings institutions have by-laws intended to afford protection against liability for payment made to a person presenting a pass book issued by it, where such person turns out not to be the true depositor. The language of such regulations is quite variant and it would be impracticable to do more than to set forth the principal ones in the form most often employed. These by-laws are as follows: "Although the bank will endeavor to prevent frauds and impositions, yet all payments to persons producing the pass books issued by it shall be valid payments to discharge the bank." "As the officers of the bank may be unable to identify every depositor, the bank will not be responsible for loss sustained when a depositor has not given notice of his book being lost or stolen, if such book be paid in whole or in part on presentment."

b. MEASURE OF CARE AND DILIGENCE — (1) *Ordinary Care and Diligence.* — Stipulations of this character do not permit the officers carelessly to close their eyes and pay any person presenting the book, but, notwithstanding them, they owe the depositors active diligence in order to detect fraud and imposition. The measure of the bank's duty is good faith and reasonable care, and failing in this it still continues liable to the depositor where it has made payment to the wrong person, notwithstanding such person presented the book at the time.[4]

administrator of a deceased depositor, being unable to obtain the pass book from the latter's family, was held entitled to recover from the bank, and as no claim to the deposit had been made by any one else he could not, as a condition precedent, be required to give indemnity.

Book Fraudulently Disposed of — Giving Bond Sufficient. — Undoubtedly the administrator of a depositor may recover the deposit from the bank, if the money is needed to pay debts, upon offering a satisfactory bond of indemnity in place of the book, where the latter was shown to have been fraudulently disposed of by the depositor in his lifetime. Wall *v.* Provident Sav. Inst., 6 Allen (Mass.) 320. See also Wall *v.* Provident Sav. Inst., 3 Allen (Mass.) 96.

1. Mills *v.* Albany Exch. Sav. Bank, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 251.

2. Mills *v.* Albany Exch. Sav. Bank, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 251. See also *supra*, this title, *Pass Books*.

3. Wallace *v.* Lowell Sav. Inst., 7 Gray (Mass.) 134.

4. **Requisite Degree of Care.** — Sullivan *v.* Lewiston Sav. Inst., 56 Me. 507, 96 Am. Dec. 500; Ladd *v.* Augusta Sav. Bank, 96 Me. 510; Kimball *v.* Norton, 59 N. H. 1, 47 Am. Rep. 171; Brown *v.* Merrimack River Sav. Bank, 67 N. H. 549, 68 Am. St. Rep. 700; Appleby *v.* Erie County Sav. Bank, 62 N. Y. 12; Allen *v.* Williamsburgh Sav. Bank, 69 N. Y. 314; Gearns *v.* Bowery Sav. Bank, 135 N. Y. 557; Tobin *v.* Manhattan Sav. Inst., (C. Pl. Gen. T.) 6 Misc. (N. Y.) 110; Abramowitz *v.* Citizens' Sav. Bank, (N. Y. City Ct. Gen. T.) 17 Misc. (N. Y.) 297; Geitelsohn *v.* Citizens' Sav. Bank, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 574; Ficken *v.* Emigrant Industrial Sav. Bank,

(2) *By-law Imposing Higher Degree.* — The bank may, by a by-law, bind itself to the exercise of a higher degree of care and diligence than reasonable care and diligence, and it was held to have imposed such degree upon itself by a provision in its by-laws that it would use "its best efforts" to prevent fraud.[1]

c. NEGLIGENCE OF BANK — (1) *Evidence Of* — (a) **Failure to Adopt Proper Means of Identification.** — Where the only proof of identity required is the possession of the depositor's bank book, it cannot be said that reasonable care has been taken to prevent mistake in making payments, and a bank with large deposits and numerous depositors is negligent in not having some other means at hand to aid in the identification of its depositors and to prevent false impersonation; such as some convenient record of the signatures of depositors, so that a comparison may be made therewith of the signature of the persons who make claim to the deposit.[2]

(b) **Failure to Institute Inquiry.** — If at the time of payment a fact or circumstance is brought to the knowledge of the bank's officers which is calculated to and should excite the suspicions and inquiry of an ordinarily careful person, it is their duty to institute such inquiry, and their failure to do so presents a question for the consideration of the jury.[3]

(c) **Publication of Probate Citation by Executor.** — The fact that after the depositor's decease and before the payment his executor published the usual probate citation addressed to the heirs at law, next of kin, and all persons interested in the estate, did not affect the bank with notice, either actual or constructive, of the death of the depositor, and the bank was not liable to the latter's executor.[4]

(d) **Dissimilarity Between Signatures.** — If the signature of the depositor in the

(Supm. Ct. App. T.) 33 Misc. (N. Y.) 92; Israel *v.* Bowery Sav. Bank, 9 Daly (N. Y.) 507; Saling *v.* German Sav. Bank, 15 Daly (N. Y.) 386.

Notwithstanding such by-laws, the duty still devolves upon the officers to exercise care and diligence in order that their depositors may be protected from fraud and larceny. Kummel *v.* Germania Sav. Bank, 127 N. Y. 488 (*criticising* Schoenwald *v.* Metropolitan Sav. Bank, 57 N. Y. 418); Clark *v.* Saugerties Sav. Bank, 62 Hun (N. Y.) 346; Wall *v.* Emigrant Industrial Sav. Bank, 64 Hun (N. Y.) 249.

"Notwithstanding the protective character of such a by-law, the bank was not relieved from the exercise of that investigation which was necessary to carry out the undertaking expressed by the words 'will endeavor to prevent frauds on its depositors.'" Cornell *v.* Emigrant Industrial Sav. Bank, (Supm. Ct. Gen. T.) 9 N. Y. St. Rep. 72.

1. Allen *v.* Williamsburgh Sav. Bank, 69 N. Y. 314.

2. Ladd *v.* Augusta Sav. Bank, 96 Me. 510.

And the Fact that the Initial Deposit Is Sent by Mail or Messenger is not a serious objection to this method, as the signature of a depositor can easily be obtained even though he does not come personally to the bank; and if for any reason this cannot be done, then other proof of identity should be required besides the possession of the book, even if the depositor is put to some inconvenience thereby. Ladd *v.* Augusta Sav. Bank, 96 Me. 510, *distinguishing* Sullivan *v.* Lewiston Sav. Inst., 56 Me. 507, 96 Am. Dec. 500.

3. Gearns *v.* Bowery Sav. Bank, 135 N. Y. 557.

By-law Calling for Bank's "Endeavor" to Prevent Fraud. — If by a regulation designed to prevent fraud upon depositors, which by the rules the bank promised to "endeavor" to do, a fact or circumstance is brought to the knowledge of the officers which is calculated to or ought to excite the suspicion and inquiry of an ordinarily careful person, it is clearly the duty of the officers to institute such inquiry, and a failure to do so is negligence for which the bank is liable. Appleby *v.* Erie County Sav. Bank, 62 N. Y. 12.

Actual Identification. — A bank's failure to require the person who presented the book to identify himself, and to compare his signature with that of the depositor on the bank's books, was considered evidence of negligence. Brown *v.* Merrimack River Sav. Bank, 67 N. H. 549, 68 Am. St. Rep. 700.

But where the bank applied the tests for identification according to its custom and there was no fact or circumstance to excite suspicion, its failure to require actual identification and to make inquiries at the depositor's residence was held not to be want of ordinary care. Geitelsohn *v.* Citizens' Sav. Bank, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 574.

Withdrawal of Entire Deposit. — Where there is nothing in the demeanor of the applicant, or in his replies to questions put to him for the purpose of identification, to excite suspicion, the fact that the whole deposit is withdrawn is not a circumstance calculated to arouse inquiry, and it should not be left to a jury to say whether it is or not. Geitelsohn *v.* Citizens' Sav. Bank, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 574.

4. Donlan *v.* Provident Sav. Inst., 127 Mass. 183, 34 Am. Rep. 358.

bank's book kept for the purpose and the signature of the person signing the receipt for the deposit are so dissimilar that, when compared, the discrepancy would be easily discovered by a person competent for the position, then the failure to discover it would be evidence of negligence. On the other hand, it would not be evidence of negligence if the difference was not marked and apparent, or if it would require a critical examination to detect it, and especially if the discrepancy was one as to which competent persons might honestly differ in opinion.[1]

(2) *Question of Law or Fact.* — The question of due care and diligence is one of law or fact, as the proofs are conclusive and undisputed, or debatable and conflicting;[2] and upon the point there are numerous cases, but authorities upon this question are necessarily of little value, as each case must be decided upon the facts and circumstances peculiar to it.

(3) *Burden of Proof.* — It is incumbent upon the plaintiff, it has been held, to show negligence on the part of the bank.[3]

d. NEGLIGENCE OR FRAUD OF DEPOSITOR — (1) *Suffering Another to Appear as Owner.* — Where the true owner suffers another person so to deal with the money at the time of deposit as to indicate to the bank that such other person is in fact the owner, and the bank subsequently repays the amount to him, the loss must fall upon the owner, as he was the occasion of it.[4]

(2) *In Care of Pass Book.* — According to several well-considered cases, negligence on the part of the depositor in taking care of his pass book is inapplicable in such cases.[5]

(3) *False Descriptions.* — Where, by reason of false description of occupation and age given by the depositor, the bank is misled into making payment to the wrong party, the depositor, not the bank, must suffer.[6]

1. Appleby *v.* Erie County Sav. Bank, 62 N. Y. 12.

Whether or Not Due Care Has Been Exercised by the bank officers to detect a forgery depends upon the degree of significance that would be attributed to the differences between the signature in the signature-book and that to the forged order, not by a common and unskilled person, but by a skilled person. Fricke *v.* German Sav. Bank, 56 N. Y. Super. Ct. 468.

2. Law or Fact. — Allen *v.* Williamsburgh Sav. Bank, 69 N. Y. 314.

The fact that the evidence on behalf of the bank as to the circumstances of payment is given by the person who made the payment and who testified not from recollection, but from the course of business which he was reasonably certain was followed, will present no question for the jury in the absence of facts tending to create a doubt as to the correctness of his testimony. Geitelsohn *v.* Citizens' Sav. Bank, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 574.

Question of Due Care for Jury. — Ladd *v.* Augusta Sav. Bank, 96 Me. 510; Tobin *v.* Manhattan Sav. Inst., (C. Pl. Gen. T.) 6 Misc. (N. Y.) 110; Abramowitz *v.* Citizens' Sav. Bank, (N. Y. City Ct. Gen. T.) 17 Misc. (N. Y.) 297; Geitelsohn *v.* Citizens' Sav. Bank, (N. Y. City Ct. Gen. T.) 19 Misc. (N. Y.) 422; Rosen *v.* State Bank, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 231; Saling *v.* German Sav. Bank, 15 Daly (N. Y.) 386; Farmer *v.* Manhattan Sav. Inst., 60 Hun (N. Y.) 462; Clark *v.* Saugerties Sav. Bank, 62 Hun (N. Y.) 347; Wegner *v.* Second Ward Sav. Bank, 76 Wis. 242. See also Fiore *v.* Ladd, 22 Oregon 202. And see City Sav. Bank *v.* Enos, 135 Cal. 167; Hager *v.* Buffalo Sav. Bank, (Buffalo Super. Ct. Gen. T.) 10 Misc. (N. Y.) 455; Ficken *v.* Emigrant Industrial Sav. Bank, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 92; Hales *v.* Seamen's Sav. Bank, 28 N. Y. App. Div. 407; Winter *v.* Williamsburgh Sav. Bank, 68 N. Y. App. Div. 193; in the first three cases the bank being held liable, and in the last two, not liable, under the circumstances of the payment.

3. Israel *v.* Bowery Sav. Bank, 9 Daly (N. Y.) 507.

4. Fiore *v.* Ladd, 22 Oregon 202.

5. Negligence of Depositor. — Brown *v.* Merrimack River Sav. Bank, 67 N. H. 549, 68 Am. St. Rep. 700; Geitelsohn *v.* Citizens' Sav. Bank, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 574. In this latter case the court said: "The introduction of the rule as to contributory negligence is a novelty in these cases." See also Ladd *v.* Androscoggin County Sav. Bank, 96 Me. 520.

Question Held Immaterial. — In Peoples' Sav. Bank *v.* Cupps, 91 Pa. St. 315, the court considered it immaterial whether or not the depositor was guilty of negligence in the care of his pass book, saying that "it was a case of mispayment contrary to the published rules."

Failure of Bank to Adopt Proper Methods of Detection. — Negligence of the depositor in the care of his book does not excuse the bank officers from the exercise of reasonable care in the adoption of suitable means of preventing mistakes and fraud. Ladd *v.* Augusta Sav. Bank 96 Me. 510.

6. People *v.* Third Ave. Sav. Bank, 98 N. Y. 661.

(4) *Personal Information to Stranger.* — Where the depositor was shown to have supplied a stranger with such information as to himself as to enable the stranger to answer the test questions propounded by the bank, he was held guilty of such contributory negligence as barred a recovery as a matter of law.[1]

(5) *Fraud — Evidence to Negative.* — Where the bank's defense was that the depositor himself, or some one with whom he was in collusion to defraud the bank, drew the money from the bank, evidence was admissible to show that the depositor at the time of his death, about two and a half months after the money was drawn, possessed but a small amount of money.[2]

e. CERTAIN INSTANCES OF PAYMENTS CONSIDERED — (1) *To Person Presenting Pass Book.* — There is a lack of harmony in the cases as to the effect to be given to the fact of possession of a pass book, as evidence of the possessor's right to receive and the bank's authority to pay him the deposits entered in the book. In one instance it was said that "a pass book is not negotiable paper, and its possession constitutes in itself no evidence of a right to draw money thereon."[3] But this statement has been criticised in that it "clearly excludes the effect of the rules taken in connection with the possession of the book."[4] And, indeed, it would appear not unreasonable to hold that such possession affords "a strong presumption that the person presenting it was authorized to receive the money,"[5] and that when there is no fact or circumstance to excite suspicion or inquiry, and when customary and ordinarily careful means of identification are employed, it justifies payment to the holder.[6] There is excellent authority for the view that where the by-laws clearly contemplate but two modes of payment, one to the depositor personally and the other upon his written order, both requiring the production of the book, the fair implication is that no other payments to strangers are contemplated or authorized.[7]

By-law Calling for "Best Efforts." — Where the bank is required by its by-laws to use its "best" efforts to prevent fraud, payment to one presenting a pass book who has wrongfully obtained such book, and produces it under circumstances that would necessarily excite suspicion and inquiry, as for instance, where the depositor was a man and the book was presented by a woman, the bank is liable, notwithstanding a further provision in its rules that payments

1. Wall *v.* Emigrant Industrial Sav. Bank, 64 Hun (N. Y.) 249.

2. Brown *v.* Merrimack River Sav. Bank, 67 N. H. 549, 68 Am. St. Rep. 700.

3. **Presentation of Pass Book.** — Smith *v.* Brooklyn Sav. Bank, 101 N. Y. 58, 54 Am. Rep. 653. See also Eaves *v.* People's Sav. Bank, 27 Conn. 229, 71 Am. Dec. 59. And see *supra*, this title, *Pass Books — Not Negotiable.*

4. Geitelsohn *v.* Citizens' Sav. Bank, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 574.

5. Palmer *v.* Providence Sav. Inst., 14 R. I. 68, 51 Am. Rep. 341.

6. Geitelsohn *v.* Citizens' Sav. Bank, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 574.

In People *v.* Third Ave. Sav. Bank, 98 N. Y. 663, it was held that where payment has been made with due care and diligence, to one presenting the deposit book, such payment being made in pursuance of the by-laws and regulations under which the deposit was received, it was effectual.

In Cosgrove *v.* Provident Sav. Inst., 64 N. J. L. 653, *reversing* 64 N. J. L. 39, the bank adopted and caused to be printed upon its deposit books a by-law which provided that "deposits and dividends shall be drawn out only by the depositors in person or by their written order, or by some person legally authorized, and only upon production of the depositor's book, that such payments may be entered therein, and all payments to persons who present the deposit book shall be valid payments to discharge the bank and its officers." It was held that a payment made by the bank in good faith and in the exercise of due care to any person who produced the pass book would discharge the bank without regard to whether or not such person was entitled to draw the money. *Distinguishing* Smith *v.* Brooklyn Sav. Bank, 101 N. Y. 60, 54 Am. Rep. 653. *Citing* Schoenwald *v.* Metropolitan Sav. Bank, 57 N. Y. 418.

7. Smith *v.* Brooklyn Sav. Bank, 101 N. Y. 58, 54 Am. Rep. 653 (*per* Ruger, C. J.), holding that under the by-laws involved, the bank was not protected in paying to a stranger whose sole evidence of authority was the possession of the pass book. The court *distinguished* "Schoenwald *v.* Metropolitan Sav. Bank, 57 N. Y. 418, and similar cases, where the language of the contract was substantially different." But this case is itself *criticised* in Geitelsohn *v.* Citizens' Sav. Bank, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 574, as stated *supra*, this subdivision.

made to persons producing the pass book shall be deemed good and valid payments to depositors.[1]

(2) *To Person Presenting Order Not Properly Witnessed.* — Where a bank pays out money on forged orders and these orders were not witnessed, as the by-laws require the orders of absent depositors to be, the bank is liable to the depositor.[2]

(3) *To Person Presenting Order and Pass Book* — **When Order Forged.** — In a *Connecticut* case payment to a person presenting the pass book, together with a forged power of attorney, was held not available to the bank as a defense. The court considered the forged power of attorney as equivalent to none at all, and the presentation of the book alone as of no greater effect, since it was not negotiable.[3] But in a *New York* case the bank was deemed warranted under such circumstances, so long as there was no lack of proper care and diligence.[4]

When Depositor Insane. — Where the bank pays a deposit in good faith, and in the usual course of business, to the person presenting an order from the depositor, together with the pass book, and without notice of the insanity of the depositor, such payment cannot be set aside upon the application of the depositor's administrator.[5]

(4) *By-law Requiring Notice of Loss of Pass Book.* — A by-law of this nature, such as is set out above,[6] is intended to exonerate the bank from loss occasioned by inability of its officers to identify the depositor, and to throw upon the depositor the risk of keeping his book safely, and there is no liability on the part of the bank for paying in good faith and without negligence to some person who had stolen or otherwise obtained possession of the book and who fraudulently represented the plaintiff, no notice that the book was stolen

1. Allen *v.* Williamsburgh Sav. Bank, 69 N. Y. 314. The court *distinguishes* and *limits* Schoenwald *v.* Metropolitan Sav. Bank, 57 N. Y. 418, and *distinguishes* Hayden *v.* Brooklyn Sav. Bank, (Brooklyn City Ct. Gen. T.) 15 Abb. Pr. N. S. (N. Y.) 297, and Appleby *v.* Erie County Sav. Bank, 62 N. Y. 12.

2. Peoples' Sav. Bank *v.* Cupps, 91 Pa. St. 315.

3. Eaves *v.* People's Sav. Bank, 27 Conn. 229, 71 Am. Dec. 59.

Negligence of Depositor — No By-law Requiring Notice of Loss. — Where a deposit is paid upon a forged order, accompanied by the pass book, of the loss of which the bank was not notified, no question of negligence either of the depositor or of the bank is involved, in the absence of any regulation requiring notice of the loss of the book, but the contract is the ordinary one of debtor and creditor. Ladd *v.* Androscoggin County Sav. Bank, 96 Me. 520, (*distinguishing* Ladd *v.* Augusta Sav. Bank, 96 Me. 510); Tobin *v.* Manhattan Sav. Inst., (C. Pl. Gen. T.) 6 Misc. (N. Y.) 110.

But where payment was made to a person presenting the pass book and an order with the depositor's signature forged, two days after the loss of the pass book by the depositor, without notice to the bank of the loss, the bank was held not to be liable, the depositor having been guilty of negligence in delaying to give notice of the loss. Kelly *v.* Emigrant Industrial Sav. Bank, 2 Daly (N. Y.) 227. Here there was no by-law in terms requiring notice of loss of the book, but the court considered the depositor's failure to give such notice a breach of his duty and of good faith.

No Credit for Amount Placed to Account of Depositor and Withdrawn by Him. — In Underhill *v.* Poughkeepsie Sav. Bank, 32 Hun (N. Y.) 432, the plaintiff deposited four hundred dollars with the defendant; half of this sum was loaned to her lawyer and drawn out on her order. Afterwards he drew the balance on forged orders and surrendered her pass book; he then deposited to the credit of the plaintiff one hundred and fifty dollars, and obtained a new pass book in her name, containing the credit, which he delivered to her. She drew out this sum so deposited and brought her action for the amount drawn on the forged orders. It was held that the amount deposited by her lawyer and drawn out by herself could not be applied as a payment upon the balance due her upon the first account. The report of this case does not refer to the by-laws of the institution.

4. Schoenwald *v.* Metropolitan Sav. Bank, 57 N. Y. 418. Here it was said that the bank was authorized to pay a deposit on the simple production of the pass book without an order from the depositor, and the fact that a forged order was presented also, was immaterial. This case seems to go beyond the other authorities, and has been *distinguished* and *limited* in Allen *v.* Williamsburgh Sav. Bank, 69 N. Y. 314, and *distinguished* in Smith *v.* Brooklyn Sav. Bank, 101 N. Y. 63, 54 Am. Rep. 653.

5. Riley *v.* Albany Sav. Bank, 36 Hun (N. Y.) 513, *affirmed* without opinion 103 N. Y. 669.

6. **Rule Requiring Notice of Loss of Book.** — See *supra*, this section, *Terms of Usual By-laws.*

having been given to the bank,[1] although the depositor was ignorant of the loss,[2] or was illiterate and unable to read the rules of the pass book delivered to him.[3] But such a by-law does not relieve the bank from the exercise of reasonable care, and payment to the wrong person on presentation of the book, even before notice of its loss, will not exonerate the bank if the attending circumstances were sufficient to excite the suspicion of a prudent man and put him on inquiry.[4]

(5) *To Administrator of Deceased Depositor* — **Administrator Appointed in Lifetime of Depositor.** — In *Massachusetts* it has been held that a depositor may recover his deposit from the bank, notwithstanding the amount has been paid to one appointed as his administrator and who produced the pass book, the appointment being made under the mistaken belief that the depositor was dead, after he had been absent without being heard from for more than seven years;[5] but in *New York* the contrary view has been taken.[6]

Bank Must Show Administrator's Right. — Where, in case of the death of a depositor, the rules of the bank provide that payment will be made only to his legal representatives, it is for the bank to justify the payment by showing that the party had a legal right to receive the money in question.[7]

Administration Procured by Husband. — Where it appeared that the wife had deposited money belonging to the husband in her name, and upon her death he procured some one to administer upon her estate, for the very purpose of receiving the money from the bank and the money was so received, he has no claim against the bank, but must be considered merely as a creditor of her estate.[8]

Administrator of Trustee. — Payment by the bank to the administrator of one who has constituted himself trustee of a savings-bank account for another, upon the production of his letters and of the pass book, and in the absence of any notice from the beneficiary, is a good payment and effectual to discharge the bank.[9]

Account in Alternative Form. — Where a deposit is in the name of "A or B," the bank may pay to the executor of A, on presentation by him of the pass book and testamentary letters, where B had never deposited in the account, nor drawn anything therefrom, nor ever had possession of the pass book.[10]

Foreign Administrator. — Where the bank, acting in good faith, and in accordance with a provision of its by-laws by which it obligated itself to pay the account to the legal representative of the depositor upon the surrender of the pass book, paid the foreign administrator who had title, before receiving

1. Goldrick *v.* Bristol County Sav. Bank, 123 Mass. 320; Sullivan *v.* Lewiston Sav. Inst., 56 Me. 507, 96 Am. Dec. 500. *Compare* Eaves *v.* People's Sav. Bank, 27 Conn. 229.

2. Levy *v.* Franklin Sav. Bank, 117 Mass. 448.

3. Burrill *v.* Dollar Sav. Bank, 92 Pa. St. 134, 37 Am. Rep. 669.

4. Gifford *v.* Rutland Sav. Bank, 63 Vt. 108, 25 Am. St. Rep. 744; Sullivan *v.* Lewiston Sav. Inst., 56 Me. 507, 96 Am. Dec. 500.

5. Jochumsen *v.* Suffolk Sav. Bank, 3 Allen (Mass.) 87.

6. Roderigas *v.* East River Sav. Inst., 63 N. Y. 460, 20 Am. Rep. 555. But this case has been *criticised*. See 10 Am. L. Rev. 787; 15 Am. L. Reg. 212.

7. Farmer *v.* Manhattan Sav. Inst., 60 Hun (N. Y.) 462; Podmore *v.* South Brooklyn Sav. Inst., 48 N. Y. App. Div. 218.

8. McDermott *v.* Miners' Sav. Bank, 100 Pa. St. 285.

9. Boone *v.* Citizens' Sav. Bank, 84 N. Y. 83, 38 Am. Rep. 498. See also Brabrook *v.* Boston Five Cents Sav. Bank, 104 Mass. 228, 6 Am. Rep. 222; Clark *v.* Clark, 108 Mass. 522.

10. Grafing *v.* Irving Sav. Inst., 69 N. Y. App. Div. 566, *affirming* (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 20.

Notice Not to Pay to Administrator. — Where a savings bank account was opened in the alternative form as follows: A or B, and to that account each contributed, either has the right to draw the money, and the bank is justified in paying on the separate order of either. And this right of the bank and of each depositor is not terminated by the death of one of them. The authority of the deceased depositor being coupled with an interest vests on his death in his personal representative. But where the bank had notice that the fund belonged to the survivor and was prohibited by him from paying it to the representative of the deceased, it could not thereafter justify a payment to the latter, if the money, of right, as between the survivor and the estate of the deceased, belonged to the former. Mulcahey *v.* Emigrant Industrial Sav. Bank, 89 N. Y. 435.

notice of the prior appointment of a domestic administrator, and it does not appear that there are any local creditors who require protection, the bank is discharged from any liability to the domestic administrator.[1]

(6) *False Personation and False Claim of Authority Distinguished.* — A by-law based upon the difficulty of identifying depositors, such as is set forth above,[2] authorizes payment to one who falsely personates a depositor in presenting the stolen book,[3] but not to one who falsely claims to act under authority from the depositor.[4]

(7) *To Donee of Deposit.* — Where the fact of a perfect gift of the deposit has been established, the bank must make payment to the donee upon presentation of the pass book, and cannot require the appointment of an administrator of the estate of the deceased donor and payment to him.[5]

(8) *Deposit in Name of Minor — Massachusetts Statute.* — A statute of Massachusetts that provided that "money deposited in the name of a minor may, at the discretion of the trustees or committee of investment, be paid to such minor or to the person making such deposit" has been construed to mean that "if the minor deposited the money, the statute authorized the payment only to the minor; if some other person deposited the money in the minor's name, the statute authorized the payment of the money either to the minor or to the person making the deposit." [6]

(9) *Committee Funds.* — Where the disposition of a fund raised for a specified purpose was given to a committee, and the fund deposited in bank by the treasurer of the committee, in his name as treasurer, the appropriation of the fund by the committee for the purpose was sufficient authority to warrant payment by the bank to another person chosen by the committee to receive it.[7]

(10) *To Justice in Garnishment Proceedings.* — Where the plaintiff claimed that money deposited by her husband to his individual credit was for her benefit, payment of the same to a justice of the peace in garnishment proceedings against the husband does not discharge the bank in the absence of a judgment in garnishment rendered against it, or the consent of the plaintiff obtained.[8]

7. Ratification of Payments to Agent. — Where not only the form of the account indicates an agency on the part of a third person, but the principal allows the bank to act in the faith that such person is in fact agent, and ratifies numerous acts of his in the course of his dealings with the bank about the account, the bank, in the absence of negligence, is not liable to the principal or his assignee for payments made to such agent.[9]

1. Maas *v.* German Sav. Bank, 73 N. Y. App. Div. 524.

2. See *supra*, this section, *Terms of Usual By-laws.*

3. Goldrick *v.* Bristol County Sav. Bank, 123 Mass. 320; Kimins *v.* Boston Five Cents Sav. Bank, 141 Mass. 33, 55 Am. Rep. 441; Ladd *v.* Augusta Sav. Bank, 96 Me. 510.

4. Jochumsen *v.* Suffolk Sav. Bank, 3 Allen (Mass.) 87; Kimins *v.* Boston Five Cents Sav. Bank, 141 Mass. 33; Kingsley *v.* Whitman Sav. Bank, (Mass. 1902) 65 N. E. Rep. 161 (*distinguishing* McCarthy *v.* Provident Sav. Inst., 159 Mass. 527); Ladd *v.* Augusta Sav. Bank, 96 Me. 510. See also Ladd *v.* Androscoggin County Sav. Bank, 96 Me. 520.

Qualification Held to Protect Bank. — In Levy *v.* Franklin Sav. Bank, 117 Mass. 448, the by-law was similar to that referred to above, except that it contained the following additional clause, "in all cases, a payment upon presentation of deposit book shall be a discharge of the corporation for the amount so paid." This additional clause was held to enlarge the by-law and to protect the bank, if it, using reasonable care and in good faith, paid the whole of the plaintiff's deposit upon the presentation of his book, although the book had been stolen and an order, purporting to be signed by the depositor, forged.

5. **Donee.** — Cosgriff *v.* Hudson City Sav. Inst., (Supm. Ct. Eq. T.) 24 Misc. (N. Y.) 4. And see Farmer *v.* Manhattan Sav. Inst., 60 Hun (N. Y.) 462. See also the title GIFTS, vol. 14, pp. 1029, 1062.

6. Dickinson *v.* Leominster Sav. Bank, 152 Mass. 49.

7. Tay *v.* Concord Sav. Bank, 60 N. H. 277.

8. Bessemer Sav. Bank *v.* Anderson, (Ala. 1902) 32 So. Rep. 716.

9. Wilcox *v.* Onondaga County Sav. Bank, 40 Hun (N. Y.) 297. Here the account was in this form, "A. B., C. D., agent."

Assent of Guardian to Payment of Deposit in Ward's Name to Another — Whether Inferred from Circumstances, Question for Jury. — Eagle, etc., Mfg. Co. *v.* Belcher, 89 Ga. 218.

8. Liability of Stockholders or Members. — **Where Unmodified by Special Contract,** a deposit in a savings bank having a capital stock is a debt against the bank, and therefore each stockholder is liable for his proportion of the debt, saving as that liability may have been modified or waived by contract.[1]

Circumstances Not Amounting to Waiver. — Neither an agreement printed in the pass book, which was not signed by the depositor, nor a printed release inserted in the signature book, which was not specially signed, constitutes a waiver of a stockholder's liability.[2]

A By-law asserting that the stockholders were not held to their constitutional liability is void and does not bind depositors.[3]

Whether Deposit Made Subject to Constitutional Restrictions. — Where by the constitution of the institution the deposits of the members are alone responsible for the debts of the institution, and no engagement of the same can be legally made unless it shall contain a limitation or restriction to such effect, the members are, notwithstanding, personally liable for a deposit unless it can be clearly established that it was made subject to the constitutional limitations and restrictions.[4]

9. Special Safety Fund. — A statute authorizing a company to establish a savings department, and also empowering and requiring it to pledge its entire capital stock and property for the payment of depositors, was held not to create a present and effective lien without further action on the part of the company.[5]

1. Wells *v.* Black, 117 Cal. 157, 59 Am. St. Rep. 162.

Liability of Stockholders a Common Fund for Security of Creditors — Enforcement by Creditor. — Queenan *v.* Palmer, 117 Ill. 619.

Not in Nature of Penalty. — In Queenan *v.* Palmer, 117 Ill. 619, where the charter made the stockholders "responsible in their individual property in an amount equal to the amount of stock held by them respectively to make good losses to depositors and others," it was held that this individual liability was not in the nature of a penalty and enforceable only in a court of law, but was subject to the demands of creditors equally with the assets of the bank.

Double Liability. — Stock issued under *Minnesota* Special Laws, 1873, c. 117, is not of such a character as to bring it within the constitutional provision imposing a double liability, and the depositors are not creditors entitled to enforce such a liability. State *v.* Savings Bank, (Minn. 1902) 92 N. W. Rep. 403.

Partnership. — In Gibbs's Estate, 157 Pa. St. 59, it was held that the evidence was not sufficient to warrant the Supreme Court in reversing the finding by an auditor affirmed by the court below that the bank in question was not a partnership and that the stockholders were not liable as partners for its debts. *Followed* in Pease's Appeal, 157 Pa. St. 75.

Redemption of Deposits — Discharge of Stockholder's Liability. — In a suit against a stockholder of a savings bank by a depositor on his individual liability for the ultimate redemption of the deposits in proportion to the amount of the stock held by him in the bank, the stockholder may defend the suit by showing that previously to the commencement of the suit he has discharged his obligation by paying to other depositors than the plaintiff an amount equal to the full proportion his stock bears to the whole amount due the depositor. Such stockholder cannot, after any one depositor has commenced suit against him on his liability, defeat the suit by paying other depositors than the plaintiff, even though he pay to the full amount of his liability. Such payment, after notice of suit, is in fraud of the plaintiff's claim, and contrary to the policy of the act creating the liability, and if allowed would practically defeat the object of the legislature in imposing the obligation. Jones *v.* Wiltberger, 42 Ga. 575.

2. Wells *v.* Black, 117 Cal. 157, 59 Am. St. Rep. 162.

3. Wells *v.* Black, 117 Cal. 157, 59 Am. St. Rep. 162.

4. Beaver *v.* McGrath, 50 Pa. St. 479. And it was further held that the former membership of the depositor would not alone suffice to affect him with knowledge of the constitutional restrictions so that the assets would alone be liable for his claim.

5. **Safety Fund.**— Newton *v.* Eagle, etc., Mfg. Co., 101 Fed. Rep. 149. And it was further held that a mortgage was the only proper means by which the security contemplated by the statute could have been given; and that although there was not a statutory lien, yet there was an equitable lien in favor of depositors.

Where the Charter Provided that a Certain Capital Should Be Raised Previously to Granting Letters of Incorporation, "which capital shall at all times be liable to the depositors for the amount of their deposits and the interest accruing thereon," such provision was designed to constitute a fund to be employed by the trustees for any of the legitimate purposes of the corporation, and not as a security for depositors exclusively. It was not intended to be a special fund, separate and distinct from other funds of the institution and for the exclusive benefit of depositors, but it could not be withdrawn by, or refunded to, those by whom it was subscribed. Fox's Appeal, 93 Pa. St. 406.

10. Depositor's Right of Set-off — When Bank Insolvent. — The right of set-off of deposits against indebtedness to the bank, in case of insolvency of the institution, is discussed in another part of this title.[1]

When Bank Solvent. — It is competent for the bank and a depositor, while the bank is solvent and not in contemplation of insolvency, to agree that the balance of his deposits shall be credited as a payment on a note owing by him to the bank, especially where the note really represented a part of the same account upon which the deposits so credited were originally entered.[2]

11. Assignment — Right to Assign. — Certain by-laws in reference to the conditions of repayment were held to relate to the dealings between the bank and depositor, and not to prevent the latter from passing his claim by assignment, general or specific, or in any other legal manner, and a demand of payment in the ordinary way by the transferee was all that was required.[3]

Time of Taking Effect. — An order by a depositor in favor of a third person, given in good faith and for a sufficient consideration, constitutes an assignment of the deposit which takes effect from delivery and is unaffected by a subsequent qualified acceptance after service of trustee process.[4]

Subject to Equities. — A depositor can convey no greater right in the funds of the bank than he himself has, and any defense on the part of the bank which is good against the original depositor is equally good against his assignee, unless there are facts to create an estoppel.[5]

Omission of Date — Tender. — Omission from an order on the bank, by the depositor in favor of a third party, of the month and day of the month, does not invalidate the order, nor excuse the bank from making payment to the assignee; furthermore, a tender by the bank fifteen days afterwards is bad if it does not include in the amount offered interest for the fifteen days.[6]

A Circular of an Ordinary Commercial Bank declaring that the capital and stock of the bank constitute a capital or safety fund for the benefit of savings depositors, but which does not declare that the capital and stock belong to the savings depositors, is not equivalent to a legal declaration of trust in that regard, nor does it have the elements of an estoppel *in pais*. Ward *v.* Johnson, 95 Ill. 215.

Promise as to Certain Securities. — A promise by a bank, which is an ordinary commercial bank, to use certain securities for the benefit of its savings depositors does not create either a mortgage, pledge, or trust. Ward *v.* Johnson, 95 Ill. 215.

1. See *infra*, this title, *Insolvency*, *Receivers*, *and Assignments*.

2. Set-off. — Robinson *v.* Aird, (Fla. 1901) 29 So. Rep. 633.

So Long as the Bank Is Solvent No Injury Can Arise from permitting a depositor to offset his deposit against his debt due to the bank, as no preference would be given in such case to one depositor over another. Hannon *v.* Williams, 34 N. J. Eq. 255, 38 Am. Rep. 378.

Agreement Made Before Suspension. — An agreement between the treasurer and a depositor two years before the suspension of the bank, to apply his deposits in payment of his debt next quarter day, and made with the understanding that the application was then made and nothing more remained to be done in execution of the agreement, entitles the depositor to set-off of his deposit against his indebtedness to the bank. Hall *v.* Paris, 59 N. H. 71.

Joint and Several Obligation. — In Barnstable Sav. Bank *v.* Snow, 128 Mass. 512, it was held that neither Gen. Stat., c. 130, § 8, nor the Statute of 1878, c. 261, authorized a set-off, in a suit by the bank against several persons upon a joint and several obligation, of sums severally due them from the bank.

Notice. — The *Massachusetts* Statute of 1878, c. 261, allowing set-off in certain cases, is constitutional, and the right of set-off is not affected by failure of the assignee of a deposit to give notice to the bank of the assignment. North Bridgewater Sav. Bank *v.* Soule, 129 Mass. 528.

3. Gammond *v.* Bowery Sav. Bank, 15 Daly (N. Y.) 483.

Delivery of Pass Book. — The delivery of the pass book without an express assignment of the fund represented thereby, and with the intention that it should be held as collateral security for the payment of a debt, transfers an equitable title which will prevail against a subsequent trustee process. Taft *v.* Bowker, 132 Mass. 277.

4. Kingman *v.* Perkins, 105 Mass. 111.

5. Equities. — McCaskill *v.* Connecticut Sav. Bank, 60 Conn. 300, 25 Am. St. Rep. 323, the court saying: "The nature and purpose of savings banks and the relation of depositors to each other, as well as their mutual security, all require the application of these principles."

6. Omission of Date — Tender — Interest. — Weld *v.* Eliot Five Cents Sav. Bank, 158 Mass. 339. In this case the bank contended that the plaintiff was bound to show that by the rules he was entitled to call for payment without prior notice, but the court negatived this contention, holding that, on the contrary, it was for the defendant to show, if it could, that he was not so entitled.

Claim of Third Party. — In an action against the bank by the assignee of a depositor to recover the sum deposited, the defendant cannot set up as a defense that the deposit is the proceeds of securities belonging to third parties, which the depositor obtained and fraudulently converted and that such third parties have notified the defendant of those facts and that they claim the deposit as their property.[1]

12. Demand Before Suit — Costs. — Before suit can be maintained against the bank for the recovery of a deposit, demand is essential.[2]

VII. Interest and Dividends — 1. Interest — *a.* Interest Payable. — In *Georgia*, by statute, a savings institution which pays interest on its deposits and whose deposits are not subject to check may agree with its depositors at what times and in what amounts it will pay interest.[3]

Semi-annual Interest as New Principal. — An agreement between the bank and a special depositor that if he would let the semi-annual amounts of interest remain in the institution, these amounts should draw interest as new principal, has been held to be unobjectionable.[4]

b. Interest Chargeable. — A charter provision authorizing the institution to "receive such rate of interest as may be mutually agreed upon" was considered as not intended to confer the exclusive privilege of charging a rate which it was unlawful for others to receive, but rather to confer the right to agree for interest within the limits prescribed by the law for all.[5]

2. Dividends — Profits Actually Received. — In *California* a savings bank has been held not to be authorized to appropriate and pay as a dividend on the profits arising from its business any portion of the interest upon its loans or investments that may have matured or accrued but which has not been actually collected and received in money, however well secured or certain to be eventually paid.[6]

1. Lunn *v.* Seamen's Sav. Bank, 37 Barb. (N. Y.) 129. See also Clark *v.* Saugerties Sav. Bank, 62 Hun (N. Y.) 347.

2. Hales *v.* Seamen's Sav. Bank, 28 N. Y. App. Div. 407. And see the titles Banks and Banking, vol. 3, p. 839, Demand, vol. 9, p. 200.

Costs. — New York Laws of 1882, c. 409, § 259, providing that in certain cases against savings banks, costs shall be in the discretion of the court, only provides for costs in cases distinctly specified in it, to wit: in actions by a husband to recover moneys deposited by his wife in her own name, and in actions to recover for moneys on deposit, when there are other claimants to the same fund who are not parties to the action. Davenport *v.* Savings Bank, 36 Hun (N. Y.) 303.

3. Interest. — Dottenheim *v.* Union Sav. Bank etc., Co., 114 Ga. 788.

Georgia Act Constitutional. — This statute (Act of 1889) is not repugnant to that clause of the constitution that declares that "laws of a general nature shall have uniform operation throughout the state and no special law shall be enacted in any case for which provision has been made by an existing general law." Whether or not the act is applicable to a bank which is both a savings institution and a bank doing a general banking business was left undecided. Union Sav. Bank, etc., Co. *v.* Dottenheim, 107 Ga. 606. But see the *dissenting* opinion of Simmons, C. J., in the case first cited above.

Question of Fact. — Whether, in order to avail itself of privileges conferred by statute, a particular banking institution has shown itself to be a savings institution which pays interest on its deposits, and whose deposits are not subject to check, was, in Dottenheim *v.* Union Sav. Bank, etc., Co., 114 Ga. 788, held to be a question of fact for the jury.

What Record Must Show. — Where the record did not disclose in terms that the institution in question was a savings bank which paid "interest to depositors and whose deposits were not subject to check," the transaction cannot be upheld as being within the provisions of the statute. Atlanta Sav. Bank *v.* Spencer, 107 Ga. 629.

Special Statute. — As to the regulation of the rate of interest by the trustees under a special statute, see Werner *v.* German Sav. Bank, 2 Daly (N. Y.) 406.

Suit to Recover Deposit. — In *Massachusetts*, where the agreement between the bank and the depositor is for a rate of interest less than six per cent., the latter, in a suit to recover his deposit, is entitled to only the agreed rate up to the time of judgment. Pierce *v.* Boston Five Cents Sav. Bank, 129 Mass. 425, 37 Am. Rep. 371.

4. Heironimus *v.* Sweeney, 83 Md. 146, 55 Am. St. Rep 333.

5. Tishimingo Sav. Inst. *v.* Buchanan, 60 Miss. 496.

The Dollar Savings Bank of Atlanta, Ga., could not, under its charter, charge interest at a greater rate than that allowed by law, namely, seven per cent. per annum. Candler *v.* Corra, 54 Ga. 190.

6. Dividends. — People *v.* San Francisco Sav. Union, 72 Cal. 199.

But under the New York Act of 1875, c. 371,

VIII. Loans and Investments — 1. General Rule as to Duty of Trustees. — The trustees are under a positive duty to see to it that the funds of the bank are not invested contrary to law, and a disregard of such obligation is a breach of duty and a ground of liability.[1] And where the institution is a savings bank in the strict sense of the term, the managers are bound to invest the funds not only in the manner indicated and required by the charter, but also prudently, the prudence required being measured by the character and objects of the constitution.[2]

2. Power to "Invest" Construed. — The power given to savings banks to "invest" their funds contemplates the putting out of money on interest, either by way of loan or of the purchase of any income-producing property.[3]

3. Report of Investment Committee. — An executory contract to lend money, made by a savings bank without the report of the investment committee as required by statute, cannot be enforced or made the foundation of a claim for damages.[4]

4. Binding Force of By-laws. — It has been held, according to the familiar rule that corporate by-laws are binding only upon its members and officers, that a by-law directing the investment of saving deposits is not binding upon persons dealing with the corporation.[5]

5. Certain Transactions Considered — *a.* Loans on and Purchase of Personal Securities — **Prohibited by Some Statutes.** — Under some of the charters and statutes the investment of funds upon personal security merely is unauthorized and illegal.[6]

Where One of Several Securities Unauthorized. — Where a loan is made upon promissory notes, bond and mortgage, the fact that the bank is prohibited from lending on notes will not vitiate the loan, there being authority to loan on bond and mortgage.[7] And where the borrower gives his demand note accompanied by a pledge of bank stock, the loan will be deemed to have been made upon the stock, and therefore not in violation of a prohibition against loaning on mere personal security.[8]

Provision Construed as Authorizing Loans on Personal Security. — Under authority to the managers to keep an "available fund" "on deposit on interest or otherwise, or in such available form" as they may direct, they are authorized

§ 33, prohibiting the declaring and crediting of dividends under certain circumstances, and also making the trustees personally liable for a violation of the provisions, a trustee does not overstep his duty so long as he declares no dividend beyond profits "earned," and if by comparing the amount of profits earned with the dividend declared it appears that the latter falls short of the former he cannot be said to be liable; and it is immaterial that the profits on the basis of which the dividend is declared have not been actually received. The statutory scheme contemplated that the dividend might lawfully be paid without first deducting the expenses. Van Dyck *v.* McQuade, 86 N. Y. 38.

Rate — Surplus. — In *New Jersey* the chancellor, upon application to him for directions, considered that under P. L. 1878, p. 393, taken in connection with P. L. 1876, p. 341, the institution should not pay its depositors dividends at the rate of more than five per cent. per annum until it should have accumulated a surplus not less than fifteen per cent. of its deposits. Matter of Provident Sav. Inst., 30 N. J. Eq. 5.

1. Rule as to Trustee's Duty. — Paine *v.* Barnum, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 303.

Unauthorized Business. — Where the trustees selected and qualified under the Act of April 16, 1867, do nothing whatever in the execution of corporate power, the mere fact of the existence of the corporate agency will not shield them from individual liability in an action based solely on a contract entered into by them in conducting a business wholly foreign to the objects and purposes of the incorporation, though such business was conducted and such contract entered into in an associate name which could properly be used in corporate as well as private business. Ridenour *v.* Mayo, 40 Ohio St. 9.

2. Williams *v.* McKay, 46 N. J. Eq. 25.

3. Savings Bank *v.* Barrett, 126 Cal. 413.

4. Gilson *v.* Cambridge Sav. Bank, 180 Mass. 444. The court left undecided the question as to the effect of the statute upon a contract executed in violation of it.

5. Ward *v* Johnson, 95 Ill. 215.

6. Personal Securities. — Williams *v.* McKay, 46 N. J. Eq. 25, 40 N. J. Eq. 189, 53 Am. Rep. 775.

7. Auburn Sav. Bank *v.* Brinkerhoff, 44 Hun (N. Y.) 142; Pratt *v.* Eaton, 79 N. Y. 449.

8. U. S. Trust Co. *v.* Brady, 20 Barb. (N. Y.) 119.

to make loans from such fund upon personal security.[1]

Discounting — Purchase of Commercial Paper. — Under a general power of "discounting negotiable notes and notes not negotiable" savings banks have been held to be authorized to purchase such notes.[2]

b. LOANS ON AND PURCHASE OF MORTGAGES AND DEEDS OF TRUST ON LANDS — **Limitation as to Value of Land.** — A provision in a charter that the real estate on which loans are made shall be worth "at least double the amount of the sum invested above all incumbrances," means that the land shall be worth double the incumbrance upon it, and the investment in it, combined.[3]

Time When Value to Be Taken. — The value of the property is to be taken as of the time of the loan, and not at the time the mortgage is foreclosed.[4]

Limitation as to Amount of Loan — Purchase. — A prohibition against loaning beyond a specified sum to one individual on bond and mortgage, is violated by the buying of a mortgage in excess of such sum.[5]

Purchase from Cotrustee. — The purchase by the bank from one of its trustees of a mortgage has been held to be in violation of a prohibition that no trustee shall directly or indirectly borrow any of the funds of the bank or in any manner use the same except to pay necessary current expenses, and trustees

1. Rome Sav. Bank *v.* Kramer, 32 Hun (N. Y.) 270, *affirmed* 102 N. Y. 331. See also Paine *v.* Barnum, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 303.

Loans to Individuals on Their Notes. — Authority to invest in personal securities carries authority to make loans to individuals and to take their personal notes therefor. Colorado Sav. Bank *v.* Evans, 12 Colo. App. 334.

2. Pape *v.* Capitol Bank, 20 Kan. 440, 27 Am. Rep. 183.

By the Iowa Statute, McLain's Code, § 1796, a savings bank may purchase commercial paper, and this of necessity carries the right to make agreements for such purchases, and this notwithstanding that by another statute the power of such banks to contract debts is restricted to debts "for deposits and the necessary expenses of managing and transacting their business." Ubbinga *v.* Farmers' Sav. Bank, 108 Iowa 221.

A Savings Bank Incorporated under the Maryland Act of 1868 is prohibited from discounting notes. United German Bank *v.* Katz, 57 Md. 129. But in Duncan *v.* Maryland Sav. Inst., 10 Gill & J. (Md.) 300, the institution under the statutes involved in that case was held to be authorized to make loans by way of discount.

3. **Mortgages.** — Williams *v.* McKay, 46 N. J. Eq. 25; Williams *v.* McDonald, 42 N. J. Eq. 392, *reversing* 37 N. J. Eq. 409.

Fraud or Direct Benefit on Part of Trustee Unnecessary. — In Williams *v.* McDonald, 42 N. J. Eq. 302, *reversing* 37 N. J. Eq. 409, the defendant, who was a director and member of the finance committee having acted with the president in investing the funds on mortgage on real estate not worth at least double the amount of the sum invested above all incumbrances, was held liable for the loss. It was also held that he was not liable for any error of judgment or mistake in estimating the value of the property, using reasonable and ordinary care. In such a case it is not necessary to show fraud or any benefit to himself from the transaction. It is sufficient to show that there was a culpable violation of duty as trustee of the funds of the bank.

Liability of Trustee Selling to Bank. — Where the treasurer of a savings bank, who was also a member of the board of managers, assigned to the bank a bond and mortgage owned by him on land not worth double the mortgage as required by the bank's charter and without submitting the propriety of the investment to the finance committee, as required by the by-laws, although with the concurrence of the president, he was held liable for the loss resulting to the bank, and it was immaterial that the managers did not repudiate the transaction within six years, whether his breach of duty was known or not by the other managers. Williams *v.* Riley, 34 N. J. Eq. 398.

The Colorado Act authorizes the directors to invest one-half of the deposits in bonds and stocks of certain kinds, and in bonds secured by mortgage on unincumbered real estate "worth at least double the amount of the loan;" but this limitation is held to apply only to loans made upon real estate, and does not extend to all the investments specified in the act. Colorado Sav. Bank *v.* Evans, 12 Colo. App. 334.

Directions by Court of Equity. — On application by the managers or directors as to investments of new deposits in a bank under the superintendence of the court of equity, the chancellor directed that in investing in mortgages, besides the requirements of the statute, there must be "a certificate of the counsel of the institution that the title is good and the mortgage legally valid, and there must also be a certificate in writing by a master of this court to be designated by me, approving the security as a proper and unexceptionable investment for trust funds under the charge of the court of chancery." Matter of Newark Sav. Inst., 32 N. J. Eq. 644.

Deeds of Trust. — In Tishimingo Sav. Inst. *v.* Buchanan, 60 Miss. 496, it was held that the charter authorized the bank to loan money and to secure the same by taking a deed of trust on land.

4. Colorado Sav. Bank *v.* Evans, 12 Colo. App. 334.

5. Paine *v.* Irwin, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 317.

who sanction such use of the money by a cotrustee, equally with him, violate the law.[1]

Second Mortgage. — Although the charter does not prohibit loans upon second mortgages, such loans are imprudent where the first mortgage is large and the investor must stand perpetually ready to buy or pay the larger mortgage.[2]

Discretion of Directors — California Statute. — Whether or not the purchase of a mortgage is "such as the purposes of the corporation required," within the meaning of the California civil code, is to be determined by the board of directors, and is not open to investigation at the instance of the mortgagor.[3]

Purchase of Mortgage. — Under the *California* civil code, savings banks may purchase mortgages on real estate, and this right necessarily carries with it the right to purchase the obligations secured by the mortgage.[4]

Land Situate in Another State. — Where there is no limitation, express or implied, upon the bank's power to loan in or out of the state, it may take and hold a mortgage upon land in another state and may avail itself of the rights and remedies open to creditors generally.[5]

c. PURCHASE OF REAL ESTATE. — It has been held that the question whether or not the purchase of real estate by the trustees was a reasonable exercise of discretion and warranted by the financial condition of the bank is one of fact for the jury.[6]

d. PURCHASE OF MUNICIPAL WARRANTS. — In *Missouri* it has been held that a savings bank may purchase and hold municipal warrants.[7]

e. SPECULATIVE CONTRACTS AT STOCK BOARD. — Speculative contracts entered into for the sale or purchase of stock or other property by a savings bank at the stock board or elsewhere, subject to the hazard and contingency of gain or loss, are *ultra vires*.[8]

f. DEPOSITS IN OTHER BANKS AT INTEREST. — Where savings banks are expressly authorized to keep deposits in other banks, the fact that they secure an agreement to pay interest on the deposits does not convert the deposits into unauthorized loans.[9]

6. Losses — *a.* EXCESSIVE LOANS. — Where the statute fixes authority on directors in respect to the amount in which any person may become indebted to the bank, if they wilfully and knowingly permit the limit to be exceeded and loss to the bank results therefrom, they are liable for such losses, although the statute does not provide any penalty for its violation.[10]

1. Paine *v.* Irwin, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 317.

2. Williams *v.* McKay, 46 N. J. Eq. 25.

3. Savings Bank *v.* Barrett, 126 Cal. 413.

4. Savings Bank *v.* Barrett, 126 Cal. 413.

5. Lebanon Sav. Bank *v.* Hollenbeck, 29 Minn. 322.

6. French *v.* Redman, 13 Hun (N. Y.) 502.

7. Aull Sav. Bank *v.* Lexington, 74 Mo. 104.

8. Jemison *v.* Citizens' Sav. Bank, 122 N. Y. 135, 19 Am. St. Rep. 482.

9. Erie County Sav. Bank *v.* Coit, 104 N. Y. 532. The court said: "It would seem strange to make an act of provident administration a cause of forfeiture upon a strained construction of the transaction."

10. **Losses.** — Thompson *v.* Greeley, 107 Mo. 577; Thompson *v.* Swain, 107 Mo. 594.

Bond of Indemnity — Iowa Statute. — A bond indemnifying a savings bank against the failure of a debtor to pay indebtedness "now owing or which may be contracted hereafter," is not within the prohibition of the Iowa statute against liability for "money borrowed" beyond a certain amount. Benton County Sav. Bank *v.* Boddicker, 105 Iowa 548, 67 Am. St. Rep. 310.

Mortgage to Make up Deficiency — Estoppel of Trustee. — Where there was a claim by the bank superintendent of personal liability on the part of the trustees for the deficiency existing in the assets of the bank and that unless this was made up their individual liability would be enforced, and a trustee upon such requisition of the superintendent gave a mortgage under seal which was reported to the banking department as a portion of the assets, and likewise so represented to the depositors, and all this was done with his knowledge and assent, he is estopped from denying the validity of the mortgage. Best *v.* Thiel, 79 N. Y. 15. See also Hurd *v.* Kelly, 78 N. Y. 588, 34 Am. Rep. 567, *affirming* 17 Hun (N. Y.) 327.

Prohibition Against Trustee as Surety or Obligor. — Where there was a deficit in the assets of the bank and one of the trustees executed a mortgage and had it assigned to the bank for the express purpose of making up this deficit and thus enabling the bank to go on with its business, such mortgage is not invalid as being in violation of § 21, c. 371, N. Y. Laws of 1875, which prohibits a trustee from becoming a surety or an obligor for

b. SPECIAL DEPOSITS. — Special deposits, having no share or interest in the profits or earnings of the bank, are not liable to be subjected to any part of its losses so long as the assets are sufficient to pay its debts, and this notwithstanding such deposits were received without authority.[1]

c. REIMBURSEMENT. — Where loss has resulted from illegal investments by the trustees, they are released by reimbursement, although made by subsequent trustees.[2] And part payment of such a loss will operate as a release *pro tanto*, even though made by one jointly liable for the damage.[3]

7. Surplus from Sale of Collaterals. — The surplus proceeds arising from the sale of securities held by the bank as collateral for the payment of a note are not impressed with a lien for the general balance due to it from the maker.[4]

8. Ultra Vires as Defense. — The general rule is that although the particular transaction was unauthorized on the part of the bank, yet the borrower, having received the consideration, will not be permitted to set up the want of power in order to shield himself from a just liability.[5]

moneys loaned or borrowed of the institution. Best *v.* Thiel, 79 N. Y. 15.

1. Special Deposits. — Abbott *v.* Wolfeborough Sav. Bank, 68 N. H. 290. In this case the court said: "The general depositors in a savings bank stand in the same relation to its assets as stockholders to banks of discount (Cogswell *v.* Rockingham Ten Cents Sav. Bank, 59 N. H. 45), and the standing of special depositors, like the plaintiffs, in the former, corresponds to that of ordinary business depositors in the latter, whose deposits are subject to payment on call."

2. Hun *v.* Van Dyck, 26 Hun (N. Y.) 567, *affirmed* 92 N. Y. 660.

3. Knapp *v.* Roche, 94 N. Y. 329.

4. Brown *v.* New Bedford Sav. Inst., 137 Mass. 262.

And in Tallman *v.* New Bedford Five Cents Sav. Bank, 138 Mass. 330, it was held that where the bank holds two notes against the same party, one of which is secured by a mortgage on land and the other not secured, it cannot apply the surplus arising from the foreclosure of the mortgage to the unsecured obligation.

5. Ultra Vires. — Rome Sav. Bank *v.* Krug, 102 N. Y. 331; Pratt *v.* Eaton, 79 N. Y. 449; Pratt *v.* Short, 79 N. Y. 437, 35 Am. Rep. 531.

Discounting. — Although the bank may be prohibited from discounting notes, yet this want of power is not available as a defense in a suit by the bank to recover on a note. United German Bank *v.* Katz, 57 Md. 129.

Personal Security. — Notwithstanding the bank is prohibited by statute from loaning money on the security of names alone, this will not prevent the bank from recovering on a note. Farmington Sav. Bank *v.* Fall, 71 Me. 49.

Pledge of Stock — Note and Mortgage — Officer of Bank. — A statutory provision that no officer of a savings institution may directly or indirectly borrow any of its funds, and that the office of any one who acts in contravention thereof shall immediately become vacant, does not render invalid a pledge of stock made by an officer for money borrowed from the institution, Brittan *v.* Oakland Sav. Bank, 124 Cal. 282, 71 Am. St. Rep. 58, nor a note and mortgage. Savings Bank *v.* Burns, 104 Cal. 473.

In the first named case the court said that the bank could sue the officer to recover back the money loaned, and could hold the pledged stock or its proceeds in suit for the recovery of the same, until the money loaned on the faith of such pledge was repaid.

The Provision of the Iowa Statute that the total liabilities to savings banks of any person for money borrowed shall not exceed a certain proportion of the capital stock, is intended as a rule for the government of the bank, and does not render void a loan in excess of the per centum named. Benton County Sav. Bank *v.* Boddicker, 105 Iowa 548, 67 Am. St. Rep. 310.

Report of Committee. — Where it is not shown before making the loan that there was a compliance with the statutory requirement of a report of the committee certifying the value of the property, this fact is not available to the debtor as a defense to an action upon his obligation. Auburn Sav. Bank *v.* Brinkerhoff, 44 Hun (N. Y.) 142.

Injunction. — A person who has borrowed money of the bank upon his promissory note secured by a pledge of bank stock is not entitled to an injunction to prevent the prosecution of the note on the ground that the bank was prohibited by its charter from making loans of that character. Mott *v.* U. S. Trust Co., 19 Barb. (N. Y.) 568.

But Where the Bank Was Forbidden by Law, under Heavy Penalties, from doing a general banking business, it was held that notes discounted in the course of such business were wholly void, and neither as contracts nor securities constituted any ground of claim or debt against the makers when subsequently bankrupt. *In re* Jaycox, 12 Blatchf. (U. S.) 209.

And in Pratt *v.* Short, 79 N. Y. 437, 35 Am. Rep. 531, it was held that the discount by the bank of the note in question was unlawful, and upon general principles, applicable to the subject as well as by the terms of the restraining act, the security taken by the company was void and furnished no ground of action, but that notwithstanding this the money loaned by the illegal act of the directors might be recovered back.

For a Full Discussion of this subject, with reference to corporations generally, see the title ULTRA VIRES.

IX. Scaling or Reducing Deposits — 1. In General. — It Seems to Be the Policy in Some of the States to permit savings banks, whose assets, from any cause, have shrunk below their liabilities, to scale down deposits and resume business whenever this can be done upon a solvent basis.[1]

No Absolute Promise to Repay in Full. — There is no absolute promise to repay to a depositor the full amount of his deposit at all events. The promise is, in effect, to pay every depositor in full together with his dividends, provided the assets are sufficient, and if they are not sufficient, then to pay every one his proportionate share.[2]

2. Statutes. — And such a procedure is expressly authorized by statute in several jurisdictions.[3]

Final Division. — The *New Hampshire* statute expressly provides that if a bank, after such reduction, shall realize from the assets a greater amount than that fixed upon at the time of the reduction, the amount so realized shall be equitably divided and credited to the accounts of the depositors which have been reduced. The rule must be the same in the absence of any statute.[4]

X. Statutory Preferences of Savings Banks — 1. What Deposits Authorized — "Available Fund" — "Temporary Deposits." — The right of a savings bank to make deposits in other banks is conferred by statute in some states. In *New York* two distinct funds are recognized as the subject of deposit: First, a fund not exceeding a certain proportion of its deposits, which may be kept uninvested by the savings institution and on hand "for the purpose of meeting current payments and expenses in excess of the receipts." This fund is termed the "available fund." Second, the accumulations of money for which the institution cannot readily find proper investments, and designated "temporary deposits." This fund may be deposited until such time as it can be judiciously invested in the securities required by statute; there is no limitation on the amount of such moneys which may be deposited in any one bank.[5]

1. Scaling Deposits. — People *v.* Ulster County Sav. Inst., 64 Hun (N. Y.) 434, *affirmed* 133 N. Y. 689.

The court below also refers to numerous instances where such a course had been recommended by the banking department of the state. And the learned judge (Fursman, J.) considered such a proceeding to be authorized by § 278, c. 409, Laws 1882. The power was exercised in Matter of Newark Savings Institution, 28 N. J. Eq. 552, and in Osborn *v.* Byrne, 43 Conn. 155, 21 Am. Rep. 641, where the deposits were scaled twenty-four per cent., and in *New Hampshire*, where there is a statute authorizing such a proceeding. Simpson *v.* City Sav. Bank, 56 N. H. 466, 22 Am. Rep. 491. See also Lewis *v.* Lynn Sav. Inst., 148 Mass. 235, 12 Am. St. Rep. 535.

2. Lewis *v.* Lynn Sav. Inst., 148 Mass. 235, 12 Am. St. Rep. 535. In this case the court *disapproved* the decision in Makin *v.* Savings Inst., 23 Me. 350, 41 Am. Dec. 349, and *explained* the remark in Reed *v.* Home Sav. Bank, 130 Mass. 443, 39 Am. Rep. 468, that a depositor in a savings bank becomes a creditor of the bank, by saying that although this was a correct statement, yet there was then no occasion to consider what is now determined, namely, that the promise of the savings bank is not an absolute promise to pay in full at all events.

3. The *New Hampshire* statute is constitutional, and not inoperative because of the existence of a federal bankruptcy law. Simpson *v.* City Sav. Bank, 56 N. H. 466.

4. Francestown Sav. Bank Case, 63 N. H. 138.

The Action of the Tribunal Making the Reduction is not a judgment depriving the depositor of his property in any of the assets of the bank. Francestown Sav. Bank Case, 63 N. H. 138; Simpson *v.* City Sav. Bank, 56 N. H. 477, 22 Am. Rep. 491.

When It Appears that the Bank Has Exceeded Its Powers or failed to comply with any of the rules, restrictions and conditions provided by law, the observance of which the legislature has declared essential for the security of its funds and deposits, the court has no power under the *Maine* Act of 1877 to proceed and reduce the deposits, though it does not appear that such violation of law has caused or contributed to the bank's insolvency. Matter of Newport Sav. Bank, 68 Me. 396. The court further said that the acts of the trustees in these matters are the acts of the corporation.

Payment by Instalments. — And under this latter statute the court has no power to order the sums to which the deposits have been scaled to be paid by instalments. Matter of Newport Sav. Bank, 68 Me. 396.

Acceptance of Balance — Estoppel. — Where, on account of loss from investments, the officers scaled down the deposits, to which action the depositors submitted, such action is binding upon a depositor who, either personally or through an authorized agent, accepts the balance found to be due him. Lewis *v.* Lynn Sav. Inst., 148 Mass. 235, 12 Am. St. Rep. 535.

5. Preferences of Savings Banks. — Chenango Valley Sav. Bank *v.* Dunn, 40 N. Y. App. Div. 552.

2. What Claims Preferred — *a.* MONEYS DEPOSITED IN USUAL COURSE OF BUSINESS AND SUBJECT TO DRAFT. — In some jurisdictions there are statutes which provide that the receiver of an insolvent bank, after providing for the payment of its circulating notes, if any it has, shall apply all its property to the payment in full of any sum or sums of money deposited therewith by any savings bank. The statute does not undertake to secure the debts of every character which may be due to a savings institution, but only such as are due for money deposited in the usual course of business, and subject to the drafts of the depositor, to an amount not exceeding that authorized to be deposited by the statute.[1]

b. LOANS. — Loans, whether on time or payable on call, are not entitled to a preference.[2] And if the money sought to be recovered was in fact a loan, it cannot be changed into a deposit by reason of any want of authority in the managers of the savings bank to make the loan, or for the reason that it may have been made in violation of law.[3]

c. EFFECT OF PAYMENT OF INTEREST. — The fact that interest is to be paid on the money does not change its character or prevent it from being a deposit in the ordinary meaning of that word.[4]

d. TIME WHEN DEPOSIT MADE. — The *New York* act creates a preference for all sums deposited, without regard to the time of making the deposit.[5]

e. INTEREST ON PREFERRED CLAIM. — In one instance the bank was allowed a preference for the interest upon the deposit.[6] But where the provision in a charter was that, "in case of the dissolution of such company" savings banks shall have a preference for "debts due," it was decided that the point of time at which the amount preferred is to be fixed is the date of the dissolution; and that as against the corporation itself interest may be continued, and, if there is enough to pay all creditors, would be allowed, but it would be otherwise in case of insufficiency of assets.[7]

3. No Lien Conferred. — A statute of the kind in question has been held to be simply a rule of distribution, and not to give an interest in or lien upon the property of the insolvent bank.[8]

4. Constitutionality of Statutes. — It is competent for the legislature to pro-

1. Rosenback *v.* Manufacturers, etc., Bank, 10 Hun (N. Y.) 148, *affirmed* 69 N. Y. 358.

Amount Authorized. — It is entirely regular for a savings institution to deposit with one bank and in one account money for the purpose of meeting its current expenses and also such accumulations as it is holding for investment, notwithstanding the aggregate of the amounts is greater than the proportion of its available funds which it is authorized to deposit in any one bank. Chenango Valley Sav. Bank *v.* Dunn, 40 N. Y. App. Div. 552.

Burden of Proof to Show Amount Excessive. — And where it is shown that the savings bank has made a deposit for the twofold purpose authorized by the statute, in the absence of any proof to the contrary, it cannot be said that any part of such deposit was without authority, but it is incumbent upon the party who would justify a refusal to prefer the same as the statute provides, to show affirmatively that some portion, and how much, of such a deposit was unauthorized. Chenango Valley Sav. Bank *v.* Dunn, 40 N. Y. App. Div. 552.

2. Loans Not Preferred. — Rosenback *v.* Manufacturers, etc., Bank, 10 Hun (N. Y.) 148, *affirmed* 69 N. Y. 358. In this case the transaction involved was held to be a loan and not a deposit, and therefore not entitled to preference.

In Matter of Patterson, 18 Hun (N. Y.) 221, *affirmed* 78 N. Y. 608, the transaction was held to be a deposit and entitled to the priority given by the statute. The court said: "The transaction is wholly unlike that which was examined in the case of Rosenback *v.* Manufacturers, etc., Bank, 69 N. Y. 358."

And in Upton *v.* New York, etc., Bank, 13 Hun (N. Y.) 269, the transaction was held to be a deposit.

3. Rosenback *v.* Manufacturers, etc., Bank, 10 Hun (N. Y.) 148, *affirmed* 69 N. Y. 358.

4. Matter of Patterson, 18 Hun (N. Y.) 221, *affirmed* 78 N. Y. 608; Upton *v.* New York, etc., Bank, 13 Hun (N. Y.) 269.

5. Upton *v.* New York, etc., Bank, 13 Hun (N. Y.) 269.

6. Upton *v.* New York, etc., Bank, 13 Hun (N. Y.) 269.

7. People *v.* American L. & T. Co., 70 N. Y. App. Div. 579, *affirmed* 172 N. Y. 371, *distinguishing* the case in the preceding notes. In the course of the opinion by the Court of Appeals, Judge Vann said, in reference to the question of interest, that the Upton case was not well considered, and that in the Patterson case the question was not raised.

8. *In re* Stuyvesant Bank, 12 Blatchf. (U. S.) 179.

vide that upon the failure of an ordinary commercial bank savings banks having deposits therein shall receive a preference in the distribution of its assets.[1]

As Applied to National Banks. — But when such a provision is attempted to be applied to an insolvent national bank it conflicts with the act of Congress directing that such bank's assets shall be distributed by the comptroller of the currency ratably among the creditors, and is inoperative and void as against the dominant authority of the federal statute.[2]

XI. Insolvency, Receivers, and Assignments — **1. Appointment of Receiver.** — An application for a receiver, in which the directors were not charged with misappropriation of the assets to private or fraudulent purposes, or with any continuing acts which were endangering the existence of the charter, or with any acts whatever amounting to a breach of trust, was denied as not presenting any grounds for the interference of equity.[3]

2. Authority to Make Assignment. — In a *Pennsylvania* case it was held that the institution involved, not being subject to the general banking act, had the power to make a general assignment for creditors, which power could be exercised by the board of directors.[4]

3. Order of Payment — Preferences — *a.* In General — Equity Jurisdiction. — A savings bank has been held to be a general or public trustee, and subject to the interference of equity to prevent the payment of any depositor in full so long as it is uncertain whether there will be assets sufficient to pay the others in full also.[5]

b. As Between Special and General Depositors. — Special depositors are entitled to be paid in full in priority to general depositors.[6]

1. *In re* Stuyvesant Bank. 12 Blatchf. (U. S.) 179.

2. Davis *v.* Elmira Sav. Bank, 161 U. S. 275, *reversing* 142 N. Y. 590, which *affirmed* 73 Hun (N. Y.) 357.

3. Appointment of Receiver. — Gorman *v.* Guardian Sav. Bank, 4 Mo. App. 180. The court said: "The sum and substance of all the allegations is that the business of the bank is not prosperous, and plaintiff thinks that the best move, under the circumstances, would be to wind up the concern. She would like the court to back her opinion by a decree to that effect, and thus enable her to escape the payment of an assessment to which she has unfortunately committed herself by contract."

4. Assignment. — *In re* Miners' Bank, 13 W. N. C. (Pa.) 370.

5. Matter of Newark Sav. Inst., 28 N. J. Eq. 552.

Checks Given to Depositors, on account of deposits, which were not paid for want of funds in the bank on which they were drawn, are not to be preferred. Stockton *v.* Mechanics', etc., Sav. Bank, 32 N. J. Eq. 163.

Upon Application to the Court for Its Directions, the chancellor decreed that it was the duty of the officers, under the circumstances, to convert the assets of the institution into cash as rapidly as was possible without sacrifice, and to distribute the same among the depositors without unnecessary delay. Matter of Dime Sav. Inst., 29 N. J. Eq. 109, *following* Matter of Newark Sav. Inst., 28 N. J. Eq. 552.

Voluntary Liquidation — Surplus. — Where a savings bank goes into voluntary liquidation, only those who are depositors at the time the proceedings are instituted are entitled to share in the surplus. Morristown Sav. Inst. *v.* Roberts, 42 N. J. Eq. 496.

Specific Performance — Inequitable Contract. — Where the officers, when the institution was insolvent, and a resolution to wind up had been agreed to, offered to a depositor certain securities of the bank in payment of his deposit, and the offer was accepted but the securities not delivered, such contract cannot be specifically enforced, as the assets being insufficient to pay all depositors, it was a contract for inequality. Shattler *v.* Taft, 7 Ohio Dec. (Reprint) 631, 4 Cinc. L. Bul. 419.

Authority to Wind Up — State Auditor. — In *Indiana*, under § 2757, Rev. Stat. 1881, the state auditor is the only person authorized to wind up the affairs of savings banks and to enforce the liability of their trustees and officers for a violation of their statutory duties. Ryan *v.* Ray, 105 Ind. 101.

Pennsylvania Statutes — Savings Banks Not Included. — In Fox's Appeal, 93 Pa. St. 406, it was held that the statutes regulating the distribution of the assets of insolvent banks and establishing an order of preference do not embrace saving institutions, which are prohibited from exercising banking privileges.

6. Special Deposits.— Heironimus *v.* Sweeney, 83 Md. 146, 55 Am. St. Rep. 333, the court considering the special depositors as creditors, and the general depositors as stockholders who owned the assets of the institution.

But where the by-laws authorized the making of special contracts with depositors, it was held that the deposits received on such contracts were not strictly special deposits, but were merely deposits received on special terms and not entitled to a preference over general deposits. Stockton *v.* Mechanics', etc., Sav. Bank, 32 N. J. Eq. 163; Vail *v.* Newark Sav. Inst., 32 N. J. Eq. 627.

And where the managers of the bank ad-

c. As Between Depositors and Creditors. — In *New Jersey* the debts of the institution contracted in the course of its business for loans and for incidental expenses are entitled to preference over the claims of depositors, being the expenses of executing the trust.[1] And in *New Hampshire* the depositors are not creditors, but, within the meaning of the law, stockholders, whose claims are postponed to those of creditors.[2] But in *New York* it is held that depositors stand as other creditors, having no greater but equal rights to be paid ratably out of the insolvent estate.[3]

d. Depositors Who Are or Are Not Stockholders. — In an insolvent savings bank, organized under the *California* act, the claims of depositors who are not stockholders are preferred to the claims of depositors who are stockholders, in the absence of a by-law putting the two classes upon equal terms.[4]

e. Stockholders Who Are Not Depositors. — A stockholder, however, who is not a depositor and has loaned money to the bank may come in equally with other creditors.[5]

f. Another Bank Conducting the Savings Bank. — Where another bank, through its officers, is in fact managing the affairs of a savings bank, it can no more prefer itself out of the assets of the latter when it is insolvent and on the verge of suspension than could legally elected officers, and for the same reasons.[6]

4. Bank Receiving Its Own Certificates. — A depositor who has converted his deposits into stock in the institution cannot, when the institution becomes insolvent and is receiving from its debtors its own certificates of deposit in payment, restrain the proceeding on the ground that the conversion of deposits into stock was in violation of the charter.[7]

5. Set-off of Deposits Against Indebtedness — General Deposits. — A depositor in an insolvent savings bank, who is also a debtor of the institution for money borrowed, may not offset the amount of his deposit against his indebtedness.[8]

vertised in the newspapers, inviting deposits which were designated as "special, separate deposits," such deposits being received over the counter of the bank in the same manner as general deposits were received, it was held that such deposits were not in fact special deposits, and that no preference in their favor could arise under the advertisement, but that they must stand on the footing of general deposits *In re* Mutual Bldg. Fund Soc., etc., 2 Hughes (U. S.) 374.

1. Stockton *v.* Mechanics', etc., Sav. Bank, 32 N. J. Eq. 163.

Money Exchanged for Checks Dishonored. — Money delivered to the institution in exchange for its check, given for the accommodation of the payee, which was dishonored for want of funds in the bank upon which it was drawn, presumably went into the funds and should be preferred. Stockton *v.* Mechanics', etc., Sav. Bank, 32 N. J. Eq. 163.

A Claim under a Covenant in a Lease for rent accruing after the surrender of the premises to the lessor by the receiver cannot be maintained. Stockton *v.* Mechanics', etc. Sav. Bank, 32 N. J. Eq. 163.

2. Hall *v.* Paris, 59 N. H. 71; Simpson *v.* City Sav. Bank, 56 N. H. 477, 22 Am. Rep. 491.

3. People *v.* Mechanics, etc., Sav. Inst., 92 N. Y. 7, *reversing* 28 Hun (N. Y.) 375.

4. **California Statute.** — Murphy *v.* Pacific Bank, 130 Cal. 542, 119 Cal. 334. See also Laidlaw *v.* Pacific Bank, (Cal. 1902) 67 Pac. Rep. 897.

5. Murphy *v.* Pacific Bank, 130 Cal. 542; Laidlaw *v.* Pacific Bank, (Cal. 1902) 67 Pac. Rep. 897.

6. Slack *v.* Northwestern Nat. Bank, 103 Wis. 57, 74 Am. St. Rep. 841.

7. Maryland Sav. Inst. *v.* Schroeder, 8 Gill & J. (Md.) 93, 29 Am. Dec. 528.

8. Osborn *v.* Byrne, 43 Conn. 155, 21 Am. Rep. 641; Hannon *v.* Williams, 34 N. J. Eq. 255, 38 Am. Rep. 378; Stockton *v.* Mechanics', etc., Sav. Bank, 32 N. J. Eq. 163; Cogswell *v.* Rockingham Ten Cents Sav. Bank, 59 N. H. 43; Hall *v.* Paris, 59 N. H. 71.

Setoff Allowed — Case Criticised. — In New Amsterdam Sav. Bank *v.* Tartter, (Supm. Ct.) 4 Abb. N. Cas. (N. Y.) 215, a depositor was, upon insolvency of the bank and the appointment of a receiver, held entitled to a setoff *pro tanto* of his deposits against an obligation held by the bank against him. But of this case the court, in Hannon *v.* Williams, 34 N. J. Eq. 255, 38 Am. Rep. 378, said: "The only case I have found holding a contrary doctrine is Receiver of the New Amsterdam Savings Bank *v.* Tartter, (Supm. Ct.) 54 How. Pr. 385; but upon examination that decision appears to be rested mainly on the general rules of setoff between debtor and creditor, without due regard to the peculiar character of the institution in process of liquidation."

The Receiver of an Insolvent Savings Institution cannot, either directly or indirectly, permit a setoff against a debt owing the bank, where the claim sought to be set off was as-

When Money Borrowed Entered to Depositor's Credit. — And the fact that money borrowed of the bank by a depositor was, at his request, placed to his credit on the books of the bank and entered in his pass book as a deposit and subject to check, does not entitle him to have the balance standing to his credit offset against his indebtedness.[1]

Pledge of Pass Book — Expectation. — Neither the pledge of the depositor's book to the bank as collateral security for his debt, nor his expectation that his deposit will pay the debt, will give him the right of set-off.[2]

Special Deposits. — A special deposit to be withdrawn "on call" may be set off against a depositor's debt to the bank.[3] And where a person makes a deposit, not for the ordinary purposes, but for the purpose and with the intention to apply the same in payment of his indebtedness, he is entitled to a set-off where the officers of the bank knew for what purpose the deposit was made, although the amount was never in fact applied in cancellation of the indebtedness.[4]

Deposits in Creditor Bank. — Where a bank holding deposits of a savings bank, and which was also a creditor of the latter, received from it on the eve of suspension a check for the amount of its deposits, it was allowed to set off the same against the part of the much larger indebtedness owing to it by the savings bank.[5]

XII. Nonuser — Forfeiture. — The principles applicable to corporations generally have already been discussed.[6] It has been held that the nonuser by a savings bank of its franchise for sixteen years, did not work a dissolution of the corporation in the absence of any action on the part of the state.[7]

signed for that purpose after the appointment of the receiver. Van Dyck *v.* McQuade, 85 N. Y. 616.

1. Hannon *v.* Williams, 34 N. J. Eq. 255, 38 Am. Rep. 378.

2. Hall *v.* Paris, 59 N. H. 71.

3. **Special Deposits.** — Hall *v.* Paris, 59 N. Y. 71.

4. Osborn *v.* Byrne, 43 Conn. 155, 21 Am. Rep. 641.

5. Slack *v.* Northwestern Nat. Bank, 103 Wis. 57, 74 Am. St. Rep. 841.

6. **Nonuser — Forfeiture.** — See the title Dissolution of Corporations, vol. 9, p. 544.

7. Richards *v.* Minnesota Sav. Bank, 75 Minn. 196. The court said that this corporation was not one for conducting a purely private enterprise for the benefit of its members, but its franchise was granted to conserve important interests.

Temporary Suspension — Fraudulent Suspension. — In State *v.* Louisiana Sav. Co., 12 La. Ann. 568, it was held that owing to the peculiar nature of the institution the closing of its doors, the cessation of business, and the temporary suspension of the company for a few days, were not sufficient causes for forfeiture. It would be different, however, in the case of a fraudulent suspension of payment or gross negligence in loaning money without sufficient guaranty whereby a temporary suspension of payment might follow.

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